QUALITY CONTROL FOR INSTRUCTIONAL MATERIALS:

LEGISLATIVE MANDATES OF LEARNER VERIFICATION AND IMPLICATIONS FOR PUBLIC EDUCATION

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Introduction

Since World War II, the American educational publishing industry has been transformed by the introduction of new technologies and by rapidly increasing demands for materials of all kinds. The traditional school textbook has been supplemented by a variety of products, such as film-strips, workbooks, and programmed and computer-assisted curricula. The total number of instructional materials produced in the United States rose from only 10,000 in 1951 to over 200,000 in 1971,[1] while public and private school expenditures on elementary and secondary instructional materials and equipment reached $1.9 billion in 1973-74.[2]

At the same time, the public has become increasingly concerned with the quality of education in the public schools and

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1 *Hearings on H.R. 33, H.R. 3606, and Other Related Bills Before the Select Subcomm. on Education of the House Comm. on Education and Labor,* 92d Cong., 1st Sess. 335-36 (ERIC Document ED 059 612, at 2-3, 1971).

2 Hoffman, *Spending for Instructional Materials and Equipment,* 18 SCHOOL MANAGEMENT, Oct. 1974, at 10.

has begun to demand accountability in education.[3] This trend toward accountability in the public schools has led to calls for the improvement of the educational materials used. One such call comes from Kenneth Komoski, the Executive Director of the Educational Products Information Exchange Institute (EPIE).[4] Komoski advocates the implementation of a process which he calls Learner Verification and Revision (LVR). He defines LVR in the following way:

> The concept of learner verification and revision refers to an empirical process of data gathering and analysis aimed at assessing, improving, and maintaining the teaching-learning effectiveness of an instructional material — beginning with its earliest developmental version through all subsequent revisions — until such time as the material is no longer published. Development of materials should be informed by results of trial use with appropriate students; evaluation of whether those students learn what is intended (and if not, why not) should form the basis for refinement and revision before the material is marketed. Then, once the material is on the market, the producer should systematically monitor its performance "in the real world" so that it may be revised and improved as the results of continuous empirical verification indicate.[5]

Essentially, Komoski's idea of LVR asserts that materials will be better if they are tested out with students, and revised on the basis of problems experienced by those students in learning from the materials.[6] The process involves teachers and learners in the development of the materials, as well as in the pre-publication and post-publication evaluations.

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3 *See* text accompanying notes 40-72 *infra*.

4 EPIE is a nonprofit corporation chartered by the Regents of the University of the State of New York whose purpose is "to provide information and counsel based on impartial, independent studies of availability, use and effectiveness of educational materials, equipment, and systems . . . [and] to facilitate the making of informed rational evaluations of specific products by the educational consumer." Its executive director is P. Kenneth Komoski. Its general offices are at 463 West St. N.Y., N.Y. 10014.

5 *Id.* at 11.

6 Komoski differentiates LVR from "validation" studies in which producers state that learners do, in fact, "learn from their products." Remarks by P. Kenneth Komoski, Educational Marketer Days, June 20, 1974, at 5-6 (on file with *Harvard Journal on Legislation*) [hereinafter cited as Remarks of Komoski].

Komoski envisages a process of evaluation going well beyond the more traditional methods of student testing and teacher comments.[7] The LVR process will apply not only to the content of instructional materials, but also to the context of their use. This may mean that publishers will provide in-service training to teachers in the use of the materials, and will develop teaching aids such as teachers' manuals, student handbooks, and laboratory manuals.

The roots of LVR are found in the development of the much acclaimed Physical Sciences Study Committee (PSSC) program,[8] whose efficiency and success at meeting students' needs were attributed to continuous fine-grained evaluation and revision.[9] The underlying assumption of the PSSC program and many of its successors was that carefully designed materials tailored to a student's competencies and interests could efficiently instruct[10]

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7 P. Kenneth Komoski & D. Eliott, Suggested Guidelines for the Learner Verification of Instructional Materials, EPIE Institute, New York, Nov. 20, 1973 (EPIE Institute, New York). Primary data is gathered directly from learners and may include formal observation, written questionnaires, individual and/or small group interviews, as well as normed and criterion-referenced tests. Secondary data from teachers, supervisors, parents and other participants and observers are acceptable. Testing may involve collecting background data such as achievement and ability scores and information on student self-concept and student level of interest in school and subject matter. Some of this data gathering would require that publishers spend time in classrooms.

8 The Physical Science Studies Committee organized at MIT in 1956 by Professor Jerrold R. Zacharias became the model for future innovative programs, and its underlying assumptions about the instructional process, testing and development set the tone for subsequent research and development. The program emphasized an inductive "discovery" approach in learning, openly breaking away from rote-memory and content-oriented teaching strategies. *See* P. Marsh, The Physical Science Study Committee: A Case History of Nationwide Curriculum Development 1956-1961 (1964) (unpublished thesis in Harvard Graduate School of Education Library).

9 Extensive and intensive periods of trial and experimentation were deemed necessary parts of the design and development of the program to eliminate gross errors of conception or execution. Course objectives were of an empirical nature designed to influence the way the course was taught. Not only were teachers involved through in-depth training in the use of the materials, but the students themselves became important sources of feedback. Feedback in this context refers to isolation of areas of difficulty for the purposes of revising the materials with the general goal of tailoring the materials to a learner's needs and abilities.

10 *See* Skinner, *The Science of Learning and the Art of Teaching*, 24 HARV. ED. REV. 86 (1954). Skinner placed primary emphasis on observable behavior and introduced the "teaching machine" with predictions of efficient and successful skill

and thus relieve the teacher of the full burden of success and failure.[11] Thus, the process of LVR does not appear to be new; in fact, several major publishers claim that they have been engaging in LVR or its equivalent for a number of years.[12]

Komoski, however, goes beyond a call for the voluntary introduction of LVR by publishers and advocates that states require all publishers to conduct LVR on all materials offered for sale.[13] Because of the magnitude of public expenditures on instructional materials, states have long exercised control over the process of selection and purchase of materials for use in their public schools.[14] In order to understand the proposals for mandated LVR, therefore, it is necessary to review the state instructional materials selection statutes which provide the framework in which textbooks and other materials move from publishers to the final consumers, local school districts, teachers, and students.

Initially, books for use in schools were supplied by the parents. After 1821, states began to require uniform adoption within a school or school district, but they granted local school districts broad authority to select and purchase instructional materials with little or no state-level control.[15] Twenty-one states still permit their local school districts complete control over instructional

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acquisition. Programmed instruction was born. From the revision of textbooks to the creation of filmstrips to highly sophisticated computerized systems, the information to be transmitted to the learner was broken into a series of logical and incremental steps designed to bring the students from one conclusion to the next gradually building "learning." Knowledge was quantitative and expressed in "responses" which were elicited and reinforced in a consistent predictable fashion.

11 The development seemed especially important because the teacher shortage of the 1950's and 1960's made it impossible to provide individualized instruction without supplementary materials that could teach skills in a programmed fashion or capture the student's interest such that independent study would be possible.

12 Holt, Rinehart & Winston, Inc., Learner Verification Plans Report Number 1, Jan. 1975 (on file with *Harvard Journal on Legislation*). *See also* Sigel, *General Learning*, 1 SAT. REV. EDUCATION, May 1973, at 46, 47, where the author states that General Learning Corporation, McGraw Hill, Xerox, SRA (a subsidiary of IBM) and Westinghouse Corporation already practice the equivalent of LVR.

13 *See, e.g.*, Remarks of Komoski, *supra* note 6.

14 As of 1854, two states had vested mandatory initial textbook adopting authority in a state agency; by 1957, the number had risen to 23. J. Hall, A Study of the Development of Legislation Affecting the Selection of Textbooks in the United States 231 (1958) (unpublished thesis in Harvard Graduate Sch. of Educ. Library) [hereinafter cited as Hall].

15 *Id.* at 293.

materials acquisition,[16] and five others grant substantial local autonomy.[17]

Beginning in the 1880's, states began to assert greater control, first over elementary school materials and later over secondary school items.[18] One method combined state adoption with local option: the state, through a state agency, adopted a list of textbooks and other materials which it considered appropriate for use in various grades and subject areas and then local school districts were permitted to select materials from the state adoption lists. Some statutes strictly limited the number of items which could be listed for a given grade level and subject;[19] others allowed unlimited numbers of items to be listed, suggesting that the state agency might do little more than screen out the most clearly inadequate items.[20] Currently, eleven states provide for state adoption or listing and local option.[21]

16 Those statutes permitting local adoption are: ALASKA STAT. § 14.07.040 (1974); Colorado by omission of legislation; CONN. GEN. STAT. ANN. § 10-228 (Supp. 1975); IOWA CODE ANN. § 301.1 (Supp. 1974); KAN. STAT. ANN. § 72-4107 (1972); ME. REV. STAT. ANN. tit. 20, § 161 (1964); MD. ANN. CODE art. 77, § 67 (1975); MASS. GEN. LAWS ANN. ch. 71 § 48 (Supp. 1975); MICH. COMP. LAWS ANN. § 340.882 (1967); MINN. STAT. §§ 123.35, 126.18 (1971); NEB. REV. STAT. §§ 79-4, 118 (1971); N.H. REV. STAT. ANN. § 189:16 (1964); N.J. STAT. ANN. § 18A:34-1 (1968); N.Y. EDUC. LAW § 701 (McKinney Supp. 1974); PA. STAT. ANN. tit. 24, § 8-801 (1962), *id.* § 8-803 (Supp. 1974); R.I. GEN. LAWS ANN. §§ 16-1-9, 16-2-11 (1969); S.D. COMPILED LAWS ANN. § 13-34-16 (Supp. 1974); VT. STAT. ANN. tit. 16, § 3743 (1968); WASH. REV. CODE ANN. § 28A.58.103 (Supp. 1974); WISC. STAT. § 118.03 (1971); and WYO. STAT ANN. § 21.1-181 (Cum. Supp. 1973).

17 ALA. CODE tit. 52 § 433(12) (Cum. Supp. 1973) (providing local option for cities with population greater than 40,000 and possible exemption for other large localities); CAL. EDUC. CODE § 9600 (West 1975) (high schools only); DEL. CODE ANN. tit. 14, § 122(6) (Cum. Supp. Pamphlet 1970) (school districts apply set of criteria adopted by State Board of Education to select materials); MONT. REV. CODES ANN. § 75-7603 (1971), § 75-7604 (Supp. 1974) (school districts select textbooks only from licensed dealers); *id.* § 75-7604 (Supp. 1974) (same); ORE. REV. STAT. §§ 337.050, 337.141 (1974) (local option for localities with greater than 20,000 school population or with state permission).

18 State authority over initial elementary textbook adoption increased rapidly from 1852 to 1904; by 1917, 25 states provided such authority. *See* Hall, *supra* note 14 at 297-98. State-level adoption of secondary books started twenty years later and peaked in 1947 with 19 states. *Id.* at 298.

19 *See, e.g.*, KY. REV. STAT. ANN. § 156.435(1) (Supp. 1974).

20 Idaho and Oregon put no limit on the number of books the textbook commissions may approve. IDAHO CODE § 33-118 (1963); ORE. REV. STAT. § 337.050 (1974).

21 Those provisions which require state adoption or listing and local option are: ALASKA STAT. § 14.07.050 (1971); CAL. CONST. art. 9, § 7.5 and CAL. EDUC. CODE § 9400 (West 1975) (elementary schools only); IDAHO CODE § 33-118 (1963); ILL. REV.

The second method of asserting state control involved outright state adoption. A state agency simply specified texts and other materials for each grade level and subject. In some cases, the state made these materials available to the local school districts free of charge;[22] in other cases, local districts were still required to purchase the materials with local funds, either directly or through a central state purchasing agency.[23] Fourteen states currently impose full state adoption,[24] and two, partial state adoption.[25]

Komoski's proposals link the requirement of LVR to state selection statutes. He proposes that states require publishers to submit to the state instructional materials selection authorities proof that each material offered for sale in the state has been subjected to LVR. Two states, California and Florida, have already passed legislation to this effect. California enacted statutory provisions concerning LVR in 1972,[26] as part of an overall revision of Division 8 (Instructional Materials) of the California Education Code.[27] Florida followed suit in 1974[28] as part of a general revision of its statutory provisions concerning textbook selection.[29] The Lawyers' Committee for Civil Rights Under Law (hereinafter Lawyers' Committee), operating under a grant from the National Institute for Education, has developed a Model

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STAT. ch. 122, § 28-6 (1973); KY. REV. STAT. ANN. §§ 156.440, 156.447 (Supp. 1974); MISS. CODE ANN. § 37-43-31 (1972); MO. ANN. STAT. § 170.051 (Vernon 1975); N.D. CENT. CODE § 15-43-04 (1971); OHIO REV. CODE ANN. § 3329.01 (1972); VA. CODE § 22-296 (1964), *id.*, § 22-318 (Cum. Supp. 1972); and W. VA. CODE ANN. § 18-2A-8 (Supp. 1974).

22 *See, e.g.*, N.M. STAT. ANN. § 77-13-5 (1968); MISS. CODE ANN. § 37-43-1 (1972).

23 CAL. EDUC. CODE § 9621 (West 1975) (high schools only).

24 ARIZ. REV. STAT. ANN. §§ 15-1101-1103 (Supp. 1974); ARK. STAT. ANN. §§ 80-1702-1730 (1960); FLA. STAT. § 233.16 (1973); GA. CODE ANN. § 32-707 (1969); IND. CODE §§ 20-10-33, 20-10-35 (1971); LA. REV. STAT. ANN. § 17:7 (West Supp. 1975); NEV. REV. STAT. § 390.140 (1973); N.M. STAT. ANN. § 77-13-8 (1968); N.C. GEN. STAT. § 115-206.2 (Cum. Supp. 1974); OKLA. STAT. tit. 70, § 16-102 (1971); S.C. CODE ANN. § 21-456 (1962), *id.*, § 21-45 (Cum. Supp. 1974); TENN. CODE ANN. § 49-2008 (Cum. Supp. 1974); TEX. EDUC. CODE ANN. § 12.11 (1972); UTAH CODE ANN. § 53-13-3 (1970).

25 ALA. CODE tit. 52, § 433(7) (Cum. Supp. 1973); ORE. REV. STAT. §§ 337.050, 337.141 (1974).

26 CAL. EDUC. CODE §§ 9234, 9426, 9600 (West 1975).

27 Chs. 929, 1233 [1972] CAL. STAT. 1655, 2380.

28 Ch. 74-337, §§ 1, 11 [West Supp. 1974] FLA. STAT. 824, 831.

29 Ch. 74-337 [West Supp. 1974] FLA. STAT. 823.

Statute on Instructional Materials Selection and LVR.[30] The California statute, the Florida statute, and the draft of the Model Statute, all choose a single means of inducing publishers to engage in LVR: prohibition of the sale of any instructional materials to public schools within the state unless those materials have been subjected to LVR in accordance with statutory standards.[31]

The success of LVR advocates in obtaining statutory mandates in California and Florida suggests that LVR could be on its way to nationwide adoption.[32] LVR has its proponent in EPIE which, though not directly involved in drafting the California legislation, has worked diligently to assist the development of regulations in that state.[33] EPIE not only helped to draft the Florida statute, but testified on its behalf.[34] The Lawyers' Committee is also engaged in assisting the California Dept. of Education with LVR regulations.[35]

Both California and Florida have state textbook adoption statutes,[36] and it seems logical to expect that LVR could spread most

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30 The Lawyers' Committee for Civil Rights under Law, Washington, D.C. was formed in 1963 at the request of the President of the United States to study and insure the just implementation of Civil Rights legislation. The Committee's offices are located in major cities across the United States.

The Lawyers' Committee is currently working on model statutes and administrative regulations in selected areas for policy-makers and state legislators interested in the reform and improvement of educational standards in their states. Project co-directors, Robert J. Harper II and Attorney Daniel M. Schember, incorporated the concept of learner verification and revision in a Model Statute on Instructional Materials Selection and LVR, which they submitted for critiquing to, among others, the members of a seminar taught by Attorney Walter J. McCann at the Harvard Graduate School of Education.

The National Institute of Education, an agency within the Education Division of the United States Department of Health, Education and Welfare, has financed the project during Fiscal Year 1974-75.

31 CAL. EDUC. CODE §§ 9426, 9600 (West 1975); ch. 74-337, § 11 [West Supp. 1974] FLA. STAT. 831.

32 *Cf.* Crane, *The "California Effect" on Textbook Adoptions*, 32 EDUC. LEADERSHIP 283 (1975).

33 *See* Komoski & Eliott, *supra* note 7.

34 Statements by P. Kenneth Komoski, Law and Education Seminar, Harvard Graduate School of Education, Feb. 18, 1975 [hereinafter cited as Statements by Komoski].

35 Letter from Hannah N. Geffert & Daniel M. Schember, Lawyers' Committee for Civil Rights under Law, to Dr. Wayne Henderson of the California State Dept. of Education, Feb. 3, 1975 (on file Harvard Journal on Legislation).

36 CAL. CONST. art. 9, § 7.5; CAL. EDUC. CODE § 9400 (West 1975); FLA. STAT. § 233.16 (1973).

quickly to other adoption states. Even without widespread state LVR statutes, LVR could soon have nationwide impact because the textbook industry is dominated by national publishing companies.[37] A large portion of that market is provided by the three largest adoption states, California, Illinois, and Texas.[38] Adoption by one of these states assures a substantial volume of sales which few, if any, individual school districts in nonadoption states could match. As a result, it is argued, national publishers aim especially at those three states, and feel obliged to comply with their statutory standards.[39] If all three impose LVR requirements, publishers could be effectively obliged to conduct LVR on all their instructional materials, regardless of the policies of other states.

The California and Florida LVR statutes suggest on their face that insufficient attention was paid to the potential problems raised by LVR. Neither statute addresses the issues of student privacy raised by a statute which mandates extensive testing, interviewing, and other data collection concerning students and their academic performance. Neither statute confronts the objections likely to be raised by teachers opposed to any interference with their classroom autonomy. The possible effects of mandated LVR on the concentration of the publishing industry have not been explored; the potential costs of LVR have not been adequately assessed and compared with the costs of other educational initiatives which might be undertaken. In order to provide a more adequate basis for judging proposals for legislatively-mandated LVR, this article will: 1) relate LVR to the basic trends which have shaped education in the post-war era; 2) analyze the educational publication industry and its political maneuvering; 3) critique the California and Florida statutes to obtain an understanding of the problems encountered in translating theory into statutory language; 4) identify problems not foreseen by either California or Florida legislators; and 5) suggest alternatives to legislative mandating of LVR.

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37 *See* text accompanying note 83 *infra*.

38 Hoffman, *supra* note 2 at 10, 11. Estimated expenditures for instructional materials and equipment in public and private elementary and secondary schools for 1973-74 were highest in California at $209,909,000. For adoption states, Illinois followed at $119,098,000 and Texas at $87,617,000.

39 Statements by Komoski, *supra* note 34.

I. Movement Toward Accountability in Education: Systems Approaches

Recent technological innovations in elementary and secondary education have been accompanied by efforts to maximize the efficiency and learning effectiveness of schools through "systems approaches," which are broadly defined as attempts to view the total performance of an organization in terms of the interrelation of its component parts and interaction of the whole with its environment.[40] Development of workable systems frameworks for education parallel previous efforts within military, industrial, and commercial institutions.[41] One of the major systems models, systems engineering, resulted from Basic Operations Research during World War II.[42] Systems engineering implied the integration of all managerial and technical functions for optimum production, and, in addition, the research and design of subsystems which were integrated into the existing production system. This framework was effectively used in responding to needs arising from increasing reliance on rapid technological innovation in military production.[43] Some systems engineering concepts were applied to the design of instructional systems for Air Force vocational and technical training programs; programmed instruction and computer simulation models were the result.[44]

40 Systems approaches refer to management frameworks for determining goals and objectives, selecting the best method-means, and performing the task to achieve desired results. For a full discussion, see J. McManama, Systems Analysis for Effective School Administration 17-59 (1971); Immegart, *The Systems Movement and Educational Administration,* in Systems Approaches to the Management of Public Education 2 (G. Mansergh, ed. 1969). For background discussion of theoretical and applied aspects of systems approaches, see R. Johnson, F. Kast, & J. Rosenzweig, The Theory and Management of Systems 3-15 (1963).

41 A review of the literature reveals a variety of management frameworks arising from the "Systems Approach" movement including Operations Research, Information Theory, Mathematical Programming, and Systems Engineering. Within the various frameworks a number of specific management techniques or models have evolved, including the Critical Path Method, PPBS, and Cost Benefit Analysis. *See* Immegart, *supra* note 40 at 4-9. Some sources combine discussion of frameworks and specific models. *See, e.g.,* New Decision-Making Tools for Managers (E. Bursk & J. Chapman, eds. 1963).

42 Operations Research is frequently cited as the first attempt at applying systems thinking to management decision-making. It stressed use of mathematical models by interdisciplinary researchers. R. Johnson, F. Kast, & J. Rosenzweig, *supra* note 40 at 217.

43 *Id.* at 117-135, 259.

44 L. Silvern, Systems Engineering of Education I: The Evolution of Systems

The educational engineering model is a refinement of the Air Force training programs and has inherited its conceptual base from systems engineering.[45] The core of educational engineering, as applied to education management functions, lies in its mechanisms for assessing student performance in terms of dollars expended.[46] According to Leon Lessinger, private industry, with its considerable experience and expertise in this area, can assist local educational agencies, if they can ". . . accept the idea that it is desirable and possible to pin educational objectives to measurable student performance as a method for determining program costs vis-a-vis program effectiveness. . . ."[47]

Another, more recent, systems model is the Planning-Programming-Budgeting System (PPBS) which was installed as a planning facilitator in the Department of Defense in 1961. PPBS ties budgeting to planning through system-wide analysis of the significant costs and benefits of alternative policy approaches.[48] As a budgeting tool, PPBS aims to provide information on programs; this is a step beyond the traditional sense of budgeting in terms of objects or services to be purchased.[49] As a planning tool, PPBS

THINKING IN EDUCATION 93, 121, 122 (1965). For broad discussion of the theoretical application — prior to 1965 — of engineering concepts to design of grades K-12 instructional programs, see *id.* at 70-72, 96-103.

45 Lessinger, *Engineering Accountability for Results in Public Education,* in ACCOUNTABILITY IN EDUCATION 28-30 (L. Lessinger & R. Tyler, eds. 1971), Straubel, *Accountability in Vocational Technical Instruction,* 11 EDUCATIONAL TECHNOLOGY, Jan. 1971, at 43.

46 For a discussion of conceptual and operational components of educational engineering, see Lessinger, *supra* note 45 at 28-41; L. LESSINGER and S. BURT, VOLUNTEER INDUSTRY INVOLVEMENT IN PUBLIC EDUCATION 144-147 (1970).

47 L. LESSINGER and S. BURT, *supra* note 46 at 147. Leon Lessinger, former Associate Commissioner of the U.S. Office of Education for Elementary and Secondary Education, and former President of the Aerospace Education Foundation, advocates close cooperation of industry and school systems. He sees as one positive step the recent establishment of a national organization, Industry-Education Councils of America, with northern and southern California and Arizona chapters. Furthermore, he sees the need for increased federal research and development funds, which would allow those in the education "industry" and in research and development laboratories to update and/or evaluate new technologies. *Id.* at 156: Lessinger, *supra* note 45 at 10.

48 SUBCOMM. ON NATIONAL SECURITY AND INTERNATIONAL OPERATIONS, SENATE COMM. ON GOVERNMENT OPERATIONS, 90TH CONG., 1ST SESS., PLANNING-PROGRAMMING-BUDGETING INQUIRY 9-12 (Comm. Print 1970).

49 RHODE ISLAND DEPARTMENT OF EDUCATION, PROGRAM BUDGETING — A PRACTICAL FIRST STEP WITHIN PPBS 4-7 (1975) [hereinafter cited as R.I. DEPT. OF EDUC.]; Hartley, *Educational Planning, Programming, and Budgeting: A Systems Approach,* in SYSTEMS APPROACHES TO THE MANAGEMENT OF PUBLIC EDUCATION 34-35 (G. Mansergh, ed. 1969).

aims to provide clarity of goals; this is to be accomplished by developing objectives with measurable performance standards, so needs assessment is a necessary precondition for this aspect of PPBS.[50] In terms of programming, PPBS aims to design programs and integrate them within the organizational structure, classifying programs structurally so that their interrelationships are not lost from view in planning to meet goals and objectives.[51]

Systems engineering and PPBS presuppose goals and objectives stated in measurable terms and assess the impact of monies spent on reaching these goals.[52] This approach can be difficult to apply to education because of the uncertain state of the art in defining the parameters of learning.

Nevertheless, the accountability movement of the mid-1960's linked systems engineering and PPBS to public education. Some form of accountability has always been a part of education,[53] but in the mid-1960's three broad developments coalesced to strengthen public scrutiny of the educational system:[54] 1) an increase in the proportion of average family income spent on taxes; 2) social recognition that a substantial proportion of young people had not met literacy standards required by the job market; and 3) the success of industry and defense establishments in using management procedures to increase effectiveness and efficiency. Public criticism focused on student academic achievement and teacher effectiveness which resulted in demands for the assessment of students, the evaluation of teachers, and the accountability of public school personnel for student performance.[55] In response, the Education Commission of the States[56] initiated the

50 R.I. DEPT. OF EDUC., *supra* note 49 at 3-4.

51 R.I. DEPT. OF EDUC., *supra* note 49 at 4-5.

52 Tyler, *Accountability in Perspective,* in ACCOUNTABILITY IN EDUCATION 2 (L. Lessinger & R. Tyler, eds. 1971); L. Lessinger, *supra* note 45 at 29. *See also* SUBCOMM. ON NATIONAL SECURITY AND INTERNATIONAL RELATIONS, *supra* note 48 at 9-12.

53 *See, e.g.,* Olson, *Who Owes What to Whom?* 5 PLANNING AND CHANGING, Summer, 1974, at 116.

54 Tyler, *supra* note 52 at 1.

55 *See, e.g.,* Olson, *supra* note 53 at 116.

56 The Education Commission of the States is the governing board of the Compact for Education, a cooperative effort supported by more than forty states. The Commission is composed of representatives from all levels of education appointed by state governors. It directs the work of the Compact, whose purpose is to centralize research, data collection and assessment studies needed by the states, to disseminate information among the states, and to act as a stimulus for state action. The Executive Director of the Commission is Mr. Wendell H. Pierce. The Commission's offices are located at 1860 Lincoln St., Denver, Colorado 80203.

National Assessment of Educational Progress project, which began in 1969 to assess the nation's youth and adults in terms of their educational competence in a variety of subjects. At the same time the federal government encouraged the development of behavioral objectives, educational technology, and performance contracting, which extended industry's role in the accountability movement.[57] Addressing Congress in March, 1970, Richard Nixon said:

> School administrators and school teachers alike are responsible for their performance and it is in their interest as well as in the interest of their pupils that they should be held accountable. Success should be measured not by some fixed national norm, but rather by the particular school and the particular set of pupils. . . . We have, as a nation. too long avoided thinking of the *productivity* of the schools.[58]

The stress on educational productivity gave impetus to application of industry and defense management systems to classroom techniques.[59] Supporters claim that behavioral objectives and management techniques are appropriate to all areas of school instruction (affective and cognitive).[60] However, critics of the general notions of accountability, behavioral objectives, performance contracting, and programmed instructions focus on their restrictive tendencies.[61] Gerald Teller, for example, claims that

57 Terrel H. Bell, while acting U.S. Commissioner of Education in 1970, claimed that research, performance contracting, instructional technology, and information dissemination were the keys to effective education. The New Look of Federal Aid to Education, Speech to the Michigan Association of School Boards, Grand Rapids, September 24, 1970, in ACCOUNTABILITY IN AMERICAN EDUCATION 41, 44-47 (F. Sciara & R. Jantz eds. 1972). *See also* Austin & Holowenzak, *Component Costs of Educational Accountability*, 5 PLANNING & CHANGING, Fall, 1974, at 167.

58 Nixon, *American Education—Message from the President of the United States*, 116 CONG. REC. 5713, 5714 (1970).

59 Alpren & Baron, *The Death of the Behavioral Objectives Movement*, INTELLECT, Nov., 1974, at 103. Behavioral objectives were attractive because they provided a quantifiable method for assessing academic growth.

60 Keller, *Goodbye Teacher . . .*, 1 J. APPLIED BEHAVIORAL ANALYSIS 79 (1968), claims contingency management and reinforcement are more effective and efficient procedures than traditional methods of college instruction. R. MAGER, PREPARING INSTRUCTIONAL OBJECTIVES (1962), provides a program for preparing instructional objectives at any level. H. MCASHAN, THE GOALS APPROACH TO PERFORMANCE OBJECTIVES (1974), suggests a model which is applicable to affective and cognitive learning, though it also addresses problems with the model in fulfilling all learning needs.

61 Alpren & Baron, *supra* note 59, at 103, indicate that behavioral objectives are applicable and appropriate only for basic skill development and are inappropriate

accountability promotes a closed system of education which thwarts the child's natural creativity.[62] Others say that the closed system required by accountability denies the importance of the child in the learning process.[63] David Turney indicates that:

> Precise determination of learner gains requires rather rigid specification of learning goals, which often results in increased rigiditiy in the curriculum.
>
> Accountability is always easier to come by in closed systems, yet the best education appears to require open-ended patterns with minimal specificity.[64]

Further, Arthur Adkins points out that while judging teacher effectiveness by pupil performance may seem logical, other important variables — e.g., environment, intelligence, health, motivation — affect learning; since the teacher has no control over these variables, he should not be held responsible for their effects. Adkins also reaffirms the notion that some forms of learning are not easily quantifiable or measured, yet are important.[65]

It is clear that many of the ramifications of accountability remain uncertain at best and alarming at worst. Nonetheless, between 1963 and 1972, 23 states enacted legislation that authorized or mandated some type of educational accountability.[66] By

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and ineffective in other cognitive areas, i.e., creativity, etc. and the affective domain. They claim that behavioral objectives have been over-extended to nonquantifiable areas and that the method will lose credibility as a result. H. MCASHAN, *supra* note 60 at 1-2, who advocates behavioral objectives, is also cautious about overextension:

> The use of behavioral objectives is not and never will be a panacea for solving major instructional problems. At best, the use of behavioral objectives can be a valuable tool that aids and motivates teachers in their instructional preparation and provides additional guidance to students so they may better achieve. At worst, behavioral objectives can be harmful in occupying too much teacher time and by confusing the real intents and values that should be achieved in learning situations.

62 Teller, *What are the Myths of Accountability,* 31 EDUCATIONAL LEADERSHIP, Feb. 1974, at 455, 456.

63 NATIONAL COMMITTEE FOR SUPPORT OF THE PUBLIC SCHOOLS, NEWS, June, 1971, at 1. A further implication may be that an accountability-constrained learning process may also thwart the teacher's spontaneity.

64 Turney, *A View from the Bridge: the Accountability Dilemmas,* 46 CONTEMPORARY EDUCATION, Fall, 1974, at 71.

65 Adkins, *An Accountability Strategy,* 56 PHI DELTA KAPPAN 180 (Nov. 1974). *See also* Harrison, Jr. & Scriven, *"Does Evaluation Preclude Learning?",* in READINGS IN EVALUATION 35-38 (A. Fults, R. Lutz, & J. Eddleman, eds. 1972); Kindsvatter, *"Guidelines for Better Grading,"* in READINGS IN EVALUATION, *supra* at 84-89.

66 Ovard, *The Practitioner's Guide to Research: Teacher Effectiveness and Ac-*

April, 1973, 16 additional states were considering some form of accountability legislation.[67] Both California and Florida have enacted accountability legislation.[68] California's Stull Bill, enacted in 1972, mandated accountability for teacher performance.[69] Arthur Olson has suggested that "[o]ther models [of evaluation and accountability] are likely to emerge, all in the spirit of ultimately improving the instructional program and providing information to the public, the man who pays the bill, on the quality of education in our schools."[70] One such model is embodied in the learner verification and revision legislation in California[71] and Florida,[72] which extends the concept of accountability to the publishers.

II. The Knowledge Industry

During the past twenty years, the "knowledge industry"[73] has grown enormously, and become a significant force in educational policy planning and evaluation. Several factors have contributed to this rapid development.

First, the "baby boom" of the post-World War II period caused a rapid rise in school enrollments[74] and a concomitant increase

countability, 59 NASSP Bulletin, Jan. 1975, at 92. The 23 states are: Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. Thirteen of these states have state testing or assessment programs; seven have PPBS; two have Management Information Systems; four have Uniform Accounting Systems; eight have evaluation of professional employees; and one, California, permits performance contracting. *Id.* at 92.

67 *Id.* at 91.

68 Cal. Educ. Code §§ 13485-13490 (West 1975); ch. 74-337 [West Supp. 1974] Fla. Stat. 1079; ch. 74-205 [West Supp. 1974] Fla. Stat. 579.

69 Cal. Educ. Code §§ 13485-13490 (West 1975).

70 Olson, *supra* note 53 at 119.

71 Cal. Educ. Code §§ 9234, 9426, 9600 (West 1975).

72 Ch. 74-337, §§ 1, 11 [West Supp. 1974] Fla. Stat. 824, 831.

73 A term coined by the growing diversity of participants and activities in the educational materials industry. *See* Institute for Educational Development, Research and Development in the Educational Materials Industries (Eric Document ED 043 232, 1969) [hereinafter cited as Research and Development]. *See also* F. Machlup, The Production and Distribution of Knowledge in the United States 44-48 (1962).

74 Between 1950 and 1960, school enrollments in the United States (kindergarten through grade 12) increased by 46 percent, from 28,660,000 to 42,012,000. U.S. Dept. of Commerce, Social and Economic Statistics Administration, Statistical Abstract of the U.S. 1974 109 (Bureau of the Census 95th Annual Ed. July, 1974).

in textbook sales.[75] In addition, increased enrollments contributed to serious shortages of teachers, time, and space,[76] creating strong pressures to find ways to educate children more efficiently. Consequently, use of school time, physical facilities, and personnel had to become more flexible.[77] Schools became increasingly receptive to technological innovations such as language labs, closed circuit and broadcast televisions, and programmed instructional devices.[78]

Second, the industry underwent substantial structural changes.[79] Between October, 1959 and May, 1962, fourteen major publishing companies made public offerings of their stock for the first time, either on the New York Stock Exchange or in the over-the-counter market.[80] At the same time, some thirty publishing companies were involved in mergers or acquisitions; the result was a substantial concentration of the publishing industry, including the publishing companies interested in educational materials.[81] Beginning in 1962, another trend became visible: the acquisition of publishing companies by large, diversified corporations such as Xerox, General Electric, IBM, RCA, and Raytheon.[82] As of

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75 R. Frase, *The Market for Book Manufacturing*, in BOWKER ANNUAL OF LIBRARY AND BOOK TRADE INFORMATION 167, 170-73 (19th ed. M. Miele 1974).

76 *See generally* THE REVOLUTION IN THE SCHOOLS (R. Gross & J. Murphy, eds. 1964).

77 *E.g.*, double shifts, different class scheduling, independent study, multi-age grouping, etc.

78 Finn, *Technology and the Instructional Process*, in THE REVOLUTION IN THE SCHOOLS 13 (R. Gross & J. Murphy, eds. 1964).

79 For a general discussion of the structural changes which occurred in the publishing industry in the early 1960's, see M. REDDING & R. SMITH, REVOLUTION IN THE TEXTBOOK PUBLISHING INDUSTRY (1963) (Report prepared for the Technological Development Project of the National Education Association).

80 *Id.* at 11. Table II, prepared by Roger Smith of *Publishers' Weekly*, lists the following companies, with their dates of first public sale of stock: American Heritage Publishing Company (Oct. 1961); Ginn and Company (Nov. 1960); Grosset and Dunlap (May 1961); Harcourt, Brace, now Harcourt, Brace & World (Aug. 1960); D.C. Heath and Company (May 1961); Richard D. Irwin, Inc. (Aug. 1961); Pocket Books (Jan. 1961); Random House (Oct. 1959); Row, Peterson, now Harper and Row (Feb. 1960); Science Research Associates (Nov. 1961); Scott, Foresman (Nov. 1960); Webster Publishing Company (May 1961); Western Publishing Company (Aug. 1960); and John Wiley & Sons (May 1962).

81 *Id.* at 12. For a listing of mergers, acquisitions and joint ventures since 1966, see Silberman, *Technology is Knocking at the Schoolhouse Door*, 74 FORTUNE, Aug., 1966, at 120, 123.

82 Silberman, *supra* note 81 at 123. Silberman summarizes the acquisitions as follows: Xerox acquired University Microfilms (1962), Basic Systems (1965), and American Publications (1965); Time, Inc. acquired Silver Burdett (1962); IBM acquired SRA (1964); Time, Inc. and General Electric acquired GLC (1965); Ray-

1974, the ten largest firms generated 57% of the revenues in the market for elementary and high school educational materials. Market shares were higher in the market for textbooks alone.[83]

Third, the federal government began to expend substantial funds on elementary and secondary education, areas which had previously been supported almost exclusively by states and local school districts. The launching of Sputnik in 1957 provided the first impetus for federal involvement; Congress responded hastily by passing the National Defense Education Act of 1958 (NDEA).[84] The Act authorized programs to revamp and improve education in areas of critical national concern, such as scientific and mathematical instruction.

Seven years later, responding to widespread criticism of the public schools' failure to educate large and identifiable groups adequately,[85] Congress took further action by passing the Elementary and Secondary Education Act (ESEA).[86] The major program authorized by ESEA, the compensatory education program, made funds available for the education of children with social and economic disadvantages,[87] thus providing an indirect stimulus to the educational materials industry by infusing new funds into the schools.[88] Two smaller programs enacted by ESEA,

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theon acquired Edex (1965), Page Bell (1965), Macalaster Scientific Corp. (1965), and D.C. Heath (1966); RCA acquired Random House (1966); CBS acquired Creative Playthings (1966); and Cowles acquired Educators' Association (1962) and College Publishing Corp. (1966).

83 8 KNOWLEDGE INDUSTRY REPORTS, Dec. 15, 1974, at 3.

84 National Defense Education Act of 1958 (NDEA), Pub. L. No. 85-864, 72 Stat. 1581. Title III, 20 U.S.C. §§ 441-444, 451-455 (1970), provides financial assistance for the strengthening of instruction in science, mathematics, modern foreign languages, and other critical subjects. It is of special interest to elementary and secondary educational materials producers because it permits expenditures for library and other instructional materials. *See* NDEA Title III, § 303(a), 20 U.S.C. 443(a).

85 *See, e.g.*, J.S. COLEMAN, ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); Silberman, *supra* note 81, at 121.

86 Elementary and Secondary Education Act of 1965 (ESEA), Pub. L. No. 89-10, 79 Stat. 27.

87 ESEA Title I, 20 U.S.C. 241a-241m (1970). Funds appropriated under ESEA Title I are made available to states and local educational agencies according to a formula based upon the number of children from low-income families resident in the state or local agency. Funds must be spent for special educational programs designed to meet the needs of educationally disadvantaged children in the state or district schools.

88 In fiscal year 1975, annual appropriations for Title I reached approximately $1.875 billion. 120 CONG. REC. H11270 (daily ed. Dec. 4, 1974).

however, directly stimulated the instructional materials producers: Title II[89] provides funds to states for the improvement of libraries and the purchase of library materials, and Title III[90] provides funds to states for the support of innovative educational projects. Library appropriations have been particularly crucial to the industry; an increasing portion of the funds for the growing audio-visual (A-V) market has come from ESEA Title II. Estimates reveal that approximately 45 percent of the appropriations for the library program for 1974 were spent on A-V materials.[91] Title III of ESEA has had a psychological as well as financial impact upon the industry because it offered attractive research and development opportunities in the electronics and communications industries where federal monies for defense research and development had been diminishing.[92] At the same time, new prospects for social science research from within the Department of Defense served to heighten industry interest in education.[93]

By the late 1960's, however, it became apparent that the population trends of the fifties were changing, and that the future of the educational materials industry was less promising.[94] Between 1963 and 1972, the United States experienced a diminished rate of population growth, and there are projections that it will decrease further between 1972 and 1980.[95] The effect upon text-

89 20 U.S.C. §§ 821-827 (1970).

90 20 U.S.C. §§ 841-847a (1970).

91 Frase, *supra* note 75 at 170.

92 Between 1953 and 1965, total (*i.e.*, federal and private) research and development funds increased almost 300%. Federal funding accounted for 55% in 1965. However, the annual rate of increase of federal funds dropped from 13% to 1% between 1962 and 1965, while the rate of increase of company funding rose from 7% increase to 11%. NATIONAL SCIENCE FOUNDATION, REVIEWS OF DATA ON SCIENCE RESOURCES 1, 4 (NSF 66-33, 1966).

93 In 1968, the Deputy Director for Research and Engineering in the Department of Defense declared that the Department now had developed broader responsibilities, aimed at such areas as "military assistance" and "pacification," which would require increased reliance upon the behavioral and social sciences. S. MELMAN, PENTAGON CAPITALISM 91-92 (1970).

94 One indication of this insecurity is the apparent reversal of the trend toward publishers' mergers and acquisitions by diversified corporations. General Electric sold General Learning Corporation to Scott Foresman in July, 1974 after losing $8.75 million on it. Litton Industries is reported to want to dispose of American Book Company, its textbook subsidiary. 8 KNOWLEDGE INDUSTRY REPORTS, July 31, 1974, at 1.

95 The rate of population growth slowed down between 1963-1972 by 14.2 per-

book sales is apparent; they constituted 1.5 percent of school expenditures in 1963 and 1.0 percent in 1973, and will probably decline further.[96] Not all instructional materials have fared equally: the sale of audio-visual materials has not decreased, probably reflecting a growing trend toward individualized instruction; however, neither computers nor teaching machines have made much of an impact.[97]

At the federal level, appropriations for elementary and secondary education programs, including Titles II and III of ESEA, have remained almost constant in recent years.[98] According to the Association of American Publishers (AAP), the percentage of certain federal expenditures for instructional materials has declined below standards recommended by the AAP and the National Education Association (NEA).[99] In addition, textbook publishers face stiff competition for limited resources from teachers and other educational staff, who have succeeded in raising salary levels in a labor-intensive enterprise.[100] These two factors are important constraints for educational marketers.[101]

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cent and is expected to decline another 8.3 percent by 1980. Frase, *supra* note 75 at 167. Enrollment figures reflect this trend: 49.7 million children attended elementary and high school in 1974, but the number is expected to drop to 45.1 million by 1982. 8 KNOWLEDGE INDUSTRY REPORTS, Jan. 15, 1975, at 8.

96 8 KNOWLEDGE INDUSTRY REPORTS, Dec. 15, 1974, at 2.

97 *Id.* at 2-3.

98 Appropriations for ESEA Title II amounted to $90 million in fiscal year 1972, $100 million in fiscal year 1973, and $90.25 million in fiscal year 1974. Appropriations for ESEA Title III in the same three fiscal years amounted to $146.4 million, $171.4 million, and $146.4 million, respectively. U.S. Dept. of Health, Education and Welfare, Justifications of Appropriations Estimates for Committee on Appropriations, Fiscal Year 1974, Volume VI, Education Division 1-45; *id.* Fiscal Year 1975, Volume V, Education Division 1-66. Under the provisions of Title IV of the Education Amendments of 1974, 20 U.S.C. 1801 *et seq.* (1975 Supp.), ESEA Titles II and III are consolidated into a new program of Libraries and Learning Resources, Innovation and Support. The combined appropriation for this program in the first year of its operation, fiscal year 1976, is $301,218,000. 120 CONG. REC. H11270 (daily ed. Dec. 4, 1974).

99 *Increasing Direct Support for Instructional Materials,* in ASSOCIATION OF AMERICAN PUBLISHERS, CRITICAL CONCERNS: 1975 (1975).

100 Frase, *supra* note 75 at 170; *cf. Increasing Direct Support for Instructional Materials, supra* note 99 at 1.

101 In addition to these factors, the Association of American Publishers cites marketing regulations which restrict the efficiency of marketing. These factors include: the practice of requiring filing fees to state adoption bodies which are not in every case refundable; unnecessarily diverse and complex bidding instructions; excessive demands for contextual changes, often by local groups; requirements of free samples; and reliance upon long-term fixed supply contracts even when costs increase as a result of inflation. *Eliminating Excessive Restrictions on Engaging in Business,* in CRITICAL CONCERNS: 1975 (1975).

Adverse economic trends have also resulted in increasing conflict between congressional commitment to federal education spending, and presidential desires to limit or cut federal budget outlays.[102] This was emphasized during the Nixon Administration by four vetoes of Office of Education appropriations acts,[103] and by unsuccessful presidential attempts to impound certain education funds.[104] As a result, publishers have begun to focus on the political realities of governmental funding; since 1969, the industry has been involved in supporting the Committee for Full Funding of Education Programs, a coalition of education, library, and other related organizations interested in maintaining federal funding levels for education programs.[105] These lobbying efforts have shown some success. In 1974, for example, President Nixon signed an appropriations bill of $6.024 billion, which represented $938 million above his budget proposal for the Office of Education.[106] A recent industry report advises educational marketers to increase their political activity this year.[107]

Publishers have also sought to improve their position by means of eliminating constraints on the educational materials industry imposed by state selection laws. The desirability of such changes

102 Frase, *Five Years of Struggle for Federal Funds,* in BOWKER ANNUAL OF LIBRARY AND BOOK TRADE INFORMATION (19th ed. M. Miele 1974).

103 President Nixon vetoed H.R. 13111, 91st Cong., 1st Sess. (1969), the first Labor-HEW appropriations bill for fiscal year 1970, on January 28, 1970. The veto was sustained by the House. President Nixon subsequently vetoed H.R. 16916, 91st Cong., 2d Sess. (1970), the Office of Education appropriations bill for fiscal year 1971, on August 11, 1970. Both Houses of Congress voted to override the veto. President Nixon later vetoed H.R. 15417, 92d Cong., 2d Sess. (1972), the first Labor-HEW appropriations bill for fiscal year 1973, on August 16, 1972. The veto was sustained by the House. The President thereafter pocket-vetoed H.R. 16654 92d Cong., 2d Sess. (1972), the second Labor-HEW appropriations bill for fiscal year 1973, on October 27, 1972.

104 President Nixon attempted to impound funds appropriated under several education-related acts, including ESEA Title II, but was prevented from doing so by adverse court decisions. *See* State of Louisiana v. Weinberger, 369 F. Supp. 856 (E.D. La. 1973), People *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721 (N.D. Ill. 1973). Commonwealth of Pennsylvania v. Weinberger, 367 F. Supp. 1378 (D.D.C. 1973), State of Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973).

105 Emergency Committee for Full Funding of Educational Programs, 300 New Jersey Ave. S.E., Washington, D.C.; registered lobbyist, Charles W. Lee; filed June 2, 1969. The Committee's particular legislative interest is educational funding within the annual Labor-HEW appropriations bills. *See* Vol. 25 CONG. Q. ALM., 91st Cong., 1st Sess. 1121 (1969).

106 *Educational Publishing Industry,* 44 WALL STREET TRANSCRIPT 36567 (1974). (There appears to be a typographical error: in light of the total budget, 6,024 billion should read 6.024 billion).

107 8 KNOWLEDGE INDUSTRY REPORTS, March 15, 1975, at 3.

was demonstrated in 1969 by the Institute for Educational Development (I.E.D.).[108] Using funds from the Carnegie Corporation and the Ford Foundation, the Institute studied the legal requirements which impede the selection, purchase, and introduction of educational materials. It concluded that the most restrictive constraints on materials selection are those regulating the length of time betwen adoptions of textbooks, and those prescribing the course of instruction.[109]

III. Legislation Mandating Learner Verification of Instructional Materials

A. *The California Textbook Market: A Century of Legislative Constraints*

For more than a century, textbook regulation in California has been rife with the type of restrictions cited by the Institute of Educational Development as most constraining publishers' access to the instructional materials market.[110] In 1849, the first Constitution of California established the Office of Superintendent of Public Instruction and delegated to the legislature the responsibility for promotion of intellectual, scientific, moral, and agricultural improvement.[111] During the next hundred years, the laws governing the public school system proliferated,[112] and by 1957, California had enacted more laws affecting textbook selection than any other state.[113]

Textbook selection power in California has been predominantly delegated to state officials or agencies. From 1853 to 1860, the Superintendent of Public Instruction, by law, recommended a uniform series of schoolbooks which school commissioners and

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108 Institute for Educational Development, Selection of Educational Materials in the United States Public Schools (ERIC Document ED 044030, 1969) [hereinafter cited as Selection of Educational Materials].

109 *Id.*, at 286.

110 *Id.*

111 Cal. Const. art. 9, §§ 1-2 (1849).

112 *See* Kunzi, *The Education Code,* in Cal. Educ. Code 101 (West 1975), for a commentary on the legislative enactments concerning education in the last century.

113 The closest competitors were Kansas, Texas, Indiana, West Virginia and Kentucky. *See* Hall, *supra* note 14 at 86-188.

teachers were required to use. In 1860, this power was delegated to a State Board of Education where it has remained in one form or another.[114] Today, the State Board of Education adopts a list of "textbooks and instructional materials" for elementary schools,[115] while district boards of education adopt "textbooks" for use in high schools.[116] This balance determines the points of entry into the market for instructional materials.

