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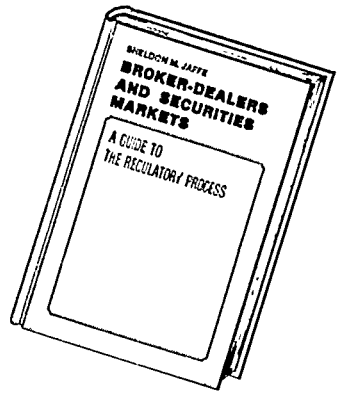

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TOWARD EQUALITY OF EDUCATIONAL OPPORTUNITY THROUGH SCHOOL DISTRICTS IN STATE BUREAUS: AN INNOVATION IN CORRECTION EDUCATION†

LAURA MEANS POPE MILLER*

As the problem of educating persons confined in state institutions receives increasing public and judicial attention, states must find new administrative structures for more effective delivery of institutional education. Professor Miller argues that the bureau school district model provides the most appropriate structure. The model involves the creation of a school district within any state bureau that operates institutions having custody of, for example, the criminal, mentally ill, retarded, or handicapped. The school district model not only facilitates access to federal and state education money, but also entitles institutionalized persons to an educational opportunity equal to that afforded other citizens of the state. Concentrating on correction education, Professor Miller presents the elements of the ideal bureau school district, discusses the major issues that arise in its implementation, and identifies desirable resolution of these issues in light of Connecticut's seven year experience with a correction school district.

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Introduction

Over two million Americans are confined in state institutions for the retarded, handicapped, mentally ill, delinquent, and criminal.[1] A devastating consequence of that confinement is the total separation of the inmates from traditional public education.

Courts and federal agencies have recently begun the process of forcing states to break down this separation and to include the institutionalized within the public education process.[2] Finding an appropriate method of providing public education to a state's institutionalized population thus becomes a critical state concern.

This article presents one administrative structure for educating persons confined in state institutions. That structure involves the creation of a school district within the state bureau or department responsible for custody of such persons. The district's schools are located within the department's various institutions.

The immediate benefits of giving the state bureau the status of a school district are that the bureau becomes more readily eligible for the federal and state education money which conventional school districts receive, and that the bureau's education effort is directed by a school board and certified superintendent of schools with close ties to the state education department and the state's traditional education process, assuring consistent advocacy of education within the department.

Less concrete, but in the long run equally significant, benefits of the school district model flow from its particular administrative structure. Education in the bureau school

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1 U.S. DEP'T OF COMMERCE, 1970 CENSUS SUBJECT REPORT, PERSONS IN INSTITUTIONS, table 1 [hereinafter cited as 1970 CENSUS REPORT].

2 A large step in this direction, for example, was taken by the U.S. Department of Health, Education, and Welfare in its sweeping and controversial regulations, 42 Fed. Reg. 22,676 (1977) (to be codified in 45 C.F.R. § 84), promulgated pursuant to § 504 of the Rehabilitation Act of 1973, 20 U.S.C. § 794, (Supp. V 1975). Section 504 provides that: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

district is no longer separated from education in other school districts in the state. The bureau school district must meet the same requirements and is eligible for the same funding as all other districts. Such equality of structure can foster equality of educational opportunity for the institutionalized, and permits the usually disfranchised and powerless population in state institutions to share the benefits of state and national pro-education efforts exerted on behalf of the state's traditional school system. Moreover, the structural equality can change the public perception of that population as separated from the normal educational processes and opportunities in the state.[3]

Legislators in Texas and Connecticut were the first to use the school district model to educate institutionalized persons. They established school districts within their departments of correction in the spring of 1969.[4] A survey sent to correction officials throughout the country in the summer of 1977[5] reveals that since 1969, six more states have adopted variations of the bureau school district model to provide correction education.[6] Proposals for enactment of the model have been rejected or ignored by legislatures in ten states, while officials in seven states report that proposals are currently being considered by their legislatures.[7] A large number of correction administrators favor use of the model,[8] an indication

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3 This observation reflects the psychological theory that "legislation and court decisions *can* change the 'hearts and minds of men,' . . . 'stateways *can* change folkways.' They do so, in part, by effecting a change in behavior; then, when behavior has been changed, attitudes often follow." D. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 69 (1970).

4 CONN. GEN. STAT. §§ 18-99a, -99b (1977); TEX. EDUC. CODE ANN. § 29.01 to .05 (1972).

5 The results of the survey are reproduced in an appendix to this article. Questionnaires were sent to all States, except Connecticut, and to the New York City, Philadelphia, and Cook County correctional systems. All but the following returned the questionnaire: Cook County, Nevada, South Dakota, Virginia, and Wisconsin. *See* Appendix A *infra.*

6 Arkansas, ARK. STAT. ANN. § 46-1301 to -1306 (Supp. 1975); Illinois, ILL. ANN. STAT. ch. 122, § 13-40 to -45 (Smith-Hurd Supp. 1977); Maryland, MD. ANN. CODE art. 77, § 218 (Supp. 1976); New Jersey, N.J. REV. STAT. ANN. § 30:4AA-1 to -8 (Supp. 1977); Ohio, OHIO REV. CODE ANN. § 3301.16 (Page 1972); Tennessee, TENN. CODE ANN. § 4-655 (Supp. 1976).