One of the major constraints on introduction of new materials to public schools has been the time period for which adopted materials must be kept in use.[117] In California, since 1866, schools have been required to use adopted materials for a period of at least four years.[118] They have been allowed to keep materials in use as long as eight years.[119] A second major constraint has been the numerous legislative prescriptions concerning curricula.[120]

Other important constraints on private entry into the California textbook market have been imposed by either the California Constitution or by statute. In 1884, the Constitution was amended to require the state to print textbooks, preferably those written by California authors. From 1891 until 1903, state law required that public schools use only state-printed books. In 1903 private publishers won a legislative concession permitting the State Board of Education to lease plates from publishers and pay royalties.[121] However, in 1913 a statutory preference for textbooks written, compiled, printed, and published in California again reinforced market constraints.[122] The legislature sought enforcement through penalties for school officers and teachers who acted as agents for publishers or who did not use state-printed textbooks, and for anyone who gave or accepted bribes to influence textbook purchases.[123]

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114 For a history of changes in textbook selection policies since 1860, see *id.* at 92-95.

115 CAL. EDUC. CODE § 9400 (West 1975).

116 *Id.* § 9600.

117 SELECTION OF EDUCATIONAL MATERIALS, *supra* note 108 at 286.

118 Hall, *supra* note 14 at 92-95. Between 1933 and 1957, the minimum adoption period was six years.

119 *Id.* at 92.

120 *Id.* at 92-95.

121 *Id.* at 93.

122 *Id.* at 95.

123 *Id.* at 93-95.

Despite these provisions inhibiting open, profitable, textbook market conditions, the sheer size of the California market guarantees continued attention from publishers and manufacturers.[124]

B. *Legislative Restructuring of the California Market for Instructional Materials*

The California legislature established a Joint Legislative Committee for the Revision of the Education Code in 1957.[125] During the next decade, partly as a result of the Committee's work, the legislature enacted a series of major revisions of the Education Code. These enactments covered a wide range of educational activities; they included the McAteer Act establishing compensatory education programs,[126] the Miller-Unruh Basic Reading Act of 1965,[127] a special mathematics improvement program,[128] special education for the gifted[129] and the handicapped,[130] a statewide program of achievement testing,[131] revised certification of professional employees,[132] and the Professional Development and Program Improvement Act of 1968.[133] In 1972, the work of the Committee led to extensive revision of Division 8 of the Education Code, entitled "Instructional Materials."[134] As part of this revision of Division 8, the legislature enacted a Learner Verification and Revision statute.[135]

The process of amending and developing the California Education Code was complicated by the fact that some of the major

124 Hoffman, *supra* note 2 at 11. The estimated expenditures for instructional materials and equipment in public and private elementary and secondary schools for 1973-74 for the top five markets are: California, $209,909,000; New York, $194,856,000; Illinois, $119,098,000; Pennsylvania, $115,957,000 and Texas, $87,617,000. *See also* Crane, *supra* note 32.

125 Ch. 2419 [1957] CAL. STAT. 4173.

126 Ch. 900 [1963] CAL. STAT. 729; Ch. 1163 [1965] CAL. STAT. 2947.

127 Ch. 1233 [1965] CAL. STAT. 3086.

128 Ch. 1639 [1967] CAL. STAT. 3923.

129 Ch. 883 [1961] CAL. STAT. 2311.

130 Ch. 2165 [1963] CAL. STAT. 4535.

131 Ch. 994 [1961] CAL. STAT. 2638.

132 Ch. 848 [1961] CAL. STAT. 2211.

133 Ch. 1414 § 2 [1968] CAL. STAT. 2780.

134 Ch. 929 § 2 [1972] CAL. STAT. 1655. Division 8 contains: General Provisions chapter 1; Elementary Instructional Materials, chapter 2; High School Textbooks chapter 3; Obsolete Instructional Materials, chapter 4; and Special Programs chapter 5.

135 CAL. EDUC. CODE §§ 9234, 9426, 9600 (1975).

elements of the public school system were governed not by statute, but by the state constitution. Until 1970, article 9, section 7 of the constitution dealt with the creation and duties of the State Board of Education, the selection, printing, and distribution of textbooks, establishment of county boards of education, and the certification of teachers by county superintendents and boards of education.[136] From 1884 until 1970, section 7 required textbooks to be "furnished and distributed by the state free of cost or charge" to all elementary school children, and provided for an adoption period of four years;[137] a 1911 amendment added the words "without any change or alteration whatsoever which will require or necessitate the furnishing of new books to such pupils."[138] The LVR concept of continual revision of instructional materials was incompatible with such a provision.

In 1968, the legislature attempted to repeal this section of the constitution, but the voters rejected the amendment.[139] Total repeal would have jeopardized the assurance of free textbooks. Two years later, the voters approved a modified amendment to the constitution which split section 7 into two shorter sections and deleted some of the requirements:

> Sec. 7. The Legislature shall provide for the appointment or election of the State Board of Education and a board of education in each county.
>
> Sec. 7.5. The State Board of Education shall adopt textbooks for use in grades one through eight throughout the State, to be furnished without cost as provided by statute.[140]

The constitution, as amended, assures that public elementary school students will receive free textbooks, but allows the legislature to decide whether the state or local tax base will bear the cost.[141] Furthermore, the legislature is free to decide how text-

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136 CAL. CONST. art. 9, § 7 (1884).

137 *Id.*

138 *Id.* (1911).

139 Proposed Cal. Const. amend. No. 30 (1968), rejected at the general election held Nov. 5, 1968 (CAL. CONST., SUPP. 1975, at 121 (note)).

140 CAL. CONST. art. 9, §§ 7-7.5.

141 To the extent that there is a disparity in local resources to fund the purchase of instructional materials, such a shift intensifies the problem of inter-district financial inequality currently under judicial attack. Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241.

books will be adopted, for how long, and whether they will be printed by the state.

One effect of the amendment is the removal of the constitutional barrier to legislation which might, as in the case of LVR, require more frequent changes in adopted textbooks. The 1972 amendments to the Education Code required publishers and manufacturers to develop plans for learner verification and revision of instructional materials.[142] State funding of textbooks was assured only until 1977.[143] The State Board of Education was required to select a greater variety of instructional materials,[144] a phrase now defined much more broadly than the term "textbook."[145] Elementary boards of education were given more discretion in selecting such materials.[146] Significantly, the periods of adoption were set from two to five years for elementary instructional materials,[147] and at "not less than three years" for high school textbooks.[148]

The history of textbook selection in California illustrates the constitutional and statutory barriers which may impede the introduction of new educational concepts. Many interests are affected by legislation concerning educational materials. Public school teachers want more control of the selection of the basic tools of their trade for several reasons: they are increasingly being held accountable, and they need the flexibility and discretion accorded to professionals who need to match their skills to changing conditions. Understandably, private textbook publishers want removal of legal constraints on their market, especially competition from state printers and long adoption periods which retard introduction of technological improvements. Local elementary boards of education desire the power to choose from a variety of instructional materials those which best suit their district goals. State legislators, on the other hand, may be willing to consider delegating more choice to local boards if some or all

142 CAL. EDUC. CODE § 9426 (West 1975).
143 *Id.* § 9446.
144 *Id.* § 9400.
145 *Id.* §§ 9221, 9221.3, 9221.5, 9222, 9222.3, 9223, 9224.
146 *Id.* § 9400(c).
147 *Id.* § 9465. This section was amended in 1973 to lengthen the period in which materials could be retained in use to six years. Ch. 647 § 6 [1973] CAL. STAT. 1192.
148 CAL. EDUC. CODE § 9603 (West 1975).

of the burden of financing such purchases could be shifted from the state tax base to that of local school districts. At the same time, they remain responsive to public demands for educational quality and accountability in return for tax dollars.

All these parties could agree that detailed regulation of public education would be more responsive to conditions if handled by statute instead of the constitution. Their converging concerns do not imply an action coalition, but suggest that the political climate may be conducive to change if the right "formula" can be found. In California, in 1972, that formula included an incipient form of LVR.

C. *The California LVR Statute*

1. Provisions

As amended in 1972, the California Education Code contains only three sections which refer to learner verification.[149] A related provision, section 9221, defines "instructional materials" as "all materials designed for use by pupils and their teachers as a learning resource and which help pupils to acquire facts, skills, or opinions or to develop cognitive processes."[150] They may be "printed or nonprinted and may include textbooks, educational materials and tests."[151] Although a broad definition, the use of the modifying phrase "designed for use" suggests that newspapers, magazines, and many materials not designed for classroom instruction would be outside the definition of instructional materials and, therefore, not subject to the LVR provisions.

Section 9234 defines "learner verification" as "the continuous and thorough evaluation of instructional materials for their effectiveness with pupils."[152] In section 9426, publishers and manufacturers are required "to develop plans to improve the quality and reliability of instructional materials through learner verification"[153] in accordance with rules and regulations of the State Board of Education. Section 9426 also requires that "[g]ov-

149 *Id.* §§ 9234, 9426, 9600.
150 *Id.* § 9221.
151 *Id.*
152 *Id.* § 9234.
153 *Id.* § 9426.

erning boards shall be encouraged to permit publishers and manufacturers to have limited access to classrooms for necessary testing and observation."[154] Initially, LVR requirements applied only to elementary instructional materials because sections 9234 and 9426 are part of chapter 2 of Division 8, which concerns only elementary materials.[155] Later the same year, however, an amendment to section 9600[156] extended these provisions to high school textbook adoption through incorporation by reference of section 9426.

2. Demands on Publishers and Manufacturers

The requirement imposed by section 9426 is, strictly speaking, only a demand that "[p]ublishers and manufacturers shall, in accordance with rules and regulations adopted by the state board, *develop plans* to improve the quality and reliability of instructional materials through learner verification" (emphasis added).[157] There is no explicit requirement that the plans be implemented. Furthermore, the section listing the information which must be submitted to the Curriculum Development and Supplemental Materials Commission before it makes recommendations to the State Board for adoption does not include these learner verification plans.[158]

The extension of requirements for learner verification of materials to high school adoptions under chapter 3 of Division 8 has greater impact because of a restriction on the power of district boards to adopt textbooks for use in high schools under their control: "Only textbooks of those publishers who comply with the requirements of . . . Section 9426 [learner verification] may be adopted by the district board."[159] Not all high school books, however, are necessarily involved because the State Board of Education is required to "designate the kinds of books which shall be classified as textbooks for the purposes of this [high school] chapter. Instructional materials not classified as text-

154 *Id.*
155 Ch. 929 § 2 [1972] CAL. STAT. 1657, 1661.
156 Ch. 1233 § 17 [1972] CAL. STAT. 2384.
157 CAL. EDUC. CODE § 9426 (West 1975).
158 *Id.* § 9422.
159 *Id.* § 9600 (1975).

books may be purchased by district boards without reference to the provisions of this chapter. . . ."[160]

Though the legislation on learner verification has been in effect nearly three years, the State Board of Education has not yet fulfilled its obligation to adopt "rules and regulations" to guide publishers and manufacturers. EPIE's efforts to assist the State Board in drafting regulations proved fruitless[161] and were followed by predictions that the state would probably settle for "deliberately vague" regulations.[162] The report of California's special Committee on Learner Verification (the Chunn Committee)[163] suggested stringent regulations which were strongly opposed by publishers at a recent meeting in New York City.[164] In addition, the draft regulations were criticized by the Lawyers' Committee project team,[165] which may try to develop alternative regulations.[166] In effect, no one knows how to implement the legislative mandate, and it is not surprising that the California State Department of Education is relying on large publishers with well developed research departments (such as Xerox,

160 *Id.* § 9601. Dr. Elaine Stowe of the California State Department of Education stated in an interview on April 14, 1975, that the State Board of Education uses the National Association of State Textbook Administrators' *Manufacturing Standards and Specifications for Textbooks* (Oct. 1971) as a guide for determining what books shall be classified as textbooks.

161 Komoski & Elliott, *supra* note 7.

162 Attributed to Clifton Garrett, Consultant to the California Assembly Education Committee, in comments to members of the Educational Media Producers Council, 17 EDUC. U.S.A., Oct. 14, 1974, at 37.

163 C. Chunn, Chm., the Learner Verification Committee, *Preliminary Guidelines for Learner Verification,* (Jan. 1974) (Cal. State Dept. of Educ., Sacramento, Cal. [hereinafter cited as Chunn Guidelines].

164 The EPIE-inspired National Learner Verification and Revision Task Force met February 24, 1975 in New York City.

165 The Lawyers' Committee staff expressed particular concern that the Chunn Committee guidelines linked LVR to the selection process in a manner which seemed to imply that LVR results would be used to rank materials and that publishers would be obliged to compete for high LVR rankings. The link is made by the Chunn Committee's suggested "ratio of comparable competence," a calculated number designed to measure the success of an instructional material in meeting its stated goals with learners. The letter states that "the Guidelines implicitly intertwine learner verification and the purchase process: they make learner verification a matter of competition among publishers rather than a matter of each publisher complying with appropriate state standards. . . ." Letter from Hannah N. Geffert & Daniel M. Schember of the Lawyers' Committee for Civil Rights under Law, to Dr. Wayne Henderson, State Department of Education, Sacramento, Cal., Feb. 3, 1975 [hereinafter cited as Geffert & Schember].

166 Interviews with Lawyers' Committee staff members Jay Harper, II, on March 3, 1975 and Daniel Schember, in Cambridge, Mass., March 11, 1975.

McGraw Hill, and Holt, Rinehart and Winston) to supply some of the answers.[167]

3. Demands on School Districts

The second sentence of section 9426 provides that "[g]overning boards shall be encouraged to permit publishers and manufacturers to have limited access to classrooms for necessary testing and observation."[168] "Governing board" is defined as "board of school trustees, and city, and city and county board of education."[169] Since "[e]very school district shall be under the control of a board of school trustees or a board of education,"[170] this provision is aimed at local boards of education, but being phrased in the passive form, it is not clear who is to do the encouraging. The provision is vague in that neither "limited" nor "necessary" is defined, and the law does not indicate who has the power to make those definitions or what criteria are to be used. Sections 39, 921, and 9426 taken together can be read to conclude that the Legislature is suggesting that local boards of education cooperate with publishers and manufacturers to enable them to meet the requirements in the first sentence of section 9426, but the discretion remains with local boards, and the statute makes no provision to resolve the conflict if a publisher is unable to obtain access to classrooms on a voluntary basis.

Once the representatives of the publishers and manufacturers enter the classroom, their role might take several forms — observing, testing, interviewing, or even teaching. Neither the California statute nor the proposed guidelines adequately delimit the range of activities to be included in LVR.[171] Furthermore, neither the statute nor the proposed guidelines assign final responsibility for evaluating the fairness and adequacy of the publishers' LVR. The EPIE guidelines provided:

> Learner verification of a product is the producer's responsibility and the data gathered are the producer's property.

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167 Telephone interview with Dr. Elaine Stowe of the California State Department of Education April 14, 1975.

168 CAL. EDUC. CODE § 9426 (West 1975).

169 *Id.* § 39.

170 *Id.* § 921.

171 *Cf.* Komoski & Elliott, *supra* note 7 at 2; Chunn Guidelines, *supra* note 163 at 2.

> Education agencies have a responsibility to permit producers to gather data from schools and a responsibility to demand evidence that the producers are employing valid procedures of data gathering and analysis and that they are using the data to improve the effectiveness of their product.[172]

This statement appears to split responsibility between publishers and school districts. Publishers who already practice LVR have experienced difficulties assuring objectivity. Holt, Rinehart and Winston reports that it initially employed an independent agency to conduct its LVR but that so many difficulties resulted from the introduction of this third party to the dialogue between publisher and school system that the independent agency was removed from the communication process.[173]

Assuming that the extent of permissible activity for publishers in the name of LVR is clarified and that school districts voluntarily open their doors, the third and final sentence of section 9426 presents another substantial problem: "Publishers and manufacturers shall provide copies of test results and evaluations made as part of learner verification at the request of any governing board."[174] The pupils' right to privacy appears to be ignored. Not only the district which opened its doors, but any district may ask for information, and the law clearly mandates compliance by the publishers and manufacturers. The statute does not require the consent of parents or students who have reached the age of eighteen before information may be gathered or disclosed.

Less than three months after adoption of the LVR statute,[175]

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172 Komoski & Elliott, *supra* note 7 at 2.

173 Holt, Rinehart, & Winston, Inc., *supra* note 12, at 5-6. The intent was ". . . to add objectivity and reduce possible bias from the process, . . . [and] to add expertise that was not widely available (*e.g.*, testing specialists and computer analysts)." *Id.* at 6. Holt, Rinehart & Winston, Inc. remain committed to the use of outside experts to assure objectivity of the LVR process. Its Learner Verification Plans Report states:

> We have retained external consultants to review each stage of our research design and implementation, have arranged for independent observers to visit participating schools during the research process, and will arrange for the participation of independent consultants in the analysis of the data and the preparation of learner based research reports.

Id. at 6.

174 CAL. EDUC. CODE, § 9426 (West 1975).

175 Nov. 7, 1972.

the California Constitution was amended to make privacy an inalienable right:

> All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; and pursuing and obtaining safety, happiness, and privacy.[176]

The effect of this constitutional amendment on students' rights is uncertain. It is necessary that the question of striking a balance between the student's right to privacy and the public's right to monitor LVR be openly confronted. This could be done in developing regulations to implement the LVR statute. Given the importance of the issue, however, it would be preferable for the legislature to resolve the conflict by amendment to the statute itself.

4. In-service Training of Teachers

The California LVR provisions do not mention in-service training of teachers, one aspect of learner verification and revision which is claimed to be integral to the process.[177] However, section 9425 concerns in-service training of teachers.[178] That section: a) requires publishers and manufacturers to offer in-service training in the use of their materials; b) requires other qualified persons or organizations to do the same; c) requires service to be provided in accordance with terms agreed to by the parties, *i.e.*, endorses contracts; d) allows district boards to pay for the service; and e) exempts publishers and manufacturers from penalties if the service is not free and the board does not want to pay for it. No penalty is provided in section 9425 or elsewhere in article 2 (Duties of Publishers and Manufacturers).[179]

The ambiguity of the reference to penalties in article 2 invites

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176 CAL. CONST. art. 1, § 1.

177 Komoski, *Learner Verification: Touchstone for Instructional Materials*, EDUC. LEADERSHIP, Feb., 1974, at 399.

178 CAL. EDUC. CODE § 9425 (West 1975), Section 9425 may have been related to the Professional Development and Program Improvement Act of 1968, an act concerning in-service training which has subsequently been repealed. *See* Ch. 1414 § 2 [1968] CAL. STAT. 2785, *repealed by* Ch. 1499 § 16 [1974] CAL. STAT.

179 CAL. EDUC. CODE §§ 9420-9426 (West 1975).

disregard of that article's mandates. The only generally applicable penalty in Division 8 appears in section 9263;[180] it would require every board of education to order any publisher or manufacturer who does not offer in-service training for the use of all its instructional materials "to cease to offer or sell any instructional materials to that governing board."[181] Publishers and manufacturers who do not want to offer in-service training can, however, gain exemption from such orders by the simple expedient of pricing their materials and training separately. They can then set a price for their training programs which is unacceptable to boards of education. In the absence of any effective penalty, section 9425 does no more than permit district boards to contract with publishers and manufacturers or others for in-service training of teachers in the use of instructional materials, and permit expenditure of public funds for that purpose.

5. Enforcement Provisions

Only two penalty sections appear in all of the Division 8 statutes. The first is anomalous:

> Any governing board shall order any publisher or manufacturer who violates any provision of this division to cease to offer or sell any instructional materials to that governing board. If such an order is made, it shall be unlawful for that governing board to purchase or order instructional materials from such publisher or manufacturer.[182]

The governing board becomes the prosecutor, judge and jury, law enforcement officer; and it even becomes a potential criminal if it continues to "traffic" with the violator. If the board knows nothing of the violations and issues no order, the board may be in violation of the statute, but there is no penalty for such a violation. There seems little incentive to probe possible violations by the publishers, for it may be in a particular board's best interests not to know anything about a publisher's activities if that board wants to purchase the publisher's materials. It would have seemed wiser for the legislature to have chosen a less inter-

180 *Id.* § 9263.
181 *Id.*
182 *Id.*

ested agency than a local board of education to enforce the pr visions. Furthermore, the statute provides inadequate standar by which to judge the publishers' performance, and fails t accord publishers any hearing rights, appeal procedures, or mea of reinstatement if they later meet the requirements.

The second provision is more straightforward.[183] It mak bribery or acceptance of a bribe intended to influence the purcha of instructional materials a misdemeanor, and in addition, p nalizes school officials with loss of office.

The three sections on LVR in the California statutes[184] contai a scant six sentences. This simplistic approach to a legislati mandate with such complex implications suggests one explan tion for the failure to adopt regulations to implement the sta utes in the nearly three years following their enactment. The te tative "mandate" of section 9426[185] and the absence of penalti related to enforcement of LVR indicate a cautious response t this innovation in education law.

D. *Florida: A Statutory Refinement of the LVR Mandate*

With a history of textbook selection as long as that in Califo nia,[186] Florida extensively revised its statutes on textbook sele tion procedures in June, 1974.[187] Accountability was a majc concern of the legislature, which enacted extensive revision c the state's educational research and development program[188] an of the state assessment program[189] as well as an LVR statute.

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183 *Id.* § 9283.

184 *Id.* §§ 9234, 9426, 9600.

185 "Publishers and manufacturers shall . . . develop plans . . . ." *Id.* § 9426.

186 According to Hall, *supra* note 14 at 99-102, Florida established a unifor system of common schools in 1869, and gave the governing boards discretion co cerning procurement of textbooks. Subsequently, the legislature required count wide textbook adoption in 1883, statewide uniform textbook adoption by the boa of commissioners of state institutions in 1911, and statewide adoption of hig school texts in 1917. In 1925, the state was directed to provide free textbooks f pupils in the first six grades, a mandate extended to all public elementary an secondary students by 1935.

187 The 1974 legislation provides for instructional materials councils nominat by the Commissioner of Education and appointed by the State Board of Educatio The councils are now composed of four classroom teachers, a school board memb and one other lay person and two supervisors of teachers. The Commissioner re ommends annually the areas in which instructional materials shall be submitt for adoption. Ch. 74-337, [1974] FLA. STAT. 1065.

188 *Id.* § 15 at 1079.

189 Ch. 74-205, [1974] FLA. STAT. 579.

The 1974 amendment deleted the term "textbooks" throughout the selection statutes and replaced it with "instructional materials," which it defined as:

> . . . items that by design serve as a major tool for assisting in the instruction of a subject, course, or activity. These items may be available in bound, unbound, kit, or package form, and may consist of hard or softback textbooks, consumables, learning laboratories, slides, films and film strips, recordings, manipulatives, and other commonly accepted instructional tools.[190]

As in the California statute,[191] this definition is broad, but has a significant limitation in the words "by design serve as a major tool for assisting in the instruction." The "design" limitation appears in the statutes of both states, but the further modification in the Florida statute suggests that supplementary materials are not subject by law to LVR, provided they do not function as a "major tool."[192]

Other distinctions between the California and Florida statutes occur in the operation of the LVR sections. In California, the publishers and manufacturers are required only to develop plans for LVR,[193] and the requirement is not tied to the state adoption section.[194] By contrast, the Florida law requires that, prior to consideration of their wares for state adoption, publishers and manufacturers must submit "[w]ritten proof of the use of the learner verification and revision process during prepublication development and postpublication revision of the materials in question."[195]

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190 Ch. 74-337, § 1, [1974] FLA. STAT. 1068.

191 CAL. EDUC. CODE § 9221 (West 1975).

192 The requirement that instructional materials be learner verified and revised is applied only to those which are state adopted. It will not affect all materials in use because district school boards may use up to twenty-five percent of their state allocated instructional materials funds "for the purchase of instructional materials, including library and reference books not included on the state adopted list and repair and renovation of textbooks and library books." Ch. 74-337, § 13, [1974] FLA. STAT. 1079.

193 CAL. EDUC. CODE § 9426 (West 1975).

194 *Id.* § 9422.

195 Ch. 74-337, § 11, [1974] FLA. STAT. 1077, provides that publishers and manufacturers of instructional materials shall:

> (3) Submit, at a time designated in section 233.14, Florida Statutes, the following information: . . .

However, the Florida statute recognizes the need for time to adapt to the new requirements by allowing any publisher who cannot submit proof of LVR instead to "satisfy the state instructional materials selection council that he will systematically gather and utilize learner-verification data to revise the materials in question to better meet the needs of learners throughout the state."[196]

The Florida law imposes a more specific approach to the improvement of instructional materials than the vague language in the California law which loosely defines LVR as "continuous and thorough evaluation."[197] It provides:

> . . . learner verification is defined as the empirical process of data gathering and analysis by which a publisher of a curriculum material has improved the instructional effectiveness of that product before it reaches the market and then continues to gather data from learners in order to improve the quality and reliability of that material during its full market life.[198]

At this point, the statute makes special provisions waiving the requirement of proof of prepublication LVR in some cases. It

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(b) Written proof of the use of the learner verification and revision process during pre-publication development and post-publication revision.
of the materials in question. For purposes of this section learner verification is defined as the empirical process of data gathering and analysis by which a publisher of a curriculum material has improved the instructional effectiveness of that product before it reaches the market and then continues to gather data from learners in order to improve the quality and reliability of that material during its full market life. Failing such proof, if the publisher wishes to submit material for adoption, he must satisfy the state instructional materials selection council that he will systematically gather and utilize learner-verification data to revise the materials in question to better meet the needs of learners throughout the state. Such text revision should be interpreted as including specific revision of the materials themselves, revision of the teachers' materials and revision of the teachers' skill through retraining, it being the intent of the legislature that learner-verification and revision data shall include data gathered directly from learners and that such data may include the results of criterion-referenced and group-normed tests, direct learner comments, or information gathered from written questionnaires from individual or small group interviews, and not precluding the use of secondary data gathered from teachers, supervisors, parents, and all appropriate participants and observers of the teaching-learning process.

196 *Id.*

197 CAL. EDUC. CODE § 9234 (West 1975).

198 Ch. 74-337, § 11, [1974] FLA. STAT. 1077.

then continues: "Such text revision should be interpreted as including specific revision of the materials themselves, revision of the teachers' materials and revision of the teachers' skill through retraining. . . ."[199]

Because of the ambiguous ordering of these passages, it is unclear whether this last provision applies to all LVR, or only to postpurchase LVR of materials permitted to be sold without prior proof of LVR. In any case, the provision clearly calls for in-service training of teachers by publishers and manufacturers as an integral part of LVR;[200] this contrasts sharply with the tenuous link in the California law.[201] It appears likely that the Florida in-service training provision applies to all LVR because of the broader implications of the rest of the sentence:

> . . . it being the intent of the legislature that learner-verification and revision data shall include data gathered directly from learners and that such data may include the results of criterion-referenced and group-normed tests, direct learner comments, or information gathered from written questionnaires from individual or small group interviews, and not precluding the use of secondary data gathered from teachers, supervisors, parents, and all appropriate participants and observers of the teaching-learning process.[202]

The penalty for willful violation of the section of the Florida statute covering LVR[203] is appropriate only for violations concerning the pricing of instructional materials and is not suitable for enforcement of LVR. It is possible that the legislature made

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199 *Id.*

200 The importance of contact with teachers as a means for introducing new materials into the market can hardly be lost on the publishing industry. According to the Institute for Educational Development:

> [A]dvertising and information about products is more effective when it is reinforced by personal communications. . . . For many educational professionals, information is most effective when conveyed by a respected peer or colleague. Thus, educational personnel and salesmen, in that order, were regarded as the most important information sources by nearly all categories of respondents. Personal sources of information were considered by respondents to be more important than any form of nonpersonal information sources.

SELECTION OF EDUCATIONAL MATERIALS, *supra* note 108 at 292. *See also,* D. BEM, BELIEFS, ATTITUDES AND HUMAN AFFAIRS 75-77 (1970).

201 CAL. EDUC. CODE § 9425 (West 1975).

202 Ch. 74-337, § 11, [1974] FLA. STAT. 1077.

203 *Id.* at 1078, amending § 233.25(b)(12).

a conscious choice not to penalize failure to comply with the LVR provisions, but more likely that it simply failed to consider the suitability of the penalty provisions as a means to enforce LVR.

In common with California, the Florida Legislature ignored the students' rights to privacy and the classroom teachers' professional and academic freedom.

While more explicit and better articulated than the California statute, Florida's LVR legislation makes the same basic policy choices. Before following the lead of California and Florida other state legislatures should study the implications of LVR for public education, and the alternatives which may merit prior consideration.

IV. Implications

The value of LVR is purported to lie in the systematic study of the manner in which instructional materials communicate to or teach students, what blocks such communication, and conversely what best communicates particular information, attitudes or values to students. Theoretically, the LVR process offers hope for better instructional materials and improved learning. Mandating LVR by legislation attempts to insure the establishment and maintenance of minimum standards for evaluation and revision of such materials, and to make the concept of "accountability" integral to the learning process. LVR places responsibility on the textbook publisher to provide mechanisms for feedback from teachers and learners.

There are, however, some difficult questions raised. First, evaluating cognitive and affective learning is an imprecise art rather than a specific science, and it is unrealistic to assume that a single system, regardless of its refinement, will end ambiguity. In addition, the prerogative of the teacher to engage in spontaneous activity, even if it departs from standard curricular objectives, is important to the educational process; strict adherence to LVR might jeopardize that because non-adherence to the publisher's intended use of the materials introduces a variable which could confound the LVR process. Finally, LVR may not be a desirable

or effective evaluation instrument for all educational texts. There are, in addition, legal and financial considerations.

In assessing these problem areas, it is important to recognize that LVR affects the educational process in two distinct ways: by limiting the materials which may be used in public schools, and by bringing publishers' representatives into classrooms to conduct LVR projects.

It is difficult to estimate how many classrooms throughout the country may ultimately be involved in learner verifying materials. This will depend upon the sampling policies adopted by publishers which, in turn, may depend upon state regulations.[204] It will also depend upon the number of states which adopt LVR, and the differences in their statutory standards. If guidelines require wide population samples, or if different states impose different guidelines, the number of classrooms may be large and the impact upon teachers, students, and publishers correspondingly great.

A. *Programmatic vs. Creative Learning*

The process of LVR may include observation, testing, and data collection in the classroom;[205] this may not only involve extra work for the teacher, but could also disrupt classroom dynamics. The effective use of LVR may require some control over a teacher's classroom methods and, for at least the period in which a teacher is testing a product, that teacher's ability to improvise, revise, or extend the curriculum may be limited.[206] Even beyond

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204 In a telephone conversation April 14, 1975, Dr. Elaine Stowe of the California State Department of Education indicated that state regulations or guidelines of the LVR process have not yet been adopted in California. Florida also has not adopted guidelines. The guidelines proposed by the Chunn Committee in California stated, with reference to sampling and number of students to be tested: "The minimum respondents in any verification shall be one classroom of 30 pupils; more pupils, of course, may be tested in any program at the discretion of the publisher and school personnel. Control groups may be used also to reinforce validity" Chunn Guidelines, *supra* note 163 at 3. The guidelines state further that, "In the process of learner verification, the publisher, teacher, [Curriculum Development and Supplemental Materials] Commission, and evaluators should consider as many as possible of the following questions in order to test the validity of the process: . . . 2. Will [a] control group be used? 3. What sampling should be used? . . ." *Id.* at 6.

205 *See* note 7 and accompanying text.

206 In a memo dated March 4, 1975, Shirley McCune, staff member of the

the period of actual LVR, a requirement that schools purchase only materials which have been subjected to LVR may limit the teacher's ability to improvise or extend the curriculum.[207] Thus, extensive use of LVR could lead to rigidity.[208]

Furthermore, many educators believe that a significant component of classroom learning can result from spontaneous interaction between student and teacher.[209] Attempts to control or limit a teacher's instructional style may limit this spontaneous interaction and, perhaps, more than offset any increase in learning attributable to improved instructional format. It would be unfortunate if LVR proved a distraction from deeper explorations into the spontaneous interaction of the teacher with students, and the students with each other.

National Education Association (NEA), recommended that the NEA not endorse the Lawyers' Committee's first draft of LVR model legislation. In her analysis of the model code she states, "The required cooperation of teachers in learner verification opens the door to abuses of teachers' time and the use of public schools to carry out work for [the] publisher."

207 *Id.* McCune indicates the LVR model legislation would tend to "reduce the value and potential of informal teacher produced materials [and] [l]imit the range of materials."

208 *See* Holt, Rinehart, & Winston, Inc., *supra* note 12. The Report states the following concerns:

> It has become evident that "learner verification" raises a new set of expectations. Understandably, schools are concerned with providing the best possible learning environment for children, with guarding the confidentiality of student data, with preventing excessive additions to the workload of the teaching staff and with avoiding unnecessary disruption of school and classroom procedures. For the researcher conducting the learner based research study, on the other hand, essential concerns include consistency in methodology, comparability of data across sites, maintenance of data collection schedules, cost effective implementation, etc.

Id. at 7.

209 Heilman, Effects of an Intensive In-Service Program on Teacher's Classroom Behavior and Pupil's Reading Achievement (ERIC Document ED 003 359, Nov 1965) at 2, states:

> The hundreds of studies which compare the efficacy of methods-materials have not resulted in any clear instructional mandate. Perhaps the inconclusive nature of research findings results from the fact that what the teacher does in the classroom has more impact on pupil growth in reading than does the prescribing or proscribing of instructional materials.

See also Carbonari, An Investigation of Relationships Among Instructional Mode Teacher Needs, and Students' Personalities (ERIC Document ED 076 563, Feb 1973). *See generally* Morrison, Teacher-Pupil Interaction in Elementary Urban Schools (ERIC Document ED 003 385, 1965). Morrison states that "the generalization of interpersonal feeling between teacher and pupil is the teaching factor that lies at the core of the classroom tone." *Id.* at 3.

The distinction between programmed and creative learning suggests that some forms of learning are more conducive to standardized evaluation than others;[210] some learning, particularly in the affective domain, may not be suitable for LVR at all.[211] The teacher and the student must retain the ability to engage in discovery learning, to deal with knowledge creatively, spontaneously and without the spectre of schedules, criteria and imposed external structures.[212] One solution may be to develop a more discriminating definition of "instructional materials" for purposes of LVR legislation. If the definition of instructional materials for purposes of learner verification were limited to those dealing with cognitive skills presented in a programmed or incremental format, the process of LVR could be more effectively and appropriately applied. In addition, by restricting the definition to those materials, such as basal texts in reading and mathematics, and programmed instruction materials, most amenable to improvement through LVR, the dangers of restricting other, more creative elements of learning could be minimized.

B. *Problems of Evaluation*

Unfortunately, there is little assurance that even the most rigorous application of LVR will, in fact, lead to increased learning on the part of students. In testimony before the House Subcommittee for Educational Development, Sidney Tickton of the

210 Thomas Murphy of Holt, Rinehart, & Winston, Inc. stated in a telephone interview on April 9, 1975 that programmed and incremental learning in such subjects as reading and math were more amenable to the LVR process than subjects which are less easily subdivided and serially arranged.

211 D. Krathwokl, B. Bloom and B. Masia distinguish five categories constituting the affective domain (hierarchically arranged):

1) receiving
2) responding
3) valuing
4) organization
5) characterization by a value or value complex.

Some educators hesitate to use affective measures for evaluating student performance (as part of a grading system) because of the inadequacy of assessment techniques, and the fact that local philosophical and cultural values are likely to regard one's beliefs, attitudes, values and personality characteristics as a private matter. *See* D. KRATHWOHL, B. BLOOM, B. MASIA, TAXONOMY OF EDUCATIONAL OBJECTIVES HANDBOOK II: AFFECTIVE DOMAIN 95 (1964).

212 *See* Morrison, *supra* note 209.

Academy for Educational Development, speaking of the effect of the use of educational technology in the classroom, stated that:

> In most of the cases, the student showed no significant difference in achievement from conventional classrooms. It has not been possible to say that if you use this piece of technology, or use this method, your students will achieve more. This is partly due to the fact that we are not too sure about what it takes to improve learning of the student. . . . We do not know how to measure improvement in learning.[213]

Because it is not presently possible to measure improvement in learning, there can be no assurance that LVR will, in fact, improve learning. This conclusion has been reached by staff members of the Lawyers' Committee. In a recent letter, they wrote that "the process of learner verification is incapable of leading to a determination, certification, or proving of instructional material reliability in terms of specific guaranteed levels of classroom performance."[214] Some publishers have observed that many subjects are not amenable to learner verification.[215] Reading, math and basic skill areas are relatively easy to learner-verify, but other subjects present significant obstacles.[216]

Moreover, this inability to insure improvement of learning through the use of learner-verified materials points to a possible weakness in the entire concept of legislated LVR. The legislative mandate of LVR could be construed in effect to require publishers to "validate" the results of their learner verification, that is, to prove that students can, in fact, learn from the materials.[217] There is little convincing evidence that enough is known about the learning process to "validate" learning methods or materials for use by the general public. Thus, a legislature which has mandated LVR could be requiring publishers to undertake a task that educators would be loathe to assume — to develop mechanisms which guarantee learning.

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213 *Hearings on H.R. 8838 Before the Select Subcomm. on Education of the House Comm. on Education and Labor,* 91st Cong., 2nd Sess., at 52 (Mar. 12, 1970).

214 Geffert & Schember, *supra* note 165, at 2.

215 *See* note 210 *supra* and accompanying text.

216 *See* discussion in text accompanying notes 205-212.

217 Komoski distinguishes validation from LVR on the basis that LVR is simply a mechanism for improving materials' effectiveness on the basis of feedback from students. *See* Remarks of Komoski, *supra* note 6 at 5-6.

Mandated LVR combined with prescriptive guidelines delimiting a specific evaluation process might also thwart research and development of potentially more productive methods of evaluating instructional materials, thus defeating the ultimate purpose of the LVR concept.

C. *Cost Effectiveness*

Generally, increased costs in generating a product are translated into increased cost to the consumer who purchases that product; the publishing industry is no exception. Implementation of LVR may make it necessary for publishers to hire psychologists to design tests, to set up testing programs in classrooms, to use programmers and computer time to correlate data, to hire statisticians to interpret the results, and to pay for travel time and expenses for any or all of the people involved in testing. One major publishing company which does business in California found that its annual expenditure for LVR more than doubled in the past year; in 1975 that company will spend approximately $140,000 for LVR.[218] Sources within the industry predict that substantial sums will be spent by consulting firms toward the development of LVR.[219]

This increased financial burden will inevitably be borne by the textbook purchasers, and ultimately by the taxpayers through federal, state, and/or local taxes.[220] Consumers should be aware that this is on the horizon, and that they will ultimately pay for LVR. Since there is no assurance that LVR can improve learning, it may be difficult to justify these increased costs.

Legislators should also be aware of the differential effects of LVR requirements on various publishers. In general, the LVR process will cost the same, whatever the publisher's volume of sales; consequently, the cost of LVR per unit could vary substantially according to the size of the publisher and the volume of sales of a particular material, placing larger publishers at a

218 Interview material.

219 Interview material.

220 For a discussion of the provision of free textbooks, *see* Hall, *supra* note 14 at 68. Hall indicates that "[t]he concept that free public education should include the free use of textbooks is widespread in the United States today." *See, e.g.*, CAL. CONST. art. 9, § 7.5 (Supp. 1975); CAL. EDUC. CODE §§ 9280, 9621 (West 1975).

competitive advantage. Moreover, some of the largest publishers already practice LVR,[221] and would therefore suffer no financial burden if the process were legislatively mandated. In fact, such a mandate appears to be in their interest. A study conducted by the National Academy of Engineering for the U.S. Office of Education, "Issues and Public Policy in Educational Technology,"[222] after speaking favorably of LVR[223] and mentioning the California statute, concludes that laws demanding test results and uniform selection criteria will help unify the "chaotic educational technology marketplace."[224]

Other observers, however, have expressed concern that the educational materials industry is already overconcentrated.[225] The effect of LVR on smaller publishing firms could depend upon the exact guidelines adopted to regulate sampling techniques. If the guidelines require large population or geographic samples, small publishers with limited markets (particularly minority and women's presses) could be eliminated. On the other hand, if the guidelines allowed samples representative of specific markets, small publishers might be able to comply, while medium-sized publishers with thirty or forty products, aimed at nationwide markets, might find that their volume of sales could not support the expenses of national sampling.[226]

D. *Rights of Privacy*

The question of privacy for students and parents has not been considered in either the California or the Florida LVR statute.[227] It is not yet known if guidelines for those states will deal with

221 See note 12 *supra*.

222 National Academy of Engineering, *Issues and Public Policy in Educational Technology* (1974).

223 This is one of the few direct references to LVR found in the literature by the authors.

224 National Academy of Engineering, *supra* note 222 at 40.

225 General Electric sold General Learning Corporation to Scott Foresman in July, 1974, thus adding General Learning Corporation's 4-5% share of the market to Scott Foresman's 12-13% share. The ten largest publishing firms receive 57% of the revenues in the market for elementary and high school educational materials, and an even larger share of textbook revenues. *See* 8 KNOWLEDGE INDUSTRY REPORTS 3 (December 15, 1974).

226 *Cf.* RESEARCH AND DEVELOPMENT, *supra* note 73 at 35-37.

227 CAL. EDUC. CODE §§ 9234, 9426, 9600 (West 1975); Ch. 74-337, § 11, [1974] FLA. STAT. 1077.

the problem of invasion of privacy.[228] In general, publishers do not now collect data on students' names, but Holt, Rinehart and Winston, for instance, collects information on student achievement and ability, student self-concept, student level of interest in school and subject matter, classroom environment, teacher evaluation of the Holt, Rinehart and Winston program, teacher attitude toward instructional methodology, and teacher and student demographics.[229] Statistical variables such as I.Q., sex, etc. must be isolated and held constant in order to gain a strict measure of student interaction with instructional materials.[230] Auditing the accuracy and validity of the LVR process may require the inclusion of names and/or personally identifying information with the results.[231] At present, there is no evidence of misuse of

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228 As indicated, *supra* note 204, guidelines have not been adopted in California or Florida. The preliminary guidelines submitted by the Chunn Committee did not address the problem of invasion of privacy. The guidelines submitted by EPIE to the California Department of Education barely touched the topic of safeguarding privacy:

> *Necessary Safeguards*
>
> In carrying out any studies in the schools, it is, of course, necessary to provide safeguards against the inappropriate use of the information that is gathered — for example, to publicly single out particular students, teachers, or schools as having performed poorly. Therefore, it will be necessary to follow the ethical principles of good behavioral science research in the learner verification process. It is especially important to protect the identity of individual respondents by summarizing findings in relation to *kinds* of learners, teachers, or school settings, rather than in relation to specific cases.

Komoski & Elliott, *supra* note 7 at 8.

229 Holt, Rinehart, & Winston, Inc., *supra* note 208 at 3.

230 The process of LVR seeks to determine the effectiveness of instructional materials being used by students. Thus, the other variables involved with or potentially affecting the learning process must be known and accounted for in order to measure the interaction between learner and instructional material alone. *See* Geffert & Schember, *supra* note 165 at 2.

231 The guidelines proposed by EPIE for California, *supra* note 7, suggested general criterion referenced measurement by the publisher in a pre-post-test design. The measurement would take place at two separate times. The first, cross-sectional measurement would "typically take place within one school semester or year and would provide the data necessary to begin Step III" (analysis of test data by the publisher). *Id.* at 11. The second, longitudinal measurement, "would be for the purpose of generating data on those aspects of the material's effect (and affect) which cannot adequately be evaluated after a short period of instruction (or, immediately following instruction for a semester or a year) . . . e.g., long-term retention, application to new situations, continuing progress along subsequent development stages, etc." *Id.* at 12. By definition a longitudinal study would require recording the names and/or personally identifiable information of the students involved in order to compare their performance across time.

confidential information by publishers,[232] but if the guidelines, or competition engendered by certain guidelines, require increasingly fine-grained data, more and more variables may have to be considered and more data collected about the students' (or teachers') personal lives and background.[233]

Students involved in prepublication testing of an academic program participate in an experimental program requiring increased testing, data collection, and observation. These programs can be exciting and rewarding for the students, but it is also possible that untried programs may adversely affect student achievement or psychological health. As the public becomes more concerned with student levels of achievement and the effects of testing, this may become a sensitive issue and publishers may encounter increased difficulty in implementing their LVR programs.

The involvement of publishers as outside agents obtaining and using personal information about individual students also conflicts with emerging national policies concerning student records and student privacy in an area that is fast becoming a sensitive political issue.[234] Title V of the Education Amendments of 1974[235] contains the Buckley Amendment,[236] which forbids federal funds from going to states or local school districts which fail to meet its standards of student privacy. The Buckley Amendment requires that schools give parents (and, in some cases, students themselves) the right to inspect[237] and challenge[238] all records

232 *E.g.*, interview material.

233 One possible danger to student privacy is that competition induced by the Chunn Committee Guidelines could cause a publisher who gets a relatively low ratio of comparable competence (an index employed in the Guidelines), and thus finds his sales endangered, to explain students' failure to learn adequately from his materials by statistically compensating for certain aspects of the students' family lives. This could lead to use of data on such things as parents' marital stability, morals, politics, etc.

234 The seriousness of the right to privacy is emphasized by Charles Fried:

> Privacy has become the object of considerable concern. The purely fortuitous intrusions inherent in a compact and interrelated society have multiplied. The more insidious intrusions of increasingly sophisticated scientific devices into previously untouched areas, and the burgeoning claims of public and private agencies to personal information, have created a new sense of urgency in defense of privacy.

Fried, *Privacy* 77 YALE L.J. 475 (Jan. 1968).

235 Act of August 21, 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974).

236 20 U.S.C.A. § 1232g (Supp. Feb. 1975).

237 20 U.S.C.A. § 1232g(a)(1)(A) (Supp. Feb. 1975).

238 20 U.S.C.A. § 1232g(a)(2) (Supp. Feb. 1975).

pertaining to their children (or themselves). It also forbids schools to disclose such records, without the written permission of the parent, to anyone except specified school officials and certain other state and federal officials.[239] Unless publishers are able to qualify under the definition of eligible recipients of student data,[240] LVR requirements which do not provide for voluntary participation by individual students could directly conflict with the provisions of the Buckley Amendment, thereby jeopardizing the schools' rights to receive federal funds.

E. *Professionalism in Teaching*

Professionalism and autonomy are major issues to teachers today. The sense of professionalism among teachers is closely identified with individual choice, with freedom to modify and alter programs in response to pupil needs;[241] to impose a system which might suggest rigidity and conformity to external regulations could therefore conflict with teachers' concepts of their professional role. Mandated LVR carries the potential for requiring teachers to cooperate with outside researchers even though cooperation may mean taking actions in the classroom in opposition to the teacher's professional judgment. While such a threat to teachers could be alleviated by making participation in an LVR project voluntary on the part of individual teachers, the fact that there is currently an oversupply of teachers[242] suggests that teachers would still feel themselves under pressure to cooperate: the knowledge that other qualified applicants are always available could cause teachers to sacrifice their professional judgment to avoid being replaced for non-cooperation.

Large-scale interference with the teachers' authority to run

239 20 U.S.C.A. § 1232g(b)(1) (Supp. Feb. 1975).

240 20 U.S.C.A. § 1232g(b)(1)(F) (Supp. Feb. 1975) [p. 496].

241 In a recent publication the National Education Association (NEA) states its belief that "a prime responsibility of professional associations is to stimulate significant improvements in the quality of instruction. Much of the responsibility to make educational changes should lie with the teachers through their influence and involvement in democratic decision making in and out of the school." NATIONAL EDUCATION ASSOCIATION, EDUCATIONAL ACTIONS 17 (1974) [hereinafter EDUCATIONAL ACTIONS].

242 For a discussion of teacher oversupply, *see* M. FRANKEL & J. BEAMER, PROJECTIONS OF EDUCATIONAL STATISTICS TO 1982-83 at 61-73 (1974) (DHEW Pub. No. (OE) 74-11105).

their own classrooms could precipitate difficulties with the teachers' unions.[243] The number of certified teachers in public schools represented by unions affiliated with one of the two national teachers' organizations, the American Federation of Teachers (AFL-CIO) and the National Education Association, continues to increase.[244] These organizations have already demonstrated their concern over LVR.[245] The National Education Association recommends research, development and field-testing of instructional materials by publishers[246] but also insists that the responsibility for educational changes lies with the classroom teacher.[247] In addition, the Association recommends "that professional educators enter into active collaboration with research and development specialists, both in regional educational laboratories and in industry, to promote technology's potential contribution to education by guiding the development of technology in the most educationally sound directions [and] it encourages school systems to establish learning materials centers."[248] Nonetheless, the Association insists:

> Decisions on which school learning experiences will develop a student's talents are best made by a teacher who knows the learner. Teaching quality depends on freedom to make such decisions. Teachers must select instructional materials without censorship. Challenges of the choice of instructional

243 The National Education Association (NEA) and the American Federation of Teachers (AFT) have increasingly sought to inject issues of teacher autonomy into the collective bargaining process. For further discussion see M. MOSKOW, J. LOWENBERG. E. KOZARIA, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT; AN APPROACH TO SCHOOL ADMINISTRATION (1970).

244 In 1970, the NEA reported approximately 1,100,000 members and the AFT reported a membership of 200,000. By 1974 the NEA's membership had grown to 1,444,000. For further discussion of union membership, *see* M. LIEBERMAN & M. MOSKOW, COLLECTIVE NEGOTIATIONS FOR TEACHERS (1966); EDUCATIONAL ACTIONS, *supra* note 241 at 9.

245 Representatives of the National Education Association and American Federation of Teachers took part in the National LVR Task Force, *supra* note 164. Shirley McCune of the NEA has' recommended that the NEA not endorse the model LVR code of the Lawyers' Committee. *See* note 206 *supra.*

246 The NEA recommends "that the profession, in cooperation with other interested groups, establish standards for educational materials, and insist that publishers and producers use the services of a competent educational institution or facility to field test, in actual classroom situations, such materials, and publish the results of their effectiveness." EDUCATIONAL ACTIONS, *supra* note 241 at 17.

247 *Id.* at 17.

248 *Id.*

> materials must be orderly and objective, under procedures mutually adopted by professional associations and school boards.
>
> The Association urges its affiliates to seek the removal of laws and regulations which restrict the selection of a diversity of instructional materials or which limit educators in the selection of such materials.[249]

Teachers' demands for such control over their classrooms are likely to increase to the extent that they are held accountable for their professional performance through evaluation.[250]

V. Alternatives to Current LVR Statutes

As a mechanism to improve instructional materials, LVR brings the benefits of systematic study to an important segment of the educational process. If freely chosen for its advantages, the risks are minimized. When government intervenes, the risk of rigidity increases, costs escalate, and large companies may dominate the regulatory process. If fifty states set bureaucratic machinery into motion through legislative mandates similar to those in California and Florida,[251] the cost in time, money, privacy and professionalism could outweigh any potential benefit. Each state will duplicate the process of regulation with endless variety and numerous conflicting demands on publishers. The result would be a market fractured into many jurisdictions, diminished economies of scale, and costly increases in lobbying, testing, red tape and, ultimately, the prices of instructional materials. There are alternatives to the single state initiative model. Informed choice, however, requires an answer to the anterior question: what is the problem requiring legislative action?

If the problem is phrased as one of lack of knowledge about the significance of instructional materials in the learning process, re-

249 *Id.*

250 *See* note 66 *supra* and accompanying text.

251 The California and Florida LVR statutes provide an indirect incentive to other states. Section 9261 of the California Education Code and Section 233.25(5) of the Florida Revised Statutes provide that a publisher may not offer materials to other states at a price lower than that offered to schools in California and Florida. Cal. Educ. Code § 9261 (West 1975); Ch. 74-337, § 11, [1974] Fla. Stat. 1078. Legislators in other states may feel that they are being forced to pay for LVR through general price increases, and therefore seek to enact their own LVR statutes in order to gain a measure of control over the process.

search appears to make more sense than mandating LVR. The impact of educational materials on the teaching-learning process has not been fully explored,[252] and there is virtually no way to assess the costs and benefits of LVR. A 1969 study of the research and development practices of the instructional materials industry does not augur well for funding of basic research by publishers and manufacturers. The study concluded that "[m]ost of what constitutes research and development in the educational materials industries is either formal or informal market research."[253] Funding research to determine the significance of instructional materials in the learning process is more likely to be done by private foundations or federal and state governments.[254] Without a solution to this problem, no logical choices can be made concerning investment in LVR.

Another aspect of the problem involves a qualitative question: to what extent does LVR improve various kinds of instructional materials? The answer is elusive,[255] but crucial to the determination of the appropriate application of LVR. Funding research is likely to be a more efficient way to find the answer than indiscriminately requiring publishers and manufacturers to use the process on all instructional materials.

The problem has also been stated as one of consumer protection, but that focus fails to clarify the issue. In the case of the instructional materials market, the consumer is difficult to iden-

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252 RESEARCH AND DEVELOPMENT, supra note 73 at 2. C. Chunn, Learner Verification at 2, Jan. 1974 (Cal. State Dept. of Educ., Sacramento, Cal.) states: "M.W. Kirst and D. Walker in "An Analysis of Curriculum Policy Making" (*Review of Educational Research,* 41, 492, 1971) estimated that 75 percent of a child's classroom time and 90 percent of the homework time are spent using text materials." Kirst and Walker cite *Public Education in Texas,* a study by the Governor's Committee on Public Education (Austin, 1969), for these statistics. The Texas Department of Education could not locate the study on which it relied, so no assessment of the validity of the conclusion could be made for purposes of this article.

253 RESEARCH AND DEVELOPMENT, *supra* note 73 at 59.

254 Experiments, pilot projects, and demonstrations were well funded in the mid-1960's by government, foundations, and private industry, but did not yield the results expected concerning educational technology. *Id.* at 60. The I.E.D. report yielded the conclusion that ". . . the problems of research into research and development involve some of the most intricate and complex of all social phenomena. . . ." *Id.* at 60. The principal utility of this inquiry for those outside I.E.D. may lie in the recognition of how much is not known about the basic components of processes such as research and development, how much is taken for granted, and how much fundamental investigation remains to be done. *Id.* at 60, 61.

255 *See* text accompanying notes 213-216.

tify.[256] The people who select the materials may or may not be the ones who use them, and the users include children, teachers and, arguably, parents. To complicate the identification, those who choose and/or use the materials may or may not be the taxpayers who fund the purchases. Nevertheless, legislators are subject to over-simplified but politically appealing calls to action such as the following: "At this time of national concern over consumer protection, the largest single group of unprotected consumers is made up of the 50 million school children who are being required to learn from educational materials almost all of which have been inadequately developed and evaluated."[257]

There is little evidence that publishers and manufacturers have been challenged in court over the efficacy of their products by any of the purchasers or users.[258] Parents, however, frequently attack the content of instructional materials, an action which assumes that the materials effectively influence the education of the children.[259] When teachers are dissatisfied with particular materials, or the lack of appropriate materials, they frequently generate new textbooks and materials with which to teach, but despite urging from EPIE, they have not made their choices on

256 SELECTION OF EDUCATIONAL MATERIALS, *supra* note 108 at 309.

257 Komoski, *supra* note 1 at 337 (ED 059 612 at 4).

258 The authors' search of post-1967 case law in the area of textbooks failed to reveal litigation concerning whether materials have been tested with students.

259 The most recent controversy involved Kanawha County, West Virginia, where for nearly a year fundamentalist Alice Moore, mother of four, has battled for changes in the textbooks. Now a member of the Board of Education, she reportedly opposed the social studies series recently adopted for use in kindergarten through the sixth grade on the grounds that "she objected to any textbooks teaching Darwin's theory of evolution as fact." Charleston Gazette, April 4, 1975, 31 at 1. *Cf.* Epperson v. Arkansas, 393 U.S. 97 (1968). *See also* Wright v. Houston Independent School District, 486 F.2d 137 (5th Cir. 1973); Smith v. State, 242 So. 2d 692 (Miss. 1970). Sex education courses are also a common target. *See* Hobolth v. Greenway, 52 Mich. App. 682, 218 N.W.2d 98 (1974); Hopkins v. Hamden Bd. of Ed. 29 Conn. Sup. 397, 289 A.2d 914 (Conn. Com. Pl. 1971); Valent v. New Jersey State Bd. of Ed., 118 N.J. Super. 416, 288 A.2d 52 (N.J. Super. Ct. 1972); Medeiros v. Kiyosaki, 478 P.2d 314 (Hawaii 1970). By far the greatest number of challenges from parents are concerned with the duty of the board of education or state to provide textbooks without charge to students rather than the content of the materials. *See* Carpio v. Tucson High School Dist. No. 1 of Pima County, 111 Ariz. 127, 524 P.2d 948, (Ariz. 1974); Vandevender v. Cassell, 208 S.E.2d 436 (W. Va. 1974); Board of Ed. v. Sinclair, 65 Wis. 2d 179, 222 N.W.2d 143 (1974); Chandler v. South Bend Community School Corp., 312 N.E.2d 915 (Ind. App. 1974); Johnson v. New York State Ed. Dept., 449 F.2d 871 (2d Cir. 1971); Hamer v. Board of Ed. of School Dist. No. 109, 265 N.E.2d 616 (Ill. 1970); Bond v. Public Schools of Ann Arbor School Dist., 383 Mich. 693, 178 N.W.2d 484 (1970); Paulson v. Minidoka County School Dist. No. 331, 93 Idaho 469, 463 P.2d 935 (Idaho 1970).

the basis of whether the materials have been subjected to LVR.[200] These illustrations indicate the futility of a broad statement of the problem as one of consumer protection. Demanding uniformity of approach to the development and evaluation of instructional materials may not be an effective answer to a multi-faceted question. Legislation, to date, has required uniformity.

The whole matter could be left to market forces. EPIE and some state agencies assist purchasers of instructional materials by evaluating them on a number of dimensions. Adding a statement concerning the testing and revision of the material would give consumers one more factor to consider in their choices. Whether materials have been subjected to LVR would be weighed among many criteria for selection and its relative importance would be determined by the purchases of many consumers. The complexity of such decisions is one argument in favor of letting market choices determine levels of investment in LVR instead of using legislation to mandate a process and, coincidentally, allocation of resources to that activity.

State legislatures or Congress could aid consumers by requiring accurate and full disclosure by publishers and manufacturers of pertinent information concerning all testing procedures used and results obtained in the development and revision of the instructional material offered for sale. Truth in advertising would help consumers make discriminating choices.

Some publishers, concerned about the higher development costs associated with LVR at a time of economic recession and increased taxpayer resistance, may ask the question: will the increased costs of voluntary use of LVR place us at a competitive disadvantage?

One solution to this problem is to mandate by statute that all publishers and manufacturers use the LVR process on materials sold to the public schools. Although this approach appears to achieve uniformity, the burden on publishers is not equal. The process may cost the same, regardless of the quantity of the product sold, so the unit cost of LVR could vary widely.[201] Cost squeezes could accelerate concentration of the market in a few publishers and manufacturers.

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260 SELECTION OF EDUCATIONAL MATERIALS, *supra* note 108 at 287, 291-296.
261 *See* text accompanying notes 218-226 *supra*.

Other publishers might pose the problem differently: we want to improve our materials through LVR, but it is difficult and costly to encourage local school district cooperation in the process. State statutes which mandate cooperation from public schools may open the classrooms to the publishers and manufacturers, but at a risk of invading the privacy of students and compromising the professional integrity and academic freedom of teachers.[262] The very existence of a statute encouraging "cooperation" exerts pressure on teachers to acquiesce. Similarly, since students ordinarily have no choice about the extent of testing to which they will submit, their privacy may be compromised even by cooperation with publishers which has not been coerced by law. If the statute is drawn to require voluntary consent of the teacher and the parents (or students who have attained the age of eighteen), the publisher may have difficulty obtaining the permission of a sufficiently representative sample to conduct learner verification of materials in accordance with accepted principles of sampling.

Another problem concerns the range of materials subject to mandatory LVR. The California and Florida statutes create serious problems because of the breadth of their definitions of "instructional materials."[263] Any solution which legislatively mandates LVR should narrow its application to those materials for which it is best suited and most needed. To do otherwise may be to invite constant and serious disruption of the educational process.

Conclusion

A wise choice among competing alternatives requires public debate and conscious resolution. No legislature should accept claims of efficacy for learner verification and revision which have not been substantiated with well documented and replicated research. Too little is known about the significance of instructional materials in the learning process and even less is known either about the kinds of materials amenable to LVR, or about the most productive form of LVR. More information is needed about the cost of LVR in terms of investment of funds and time,

262 *See* text accompanying notes 227-250 *supra.*

263 *See* text accompanying notes 150-151 *supra* and notes 190-192 *supra.*

and the potential interference with the academic program, in order to balance such costs against the benefits of applying the process. The problem requires research; since it concerns a national market, cooperation which is national in scope would be most appropriate.

Two approaches offer a solution: the federal government could fund research designed to answer the questions, or the Education Commission of the States[264] might fund a project cooperatively supported by the 50 states. In either case, the results could form the basis for further action, preferably national in effect. If the research findings did not clearly support LVR, reliance on market decisions would be an appropriate solution. If LVR is found to be worthwhile, the various governmental agencies which fund the purchase of instructional materials could ban the use of such funds for materials which have not been subjected to LVR. States which adopt textbooks, or local school boards which perform that function, could ban the use of materials which have not been subjected to LVR to the extent research finds to be appropriate. Both actions assume enforcement through penalties.

Even if LVR is desirable, however, a mandatory approach may not be the best way to induce it. An alternative would be a "Gold Star" or "Seal of Approval" approach which would encourage action without reliance upon penalties and enforcement machinery. Federal, state or local authorities could recommend materials which have undergone LVR, recognizing that uniformity may not be crucial to the implementation of LVR and that other factors may be more important. For example, the particular market for a product may be too small to support LVR, or the materials may be uniquely creative and thus saleable whether or not they have been subjected to LVR.

The public interest may best be served by public funding of basic research on the pertinent problems and encouraging experimentation with evaluation procedures in the development of instructional materials. Premature legislative mandates of LVR inhibit the funding of alternatives. Unless carefully drafted, any LVR statute is likely to promote educational rigidity and induce greater concentration in the instructional materials industry.

264 *See* note 56 *supra.*

STATUTE

A MODEL STATE LAND TRUST ACT

JOHN MCCLAUGHRY*

Introduction

Over the past two decades the conversion of prime agricultural lands to development has increasingly become a matter for public concern.[1] From 1954 to 1974, the amount of land devoted to farming in the United States decreased by 119 million acres, an area nearly three times the size of New England.[2] There are two basic reasons for this decline: the demand for more intensive land development to meet the needs of a rising population and growing economy; and the declining attractiveness of farming, especially on the smaller, less mechanized, marginal farms.

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1 *See generally*, Barnes, *Special Farmland Assessment*, in THE PEOPLE'S LAND 48-51 (P. Barnes ed. 1975); S. SIEGEL, THE LAW OF OPEN SPACE (1960); T. HADY & A. SIBOLD, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND (Economic Research Service, U.S. Dep't of Agriculture, Agricultural Economic Report No. 256, 1974); Address by Thomas F. Hady, Seminar on Taxation of Agricultural and Other Open Land, Michigan State University, April 1, 1971 (on file with *Harvard Journal on Legislation*); Bab, *Taxation and Land Use Planning*, 10 WILLAMETTE L.J. 439 (1974); Carman & Polson, *Tax Shifts Occurring as a Result of Differential Assessment of Farmland: California 1968-1969*, 24 NAT'L TAX J. 449 (1971); Cooke & Power, *Preferential Assessment of Agricultural Land*, 47 FLA. BAR A.J. 636 (1973); Hagman, *Open Space Planning and Property Taxation — Some Suggestions*, 1964 WIS. L. REV. 628 (1964); Halpin, *How Can We Save Open Space?*, PEOPLE & TAXES, July, 1974 at 7; Heller, *Theory of Property Taxation and Land Use Restriction*, 1974 WIS. L. REV. 751 (1974); Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECONOMICS 343 (1963); Stocker, *Taxing Farmland in the Urban Fringe*, 30 TAX POLICY 3 (December 1963); Wershow, *Ad Valorem Taxation and its Relationship to Agricultural Land Tax Problems in Florida*, 16 U. FLA. L. REV. 521 (1964); Woodruff, *How Changing Tax Laws Affect Land Development*, 20 URBAN LAND 1 (1961); Zimmerman, *Tax Planning for Land Use Control*, 5 URBAN LAWYER 639 (1973); Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEGIS. 158 (1970); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960); Note, *Taxation Affecting Agricultural Land Use*, 50 IOWA L. REV. 600 (1965). *See also* sources cited in note 28 *infra*.

2 U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 597 (95th ed. 1974). Some decline could be seen in all but three states (Alaska, New Mexico, and Oklahoma) between 1959 and 1969. New England's decline was most marked among general areas with 40 percent (60.2 million acres) of its 1959 farmland being converted by 1969.

This latter reason has a number of components. If entrepreneurial labor and unpaid assistance from family members are taken into full account, the return to the farm family on its investment usually is low. There are complicated government regulations to comply with; an uncertain market cycle; the vagaries of the weather; the usual need for incurring heavy indebtedness; and the difficulty of obtaining steady and capable farm labor. Finally, there is the burden of property taxation, especially difficult for a land intensive activity like farming.

Many of these factors behind the declining attractiveness of farming are beyond the effective reach of public policy initiatives. One major one that is not is property taxation. Thus, it is farm property taxation legislation that has been the chosen technique of those concerned about preventing the forced conversion of farmland to more intensive uses.[3] This article describes the various types of tax techniques that, in response to such concern, have been employed or proposed to alleviate the tax pressure on farm and other open space lands. It then presents a model state Land Trust statute designed to prevent tax-forced conversion of farmlands to more intensive uses through public leasing of farm development rights.

I. Interests Favoring Farm Tax Legislation

Public concern with preserving farmland and other open spaces originated with respect to the "exurban fringe" around metropolitan areas, where the demand for intensive land development is strongest. Later, however, it also came to embrace more remote, rural areas with high potential for vacation home and resort development within reasonably easy reach of the larger population centers.

Those concerned about farm conversion in the exurban fringe usually have been of urban/suburban orientation. They perceive the nearby farm not so much as the mainstay of the local economy and producer of foodstuffs, but as a privately managed park. They

3 *See* Section II *infra.*

are concerned about its conversion to more intensive uses because such conversion would: (a) deprive the area of environmental amenities (e.g., green belt and open space); (b) create problems of urban density (e.g., traffic congestion); and (c) especially in the case of residential development, cause additional local tax burdens well in excess of new tax revenue as a result of a large influx of school age children and the necessity of extending water, sewer and highway services.[4]

Those concerned about the farm conversion in more remote rural areas share these apprehensions, but have several of their own as well. They do not want to lose the contribution of the farmer to the local farm-oriented economy, a loss far more important there than in a large metropolitan area. They do not want to become a tourist-oriented economy. They do not welcome the prospect of a change in the political complexion of the area caused by permanent settlement of large numbers of urban expatriates accustomed to higher levels of public services and more tolerant of accompanying governmental regulations. And, finally, they resent absentee landowners who all too often post their lands against hunting, fishing, and, in more recent years, snowmobiling.[5]

In addition to these two groups, new support for farm preservation efforts recently has come from a third: those who discern a need to preserve productive farmland to alleviate the world food shortage. With more and more Americans alarmed about world population growth and the prospect of famine not only in the "Third World," but even in the United States, retaining farmland is increasingly viewed by some as more than preservation of suburban amenities or a rural way of life; it is seen as an investment in national survival.[6] With the growing popularity of "gloom and doom" theories forecasting an "ecospasm" with major disruption

4 Short-run additional tax burdens might be offset in the longer run by increased revenues resulting from a broadened economic base, but only at the expense of an increase in crowding and urbanization which these suburban taxpayer-environmentalists seek to avoid.

5 *See, e.g.*, W. WHYTE, THE LAST LANDSCAPE 25-26 (1970). Whyte generally is credited with popularizing the "conservation easement" approach to open space preservation.

6 *See, e.g.*, Warren, *Agricultural Lands — California's Response to Worldwide Food Crisis*, CALIFORNIA TODAY, Oct. 1974, in 120 CONG. REC. E 6856 (daily ed. Nov. 26, 1974).

of transportation and commerce, many have expressed an active interest in having a reliable source of food very close to home.[7]

Over the past two decades at least 31 states have responded to the demands of these groups by enacting various statutes aimed at preserving farmlands, timberlands, and open spaces, including in some cases golf courses.[8] The Maryland preferential assessment law of 1956 led the way,[9] although developments in the subsequent five years included a governor's veto, a veto override, a repeal one year later, a reenactment the following year,[10] two successive holdings of unconstitutionality by the Maryland Court of Appeals in 1960 (with two separate rationales),[11] two subsequent constitutional amendments,[12] and a corrective reenactment.[13]

Reflecting the different concerns of the groups pushing for such legislation, the rationales given for state action in this area generally have fallen into two main categories: tax equity and the prevention of intensive development.[14] Those who stress the tax equity rationale, primarily farmers themselves, argue that the burden of property taxation, measured as a fraction of income, falls more heavily on farmers than on the remainder of the population. Nationally, according to the U.S. Department of Agriculture,

> real property taxes on U.S. farms in 1971 amounted to an estimated 7.6 percent of the personal income of the farm population, up from 5.7 percent in 1961. This compares with total property tax levied (real and personal) of 4.4 percent of personal income for the Nation as a whole in 1971 and 4.3 per-

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7 *See generally* H. BROWNE, HOW YOU CAN PROFIT FROM THE COMING DEVALUATION (1970); A. TOFFLER, THE ECOSPASM REPORT (1975); R. VACCA, THE COMING DARK AGE (1974).

8 *See* notes 24, 25 & 29 *infra.*

9 Act of Feb. 7, 1956, ch. 9, [1956] LAWS OF MD. 10 (vetoed 1955; repassed 1956).

10 Act of April 10, 1957, ch. 680, [1957] LAWS OF MD. 1100.

11 State Tax Comm. v. Gales, 222 Md. 543, 161 A.2d 676 (1960). (Art. 81, § 19(b) of the Maryland Code held unconstitutional as an attempt to set up a separate classification of land for tax purposes, thereby controverting Art. 15 of the Declaration of Rights which required uniformity of taxing of land within a taxing district).

12 Act of March 23, 1960, ch. 64, [1960] LAWS OF MD. 185; Act of March 23, 1960, ch. 65, [1960] LAWS OF MD. 186 (amending, respectively, Articles 15 and 43 of the Declaration of Rights of the Maryland Constitution).

13 Act of April 24, 1961, ch. 455, [1961] LAWS OF MD. 629, as amended MD. ANN. CODE art. 81, § 19(b) (1957).

14 These rationales are used not only as political arguments, but also to attempt to satisfy the constitutional requirements of a "public purpose." *See generally,* J. METZENBAUM, THE LAW OF ZONING 1627 (2d ed. 1955).

> cent in 1961. . . . These data suggest that the average farmer does pay a larger proportion of his income in property taxes than does the average nonfarmer.[15]

The national data, however, obscures the effect on strategically placed farmland, either in the exurban fringe or in desirable rural vacation areas. In New England, where land in both areas is affected, property taxes averaged 11.1% of net farm income in 1973, with a high of 21.4% in Massachusetts.[16] The percentage for New York state was 17.7, and Michigan 13.8.[17] Needless to say, the burden is very much higher on selected parcels in the path of development. By contrast, in states like Arkansas and Louisiana, where farmland is located away from the exurban fringe and vacation areas, the figures were 1.8 and 1.6 percent respectively.[18]

Included in the equity argument is the proposition that since farmers do not themselves demand expensive public services, not only should they not be taxed more heavily than their nonfarm neighbors, they should actually be taxed less. This feeling was well described by William H. Whyte in his book, *The Last Landscape:*

> The farmer says that he is being punished when he should be rewarded. The reason the taxes have to go up is those new people in the subdivisions. They are the ones who need the extra sewer lines and the schoolrooms and the fire engines. He does not. His property, indeed, is a boon to the community. By keeping it open, he provides scenery and breathing space — and he spares the community the burden of yet another subdivision. Why, then, sock him? It would pay the community to keep his taxes low just to have him stay around and keep the land open. Come to think of it, some farm bureaus have suggested, it would pay the community not to tax him at all.[19]

The equity argument thus stresses the proposition that farmland owners not only are being taxed more heavily than nonfarmers, but that even equal taxation would be unfair in light of the level of services consumed.

15 HADY & SIBOLD, *supra* note 3, at 7-8.

16 STAM & COURTNEY, FARM REAL ESTATE TAXES: RECENT TRENDS AND DEVELOPMENTS 14-15 (Economic Research Service, U.S. Dep't of Agriculture RET-14, March 1975).

17 *Id.*

18 *Id.*

19 WHYTE, *supra* note 5, at 120.

To this contention, however, there are at least two rebuttals. First, if tax equity really is the concern, the focus of remedial action should be those who suffer tax inequities, a class which may not include all farmers, and which certainly includes numerous other taxpayers, such as pensioners.[20] Second, it can be argued that the burden of a particular form of taxation is not as relevant as the net balance of all governmental burdens, offset by all forms of governmental benefits, federal, state and local. Thus, farmers who are heavily burdened by the local property tax may also be receiving federal income tax breaks[21] and crop subsidies,[22] which, in the aggregate, may result in reasonably equitable treatment.

The second rationale for action at the state level to preserve farmlands, the need for orderly and efficient growth and the protection of the natural environment from intensive development, is often advanced by nonfarmers. In a rapidly urbanizing metropolitan area, open space land, including farmland, takes on a special value as an environmental amenity. In addition, its continuation as farmland prevents the burdens associated with new development — congestion, density, water and sewer extensions, road construction and maintenance, police and fire protection, and increased school construction and operating costs. This rationale thus looks at farmland along with other "open space" land not so much as land in farming but rather as land whose development should be prevented. Preventing development becomes the logical objective rather than preserving the business of farming.

It should be noted that the objectives of tax equity and the

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20 *See* Paglin & Fogarty, *Equity and the Property Tax: A New Conceptual Focus*, 25 NAT'L TAX J. 557 (1972).

21 *See, e.g.*, INT. REV. CODE OF 1954, §§ 175, 180, 182, 268, 278, 1231(b)(3), 1231 (b)(4), 1251, 1252. *See generally* Allington, *Farming as a Tax Shelter*, 14 So. D.L. REV. 181 (1969). Allington states: "Most of the tax benefits of a farm investment stem from the special accounting methods which farmers are allowed to use in computing their taxable income, coupled in certain instances with favorable capital gains treatment." But he points out that the greater tax benefits accrues not to the farmer but to the high bracket investor with substanial nonfarm income sources who can better utilize the advantages of deferred tax liability and capital gains treatment. *Id. See also* Davenport, *Farm Losses Under the Tax Reform Act of 1969: Keepin' 'Em Happy Down on the Farm*, 12 B.C. IND. & COM. L. REV. 319 (1971); Hjorth, *Farm Losses and Related Provisions*, 25 TAX L. REV. 581 (1970).

22 *See* L. SOTH, AN EMBARRASSMENT OF PLENTY 147-50 (1965); HOUSE COMM. ON AGRICULTURE, 91ST CONG., 1ST SESS., GOVERNMENT SUBSIDY HISTORICAL REVIEW 63-68 (1970).

prevention of intensive development are not the same, and may lead in somewhat different directions.[23] For example, from a tax equity standpoint, a 200 acre farm well inside the suburbs may cry out for tax relief, but from the standpoint of minimizing the costs of development to the public, it might be preferable to let that farm be developed, while preventing conversion elsewhere where public services would be more expensive. On the other hand, preserving a remote hill country farm where there is no pressure for development would appeal to no one concerned about the shape of growth, but the tax equity concern still might argue for some remedy. Since the political coalition for open lands preservation is likely to be composed of two quite different groups (farmers and suburban taxpayer-environmentalists), it is especially important that those considering legislation to preserve farmlands and open space keep the differences between these objectives clearly in mind.

II. Attempted Statutory Solutions

At least six types of public programs have been attempted in the United States and Canada to deal with the problems of preserving farmland and/or open space. First, there is the *preferential assessment* approach.[24] Under this approach, land which qualifies — generally "agricultural land" — is assessed for tax by the local jurisdiction at its value for agricultural use rather than at market value. Whenever the owner wishes to convert into a more intensive use, local zoning permitting, he may do so without incurring any penalty or recapture of benefits. Preferential assessment is much favored by landowners, but widely criticized as a haven for speculators.[25] For that reason it is in increasing disfavor. In addi-

23 *See generally* Hady, *Differential Assessment of Open Space and Farmland*, in Senate Comm. on Agriculture and Forestry, 93d Cong., 2d Sess., Agriculture, Rural Development and the Use of Land 85-91 (Comm. Print 1974).

24 Preferential assessment statutes include: Ark. Stat. Ann. § 84-483 (Supp. 1973); Colo. Rev. Stat. Ann. § 137-1-3 (Supp. 1967); Del. Code Ann. tit. 9, § 8329 (Supp. 1974); Fla. Stat. Ann. § 193.461 (Supp. 1975) (farmland); Ind. Ann. Stat. § 6-1-26-2 (Burns 1972); Iowa Code Ann. § 404.15 (Supp. 1974); Me. Rev. Stat. Ann. tit. 36, § 564 (1964) (forest land); N.M. Stat. Ann. § 72-2-14.1 (Supp. 1973); S.D. Comp. Laws Ann. § 10-6-31 (Supp. 1967); Wyo. Stat. Ann. § 39-82(c) (Supp. 1973).

25 A reduction in assessed valuation on land increases its net yield and thus

tion, the entire cost of such a program is borne by the local taxing authority through the decline in property tax revenues, absent provisions for state reimbursement.

A modification of this method is *deferred taxation.*[26] Preferential assessment for agricultural land is combined with some kind of recapture provision ("rollback"), a conversion penalty clause, or a separate conveyance tax when the use is subsequently changed as an incentive to preserve the undeveloped character of the land. A severe example is the Oregon law, which provides a change of use penalty depending on years of benefit of up to ten times the amount of tax benefit accrued to land in a farm use zone.[27] For unzoned, specially assessed land there is a recapture of the deferred taxation for up to ten previous years carried forward at six percent interest.[28] The deferred taxation approach strikes at the problem of the speculative haven by assessing an economic charge when the land ceases to qualify as agricultural. However, it does not prevent

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increases the present market value. This then reduces the ability of farmers to purchase such lands for agricultural purposes, since the market value for the land is raised by the preferential treatment. Who then would be interested in buying such lands — the bona fide farmer or the speculator who feels the land has future urban use?

Cooke & Power, *supra* note 3, at 640.

26 Deferred taxation statutes include: ALASKA STAT. § 29.53.035 (1962); CONN. GEN. STAT. ANN. §§ 12-107c to 12-107e (1958) (classification); *id.* 12-99 (forest land reclassification penalty); *id.* 12-504a (conveyance tax); *id.* 12-504e (Supp. 1975) (change of use of land tax); HAWAII REV. STAT. § 246-12d (Supp. 1974); ILL. ANN. STAT. ch. 120, §§ 501a-1 to 501a-3 (Smith-Hurd Supp. 1974); KY. REV. STAT. §§ 132.450, 132.454 (1970); ME. REV. STAT. ANN. §§ 590, 591 (Supp. 1973); MD. ANN. CODE art. 81, § 19(b) (1957); MD. ANN. NATURAL RESOURCES CODE § 5-305 (1974) (woodland); MASS. GEN. LAWS ANN. ch. 61, § 1 (Supp. 1975) (forest lands); *id.* ch. 61A, §§ 4, 12, 13; MINN. STAT. ANN. §§ 273.111, 273.112 (Supp. 1974); MONT. REV. STAT. ANN. §§ 84-437.1, 84-437.3, 84-437.4 (Supp. 1974); NEB. REV. STAT. §§ 77-1344, 77-1348 (Cum. Supp. 1974); N.H. REV. STAT. ANN. §§ 79-A:5, 79-A:7 (Supp. 1973); N.J. STAT. ANN. §§ 54:4-23.2, 54:4-23.8 (Supp. 1975); N.C. GEN. STAT. §§ 105.277.4-105.277.5 (Supp. 1974); ORE. REV. STAT. §§ 308.370, 308.395, 308.399 (1974); R.I. GEN. LAWS ANN. §§ 44-27-1, 44-5-39 (1970); UTAH CODE ANN. § 59-5-87, 59-5-91 (1953); VA. CODE ANN. §§ 58-769.9, 58-769.10 (Supp. 1972). Texas amended its constitution in 1966 to mandate tax deferral: TEXAS CONST. art. 8, § 1-d. For a sharp critique of the New Jersey law in practice see J. KOLESAR & J. SCHOLL, MISPLACED HOPES, MISSPENT MILLIONS: A REPORT ON FARMLAND ASSESSMENTS IN NEW JERSEY (1972).

27 ORE. REV. STAT. § 308.399 (1974).

28 ORE. REV. STAT. § 308.395(1) (1974). For critical evaluation of the Oregon law in practice, see Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117 (1974); Roberts, *The Taxation of Farm Land in Oregon*, 4 WILLAMETTE L.J. 431 (1967); Sullivan, *The Greening of the Taxpayer: The Relation of Farm A Zone Taxation in Oregon to Land Use*, 9 WILLAMETTE L.J. (1973).

conversion; an owner willing to incur the charge may convert his land at any time.

Under the third approach, *restrictive agreements,* the landowner enters into an agreement not to change the use of the land for a fixed period, commonly ten years.[29] In return, the land is specially assessed for taxation at some specified less-than-market value. Under the New Hampshire law, for example, a landowner may grant a no-development easement to the local government, with the agreement of the local governing body, for at least ten years.[30] The parcel will then be assessed at current use value.[31] Upon a "demonstration of extreme personal hardship," the landowner may obtain a release from the easement. But to obtain the release he must pay as "consideration" either 6 percent of full value assessment if the easement term has passed the halfway point, or 12 percent if it has not.[32] In addition, a "land use change tax" of 10 percent of assessed value is due upon actual conversion of the land to a non-open space use.[33]

29 Statutes based on the contract or restrictive agreement method of awarding preferential tax treatment include: CAL. GOV'T CODE § 51252 (enforceable restrictions), CAL. REV. & TAX CODE (West Supp. 1975) § 423 (West Supp. 1975) (valuation); FLA. STAT. ANN. § 193.501 (Supp. 1975) (parkland); HAWAII REV. STAT. § 246-12 (Supp. 1974); ME. REV. STAT. ANN. tit. 36, § 589 (Cum. Supp. 1973); MD. ANN. NATURAL RESOURCES CODE § 5-302 (1974) (woodland); N.H. REV. STAT. ANN. § 79-A:15 (Supp. 1973); N.Y. AGRIC. & MKTS. CODE § 306 (Supp. 1975); PA. STAT. ANN. tit. 16, § 11944 (Supp. 1974); VT. STAT. ANN. tit. 24, § 2741 (Supp. 1974). For a description of the New York Agricultural Districts program see H. CONKLIN, RECENT CHANGES IN GOVERNMENTAL MECHANISMS FOR MODIFYING RURAL LAND USE DECISIONS IN NEW YORK STATE (Cornell Agricultural Economics Staff Paper No. 73-22, November 1973).

30 N.H. REV. STAT. ANN. § 79-A:15-21 (Supp. 1973).

31 N.H. REV. STAT. ANN. § 79-A:2(XI) (Supp. 1973) defines "use value" in this context:

> [I]n the case of open space land [use value means] the valuation per acre which the land would command if it were required to remain henceforth in an open space qualifying use. This valuation will be determined by the assessor in accordance with the recommendations of the board for the class, type, grade and location of land under consideration and its income-producing capability.

32 *Id.* § 79-A:19. It should be pointed out that the idea of the easement in common law has historically been fraught with difficulties. For a description of the complexities and problems of an easement approach as utilized to preserve the Lake George, N.Y. area, see Eveleth, *New Techniques to Preserve Areas of Scenic Attraction in Established Rural-Residential Communities — The Lake George Approach,* 18 SYRACUSE L. REV. 37 (1966). For a scholarly treatment that will leave one wishing he had never broached the subject, see Reno, *The Enforcement of Equitable Servitudes in Land,* 28 VA. L. REV. 951, 1067 (1942).

33 N.H. REV. STAT. ANN. 79-A:7 (Supp. 1973).

The restrictive agreement approach differs from the deferred taxation model in that the former requires an exchange of benefits agreement between the landowner and the local government, thus allowing the government some discretion in admitting lands to the program. Under the latter program, any qualified land is automatically entitled to receive benefits without formal agreement with the local government. The two approaches are, however, quite similar in overall effect. In either case the farmer's participation is entirely voluntary and the cost of the program is borne entirely by the local taxing authority.

A more direct approach to preserving agricultural land is compulsory *restrictive zoning*, which simply forbids the conversion of farmland to any more intensive use.[34] A case for enacting this type of statute was made by Professor Heyman as early as 1965.[35] From the standpoint of the enforcing government this technique may appear to be a "free lunch," but in fact it will impose higher property tax costs on the owners of unrestricted property, although these costs tend to be hidden unless the proportion of restrictively zoned land becomes large. From the standpoint of the landowner, the resulting benefit of reduced taxation, coinciding with the reduced value as a result of restricted use potential, must be weighed against the destruction of much of the capital value of the land by governmental fiat.

The most significant drawback of the "agricultural use only" zone is that it raises serious questions of a taking of property under the 5th Amendment of the U.S. Constitution and various similar provisions in state constitutions.[36] In one famous New Jersey case,[37]

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34 Perhaps the nearest approach to a state-level open space zoning scheme is found in Hawaii. HAWAII REV. STAT. § 205-2 (Supp. 1974). Under this law the Land Use Commission classifies all land into one of four categories — conservation, agricultural, rural or urban. Land included in the "agricultural" districts is restricted to traditional agricultural uses. In their detailed description of the implications of the Hawaii act, Bosselman and Callies suggest that restrictive regulatory zoning systems can be planned so as to avoid successful attack as unconstitutional takings. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 5-6, 31 (1972). *See generally*, E. SOLBERG & R. PFISTER, RURAL ZONING IN THE UNITED STATES (Economic Research Service, U.S. Dep't of Agriculture Misc. Pub. No. 1232, 1972).

35 *See* Heyman, *Open Space and the Police Power*, in OPEN SPACE AND THE LAW 5-28 (F. Herring ed. 1965).

36 Almost every state has a constitutional provision specifically prohibiting the state from taking private property without just compensation. *See, e.g.*, ALA. CONST. § 235; ARIZ. CONST. art. 2, § 17; CAL. CONST. art. 1, § 14; MISS. CONST. art. 3, § 17;

a landowner found his land included in a "meadowlands zone," where only certain minor improvements and uses were allowed. He successfully challenged the ordinance as an unconstitutional taking. In striking down the ordinance, the New Jersey Supreme Court said:

> While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space. These are laudable public purposes. . . . But such factors cannot cure basic unconstitutionality.[38]

The spectre of unconstitutionality has thus been sufficient to prevent the widespread use of compulsory "agricultural use only" zoning despite indications in recent cases of a judicial trend toward allowing ever more confiscatory regulations without requiring compensation.[39] Whether or not a highly restrictive zoning scheme is constitutional, the practice of destroying the capital value of a farm owner, and hence much of his farm credit capacity, without compensation from the public seems a rather backhanded way to assist the farmer to continue farming, and an inequitable method of allocating the cost of controlling development.[40] Not surpris-

PA. CONST. art. 1, § 10. Even if such provision were not operative, every state would still be required to justly compensate for takings under the "due process" clause of the Fourteenth Amendment of the United States Constitution. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

The "taking issue" is currently the subject of considerable legal effort, as various commentators seek an ironclad rationale for public confiscation of private property rights without compensation. Chief among these efforts is F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973).

37 Morris County Land I. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963).

38 *Id.* at 555, 193 A.2d at 241. The case might be limited in value as a precedent for holding such statutes unconstitutional. The land there involved was marshland, and while the law permitted agricultural uses, as a practical matter the owner could receive virtually no income without (illegally) developing the area for other uses. Query how the case would have come out had the owner been able to successfully farm and to obtain some return from the land in its use-restricted state. The court indeed adds: "Both public uses are necessarily so all-encompassing as practically to prevent the exercise of any worthwhile rights or benefits in the land. So public acquisition rather than regulation is required." *Id.*

39 For a survey of recent cases and emerging legal theories, see D. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039.

40 For a critical discussion of the uncompensated police power land use control

ingly, farmers have been less than enthusiastic about such an approach.

The *outright acquisition* of land, often with subsequent lease-back to operating farmers, avoids the thorny problem of the taking issue by fair-value compensation to the previous owner. This, of course, has its defect as well, in that it requires large initial public capital outlays. Yet it has the great virtue of placing the public firmly in control of the future use of the land values that might accrue as a result of public investment decisions.

Abundant use of this acquisition approach has been made recently in Canada. The Prince Edward Island Land Development Corporation, for example, was created by the provincial legislature in 1969.[41] It was designed to buy, hold and reorganize farm units and sell or lease them on a long term basis to farmers needing additional land, with the primary objective of consolidating good agricultural lands so as to increase farmer and agricultural sector income.[42] The Canadian federal government supplied a start-up appropriation of $26 million to cover all capital costs and 75% of administrative costs for the first five years. In fiscal year 1974 the Corporation acquired 179 parcels totalling 14,687 acres at a cost of $1.374 million, and either sold or leased 208 parcels comprising 14,426 acres. In four years the Corporation has also put some 9,000 acres of farmland back into production.[43]

In western Canada, the provincial legislature established the Saskatchewan Land Bank Commission in 1972 to purchase farmland and lease it back at reasonable rates to young farmers.[44] In its first full fiscal year of operation (1972-73) the Commission purchased 168,481 acres in 381 transactions (averaging 458 acres

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approach, with special reference to the Vermont experience, see McClaughry, *The New Feudalism*, 5 ENVIRONMENTAL LAW (forthcoming 1975). *See also*, B. SIEGAN, LAND USE WITHOUT ZONING 203-24 (1972).

41 Land Development Corporation Act, P.E.I. ACTS c. 40 (1969) as amended P.E.I. ACTS c. 21 (1974). *See generally* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, STRUCTURAL REFORM MEASURES IN AGRICULTURE 60, 68-69 (1972).

42 PRINCE EDWARD ISLAND LAND DEVELOPMENT CORPORATION, ANN. REP. 6 (1973).

43 Prince Edward Island Land Development Corporation, Ann. Rep. Chart 3 (1974).

44 Land Bank Act, SASK. STAT. ch. 60 (1922); For commentary, *see* B. Young, *Saskatchewan Government Buys Up Land To Help Keep Farmers Down on the Farm*, Wall St. J., Feb. 5, 1975, at 32, col. 1.

each, for a total acquisition cost of $10.9 million. During the same year it finalized 425 leases of parcels averaging 404 acres each.[45]

As noted, a major problem with the acquisition of fee simple interests is the need for front end or start-up capital, which has perhaps deterred a similar approach in the United States. Another deterrent is the well-known American dislike for public ownership of land, which continues to amaze foreign observers.[46] This hoary tradition may, however, be crumbling, in part due to the realization by its defenders that forcing government to acquire land interests outright may well be preferable to having the value of private land zoned away in the name of environmental protection or "managed growth."

It must be admitted, however, that these two objections still are formidable political obstacles to adoption of an outright acquisition plan despite its acknowledged effectiveness. Some modification of this approach, which preserves as many of its attributes as possible, seems both necessary and desirable. Therefore, American state legislatures interested in farm preservation should consider what appears to be a sensible compromise, the *acquisition of rights* approach, in which the government acquires less than a fee simple interest in farmland or open space property.[47] This is the approach adopted in the model statute set forth below.

The acquisition of rights approach is something of a cross between a restrictive agreement and an acquisition of fee. It differs from the common version of the former[48] in that once the public body has acquired development rights, the owner of the residual fee cannot under any circumstances develop without somehow reacquiring the publicly held rights; under most restrictive agreement laws, the landowner can unilaterally break the

45 SASKATCHEWAN LAND BANK COMMISSION, ANN. REP. 12-13 (1973).

46 *See, e.g.*, R. BRYANT, LAND: PRIVATE PROPERTY, PUBLIC CONTROL 142-43 (1972).

47 *See generally* R. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 87-92 (1967); C. LITTLE, CHALLENGE OF THE LAND 63-66 (1968); W. WHYTE, OPEN SPACE ACTION 17-21 (Outdoor Recreation Resources Review Comm. Study No. 15, 1962); W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (1959). Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL ESTATE L.J. 330 (1975); Weissberg, *Legal Alternatives to Police Power: Condemnation and Purchase, Development Rights, Gifts*, in OPEN SPACE AND THE LAW 41-51 (F. Herring ed. 1965).

48 *See* text accompanying notes 29-33 *supra*.

agreement and proceed to develop, if he is willing to pay some economic cost specified in the legislation or contractual agreements. An acquisition of rights approach has an additional advantage over restrictive agreements in that the transfer of development rights by deed or lease is a process well understood in the law. Disputes are governed by the concept of possession of interests in land, not by the less well-defined terms of a contract between two parties to behave in specified ways.

Acquisition of rights differs from acquisition of fee simple, of course, in that the residuum of the fee remains with the private landowner, while the public acquires only certain as yet unexercised rights. These rights have an economic value, and are themselves subject to property taxation.

The use of the separable development rights concept should have the long-range effect of creating acceptance for various creative uses of development rights transfer for achieving managed growth objectives. From the standpoint of the landowner concerned about "police power" programs for open space preservation at his expense, this approach has an added virtue of establishing that development rights have an economic value which may not properly be extinguished by police power regulations without compensation to the landowner.

It should be emphasized, however, that the alleviation of tax pressure does not guarantee that land will not ultimately be converted. Skyrocketing land prices in certain farm areas in recent years have sorely tested the resolution of even the most determined farmer to remain in farming.[49] If the objective is to absolutely prevent the conversion of farmland, relieving tax pressure will not be enough. The development rights, at least, will have to be permanently acquired. This, however, will require substantial front-end capital and, quite possibly, the exercise of eminent domain. Neither of these features is included in the proposed model statute.

49 [Farmers] are mindful of the money they might reap by selling out to a developer, but most of them really do want to continue farming. They have a big capital investment in their operation, and as the smaller farmers in the marginal land give up farming, the big farmers get bigger. Better soil practices, watershed planning, and such are an economic necessity for them, and they will be as activist in conservation programs as the gentry.
W. WHYTE, *supra* note 5, at 26.

A key feature of the proposed statute, though, is an arrangement so that the landowner whose tax burden has been alleviated and the public will fairly share the economic benefits of any subsequent conversion of rights back to private control; it is not sound public policy to create a tax shelter for land speculators at the expense of other taxpayers. And since the program is designed to benefit the public generally, the state should at least share in the revenue loss incurred by local taxing jurisdictions where taxable property rights are conveyed to a state instrumentality.[50] This becomes increasingly important where the local taxing jurisdictions are small.

Perhaps the foremost example of public acquisition of less than fee interests in the United States is the program launched in 1974 in Suffolk County, New York.[51] Pursuant to state[52] and county[53] laws, the County itself is in the process of acquiring development rights to up to 9,000 acres of Long Island farmland, at an anticipated cost of some $45,000,000. When first proposing this program, County Executive John V. N. Klein stated:

> By an intelligent combination of the acquisition of fee title with lease-back to farming interests and the acquisition of development rights to property leaving the farmer in possession with the right to continue agriculture, a major portion of Eastern Suffolk County can be set aside in the immediate future, for all time, for agriculture.[54]

At least four state legislatures — Connecticut,[55] Maryland,[56]

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50 Currently, two states subsidize local governments which lose tax ratables through open space preservation programs. See CAL. GOV'T CODE §§ 16140-54 (West Supp. 1975); N.Y. AGRIC. & MKTS. LAW § 305(1)(f) (McKinney 1972).

51 *See generally* J. KLEIN, FARMLANDS PRESERVATION PROGRAM, REPORT TO THE SUFFOLK COUNTY LEGISLATURE FROM THE COUNTY EXECUTIVE (1973); *see also* SUFFOLK COUNTY LEGISLATURE SEL. COMM. ON THE ACQUISITION OF FARMLANDS, REPORT, (Mar. & Nov. 1974).

52 N.Y. GEN. MUNIC. LAW § 247 (McKinney 1965).

53 Suffolk County, N.Y., Act of June 25, 1974, Local L. No. 19.

54 J. KLEIN, *supra* note 51, at *iii*.

55 Conn. H.B. 7598, (Jan. Sess. 1975), provides for creation of an Agricultural Land Preservation Commission which, aided by local planning bodies, would designate agricultural areas throughout the state. The Commission would then offer to buy development rights from landowners in these designated areas. Funds for acquisition would come from an Agricultural Land Preservation Fund launched by a $500 million bond issue, the bonds to be sold as required. The bonds would not be full faith and credit obligations of the state, but would instead be secured by revenues of a 1% real estate conveyance tax. Whether this tax, in a time of depressed

New Jersey,[57] and Vermont[58] — are considering measures to create a state program for either lease or purchase of development rights to eligible land, generally farmland.[59] An acquisition of rights bill also passed the California legislature in 1974, but was vetoed by the Governor.[60]

Interestingly, each of these programs would be funded by assignment of the proceeds of a property transfer tax, a prominent feature of the proposed model statute. Such a tax is relatively

land values and reduced conveyancing, would yield sufficient revenue to meet the amortization requirements of the outstanding bonds is a question that will no doubt occupy many bond counsels. *See generally* GOVERNOR'S TASK FORCE FOR THE PRESERVATION OF AGRICULTURAL LAND, REPORT (1974).

56 Md. H.B. 18, (1975), provides for formation of agricultural districts by landowner initiative, with public investment in facilities and utilities and exercise of the power of condemnation strictly limited thereafter. Landowners in agricultural districts may sell easements to the state, but the state is not obliged to accept the offers; under proposed amendments, however, the state is required to purchase. Funding is provided from assignment of proceeds of a 1/2% property transfer tax to an Agricultural Land Preservation Fund administered by the Secretary of Agriculture.

57 *See generally* BLUEPRINT COMMISSION ON THE FUTURE OF NEW JERSEY AGRICULTURE, REPORT (1973), which advocated the purchase of agricultural easements and dedication of proceeds of a property transfer tax as a source of funds. To resolve constitutional uncertainties, two senators introduced S.C.R. 86 196th Leg. 1st Sess. (1974), to add a new ¶ 4 to art. 8, § 3 of the N.J. Constitution:

> The continued application and use of privately owned land for agricultural purposes is in the public interest. The legislature may provide by law for the acquisition by the state of development easements on lands in agricultural open space preserves to encourage and assure continued use of the lands for agricultural and open space purposes. The acquisition of such easements in privately owned property by the state shall be a public purpose and a public use. The net proceeds of any tax imposed by law to finance acquisition by the state of development easements in agricultural open space lands shall be appropriated exclusively for this purpose.

No action, however, had been taken as of April, 1975. A statute will probably be introduced if the constitutional amendment is adopted.

58 Vt. H. 126, 53d Bienn. Sess. (1975) would create a state land trust funded by an existing property transfer tax and by assignment of gasoline tax receipts attributable to off-highway uses, and conforms to the statute presented here in most respects.

59 For a similar approach at the federal level, and containing regulatory powers over privately owned land as well as acquisition of interests in land, see Gifford, *An Islands Trust: Leading Edges in Land Use Laws*, 11 HARV. J. LEGIS. 417 (1974). The Kennedy-Brooke bill described therein has been reintroduced as S. 67, 94th Cong., 1st Sess. (1975).

60 Cal. A.B. 921 Reg. Sess. (1973-74). In 1972, Cal. A.B. 2137, Reg. Sess. 1971-72, its predecessor, was defeated on the floor of the Assembly. The sponsor of these bills, then Assemblyman John F. Dunlap, does not plan to introduce a similar measure in the 1975 session. The bill would have created an Open Space and Resource Conservation Fund, funded by assignment of the proceeds of a real property transfer tax, to make grants for acquisition of fee or less than fee interests in open lands by state agencies and regional and local jurisdictions.

easy to administer. In addition, its receipts have the virtue of rising with a strong real estate market, just as tax pressure for conversion is also rising.[61]

III. A Summary of the Model Statute

The Land Trust would be a state instrumentality governed by five trustees appointed by the Governor and confirmed by the Senate for five year terms. Its principal corporate purpose would be to accept land and interests in land for the benefit of the people of the state. It would not have the power to issue bonds or exercise eminent domain.

To develop standard methods of determining the value of lands and development rights, the Governor would name a five member Land Value Advisory Committee.[62] In addition, Rural Land Appraisal Commissions of three members each would be created in each of the present natural resource conservation districts.[63] These commissions would make appraisals of lands and interests in lands within their geographic areas independently, of local appraisers so as to avoid a fiscal conflict of interest situation.[64]

61 Vermont is the only state that presently has a land gains tax. Vt. Stat. Ann. tit. 32, § 236 (1973). There are, however, some alternatives. *See* Cal. Assembly Sel. Comm. on Open Space Lands, Funding for Acquisition of Open Space Lands: Three Approaches 28-37 (1972) (unearned increment and capital gains taxation). *See also* McClaughry, *Taxes for Land Acquisition*, in The People's Land (P. Barnes ed. 1975); Rogers, *Financing Park and Open Space Projects*, in Open Space and the Law 75-93 (F. Herring ed. 1965).

62 This committee is modeled after the New Jersey Farmland Evaluation Advisory Committee. *See* N.J. Stat. Ann. § 54:4-23.20 (Cum. Supp. 1974).

63 Natural resource conservation districts have existed since 1935 in conjunction with the Soil Conservation Service of the U.S. Department of Agriculture. *See* Soil Conservation Act, 16 U.S.C. §§ 590(b)-(f) (1970). There are approximately 3,000 local districts in all 50 states, involving over two million cooperating landowners in watershed protection, erosion control, woodlot management, and wildlife habitat improvement projects. Most districts are governed by a landowner-elected board of supervisors. National Association of Conservation Districts, America's Conservation Districts (1974).

64 The conflict of interest may arise because local appraisers would have no reason not to overvalue development rights if the Trust were committed to paying the full locally assessed taxes on values held by it. By having the development rights appraised by a body independent of the local taxing jurisdiction, this possibility is eliminated. It should be noted that there may be a problem where local governments within a rural land appraisal district have assessments varying widely in percentage of true fair market value; this problem will have to be considered on a state by state basis.

The Trust would offer two different opportunities — one open to any owner of suitable open space lands, the other available only to resident farmers who derive at least one-third of their income from farming 40 acres or more. Under the first option, any landowner could offer to dedicate and convey his lands or interests in land to the Trust. If the Trust accepted the offer, the Trust would become the owner, and the former owner would have no tax liability for the interests conveyed. The Trust would have full discretion as to which lands or interests it could acquire, and the conveyor would have no unilateral right to reacquire the rights conveyed. The Trust could, under limited circumstances, reconvey the land or interests. A conveyor of land could, by agreement with the Trust, retain privileges such as life tenure, recreational use, and continued agricultural use. Donation of land or interests in land to the Trust would qualify as a tax deduction to the donor under both Federal and state income tax laws, and the donation could be phased over a number of years for maximum advantage.[65]

Operating farmers would have an additional option. Instead of dedicating their land or development rights, they could also lease them to the Trust for a fixed period of years. The model bill requires that the Trust enter into this lease if the farmer and farmland qualify, but the farm owner would not be required to participate against his will. The terms of the lease agreement would specify that the Trust would pay each year to the farmer the local property taxes attributable to the rights leased by the Trust; thus, in effect, the farmer would pay taxes only on use value, while the Trust would pay taxes on the value of the development rights. If the Trust should default on a payment due the farmer-lessor, the lease agreement would be terminated without penalty, unless the farmer waived a partial default by the Trust and elected to continue with the lease.

If the farmer wished to recover the development rights leased to the Trust, he could do so at any time by paying a lease termination price of half the difference in value of the rights computed on the day of initial leasing and that of termination. In no case, however, would the payment be less than a rollback price equal

65 *See* INT. REV. CODE OF 1954, § 170(c)(1).

to the past five years' tax benefits carried forward at six percent interest. In effect, the farmer could reacquire all rights by sharing one half of the accrued capital gain with the Trust.[66]

Where the Trust leased rights to farmland, it would pay to the farmer the taxes on the value of the land or rights leased, as determined by an appraisal by the Rural Land Appraisal Commission and the tax rate of the local jurisdiction in which the land is located. The farmer then would make full payment of taxes to the local government at the local appraisal value. This approach, incidentally, would relieve local assessors and clerks of the problems of assessing and maintaining records of use values, development values, deferred taxes, etc., problems which can become burdensome where local tax officials are relatively untrained and inexperienced with these more sophisticated concepts.

With respect to land or rights in land other than farmlands, the Trust would pay taxes to the local government only on that portion of such lands or rights which, when valued at fair market value and added to the value of other state owned property in the jurisdiction, exceeded ten percent of the remainder of the assessment roll. Local taxpayers, then, would absorb a revenue loss until the ten percent threshold is reached.[67]

The Trust would be funded by the proceeds of a property transfer tax of one percent on the value of all property transferred in excess of $10,000.[68] This would relieve lower income home and lot buyers from much of the incidence of the tax. The Trust also would receive some income from lease termination payments from farmers wishing to reacquire leased rights.

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66 This is the function of the rollback provision in many state statutes. *See, e.g.*, CONN. GEN. STAT. ANN. § 12-504(a)-(h) (Cum. Supp. 1975); N.H. REV. STAT. ANN. § 79-A:7 (Cum. Supp. 1973). These laws provide for a separate conveyance or land use change tax, computed not with respect to tax benefits received, but at the rate of ten percent of the total sale or value of the property (declining one percent for each year the property qualified before conversion in Connecticut).

67 The ten percent figure is largely arbitrary, being that used in Vermont under the so-called "Groton formula" for reimbursing towns in which the state has acquired large holdings. *See* VT. STAT. ANN. tit. 32, § 365(a) (1973).

68 The current Vermont property transfer tax is 0.5 percent of all non-exempt transfers. VT. STAT. ANN. tit. 32, § 9602 (1970). The Vermont Tax Department has estimated that changing the tax to 1% of all transfers in excess of $10,000 would greatly increase revenues. The Department's estimate, however, was based on the assumption of a $10,000 homestead exemption, rather than a $10,000 value exemption; hence its figures are not strictly applicable.

If the Trust's revenues fell below that necessary to meet the lease payment obligations, the lease would be terminated and the farmer would recover all leased rights without encumbrance or penalty. This ensures that there would be no open-ended commitment of the funds of the Land Trust or the State, a difficult problem in other contract-type bills.

AN ACT TO CREATE A STATE LAND TRUST

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I. Short Title, Purpose, and Definitions

§ 101 *Short Title*

This act may be cited as the [State] Land Trust Act.

§ 102 *Statement of Legislative Intent*

The purposes of this act are:

(a) to permit owners of agricultural, forest, or open space land to dedicate interests therein to a Land Trust, thereby reducing their liability for property taxes and preventing forced conversion of such lands to more intensive uses;

(b) to permit owners of qualified operating farmlands to lease the development rights to such lands to the Land Trust, thereby reducing their liability for property taxes and preventing forced conversion of such lands to more intensive uses;

(c) to protect local governments from undue loss of property tax revenue;

(d) to provide technical and legal assistance for the formation of private, voluntary community land trusts and for the increased use of farmers' contracts;

(e) to provide for reasonable use of trust lands for snowmobiling, hunting, fishing, hiking and crosscountry skiing; and

(f) to impose a tax on the transfer of real estate to fund the operation of the Land Trust.

COMMENT: Subsections (d) and (e) are optional. Subsection (d) incorporates the purpose of state encouragement of land preservation efforts by voluntary groups and local governments by the relatively inexpensive device of making available to them the expertise that will be required in any case for the proper operation of the Trust.[69] Subsection (e) poses a policy question with regard to snowmobiling. In cold weather states where snowmobiling is popular, inclusion of snowmobiling as a legitimate use of Trust lands may attract valuable political support, which of course must be netted against opposition from wilderness preservation forces.

§ 103 *Definitions*

(a) "Development rights" means the rights to engage in land development other than for the purposes of agriculture and forestry.

(b) "Farming" means the business of farming, i.e., the cultivation, operation or management of a farm for gain or profit, either as owner or tenant.

COMMENT: This definition follows very closely the definition in § 1.175-3 of the Internal Revenue Code Regulations.

(c) "Farmland" means real estate which:

(1) is actively and exclusively devoted to farming;
(2) comprises no less than 40 acres of open lands, including the residential area, and not to exceed 10 acres of woodlots;
(3) is operated as a farm enterprise by its owner, who shall be a resident of the state; and
(4) produced in farm-related income no less than one-third of the owner's adjusted gross income as defined in [cross ref-

69 For a description of the local community land trust idea, *see* INTERNATIONAL INDEPENDENCE INSTITUTE, THE COMMUNITY LAND TRUST 1-24 (1972).

erence] in the owner's taxable year immediately preceding the year in which classification under this Act is sought.

COMMENT: Since special benefits under the act are available to farmland owners, the definition of "farmland" is very important. The acreage requirements may well be varied with respect to the type of farming carried out in a given state. The limitation on woodlot acreage that may be included is not intended to exclude from participation otherwise qualified farmland that may happen to include more than 100 acres of woodlots; it merely limits the amount of woodlots that may be included for valuation and lease purposes to 100 acres. The seemingly low requirement of one-third farm-related income recognizes that many smaller farms are, in effect, subsidized by outside wages earned by the farmer's family. The cross reference relates to the definition of adjusted gross income elsewhere in the state's tax statutes; for states without income taxation, a definition will have to be included in this section.

(d) "Interests in Land" includes, but is not limited to:

(1) fee simple;

(2) fee simple subject to the right of occupancy and use, defined as full and complete title subject only to a right of occupancy and use of the subject real property or part thereof by the grantor for residential, agricultural or forestry purposes;

(3) fee simple and resale of rights and interests, defined as the acqusition of land in fee simple and the subsequent reconveyance of rights and interests in such property to the former owner or to others, designed to accomplish the purposes of this act;

(4) fee simple and leaseback, defined as the acquisition of real property in fee simple and the lease, for the life of a person or for a term of years, of rights and interests therein, subject to the provisions of this act and to such covenants, restrictions, conditions, or affirmative requirements fixed by the Land Trust to accomplish the purposes of this Act;

(5) less than fee simple, defined as the acquisition of any rights and interests in real property less than fee simple;

(6) option to purchase, defined as the acquisition of an option to purchase land or rights and interests therein.[70]

(e) "Land" means real property in land, including areas covered by water, air space, subterranean rights, and any buildings, structures or other improvements thereon.

(f) "Owner" of farmland means the record holder of legal title, the perpetual leasehold interest or the equity of redemption in either, under a bona fide mortgage deed, free and clear of any contract, option, or other agreement, written or oral, recorded or unrecorded, requiring, conditionally or absolutely, transfer of the beneficial ownership so as to disqualify the lands for dedication under section 301 of this Act. "Owner" includes joint ownership or corporate ownership where all holders of beneficial interests, either as individuals or stockholders, are actively engaged in the business of farming in this state.

II. Creation of Land Trust

§ 201 *Land Trust Created*

There is created a body corporate and politic to be known as the [State] Land Trust, which shall be an instrumentality of the state benefiting all the citizens of the state by carrying out the public purposes expressed in this Act.

Comment: This section may need refinement to conform to constitutional language and judicial decisions of each state specifying the boundaries of "public purpose" for which the revenue-raising and expenditure provisions of this act are undertaken.

§ 202 *Trustees*

(a) The Trust shall have five trustees, who shall be residents of the state. At least two of the trustees shall be active or retired farmers. No trustee shall hold any other office, either elective or appointive, under state or local government.

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70 *See* Vt. Stat. Ann. tit. 10, § 6303(a)(1)-(7) (1973).

COMMENT: The requirement that two of the trustees be active or retired farmers is designed to assure farmers that the Trust is not merely an instrument of lawyers, bankers, and environmentalists designed to deprive them of their property. The proscription against holding other offices is intended to prevent conflict of interest situations which could arise, for example, when the Trust takes action affecting the tax base of a local government.

(b) The Governor shall appoint the trustees with the advice and consent of the Senate for terms of five years; except that the terms of the members first appointed shall be for one, two, three, four, and five years in order that no more than one vacancy will occur in any calendar year. The Governor shall make appointments to fill vacancies to serve for the remainder of the unexpired term. A trustee may be removed for cause at any time by a two-thirds vote of the Senate.

(c) The trustees shall elect a chairman and a clerk, and at their organizational meeting shall adopt by majority vote such rules as they deem necessary. The Trust shall keep a public record of its resolutions and transactions, and its financial records shall be audited annually by the [auditor of accounts].

(d) Trustees shall receive compensation for their services at the rate of $_____ per year, and shall be entitled to reimbursement from the Trust for expenses incurred in the performance of their duties.

(e) A trustee shall not participate in any actions of the Trust relating to land or interest in land in which such trustee, his immediate family, or close associates have an interest, direct or indirect, and in such cases he shall enter the reason for his nonparticipation in the records of the Trust.

§ 203 *Powers and Duties*

(a) The Trust may acquire, by purchase, gift or any other manner, and hold for the benefit of the people of the state, any rights or interests in land in the state. It shall record within thirty days of its execution any instrument conveying to or from it any interest in land, which recordation shall be a condition of the validity of such transfer.

(b) In accepting conveyance of, and in holding and conveying in-

terests in land, the Trust shall comply with the provisions of sections 303 and 304 of this Act and any plan or bylaws lawfully adopted by the governmental bodies in which such lands or interests are situated.

(c) The Trust shall prepare model legal documents and explanatory materials, conformable to the laws of [State], for the guidance of landowners and local groups wishing to establish community land trusts, and local governments wishing to enter into farm tax stabilization contracts pursuant to [cross reference]; and may provide direct technical and legal assistance to such landowners, groups, and local governments.

COMMENT: This subsection is optional. The cross reference to farm tax stabilization contracts refers to legislation permitting local governments to enter into stabilization agreements with farmers, a practice frequently used with respect to industrial plants.[71]

(d) The Trust shall have the following additional powers:

(1) To sue and be sued in the Trust's name, but the trustees shall not be liable for acts performed in good faith;
(2) To adopt a seal and alter the same with pleasure;
(3) To adopt bylaws for the regulation of its affairs and the conduct of its business;
(4) To maintain an office or offices at such place or places within the state as the trustees may designate;
(5) To appoint a secretary and treasurer and such other officers, who need not be trustees, as it shall deem advisable, and to employ such other employees and agents as may be necessary or desirable;
(6) To apply for and accept any grant of money or other assistance for programs relating to the purposes of the Trust, from the federal government, from private individuals, organizations or foundations, or from any other source, and to subscribe to and comply with any rule, regulation, contract or agreement with respect to the application of such grant or assistance;
(7) To make, enter into and perform all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this Act;

71 *See* VT. STAT. ANN. tit. 24, § 2741 (1967).

(8) To cooperate with and assist any agency of the state or any of its political subdivisions, and any private agency or person in furtherance of the purposes of the Trust;
(9) To do all acts and things necessary or convenient to carry out the powers expressly granted in this section.

§ 204 *Power to Issue Bonded Debt Reserved*

The Trust shall not have the power to issue bonded debt unless expressly authorized to do so by legislative enactment.

COMMENT: This section and the section following have a dual purpose. As written, they forbid the issuance of bonded debt and the exercise of eminent domain. This eliminates two difficult questions for legislative debate. If it is subsequently desired to have the Trust actually acquire development rights for compensation, either by voluntary purchase or eminent domain, such future enactment would replace these two sections at this point in the statute.

§ 205 *Power to Exercise Eminent Domain Reserved*

The Trust shall not have the power to exercise eminent domain over land or interests in land unless expressly authorized to do so by legislative enactment.

§ 206 *Land Value Advisory Committee*

(a) There is established a land value advisory committee consisting of three members serving for terms of four years. Two members shall be appointed by the Governor and shall serve at his pleasure. One additional member shall be appointed by the president of the state agricultural college. All appointed members shall be persons experienced in agriculture or real estate appraisal. Any vacancies shall be filled by the Governor and the president of the state agricultural college, respectively. The commissioner of taxes and the commissioner of agriculture, or their delegates, shall be members of the committee *ex officio*.

(b) The committee shall formulate guidelines for the determination of agricultural use value and development rights value of rural land. In formulating such guidelines, consideration shall be given to the agricultural productivity of the land; the present market value of the land for agricultural purposes and for development purposes; the topography, size, location, and climatic exposure of the land; current standards of farm management and efficiency; and any other factor which the committee finds relevant to the determination of agricultural use value or development rights value. The committee shall provide technical advice and counsel to rural land appraisal commissions and to the Trust on request.

COMMENT: This blue ribbon committee is necessary to provide expert assistance on the often complicated question of assessing the value of interests less than fee of agricultural and open space land, a task which may well, at least initially, overwhelm local government appraisers, particularly where they are nonprofessionals. It is modelled after the New Jersey State Farmland Evaluation Advisory Committee.[72]

§ 207 *Rural Land Appraisal Districts*

The [commissioner of agriculture] shall divide the state into rural land appraisal districts. Such districts shall be coterminous with existing boundaries of natural resource conservation districts insofar as practicable, and no rural land appraisal district shall contain more than three natural resource conservation districts.

§ 208 *Appointment of Rural Land Appraisal Commissions*

(a) The Governor shall appoint three persons to serve as members of a rural land appraisal commission in each rural land appraisal district. The members of the commission appointed by the Governor shall serve at the pleasure of the Governor, and may be removed by him at any time. The Governor may appoint a successor for any commission member appointed by him who dies, resigns or is removed. Insofar as practicable the members of each commission appointed by the Governor shall include the following: a representative of the department of agriculture; a person employed by a lending institution

72 *See* N.J. STAT. ANN. § 54:4-23.20 (Cum. Supp. 1974).

engaged in making farm loans in the district; and a person who has served as a tax assessor for a local government within the district.

(b) The cooperating landowners in each natural resource conservation district within a rural land appraisal district shall elect, at the time of election for natural resource conservation district supervisors, one person from among no less than two persons nominated and placed on the ballot by the supervisors, to serve as a member of the rural land appraisal commission with respect to appraisals in that district.

(c) Each commission shall elect annually from among its membership a chairman and a clerk, who shall serve until their successors are elected. Members of the commission shall not receive compensation for their services but shall be entitled to reimbursement from the Trust for reasonable and necessary expenses incurred in the performance of their duties.

COMMENT: The provision for election of one member of the commission by the "cooperators" of a natural resource conservation district is an attempt to allow rural landowners themselves to have a voice in the composition of the local commission, in addition to gubernatorial appointments. Nationally, there are some 300 such conservation districts involving over two million landowners.[73]

§ 209 *Biennial Report*

Biennially the Trust shall make a report to the [legislature] concerning its operations for the previous biennial period, including such recommendations as it may choose to make concerning the future operation of the program.

III. ACQUISITION, MANAGEMENT AND TAXATION OF INTERESTS IN LAND

§ 301 *Dedication of Interests in Land*

(a) Any interests in land may be conveyed to the Trust, and accepted by the Trust in the discretion of the trustees, under such terms

73 *See* note 63 *supra.*

and conditions as may be agreed upon. Before accepting any lands or interests in land under this section the trustees shall consider:

(1) Their value and the amount of the tax liability assumed by the Trust under section 305 of this Act;
(2) The value of the lands in preserving the landscape of the area, including views and perspectives;
(3) The extent to which the public may be expected to benefit directly from and enjoy such dedication;
(4) The location of the lands in relation to other lands or interests held by the Trust, the state or other governmental authority;
(5) The potential use of the land, inherently, and as affected by any state, regional or local land use plan, development plan, or zoning bylaw;
(6) The ecological, geological and biological uniqueness and value to the state;
(7) Whether ownership would enable the Trust to influence the development of the area for the public benefit; and
(8) The extent and nature of reservations, if any, proposed by the donor if an offer is made of an interest less than fee.

(b) Prior to acceptance of land or interests in land by the Trust, the details of the proposed transaction shall be submitted to each affected municipal and regional planning commission, which shall forward its comments and recommendations, if any, to the Trust within 30 days. At the request of any affected municipal or regional planning commission within said 30 day period, the Trust shall, before concluding any proposed transaction, announce and hold a public hearing in the vicinity. Prior to concluding any transaction, the Trust shall take into consideration all comments and recommendations received from planning commissions and other public bodies, and shall convey its specific responses to the respective commissions or bodies from which the comments or recommendations originated. Any affected commission or governmental body shall have standing to seek an injunction against a proposed transaction where the procedural provisions of this Act have allegedly been disregarded.

COMMENT: This subsection recognizes the importance of close liaison between the Trust and local taxing jurisdictions. Since acceptance by the Trust of interests in land will in many cases affect the local property tax base, it is important that the Trust

proceed in full public view, although the local jurisdiction is not accorded a right of veto over a proposed conveyance. The last sentence, relating to injunction, is included to ensure that the Trust comply with these detailed procedural requirements. In a Vermont case, where no statutory law exists concerning mandamus or injunction relating to procedural errors by a state agency, a mandamus action by a local planning commission against the state environmental board was dismissed, presumably on the grounds that the state board's refusal to comply with statutory procedure in promulgating a land use plan for submission to the legislature was a political question for legislative, not judicial, resolution.[74]

(c) If the Trust accepts land in fee simple under this section, it shall permit reasonable use of the land for snowmobiling, hunting, fishing, hiking, and crosscountry skiing by the public. If the Trust accepts less than fee simple interests in land under this section, the terms and conditions of conveyance to the Trust shall include agreement by the conveyor to permit reasonable use of the land for snowmobiling, hunting, fishing, hiking and crosscountry skiing. The Trust may establish guidelines for such reasonable use in consultation with the [Departments of Fish and Game and Forests and Parks].

COMMENT: This subsection strengthens the case that the act has a public purpose benefiting all the public, but as noted above, it poses a difficult policy question especially with respect to snowmobiling.

§ 302 *Special Leasing of Farmlands*

COMMENT: The following section requires the Trust to lease the development rights to qualified farmland for a period not to exceed 25 years. Lessors are allowed to break the lease by paying a prescribed lease termination price, but the Trust may not break a lease unless the revenues assigned to it (which are beyond the

74 Town of Kirby Planning Commission v. State Environmental Board, Caledonia County (Vermont) Court, Docket C 19-74 CAC, filed February 15, 1974. (Motion for summary judgment by defendant granted without indication of which of the numerous grounds offered was persuasive).

Trust's control) prove insufficient to cover all lease payment obligations. Nothing prevents the Trust from entering into a lease of as little as one year's duration; such a lease, however, would be a speculator's dream, since the lessor could, after enjoying the benefits for a year, choose not to renew the lease without becoming liable for the lease termination payment.

At the end of any lease, the statute as written makes it mandatory for the Trust to enter into another lease if the farmer and farmland continue to qualify. The 25 year term provision ensures that the legislature can act to relieve the Trust of this requirement if it appears that mandatory leasing will be undesirable. Since no lease is perpetually renewable, such revision of the program would raise no question of breach of contract or an unconstitutional taking of property (the property right to the lease benefits).

(a) The Trust shall, upon application by an owner of farmland, lease the development rights to such farmland at the nominal rate of $1.00 per year for a period not to exceed 25 years. The lease agreement shall provide that:

(1) The owner may continue to reside upon the land and continue all agricultural uses practiced at the time of leasing;

(2) If the land has been actively and continuously farmed for a period of ten years or more, and no less than three years by the owner, the owner may discontinue agricultural operations without termination of the lease agreement provided he continues to maintain the open space character of the land in a condition equivalent to that associated with active farming;

COMMENT: This paragraph is intended to qualify the retired farmer, who would otherwise not qualify due to the definitions of "farming" and "farmland," which require engaging in the business of farming and one-third of family income from farm operation.[75] The retired farmer could, of course, lease his productive acres to another farmer, or just keep the fields mowed to qualify.

(3) If at any time the land fails to qualify as farmland, and the

75 Model State Land Trust Act § 103(c) *supra.*

owner fails to comply with the provisions of paragraph (2), the lease agreement shall be deemed terminated by the owner, and he shall pay to the Trust the lease termination price as provided in subsection (b);

(4) The owner shall permit reasonable recreational use of the land for snowmobiling, hunting, fishing, hiking, and cross-country skiing by the general public in accordance with guidelines established by the Trust;

(5) The Trust may not convey its lease interest to any party other than the owner;

COMMENT: It is, of course, unlikely that a third party would want to acquire a lease interest to development rights from the Trust as a business proposition. This paragraph is included mainly to reassure the farmer-lessor that if at some future time he wishes to terminate the lease and reacquire the rights, he will be dealing with the Trust rather than with the federal government or the Nature Conservancy.

(6) The owner may give, convey, grant, or devise his interest in the farmland subject to the lease to any party and the lease shall not thereby be terminated and no termination price shall be due under subsection (b) of this section, provided that the successor in interest resides upon the land, continues agricultural uses, and otherwise assumes all the obligations under the lease of the original owner;

COMMENT: This paragraph principally provides for transfer of the lessor's interest at death. Note, however, that where a lessor qualifying under paragraph 2 of this subsection conveys the lease to an heir, the heir must recommence agricultural operations to qualify. The "retired farmer" clause is intended to benefit only the retired farmer himself, and not his heirs.

(7) The lease may be terminated at any time by the owner in accordance with the provisions of subsection (b) of this section;

COMMENT: This is the "escape clause" that allows the farmer-lessor to reacquire his leased development rights.

(8) Upon proper certification, the Trust shall pay to the owner each year an amount equal to the general local property taxes that the owner would be liable for if the rights leased were taxed at the value determined by the appropriate rural land appraisal commission, and at the rate obtaining in the local taxing jurisdiction in which the rights are located; and

COMMENT: Note that the amount of lease payment to the lessor may not exactly equal the tax liability of the lessor to the local taxing jurisdiction. The payment by the Trust to the lessor equals the amount the lessor would have to pay in local property taxes if his property were taxed at the value fixed by the rural land appraisal commission, which is independent of any taxing jurisdiction. This provision eliminates the problem of reliance on local assessment officials who would have a tendency to overvalue the leased rights on the theory that the Trust's commitment to pay the full taxes due on those rights would eliminate any adverse interest of the local property owner.

(9) If the Trust fails to make the payment required by paragraph (8), the owner, at his option, may declare the lease terminated and recover all rights contained in the lease without payment of the lease termination price required by subsection (b); or he may accept a partial payment by the Trust, waiving any further claim against the Trust for the deficiency, and continuing the lease agreement in force.

COMMENT: This paragraph deals with the problem of revenue to the Trust insufficient to permit full payment of all the Trust's lease obligations. If this should happen, the Trust can make partial payments to all lessors who will accept them; or the Trust can make full payment to selected lessors and none to others, causing the termination of the latter leases; or a combination of both policies. This provision is extremely important since it eliminates the problem posed by a state instrumentality contractually required to incur budget obligations into the unpredictable future, a problem that has been the bane of many similar proposals.

(b) If the lease is terminated by the action of the owner under the

provisions of paragraph (3) or (7) of subsection (a), the owner shall pay to the Trust as the lease termination price one-half of any increase in the fair market value of the rights from the time the lease was entered into, to the time the lease was terminated, as determined by the appropriate rural land appraisal commission, provided, however, that in no case shall the lease termination price be less than the total payments made by the Trust under paragraph (8) of subsection (a) during the five years preceding the year in which the rights are reacquired, plus interest at the rate of six percent per annum calculated from each date that payments were made by the Trust. An owner dissatisfied with the appraisal may appeal to the county court as provided in [cross reference].

COMMENT: This important provision allows the farmer-lessor to "buy out" of his lease at any time, preserving the free alienability of land so prized by rural landowners. As a penalty for buying out, the landowner whose tax burden has been alleviated must share with the public the economic benefits of subsequent conversion. Presumably the farmer would not exercise this option unless he had closed a deal for sale of the property fee simple, and the Trust would then be a party at the closing where all rights and considerations would be appropriately exchanged. As pointed out in the text,[76] if it is desired that the Trust be able absolutely to prevent conversion of qualified lands, actual acquisition of either the fee or development rights is the only procedure that can accomplish that objective without raising the problems associated with the taking of property without compensation.

(c) The Trust shall have a lien against the real estate to secure the lease termination price in the same manner as taxes assessed against real estate are a lien under [cross reference], and the same may be collected and enforced by action at law in the manner provided for under sections [cross reference], or by sale of real estate as provided under sections [cross reference], or by foreclosure as provided under section [cross reference].

COMMENT: These cross references refer to existing statutes concerning governmental action in case of nonpayment of property taxes.

76 *See* text accompanying note 48 *supra*.

§ 303 *Management of Interests by Trust*

In managing lands and interest in lands held by the Trust, the trustees shall establish and adhere to policies and practices which shall:

(a) preserve the open space, scenic prospects, and general appearance of the countryside;
(b) preserve and enhance the natural history and ecological balance of the area;
(c) avoid and abate air and water pollution and any other hazard to the health and welfare and safety of the public;
(d) protect historic sites;
(e) conform to all lawfully adopted local, regional, and state land use, development, and zoning plans;
(f) permit reasonable use for snowmobiling, hunting, fishing, hiking and crosscountry skiing; and
(g) otherwise protect the public interest and the welfare and safety of the people of the area and the state.

The Trust may enter into arrangements with any department of federal, state or local government or a responsible private organization for the actual management of specific lands and interests owned by the Trust.

§ 304 *Transfer of Interests by Trust*

(a) The Trust may not convey any interest less than fee held by it except to the owner of the remainder of the fee, without his written consent. With respect to interests dedicated to the Trust under § 301, the owner of the remainder of the fee may reacquire the outstanding interest in the fee only with the consent of the trustees and on such terms and at such a price as they may specify. In determining whether conveyance of any interest held by the Trust should be made, the trustees shall consider:

(1) the probable effects of conveyance on the continued management of the lands or interests in accordance with the policies and practices enumerated in § 303;
(2) the probable impact on the economy, government, and tax base of the town in which such lands or interests are located; and

(3) the net gain likely to accrue to the public interest (or to the Trust, acting in the public interest) from conveyance.

(b) The Trust shall give notice of any proposed conveyance of lands or interests held by it to the regional and local planning commissions wherein the land lies and to all affected local governments, and hold public hearings in the locality prior to effecting any such conveyance.

(c) If the trustees determine that lands or interests held by the Trust should be sold, such conveyance may include conditions, restrictions, or covenants specifying the nature and character and particular type of development that may occur thereon, consistent with state, regional and local plans and zoning bylaws.

COMMENT: Although in general the Trust would not reconvey interests held by it to a private owner, it is conceivable that changing settlement patterns and planning considerations might suggest development of a Trust-held parcel as preferable to the development of private land in the vicinity. The Trust under this section would thus have carefully safeguarded powers to transfer or exchange interests in land. The safeguards are necessary to discourage transfers principally devised to promote private interests.

§ 305 *Taxation of Interests Held in Trust*

(a) When development rights or any other interests in land are deeded to the Trust pursuant to § 301, the interest deeded shall be appraised by the rural land appraisal commission at fair market value and listed separately and apart from other property in the assessment rolls of the local taxing jurisdiction in the name of the Trust. The Trust shall pay property taxes to the local taxing jurisdiction on the value of such lands or interests which, when added to the value of other state-owned property in the local jurisdiction, exceeds ten percent of the total value of all other property listed in the local jurisdiction.

(b) In the case of lands or interests in lands leased to the Trust by an owner of farmland under § 302, the lessor shall remain liable for all local property taxes.

(c) All appraisals of interests in land held by the Trust shall be

made at the direction of the Trust by the rural land appraisal commission in the district in which the land is situated.

(d) On or before May 1 in each year, the Trust shall notify the rural land appraisal commission in each rural land appraisal district as to the properties or rights within the district for which a determination of value is requested. On receipt of notification from the Trust of the properties or rights for which a request has been submitted under this section, the rural land appraisal commission shall determine the appropriate value for each property or right for which a request has been made. In making determinations of land values, the commission shall follow the guidelines established by the land value advisory committee under § 206. Prior to completing a determination the commission shall grant a hearing to the owner, on reasonable notice. The Trust shall also be given notice of such hearings and shall be entitled to appear. The commission shall prepare a report containing its valuation of each property or interest. One copy of the report shall be mailed to the owner on or before August 1; one copy filed with the commissioner of taxes; and one copy transmitted to the Trust.

(e) Farmland, as defined in this Act, which is held in the same ownership shall be appraised as one unit, even if the same consists of two or more parcels which are not contiguous.

(f) Each determination of value made in accordance with this section shall remain in effect for a period of four taxable years, including the year in which the determination is made, and shall be altered or revised prior to expiration of such four-year period only when there is a substantial change in the quantity of land held by the owner.

(g) The Trust, a municipality, or an owner, if aggrieved or dissatisfied by a determination by a rural land appraisal commission, may appeal to the county court for the county in which the land is situated, or if the land lies in more than one county, the county court for any county in which any part of the same is situated. Appeal procedure shall be provided as in [cross reference].

COMMENT: This section prescribes the two separate methods of taxation employed with respect to Trust-held interests in land. When interests are deeded to the Trust under § 301, the Trust pays local property taxes only on the value of the interests which, when added to other state-held property, exceeds ten percent of the local jurisdiction's assessment rolls. This in effect is a local "deductible" similar to current Vermont law.[77] The local juris-

77 *See* note 67 *supra.*

diction must assume the tax loss until such time as the state and its instrumentalities have consumed one-eleventh (10% of the remainder is one-eleventh of the total) of the local tax base in one way or another. With regard to the special farmland leasing provisions of § 302, the farmer-lessor remains fully liable, but is of course, reimbursed by the Trust under the terms of his lease. Subsection (g) is cross referenced to the customary property tax appeals provisions elsewhere in the state's tax law.

§ 306 *Taxation of Residual Interests of Landowners*

When interests less than fee simple are dedicated to the Trust, the basis of valuation of the remainder of the fee for tax assessment purposes shall be the fair market value of the fee, less the fair market value of the interests conveyed to the Trust as appraised pursuant to subsection (a) of § 305.

COMMENT: This section provides for taxation of residual interests at residual value. While this is logically necessary and probably required by law in most states in any case, in some states there may be a reluctance of local taxing authorities to recognize the full diminution of value occasioned by dedication of interests less than fee. This section is designed to remove any uncertainty.

IV. PROPERTY TRANSFER TAX

COMMENT: Since it is likely that this part would be codified under the state's tax laws, rather than with the Land Trust provisions, it is referred to throughout as a "chapter" and contains its own set of definitions.[78]

78 This chapter is modeled on the existing Vermont property transfer statute, including amendments proposed by the Tax Department in 1975 to resolve some problems of interpretation. See VT. STAT. ANN. tit. 32, §§ 9601-16 (1970 & Cum. Supp. 1974).

§ 401 *Definitions*

The following definitions shall apply throughout this chapter unless the context requires otherwise:

(a) "Commissioner" means the commissioner of taxes.

(b) "Deed" includes any deed, instrument or other writing evidencing a transfer of title to property.

(c) "Person" means every natural person, association, trust, or corporation.

(d) "Property" means real property, including furnishings, accessories and improvements permanently attached and annexed thereto, but the term does not include personal property transferred in the same transaction with real property.

COMMENT: The term "property" has posed some tricky problems of definition under the Vermont statute. For example, throw rugs included in the sale of a motel are clearly exempt from the tax as personal property, but a nailed-down wall to wall carpet is arguably real property. The language used here is adapted from a Vermont case.[79]

(e) "Recording clerk" means any town clerk, city clerk, county clerk or other official whose duty it is to record deeds of property.

(f) "Title to property" includes:

(1) those interests in property which endure for a period of time the termination of which is not fixed or ascertained by a specific number of years, including without limitation, an estate in fee simple, life estate, perpetual leasehold, and perpetual easement; and

(2) those interests in property enduring for a fixed period of years but which, either by reason of the length of the term or the grant of a right to extend the term by renewal or otherwise, consist of a group of rights approximating those of an estate in fee simple.

(g) "Transfer" includes a grant, assignment, conveyance, will, trust, decree of court or any other means of transferring title to property or vesting title to property in any person. In case of a foreclosure or a

79 Sherburne Corp. v. Town of Sherburne, 124 Vt. 481, 484, 207 A.2d 125, 127 (1965).

conveyance in lieu of a foreclosure where there are a number of liens on the same property, the transfer between the obligor and the primary obligee shall be the only transfer arising out of the foreclosure proceedings or conveyance in lieu of foreclosure subject to tax under this chapter, any subsequent transfers to the junior lienholders being merged into the transfer from the obligor to the primary obligee.

(h) "Value" means, in the case of any transfer of title to property which is not a gift and which is not made for a nominal consideration, the amount of the full actual consideration for such transfer, paid or to be paid, including the amount of any liens or encumbrances on the property existing before the transfer and not removed thereby; in the case of a gift, or a transfer for nominal consideration, "value" means the fair market value of the property transferred.

§ 402 *Tax on Transfer of Property; Use of Proceeds*

(a) A tax is hereby imposed upon the transfer by deed of title to property located in this state. The amount of the tax equals one percent of the value of the property transferred which is in excess of $10,000.00, or $1.00, whichever is greater.

(b) On or before January 31 of each year the commissioner shall pay to the [State] Land Trust an amount equal to the full amount collected by him in the preceding calendar year under this chapter.

COMMENT: The Vermont tax is one-half percent of the full value of the property transferred. Using one percent of all value in excess of $10,000 eases or eliminates the tax burden on lower-priced homes and lots. In particular, it also reduces the knotty problem of mobile homes for resale by a non-dealer owner, since the $10,000 exemption virtually eliminates any tax otherwise due on a second-hand mobile home.

§ 403 *Exemptions*

The following transfers are exempt from the tax imposed by this chapter:

(a) Transfers recorded prior to the effective date of this act;

(b) Transfers of property to the United States of America, the state of [State], or any of their instrumentalities, agencies or subdivisions;

(c) Transfers directly to the obligee to secure a debt or other obligation; and transfers directly to the obligor releasing property which is security for a debt or other obligation when such debt or other obligation has been fully satisfied;

(d) Transfers which, without additional compensation, confirm, correct, modify or supplement a transfer previously recorded;

(e) Transfers between husband and wife, or parent and child, or grandparent and grandchild, without actual consideration therefor; and transfers in trust or by decree of court to the extent of the benefit to the donor or one or more of the related persons above named; and transfers from such a trust conveying or releasing the property free of trust as between such persons and without actual consideration therefor;

(f) Transfers pursuant to a public sale for delinquent taxes;

(g) Transfers of partition;

(h) Transfers made pursuant to mergers or consolidations of corporations; bona fide transfers to shareholders of corporations in connection with the complete dissolution thereof, except where the commissioner finds that a major purpose of such dissolution is to evade the property transfer tax;

(i) Transfers made by a subsidiary corporation to its parent corporation for no consideration other than cancellation or surrender of the subsidiary's stock;

(j) Transfers made to a corporation at the time of its formation pursuant to which transfer no gain or loss is recognized under section 351 of the Internal Revenue Code of 1954 as in effect on [date];

(k) Transfers made by a partnership to a partner in connection with a complete dissolution of the partnership, except where the commissioner finds that a major purpose of such dissolution is to evade the property transfer tax;

(l) Transfers made to a partnership at the time of its formation, pursuant to which transfer no gain or loss is recognized under Section 721 of the Internal Revenue Code of 1954 as in effect on [date];

(m) Transfers made to, or made by, a nonprofit local development corporation as organized and defined in [cross reference]; and

(n) Transfers to community land trusts and other nonprofit organizations created to acquire real property and manage it in accordance with § 303 of the [State] Land Trust Act, as certified to the commissioner of taxes by the [State] Land Trust.

COMMENT: Exemption (c) is written for a title property state, where a mortgagee holds actual title until the mortgage is discharged. This exemption may need revision in a lien property state. Exemptions (j) and (l), relating to transfers without recognized gain or loss, incorporate by reference two sections of the U.S. Internal Revenue Code in effect on a specified date. There is some legal question as to whether a state law may incorporate future changes in Federal statutory language by reference. The draft here is written to require further legislative action to update the reference to the Federal Code (by advancing the date specified). Exemptions (m) and (n) relate to nonprofit local development corporations authorized by the laws of most states for the purposes of encouraging job-creating industries, and to nonprofit organizations organized to preserve open lands, such as a community land trust or nature conservancy group. With regard to the latter, the Trust would certify to the commissioner that the organization to which property was transferred qualified for the exemption.

§ 404 *Liability for Tax*

The tax imposed by this chapter upon any transfer of title to property is the liability of the transferee of the title, unless fixed otherwise by agreement of the parties.

§ 405 *Payment of Tax*

The tax imposed by this chapter shall be paid to a recording clerk at the time of the delivery to that clerk for recording of a deed evidencing a transfer of title to property subject to the tax.

§ 406 *Property Transfer Return*

(a) A property transfer return complying with this section shall be filed with a recording clerk at the time of the payment to the clerk of an amount of property transfer tax under § 405 of this chapter, or at

the time of the delivery to the clerk for recording of a deed evidencing a transfer of title to property which is not subject to the tax imposed by this chapter.

(b) The property transfer return required by this section shall be in such form as the commissioner, by regulation, shall prescribe, and shall be signed, under oath or affirmation, by each of the parties, or their legal representatives, to the transfer of title to property for which the return is filed. If the return is filed for a transfer claimed to be exempt from the tax imposed by this chapter, the return shall set forth the basis for such exemption. If the return is filed for a transfer subject to such tax, the return shall truly disclose the value of the property transferred, together with such other information as the commissioner may reasonably require for the proper administration of this chapter.

§ 407 *Acknowledgment of Return and Tax Payment*

Upon the receipt by the recording clerk of a property transfer return, complete and regular on its face, together with the tax payment, if any, called for by that return, and the fee required under section 406, the clerk shall forthwith mail or otherwise deliver to the transferee of title to property for which such return was filed a signed and written acknowledgment of the receipt of that return and payment. A copy of that acknowledgment, or any other form of acknowledgment approved by the commissioner, shall be affixed to the deed evidencing the transfer of property with respect to which the return was filed. The acknowledgment so affixed to a deed, however, shall not disclose the amount of tax paid with respect to any return or transfer.

§ 408 *Prohibition Against Certain Recordings*

No recording clerk shall record, or receive for recording, any deed to which has not been affixed an acknowledgment of return and tax payment under § 407 of this chapter. A clerk who violates this section shall be fined $50.00 for the first offense and $100.00 for each subsequent offense.

§ 409 *Penalty for False Statement*

Any person who willfully falsifies any statement contained in a property transfer return required under § 406 of this chapter shall be subject to a fine of not more than $1,000.00.

§ 410 *Remittance of Return and Tax; Inspection of Returns*

(a) Not later than thirty days after the receipt of any property transfer return or payment of tax under this chapter, a recording clerk shall file the return in the office of the local taxing jurisdiction and forward one copy of the return and the amount of tax paid with respect thereto to the commissioner.

(b) The copies of property transfer returns shall be open to public inspection.

§ 411 *Interest*

Any person who fails to pay any tax imposed by this chapter on or before the date when the tax is required to be paid shall pay interest on that tax at the rate of one-half of one percent for each month or fraction thereof of the tax remaining unpaid, to be calculated from the date the tax was required to be paid. All such interest shall be payable to and recoverable by the commissioner in the same manner as the tax imposed by this chapter. For a reasonable cause the commissioner may abate all or any part of such interest.

§ 412 *Penalties*

Whenever the commissioner determines that any tax assessed under this chapter was unpaid due to negligence or disregard of the provisions of this chapter or of any ruling or regulation of the commissioner issued pursuant to the provisions of this chapter, but without intent to defraud, a penalty of ten percent of the amount of such tax as determined by the commissioner shall be added to the assessment and interest shall be payable on the amount of the tax at the rate of one percent of such tax for each month or fraction of a month during which the tax remains unpaid. Whenever any tax assessed under this chapter was unpaid due to fraud with intent to evade the tax imposed by this chapter, a penalty of twenty-five percent of the amount of such tax as determined by the commissioner shall be added to said assessment, and interest shall be payable on the amount of the tax at the rate of one percent of such tax for each month or fraction of a month during which the tax remains unpaid. For reasonable cause the commissioner may waive or abate all or any part of such penalties and interest.

§ 413 *Taxes as Personal Debt to State*

(a) All taxes required to be paid under this chapter and all increases, interest and penalty thereon, which becomes due and payable to the commissioner, shall constitute a personal debt from the person liable to pay the same to the state of [State] to be recovered in an action of contract on this statute.

(b) Action may be brought by the attorney general at the instance of the commissioner in the name of the state to recover the amount of taxes, penalties and interest due from such person provided the action is brought within three years after the same are due. The action shall be returnable in the county where the person resides if a resident of the state; and if a nonresident, the action shall be returnable to the county of [the state capital]. The limitation of three years in this section shall not apply to a suit to collect taxes, penalties, interest and costs when the person filed a fraudulent return or failed to file a return when the same was due.

§ 414 *Levy for Nonpayment*

When all or any portion of a tax imposed by this chapter, or any penalty or interest due in connection with such a tax, is not paid, the commissioner may issue a warrant under his hand and official seal directed to the sheriff of any county of this state. The warrant shall command the sheriff to levy upon and sell the real and personal property of the taxpayer for the payment of the unpaid tax liability imposed by this chapter, together with allowable fees and costs. The levy and sale shall be effected in the manner, and shall be subject to the limitations, prescribed for the levy, distraint and sale of property for nonpayment of local property taxes under [cross reference]. The sheriff shall return the warrant to the commissioner and pay to him the money collected thereunder within the time specified in the warrant.

COMMENT: The cross reference is to existing state statutes for property tax delinquency actions.

§ 415 *Taxes as Property Lien*

If any person required to pay a tax under this chapter neglects or refuses to pay the same after demand, the amount, together with all

penalties and interest provided for in this chapter and together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of [State] upon all property and rights to property, whether real or personal, belonging to such person. Such lien shall arise at the time demand is made by the commissioner and shall continue until the liability for such sum with interest and costs is satisfied or becomes unenforceable. Notice of lien, and certificate of release of lien shall be recorded as provided in [cross reference].

COMMENT: The cross reference is to existing state statutes regarding imposition and release of liens on property.

§ 416 *Administrative Appeals*

Any person held liable to tax under this chapter may appeal such holding under the provisions of [cross reference].

COMMENT: The cross reference is to existing state property tax appeals procedures.

§ 417 *Grace Period for Unrecorded Deeds*

Where real property was in fact transferred prior to the effective date of this chapter, but deed was not recorded as of such effective date, the transferee may within 90 days following the effective date of this chapter record the deed without incurring liability for payment of tax under this chapter, provided, however, that in any case where the tax otherwise due would exceed $200.00, the commissioner may require evidence of bona fide prior transfer.

§ 418 *Regulations of Commissioner*

The commissioner may from time to time, issue, amend and withdraw regulations interpreting and implementing this chapter, in accordance with [cross reference to administrative procedures act].

STATUTE

BEYOND THE "CUCKOO'S NEST": A PROPOSAL FOR FEDERAL REGULATION OF PSYCHOSURGERY

Introduction

In Ken Kesey's *One Flew Over the Cuckoo's Nest,* a lobotomy permanently ends Randle Patrick McMurphy's heroic struggle against Big Nurse.[1] In Michael Crichton's *The Terminal Man,* Harry Benson learns to stop worrying and love the charge he gets from 40 electrodes implanted in his brain.[2] The characters are fictional, but the techniques and the potential dangers are not. Today, the new wave of "psychosurgery" sweeping the country mandates legislative action.[3]

Psychosurgery[4] is the most extreme and controversial of recent developments in the wide-ranging field of psychotechnology.[5] At best, psychosurgery is a promising new technique offering release from crippling psychological disorders. At worst, it is a primitive method which blunts emotional and mental processes and threatens to control the mind. At least, it engenders serious ethical, social, and political problems which can no longer be ignored.

1 K. KESEY, ONE FLEW OVER THE CUCKOO'S NEST (1962).

2 M. CRICHTON, THE TERMINAL MAN (1972). This story deals with the control of temporal lobe epilepsy through computer-controlled Electrical Stimulation of the Brain (ESB), one type of psychosurgery. See text accompanying notes 214-16 & note 215 *infra.*

3 *See* Breggin, *The Return of Lobotomy and Psychosurgery,* 118 CONG. REC. E1602 (daily ed. Feb. 24, 1972) [hereinafter cited as Breggin]; Holden, *Psychosurgery: Legitimate Therapy or Laundered Lobotomy?,* 179 SCIENCE 1109 (1973); *Hearings on S. 974, S. 878, & S.J. Res. 71 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare,* 93d Cong., 1st Sess., pt. 2, at 359-60 (1973) [hereinafter cited as *Hearings*] (testimony of Dr. Peter Breggin).

4 Defining psychosurgery is an elusive but important endeavor. See § 2 of the proposed Act and text accompanying notes 209-19 *infra* for proposed statutory definition. An accurate preliminary definition for our purposes would be surgery on the brain performed for the principal purpose of modifying thinking or behavior patterns.

5 The term "psychotechnology" was coined by R. L. Schwitzgebel and R. K. Schwitzgebel (eds.) in PSYCHOTECHNOLOGY: ELECTRONIC CONTROL OF MIND AND BEHAVIOR (1973). The term refers to the varied tools and techniques for predicting and modifying human behavior.

Psychosurgery involves several competing interests entitled to protection.[6] The patient has an interest in his physical and mental integrity. The psychosurgeon has an interest in pursuing his vocation of practice and research. Future patients have an interest in obtaining the potential benefits of current psychosurgical research. Finally, the social collectivity has an interest in expanding its store of knowledge.

These interests are reflected in a wide spectrum of views about the acceptability of psychosurgery. Some believe that the practice of psychosurgery has developed beyond the experimental stage and now can be considered acceptable therapy for certain patients.[7] At the other end of the spectrum are those who argue for a total ban of psychosurgery, largely for reasons independent of its characterization as an experimental or therapeutic procedure.[8] Moderating between these poles are a number of opinions and proposals recognizing the potential benefits of further research and practice as well as the urgency of safeguarding against potential abuses.[9] The statute proposed in this piece adopts such a position by allowing psychosurgery, but only when a capable patient gives fully informed consent — with two narrowly defined exceptions. This type of regulation[10] will enable consenting patients to obtain relief

6 *See* Jaffe, *Law as a System of Control*, 98 DAEDALUS 406 (1969), in P. FREUND, EXPERIMENTATION WITH HUMAN SUBJECTS 197 (1969). *See generally* the Spring 1969 issue of DAEDALUS, which explores several aspects of experimentation with human subjects.

7 *See, e.g., Hearings, supra* note 3, at 348-57, 363-68 (testimony of Drs. Orlando Andy & Robert Heath); Andy, *Neurological Treatment of Abnormal Behavior*, 252 AM. J. MED. SCIENCE 232 (1966); Mark, *A Psychosurgeon's Case for Psychosurgery*, 8 PSYCHOLOGY TODAY, July, 1974, at 28.

8 *See, e.g., Hearings, supra* note 3, at 357-63 (testimony of Dr. Peter Breggin); Breggin, *supra* note 3; Gastonguay, *Psychosurgery: Call for a Moratorium*, 130 AMERICA 329 (1974).

9 *See, e.g.*, Massachusetts Task Force on Psychosurgery, Majority and Minority Reports (1974) (on file with *Harvard Journal on Legislation*); Mishkin, *Multidisciplinary Review for the Protection of Human Subjects in Biomedical Research: Present and Prospective HEW Policy*, 54 BOSTON U.L. REV. 278 (1974); *Hearings, supra* note 3, at 338-47 (testimony of Dr. Bertram Brown, Director of the National Institute of Mental Health (NIMH)); *The New Psychosurgery*, 226 J.A.M.A. 779 (1973) (editorial). *See also* text accompanying notes 54-116 *infra* for discussion of current law in the field.

10 The medical profession is noted for its insistence upon non-interference in its affairs. *See, e.g.*, Massachusetts Task Force on Psychosurgery, Minority Report, *supra* note 9. In a position paper, the American Psychiatric Association has emphasized that decisions as to treatment and its adequacy should be within the discretion of the professional. Council of the American Psychiatric Association,

from pain or debilitation, while protecting nonconsenting patients from being subjected to the dangers of mental impairment or behavior control.

Before setting out the substantive provisions of and commentary concerning the proposed model statute to regulate psychosurgery, this Note will discuss: the development and present state of the practice of psychosurgery; the present law regulating or relating to its practice; and the philosophical and policy bases for the statute. The third section will consider the need for federal legislation, the argument for avoiding both prohibition and imposition of psychosurgery, and some problems associated with informed consent.

I. Psychosurgical Technology and Practice

The practice of psychosurgery reportedly traces to "trephining," a primitive method of opening the skull done in Peru over 12,000 years ago, probably with the expectation of releasing demons.[11] There are later references in ancient Roman writings to the "relief" that sword wounds in the head gave to the insane.[12] The modern practice began in 1935, when Portuguese neurosurgeon Antonio Moniz performed several radical prefrontal lobotomies[13]

Position Statement on the Question of Adequacy of Treatment, 123 Am. J. Psychiatry 1458 (1967).

11 102 Time, Apr. 3, 1972, at 50.

12 Restak, *The Promise and Peril of Psychosurgery*, Sat. Rev. World, Sept. 25, 1973, at 54, 55.

13 The classic prefrontal lobotomy or leucotomy is accomplished by severing certain fiber tracts running between both frontal lobes and the rest of the brain with a special knife, the leucotome, which is inserted through a small opening drilled in the skull. *See* Goldstein, *Prefrontal Lobotomy: Analysis and Warning*, 182 Scientific Am., Feb. 1950, at 44. The lobotomy not only diminished intellect and altered personality, but often impaired emotion and destroyed capacity to respond to external stimuli. Knight, *Neurological Aspects of Psychosurgery*, 65 Proceedings Royal Soc'y Med. 1099 (1972). The procedure was less a cure than a pacifier—reducing many patients to postoperative vegetables. Older, *Psychosurgery: Ethical Issues and a Proposal for Control*, 44 Am. J. Orthopsychiatry 661 (1974). The practice came under increasing scrutiny and criticism, and, as a result, many of the exaggerated reports of the operation's successes have been discredited. *See, e.g.*, Studies in Lobotomy (M. Greenblatt, H. Solsman, & R. Arnst, eds. 1950); W. Freeman & J. Watts, Psychosurgery in the Treatment of Mental Disorders and Intractable Pain (1950).

on chronically hospitalized mental patients.[14] Over the next 15 years, the practice gained in popularity with operations being performed on less seriously ill patients, including nonhospitalized neurotics.[15] In total, more than 100,000 lobotomies worldwide and 50,000 in the United States alone were reported during this era.[16]

The use of lobotomy was largely discontinued around 1948[17] due to the advent of modern drugs for treating mental disorders.[18] Electro-convulsive therapy (ECT), which does not properly fall within the definition of psychosurgery, also became increasingly popular because it was a reversible and less drastic means of treatment.[19] But modified forms of psychosurgery have survived and in the past ten years have made a resurgence.[20]

Current psychosurgical procedures are considerably more exact and sophisticated than lobotomies. The stereotaxic method allows placement of needle-sized electrodes deep inside specific regions of the brain. These electrodes are used to stimulate and destroy certain portions of brain tissue.[21] Other methods of tissue destruction have also been used.[22] Such operations depend on pinpointing certain "centers" in the brain, which control specific mental activity and behavior.[23] Most surgery today is performed on the system which is the center for violence, hunger, sexuality, and

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14 *See* Chorover, *The Pacification of the Brain,* 7 PSYCHOLOGY TODAY, May, 1974, at 60.

15 *Id.*

16 *Hearings, supra* note 3, at 340 (testimony of Dr. Bertram Brown).

17 Knight, *supra* note 13, at 1099.

18 Older, *supra* note 13, at 661.

19 See Kabnowsky, *The Convulsive Therapies,'* in COMPRENHENSIVE TEXTBOOK OF PSYCHIATRY, at 1279 (A. Friedman & H. Kaplan eds. 1967). It is principally because ECT represents a temporary, albeit severe, intrusion upon the mind that it is distinguishable from psychosurgery. *See* note 212 *infra* for a discussion.

20 Older, *supra* note 13, at 662.

21 The most detailed medical description of the technique is Kelly, Richardson, & Mitchell-Heggs, *Stereotactic Limbic Leucotomy: Neurophysiological Aspects and Operative Technique,* 123 BRIT. J. PSYCHIATRY 133, 137 (1973). The surgery is also discussed, along with extensive photographs of the instruments, tools, and methods used therein, in V. MARK & F. ERVIN, VIOLENCE AND THE BRAIN, 71-85 (1970). This book, authored by two of the leading practitioners and proponents of psychosurgery, is the leading and most controversial work in the field. For a critique, see Hobson, *Reflections Concerning Violence and the Brain,* 9 CRIM. L. BULL. 684 (1973); Wexler, Book Review, 85 HARV. L. REV. 1489 (1972).

22 Older, *supra* note 13, at 662; Breggin, *supra* note 3, at E1604-09.

23 For a more detailed discussion, see L. LAITENEN & K. LIVINGSTON, SURGICAL APPROACHES IN PSYCHIATRY (1973).

emotional tone.[24] Many doubt, however, that the controlling areas of the brain can be located with the necessary accuracy.[25]

Approximately 500-600 psychosurgical operations are being performed in the United States annually.[26] (It is impossible to tell exactly how many are being done, or where, because of the lack of any centralized record-keeping.[27]) Patients are of all ages and races, with several different illnesses and problems.[28] Dr. Orlando Andy, Chairman of the Department of Neurosurgery at the University of Mississippi, is well known for his treatment of disturbed children with psychosurgery.[29] He has operated on 13 or 14 children ranging in age from six to 19.[30] Psychosurgery has been performed on prisoners,[31] and has been proposed as a "cure" for sexual deviants.[32] Apparently, most subjects today are neither violent nor psychotic but suffer from some form of neurosis: depression, anxiety, or obsession.[33]

A survey of the literature would appear to indicate that psychosurgery has met with considerable success. Neurotic patients have benefitted most by the procedure.[34] For example, substantial success has been reported in the treatment of obsessive-compulsive neurosis, a disorder often characterized by constant fixation on a single object or activity.[35] Certain operations have enabled pre-

24 *See* Mark, *supra* note 7, at 30. *See generally* V. MARK & F. ERVIN, *supra* note 21.

25 *See, e.g., Hearings, supra* note 3, at 339 (testimony of Dr. Bertram Brown).

26 Edson, *The Psyche and the Surgeon,* N.Y. Times, Sept. 30, 1973, § 6 (Magazine), at 14, 72.

27 The estimates of Dr. Breggin are based on his personal correspondence with practitioners. He also notes that we are witnessing the beginnings of a massive increase to rival the 50,000 of 20 years ago. He believes there are approximately 40 psychosurgeons in the country today. Breggin, *supra* note 3, at E1602-03.

28 Templer, *The Efficacy of Psychosurgery,* 9 BIOLOGICAL PSYCHIATRY 205 (1974).

29 Restak, *supra* note 12, at 54-55.

30 *Hearings, supra* note 3, at 353. *See* text accompanying notes 191-194 and § 101 of the proposed Act *infra* for a discussion of the practice of psychosurgery on children.

31 *See* Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies,* 47 S. CAL. L. REV. 237, 247 (1974).

32 *See Brain Surgery for Sexual Disorders,* 4 LANCET 250, 251 (1969) (editorial).

33 *See* Sweet, *Treatment of Medically Intractable Mental Disease by Limited Frontal Leucotomy — Justifiable?* 289 N. ENG. J. MED. 1117 (1973).

34 *See* Restak, *supra* note 12, at 56. Dr. Restak indicates that the range of candidates who could benefit from psychosurgery is actually very limited. He reports several successful uses of the operation. *Id.* at 54.

35 Bridges, Goktepe, & Maratos, *A Comparative Review of Patients with Obsessional Neurosis and with Depression Treated by Psychosurgery,* 123 BRIT. J. PSY-

viously institutionalized patients to return to their families and resume partial or full employment.[36] More modest claims are made about the effectiveness of psychosurgery in the treatment of schizophrenic patients.[37] Perhaps the greatest benefit from psychosurgery is derived by patients suffering from intractable pain, whether caused by unknown psychological factors or untreatable physical diseases.[38] The most controversial use of psychosurgical techniques is upon "violent" patients who are thought to be suffering from epilepsy.[39] There is considerable disagreement as to whether epilepsy and violence are associated,[40] and attempting to control aggressive behavior generates fears of potential political abuse.[41]

CHIATRY 663, 664 (1973); Fan, Marks, & Marset, *Bimedial Leucotomy in Obsessive-Compulsive Neurosis: A Controlled Serial Inquiry*, 118 BRIT. J. PSYCHIATRY 155 (1971).

36 One of the largest samplings, 210 patients, found great improvement in patients suffering from chronic depression. Ström-Olsen & Carlisle, *Bi-Frontal Stereotactic Tractotomy*, 118 BRIT. J. PSYCHIATRY 141 (1971). These surgeons reported that before the operation less than 1% of the patients were fully employed, while afterward over half were fully employed. *Id.* at 148.

37 For a discussion of eight major controlled studies of schizophrenic patients see Templer, *supra* note 28, at 206-70.

38 *See, e.g.*, Roberts & Valenshas, *Control of Pain Associated with Malignant Disease by Freezing: Cryolencotomy*, 37 CONN. MED. 184 (1973). The doctors report on 13 patients with terminal malignancies who were experiencing insuperable pain not controllable by surgery or medicine. After performance of a variation of psychosurgery utilizing freezing techniques, 11 of the 13 were able to return home and all of them were able to discontinue medication without experiencing pain. *Id.* at 185. *See also* Solker & Jannetta, *Central Pain and Central Therapy for Pain*, CURRENT PROBLEMS IN SURGERY 59 (Feb. 1973).

39 *See* V. MARK & F. ERVIN, *supra* note 21; Mark & Neville, *Brain Surgery in Aggressive Epileptics: Social and Ethical Implications*, 226 J.A.M.A. 765 (1973). The authors of the latter work call generally for a recognition that some violence may be occasionally related to organic brain disease, but limit the definition of "violence" posited by Mark and Ervin to "personal" rather than "political" acts. *Id.* at 765, 68.

40 Abnormal electrical charges have often been detected during violent seizures of temporal lobe epilepsy in a specific part of the brain. Thus, the inference has been made that this area of the brain controls such violent activity. V. MARK & F. ERVIN, *supra* note 21, at 60-65. *See generally* TEMPORAL LOBE EPILEPSY (M. Baldwin & P. Bailey eds. 1958). A study sponsored by the National Institute of Neurological Diseases and Strokes (NINDS) concluded that a connection between epilepsy and violence is coincidental, and has not been proven. *See* Goldstein, *Brain Research and Violent Behavior*, 30 ARCHIVES OF NEUROLOGY 1, 28 (1974).

41 *See, e.g.*, Hunt, *The Politics of Psychosurgery*, pt. I, Real Paper (Boston), May 30, 1973, at 1, col. 1; *id.*, pt. II, June 13, 1973, at 8, col. 1; Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972).

The careful scrutiny given the reported results of Vernon Mark and Frank Ervin, two leading psychosurgeons, has cast doubt upon all of the alleged positive claims of psychosurgeons. Their most famous case involved a patient subject to periodic outbursts of extreme anger and violent behavior.[42] The surgeons reported that the patient had no violent episodes for four years after a psychosurgical operation.[43] But a follow-up investigation found the patient in a locked ward of a hospital violently psychotic and completely unable to function for himself.[44] Dr. Andy's reports may also be questionable, since he allegedly failed to include all of his subjects in a follow-up study, and assigned others to the "good result group" despite marked intellectual deterioration.[45] These cases illustrate the growing belief that reports on the successes of modern psychosurgery have been exaggerated, if not distorted.

There are also serious methodological problems in the published results. Most of the studies have no controls.[46] Different surgeons operate on different areas of the brain and thus their results are not comparable. Surgeons who claim good results operating in one area of the brain move to other areas without adequate explanation.[47] The clinical evaluations which are made often lack detail or definitive conclusions.[48]

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42 V. MARK & F. ERVIN, *supra* note 21, at 93-97. The doctors report that the patient was suffering from temporal lobe epilepsy, although scientific data for this diagnosis was lacking (at least in the book).

43 The consent of the patient, Thomas R., was obtained only after "many weeks of patient explanation" during which time ESB was being applied. Without subjecting Thomas to electrical impulses, "the suggestion that the medial portion of his temporal lobe was to be destroyed would provoke wild, disordered thinking." Under the influence of ESB, the patient "showed bland acquiescence to the suggestion." *Id.* at 34. The striking possibility of physician abuse in obtaining informed consent is demonstrated by these revelations.

44 Breggin, *An Independent Following of a Person Operated Upon for Violence and Epilepsy by Drs. Vernon Mark, Frank Ervin, and William Street of the Neuro-Research Foundation of Boston,* ROUGH TIMES, Nov.-Dec. 1973, at 8, 9, *discussed in* Chorover, *Psychosurgery: A Neuropsychological Perspective,* 54 BOSTON U.L. REV. 231, 232-35 (1974).

Thomas' mother has sued Mark and Ervin for totally incapacitating her son. Geis v. Mark, Civil No. 681998 (Super. Ct., Suffolk County, Mass., filed Dec. 3, 1973).

45 Older, *supra* note 13, at 664.

46 Templer, *supra* note 28, at 205. Dr. Templer concludes that there have been only 10 "reasonably well controlled studies" producing informative results.

47 Interview with Dr. Alan Stone, Professor of Law and Psychiatry at Harvard University and Chairman of the Massachusetts Task Force on Psychosurgery, in Boston, Apr. 23, 1975 [hereinafter cited as Stone Interview].

48 Chorover, *supra* note 44, at 239.

Not only is there doubt about the purported benefits of psychosurgery, but adverse effects of the procedure have also been identified. Psychosurgery results in a blunting of the patient's emotions, imagination, and drive, although I.Q. itself may not be affected.[49] In studies conducted on monkeys using the same operations now performed on man, the animals were often left fearful and timid, unable to cope with their normal social habitats.[50] And such effects, because psychosurgery works by the destruction of brain tissue, are irreversible.

Even most who criticize today's practice of psychosurgery recognize the need for its use and continued development — under limited and tightly controlled circumstances. Both the National Institutes of Health (NIH) and the National Institute of Neurological Diseases and Strokes (NINDS) have announced they favor continued experimental performance of psychosurgery.[51] The inadequacy of psychotherapeutic methods is being recognized.[52] Research with the use of drugs for psychological disorders has indicated the limitations and dangers of their long-term use.[53] This absence of an effective alternative is additional justification for further exploring the use of psychosurgery.

II. Present Law

Present law on psychosurgery is minimal. Before outlining a model federal statute, however, it would be useful to examine both existing and proposed federal and state legislation and regulations in this area.

A. *Federal Administrative Regulations*

Although federal regulations either do not apply to psychosurgery or do not provide adequate control, the general federal

49 *Id.* at 234. *See also* Freeman, *Psychosurgery,* in 2 American Handbook of Psychiatry 1521, 1525 (S. Arieti ed. 1959).

50 Chorover, *supra* note 44, at 238-39.

51 *Hearings, supra* note 3, at 342 (remarks of Dr. Bertram Brown); N.Y. Times, Nov. 9, 1973, § C, at 18, *quoted in* Heldman, *Behavior Modification and Other Legal Ambroglios of Human Experimentation,* 53 J. Urban Law 155, 161 (1974).

52 Schwitzgebel, *The Right to Effective Mental Treatment,* 62 Calif. L. Rev. 936, 938 (1974). This article discusses studies analyzing the ineffectiveness of traditional psychotherapeutic methods.

53 *Hearings, supra* note 3, at 349.

approach at least provides an example of regulating experimentation on human subjects.

The Department of Health, Education, and Welfare (DHEW) has proposed and promulgated regulations for the protection of human subjects, which became effective on July 30, 1974,[54] and extend to any "activity involving human subjects to be supported by DHEW grants or contracts . . . ."[55] Initial and continuing reviews of any such activity by an organizational review committee at the institution conducting the research are required as a condition to receiving federal funds.[56] Each committee must be composed of "not less than five persons with varying backgrounds" who must be identified to DHEW.[57] A summary of the proposed research, along with thorough documentation of informed consent, must be submitted to the Department in advance.[58]

In recognition of the need to provide additional protection for children, prisoners, and patients in mental institutions, rules have been proposed by DHEW,[59] which would require the organizational review committees to assure "that there will be no undue inducements to participation" by prisoners or the involuntarily committed and that the activity would also be appropriate for the non-institutionalized.[60] Each institution must also establish a "Consent Committee," approved by the Department, to oversee the selection of subjects and the process of securing their consents.[61] Although the proposed rule is ambiguous, one interpretation is that these consent committees may be given the power to override the informed consent of the patient. Thus, any expansion of these regulations to include psychosurgery might allow state denial of a patient's choice to undergo psychosurgery.[62]

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54 39 Fed. Reg. 18914 (1974). These regulations are a substantial adoption of the proposed rules. 38 Fed. Reg. 27882 (1973). Changes were made in the standards for review and informed consent. The adopted rules also give the Secretary much more discretion in determining what programs must follow the standards.

55 39 Fed. Reg. 18917 (1974).

56 *Id.* at 18920.

57 *Id.* at 18918.

58 *Id.* at 18918-19.

59 *Id.* at 30648. These proposals stem from an earlier policy statement. 38 Fed. Reg. 31738 (1973).

60 39 Fed. Reg. 30654-56 (1974).

61 *Id.* at 30655-56.

62 *Id.* at 30653 (proposing to add § 46.305(a)(1) to C.F.R.).

However, these regulations fail to reach any of the psychosurgery currently being performed in the United States. Neither DHEW directly, nor any of its adjunct research-sponsoring agencies,[63] is now funding any psychosurgical research.[64] Since the new and proposed regulations reach only DHEW-funded activity, none of the several hundred operations now performed annually is affected by them.[65] It should be noted that an NIH proposal, which would have expanded the coverage of the regulations by requiring review of all research projects involving human subjects, whether or not funded by DHEW, in institutions receiving any NIH funds, was dropped from the proposed rules later issued.[66] This change was made without comment.

In 1966, the Surgeon General promulgated a policy statement requiring the creation of review committees as a condition to receiving funds from the Public Health Service for clinical research on human beings.[67] As a result, many medical facilities now have their own control groups.[68]

There is little available data concerning the effectiveness of such review committees,[69] and the existing studies are in conflict.[70] One

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63 The National Institutes of Health is the principle research sponsoring agency within DHEW. It annually awards over 20,000 grants in its field. The National Institute of Neurological Diseases and Strokes (NINDS) also sponsors research in the neuropsychiatric area. *See* Curran, *Governmental Regulation of the Use of Human Subjects in Medical Research: The Approach of Two Federal Agencies*, in P. FREUND, EXPERIMENTATION WITH HUMAN SUBJECTS 402 [hereinafter cited as *Agency Approach*].

64 The Department has ceased any funding of research in the biobehavioral control field largely as a response to public and Congressional pressures. *See, e.g.*, Gallagher, *Federal Funds of $283,000 to Harvard Psychologist B. F. Skinner*, 117 CONG. REC. 47185 (1971). Dr. Brown has testified that now "most of the human studies are aimed at understanding the behavioral consequences of altered brain function as a result of war injury, accident, disease, or surgery performed because of clinical necessity, such as removal of malignant brain tumors." *Hearings, supra* note 3, at 341.

65 *Hearings, supra* note 3, at 343.

66 38 Fed. Reg. 31738, 31745 (1973).

67 *See Agency Approach, supra* note 63, at 436-37. For a more detailed study of the PHS policy, see Confey, *PHS Grant-Supported Research with Human Subjects*, 83 PUBLIC HEALTH REPORTS 127 (1968).

68 For example, the Trustees of Boston City Hospital, where Dr. Mark engages in stereotaxic psychosurgery to control seizures, have established a special multidisciplinary committee for the purpose of reviewing and approving all of Dr. Mark's proposed operations. Annas & Glantz, *Psychosurgery: The Law's Response*, 54 BOSTON U.L. REV. 249, 266 n.109 (1974).

69 *Agency Approach, supra* note 63, at 442.

70 *See, e.g.*, B. BARBER, RESEARCH ON HUMAN SUBJECTS (1973); C. FRIED, MEDICAL

deficiency is the lack of diversified membership. In one NIH sponsored survey of approved committees, it was found that 73 percent were limited to medical peer group membership and fewer than 20 percent had representation from the legal profession.[71] The study also found great variances in size, procedures, and record-keeping practices.[72]

Some psychosurgery is not presently being reviewed at all. Dr. Andy has testified that there is no type of review board or control committee overseeing his practice of psychosurgery.[73] He alone decides whether an operation is warranted and advises the patient accordingly.[74] Thus, federal regulation either does not reach or does not effectively control the practice of psychosurgery.

B. *State Legislation*

1. Oregon

In 1973, Oregon became the first and, thus far, only state to enact a comprehensive measure regulating all psychosurgery practiced on its citizens.[75] The preamble to the Act declares the intent of the legislature "to provide the strictest possible control over the advocacy and practice of operations specifically aimed at permanently altering behavior."[76] A nine member Psychosurgery Review Board is to conduct an investigation of each proposed operation and must give its approval before the operation may proceed.[77] Specific standards of informed consent and appropriateness of the treatment must be met.[78]

Oregon's pioneering attempt to regulate psychosurgery is laudable, but the statute is structurally flawed. Seven out of nine members on the Board are medical specialists,[79] who, while pro-

EXPERIMENTATION: PERSONAL INTEGRITY AND SOCIAL POLICY (1974); *Agency Approach, supra* note 63, at 442; Jaffe, *supra* note 6, at 409-10.

71 *Agency Approach, supra* note 63, at 443.

72 *Id.* at 443-45.

73 *Hearings, supra* note 3, at 354.

74 *Id.*

75 ORE. REV. STAT. §§ 426.700-.755 (1974).

76 Ch. 616, preamble, Ore. Laws 1361-62 (1973).

77 ORE. REV. STAT. § 426.750 (1974).

78 *Id.* § 426.715.

79 The exact membership on the Board is as follows: two psychiatrists, two neurosurgeons, one neurologist, one clinical psychologist, one neuroscientist, one attorney, and one "member of the general public." *Id.* § 426.750.

viding needed expertise, may be predisposed to favoring research.[80] Even though the Board has only one attorney, it is required to render a technical legal judgment on the issue of informed consent. Significantly, a legal guardian may give consent.[81] Moreover, the Review Board may prevent an operation on an individual who has given his informed consent. The definition of psychosurgery provided in the statute is also very narrow.[82]

2. Massachusetts

A similar statute was proposed in Massachusetts during the 1974 session of its legislature.[83] This bill proposed a nine-member Experimental Neurosurgery Review Board, including four members not connected with the medical profession.[84] The procedures required of the Board would have been considerably more extensive than in the Oregon statute.[85] Operations required to be reviewed were defined to encompass surgery performed on any part of the central nervous system.[86] Largely because of this sweep-

80 *See* Jaffe, *supra* note 6, at 409-13; Shapiro, *supra* note 31, at 240-49, and especially 246. *See also* Cooley, *Observations of a Heart Surgeon,* THIS WEEK MAGAZINE, June 22, 1969, at 6; Page, *Raising a Great Dust and Complaining We Cannot See,* 8 ANNALS OF THORACIC SURGERY 191 (1969) in W. CURRAN & E. SHAPIRO, LAW, MEDICINE, & FORENSIC SCIENCE 913-15 (2d ed. 1970).

81 ORE. REV. STAT. § 426.715(5) (1974). Section 426.30 of the statute authorizes appointment of a guardian, with preference in this order: spouse, next of kin, personal friend, public guardian. The statute does not require any investigation as to the basis for any prior appointment of guardians.

82 The statute defines psychosurgery as:

> Any operation designed to irreversibly lesion or destroy brain tissue for the primary purpose of altering the thoughts, emotions, or behavior of a human being. "Psychosurgery" does not include procedures which may irreversibly lesion or destroy brain tissue when undertaken to cure well-defined disease states such as brain tumor, epileptic foci and certain chronic pain syndromes.

Id. § 426.700. The above definition might exclude ESB or other procedures. The exclusion of procedures for "well-defined diseased states" would today allow operations properly defined as psychosurgery.

83 Mass. S. 660 (1974). The bill was introduced by State Senator Chester Atkins and is discussed in Atkins & Lauriat, *Psychosurgery and the Role of Legislation,* 54 BOSTON U.L. REV. 288, 291-93 (1974).

84 Mass. S. 660 § 2 (1974); Atkins & Lauriat, *supra* note 83, at 292.

85 Besides a formal hearing, the board was required to interview and examine the patient thoroughly, including the conduct of extensive medical testing. Mass. S. 660 § 4 (1974). The board was empowered to consult outside authorities. *Id.* § 3.

86 *Id.* § 1. The proposed definition would have included ESB, ultrasonic and thermal procedures, and operations for pain. However, this ambiguous definition could also have encompassed organic diseases.

ing definition, the bill was not reported out of one committee and disapproved in another.[87] The bill has not been reintroduced.[88]

3. California

In California, two recently enacted laws protect confined mental patients and prisoners against involuntary psychosurgery, electroconvulsive therapy (ECT), and conditioning. One law gives any institutionalized mental patient the right to refuse psychosurgery.[89] Previously, certain rights could be denied to a patient by the superintendent of the facility. The amendments also establish specific guidelines for obtaining consent from the patient and require certification by a panel of specialists of the patient's capacity to give informed consent.[90] As in Oregon, however, the panel may prevent an operation on a consenting patient by finding that it is inappropriate. Other deficiencies in the statute include a failure to provide for any non-medical review as to whether informed consent has been given and the granting to a guardian of the right to give consent.

The *California Penal Code* was amended in 1974 to require prior judicial approval of any organic treatment[91] proposed for

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87 The bill was first referred to the Senate Ways and Means Committee which did not report it out. It was then referred to the Joint Health Care Committee, which gave it an "unfavorable" review. Interview with Ms. Kathy Brennan, Staff Assistant, Joint Health Care Committee, in Boston, Apr. 3, 1975.

88 The Massachusetts Department of Mental Health is at this writing preparing regulations for promulgation which will include many of the bill's provisions. Senator Atkins has not reintroduced the bill pending issuance of these regulations. *Id.*

89 Ch. 1534, §§ 1-5, [1974] Cal. Stat. ___, *amending* CAL. WELF. & INST'NS CODE §§ 5325, 5326, *adding* §§ 5326.3-.5 (West Supp. 1975). *But see* Shapiro, *supra* note 31, at 347-48. Professor Shapiro reads the bill as permitting the right to refuse psychosurgery to be denied under guidelines adopted by the State Department of Mental Health. His confusion stems from the unclear language of § 5326: "The professional person in charge of the facility, or his designee may, for good cause, deny a person any of the rights under Section 5325, except under subdivision (g) [concerning psychosurgery] and the rights under subdivision (f) [concerning shock therapy] may be denied only under the conditions specified in Section 5326.4." The bill goes on in § 5326.3 to state unqualifiedly: "No psychosurgery shall be performed unless informed consent to such treatment is obtained in writing. . . . If the patient refuses psychosurgery, his right to refuse may not be denied for any cause."

90 CAL. WELF. & INST'NS CODE § 5326.3 (West Supp. 1975).

91 The term "organic therapy" as used in the statute includes psychosurgery, shock treatment, and any program of aversive, classical, or operant conditioning. CAL. PENAL CODE § 2670.5(c) (West Supp. 1975).

any prisoner.[92] The warden or superintendent of the institution must petition the county court for authorization to administer the treatment, detailing all its aspects and the patient's problem and capacity for informed consent.[93] The statute lists eight items which must be specifically communicated to the patient before obtaining his consent.[94] After a petition has been filed, the court is required to appoint independent counsel where there is financial need and a medical expert in all cases.[95] A standard of "clear and convincing evidence" of need, capacity, and manifestation of consent is required for court authorization of the treatment,[96] which again would allow a consenting patient to be denied treatment. However, the statute prohibits the administration of psychosurgery or ESB under any circumstances without informed consent,[97] and apparently a guardian may not consent for a person who lacks capacity.

The California prisoners statute is the only existing legislation to provide for judicial review prior to any operation. Both California statutes represent reactions to specific incidents in California: first, the use of aversive conditioning on nonconsenting inmates of a state mental hospital,[98] and second, the practice of psychosurgery on prisoners.[99] As we have seen, however, the prac-

92 Ch. 1513 § 1, [1974] Cal. Stat. ___, *adding* CAL. PENAL CODE §§ 2670-80 (West Supp. 1975). Professor Shapiro of the University of Southern California participated substantially in the drafting of the bill, and his article provides extensive analysis of and arguments for it. *See* Shapiro, *supra* note 31.

93 CAL. PENAL CODE § 2675 (West Supp. 1975).

94 *Id.* § 2673. The standards for informed consent in the proposed statute, § 102 *infra*, are based substantially upon this model.

95 *Id.* § 2677.

96 *Id.* § 2679. The traditional measure of persuasion in non-criminal cases is by a preponderance of the evidence. The "clear and convincing" standard is a greater burden, but exactly how much so is uncertain. It has been persuasively argued that this standard should be translated to the jury as requiring a belief that the truth of the contention is "highly probable." *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 796 (2d ed. E. Cleary 1972). *See also* McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246, 253-54 (1944).

97 CAL. PENAL CODE § 2679(b) (West Supp. 1975).

98 The drug Anectine was used in experiments in aversive conditioning (negative stimuli similar to that in Anthony Burgess' *A Clockwork Orange*) at the California Medical Facility at Vacaville and the Atascadero State Mental Hospital. Used on both willing and unwilling patients, this drug produced muscular paralysis and respiratory arrest associated with the disfavored behavior. *See* Shapiro, *supra* note 31, at 245-46.

99 Three prison patients at Vacaville underwent a form of stereotaxic psychosurgery for the control of violent behavior. Trotter, *A Clockwork Orange in a*

tice of psychosurgery today extends beyond the walls of such institutions.[100]

C. *Federal Legislation*

The psychosurgery controversy has also captured the attention of federal legislators. In 1973 five measures were introduced in Congress affecting the practice of psychosurgery.[101] The only bill which received congressional action was introduced by Senator J. Glenn Beall, Jr. and proposed a two-year moratorium on the use of federal funds for any projects involving psychosurgery.[102] During this time, a comprehensive study was to be conducted by DHEW to identify and evaluate operations performed during the previous five years in the United States.[103] The proposal for the five-year study was eventually adopted as part of the Act establishing a National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.[104]

During floor debate, Senator Beall agreed to delete the portion of his bill calling for a two-year moratorium on further psychosurgery.[105] Certain senators expressed the fear that such a total ban would prevent the use of psychosurgery on consenting patients who could not be helped by less drastic methods.[106] Specifically, several successful operations on patients who had failed to respond to any other treatment were cited.[107]

The bill establishing the National Commission was proposed by Senator Edward M. Kennedy and enacted as Title II of the

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California Prison, 101 SCIENCE NEWS 174, 175 (1972). For a discussion of psychosurgery used to control violence, see Chorover, *supra* note 44, 237-39, and references cited therein. *See generally* V. MARK & F. ERVIN, *supra* note 21.

100 See text accompanying notes 26-33 *supra*.

101 S. 878, S. 974, S.J. Res. 71, S.J. Res. 86, and H.R. 6852, 93d Cong., 1st Sess. (1973).

102 S.J. Res. 86, 93d Cong., 1st Sess. § 1 (1973). The resolution was assigned to the Senate Labor and Public Welfare Committee. It was one of the measures on which hearings were conducted by Senator Edward M. Kennedy's Health subcommittee. *See Hearings*, *supra* note 3.

103 S.J. Res. 86, 93d Cong., 1st Sess. § 2 (1973).

104 National Research Service Award Act of 1974, Pub. L. No. 93-348, §§ 201-05, 88 Stat. 348-51 (codified at 42 U.S.C.A. § 289*l*-1 (note) (1974)). Senator Beall's amendment was adopted as § 202(c) of the Act.

105 119 CONG. REC. S16343-44 (daily ed. Sept. 11, 1973).

106 *Id.* at S16341-44.

107 *Id.* at S16343.

National Research Service Award Act of 1974. The 11 member Commission is required to "conduct a comprehensive investigation and study to identify the basic ethical principles which should underlie the conduct of biomedical and behavioral research involving human subjects."[108] Besides its specific task of studying psychosurgery, the Commission is to develop guidelines for the selection of subjects and for obtaining their informed consent.[109] It also is called upon to frame a workable distinction between biomedical and behavioral "research," and the accepted and routine practice of medicine.[110]

The first meeting of the Commission was held on December 3, 1974.[111] Since that time, its work has been in the area of fetal research. The Commission next will turn its attention to the area of psychosurgery, with a final report expected in the winter of 1976.[112]

While the information which will be provided by the Commission is needed, a study alone will not solve the problems raised by psychosurgery. In recognition of the urgency for action Congressman Louis Stokes introduced a bill in the House in 1973[113] to prohibit psychosurgery in all "federally connected health care facilities."[114] The bill also establishes a nine member commission for enforcement.[115] It has not been reintroduced in the current congressional session.[116]

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108 National Research Service Award Act of 1974, § 202(a)(1)(A), 42 U.S.C.A. § 289*l*-1 (note) (1974).

109 *Id.* § 202(a)(2).

110 *Id.* § 202(a)(1)(B).

111 DHEW Press Release, Dec. 3, 1974 (on file with *Harvard Journal on Legislation*). The Commission membership includes three medical doctors and two clinical psychologists, all of whom have conducted biomedical or behavioral research involving human subjects. Three members of the Commission are attorneys. The Commission is chaired by Dr. Kenneth Ryan of Harvard Medical School and the Boston Hospital for Women.

112 Interview with Michael S. Yesley, Staff Director of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, in Boston, Apr. 2, 1975.

113 The bill was introduced as H.R. 5371, 93d Cong., 1st Sess. (1973), and was reintroduced as H.R. 6852. The proposal was referred to the House Interstate and Foreign Commerce Committee but was not reported out.

114 H.R. 6852, 93d Cong., 1st Sess. § 1 (1973). Nearly every medical facility in the country would thereby be affected, since the receipt of federal grants or loans for construction programs, or as aid through the Social Security Act would qualify as "federally connected." *Id.*

115 H.R. 6852, 93d Cong., 1st Sess. § 4 (1973). Specifically excluded from member-

III. An Alternative Proposal

A. *The Need for Legislation*

The preceding discussion shows that the practice of psychosurgery, despite its potential for medical harm, is largely unregulated and unreviewed. In contrast, the distribution of drugs has been regulated to some degree by the Food and Drug Administration (FDA) since 1938 and was brought under demanding requirements during all phases of development in the Drug Amendments of 1962.[117] Certainly, psychosurgery produces effects which are at least as far reaching and irreversible as the most potent of drugs.[118] In fact, no drug which even temporarily produced the effects of psychosurgery could be marketed without limitations on its use.[119]

Psychosurgery is also a potential tool of those who would control behavior. In his remarkably prescient play, *Candle in the Wind*, Alexander Solzhenitsyn depicts a futuristic society in which human problems and political unrest are managed by a fictional form of psychosurgery.[120] While such fears of psychotechnological control of society are often exaggerated,[121] certainly those uses already instance, use of the technique to "civilize" antisocial individuals[123] proposed have far reaching and enormous consequences.[122] For

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ship on the Commission is any physician or person trained in psychology. There is no provision by which this panel of nonprofessionals may obtain specialized advice.

116 Interview with Edward Black, Legislative Assistant to Congressman Stokes, in Boston, Apr. 3, 1975.

117 *See Agency Approach, supra* note 63, at 410-16. The 1962 law required proof of the safety and therapeutic efficacy of the drugs, more complete description of ingredients and risks, standards of consent for any subjects upon whom the drugs are tested, and periodic progress reports on the effects of the drugs. For an excellent summary and analysis of the history of FDA regulation of drugs see *id.* at 409-30.

118 *See generally* W. Cutting, Handbook of Pharmacology (4th ed. 1969).

119 *Hearings, supra* note 3, at 375 (testimony of Dr. Willard Gaylin).

120 A. Solzhenitsyn, Candle in the Wind (1960), *excerpted in* 4 Intellectual Digest, Jan. 1974, at 25. An episode of the popular science-fiction television series *Star Trek*, "The Dagger of the Mind," depicted the control of an entire earth colony by one eccentric scientist through the use of a "neuroneutralizer."

121 *See, e.g., Hearings, supra* note 3, at 367 (testimony of Dr. Robert G. Heath). Dr. B. F. Skinner has pointed out that there are much more direct and efficacious methods of social control, such as police power, public schooling, religion, and the mass media. *Hearings, supra* note 3, at 369-73.

122 *See* Note, *supra* note 41, at 616; *Hearings, supra* note 3, at 342 (testimony of Dr. Bertram Brown).

123 *See* J. Delgado, Physical Control of the Mind: Toward a Psychocivilized

and to control participants in urban riots[124] has been suggested. Such ideas have made psychosurgery a perceived threat for certain racial groups.[125] Whether or not such fears are justified, the potential medical and social dangers warrant federal legislative action.

B. *Objections to Both Prohibition and Imposition*

The use of psychosurgery may pose a serious threat to the best interests of many individuals and perhaps to society itself.[126] However, this therapy also represents an important medical advance for treating some mental illnesses, which holds additional promise for the future.[127] Any statute must balance freedom from the medical and social hazards of psychosurgery against the possibility of freedom from the debilitation of mental illness. The effect of therapy foregone may be just as destructive of human liberty and potential in one case as the use of such therapy in another.

There would be a contradiction in the government's protecting its citizens from the dangers of psychosurgery by prohibiting them from obtaining it — insuring autonomy by denying autonomy. Deciding whether to consent to psychosurgery is an unimpeded exercise of free choice — a value in itself with which it is prima facie wrong to interfere. It enables persons to experiment — even with living — and to discover things valuable both to themselves and to others.[128] For the victim of mental illness, it is a part of the search for full humanity.

The American concept of liberty grew out of the fundamental principle that a person is free to act and choose so long as his

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SOCIETY (1969), *discussed in* Breggin, *supra* note 3, at E1609. According to the author, the book contains "a discussion of what the mind is, the technical problems involved in its possible control by physical means, and the outlook for development of a future psychocivilized society." DELGADO, *supra*, at 19-20. An analysis of the broader issues of behavior control is presented in B. SKINNER, BEYOND FREEDOM AND DIGNITY (1969).

124 *See* Mark, Sweet, & Ervin, *Role of Brain Disease in Riots and Urban Violence*, 201 J.A.M.A. 895 (1967) (letter), *reprinted in* Mark, *Psychosurgery v. Antipsychiatry*, 54 BOSTON U.L. REV. 217, 222 n.22 (1974). *See generally* V. MARK & F. ERVIN, *supra* note 21.

125 Mason, *New Threat to Blacks: Brain Surgery to Control Behavior*, EBONY, Feb. 1, 1973, at 63. *See also* Breggin, *supra* note 3, at E1610-11.

126 See text accompanying notes 42-47 *supra*.

127 See text accompanying notes 34-41 *supra*.

128 H. HART, LAW, LIBERTY, AND MORALITY 21-22 (1963).

conduct does not infringe upon the same right in others.[129] Much in this concept is owed to John Stuart Mill.[130] This value of personal liberty and autonomy finds expression today in the concept of due process and the "unenumerated rights" of the Constitution.[131] Thus, it would be wrong to deny an individual's right to choose psychosurgery when this choice does not threaten others.[132]

The right to choose implies more than just limiting governmental restrictions. It also means that the individual must make a decision — choosing to impose risks upon himself — before he can be subjected to any potential danger. Thus, it is submitted that neither the state nor any person should be able to compel a person to undergo treatment unless he consents. State action to assure that

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129 In Mugler v. Kansas, 123 U.S. 623 (1887), the Supreme Court, in commenting upon a state prohibition law, declared: "[o]ur system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself."

130 Mill has written:

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them . . . . In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences.

J. MILL, ON LIBERTY 75-76 (A. Castell ed. 1947).

131 *See* Comment, *Unenumerated Rights — Substantive Due Process, the Ninth Amendment, and John Stuart Mill,* 1971 WIS. L. REV. 922, 924 (1971). The due process clause, of course, only protects individuals against governmental, not private interference. U.S. CONST. amend. V; *id.* amend. XIV, § 1; Civil Rights Cases, 109 U.S. 3, 11 (1883).

132 It may be argued that one who dies or is institutionalized as a result of psychosurgery imposes on the state and its citizens the burden of supporting him or his dependents, thus justifying prohibition of psychosurgery to avoid such a risk. However, this view ignores the potential social benefits of psychosurgery. The fact that a successful operation makes the patient a more productive citizen at least arguably outweighs the possibility of increased dependency. The full disclosure of information required by the statute proposed herein is designed to minimize the probability that a patient will choose an operation likely to fail.

By disregarding the social benefits of such other activities as driving or engaging in athletics, one might justify their prohibition solely because they involve risk of death or disability — a result society surely would not tolerate. Regulation regarding the effect of such activities on others, however, might be justified. For a thorough discussion and listing of cases where individual rights have been measured against societal good see F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 3-33 (1970).

psychosurgery is not performed without consent does not intrude upon free choice, it protects it.[133]

1. Prohibition

It can be argued that access to the potential benefits of psychosurgery and other mental treatment is a constitutional right grounded in the first amendment. Psychosurgery may enhance mental capabilities or remove barriers to the exercise of existing mental powers, thus augmenting the ability to develop ideas. In the only judicial opinion dealing with psychosurgery, the court observed in a dictum that "if the First Amendment protects the freedom to express ideas, it necessarily follows that it must protect the freedom to generate ideas. Without the latter protection, the former is meaningless."[134] Professor Shapiro has developed this line of reasoning into an argument for a constitutional right to mental activity of any kind, which would protect against state coercive imposition of psychosurgery as well as government denial of access to therapy which might be beneficial.[135]

The D.C. Circuit Court found in *Rouse v. Cameron* that involuntary civil commitment gives rise to a constitutional right to adequate treatment under the due process, equal protection, and cruel and unusual punishment clauses, though the decision was based on statutory grounds.[136] *Wyatt v. Stickney* in Alabama, how-

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133 There is a clear distinction between the state compelling a person to act to protect his well being and its insuring that the person himself wants to act in one way or another affecting his well being. In the first case the state itself is deciding what is in an individual's best interests while in the second the state is making sure that it is indeed the individual making this decision. *See generally* J. MILL, PRINCIPLES OF POLITICAL ECONOMY 937-38 (1965).

134 Kaimowitz v. Dep't of Mental Health, Civil No. 73-19434-AW, at 35 (Cir. Ct., Wayne County, Mich., July 10, 1973), *summarized at* 42 U.S.L.W. 2063 (July 31, 1973) [hereinafter cited as Kaimowitz v. Dep't of Mental Health].

135 Shapiro, *supra* note 31, at 256-57, 324-34. It should be noted that there is no case support for such a right other than *Kaimowitz*. If mental activity is held to be within first amendment protection by future courts, they will undoubtedly allow the right to be overcome by a compelling state interest as under the "clear and present danger" test. However, where a fundamental right is burdened, the government is required to use alternatives less restrictive than prohibition, if available. NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960). If genetic engineering becomes a reality, the implications of a constitutional right to mental activity will reach far beyond access to psychosurgery.

136 Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966). *Rouse* is considered

ever, found an unquestionable "constitutional right to receive such individual treatment as will give each [patient] a realistic opportunity to be cured or to improve his or her mental condition."[137] It is treatment, the court declared, which is the constitutional justification for continued confinement of persons involuntarily and civilly committed.[138]

While this mandated right to treatment applies only to the involuntarily confined,[139] this group is large, and includes many of those who would be potential subjects of psychosurgery. Any proscription of the practice could thus face a constitutional objection that it was preventing therapy in cases where psychosurgery was adequate and realistic treatment. Moreover, therapy would have to be provided at government expense.

2. Imposition

In addition to overriding the autonomous exercise of personal choice, the performance of psychosurgery on a non-consenting patient would clearly be a common law battery,[140] for which the surgeon would be liable. The availability of a private action, however, does not obviate the need for statutory protection. A mentally ill patient, especially if involuntarily confined, whose condition is worsened by psychosurgery, is unlikely to sue. Even if relatives sued on his behalf, monetary damages would be difficult to prove.

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the seminal decision in the right to treatment area. *See* New York State Association for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 758 (E.D.N.Y. 1973).

137 Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

138 *Id.* A more definitive pronouncement on the doctrine was recently handed down by the Supreme Court as a result of a Fifth Circuit case finding a right to treatment for patients in a state mental hospital. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *aff'd by a unanimous Court (vacated on the issue of damages)* 50 U.S.L.W. 4929 (U.S. June 26, 1975) (a more complete discussion of the Supreme Court opinion does not appear herein because the case was decided after this issue went to press). The Supreme Court held that a civilly committed patient who is not dangerous to society must either be given treatment or released.

For discussions of the right to treatment doctrine see Morris, *Institutionalizing the Rights of Mental Patients: Committing the Legislature,* 62 CALIF. L. REV. 957, 958 (1974); *Symposium, The Right to Treatment,* 57 GEO. L.J. 673 (1969); Comment, *Wyatt v. Stickney and The Right of the Civilly Committed Mental Patients to Adequate Treatment,* 86 HARV. L. REV. 1282 (1973); Note, *The Nascent Right to Treatment,* 53 VA. L. REV. 1134 (1967).

139 325 F. Supp. at 784.

140 W. PROSSER, LAW OF TORTS 36 (4th ed. 1971).

Imposition of psychosurgery by the government on non-consenting institutionalized persons may also be an unconstitutional invasion of privacy. That "mental privacy" is protected by the Constitution was made clear by the Supreme Court in *Stanley v. Georgia*,[141] a case challenging Georgia's prohibition of the possession of obscene material. The statute posed the question of whether the power to protect the body of a citizen also included the power to protect his mind.[142] The Court affirmed that it was "well established that the Constitution protects the right to receive information and ideas."[143] No government has the right to intrude upon one's privacy, the Court said, and concluded that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[144]

The court in *Kaimowitz v. Dep't of Mental Health*, the only decided case involving psychosurgery, adopted an analysis of privacy as one of the bases for its decision, relying both upon the first amendment's protection of privacy and upon the rights guaranteed by other constitutional provisions:[145]

> There is no privacy more deserving of constitutional protection than that of one's mind. . . .
>
> Intrusion into one's intellect . . . is an intrusion into one's constitutionally protected right of privacy. If one is not protected in his thoughts, behavior, personality, and identity, then the right of privacy becomes meaningless.[146]

Since the purpose of psychosurgery is to modify thought and behavior and since it literally intrudes into the brain, a coercive operation by the state clearly invades any concept of mental privacy.

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141 394 U.S. 557 (1969).

142 *Id.* at 560.

143 *Id.* at 564. *See also* Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Lamont v. Postmaster General, 381 U.S. 301, 307-08 (1964) (Brennan, J., concurring).

144 394 U.S. at 565.

145 Kaimowitz v. Dep't of Mental Health, *supra* note 134 at 37. In addition to *Stanley* the court cited with approval Griswald v. Connecticut, 381 U.S. 479 (1965), where the court found the right to privacy emanating from the penumbra of the Bill of Rights, *id.* at 484, and Roe v. Wade, 410 U.S. 113, in which privacy was grounded in the fourteenth amendment and the Court observed that prior cases had relied also on the first, fourth, fifth, and ninth amendments, *id.* at 152-53.

146 Kaimowitz v. Dep't of Mental Health, *supra* note 134, at 38.

The only approach to the regulation of psychosurgery which avoids the infirmities of both prohibition and imposition is assurance that the operation is performed only when there is prior informed consent, with narrow exceptions for compelling medical reasons.

E. *Informed Consent*

In order to understand the problems and implications of defining and policing informed consent, it is necessary to analyze the doctrine as it appears in medical malpractice law.

1. The General Rule

The American tort law notion of consent starts with the premise, drawn from John Stuart Mill, that each individual is the master of his own body and mind.[147] Therefore, he may recover damages from one who invades his person against his will. Although this principle received early judicial articulation,[148] most of the present law of informed consent developed after 1960.[149] The general rule is that a physician must disclose all material facts necessary to form the basis of informed consent before conducting an operation or be liable for the damage done.[150] The doctor may withhold only such information as is necessary to insure the welfare of the pa-

147 Annot., 79 A.L.R.2d 1028 (1961). *See* J. MILL, *supra* note 130, at 10.

148 Sixty years ago Judge Cardozo, writing for the New York Court of Appeals, said, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

149 *See* Plante, *An Analysis of "Informed Consent,"* 36 Ford. L. Rev. 639 (1968). Professor Plante writes that the first opinion to deal specifically with the problem was Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (1957), in which the court stated its view of the law:

> A physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment. Likewise the physician may not minimize the known dangers of a procedure or operation in order to induce his patient's consent.

Id. at 578, 317 P.2d at 181. The court, however, qualified this rule by requiring the physician to also recognize the patient's mental and emotional condition and to use his discretion accordingly in discussing the elements of risk. *Id.* The next step was taken by Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093 (1960). *See also* Cubbs v. Grant, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

150 Annot., 79 A.L.R.2d 1028, 1029-30 (1961).

tient.[151] In so doing, the physician is judged on the basis of the reasonableness of his actions.[152]

The leading modern case on informed consent is *Canterbury v. Spence*.[153] There, a physician performed surgery on a ruptured disc without properly disclosing the risks to the patient.[154] The patient later suffered from trauma paralysis of the bottom half of his body — a slight, but known risk of the operation performed.[155] The court reiterated the general informed consent rule from a long line of decisions,[156] emphasizing the special quasi-fiducial qualities of the doctor-patient relationship.[157]

The *Canterbury* court then went beyond the "majority rule" that only the standards of the community and the same school of medical thought determine what must be disclosed.[158] Significantly, the Canterbury court pointed out that in cases where the physician has specialized knowledge and complex procedures are used, a higher standard for disclosure and consent must be met.[159] Certainly psychosurgery involves specialized knowledge and complex procedures.

2. Exceptions

Beyond basic principles one finds the law of informed consent riddled with exceptions and uncertainties. Even the *Canterbury* court recognized that full disclosure can never be made.[160] Slight

151 *Id.*
152 *Id.* at 1030.
153 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972).
154 *Id.* at 778.
155 *Id.* at 777.
156 *See, e.g.*, Franklyn v. Peabody, 249 Mich. 363, 366-67, 228 N.W. 681, 682 (1930); Sheets v. Burman, 322 F.2d 277, 279 (5th Cir. 1963). The recent case law and legal commentary on the subject of informed consent is abundant. The most complete list of references is contained in Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628, n.1 (1970).
157 The court observed that the trust and confidence reposed in a doctor is greater than in arms-length transaction. 464 F.2d at 782. *See also* Campbell v. Oliva, 424 F.2d 1244, 1250 (6th Cir. 1970).
158 464 F.2d at 783. For an enunciation of the "community standard" rule, see W. PROSSER, *supra* note 140, at 163; Karp v. Cooley, 493 F.2d 408, 419 (5th Cir. 1974).
159 464 F.2d at 785. *See also* Washington Hosp. Center v. Butler, 384 F.2d 331, 335-37 (D.C. Cir. 1967).
160 464 F.2d at 786.

"possibilities" or the exact quantification of certain "probabilities" need not be determined nor disclosed.[161] The "emergency exception" to the necessity of disclosure and consent is also well recognized.[162]

Perhaps the most pernicious and far-reaching "exception" to the rule demanding informed consent is that disclosure is not required if perceived as a threat to the patient.[163] One leading case declared a privilege on therapeutic grounds where a physician withholds information — thus getting less than "informed" consent — because of a perceived danger that recovery will be jeopardized by such knowledge, as with an unstable, temperamental, or depressed patient.[164] Even the consent guidelines of the FDA recognize this exception.[165] While the *Canterbury* court recognized this rule, it also noted that there are innumerable problems in determining when a "danger" to the patient exists and questioned to what extent a physician may make unwarranted assumptions about the patient's reactions to information.[166] Within the context of psychosurgery, where the procedure is extraordinarily complex, the dangers great, and the patients almost always mentally ill, this exception could be seriously abused.

The ultimate problem with today's practice of informed consent is that the relevant decisions are left to the physician. Courts intervene only ex post facto, and then only in those rare cases which result in litigation. As a result, there is no assurance that doctors

161 Annot., 79 A.L.R.2d 1028, 1031 (1961).

162 *Id.* at 1035; Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir. 1972).

163 Annot., 79 A.L.R.2d 1028, 1034-35 (1961).

164 Natanson v. Kline, 186 Kan. 393, 409, 350 P.2d 1093, 1103 (1960).

165 21 C.F.R. §§ 130.37(a), (b), (d), (g) (1973). *Agency Approach, supra* note 63, at 429. Professor Curran points out that when an investigator is allowed to judge what is in the "best interests of the patient," he is being permitted to wear two hats at the same time — that of investigator and that of the subject's personal physician. The roles may not be compatible, especially where he has a personal interest in the research. *Id. The Report on Human Experimentation of the Public Health Council of the Netherlands* recognizes this conflict: "Scientific experimentations demand from the investigator an objective attitude, a certain distance and restraint toward his object of experimentation, which is actually in conflict with the relationship of physician and patient." 4 WORLD MED. J. 299, 300 (1957), in W. CURRAN & E. SHAPIRO, LAW, MEDICINE, & FORENSIC SCIENCE 889, 891 (2d ed. 1970) [hereinafter cited as *PHC Report*]. To the extent that operations by psychosurgeons are motivated by research objectives, there is a similar incentive not to convey information which might dissuade patients from consenting. *Id.*

166 464 F.2d at 788-89. *See* Comment, *Informed Consent in Medical Malpractice*, 55 CALIF. L. REV. 1396, 1409-11 (1967).

are actually obtaining informed consent in all cases.[167] Another problem is that present standards do not require disclosure of the fact that experience with an operation is so limited that its effects are uncertain or indeed unknown.[168]

The attitude of the physician is likely to be that the information relevant to informed consent is so incomprehensible to patients that a detailed disclosure would be time-consuming and purposeless.[169] One physician has written: "Consent is primarily important in the abstract and appeals to those who are interested in civil libertarian problems."[170] Thus, physician-controlled consent standards ought to be viewed with skepticism.

The lack of specific guidelines for informed consent aggravates this problem. The "reasonableness" standard is inherently obscure[171] and necessarily rests on a case-by-case determination.[172] The international medical codes, which should provide basic direction for all physicians, raise as many questions as they answer and provide for no participation by non-physicians in the process of formulating or applying standards.[173] The medical profession itself has frankly admitted the need for precise written standards.[174] Whatever standards may be developed by the new National Commission will have no binding effect.[175]

There is much debate as to whether psychosurgery is "experimental" or "therapeutic" in nature.[176] The categorization has important legal implications for all medical practice. The existing detailed standards of informed consent, including the international

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167 *See* Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship,* 79 YALE L.J. 1533, 1558 (1970).

168 *See* Shapiro, *supra* note 31, at 311, n.259.

169 Note, *supra* note 167, at 1558-59.

170 Jaffe, *supra* note 6, at 420 (quoting Dr. Louis Lasagna).

171 *See* W. PROSSER, *supra* note 140 at 151.

172 464 F.2d at 788.

173 Ratnoff & Smith, *Human Laboratory Animals: Martyrs for Medicine,* 36 FORD. L. REV. 673, 681-82 (1968). Several of the most prominent international codes, such as Nuremberg and the Declaration of Helsinki, are reprinted in W. CURRAN & E. SHAPIRO, LAW, MEDICINE, & FORENSIC SCIENCE 887-902 (2d ed. 1970).

174 Ritts, *Physician's View of Informed Consent in Human Experimentation,* 36 FORD. L. REV. 631, 632 (1968).

175 National Research Service Award Act of 1974 § 202(a)(2), 42 U.S.C.A. § 289*l*-1 (note) (1974).

176 Dr. Andy, one of the leading practitioners of psychosurgery, has declared flatly that psychological procedures are "not experimental." *Hearings, supra* note 3, at 350.

medical codes, apply only to experimental projects, such as drug research, rather than to therapeutic activities.[177] Patients may not generally be charged for the costs of experimental procedures,[178] and informed consent is more closely scrutinized in these cases.[179]

Where psychosurgery falls on a continuum from experimental uncertainty to therapeutic certainty varies with each case. The standard for informed consent should not depend on assignment to one of two supposedly discrete categories, between which there is no sharp dividing line. In any case, the emphasis should be on conveying all relevant information to the patient, and especially the probability of possible effects.

3. Incapacity for Consent

But even if standards of disclosure and informed consent were promulgated and enforced, present law admits of yet another exception which could negate their effect. It is well established that where the patient is "unable" to give consent, as with children and legal incompetents, approval may be obtained from the patient's guardian, parent, or other "representative."[180] Statutes which allow this exception[181] may be accomplishing little.

This problem was pointedly identified by Dr. Harold Edgar of Columbia University:

> As things now stand, the surgeon is covered as long as he explains uncertainties in the methods and gets [the family] to agree to it without guarantee. It is quite possible that

177 *See, e.g., PHC Report, supra* note 165; A.M.A., Principles of Medical Ethics (1957) (pamphlet), in Ratnoff and Smith, *supra* note 173, at 679. Even at this, the codes do not require consent in all cases. The *Declaration of Helsinki* provides for example: "If at all possible, consistent with the patient psychology, the doctor should obtain the patient's freely given consent. . . ." World Medical Association, *Declaration of Helsinki,* 11 WORLD MEDICAL JOURNAL 281 (1964), in W. CURRAN & E. SHAPIRO, LAW, MEDICINE, & FORENSIC SCIENCE 893, 894 (2d ed. 1970) (hereinafter cited as *Declaration of Helsinki*).

178 Stone Interview, *supra* note 47.

179 Kaimowitz v. Dep't of Mental Health, *supra* note 134, at 18-22; Note, *Experimentation on Human Beings,* 20 STAN. L. REV. 99, 102-05 (1967).

180 Cobbs v. Grant, 8 Cal.3d 229, 244, 502 P.2d 1, 10, 104 Cal. Rptr. 505, 514 (1972); Banner v. Moran, 126 F.2d 121 (D.C. Cir. 1941). When parents are considered to unreasonably be refusing consent, courts may order a custodian appointed in their place. W. PROSSER, *supra* note 140 at 103 n.50; *In re* Brooklyn Hospital v. Torres, 45 Misc. 2d 914, 258 N.Y.S.2d 621 (1965). Even the FDA's statutory consent requirements allow surrogate approval. *Agency Approach, supra* note 63, at 427-30.

181 *See, e.g.,* CAL. WELF. & INST'NS CODE § 5326.3 (West Supp. 1975).

> some families would be willing to consent to almost anything to get a troublesome relative off their hands. There must be protection against collusion of such families with overzealous psychosurgeons. The unwilling patients' rights must be safeguarded.[182]

This exhortation takes on an added dimension when one realizes that all subjects for potential psychosurgery are seriously mentally ill; many are institutionalized; many are children. The proposed statute therefore provides that, in the absence of capacity to consent, psychosurgery may not be performed except in those rare cases where compelling medical need exists and is confirmed by both judicial and medical review.

Even when a court is not willing to accept consent by a relative or guardian, it may itself decide whether the patient would have consented had he possessed the mental capacity. The doctrine of substituted judgment would then permit fulfillment of the patient's "real" wishes.[183] However, there is no assurance the court's decision will be the same as a subjective decision made by a mentally competent person in the circumstances of the case.[184]

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182 Restak, *supra* note 12, at 57.

183 The problem of consent for an incompetent was confronted by the court in Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969). In that case, the court approved the donation of a kidney by a 27 year old with an I.Q. of 35 to his brother, who would have died without the new organ. The court adopted the doctrine of substituted judgment and decided that the retarded brother would have consented had he been mentally competent. *Id.* at 145-48. The majority also cited the low risk to the donor and the life-saving benefit to the donee. *Id.* at 148-49. The court heard expert testimony that the retarded brother would suffer psychological trauma if his brother should die. *Id.* at 146-47.

184 A vigorous dissenting opinion in *Strunk* (the court split four to three) pointed out the danger of substituted judgment:

> Apparently because of my indelible recollection of a government which, to the everlasting shame of its citizens, embarked on a program of genocide and experimentation with human bodies I have been more troubled in reaching a decision in this case than in any other. My sympathies and emotions are torn between a compassion to aid an ailing young man and a duty to fully protect [an] unfortunate [member] of society.
>
> . . . .
>
> . . . To hold that committees, guardians, or courts have such awesome power even in the persuasive case before us, could establish legal precedent, the dire result of which we cannot fathom.

Id. at 149-50 (Steinfield, J., dissenting). The case is thoughtfully analyzed in Comment, 58 CALIF. L. REV. 754 (1970). *See also* Savage, *Organ Transplantation with an Incompetent Donor: Kentucky Resolves the Dilemma of Strunk v. Strunk,* 58 KY. L.J. 129 (1970). Other cases are discussed in Curran, *A Problem of Consent: Kidney Transplantation in Minors,* 34 N.Y.U.L. REV. 891 (1959).

The general societal view that a mentally ill person is ipso facto incompetent is simply empirically untrue. Mental illness may coexist with good mental capacity.[185] Perhaps the most striking illustration of the fine lines between states of mind is contained in a study by Dr. Rosenham, in which normal outsiders were planted in a mental hospital for a prolonged period with the result that the facility's medical personnel, such as nurses and orderlies, could not tell the difference between the behavior of the "sane" and the behavior of the "insane."[186] The law generally presumes competence in all transactions, including competence to consent to medical treatment.[187] It should do no less in the case of those facing psychosurgery.

In *Winters v. Miller*[188] the court upheld the right of a mentally ill Christian Scientist to refuse to take mind-altering drugs. The court held that a physician's finding of mental illness does not include or justify a finding of mental incompetence.[189] This same principle is included in the California statute governing the practice of psychosurgery on prisoners.[190] It is also a part of the standard of informed consent proposed in this piece.

A special category of persons lacking the full capacity for consent and requiring additional safeguarding is children. Today they are the subjects of many psychosurgical operations.[191] The availability of psychosurgical treatment for children is important, because early therapy is possible and most helpful.[192] In addition,

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185 G. ULETT, A SYNOPSIS OF CONTEMPORARY PSYCHIATRY 337-38 (5th ed. 1972). The author argues that any test for competency must be based upon the question "competence for what purpose?"

186 Rosenbaum, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW, 379 (1973). The author's personal observations at the California State Mental Hospital at Camarillo support Dr. Rosenbaum's conclusions. With the exception of the seriously mentally retarded and paranoid schizophrenic, the "insane" persons there function and interact often in a manner that is indistinguishable from those who are "sane."

187 *See, e.g.*, Belger v. Arnot, 344 Mass. 679, 686, 183 N.E.2d 866, 891 (1962); Grannum v. Berard, 70 Wash.2d 304, 307, 422 P.2d 812, 815 (1967). *See also* Annot., 25 A.L.R.3d 1439, 1441-42 (1969).

188 446 F.2d 65 (2d Cir. 1971), *cert. denied*, 404 U.S. 815 (1971).

189 *Id.* at 68. The court also said that a vague finding that the patient was "possibly harmful to herself and others" was inadequate to overcome her unwillingness. *Id.* at 70.

190 CAL. PENAL CODE § 2672(b) (West Supp. 1975).

191 *See* text accompanying notes 29-30 *supra*.

192 Many disorders which might be treated by procedures arguably within the

since the basic body biochemistry of children is different from that of adults, progress in medical treatment for children is dependent upon research with children.[193] The English have found that severe restrictions on research practices involving children have impeded advances in medicine.[194]

4. Involuntary Confinement

Another distinct problem is presented by the case of institutionalized patients. In *Kaimowitz v. Department of Mental Health*,[195] the court held that the inherently coercive atmosphere of a lengthy institutionalization so greatly diminishes one's capacity to give informed, voluntary consent that it is legally impossible to do so for such a highly experimental procedure as psychosurgery.[196] This prohibition was apparently based upon the experimental nature of the procedure rather than the inherent coerciveness of the institutional framework, since the court also said consent to "accepted neurological procedure[s]" would be possible.[197] It was concerned about the additional risk involved in

definition of psychosurgery affect exclusively (or primarily) children, *e.g.*, poliomyelitis, cerebral palsy, hyperkinesis, and certain intractable psychomotor diseases. *See Hearings, supra* note 3, at 350-51. Other diseases, such as epilepsy, first appear during childhood.

193 *See* 38 Fed. Reg. 31740 (1973).

194 *See* Beecher, *Scarce Resources and Medical Advancement* in P. FREUND, EXPERIMENTATION WITH HUMAN SUBJECTS 66, 73-74.

195 Kaimowitz v. Dep't of Mental Health, *supra* note 134. The case involved a proposed psychosurgical operation on a 36 year old patient who had been confined for 17 years as a criminal psychopath charged with murder and rape. The participating psychiatrists allegedly obtained the consent of both the patient and his parents, although there was conflicting testimony on this issue at the trial. Eventually, the criminal psychopath statute under which the patient was being held was found unconstitutional. However, the court concluded that the question was likely to arise again and proceeded to address its more far-reaching implications. *Id.* at 3-15. The case is discussed in Note, *Kaimowitz v. Department of Mental Health: A Right To Be Free From Experimental Psychosurgery* 54 BOSTON U.L. REV. 301 (1974); Note, 50 CHI.-KENT L. REV. 526 (1974), and is excerpted in 42 U.S.L.W. 2063 (1973).

196 Kaimowitz v. Dep't of Mental Health, *supra* note 134, at 31. The court stated, "[i]t is impossible for an involuntarily detained mental patient to be free of ulterior forms of restraint or coercion when his very release from the institution may depend upon his cooperating with the institutional authorities and his giving consent to experimental psychosurgery." *Id.* at 27.

197 *Id.* at 40. Professor Shapiro believes that the implication of the Kaimowitz opinion is that a person involuntarily confined may have the capacity to consent to nonexperimental therapy but not to experimental procedures, because of the inherent uncertainties in the latter. Shapiro, *supra* note 31, at 316-17 n.275.

experimental procedures. The court did point out, however, the coercive atmosphere and diminished capacity for sound judgment which generally attend institutionalization.[198]

Erving Goffman's classic study *Asylums*[199] demonstrated the repressive qualities of institutions such as prisons and their effects on the inmates. The individual "begins a series of abasements, degradations, humiliations, and profanations of self."[200] Prisoners are far more likely to "consent" to participation in experiments as relief from the boredom of daily confinement, as a respite from unsatisfactory living conditions, or as a way of earning some additional money.[201] It has been documented, for example, that prisoners will submit to painful and hazardous experiments for as little as a dollar a day.[202] There is also the natural expectation that participation in research will be viewed favorably by prison authorities and parole officials.[203]

There is therefore a need to provide special protection to prisoners and other involuntarily confined persons. Some have proposed a flat ban on the practice of psychosurgery on prisoners,[204] for example, but any such exclusion of a class of persons would

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198 Kaimowitz v. Dep't of Mental Health, *supra* note 134, at 25. Two commentators have remarked:

> [T]he court's reasoning seems contradictory. On the one hand, the court emphasized the effects of institutionalization on the capacity of the patient to give informed and voluntary consent. On the other hand, however, it limited its holding to experimental situations. If amygdalotomy were to be considered an accepted neurosurgical practice, the involuntarily detained mental patient could, in the court's view, give legally adequate consent. . . . The nonexperimental status of a procedure may increase the prospective patient's knowledge concerning the risks and benefits involved, but it in no way counteracts the effects of institutionalization on his ability to consent in a truly informed fashion.

Annas & Glantz, *supra* note 68, at 262-63. Moreover, the court's distinction regarding a procedure's "experimental" nature would require an ad hoc determination about the character of not only psychosurgical techniques, but conceivably any medical practice which was as yet not wholly proven and accepted, when used on persons in institutional settings. An added but unclarified variable in the court's formula is the length of the institutionalization. In short, the opinion offers little precedential help in balancing the factors determining whether consent is possible and the quantum of information and voluntariness necessary.

199 E. GOFFMAN, ASYLUMS (1961).

200 *Id.* at 14.

201 38 Fed. Reg. 31743-44 (1973).

202 Mitford, *Experiments Behind Bars,* ATLANTIC MONTHLY, Jan. 1973, at 65.

203 38 Fed. Reg. 31743 (1973).

204 Mark & Neville, *supra* note 39, at 771.

be unnecessarily unfair.[205] The California statutes enacted are directed at the special needs of prisoners[206] and institutionalized patients.[207] The new National Commission has been given a special mandate to investigate and form guidelines for their protection.[208] Accordingly, the statute proposed in this piece contains special requirements for the informed consent of the institutionalized.

Conclusion

It is difficult to objectively assess the problem of psychosurgery. The cacophony of opinions and accusations surrounding its practice distorts what little scientific data exists. Whether or not it represents the menace faced by the fictional Randle or Harry, psychosurgery is at least a threat to the free exercise of mental functions, which, it has been argued, is a protected constitutional right. It represents a threat, and it represents a hope.

Unlike most models, the proposed statute does not provide for any evaluation of the psychosurgical procedure itself except for the special cases of incapacity and involuntary institutionalization. Review for the purpose of prohibiting the procedure when the patient has given his informed consent is state substitution of judgment — a coercive and unjustified encroachment on the individual's right to choose, even if the choices are sometimes wrong. The proposal also seeks to avoid a more subtle form of coercion present in any per se rule that the mentally ill or involuntarily

205 Jaffe, *supra* note 6, at 423-24. Professor Jaffe does not believe that the motivations of a prisoner for submission to an experimental procedure are any less worthy than those of an outsider. He writes:

> [T]he motivation of consent is so complex, so various, and so obscure that it defies determination. . . .
>
> From the subject's point of view, there is no lack of respect in allowing him to decide to participate for what seem to him to be sufficient reasons. He must be treated fairly, and the touchstone of fairness is, for the most part, what in retrospect will seem fair to him. Indeed fairness is at the heart of the whole consent problem, at least from the point of view of the subject or the patient.

Id. at 424. While Professor Jaffe seems correct in his argument about fairness, it would also seem that the concept of "informed consent" implies consent to the particular procedure proposed, and not to a favorable report to the parole board.

206 CAL. PENAL CODE §§ 2670-80 (West Supp. 1975).

207 CAL. WELF. & INST'NS CODE §§ 5325-26.5 (West Supp. 1975).

208 National Research Service Award Act of 1974, § 202(a)(2), 42 U.S.C.A. § 289*l*-1 (note) (1974).

confined lack the capacity for informed consent. Yet it extends special protection to these groups.

Ultimate protection for the patient lies in the guarantee of truly informed consent. The articulation of precise standards is a threshold step. Providing quasi-judicial scrutiny over the consent process is necessary so long as psychosurgery remains the uncertain treatment it is. Nothing short of federal statutory action will suffice. The goal in the end must be to strike the balance which will assure freedom from intrusion and freedom from mental illness.

THE SUBSTANTIVE PROVISIONS OF AN ACT TO REGULATE PSYCHOSURGERY

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Section 1. *Statement of Policy and Purpose*

The United States Congress recognizes that the human brain is the center for all man's thoughts, emotions, and behavior. The full and free use of the brain is an absolute and inalienable right of every person, and an essential prerequisite to the enjoyment of liberty and the exercise of other rights.

The Congress finds a substantial unmet need to protect these rights against intrusion. Accordingly, it is the purpose of this Act to guarantee that any medical or surgical procedure which might thereby affect these rights is administered only after obtaining consent which is based upon competency, voluntariness, and knowledge.

Section 2. *Definition of Psychosurgery*

The term "psychosurgery" applies only to procedures performed on human beings, including:

(a) lobotomy, stereotaxic surgery, and electrical stimulation of the brain (ESB);

(b) any procedure which by direct or indirect access removes, destroys, or interrupts the continuity of —

(1) histologically normal brain tissue for the purpose of modification or control of thoughts, emotions, or behavior;

(2) histologically abnormal brain tissue for the purpose of modification or control of thoughts, emotions, or behavior unless the abnormality is well-defined and is the established cause for those thoughts, emotions, or behavior;

(3) brain tissue for the treatment of epilepsy, unless —

(A) the person suffering from epilepsy has experienced seizures or repeated episodes of abnormally violent conduct, and

(B) such seizures or conduct were caused by an identifiable dysfunction at an identified locus in the brain, and

(C) surgical or ESB procedures are reasonable therapeutic techniques for control or treatment of the disease;

(4) brain tissue for the treatment of pain for which no specific organic basis is apparent and which is accompanied by psychopathology.

(c) Such term does not include —

(1) electroshock treatment; and

(2) drug therapy, except when substances are injected or inserted directly into brain tissue; and

(3) procedures for the removal or treatment of identifiable gross physical abnormalities on or in the brain, such as tumor or clot.

COMMENT: The problems inherent in defining the term "psychosurgery" are myriad, and numerous formulations have been proffered as a result.[209] Two basic models emerge from an analysis of these definitions. The first is an "inscriptive" method, which lists specific procedures to be included or excluded from the definition. The other method is "descriptive," looking to the purposes for any procedure, and includes those which are for the designated purposes. Most statutory formulations are of the latter variety.

A definition of the exclusively inscriptive variety is found in the California statute concerning prisoners.[210] Such an approach offers the advantage of specifically identifying those procedures which are to be included, regardless of stated "purpose." However, in specificity lies the possibility of undesired exclusion. Any new technique would not be included within the established definition; statutory amendment or liberal judicial interpretation

209 The Senate Subcommittee on Health hearings alone produced three definitions:

> [1] Psychosurgery can best be defined as a surgical removal or destruction of brain tissue or the cutting of brain tissue to disconnect one part of the brain from another, with the intent of altering behavior, even though there may be no direct evidence of structural disease or damage in the brain.

Hearings, *supra* note 3, at 339 (testimony of Dr. Bertram Brown). Dr. Brown went on to specifically exclude operations for epilepsy from the definition. *Id.*

> [2] Psychosurgery is a term which has been loosely used to identify brain operations performed for the treatment of behavioral and related neurological disorders.

Id. at 348 (testimony of Dr. Orlando Andy).

> [3] The definition of psychosurgery is to destroy normal brain tissue to control the emotions or behavior or a diseased tissue when the disease has nothing to do with behavior of the man.

Id. at 359 (testimony of Dr. Peter Breggin).

210 CAL. PENAL CODE § 2670.5(c)(1) (West Supp. 1975). In defining the broader term "organic therapy," the statute begins with: "Psychosurgery, including lobotomy, stereotactic [*sic*] surgery, electronic, chemical or other destruction of brain tissue, or implantation of electrodes into brain tissue." The use of the word "including" might not normally be interpreted as excluding all other procedures. However, in defining "shock therapy," the statutory wording is "including but not limited to . . . ." *Id.* § 2670.5(c)(2). Therefore, it appears that only those procedures mentioned would be included in the definition of psychosurgery.

would be required.[211] Neither can be guaranteed. Moreover, since the efficacy of any statute ultimately lies in its deterrent effect, it is important not to permit inferences of exclusion. The proposed definition includes an inscriptive list of specified procedures in addition to a thorough descriptive provision, gaining the advantages of both methods without the disadvantages of exclusive reliance on either.

Most of the inscriptive lists contained within statutes exclude specific procedures. Electroshock treatment[212] and drug therapy[213]

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211 In the California statute, the provision for "other destruction of brain tissues" might be deemed an adequate safeguard. However, it is possible that a new technique would substantially "alter" but not destroy, brain tissue. Or destruction could be aimed at some other point on the brain stem not technically within the "brain" but designed to alter behavior.

212 The use of electroconvulsive therapy (ECT) is widely misunderstood, perhaps because of the misnomer "shock treatment" and the frightening physical effects which once accompanied its practice. Its early use produced persistent memory loss, fracture, and panic, which kept the treatment in disfavor until the development of drugs and new techniques which have made these side effects virtually unknown. *See* Fink, *How Shocking is "Shock Therapy"?*, 7 BIOLOGICAL PSYCHIATRY 79 (1973). Muscle relaxants are used to prevent fractures. Anxiety is reduced and panic avoided by sedation with barbiturates. Kabnowsky, *supra* note 19, at 1279-80.

Memory loss, the most persistent of the complaints from ECT, is reduced by relocating the electrodes used to apply electricity and other techniques. Fink, *supra*, at 79. In any event, the memory loss suffered is only temporary (although lasting as long as several weeks after repeated treatments). The medical authorities referred to are unanimous in stating that there are no permanent memory effects from ECT. Shapiro, *Psychochemotherapy*, in PSYCHOPHARMOCOLOGICAL DRUGS FOR THE TERMINALLY ILL AND BEREAVED 134, 163 (I. Goldberg, S. Mality, & A. Kutscher eds. 1973); Fink, *supra*, at 79-80; Kabnowsky, *supra*, at 1281; Wells, *Electroconvulsive Treatment for Schizophrenics*, 14 COMPARATIVE PSYCHIATRY 291 (1973); *but see* Clark & Lubenow, *Attack on Electroshock*, 85 NEWSWEEK, Mar. 17, 1975, at 86; Rorreche, *Annals of Medicine: Amnesia Resulting from Electroconvulsive Shock Therapy*, 50 NEW YORKER, Sept. 9, 1974, at 84.

The exact mechanism by which ECT operates remains unknown. And the technique can no doubt be abused in nonindicated cases and with excessive treatments. But after some 40 years of consistent and frequent use, the method is generally reliable and well controlled. Most importantly, it does not produce the irreversible and crippling behavioral distortions inherent in every psychosurgical operation. ECT has not been recommended for control of "violent" patients nor does it directly affect the centers of the brain responsible for behavior. While oversight of the use of ECT is lacking and needed, it is so common and accepted that a different, less elaborate, control mechanism is required. *See generally Convulsive Therapy*, in 4 SEMINARS IN PSYCHIATRY 1 (M. Fink ed. 1972); PSYCHOBIOLOGY OF CONVULSIVE THERAPY (M. Fink ed. 1973).

213 Certain drugs can produce profound changes in thought and behavior patterns which, on a temporary basis, are as great as any effects of psychosurgery. *See* V. LONGO, NEUROPHARMOCOLOGY AND BEHAVIOR (1972). Some of these effects may actually last for some time. Administration of Prolixin Enanthate, for example, is required only once every one to three weeks or longer to produce strong

are properly excluded from most statutory definitions of psychosurgery. The Stokes bill to prohibit psychosurgery also specifically excluded ESB.[214] This exception is misguided in light of the irreversible alterations in behavior which may result from administration of the technique.[215] The proposed definition includes ESB.

Any definition of psychosurgery is tested by the problem of temporal lobe epilepsy,[216] which may be accompanied by violent behavior without any volitional control by the subject.[217] There are severe problems with both the diagnosis and the location of the disease, and it is not certain whether the aggressiveness displayed by the patients may properly be labeled "behavior."[218] A separate category has been established to exclude from the statute psychosurgery to treat epilepsy when it is designed to control or eliminate seizures by destroying tissue at a specific point in the brain. Independent case-by-case decisions will have to be made.

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sedation. PHYSICIANS' DESK REFERENCE (PDR) 1358 (26th ed. 1972), *quoted in* Shapiro, *supra* note 31, at 264. The long-term administration of other drugs may have deleterious physical side-effects. *See generally* LONGO, *supra*. Tardine oyskinesia, a disease which produces a "drooped" appearance, evaporation of bodily fluids, and difficulty in breathing, as well as effects on internal organs, is considered a necessary risk of the use of phenothiazines, such as Thorazine. *Hearings, supra* note 3, at 349. Marketing of drugs which have permanent effects or are untested are controlled or prohibited by the narcotics laws and the Food and Drug Administration (FDA).

214 H.R. 6852, 93d Cong., 1st Sess. § 1(a)(2) (1973). The following proviso is added: "except when substances are injected or inserted directly into the brain." This clause could be read, however, as modifying the immediately preceding term "drug therapy." In any event, there seems no reason to so qualify the administration of an already often-used technique such as ESB.

215 ESB has produced involuntary muscular movements, speech defects, and drastic mood variations. *See, e.g.*, D. WOOLRIDGE, THE MACHINERY OF THE BRAIN 157-58 (1963), *quoted in* Shapiro, *supra* note 31, at 263.

216 *See* Shapiro, *supra* note 31, at 241-42, n.5, for a thorough discussion of this problem.

217 *See* V. MARK & F. ERVIN, *supra* note 21, at 70-72. *But see* Goldstein, *Brain Research and Violent Behavior*, 30 ARCHIVES OF NEUROLOGY 1, 28 (1974). This latter study contests the link between violent behavior and temporal lobe epilepsy.

218 The definitional problem was raised in a DHEW pamphlet on psychosurgery:

> If an apparent focus of seizure activity is found, and if this seizure activity appears to correlate with outbursts of aggressive behavior, then a small lesion may be made to destroy tissue at the seizure focus. Ideally, this restricted lesion will stop the seizure activity at its source. Whether or not this surgical procedure constitutes 'psychosurgery' . . . is debatable. Although the surgery is done to treat aggressive behavior, it is primarily intended to stop the seizure activity of the brain.
>
> . . . .
>
> There remains the question as to whether seizure activity in the brain is directly responsible for, or even correlated with aggressive behavior.

Finally, procedures performed on well-defined diseased states of the brain, such as tumor or clot, should be excluded from the definition of psychosurgery. There is again an area of overlap, however, since these abnormal entities in the brain may produce striking behavioral effects.[219] However, when such abnormalities are readily identifiable, behavioral effects are clearly secondary to physical danger.

Section 3. *Jurisdiction*

This Act shall apply to any person who wishes to perform psychosurgery and to any person, corporation, association, or agency of government which operates a health care or correctional facility in which it permits psychosurgery to be performed, if such person, corporation, association, or agency —

(a) uses any good which has moved in interstate commerce in the performance of such psychosurgery or the operation of such facility; or

(b) in any other way affects interstate commerce by such performance of psychosurgery or the operation of such facility.

COMMENT: Because current federal regulations and proposed legislation to control the practice of psychosurgery are tied to federal funding,[220] they do not reach all psychosurgery. Regulation by individual states may only encourage psychosurgeons to move their practice to unregulated areas.[221] The problem is national in scope and warrants comprehensive federal legislation.

There would not seem to be any constitutional barrier to federal regulation of all psychosurgery under the commerce clause.[222]

> There are no firm scientific data, either from animal or human studies, to demonstrate a close relationship between either focal or generalized seizures and aggression. . . .

NAT'L INSTITUTE OF MENTAL HEALTH, DEP'T OF HEALTH, EDUCATION, & WELFARE, PSYCHOSURGERY: PERSPECTIVE ON A CURRENT PROBLEM 6 (1973). *See also* Shapiro, *supra* note 31, at 242.

219 *See* V. MARK & F. ERVIN, *supra* note 21, at 58-59. *See also* Shapiro, *supra* note 31, at 242.

220 *See* text accompanying notes 62-68; H.R. 6852, 93d Cong., 1st Sess. § 1 (1973).

221 One can envisage the possibility of local "psychosurgery centers" being founded which specialize in operations on non-institutionalized functional neurotics and avoidance of regulation. Restak, *supra* note 12, at 57.

222 U.S. CONST., art. I, § 8.

The Supreme Court, in *Heart of Atlanta Motel, Inc. v. United States,*[223] required only that Congress have a "rational basis" for finding that the activity to be regulated affects commerce.[224] The Court held that regulating a local hotel was properly within the commerce power and the Civil Rights Act of 1964 because the hotel served a significant number of transient guests who traveled interstate. Though many subjects of psychosurgery cross state lines to travel to the site of the operation, this basis for federal power woud arguably not extend to a physician or facility that operated exclusively on intrastate patients.

However, it is highly unlikely that any such physician or facility could perform psychosurgery without using some goods which had moved in interstate commerce. This linkage of an activity with interstate commerce has repeatedly been held sufficient for the exercise of federal power.[225] Accordingly, today virtually no local activity is beyond the reach of federal control.[226] Statutes making possession of dangerous narcotics,[227] firearms,[228] and the use of

223 379 U.S. 241 (1964).

224 The Court articulated this test for determining the outer limits of the commerce power:

> The power of Congress to promote interstate commerce includes the power to regulate local incidents thereof, including local activities in both the States of origin and destination . . . .
>
> The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress has a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such basis, whether the means it selected to eliminate that evil are reasonable and appropriate.

Id. at 258.

225 *See, e.g.,* Katzenbach v. McClung, 379 U.S. 294 (1964).

226 Note, *Federal Regulation of Local Activity: The Demise of the "Rational Basis" Test,* 1972 LAW & SOCIAL ORDER 683, 700 (1972). The author argues that the Court's handling of the Gun Control Act and other recent statutes indicates there is no limit to federal control over local activities, regardless of their "connection" with interstate commerce, so long as an appropriate means is employed.

227 Drug Abuse Control Amendments of 1965, Pub. L. No. 89-74, § 5, 79 Stat. 232 (repealed 1970). Under the Act, the prosecution was not required to show any connection with interstate commerce. It is evident that possession of a drug may be an entirely local activity. The constitutionality of the Act was upheld several times, *e.g.,* United States v. Cerrito, 413 F.2d 1270 (7th Cir. 1969), *cert. denied,* 396 U.S. 1004 (1970); United States v. Heiman, 406 F.2d 767 (9th Cir. 1969). *See also* Note, 49 TEXAS L. REV. 568 (1971).

228 Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. App. §§ 1201-03 (1970). The U.S. courts of appeals have often not felt compelled to apply the "rational basis" test but rather have simply declared the statute constitutional. *E.g.,* United States v. Cabbler, 429 F.2d 577, 578 (4th Cir. 1970), *cert. denied,* 400 U.S. 901 (1970) (per curiam), held the statute constitutional without comment.

extortion to collect loans[229] federals crimes have all been upheld, despite their essentially "local" character.[230] Even where it can be shown that a particular incident does not in any way involve interstate commerce, the fact that a linkage exists for most such activities is enough for federal control of the entire class of conduct.[231] The question is not whether Congress has the power, but whether it will use it.

Section 4. *Expiration*

This Act shall expire five years from the date of its enactment.

COMMENT: Psychosurgery today is in a stage of development and experimental practice.[232] Its definition is uncertain. In the future some or many of the currently improving procedures may enter the realm of "accepted medical practice" and not need to be controlled. Conversely, further use of such procedures could prove that psychosurgery is as dangerous as the lobotomy and should be banned.[233] This termination clause also is a recognition that regulatory structures may outlive their usefulness.

TITLE I: INFORMED CONSENT

Section 101. *Requirements of Informed Consent*

(a) Except as otherwise provided in this Act, no physician shall perform psychosurgery, nor shall any person, corporation, association,

229 Consumer Credit Protection Act of 1968, 18 U.S.C. §§ 891-96 (1970). Here the statute regulates not a good but an activity, which necessarily must occur on a local basis. The courts have unanimously sustained the constitutionality of the Act. Annot., 7 A.L.R. Fed. 950, 955-62 (1971). The Second Circuit has said that the activity regulated need have no more than a "tenuous impact" on interstate commerce. United States v. Perez, 426 F.2d 1073, 1080 (2d. Cir. 1970), *aff'd*, 402 U.S. 146 (1971). The Supreme Court agreed that "transactions, *though purely intrastate*, may in the judgment of Congress affect interstate commerce." 402 U.S. at 154 (emphasis supplied). *See also* Bogen, *The Hunting of the Shark: An Inquiry into the Limits of Congressional Power under the Commerce Clause*, 8 WAKE FOREST L. REV. 187 (1972).

230 Note, LAW AND SOCIAL ORDER, *supra* note 189.

231 *See* note 227 *supra*.

232 *See* text accompanying notes 11-53 *supra*.

233 *See, e.g.*, Breggin, *supra* note 3; Breggin, *Psychosurgery for the Control of Violence*, 118 CONG. REC. E3380 (daily ed. Mar. 30, 1972); Edson, *The Psyche and the Surgeon*, N.Y. Times, Sept. 30, 1973, § 6 (Magazine) at 14.

or agency of government permit psychosurgery to be performed in a facility it operates unless the patient has given his informed consent, and then only upon the authorization of the Federal Circuit Psychosurgery Review Board established in section 201 of this Act.

(b) For the purposes of this Act, "informed consent" means that a person must knowingly, voluntarily, and intelligently, and in a clear and manifest way, give his consent to the proposed psychosurgery to the physician who will perform the psychosurgery procedure.

(c) A person shall be presumed capable of giving his informed consent.

(1) This presumption shall not be overcome solely by reason of the person's being diagnosed as mentally ill, disordered, mentally defective, or in any other way abnormal.

(2) This presumption shall be ovecome, and the person found incapable of giving his informed consent, if such person —

(A) cannot understand, or knowingly and intelligently act upon, the information specified in section 102 of this Act; or

(B) cannot manifest his consent to the physician; or

(C) is seven years of age or under.

Section 305 of this Act shall apply in the case of any person so found incapable of giving his informed consent.

(d) In addition to the requirements specified in subsection (a) of this section, no person between the ages of eight and eighteen, inclusive, shall be subjected to psychosurgery unless both of that person's parents (if living) or legal guardian(s) also give their informed consent.

COMMENT: This section requires informed consent from the patient and authorization from the Review Board.[234] The three requirements of the *Kaimowitz* opinion for informed consent[235] — competency, voluntariness, and knowledge — are specified. Clear manifestation of this consent is required to guarantee that it is actually obtained.

The presumption of capacity mandated by the common law is followed by the statute.[236] The *Winters v. Miller*[237] requirement

234 See § 201 *infra* for the description of the Review Boards.

235 Kaimowitz v. Dep't of Mental Health, *supra* note 134, at 31-32.

236 *See* text accompanying note 187 *supra*.

237 446 F.2d 65 (2d Cir. 1971), *cert. denied* 404 U.S. 815 (1971). *See* text accompanying note 186 *supra*.

of presuming capacity even if a person is declared mentally ill is recognized. It is the responsibility of the Psychosurgery Advisory Board[238] to make a determination on the issue of capacity independent of prior judgments. Capacity to give consent at one time or for a relatively simple operation may not be the equivalent of capacity at a later time with respect to psychosurgery, which is more complex.

There is some variation among American courts in the designation of ages for consent.[239] The general rule is that a child does not gain capacity for consent until approximately the age of 18.[240] The *Restatement of Torts* would allow the consent of an older minor who can give informed, intelligent consent.[241] From the law of negligence comes the widely accepted rule that children should be held liable for their conduct based on what is reasonable given the age, intelligence, and experience of the child.[242]

The only exception to the presumption of capacity is that children of seven or under are treated as if they lacked the capacity to consent. A special procedure which allows psychosurgery to be performed in such cases, but only under special circumstances, is provided in Section 305 *infra*. The reason for this safeguard is the possibility that collusion between doctor and parents could "make a case" for unwarranted treatment. Moreover, the conditions for which psychosurgery is most effective do not affect or are not yet seen in younger children.[243] One leading psychiatrist has said that adults respond better to psychosurgery than children.[244]

Within an age range from this minimum (seven) to the standard age of consent (eighteen), the consent of both the parents (if living) and the child is necessary. This provision is a compromise between not allowing psychosurgery to the possible detriment of the

238 See § 202 *infra*.

239 W. PROSSER, *supra* note 140, at 103.

240 *Id.*, at 103, n.51. *See* 10 VAN. L. REV. 619 (1957); 9 W. RES. L. REV. 101 (1957).

241 RESTATEMENT OF TORTS § 59 (1934).

242 W. PROSSER, *supra* note 140, at 155.

243 *See* text accompanying notes 33-38 *supra*, for discussion of the areas of greatest effectiveness of the treatment.

244 Greenblatt, *Psychosurgery*, in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1294 (A. Friedman & H. Kaplan, eds. 1967). Dr. Andy, and others who have practiced psychosurgery on children, obviously disagree with this conclusion. But even Dr. Andy seldom operates on children below the age of 10. *Hearings*, *supra* note 3, at 353.

child and putting consent entirely in the hands of others. The capacity of an eight year old child for "informed consent" is negligible. Nonetheless, even children of that age can comprehend risks and fears. Therefore, given the safeguard of Board approval, "consent" is allowed at these younger ages in conjunction with parental consent.

Section 102. *Standards for Informed Consent*

"Informed consent" requires that the operating physician directly communicate to the person who is to give his informed consent all of the following information in clear and precise terms and in language that the person will understand:

(a) The nature and seriousness of the person's illness, disorder, defect, or abnormality;

(b) How the proposed procedure is to be performed and specifically what will be done to the person's body during the procedure;

(c) The reasons the physician has chosen the proposed procedure as well as his reasons for recommending cessation of any present treatment;

(d) Risks of death or serious disability (*e.g.*, paralysis, blindness, deafness, impotence, aphasia) if such risks are 0.5 percent or more; any risk of greater than a one percent frequency even though it may not be considered serious (*e.g.*, headache, nausea, dizziness, temporary loss of memory); the likely nature, extent, and duration of all such side effects, and how and to what extent they may be controlled;

(e) The approximate number of times the proposed procedure has been performed before; how successful or unsuccessful the procedure has been; the probability for a successful outcome in this case;

(f) The fact that success cannot be guaranteed, and what success means to the physician;

(g) The nature, likelihood, and extent of changes in and intrusions upon the person's personality, patterns of behavior, or any facet of mental activity which might result from the proposed therapy, and the degree to which these changes may be irreversible;

(h) The lack of information or data about the procedure and any other reason for uncertainty concerning its effects and outcome;

(i) The manner in which the subject's case is to be followed and his progress monitored, as well as any possibility that the person may be subject to outside attention from either the press or the medical profession because of the performance of the procedure;

(j) The duration of the postoperative recuperative period, and the associated limitations on activity, in addition to any specific postoperative tests or therapy that should be undergone;

(k) What feasible alternative modes of treatment are available; the risks, benefits, and probabilities of success of these treatments, as well as any other information specified in this section necessary to explain such alternatives, and the reasons for rejecting the alternative procedures;

(l) The likely results of the person's foregoing any treatment whatsoever;

(m) The fact that the person will not suffer in any way by withdrawing his consent at any time, and that the person is free to do so at any time, in which case he has not waived his right to also have the procedure performed at a later date if possible.

COMMENT: This list of requirements for informed consent is not original.[245] Nor can it be exhaustive. All essential information is demanded, however, and the patient fully apprised of the listed criteria will be in a position to make a well informed judgment about the procedure. It is expected that that Psychosurgery Advisory Board[246] will guarantee the clarity, comprehensiveness, and accuracy of each type of information in the formal hearing stage. Certain of the criteria require special attention:

(c) Requiring the attending physician to explain fully his reason for selection of the procedure guards against unnecessary experimentation in the field. This decision and explanation process should have a cautionary effect on the physician, requiring him to review the procedure in full.[247]

(d) This provision is unique in specifying exactly at what level the risks associated with the procedure must be disclosed. Present judicial doctrine on the matter is vague, and inappropriate for the context of psychosurgery. Difficulties of calculation, because

245 Many other lists of required information have been proffered, some of which have been relied upon in the framing of § 102. *See, e.g.,* ORE. REV. STAT. § 426.715(1) (1974) (8 items); CAL. WELF. & INST'NS CODE § 5326.4 (West Supp. 1975) (8 items); CAL. PENAL CODE § 2673 (West Supp. 1975) (8 items); Spoonhour, *Psychosurgery and Informed Consent,* 26 FLA. L. REV. 432, 452 (1974) (10 items) [hereinafter cited as Spoonhour].

246 See § 202 *infra.*

247 The same is true, of course, for the entire requirement of informed consent. *See* Spoonhour, *supra* note 245, at 441.

of lack of clinical reports on previous operations or unpredictability, should always be resolved in favor of disclosure. The very low percentages rates provided will guarantee this result.

(e)-(g) Probabilities of success and failure are difficult to assess, particularly in an untried procedure. The requirement for stating that success (of any nature) cannot be guaranteed should assure that the efficacy of the procedure is not exaggerated. Disclosure of past experience with the proposed procedure necessarily includes both favorable and unfavorable results.

The strongest argument for nondisclosure of the risk of unfavorable outcomes (especially if statistically small) is that a favorable prediction will act as a "placating placebo." It is known, for example, that the expected results of a drug are an important variable in the actual results.[248] Similarly, a favorable prognosis of recovery from surgery may be a clinical aid in such a recovery. It might be argued that this reinforcement effect is stronger among persons suffering from mental illness, who are often very suggestible.

However, because of the permanence of psychosurgery's effects and the patient's likely susceptibility to the overrating of its benefits, full disclosure of all risks and uncertainties must be made. Psychosurgeons themselves report that persons are often anxious to submit to the procedure.[249] Overenthusiasm for the "quick and easy cure" of psychosurgery blurs perception.[250] Any exaggerated hopes at such a time, any unrevealed hazards, could lead a patient to imprudently give consent. The need to preclude such a result outweighs whatever therapeutic value there may be in not disclosing all the facts. Even psychosurgery's strongest proponents and most active practitioners recognize the need to guard against ill-advised performance of psychosurgery.[251]

248 *See, e.g., Psychochemotherapy, supra* note 219, at 139-51. *See also* NATIONAL COMMISSION ON MARIHUANA AND DRUG ABUSE, MARIHUANA: A SIGNAL OF MISUNDERSTANDING 51-52 (1972).

249 Santa Monica neurosurgeon M. Hunter Brown reports that he performed 20 operations on persons who came to him solely as a result of an article in the *National Enquirer* in which Brown claimed he could turn "vicious killers" into "happy peaceful citizens." C. Holden, *Psychosurgery: Legitimate Therapy or Laundered Lobotomy,* 179 SCIENCE 1109 (1973).

250 Bridges, *Psychosurgery Today: Psychiatric Aspect,* 65 PROCEEDINGS OF ROYAL SOC'Y MED. 1104, 1105 (1972).

251 V. Mark and R. Neville, two of the leading practitioners, recognize psycho-

(h) This requirement goes beyond those specified in subsections (e)-(g) in that it calls for an affirmative statement that little is known and much is uncertain about a particular psychosurgical procedure, if that is the case. The physician thus must qualify the raw information about previous experience he is required to convey to the patient by the other standards. This is especially designed to uncover the fact that the procedure being proposed has not been previously performed or performed only on patients with different medical conditions than the patient in this case.[252]

(k)-(l) Any complete evaluation must look at feasible alternatives. Hence, rigid requirements are established for complete explanation of what else is available for treating the patient's condition including no treatment at all. While putting a considerable demand upon the physician, these standards must be met to assure fully informed consent.

TITLE II: BOARDS

Section 201. *Psychosurgery Review Boards*

(a) There shall be established a Federal Circuit Psychosurgery Review Board (Review Board) in each United States Court of Appeals circuit appointed by the federal judges of such Court of Appeals.

(1) The Review Board shall consist of three attorneys, each a member in good standing of the bar of the state in which he resides, a citizen of said state, and a resident of the circuit in which he is to serve.

(2) Each appointee must receive the approval of a majority of the judges of the Court of Appeals.

(3) The judges may solicit nominations as they deem proper and necessary. Experience with medicolegal problems and especially the issue of informed consent shall be taken into consideration.

(b) Each member of the Review Board shall serve a term of five years.

(1) Members may be removed for cause by the court of appeals.

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surgery as a "drastic" therapy of last resort which should be limited in use to cases where there is actual brain pathology. Mark & Neville, *supra* note 39, at 767. The A.M.A. seconds the "use with extreme caution" warning. 226 J.A.M.A. 779 (1973) (editorial).

252 *See* Shapiro, *supra* note 31, at 311, n.259.

(2) Members are eligible for reappointment.

(3) If there is a vacancy for any cause, the judges shall make an appointment for the unexpired term.

(c) A Chairman of the Review Board shall be selected from and by the members thereof.

(d) Notwithstanding the term of office specified in subsection (b) of this section, of the members first appointed to the Review Board:

(1) One shall serve a term of one year;

(2) One shall serve a term of three years; and

(3) One shall serve a term of five years.

(e) The Review Board shall —

(1) determine whether a patient who is a proposed subject for psychosurgery is capable of giving his informed consent to such an operation according to the standards specified in section 101 of this Act.

(2) in cases of incapacity for consent, perform the function required by section 305 of this Act.

(3) determine whether the physician desiring to perform the psychosurgery has made a reasonable and adequate disclosure of information to the patient in compliance with the standards specified in section 102 of this Act.

(4) determine whether the patient has given his informed consent.

(5) appoint the members of the Psychosurgery Advisory Board.

At least two members must concur in all decisions rendered by the Review Board.

COMMENT: Since the Review Boards are quasi-judicial bodies, their members are attorneys. They are required to make a judgment as to the sufficiency of informed consent according to statutory standards and are not required to probe into the medical efficacy of the psychosurgical procedure except in the special circumstances of Section 305.

Section 202. *Psychosurgery Advisory Boards*

(a) There shall be established a Federal Circuit Psychosurgery Advisory Board (Advisory Board) in each United States Court of Appeals circuit, appointed by the Review Board of such circuit.

(1) The Advisory Board shall consist of the following nine members:

(A) a practicing neurologist, certified by the American Board of Neurology and Psychiatry;

(B) two practicing neurosurgeons certified by the American Board of Neurosurgery;

(C) two practicing psychiatrists, certified by the American Board of Neurology and Psychiatry;

(D) two clinical psychologists;

(E) a neuroscientist actively engaged in research on the nervous system;

(F) A social worker actively engaged in work with the mentally disturbed.

(2) No more than one individual currently performing psychosurgery on human beings shall be a member of the Advisory Board. Notwithstanding the preceding sentence, the Advisory Board may study any information or consult with any person necessary, as well as conduct onsite visits.

(3) The Review Board shall solicit nominations and recommendations for appointments to the Advisory Board from the boards specified in subsections (a)(1)(A)-(C) of this section and may also consult appropriate governmental and private agencies and organizations.

(b) Each member of the Advisory Board shall serve a term of three years.

(1) Members may be removed for cause by the Court of Appeals.

(2) Members are eligible for reappointment.

(3) If there is a vacancy for any cause, the Review Board shall appoint a person of the category of subsection (a)(1) of this section in which the vacancy has arisen for the unexpired term.

(c) A Chairman of the Advisory Board shall be selected from and by the members thereof.

(d) Notwithstanding the term of office specified in subsection (b) of this section, of the members first appointed to the Advisory Board:

(1) Three shall serve terms of one year;

(2) Three shall serve terms of two years; and

(3) Three shall serve terms of three years.

(e) The Advisory Board shall have the following duties:

(1) The Advisory Board shall conduct tests and observe the intended subject as necessary prior to submitting a written recommendation to the Review Board with respect to the capacity of the individual for giving informed consent.

(2) In cases of incapacity for consent, The Advisory Board shall perform the functions required by section 305 of this Act.

(3) The Advisory Board shall present its opinions and recommendations concerning the adequacy, accuracy, and reasonableness of the informational disclosures made in the physician's petition to the Review Board, as provided in section 301 of this Act.

(4) In presenting its findings to the Review Board pursuant to this subsection, the Advisory Board may submit majority, plurality, concurring, and dissenting opinions, and shall present all such opinions to the subject, the operating physician, and, where applicable, the subject's parent(s) or guardian and attorney.

(5) The Advisory Board shall serve in such other advisory capacity as the Review Board may determine.

COMMENT: Appointment of the Advisory Board by the Review Board is provided to avoid an unnecessary additional burden on the courts of appeals. While seeking nominations for the Review Boards by the court of appeals is optional, such solicitation is mandatory in the case of appointments to the Advisory Board. Suggestions must be sought only from the two certification boards, but it is expected that the governmental agencies such as DHEW and state health departments and private organizations such as state medical societies will also be consulted. The membership composition of the advisory boards was suggested by that of the Psychosurgery Review Board of Oregon.[253] Panels of medical experts have previously been used in the context of malpractice litigation.[254]

TITLE III: REVIEW AND AUTHORIZATION

Section 301. *Filing of Petitions*

(a) Any physician licensed by the state proposing to perform psychosurgery upon any person, must file a written petition with the Review Board for the circuit in which the psychosurgery is to be

253 ORE. REV. STAT. § 426.750(3) (1974).

254 *See* Archer & West, *Medical Expert Panels for Malpractice Cases*, 88 CAL. MED. 173 (1958), *reprinted in* 33 J. STATE BAR CAL. 30 (1958).

performed at least sixty days prior to the scheduled date of the psychosurgery. Such petition shall state the name and address of the intended subject and his parents or guardian if section 101(d) of this Act applies, the name of the psychosurgery operation proposed, and all information specified in section 102 of this Act.

(b) Any person may file a petition with the Review Board for the circuit in which he expects the psychosurgery to be performed for an order to prohibit the administration or practice of such psychosurgery.

(1) Such petition shall state the name and address of both the subject of the psychosurgery and the physician proposing to perform the psychosurgery.

(2) Such petition shall automatically constitute a refusal of consent or withdrawal of prior consent if filed by the person upon whom the psychosurgery was to be performed.

(3) Upon receipt of such a petition, the Review Board may refer such petition to the Advisory Board for appropriate evaluation and study, but in no case shall action be delayed for more than one month from receipt or until later than one week prior to the scheduled date of the proposed psychosurgery, whichever is earlier.

COMMENT: The process by which approval for a psychosurgical operation is obtained begins with petitioning by the physician who desires to operate. The problem of failure to comply should be overcome by the criminal sanction for physicians and the civil sanctions for facilities resulting from violation,[255] institutional controls, and the provision establishing a mechanism for any person to intervene in a proposed operation.

Section 302. *Information to Subject*

(a) Upon the filing of a petition pursuant to section 301(a) of this Act, the Review Board shall serve notice upon the intended subject of the receipt of the petition, providing him with a copy, and shall inform him:

(1) that no sooner than thirty days from the date of notice, a quasi-judicial hearing will be held by the Review Board, at which time the Board will execute its functions as specified in section 201 of this Act.

255 See § 308 *infra*.

(2) that the Advisory Board will conduct tests as necessary to determine the subject's capacity for giving informed consent;

(3) that at all times and at all proceedings, the patient has a right to consult with and be advised by legal counsel and that if the patient cannot afford counsel, one will be appointed by the Review Board.

(4) that the Advisory Board, subject to the approval of the Review Board, may postpone the date of the hearing if necessary to perform its function;

(5) of any other pertinent information.

(b) If the subject of the proposed psychosurgery is a person 18 years of age or under, then all the information required by subsection (a) of this action must also be sent to the parent(s) or guardian of such person.

Section 303. *Hearings*

(a) The Review Board shall set a date for the proposed hearing as soon as the Advisory Board has submitted a report pursuant to section 202(e) of this Act.

(b) The hearing shall in no event be conducted less than five days before the proposed operation.

(c) The hearing shall be conducted in accordance with the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 554-57.

(d) The report of the Advisory Board pursuant to section 202(e) of this Act shall be submitted at and entered into the record of the hearing.

(1) The intended patient, his parent(s) or guardian, or his attorney, may contest all or any part of this report.

(2) In so doing, any evidence related to the report may be produced.

(e) Upon a consideration of this report, the Review Board shall determine whether the patient has the capacity for giving his informed consent and shall enter such determination into the record.

(f) Section 305 of this Act shall apply in the case of any person found incapable of giving his informed consent.

(g) If the Review Board determines that the person is capable of giving his informed consent and the person (and his parents or guardian for persons under 18) consents to the psychosurgery, the hearing will proceed to a determination as to whether the disclosure of in-

formation by the physician was sufficient to obtain the subject's informed consent.

(1) The attending physician shall present all of the information required by section 102 of this Act contained in the petition.

(2) The subject, his parent(s) or guardian, or attorney may ask questions and demand further information.

(3) The members of the Review Board may direct the attending physician to augment his disclosure if necessary to comply with the standards of section 102 of this Act.

(4) Any additional information relevant to the decision may be added by any member of the Review Board or Advisory Board.

(h) The Review Board shall then determine whether the patient has given his informed consent in accordance with the standards of section 102 of this Act.

(i) At a reasonable time after the hearing, but before the psychosurgery is performed, the Review Board shall prepare a written statement of its conclusions and the supporting reasons.

(1) This statement, the report of the Advisory Board, and the record of the hearing shall be collated and signed by all members of the Review and Advisory Boards, the operating physician, the patient, and, where applicable, his parent(s) or guardian, and attorney.

(2) This material shall then be filed with the clerk of the appropriate United States Court of Appeals.

(j) Upon said filing, the Review Board shall issue an authorization for the psychosurgery to be performed.

COMMENT: The hearing will be a relatively informal proceeding in two steps. First the Review Board, after consideration of and based on the evaluative report of the Advisory Board, will determine whether the patient has the capacity for informed consent. This finding is prior to and independent of the question of the adequacy of the information disclosed, which follows only if the subject is found capable and consents. No adversary processes are contemplated, since the refusal or withdrawal of consent by the patient (or his parents or guardian for children) at any time terminates the proceeding and the proposed psychosurgical operation. Participation by the Boards in the informational disclosure

process should insure an adequate basis for an informed consent decision by the patient.

Section 304. *Prisoners and the Involuntarily Confined*

Notwithstanding any other sections of this Act, when psychosurgery is proposed for any person who is involuntarily confined in a prison or correctional facility or mental institution, the following shall apply in addition to what is otherwise required in this Act:

(a) Upon the filing of a petition pursuant to section 301 of this Act, the Review Board shall appoint an attorney to represent the person unless the person already has retained counsel. The attorney shall advise the person of his rights in relation to the proceeding and shall at all times represent him before the Review Board.

(b) In order for an authorization for psychosurgery to be issued pursuant to this section, the Review Board must:

(1) Determine that there have been or will be no undue inducements to the person's undergoing psychosurgery, taking into account whether the earnings, living conditions, medical care, quantity or quality of food, or any other amenities offered to the person undergoing psychosurgery have been or will be greater or better than those generally available to persons confined in the institution;

(2) Determine, with the advice of the Advisory Board, that the person is an appropriate subject for psychosurgery;

(3) Determine that withdrawal of consent to the proposed psychosurgery will not adversely affect the person in any way.

COMMENT: This section responds to the special need to protect persons who are involuntarily confined.[256] The safeguards lie in mandatory appointment of counsel (compared with the optional opportunity provided for other persons) and special inquiries into the factors which might induce such a person to give his consent in the special context of involuntary institutionalization.[257] Because of the extraordinary problems in this setting, and the commensurate possibilities of abuse, here and only here the Advisory Board is to inquire into the appropriateness of the procedure

256 *See* text accompanying notes 195-208 *supra*.

257 These additional standards were suggested by the enumerated "additional duties of the organizational review committee where prisoners are involved" of the Proposed Rule of DHEW for Protection of Human Subjects. 39 Fed. Reg. 30654-55 (1974).

itself. The aim is to assure that institutionalized persons do not consent to psychosurgery for any reason other than the potential medical benefits of the operation.

Section 305. *Special Authorization for Children Seven or Under and Persons Lacking Capacity*

Notwithstanding any other sections of this Act, when a person is found not capable of giving his informed consent, special authorization for performance of psychosurgery may be granted according to the following requirements:

(a) The Review Board shall appoint an attorney to represent the person unless he has already retained legal counsel.

(b) Compelling medical need for the psychosurgery must be found by both the Review Board and the Advisory Board. Such needs include, but are not limited to, the following conditions:

(1) a mental disorder which threatens the life of the patient; or,

(2) severe, intractable pain.

(c) There must be no alternative treatment or procedure which would provide substantially equivalent relief with less risk to the patient.

(d) In the case of a child eighteen years of age or under both of his parents (if living) or legal guardian(s) must give their informed consent.

(e) A hearing shall be held pursuant to section 303 of this Act. A majority of both the Review Board and the Advisory Board must approve of such an operation (for purposes of this subsection, the Advisory Board shall act in both a decision-making and advisory role).

COMMENT: This section allows psychosurgery to be performed even in cases of incapacity where *both* Boards (the Advisory Board is given decision-making power in this situation because of the obvious need for medical expertise) find compelling medical need and lack of less risky alternative treatments. The exception is intended to be strictly limited to cases where overwhelming medical evidence is enough to outweigh the undesirability of an invasion of the mind without informed consent. Though only a majority of both boards must approve the operation, a member of either board in the minority may appeal the decision pursuant to § 306 — a procedure which may be especially appropriate under

this section, in light of the conflicting medical opinions and data about psychosurgery.

The evidence, however, is that psychosurgery will seldom be appropriate for patients lacking capacity, since it has been most successful in cases of various neurotic disorders not related to mental capability.[258] The category of persons who likely would be incapable of giving their consent includes those suffering from some form of crippling psychosis, such as catatonic schizophrenia, or the seriously mentally retarded. Psychosurgical procedures are not needed nor are they used in either of these cases, because a procedure which acts by "blunting" the emotions would not be indicated in persons so totally incapacitated.[259] The occasion when a severe mental retardate also suffers from some form of psychomotor problem is a suitable case for drug therapy, since the patient's intelligence would not be a risk factor.

Section 306. *Appeal*

Any member of the Review Board or the Advisory Board, the patient, or, where applicable, his parent(s) or guardian or attorney, may file an appeal with the United States Court of Appeals any time before the psychosurgery is performed.

(a) Upon the filing of a petition for review, the United States Court of Appeals shall issue a temporary restraining order against the performance of the proposed psychosurgery until such time as the matter has been reviewed and decided.

(b) The Court of Appeals shall make its determination based on the record developed under section 303 of this Act.

COMMENT: These appellate processes are designed to protect against abuses at the lower quasi-judicial level. Some have suggested that the judiciary system is neither competent nor suited to decide medical issues.[260] But the courts are gaining considerable expertise in this area in handling the present flood of malpractice litigation. Moreover, the Review and Advisory Boards will make the initial fact-finding and decisions.

258 *See* text accompanying notes 33-41 *supra.*

259 *See* text accompanying note 49 *supra.*

260 *See, e.g.,* Haines, *The Medical Profession and the Adversary Process,* 11 OSGOODE HALL L.J. 41 (1973).

Since there are only currently 500-600 psychosurgery operations performed annually,[261] the demands placed on the Review and Advisory Boards and courts of appeals would be minimal. Even if this number increases dramatically with the broadened definition and greater use of the technique, it would remain tiny compared to the nearly 150,000 cases filed in the federal district courts in 1972.[262] The system of boards proposed would also present minimal demands on the federal treasury.[263]

Section 307. *Reports*

(a) After performance of the psychosurgery, the operating physician shall report to the Advisory Board on the recovery and condition of the patient at least once every six months for a period of two years.

(b) The Advisory Board shall itself make such tests or conduct such investigations as necessary to verify or supplement these reports.

(c) The reports with the additional findings of the Advisory Board shall be forwarded to the National Institute of Mental Health and such other agencies or institutions, public or private, as shall request same, but no report may identify an individual patient.

COMMENT: These requirements for formalized follow-up of each case are designed to fill the need for information about psychosurgery.[264] A two-year period is established because of the finding that postoperative effects tend to stabilize after one year.[265] Rights of confidentiality and privacy of the patients should be accommo-

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261 *See* text accompanying note 26 *supra*.

262 *See generally* 1972 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1973).

263 Since there are only 11 federal circuits, only 132 appointments are necessary (33 to the Review Boards and 99 to the Advisory Boards). With the small number of cases to be heard, all of these board members need only serve on an ad hoc, part-time basis. Suggested compensation would be at the rate of GS-18, which is the established maximum scale for members of the National Commission for the Protection of Human Subjects and all other advisory or review boards established under the Public Health and Welfare Code. 42 U.S.C. § 210(c) (1970).

The caseload would be concentrated in certain districts. Dr. Andy has a considerable practice at the University of Mississippi, for example. Boston appears to be the "psychosurgery capital of the world" with the three most active practitioners performing operations at its two largest metropolitan hospitals. In such circuits, additional support staff could be hired if necessary to take some of the burden off the board members.

264 TEXTBOOK OF PSYCHIATRY, *supra* note 19, at 1295.

265 Greenblatt, *supra* note 244, at 1294.

dated by the simple removal of names as is currently done. The collection of studies during the five years of the system's operation will provide vitally needed data as well as a basis for evaluation of psychosurgery as a whole.

Section 308. *Penalties and Remedies*

(a) Any person who violates section 101(a) of this Act shall have committed a crime against the United States, and shall be subject —

(1) in the case of a first offense, to a fine of not more than $5,000; and

(2) in the case of repeated offenses, to a fine of not more than $10,000 and imprisonment of not more than five years, or both.

(b) Any person who fails to report in compliance with section 307(a) of this Act shall be subject —

(1) for the first such failure, to a fine of not more than $2,000; and

(2) for repeated failures, to a fine of not more than $5,000.

(c) Any person, corporation, association, or agency of government which operates a health care or correctional facility and which negligently permits a psychosurgical operation to be performed in such facility in violation of section 101(a) of this Act shall be —

(1) subject to a fine of not more than $10,000 for each such operation; and

(2) ineligible to receive any funds under any grant, contract, loan, or guarantee by the United States, its departments, agencies, and instrumentalities, for a period of not more than five years for each such operation.

(d) The United States Court of Appeals for the circuit in which a violation of this Act is alleged to have occurred shall have jurisdiction over the prosecutions specified in (a) and (b) above.

(e) Any individual upon whom psychosurgery was performed in violation of section 101(a) or his representative, may bring a civil action for damages against the person(s) who performed such psychosurgery or against the person, corporation, association, or agency of government which operated the facility in which it was performed, or against both, in the United States District Court for the district in which it was performed. The court in such action shall, in addition to any such judgment awarded to the plaintiff, allow reasonable attorney's fees to be paid by the defendant.

COMMENT: This enforcement provision is patterned after the Stokes Bill.[266] A key difference is the replacement of the "civil penalties" for psychosurgeons, involving only fines, with criminal sanctions. The additional threat of such charges, with the likely suspension or cancellation of the physician's license, should have a substantial deterrent effect. A graduated scale of penalties is provided to protect the unwary first-time offender but impose weighty penalties thereafter. Facilities which negligently allow such operations to be performed are themselves subject to sanctions. In addition, fines are provided for failure to submit follow-up reports on subjects of psychosurgery.

The district courts are established as the forums for both criminal and civil actions resulting from violations of the Act. The number of actions brought is not likely to be large.[267]

*Steve Knowles**

266 H.R. 6852, 93d Cong., 1st Sess. § 3 (1973).

267 Out of the several thousand psychosurgical operations which have been performed in the past few years, only two suits have been filed. *See* Kaimowitz v. Dep't of Mental Health, *supra* note 134; Geis v. Mark, Civil No. 681998 (Super. Ct., Suffolk County, Mass., filed Dec. 3, 1973). This small number is due in large part to the inadequacy of prospective standards and requirements of consent upon which to base a retrospective action. Moreover, the very elements of physician control, familial cooperation, and lack of patient understanding discourage lawsuits.

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NOTE

IS FEDERALISM DEAD? A CONSTITUTIONAL ANALYSIS OF THE FEDERAL NO-FAULT AUTOMOBILE INSURANCE BILL: S. 354

Introduction

The proposed National No-Fault Motor Vehicle Insurance Act (S. 354),[1] passed by the Senate on May 1, 1974,[2] is an attempt to deal with the growing national crisis in automobile insurance. First proposed by Senator Warren Magnuson (D.-Wash.) in 1971,[3] the bill has a double function: (1) to guarantee "adequate and uniform" reparation benefits for the bodily injuries[4] of every accident victim[5] in all states and (2) to establish an efficient system of handling automobile bodily insurance claims.[6]

The first state no-fault bill was passed in Massachusetts in 1970.[7] It succeeded in both reducing the premium rates charged

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1 S. 354, 94th Cong., 1st Sess. (1975).

2 It was passed by a vote of 53-42 (R:19-20, D:34-22).

3 The bill was originally introduced as S. 945, 92d Cong., 1st Sess. (1971). S. 354 was cosponsored by Senators Magnuson (D.-Wash.), Hart (D.-Mich.), Moss (D.-Utah), Stevens (R.-Alas.), and Stevenson (D.-Ill.).

4 S. 354, 94th Cong., 1st Sess. (1975) does not deal with no-fault automobile property insurance.

5 *Id.* §§ 102(a)(3)-(4); S. REP. No. 93-757, 93d Cong., 2d Sess. (1974) [hereinafter referred to as JUDICIARY REPORT]. Before the enactment of the first no-fault bill in 1971, only three states had compulsory insurance for the bodily injuries of automobile victims: Massachusetts, New York and North Carolina. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 76 (1965) [hereinafter cited as BASIC PROTECTION].

6 Under the negligence system of determining insurance benefits, before the advent of no-fault, it was estimated that the consumer got back less than one-half of every premium dollar because of the high overhead costs of tort litigation and pain and suffering damages. BASIC PROTECTION, *supra* note 5, at 70.

7 Actually the first jurisdiction to adopt no-fault insurance was Puerto Rico where it went into effect on January 1, 1970. The no-fault idea was popularized by Robert Keeton of Harvard Law School and Jeffrey O'Connell, then of the University of Illinois, in BASIC PROTECTION, *supra* note 5. To a large extent the Massachusetts no-fault bill, which passed in 1970, was patterned after this book. The structure of "basic protection" legislation is simple. It has two principle features: (1) a compulsory form of automobile insurance which compensates all persons injured in an auto accident without regard to fault for all out-of-pocket personal injury losses up to $10,000 per person; (2) an elimination of tort liability

for bodily injuries and alleviating the severe court congestion caused by automobile tort litigation.[8] The success of the Massachusetts experiment in no-fault, coupled with an endorsement of the no-fault concept in a $2.5 million report written by the Department of Transportation,[9] encouraged state legislatures throughout the country to consider no-fault legislation.[10] Although no-fault has been proposed at least once in every state legislature, only 13 states have passed no-fault bills which Congress believes have adequately dealt with the automobile insurance problem.[11]

The federal no-fault bill is a response to the states' failure to enact meaningful reform. In general it constitutes a two-step approach to guaranteeing a minimum level of reform throughout the country.[12] First, it establishes "minimum national standards"

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entirely where damages for pain and suffering would not exceed $5,000. In other words, under a basic protection plan, a victim could not sue unless the amount of damages he could possibly collect for pain and suffering exceeded $5,000 or unless his amount of monetary damages exceeded the $10,000 to which he was entitled from his insurance company. Earlier proposals for reform of the bodily reparation system of automobile insurance included the Columbia Plan (1932); the Saskatchewan Plan (enacted in 1946); the Proposal of the Committee on Personal Injury Claims of the California State Bar (1965); and Ehrenweig's "Full Aid" Insurance (1955). *See* BASIC PROTECTION *supra* note 5, at 125-180.

8 For example, in the Massachusetts Superior Court where two-thirds of the civil suits arose from car accidents, the case load was reduced by 50 percent. *See* Widiss & Bovbjerg, *No-Fault in Massachusetts: Its Impact on Courts and Lawyers*, 59 A.B.A.J. 487 (1973).

9 U.S. DEP'T. OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS (1970). Congress authorized this study in Act of May 22, 1968, Pub. L. No. 90-313, § 82 Stat. 126. *See also* Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207 (1971).

10 Presently 25 states claim, some falsely, to have a no-fault insurance scheme. A no-fault insurance scheme has three essential elements: (1) it distributes insurance compensation without regard to fault for the bodily injuries incurred by victims of automobile accidents; (2) it is compulsory; and (3) it requires at least a partial elimination of tort suits for pain and suffering damages and for out-of-pocket expenses below a certain threshold level. The function of this last provision is to eliminate the largest source of the costs in distributing automobile insurance —litigation expenses and excessive damages for pain and suffering in minor injuries. Many states claiming to have no-fault legislation do not have the partial elimination of tort suits but have "add-on" bills which enable the victim to receive payments regardless of fault from the insurer while preserving all tort claims for pain and suffering. Of the states which claim to have no-fault, only about sixteen have a no-fault scheme which includes all the essential elements described above. *See* CCH AUTO. L. REP., ¶¶ 1935-87 (April 18, 1975).

11 JUDICIARY REPORT, *supra* note 5, at 5. The report stated that an "adequate" no-fault bill had to provide both first party benefits and a tort threshold.

12 "[I]n all the States there should be uniformity as to the essential elements of the system of motor vehicle accident and insurance law to avoid confusion,

which all independent state legislation must comply with.[13] Second, failure of a state to comply with these standards triggers the application of the federal no-fault bill with significantly more stringent requirements than the "minimum standards."[14]

Several questions have been raised as to the constitutionality of S. 354.[15] But the major constitutional attack on the federal no-fault bill as proposed is that it violates the constitutional notions of state sovereignty embodied in the tenth amendment. This amendment[16] reserves all powers to the states which are not delegated to the Congress: implicit in it is the principle of federalism. It is unclear, however, whether the existence of states as sovereigns under the tenth amendment poses any constitutional limitations on the express powers of Congress[17] or on the means used by Congress necessary to implement those powers.[18] The critics are particularly concerned with the provisions of the bill which impose affirmative obligations on state officials to implement federal legislation.[19] The purpose of this Note will be to analyze the

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complexity, uncertainty, and chaos which would be engenedered by a multiplicity of noncomplementary State systems . . . ." S. 354, 94th Cong., 1st Sess. § 102(a)(9) (1975).

13 *Id.* § 202.

14 S. 354 has been opposed on policy grounds by three major interest groups. Many members of the bar are critical of the elimination of the tort remedy by the bill. The lawyers' lobby has been one of the most vigorous opponents of federal no-fault. *See* Ottenberg, *Lawyers Lobbying Against No-Fault Insurance,* Washington Star, July 6, 1971; Washington Star, July 7, 1971, both reprinted in 117 Cong. Rec. 28283-85 (1971). The smaller insurance companies are worried that the national no-fault scheme will drive them out of business. The state insurance commissioners are concerned that the bill will impinge on their authority.

For a compilation of the arguments of the critics of S. 354 see Hearings on S. 354 Before the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 945-86 (1974) [hereinafter cited as *Judiciary Hearings*].

15 Critics of the no-fault concept claim that it violates the Constitution because (1) it deprives the victim of his right to a jury trial and (2) it deprives a victim of his property — pain and suffering damages — without due process of law. For cases discussing substantive rights under no-fault *see* Pinnick v. Cleary, 271 N.E.2d 592 (Mass. 1971); Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972); *See generally* BASIC PROTECTION *supra* note 5. *See also* Erwin N. Griswold's statement on the constitutionality of the National No-Fault Motor Vehicle Insurance Act, *Judiciary Hearings, supra* note 14, at 743.

16 U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or the people."

17 U.S. CONST. art. I, § 8.

18 U.S. CONST. art. I, § 8, cl. 18.

19 *See* Dorsen, *The National No-Fault Motor Vehicle Insurance Act: A Problem*

federal no-fault bill in light of the tenth amendment's limitations, if any, on Congress' powers to act.[20] It concludes that S. 354 does not violate restrictions on federal action imposed by the state sovereignty concept of the tenth amendment.

I. The Federal No-Fault Bill

A. *Description*

S. 354 has three main sections. Title I sets forth the details of how every state must administer no-fault insurance benefits. Title I acts as an umbrella provision in that it applies to the other two titles. It specifically requires every automobile driver to be covered for bodily injuries,[21] and forces each state to guarantee that every person, regardless of his risk category[22] or income,[23] can receive insurance coverage. The bill carefully prescribes the conditions under which an insurance company can cancel or refuse to renew a policy. A policy of insurance, after an initial 75 day investigation period, cannot be cancelled except for non-payment of the premium or revocation of the insured's license; in either case a thirty day notice must be given.

The most controversial administrative provision imposes affirmative duties on the state insurance regulator.[24] Although deferring to state methods of establishing rates,[25] the bill requires each state insurance department to provide consumers with information about rates charged for equivalent insurance coverage by all the state insurance companies in order to let each purchaser compare prices between insurance packages.[26] To guarantee that the prices paid for medical and vocational rehabilitation services are "fair

in Federalism, 59 N.Y.U.L. Rev. 50 (1974); Judiciary Report, *supra* note 5, at 38-50 (Minority opinion).

20 This article deals exclusively with the constitutionality of S. 354 as a federal remedy for the nation's automobile insurance problems. It does not discuss the constitutionality or merits of no-fault insurance as such.

21 S. 354, 94th Cong., 1st Sess. § 104 (1975).

22 *Id.* § 105(a).

23 *Id.* § 105(a)(5).

24 Judiciary Report (Minority opinion), *supra* note 5, at 38-40.

25 S. 354, 94th Cong., 1st Sess. § 109(a) (1975).

26 *Id.* § 109(b).

and reasonable," each insurance commissioner, in conjunction with the state vocational rehabilitation agency, is required to evaluate in periodic reports the quality of the services provided and the progress of each recipient of no-fault benefits.[27] The title concludes with an enumeration of the rights and responsibilities of insurance companies most notably the requirements that each company provide "basic reparation"[28] payments without regard to fault and that each insured be covered for up to $50,000 in tort liability insurance for any liability to which he might be exposed by another state's no-fault laws.[29]

Title II establishes national standards for state no-fault insurance plans. No state under S. 354 may put any limits on the amount of benefits recoverable by an automobile victim from his own insurer for medical treatment, emergency services, vocational rehabilitation care and up to $1,000 in funeral costs.[30] Title II does, however, permit a state to limit the benefits recoverable by the victim from his insurer for workloss, both on a monthly and total amount basis.[31]

Further, Title II only partially eliminates tort liability.[32] For example, individuals remain liable for any injuries intentionally caused; for injuries negligently caused, an individual may be liable for the victim's economic losses not covered by the workloss provisions and for "pain and suffering" caused when the victim suffers death, serious injuries, permanent disfiguration, or 90 continuous days of total disability.[33] Any damages received by a victim are computed on a "net loss"[34] basis, i.e., all other benefits like social security or workmen's compensation are subtracted from loss in determining the amount of benefits to be received.

For those states which do not comply with the minimum standards of Title II, Congress has mandated in Title III an alternative

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27 *Id.* § 109(c).
28 *Id.* § 111(b).
29 *Id.* § 110(b)(2).
30 *Id.* §§ 204(a), 103(2).
31 *Id.* §§ 204(b), 207.
32 *Id.* § 206.
33 This provision differs from those in some no-fault states which allow suit for pain and suffering when the amount of medical damages reaches a minimum threshold level. See text accompanying note 61 *infra.*
34 S. 354, 94th Cong., 1st Sess. § 208 (1975).

state plan significantly more stringent than the Title II minimum requirements.

The purpose of this "carrot and stick" approach is to induce states to enact their own bill.[35] Title III incorporates most of the major requirements of Titles I and II.[36] It differs from Title II in three key respects. First, Title III completely abolishes all tort liability for motor vehicle accidents.[37] In contrast Title II only partially abolished tort liability for both economic and noneconomic damages. Second, rather than having Title II's flexible formulas for determining workloss, replacement services loss,[38] and survivor's loss,[39] Title III creates a mandatory ceiling determined, in the case of workloss for example, on the basis of the average per capita income of the state.[40] Finally, Title III requires that each insurance company offer "no-fault" coverage for noneconomic damages, pain and suffering.[41] This provision was not required in Title II, which preserves the victim's right to sue for mental distress if the accident is severe enough.[42]

A no-fault state is defined as one which provdes for compulsory motor vehicle insurance, payment of benefits without regard to fault on first party basis where the value of the benefits is not less than $2,000, and at least a partial elimination of tort suits for pain and suffering.[43] Whether a state qualifies as a "no-fault" state determines how long it has to adopt a "minimum standards" bill. Any state classified as a "no-fault" state has four years in which to enact a minimum standards bill. States without no-fault insurance are required to enact a minimum standards bill by the completion

35 JUDICIARY REPORT, *supra* note 5, at 143.

36 S. 354, 94th Cong., 1st Sess. § 301.

37 Tort liability remains (a) if the driver was not insured at the time of the accident; (b) if the car was negligently manufactured or serviced and c) if the injury was intentionally caused. *Id.* § 303(a).

38 Replacement Service Loss means the expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those the victim would have performed for the benefit of himself or his family. *Id.* § 103(24).

39 Survivor's loss means, roughly speaking, the loss of income of the deceased victim plus expenses reasonably incurred by survivors to obtain the ordinary and necessary services which the victim would have performed less the expenses which would have been incurred by reason of the victim's death. *Id.* § 103(32).

40 *Compare Id.* § 302(b) with § 204(b).

41 *Id.* § 304(b).

42 *Id.* § 206(a).

43 *Id.* § 201(g)(4).

of the first general session of the state legislature after S. 354 is adopted.[44]

The Secretary of Transportation plays an important role in determining whether states are covered by Title II or Title III. He not only makes an initial evaluation of the state's legislation but also reviews each state plan at least every three years to evaluate the success of the plan.[45] The designation as a Title II or Title III state is not inflexible. If the Secretary decides that a Title III state has passed a bill in compliance with the minimum standards, he automatically cancels the "alternative plan." Similarly, a Title II state which is no longer in compliance with national standards must submit to Title III. Any determinations made by the Secretary must take place within 90 days of receipt by him of the state's no-fault plan.[46] He must publish all reasons for his decision in the Federal Register and is subject to judicial review of all determinations. The Secretary is authorized to reimburse states for "any governmental cost increases resulting from the implementation or administration of a no-fault plan for motor vehicle insurance."[47] The bill appropriates $10,000,000 for this purpose, to be allocated at the discretion of the Secretary.[48] The no-fault bill does not expressly provide remedies for the Secretary to control recalcitrant states. However, a mandamus would probably be the appropriate remedy against state officials.[49]

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44 *Id.* § 201(g)(2).

45 *Id.* § 201(c).

46 *Id.*

47 *Id.* § 201(i).

48 *Id.* § 201(j).

49 JUDICIARY REPORT, *supra* note 5, at 13. The REPORT cited a letter written by Erwin N. Griswold to Senator Hruska stating: "Although the proposed national no-fault bill itself makes no provision for a federal remedy in case of default by a state of its Title III obligations, . . . court actions in the nature of a mandamus or declaratory judgment would lie to enforce state obligations." *See Judiciary Hearings, supra* note 14, at 881.

It is clear that a federal official, in this case the Secretary of Transportation, could obtain equitable relief in federal courts without the bar of sovereign immunity spelled out in the eleventh amendment. United States v. Mississippi, 380 U.S. 128, 140 (1964). It is also probable that a state citizen could go into federal court for equitable relief to force state officials to abide by federal regulations. *See Ex parte* Young, 209 U.S. 123 (1908). *But see* Maryland v. Wirtz, 392 U.S. 183, 199 (1968) which left open the eleventh amendment issue.

B. *Impact on the States*

The main criticism of the bill is that it coerces states to act affirmatively and therefore invades their sovereign powers. This coercion is of two kinds. First, under Titles I and II, the state administrator is forced to administer a plan in a specific way which is subject to the regulation of a federal authority. This seems to be particularly offensive to the states because they traditionally have had relative autonomy in regulating insurance.[50] Second, if a state fails to enact a Title II bill, the federal government goes even further and compels state officials to act under and administer a federal program.

The minority opinion of the Report of the Senate Judiciary Committee, articulated the states' resentment of this intrusion upon their sovereign will by the federal government as follows: "Does the Congress have the power to employ a regulatory scheme that compels the States to devote its agencies, personnel and facilities to administer a federal law?"[51]

The minority listed eleven provisions of the bill which it found infringe on state sovereignty.[52] Its greatest objection is to the numerous affirmative responsibilities the bill places on the state government. For example, the bill could force a state to create both an agency to administer an assigned claims plan[53] and a state rehabilitation agency[54] if these do not already exist. The minority also cited the many duties placed on the state insurance commissioner to administer the plan.[55]

Even those states which already have some form of no-fault legislation, must significantly alter their no-fault scheme. Only three states[56] have bills which meet the minimum standard benefits requirements, and even these states must adjust many of their

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50 *See* note 71, *infra.*

51 JUDICIARY REPORT, *supra* note 5, at 42-3 (Minority opinion).

52 *Id.* at 38-40.

53 S. 354, 94th Cong., 2d Sess. § 108 (1975).

54 *Id.* § 111(d).

55 *Id.* § 109; *see* text accompanying note 24 *supra.*

56 Michigan, New Jersey, and New York. JUDICIARY REPORT, *supra* note 5, at 5. Professor Keeton noted that of these three states, only Michigan's tort elimination provision might meet the minimum standard. Interview at Harvard Law School, May 7, 1975.

administrative details. The "Add-on" states are not considered no-fault states for purposes of S. 354.[57] In these states, like Delaware and Maryland,[58] no-fault insurance benefits are distributed on a first party basis by the insurance company, but each victim is allowed to sue on an unlimited basis for tort damages. Such states must alter their insurance system within the first legislative session after the enactment by Congress of the bill.

Massachusetts represents a second approach to no-fault automobile insurance. It will have to radically change two provisions of its no-fault law. Under present Massachusetts law, no-fault damage is limited to $2,000 in economic benefits, which includes medical services, wage loss and substitute services loss.[59] Not only will Massachusetts have to reformulate its methods of computing benefits for damages like workloss, but it will have to eliminate completely any limits on "allowable expenses" under Title II of S. 354.[60] Moreover, Massachusetts allows tort litigation for pain and suffering if the "reasonable and necessary" expenses for medical and hospital care exceed $500.[61] But under Title II the availability of such non-economic litigation must rest entirely on the kind of injury suffered, not on a threshold dollar amount.[62]

Even Michigan, which Congress cited as one of the three states which it believed had a bill consistent with the no-fault bill, will have to make several substantive changes in its methods for administering the no-fault claim. For example, the no-fault bill provides specific formulas for limiting workloss benefits.[63] However, the Michigan scheme limits the benefits receivable by putting a limit of three years, rather than any dollar amount as required by S. 354, on the workloss benefits.[64]

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57 *See* note 10 *supra.*

58 "Add-on" exists in Arkansas, Delaware, Maryland, Oregon, South Dakota, Texas, Virginia and Wisconsin. Professor Keeton describes add-on as a proposal "by people who are basically opposed to real no-fault and hope to head it off with compromise." Statement at *Hearing on H.R. Before the* Subcommittee on Commerce and Finance, Comm. on Interstate and Foreign Commerce (July 9, 1974).

59 MASS. GEN. LAWS ch. 90, § 34A (1970).

60 S. 354, 94th Cong., 2d Sess. § 204(a) (1975).

61 Florida has $1,000 as its threshold dollar amount for pain and suffering, FLA. STAT. ANN. § 627.737(2) (1971).

62 S. 354, 94th Cong., 2d Sess. § 206(a)(5) (1975).

63 S. 354, § 204(b). For example, this section says that a state cannot limit the total amount of work loss damages to less than $15,000.

64 MICH. COMP. LAWS ANN. ch. 500 § 3107(b) (1973).

The federal infringement on state powers described in the above paragraphs, has provoked much state hostility. Anticipating the ruffled feelings of state legislators and insurance administrators, the Judiciary Committee said: "We feel no-fault effectively meets this nationwide need while at the same time preserving in a sound manner and conservative spirit the existing structure of state regulation of insurance."[65] Nonetheless, advocates of state autonomy have fought S. 354 on the grounds that the Constitution mandates a federalist system which by its nature precludes the intrusion of Congress into the area of traditional state police powers without at least nominal consent by the states. The minority report argues that by compelling the states to create agencies and to staff and fund them to administer a federal law, Congress "interferes with, indeed violates, the sovereignty of the states as manifested in the tenth amendment."[66]

II. A Constitutional Framework

An analysis of federal legislation should involve a two-step inquiry.[67] First, does Congress have the power to act under Article I, Section 8? Second, has Congress used means which are "necessary and proper" for implementing its exercise of power?[68]

A. *The Commerce Power*

None of the critics of the national no-fault bill has challenged the power of Congress to regulate automobile insurance under the Commerce Clause.[69] In *United States v. Southeastern Under-*

65 Judiciary Report, *supra* note 5, at 2.

66 *Id.* at 35.

67 In M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall used this two-step analysis to evaluate the legitimacy of Congress' incorporation of a national bank.

68 U.S. Const. art. I, § 8, cl. 18.

69 Dorsen, *supra* note 19, at 47 and Judiciary Report, *supra* note 5, at 40 (Minority opinion). For cases broadly construing Congress' power to regulate interstate commerce, *see* Perez v. United States, 402 U.S. 146 (1971); Wickard v. Filburn, 317 U.S., 111 (1942); Mondov v. New York, N.H. & H.R.R., 223 U.S. 1 (1912) (Second Employer's Liability Cases). *See also* Reevis v. United States, 401 U.S. 808 (1971); United States v. Bass, 404 U.S. 336 (1971).

In S. 354 the Senate declared that the "intrastate transportation of individuals by

writers' Association,[70] the Supreme Court broke with precedent and definitively labelled insurance as "interstate commerce."[71] Justice Black, writing for the majority, held that the federal antitrust acts, which apply only to activities affecting interstate commerce, are applicable to insurance companies because "The decisions which [an insurance] company makes at its home office . . . concern not just the people of the state where the home office happens to be located."[72]

In 1945, Congress responded to *Southeastern Underwriting* with the McCarran-Ferguson Act[73] which stated that it was in the best public interest to allow the states to continue to regulate insurance under the Commerce Clause, but delegated the responsibility to the states as long as they fulfilled the dictates of the antitrust acts.[74] There is no indication that this Federal policy has changed since the Act's passage.

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motor vehicles over federal-aid highways and other highways significantly affects interstate commerce, particularly in metropolitan areas encompassing more than one State." S. 354, 94th Cong., 2d Sess. § 102(z) (1975).

70 322 U.S. 533 (1944). In this case, a federal grand jury in Georgia indicted 200 private stock insurance companies and 27 officers for violating the Sherman Antitrust Act. The charges included fixing premium rates, fixing agents' commissions, forcing non-member companies into conspiracy, and attempting to compel those seeking insurance to buy from association members. The companies demurred on the grounds that insurance was not "commerce." Amicus briefs were filed on behalf of thirty-five states to support the insurance companies' claim that insurance was not a matter for federal regulation.

71 In Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868) the Supreme Court said insurance was "local" and subject to state regulation. Upholding a Virginia statute discriminating against foreign insurance companies, the court said, "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the insured . . . . They are then, local transactions and are governed by local law." *Id.* at 183. Throughout the latter half of the 19th century both Congress and the Supreme Court consistently rejected efforts to include insurance in interstate commerce. For the history of state insurance regulation *see* F. CRANE, AUTOMOBILE INSURANCE RATE REGULATION (1962); Kimball & Boyce, *The Adequacy of State Insurance Regulation: McCarran-Ferguson Act in Historical Perspective*, 56 MICH. L. REV. 545 (1958).

72 322 U.S. at 541-42.

73 15 U.S.C. §§ 1011-15 (1970). For the legislative history of the McCarran-Ferguson Act, *see* Note, *The Year of S.E.U.A.*, 23 CHI-KENT L. REV. 317 (1945).

74 The McCarran-Ferguson Act declares that the "continued regulation and taxation by the several states of the business of insurance is in the public interest." 15 U.S.C. § 1011 (1970). The act also provided that after a three year moratorium period, the Sherman Act, the Clayton Antitrust Act and the Federal Trade Commission Act would be applicable to insurance "to the extent that such business is not regulated by state law." 15 U.S.C. § 1012 (1970). Several suits unsuccessfully challenged the absolute power of the state to regulate insurance. *See* FTC v. National

B. *The Necessary and Proper Clause*

Although it is clear that Congress has the power under the Commerce Clause to regulate and administer a system of no-fault insurance, this does not answer the problem of what means it can use to implement this power. In article I, § 8, cl. 18, the Constitution lists as one of Congress' enumerated powers the authority to make "all laws necessary and proper for carrying into execution" all powers vested by the Constitution in the federal government.

The Supreme Court was first faced with construing the impact of the "necessary and proper clause" in *M'Culloch v. Maryland*[75] where Congress' power to incorporate a bank was challenged. After deciding that Congress could act under several of its express powers,[76] Chief Justice Marshall then struggled with the question of whether the necessary and proper clause deprives Congress of its "choice of means" in implementing its powers. Marshall refused to interpret the word "necessary" narrowly,[77] contending that the clause was inserted to remove all doubts as to the right of Congress to legislate on the "vast mass of incidental powers which must be involved in the Constitution if that instrument be not a splendid bauble."[78] The Congress, he said, can select any constitutional means necessary to perform a legitimate act:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but

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Cas. Co., 357 U.S. 560 (1958); Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946). *But see* FTC v. Traveler's Health Ass'n., 362 U.S. 293 (1960).

75 17 U.S. (4 Wheat.) 316 (1819).

76 *Id.* at 407-10.

77 *Id.* at 418-19. *See also* ICC v. Brimson, 154 U.S. 447, 473-74 (1894), where the Supreme Court expressed this standard of review:

> Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. . . . The test of the power of Congress is not the judgment of the courts that a particular means are not the best that could have been employed to effect the end contemplated by the legislature. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the constitution. It cannot go beyond that inquiry without intrenching upon the domain of another department of government.

78 *Id.* at 421.

> consist with the letter and spirit of the constitution, are constitutional. . . .[79]

Marshall believed that the court should play an active role in reviewing federal legislation.[80] It must first decide whether the means used by Congress are rationally connected to the legislative goal. Second, the court must engage in a constitutional analysis. It must judge whether Congress has chosen "measures which are prohibited by the constitution,"[81] and it must determine whether Congress "under the pretext of executing its powers, pass[es] laws for the accomplishment of objects not entrusted to the government . . . ."[82]

Marshall's analysis of the "necessary and proper" clause provides the framework for a discussion of the constitutionality of S. 354. Clearly the national no-fault bill is rationally related to the goal Congress is attempting to achieve — the uniform regulation of automobile insurance. It is far less clear, however, whether the "measures" Congress utilizes in S. 354 are consonant with other constitutional requirements.

III. The Tenth Amendment

A. *S. 354 and the Tenth Amendment*

The national no-fault bill represents an important test case for evaluating the nature of federalism as expressed in the tenth amendment. S. 354 imposes mandatory obligations on the states to administer a federal no-fault scheme even when the state legislature has refused to authorize such a scheme. Moreover, under this bill, all states are required to regulate insurance.[83] In no other piece of legislation has Congress placed mandatory responsibilities on state governments.

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79 *Id.*

80 For modern cases dealing with the necessary and proper clause, *see* United States v. Oregon, 366 U.S. 643 1961); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957). *See also* Gunther & Dowling, Cases and Materials on Constitutional Law (1970) 410-23.

81 17 U.S. (4 Wheat.) at 423.

82 *Id.*

83 Under the McCarran-Ferguson Act, *supra* note 59, states were authorized, but not required, to regulate insurance.

Congress has, in the past, chosen non-mandatory means for implementing its express powers. One alternative has been the threat of federal intervention if the states fail to act. In the Voting Rights Act of 1965, Congress set up specific standards for state election procedures; if the states are remiss in fulfilling these standards, federal officials are commanded to assume these duties.[84] Likewise in the Clean Air Act of 1970, the federal government proscribed certain standards for pollution control. If the state agencies fail to adopt the required procedures, the federal agency is empowered to step in immediately.[85] The second alternative which Congress has employed in legislation like the Federal Aid for Highways Act[86] and Aid to Families with Dependent Children,[87] is the conditional grant-in-aid, where the federal government conditions its delivery of funds to the states on the fulfillment by the recipient states of specific congressional mandates.

B. *Is the Tenth Amendment a "Truism"?*

The tenth amendment reserves all powers to the states which were not delegated by the Constitution to Congress. It has been interpreted by the Supreme Court to be a "truism, that all is retained which has not been surrendered."[88] An extreme extension of this "truism" mode of analysis, however, would lead necessarily to the conclusion that the tenth amendment dictates of federalism do not impose limits on congressional powers. It is clear that Congress by statute could not abolish the states on the grounds that they adversely affect interstate commerce. The existence of states is too much a part of the fabric of the constitutional frame-

84 42 U.S.C. § 1971 *et seq.* (1970).

85 *Id.* § 1857 *et seq.*

86 23 U.S.C. § 101 *et seq.* (1970).

87 42 U.S.C. §§ 601 *et seq.* (1970).

88 United States v. Darby, 312 U.S. 100, 124 (1941). *Darby* overruled Hammer v. Dagenhart, 247 U.S. 251 (1918), which struck down a piece of federal legislation because it interfered with state sovereignty under the tenth amendment. The *Dagenhart* court took the opposite view of the purpose of the tenth amendment because it viewed Congress as being able to act only under those powers expressly delegated to the national government. *See* 1 W. CROSSSKEY, *infra* note 93, at 697, which criticized the Dagenhart approach:

> And thus, the tenth amendment, originally intended to make no change but merely to declare more clearly the subordinate function of the states, at last came to seem, to many persons, the very cornerstone of a vast and imposing edifice of inviolable state sovereignty.

work of goverment[89] to allow such an exertion of congressional power, even though the goal it seeks to achieve — regulating commerce — is clearly "legitimate." We are faced, then, with the difficult task of determining the point at which Congress' express powers to act are checked by notions of state sovereignty.

This dilemma is one which has been the subject of continued academic debate. Expressing one point of view, Professor John Hart Ely, stated his belief that the tenth amendment is an inappropriate constitutional instrument to fence off a domain of exclusively local affairs.[90] He concluded "that the question of what matters are to be left exclusively to the states is to be answered not by reference to some state enclave construct, but rather by looking to see what is not on the federal checklist."[91] In other words, Professor Ely believes that once Congress can constitutionally act under article I, § 8, it is not violating the tenth amendment. While it is unclear whether Professor Ely is claiming that there is no constitutional limit whatsoever on Congress' powers to encroach on state sovereignty, he seems to believe quite strongly that any such checks which may exist will not be found in the tenth amendment, but rather in a proper interpretation of article I, § 8.

Professor Charles Black, on the other hand, firmly asserts that there is some "implied constitutional prohibition" against the federal government's invading the powers reserved to the states: "[O]ne must conclude that some limits on federal power arise by mere implication from the fact of their being states, with general authority over their local concerns."[92] Thus Black, looking to the whole framework of the Constitution, seems to believe there are some absolute limits to the power of Congress to act even if it is pursuing some legitimate goal under article I, § 8.

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89 Many of the constitutional provisions assume the existence of states as an essential part of the American government. Art. IV discusses the relations between the states, the qualifications for statehood, and the guarantee that each state have a republican government. Many of the constitutional amendments specifically mention states. Thus an elimination of the states would necessitate a major rewrite of the Constitution — and this Note.

90 Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701 (1974).

91 *Id.* at 702.

92 C. BLACK, PERSPECTIVES IN CONSTITUTIONAL LAW 29 (1970).

C. *Historical Perspective*

Historically, the tenth amendment was probably intended to do little more than guarantee the continued existence of states as sovereign entities.[93] During the constitutional debates on the amendment, states rights advocates tried unsuccessfully three times to limit the power of the Congress to those expressly delegated to it by the Constitution.

There were two early theories of the constitutional function of the tenth amendment. Chief Justice Marshall, in M'Culloch v. Maryland,[94] viewed the amendment merely as a palliative to states rights advocates to quiet the "excessive jealousies which had been excited."[95] He believed that Congress had the power to use any means not precluded by the Constitution as long as the goal it sought to achieve was "legitimate."[96] Later Supreme Court Justices, around the middle of the nineteenth century, construed the tenth amendment as a limit on Congress' power to act. They reviewed the federalist scheme as one consisting of inviolate spheres of autonomy. Under this view, a power belonged either to the states or to Congress without any overlap. *Collector v. Day*[97] expressed this view of federalism: "The general government, and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective sphere."[98]

D. *Recent Judicial Interpretation of the Tenth Amendment*

The tenth amendment has only rarely been used successfully in attacking federal legislation.[99] The Supreme Court has been reluc-

93 For a historical analysis of the origins of the tenth amendment *see* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 675-90 (1953).

94 17 U.S. (4 Wheat.) 316 (1819).

95 *Id.* at 406.

96 *See* text accompanying note 79 *supra*. Chief Justice Marshall did not appear to recognize the tenth amendment as any such limit.

97 78 U.S. (11 Wall.) 113 (1871) (holding unconstitutional a federal income tax as applied to a state judicial officer) *overruled in* Graves v. N.Y. *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939). *See also* Indian Motorcycle v. United States, 283 U.S. 570 (1931) (holding unconstitutional a federal excise tax on the sale of motorcycles to a municipal police department).

98 78 U.S. at 124.

99 A threshold issue in the evaluation of the tenth amendment may be a deter-

tant to prevent the federal government from acting under its expressly delegated powers even when such activity seems to impinge on state sovereignty.

Since the turn of the century the Supreme Court has struck down only two congressional acts on tenth amendment grounds. In both cases the Court was careful to point out that the authority under which Congress purported to be acting did not fall under the expressly delegated powers enumerated in article I, § 8. In *Hammer v. Dagenhardt*[100] the Supreme Court held invalid, on tenth amendment grounds, a congressional act which prevented products of child labor from being sold in interstate commerce. The Court emphasized that this act was not an exercise of commerce power but was instead an attempt by Congress to regulate child labor which it described as "purely local in its character and which no authority has been delegated to Congress in conferring the power to regulate commerce among the states."[101] Eighteen years later in *United States v. Butler*[102] the Supreme Court invalidated the Agricultural Adjustment Act under the tenth amendment, although the government purported to be acting under the general welfare clause.

In both these cases the Supreme Court looked primarily at whether Congress was acting under an enumerated power. Once it decided that the legislation was not a valid exercise of one of the express powers, it struck down the legislation under the tenth amendment. Thus the Supreme Court considered the tenth amendment only after finding that Congress was not acting pursuant to one of the powers on the federal "checklist."

The tenth amendment might be an important check, however, on the means Congress uses to implement its enumerated powers.[103] The cases in which the Supreme Court has examined the means

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mination of whether the Judiciary or Congress should decide the relative powers of the state and federal governments. See Helvering v. Gerhardt, 304 U.S. 405, 416 (1938); and Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177-78 (1803); H. Wechsler, The Political Safeguards of Federalism, in Principles, Politics and Fundamental Law (1961); 81 HARV. L. REV. 1572, 1575 (1968).

100 247 U.S. 251 (1918) (later overruled by United States v. Darby, 312 U.S. 100 (1941)).

101 *Id.* at 276.

102 297 U.S. 1 (1936).

103 *See* text accompanying note 67 *supra.*

used by Congress in light of tenth amendment values, break down into three categories involving (1) the degree of coercion exerted on the states, (2) the amount of infringement on state autonomy and (3) the heaviness of the burden placed on state government.

1. Persuasion/Coercion

Several cases presented the problem of whether federal coercion of state governments is a violation of the tenth amendment. This issue first arose in situations involving financial incentives directed at the state's decision-making powers. In *Steward Machine Co. v. Davis*[104] the Court examined the Social Security Act, which encouraged the formation of state unemployment compensation funds by providing a tax credit for state employers who paid money into the state fund. The court tried to define the degree of coercion which the federal government could impose on the states without violating their sovereignty. It concluded that Congress could "persuade" the states but could not "coerce" them. Because Congress was giving a state the alternatives of setting up its own social security mechanism or submitting to a federal one, the Court held that the incentive was persuasive, not coercive. Citing the virtues of a federalist form of government, it implied that the federal government could "persuade" states by making them choose between "relief administered under the laws of her own making, by agents of her own selection instead of under federal laws, administered by federal officers . . . ."[105]

In *Oklahoma v. United States Civil Service Commission*[106] the Supreme Court was faced with a more extreme form of coercion. A member of the state highway commission, whose principal employment was in an activity financed by federal funds, was forced to resign under the Hatch Act[107] for being the chairman of the Democratic State Central Committee. The state claimed that the Hatch Act violated the Constitution because it forced the states to choose between firing a state official or suffering the penalty of

104 301 U.S. 548 (1937).
105 *Id.* at 590.
106 330 U.S. 127 (1947).
107 7 U.S.C. § 361a *et seq.* (1970).

losing funds. The fact that the loss of highway funds would have a large impact on the state's finances did not seem controlling to the Court. The Court seems to have held that once Congress acted under its express powers the tenth amendment became virtually inoperative:

> The coercive effect of the authorization to withhold sums allocated to a state is relied upon as an interference with the reserved powers of the state.
>
> . . . .
>
> [T]he Tenth Amendment has been consistently construed 'as not depriving the national government of the authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to a permitted end.'[108]

Thus the court, only eleven years after the *Steward* decision, redefined the degree of coercion that would violate the constitutional notions of federalism. It is important to note, however, that in neither *Steward* nor *Oklahoma* was any mandatory financial or administrative burden placed on the states: in *Steward* the state could opt for the federal plan, while in *Oklahoma,* requiring a state official not to become engaged in political activities is not a substantial interference with state government operations.

2. Infringement on State Autonomy

On the whole the Supreme Court has shown little concern for federal action which impinges on state autonomy. In *Sanitary District of Chicago v. United States,*[109] the Supreme Court allowed Congress to act under its commerce powers to prevent the Sanitary District from disposing of sewage for the welfare of the city by diverting water from Lake Michigan. Thus the Court seemed willing to allow Congress to interfere with a traditional domain of state police power — sewage disposal — when it was determined that the means used by the state interfered with interstate commerce.

In *United States v. Oregon,*[110] the Court allowed the federal

108 330 U.S. at 142-43 *quoting* United States v. Darby, 312 U.S. 100, 124.
109 266 U.S. 405 (1925).
110 366 U.S. 643 (1960).

government to take title to the estate of anyone who died intestate in a Veterans' Administration Hospital. This was a direct interference with the states' traditional control over estate laws. In *Minnesota Northern States Power Company v. Minnesota*,[111] the Supreme Court reaffirmed its conviction that the authorized exertion of federal power precludes any state activity even when it is acting under its traditional police powers. In this case the federal court held that the Atomic Energy Commission had exclusive jurisdiction under the Supremacy Clause[112] even when Congress had not expressly exerted a policy of total pre-emption. The court refused to let Minnesota act for the public welfare by enacting pollution standards which were more stringent than the federal ones.

The Court has allowed the federal government to impose affirmative responsibilities on state officials. In the FELA cases Congress has forced state courts to hear federal causes of action despite the state's protestations.[113] It has even empowered municipal officials to exercise eminent domain powers even though the state does not so authorize.[114] In both these situations the responsibilities placed on state officials are relatively minor infringements on state autonomy. State courts were only forced to hear federal causes of action which were similar to state claims, and in *Tacoma*, state officials merely obtained a power to act but were not required to do so.[115] But these cases show a willingness of the Court to allow some federal interference with the states' control over their administrative machinery.

In 1965 the Supreme Court was confronted with federal legislation which constituted significant incursion into the states' traditional sovereign powers. In *South Carolina v. Katzenbach*[116] the state challenged the Voting Rights Act of 1965[117] partly on the grounds that it was an unconstitutional exertion of federal coercion. In this act Congress created three remedies against voting

111 405 U.S. 1035 (1972), *aff'g mem.* 447 F.2d 1143 (8th Cir. 1971).
112 U.S. CONST. art. VI, cl. 2.
113 Mondov v. New York, N.H. & H.R.R., 223 U.S. 1 (1912) (Second Employers' Liability Cases); Testa v. Katt, 330 U.S. 366 (1947).
114 City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).
115 *Id.*
116 383 U.S. 301 (1966).
117 42 U.S.C. § 1973 *et seq.* (1970).

discrimination: (1) the suspension of literacy tests and similar voting qualifications for five years after an occurrence of voting discrimination took place; (2) under § 5, a suspension of all new voting regulations pending review by federal authorities to determine whether they perpetuate voting discrimination and (3) the assignment of federal examiners to qualify voting applicants.[118] The federal government not only interferes with traditional state powers to regulate elections, but also infringes on the states' legislative process. The Supreme Court upheld the act as a proper exercise of authority under the enforcement provision of the fifteenth amendment,[119] using Chief Justice Marshall's test[120] to analyze the express powers of Congress with respect to the reserved powers of the states.[121]

Although the Voting Rights Act of 1965 represents a symbolic attack on state sovereignty by impinging on the states' traditional police power to regulate elections, in practice, it does not force the states to act affirmatively. Rather it discourages inappropriate state activity by substituting federal officials and federal regulations for state regulation.

3. Fiscal Burden

The Supreme Court has expressed more concern with the nature of the burden placed on the states than it has with the coerced nature of federal legislation or the infringement on state autonomy.

The Supreme Court has focused, in particular, on federal legislation which will have a financial impact on the states. The taxing cases are a prime example of this concern. In *Collector v. Day*[122] the Supreme Court had held that state instrumentalities were

118 *Id.*

119 383 U.S. at 326.

120 *See* text accompanying note 79 *supra.*

121 Justice Black, in dissent, expressed outrage at the "radical degradation of the state power" which section 5 entailed. 383 U.S. at 360.

> Section 5, by providing that some of the states cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the constitution between state and federal power almost meaningless.

383 U.S. at 358-59.

122 78 U.S. (11 Wall.) 113 (1871).

immune from federal taxation on the tenth amendment ground that states were completely independent sovereign entities. The doctrine was that the federal government could not tax those activities in which the states have traditionally engaged.[123] By 1937 the tenth amendment restriction on the federal taxing power had begun to dissolve. In *Helvering v. Gerhardt,*[124] the federal government was allowed to tax salaries received by state employees on the ground that immunity from taxation should be sustained only when the taxes would interfere with "essential governmental functions."[125] In *New York v. United States,*[126] the Supreme Court went one step further by permitting the federal government to tax a state governmental activity — the production of mineral waters.[127]

The taxing cases are important, not for their actual holdings, but as an illustration of the Court's perspective on state-federal relations. The Supreme Court allowed federal taxation as a burden on the states where it did not significantly interfere with the states' essential function.

In *Maryland v. Wirtz,*[128] the judiciary was presented with a case in which it could have, but failed to, set out the limits on the congressional power to burden the states. Maryland, joined by 27 other states, challenged the 1966 amendments to the Fair Labor Standards Act which extended its coverage to include hospitals, schools and other public institutions.[129]

The legislation, requiring the states to pay a minimum wage to their employees, placed a direct financial burden on the states. The three member district court held that state employees in hospitals and educational institutions were sufficiently "interstate"

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123 *See* United States v. California, 297 U.S. 175, 185 (1936).

124 304 U.S. 405 (1938).

125 *See also* Wilmette Park District v. Campbell, 338 U.S. 411 (1949).

126 326 U.S. 572 (1946).

127 The court relied on the proprietary-governmental distinction and held that producing mineral waters is proprietary in nature. Justices Douglas and Black dissented on the grounds that the federal government should not be allowed to tax a "legitimate governmental activity" claiming that the difference between a government's acting in a governmental or a proprietary manner is bogus. 326 U.S. at 591.

128 392 U.S. 183 (1968).

129 U.S.C. § 203(d),(r),(s) (1970). Previously the Fair Labor Standards Act had only covered private employers.

in nature because of the enormous impact the spending of these institutions had on interstate commerce.[130] Judge Winter, speaking for the majority, dismissed the tenth amendment objection to the legislation, quoting *Darby* that the tenth amendment is but a "truism."[131] He disregarded the financial impact of the 1966 amendment on the states' fiscal affairs, believing that argument should be addressed to Congress and not the courts.[132]

Chief Judge Thomsen, in concurrence, disagreed with Winter's cavalier treatment of the state's claims. He proposed what might be called an "undue interference" test[133] which would balance several factors[134] to determine if the act unconstitutionally interfered with state sovereignty, including the fiscal burden placed on the states. Thomsen did not find the burden here substantial enough to warrant invalidation of the statute.

In reviewing the lower court opinion, the Supreme Court slighted the tenth amendment problem of placing monetary burdens on the states in the legislation by focusing its analysis of the Fair Labor Standards Act on the Commerce Clause. Justice Harlan, speaking for the majority, said that Congress was acting justifiably under its Commerce Clause powers: "When a state employs people . . . it is subject to the same restrictions as a whole range of other employees whose activities affect commerce, including privately operated schools and hospitals."[135] To avoid the tenth amendment issue, the Court expressly stated that the case did not infringe on state sovereignty by forcing a state government to act in a specified way toward state officials "employed in a bona fide executive . . . capacity,"[136] a comment that relates more to concerns about state autonomy than about financial burden.

Justice Douglas, in a strong dissent, did deal with the tenth amendment problem, emphasizing the "overwhelming" impact the legislation would have on the state's fiscal policy:

130 269 F. Supp. 826 (D. Md. 1967).
131 *Id.* at 838.
132 *Id.* at 846.
133 *Id.* at 849. He derived this test from Chief Justice Stone's opinion in New York v. United States, 326 U.S. 572, 586-87.
134 *See* text accompanying note 140 *infra*. *See also* Judge Northrop's dissent, which emphasized the impact the legislation would have on the state budget. 269 F. Supp. at 853.
135 392 U.S. at 194.
136 *Id.* at 193 *quoting* 269 F. Supp. at 832.

> It is one thing to force a state to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas.
>
> . . . .
>
> If constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the states to build superhighways crisscrossing their territory in order to accommodate interstate vehicles . . . ?
>
> . . . .
>
> If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment.[137]

The situation in *Maryland v. Wirtz* is the closest analogy to the one presented by the federal no-fault bill. Like S. 354, the Fair Labor Standards Act forces the state to act affirmatively by paying its employees a minimum wage, a requirement which has a substantial impact on the state's fiscal affairs. Moreover, the state is being regulated in the performance of traditional police powers — the maintenance of schools and hospitals. However, S. 354 constitutes an even greater intrusion into state sovereignty. The federal government is attempting to impose mandatory affirmative responsibilities on state officials, thereby necessitating an alteration in both administrative and fiscal policies.[138] In *Wirtz*, the Supreme Court could be read as saying that whenever Congress acts under the commerce clause its means are constitutional. However, its protestations that it is only regulating state employees and not bona fide state officials,[139] leads one to treat this opinion cautiously.

IV. The Constitutionality of S. 354

It is no longer justifiable to view the tenth amendment as creating inviolate spheres of state and federal autonomy.[140] The expanding interpretation of the federal government's powers has

137 *Id.* at 203-205.
138 *See* text accompanying note 21-66 *supra.*
139 *See* text accompanying note 136 *supra.*
140 *See* text accompanying note 97 *supra.*

inexorably led to an increasing overlap of state and federal powers. To deal with this conflict of powers, the Supreme Court has focused on three kinds of tenth amendment problems.[141] A constitutional analysis of S. 354 must be made in the context of these three perspectives.

A. *Persuasion/Coercion*

In *Steward*,[142] the Supreme Court created the persuasion/coercion test to determine if the federal government was unconstitutionally impinging on state power. Such a test is virtually meaningless today. The threat of stopping highway funds or cutting welfare aid in a society where federal funds are a necessity for the proper financing of any state government is in practice as coercive as the method of S. 354 in imposing mandatory responsibilities on a state government. In its practical effect, S. 354 is no different than many of the federal conditional grant-in-aid programs.

The symbolic difference between the two means is only significant in that Congress is tipping its hat to state sovereignty by making the fulfillment of obligations "voluntary" — i.e., the states do not have to accept the money. Critics of the federal no-fault bill view this symbolic difference as the major problem with this "mandatory" scheme. They believe this is the point at which a line must be drawn to protect state sovereignty. In a society dominated by federal influence, reliance on a persuasion/coercion test does not guarantee state sovereignty, nor is it necessary for its protection. The other two foci the court has used, if properly applied, can adequately safeguard those values of state sovereignty embodied in the tenth amendment.

B. *State Autonomy*

The Supreme Court has permitted the federal government to impose some mandatory responsibilities on the states' governmental apparatus. The *FELA* cases and *Tacoma*[143] are examples

141 *See* text accompanying notes 83-138 *supra*.
142 Stewart Machine Co. v. Davis, 301 U.S. 548 (1937).
143 *See* text accompanying note 113 *supra*.

of such intrusion. Although the Court has been willing to allow significant incursions on the states' traditional police powers,[144] it has never dealt with the question of how great an administrative burden may be imposed on the states in the implementation of federal legislation.

Judge Thomsen, in his concurring district court opinion in *Wirtz*,[145] attempted to establish some criteria for dealing with this question. He created an "undue interference" test which included five main factors: (1) a deference to congressional findings as to the importance of the legislation; (2) the importance of the state function involved; (3) the availability of alternatives to the state performance of the function; (4) the seriousness of the interference with the function; and (5) the effect of the state's practice on interstate commerce. Thomsen's balancing test is difficult to apply because no guideline is established as to the relative weight each factor is to be given, but it does provide a thorough checklist of factors to consider in evaluating a specific piece of legislation.

S. 354 is valid under Thomsen's balancing test. First, since the bill is designed to meet several important congressional objectives, as noted above,[146] judicial deference would be expected under the first prong of Judge Thomsen's test. The second and fourth prongs of the test are met in that while the state's role in regulating the insurance industry can be considered important, S. 354 does not constitute a serious interference with this function. That is, each state already has an administrative system for insurance regulation. Although it requires the state insurance administrator to fulfill certain technical operations, the state's insurance bureaucracy will remain largely intact. The main impact of the legislation is on the substance of insurance regulation, not on the extent of state machinery required for regulation. That is in effect no greater than the interference allowed in the *FELA* and *Tacoma* cases.

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144 The federal government, either through Congress or the courts, has intervened in the most traditional areas of state police powers: Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) (desegregating schools); Maryland v. Wirtz, 392 U.S. 183 (1968) (determining state salaries); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (running elections); Baker v. Carr, 369 U.S. 186 (1962) (drawing political district lines); Testa v. Katt, 330 U.S. 386 (1947) (forcing state courts to hear federal causes of action).

145 *See* text accompanying note 128 *supra*.

146 *See* text accompanying notes 1-6 *supra*.

Because S. 354 does not seriously interfere with the state's regulation of insurance, the third prong of Judge Thomsen's test — the state's need for alternatives to perform their function — is academic. Finally, since *Southeastern Underwriter's* has clearly labelled insurance as "interstate commerce," the fifth prong of Judge Thomsen's test is satisfied.[147]

C. *Fiscal Burden*

In the taxing cases,[148] the Supreme Court has devised a test for balancing the fiscal burdens placed on a state by federal taxation against the federal interest involved in raising revenues. This "economic burden test" exemplifies the Court's concern with the interference with state sovereignty through the imposition of financial burdens on the states.[149] Chief Justice Stone, concurring in *New York v. United States*,[150] expressed this concern: "[A] federal tax . . . may nevertheless so affect the state, merely because it is a state that is being taxed, as to interfere unduly with the state's performance of its sovereign function of government."[151]

Justic Douglas' dissent in *Wirtz*[152] emphasized similar concerns. He feared the possible abuse which would result from a system which allows the federal government to impose the costs of its legislation on the states. He strongly believed that the tenth amendment posed limitations on the amounts a state should be forced to spend.

The financial burden test provides a meaningful method for defining federal-state relations in a manner that provides adequate protection for state sovereignty. It gives the federal government

147 *See* text accompanying note 71 *supra.*

148 *See* text accompanying note 124 *supra.*

149 In Helvering v. Gerhardt, 304 U.S. 405 (1938) the Court set up a two-step analysis of when a tax on state activities was unconstitutional under the tenth amendment. First, it must be taxing an "essential" government function. Second the burden on the government can not be merely "uncertain and speculative." A tax is unconstitutional under this test only when it "threatens to obstruct any function essential to the continued existence of the state government." *Id.* at 424. In 1949 the Supreme Court applied this test in a challenge to a federal tax on the admission receipts of a state public beach. Wilmette Park District v. Campbell, 338 U.S. 411 (1949).

150 326 U.S. 572 (1946).

151 *Id.* at 587.

152 *See* text accompanying note 137 *supra.*

flexibility in coping with nationwide problems while at the same time preventing the fiscal destruction of the states.[153]

S. 354 clearly does not impose a destructive financial burden on the states. The administration of a national no-fault scheme will entail only minimal costs since it requires only adjustments within an existing structure rather than the mandatory creation of a new agency.[154] Moreover, in Title II of S. 354, Congress has appropriated $10,000,000[155] to cover any costs incurred in switching the present state insurance system to no-fault. Any incidental costs to the states which may result are not sufficient constitutional grounds for overruling the federal bill.[156]

Conclusion

Congress has the power to regulate insurance under its commerce clause powers. The constitutional problem is whether the means which Congress has used in the national no-fault bill violates the tenth amendment guarantee of a federalist form of government. The National No-Fault Bill as proposed does not violate any concepts of state sovereignty embodied in the tenth amendment. Thus the determination of whether Congress should enact a national no-fault bill turns on a consideration of competing policies, not an analysis of the Constitution.

*Patti B. Saris**

153 Too great a fiscal burden might be imposed on the states, for example, from a requirement that the states provide a certain minimum level of welfare benefits. The imposition of a minimum welfare expenditure could be so costly that it would completely disrupt the fiscal policies of the state governments.

154 In his brief Dean Griswold stated, "S. 354 in fact requires very little state governmental action, and as far as insurance regulation is concerned, represents a minimal interference of appropriate functions of the state government in regulating the business of insurance." See *Judiciary Hearings, supra* note 14, at 859. Since all states already have rehabilitation agencies required by S. 354, 94th Cong., 2d Sess. §§ 109, 111 (1975) it is unlikely that these provisions would create any additional costs for the state.

155 S. 354, 94th Cong., 2d Sess. § 201(i) (1975).

156 Wilmette Park District v. Campbell, 338 U.S. 411 (1949); Helvering v. Gerhardt, 304 U.S. 405 (1938). *See also* Edelman v. Jordan, 94 S. Ct. 1347, 1358 (1974): "Such an ancillary effect on the state treasury is a permissible and often inevitable consequence of the principle announced in *Ex parte* Young." Graham v. Richardson, 403 U.S. 365 (1971) and Goldberg v. Kelly, 397 U.S. 254 (1970).

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BOOK REVIEW

STATE HOUSING FINANCE AGENCIES: AN ENTREPRENEURIAL APPROACH TO SUBSIDIZED HOUSING. By *Peter R. Morris,* Lexington, MA: D.C. Heath & Co., 1974. Pp. xvii, 160, index, bibliography. $13.50.

*Reviewed by Hope M. Funkhouser**

Real estate has been producing value and profit for the private sector since the first settlers arrived on this continent and Peter R. Morris, author of *State Housing Finance Agencies,* believes that it can produce similar returns for the public sector by substituting social benefits for profit. As the title indicates, the vehicle Mr. Morris proposes to employ in this transition are the State Housing Finance Agencies[1] (SHFAs). While others have had this idea, they have not detailed techniques for manipulating the existing system as clearly as Mr. Morris has nor have they located the level of power and potential for carrying out these techniques at the state level.

Mr. Morris has structured his work around two topics. The first 42 pages of the book provide a detailed and readable outline of the growth and performance of SHFAs. This by itself would have been a meaningful piece of scholarship.

In the remaining 100 plus pages Mr. Morris attempts to grapple with a series of proposals designed to ". . . provide a framework on which State Housing Finance Agencies can create [internal] housing subsidy mechanisms that are derived from the real estate values in addition to whatever direct financial appropriation that may be required" (p. 43). The predominant theme in this second section is that SHFAs might become independent of the vagaries of legislative-approved programs and provide in-

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1 As a matter of nomenclature State Housing Finance Agencies are generally independent state agencies, created by organic act of the legislature to finance, plan, and construct adequate housing for low (and in the case of Massachusetts, moderate) income residents. SHFAs usually have the power to issue bonds and lend low-cost monies to private developers to stimulate their entrance into the market.

ternal mechanisms for lowering rents by: 1) using SHFA financed real estate investment returns as rent subsidies; 2) arbitrage; and 3) skewing of both rents and interest payments (p. 43). Not only have recent events worked to undermine the feasibility of these proposals but there are also fundamental structural problems inherent in this approach. It is instructive to take each element in turn and see what has happened.

I. Real Estate Investment Returns

State Housing Finance Agencies are authorities which generally finance the construction of privately owned and operated multifamily developments through low-interest loans. Funds for those loans are obtained through state bond issues. To carry out its function, the SHFA must have private sponsors, developers, joint venturers, partnerships, or corporations willing to construct and operate multifamily developments.[2] A major advantage for SHFA financing is that their bonds are exempt from federal taxation. This effectively lowers the cost of borrowing to the agencies and does not involve cost to the state's taxpayers. In effect, the agencies often pay 2 to 2.5 percentage points less for money than would be paid were monies to be borrowed from conventional lending institutions. Because of the lower effective interest cost, the SHFA can in turn provide private developers with long-term lower cost funds in times of high interest rates and credit unavailability.

Unfortunately this benefit must be balanced against the burdens of owning and operating rental property. The last three years have witnessed vast increases in operating expenses due primarily to changes in oil prices and inflationary pressures. These forces combined with organized tenant resistance to rent increases and the numerous strings attached to operating SHFA financed housing[3] have reduced the return on capital invested in real estate and a fortiori reduced its value to the investor-operator. Furthermore,

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2 The major exception to this model is the New York State Urban Development Corporation (UDC). The UDC has traditionally undertaken more development inhouse than other SHFAs. *See* text accompanying notes 6 & 8 *infra*.

3 See, *e.g.*, Mass. Gen. Laws Ann. ch. 23A, App., § 1-6 (1973).

it is unlikely that the present shortage of capital[4] will ease in the foreseeable future. Real estate will have to compete for scarce capital and this will certainly affect both the flow of capital into real estate and its cost. And finally, there is the real threat that the reform-minded 94th Congress will restructure the tax code to limit artificial accounting losses which have traditionally meant profits for real estate owners. The inescapable conclusion would appear to be that real estate has become a less attractive investment.

II. ARBITRAGE

An integral part of Mr. Morris' plan of SHFA independence is the use of arbitrage. Arbitrage can be defined simply as the ability of an SHFA to raise funds through its tax-exempt bonding power and invest unneeded cash in short-term securities yielding rates of return higher than the effective (borrowing) interest rates. A crucial difficulty facing SHFA is that their bonds are not backed by the full faith and credit of the states.[5] Instead, they are the alleged "moral obligation" of the sovereign.[6] Uncertainty in the banking community[7] precipitated by the default in February 1975 of New York state's Urban Development Corporation[8] on $104.5

4 *See* N.Y. Times, Mar. 7, 1975, at 45, col. 8.

5 As an example see MASS. GEN. LAWS ANN. ch. 23A, App., § 1-9 (1973) for the Massachusetts Housing Finance Agency enabling act which is typical of most state acts. "Bonds and notes issued under the provisions of this act shall not be deemed to constitute a debt of the commonwealth or of any political subdivision thereof or a pledge of the faith and credit of the commonwealth . . . but such bonds and notes shall be payable solely from the proceeds of mortgage loans made under this act. . . ."

6 *See generally* Quirk & Wein, *Homeownership for the Poor,* 54 CORNELL L. REV. 849, 860-62 (1969).

7 *Review & Outlook: Moral Obligations,* The Wall Street Journal, Feb. 28, 1975, at 10, col. 1; Klapper, *Crisis of Confidence: Just How Binding Is a 'Moral Obligation'? Bond Market Nervously Awaits Answer,* The Wall Street Journal, Feb. 28, 1975, at 32, col. 1.

8 Until its defaults in February the New York State Urban Development Corporation (UDC) had been one of the most aggressive and active planning agencies at the state level. Since 1968 it had provided over 30,000 dwelling units — 19,500 for moderate income families and 8,000 for low income families. The panoply of powers it could wield far outshadowed that of its sister agencies. UDC had the power to condemn property, initiate residential projects, overrule local zoning

million of short-term notes and the possible default on $1.1 billion in long-term obligations, has resulted in the failure to market two recent long-term bond offerings: one in Michigan in February 1975, and one in New Jersey in March 1975. The resulting paralysis could well indicate that SHFA's will no longer be able to obtain the inexpensive funds needed to make arbitrage work.

In addition, the cost of short-term money appears to be increasing. A recent offering of bond anticipation notes by the Massachusetts Housing Finance Agency, considered to be one of the most successful, financially responsible, and conservative of the state housing finance agencies, went from 6.25 percent to 7.8 percent. At those rates, building up internal subsidy funds through arbitrage becomes unrealistic. Even if it were possible to accumulate funds in this way, it would be wiser, given the nervousness of the investment community, to build up a sufficient capital fund as a protection against possible default on any of the SHFAs' outstanding individual mortgages. Since the mortgages provide the security behind the bonds, reassurance of this kind is more likely to lower the cost of borrowing money, and therefore, have a larger impact on rents than attempting to use the proceeds of arbitrage as a direct subsidy.

III. Skewing

The last element of Mr. Morris' scheme would have the SHFA employ skewing in its internal rent structure. He bases his analytical model on the unique system used by the Massachusetts Housing Finance Agency[9] (p. 43). In this system the SHFA fi-

restrictions, contract out architectural, construction, and other development services or provide for them inhouse.

9 The Massachusetts Housing Finance Agency employs a somewhat more complex system than that proposed by Mr. Morris. The enabling legislation for the MHFA requires that at least 25 percent of the units in each project be available to low income families. The statute also requires that there be a mix of income groups in each apartment complex. To accomplish these twin objectives MHFA requests that every developer plan his unit mix with three groups in mind: a market group (those persons able to pay the market rent for comparable units in a comparable area), moderate income persons (those persons or families that are eligible for either state or federal interest subsidy programs) and low income

nanced project would be divided into two groups — 75 percent middle and 25 percent low income tenants. The system of skewed rents would require that the middle income group pay a rent above the pro rata cost of their units while the low income group would pay substantially less than pro rata unit cost due to the effective subsidy from the middle income renters. In theory the middle income tenants' increased payments would be equal to the market price for a comparable unit. The owner-operator does not suffer because he has borrowed money at a low cost from the SHFA and has been able therefore to keep his total costs down. And the low income minority members are benefited because they succeed in obtaining adequate housing at prices not exceeding 25 percent of their income.

But in the real world the cost of borrowing money is high and rising. The rate on a forty-year mortgage is likely to rise to 8.5 percent instead of 7.25 percent as it has been until now. Skewing rents with interest rates so high would put upper level rents totally out of reach of the middle income tenants. It is worth noting in this connection that though Mr. Morris says that the Massachusetts Housing Finance Agency has been skewing rents (p. 43), the Agency has in fact not skewed its rent structure since the earliest days of its operations. Even then, at interest rates of 6¼ percent, the market rents skewed up to help pay for the lowest level rents — for the group defined as public housing eligibles[10]

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groups (those who are eligible for federal or state rent supplemental or other complementary programs). As an example a standard MHFA project might have a total of 154 housing units, 39 for low income families, 46 for moderate income families, and 69 at market. For the 46 moderate income units MHFA would have received a subsidy, on behalf of the mortgagor, reducing the interest rate on these units to one percent plus amortization. On the 39 low income units MHFA would receive this same subsidy plus state and federal funds equal to the difference between the basic rent charge for the unit and what the public housing eligible tenant was able to pay using 25 percent of income as the standard. This combination is commonly called piggy-backing. See generally Massachusetts Housing Finance Agency, A Social Audit of Mixed-Income Housing (1974) (on file with the Harvard Journal on Legislation); Massachusetts Housing Finance Agency, Sixth Annual Report (1974) (on file with the Harvard Journal on Legislation).

10 MASS. GEN. LAWS ANN. ch. 23A, App., § 1-1(d) (Supp. 1974) defines those persons who are eligible for public housing assistance as being:

> Those persons and families whose annual income is equal to or less than the maximum amount which would make them eligible for units owned or leased by the housing authority in the city or town in which the project is located or, in the event that there is no housing authority, that amount

— were considered to be too high to be feasible. The MHFA has relied instead on piggy-backing combinations of federal and state subsidy money[11] to achieve the same result.

Mr. Morris also suggests skewing of interest rates for homeowners (p. 45). He recommends that interest payments be less at the beginning of the mortgage (assuming a standard 30 year mortgage period) and increase throughout the life of the mortgage. The SHFA in this scheme would subsidize the interest rate in the early years of the mortgage and recover its subsidy as the skewing tipped to the higher levels later in the lifespan of the mortgage (p. 47). The underlying assumption is that family income will rise over the life of the mortgage so that the high interest payments in the later years will not cause the cost of housing to rise above 20 percent of income. It is doubtful that incomes of low and moderate income families would rise over the life of a 30 year mortgage. This assumption would hold for young professionals, but in blue-collar families income is likely to peak when the head of the household is in his late twenties or early thirties and most able to work the maximum amount of overtime. There is no account taken in Mr. Morris' plan of the catastrophic effects of cyclical unemployment nor of the increases in the cost of maintaining or operating a piece of property as it gets older.

State assisted home ownership programs also raise questions about the constitutionality of using the states' tax exempt bonding power for the benefit of individuals traditionally not considered to be in need of public aid.[12] In 1974 the Massachusetts legislature passed enabling legislation establishing the Massachusetts Home Mortgage Finance Agency[13] specifically for the purpose of providing guaranteed mortgages to homeowners in neighborhoods subject to the pressures of change. Its constitutionality is yet to be tested and the outcome is not at all certain. The requisite "public

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which is established as the maximum for eligibility for low-rent units by the department of community affairs.

11 *See* note 9 *supra.*

12 There is no doubt about the validity of the public purpose of legislation designed to produce multi-family housing units for low and moderate income people. *See* City of Cleveland v. United States, 323 U.S. 329 (1945); Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank, 356 Mass. 202, 249 N.E.2d 599 (1969).

13 MASS. GEN. LAWS ANN. ch. 23A, App., § 1-1 to 1-20 (Supp. 1974).

purpose" will undoubtedly be grounded in the concept of neighborhood strengthening.[14] The Agency is still in the planning stage and cannot begin its operation until its constitutionality is established through litigation.

IV. Active and Passive SHFAs

These specific examples demonstrate, in part, how Mr. Morris' proposals have been affected by changing economic conditions. But there are deeper, more fundamental questions to be raised about the future of real estate as an investment for the public sector and the role, active or passive, to be played in the future by the SHFA's.

In comparing the efficiency and potential for significant planning and social advances, Mr. Morris rightfully concludes that the SHFA's have far out-performed their federal analogues (pp. 17-18). He then makes a leap to the conclusion that the more active and aggressive SHFAs become in the developmental process the better will be the resulting projects. The alternative is a more passive agency.

The Massachusetts Housing Finance Agency (MHFA) provides an excellent example of the latter. The MHFA has provided to date mortgage money for over 32,000 dwelling units scattered throughout the Commonwealth. Close to 35 percent of these units were provided to public housing eligible tenants in mixed income housing complexes.[15] The MHFA operates very much like a bank — a passive receiver of investment proposals.[16] Its function is to set out the planning and social guidelines it feels will produce the

14 *See* Mass. Gen. Laws Ann. ch. 23A, App., § 2-2 (Supp. 1974), which reads in part:

> Private enterprise without the assistance contemplated by this act cannot achieve the construction or rehabilitation of any housing for persons and families of low or moderate income and the alternative of forcing such families to live in substandard housing is undesirable since it *tends to decrease the interest of such families in their communities, the maintenance of their property and the preservation of their neighborhoods.* (Emphasis added.)

15 See Massachusetts Housing Finance Agency Closed Project Summary (on file with the Harvard Journal on Legislation).

16 It is true, however, that should it become known to investor-operations that there is an interest in certain kinds of development (e.g., recycling of older buildings or for efficiency and one bedroom developments rather than standard across

most workable, socially appealing, and acceptable housing projects. The MHFA in fact combines the needed money, the developer, and the incentive to build salable housing units.

By comparison, the New York State Urban Development Corporation[17] (UDC) has suffered the results of the high risk-taking involved in sole development or coventuring projects typified by the Roosevelt Island Housing Project. Delay and runaway construction costs produced by neighborhood resistance to UDC funded projects and zoning override powers,[18] combined with the high maintenance costs in housing built exclusively for low and moderate income tenants would undoubtedly have created a financial crisis for the UDC even with the most meticulous accounting and forecasting. And, since time is of the essence in real estate planning and development, even minor political, social, or financial resistance can upset a carefully calculated timetable.

Conclusion

To fulfill the combined functions of comprehensive planning and social accountability State Housing Finance Agencies must appeal to both developers and financiers. In order to be attractive to developers they must offer substantially better interest rates on mortgages than are available in the private market along with the enticement of tax shelters and real estate tax agreements. In the last eighteen months there has been literally no competition. The banks, suffering from major outflows of savings because of interest rates as high as 11 and 12 percent on corporate paper and nine and 10 percent on Treasury bonds, have had no money to lend. Since the beginning of 1975 there has been a general decrease in interest rates and savings have flowed back into the banks. There is still, however, a perceptible reluctance by the banks to make long-term commitments, particularly on residential construction. Their decisions will have a major impact on the continued attractiveness of SHFA money, which by comparison always comes

the board project mixes) then in classic chicken and egg fashion, proposals for that kind of development would begin to appear.

17 *See* note 8 *supra.*

18 *See, e.g.,* Floyd v. New York State Urban Development Corp., 33 N.Y.2d 1, 300 N.E.2d 704, 347 N.Y.S.2d 161 (1973); Peters v. New York State Urban Development Corp., 41 App. Div. 2d 1008, 344 N.Y.S.2d 151 (1973); both holding that UDC is exempt from compliance with a city's zoning ordinances. *See generally* Anderson, *Land Use Control,* 25 SYRACUSE L. REV. 457, 458-59 (1974).

with strings attached: e.g., the inability to sell before twenty years, a fixed rent structure which is part of the mortgage agreement, the inability to increase rents to reflect even increases in operating expenses, and especially in the case of Massachusetts, an economic mix of tenants.[19]

To be attractive to the financiers the SHFAs must demonstrate that they can plan projects which can be financially profitable. They must dispel the notion that their projects are risky and poor investments. They must establish their consistency and success as well as their flexibility and planning expertise.

In the foreword to Mr. Morris' book, Harvard Law School Professor Charles M. Haar writes:

> In many instances, a new approach to problem solving has evolved. Some of the agencies have melded the strategies of comprehensive planning, resource concentration, and technical innovation into a coordinated approach for institutional change. In short, they have abandoned a *passive* approach, solely responding to the initiative of private developers, and have undertaken an *entrepreneurial* approach to housing and to land development (emphasis added) (p. xiii).

It appears to me, on the contrary, that to the extent that SHFAs have taken an entrepreneurial approach, they have encountered all the difficulties of the present real estate market — intensified because of the much higher risk-taking involved in low and moderate income housing. State Housing Finance Agencies can perform important coordinating and planning functions in conjunction with other state agencies involved in land-use planning and economic development. They can be and are conduits of federal and state housing subsidies. They can set innovative policy, as in the case of the mixture of low, moderate and middle income tenants in a single development.[20] They can be watchdogs of design, construction, management and environmental impact. They can identify areas of need and indicate that they will use their money to fund proposals from developers that will fill those needs. Their future survival and ability to operate, however, seems to lie in leaving entrepreneurial functions to the entrepreneurs.

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19 *See* note 3 *supra.*

20 See generally Massachusetts Housing Finance Agency, All in Together (1974) (on file with the Harvard Journal on Legislation).

RECENT PUBLICATIONS

CONGRESS: PROCESS & POLICY. By *Randell B. Ripley,* New York: W. W. Norton & Co., Inc., 1975. Pp. xvii, 316, index, bibliography. $9.95.

This is mainly a work about how Congress goes about making its decisions. Professor Ripley in turn examines the various internal and external pressures and influences which affect Congressional decision-making processes and policy stances. Committee assignments, the intrenched bureaucracy, party leadership pressure, campaigns and election results, and interest groups are among the forces considered.

THE QUEST FOR A FEDERAL MANPOWER PARTNERSHIP. By *Sar A. Levitan and Joyce K. Zickler,* Cambridge: Harvard University Press, 1975. Pp. x, 131, index. $6.50.

This study reviews the development of Federal Manpower Program administration and planning during the decade that elapsed between the passage of the Manpower Development and Training Act and Public Law 93-203, the Comprehensive Employment and Training Act. The authors analyze the implementation difficulties inherent in aiding the poorly educated and underskilled to compete in the labor market. The heart of the book concerns six case studies sponsored by the National League of Cities' Urban Observatory which highlight the experiences of these select urban areas in organizing, coordinating, and implementing the Federal Manpower Program objectives at the local level.

COMPUTERS AND BUREAUCRATIC REFORM: THE POLITICAL FUNCTIONS OF URBAN INFORMATION SYSTEMS. By *Kenneth C. Laudon,* New York: Wiley — Interscience, 1974. Pp. xv, 325, index, bibliography. $17.95.

The central problem addressed by Professor Laudon is the relationship between bureaucratic change and the new technology of information processing. The number of computers in American society has skyrocketed and affected the processing and dispersion of information from all parts of society. Systems considered are Social Services Information Systems (SSIS), Police Regional Infor-

mation Systems (PRIS), Criminal Identification Systems (CIS), and Criminal Information Networks (CIN). The author argues that computer anchored information services can be employed by bureaucrats to do more than process information faster but to implement alternative values and goals.

BLUE CROSS: WHAT WENT WRONG? By *Sylvia A. Law,* New Haven: Yale University Press, 1974. Pp. x, 246, index. $8.95.

Ms. Law provides an in depth look at the financial and administrative structure of the Blue Cross health care system. The author details the relationship maintained between Blue Cross, the state regulatory agencies and Medicare. Her conclusion is that while Blue Cross has economic power it is immensely inefficient and ineffective. The solution argues Ms. Law lies in institutional accountability to the taxpayers and consumers who use and finance its services. For this reason Ms. Law argues that Blue Cross should not play a major role in whatever federal health service plan is forthcoming from Congress. But the final import of the book can only be gauged by reading Aotone G. Singsen's, Senior Vice-President of Blue Cross, reply, available upon request from Blue Cross.

THE YOUNGEST MINORITY: LAWYERS IN DEFENSE OF CHILDREN. Ed. by *Sanford N. Katz,* Chicago: American Bar Association, 1974. Pp. 375. No price listed.

The *Youngest Minority* represents a series of reprints from the American Bar Association's *Family Law Quarterly* centering on the theme of how children have been victimized by our system of obsolete laws and social attitudes. While no single article is over seven years old, the vast changes in society's and the court's awareness of children as people possessing rights is brought into focus.

The authors consider a range of basically legal questions such as "A Child's Right to Counsel in Custody Cases," "The Juvenile's Right to Receive Treatment," and "Another Look at the Role of Due Process in Juvenile Court." The authors suggest various legislation directed toward bettering the child's position, including "The Uniform Parentage Act," and "A Bill of Rights for Children."