7 *See* Appendix A *infra.*

8 *Id.*

that it will be of continued importance in state education decisions.

The first part of this article will delimit the problem of educating persons in institutions by examining the numbers and educational needs of the inmates involved, the different legal theories that can force states to provide adequate or equal education, and the conflicts inherent in extending educational services into institutions whose primary concern is confinement. Although the school district model can operate in any state bureau with jurisdiction over state institutions, the article will concentrate on the operation of the model in state correction departments.

The second part will identify three alternatives to the school district model for providing education to inmates of state correction institutions, based on the variety of current practices. The third part will present the elements of the school district model, describe its funding advantages, and identify the policy choices that must accompany its implementation. The fourth part will use the seven year experience with the school district model in the Connecticut Department of Correction to draw some conclusions about how the model operates in practice and about how the policy choices discussed in the third part ought to be resolved.

I. The Problem of Education In State Custodial Institutions

The problem of educating persons in institutions under the care of state bureaus has three principal aspects. First, national figures describe an educational problem of significant proportions and immediate need. Second, developing conceptions of educational entitlement may point toward an affirmative legal obligation of the state to remedy that problem by providing equal educational opportunities to all citizens, including those in institutions. Third, when state agencies attempt to respond to the actual need or the legal compulsion, an organizational conflict arises between the custodial and educational functions of the institution.

A. *Educational Deficiencies*

Persons under the jurisdiction of state bureaus who are consistently denied an appropriate education can be divided into two groups—those voluntarily or civilly confined to a state institution and those under the custody or supervision of correctional institutions. The former group includes persons with mental, physical, or emotional problems which impair learning ability.[9] An estimated seven or eight million American children are so handicapped.[10] Sixty per cent of those children do not receive the education they need, and one million are totally excluded from educational programs.[11]

The second group, when most broadly defined, consists of about 1.8 million adults and juveniles either confined in institutions or released on probation or parole.[12] Adults and juveniles on probation are not part of the problem of educating persons inside correction institutions, since they avoid confinement. The total problem involves, however, approximately 199,000 persons in state and federal prisons and reformatories, 130,000 in local jails and workhouses, 125,000 on parole, and 77,000 juveniles in training schools and detention homes.[13] Taking into account the period of confinement, the National Prison Statistics Bulletin reported that on December 31, 1975, state and federal institutions held 242,750 prisoners with sentences of at least one year.[14] This last figure best represents the size of the correctional population upon which educational reform efforts should focus and towards which this article is primarily directed. The population is overwhelmingly adult and therefore has often been

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9 Weintraub & Abeson, *Appropriate Education For All Handicapped Children: A Growing Issue,* 23 SYRACUSE L. REV. 1037, 1037-38 (1972).

10 *Id.* Congress used the 8 million figure in the Education for All Handicapped Children Act of 1975, § 3(b)(1), Pub. L. No. 94-142, 89 Stat. 774 (1975).

11 Weintraub & Abeson, *supra* note 9, at 1038.

12 W. HARTINGER, E. EDLEFONSON & A. COFFEY, CORRECTIONS: A COMPONENT OF THE CRIMINAL JUSTICE SYSTEM 36 fig. 2 (1972) (the number is based on a projection of the corrections population to 1975).

13 1970 CENSUS REPORT, *supra* note 1, at tables 10 & 11. The probation figure is an estimate in W. HARTINGER, *supra* note 12, at 38 fig. 4.

14 NATIONAL PRISON STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1975 app. I, table 1 (Feb. 1977).

viewed as outside a state's educational obligation.[15] But the longer sentences of such inmates in fact offer the opportunity for education programs to have significant effect.

Many of these correctional inmates suffer the same learning handicaps as do inmates of non-correctional institutions. In addition, the educational deficiency of the inmate population is perhaps the most chronic and severe of any group in the country. According to national census figures, the median number of school years completed for all adult offenders in state and federal institutions is 9.8, and for adult inmates of local jails and workhouses is 10.2, while the median for the American population as a whole is 12.0 years.[16] Nearly three thousand inmates have had no schooling at all.[17]

These census figures are based on inmates' reports of grade levels; actual tests on 16,000 inmates in California reveal an even greater deficiency. Four percent of the test population was illiterate, thirty-one percent tested at less than a seventh grade level, and median grade placement was 7.8.[18]

While virtually every state provides some form of education within its correction institutions, the administrative and financial commitment to that effort varies widely. Nationally, it is estimated that only twenty percent of correctional expenditures go to rehabilitative programs in general, of which education is only a part, while eighty percent go for custody and administration.[19] Correctional education programs also suffer from "poor physical plants, thin staffs, and

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15 An example of that view is the statement by Michigan correction officials that "[m]ost regulations which pertain to school districts apply to children. Most are not applicable to adult corrections." Appendix A *infra.*

16 1970 CENSUS REPORT, *supra* note 1, at table 24. Results of another study showed that up to 90 percent of adult offenders in U.S. penal institutions lack a high school degree at the date of first incarceration, and that in a majority of adult prisons over 50 percent of inmates have less than an eighth grade education. SYRACUSE UNIVERSITY RESEARCH CORPORATION, SCHOOL BEHIND BARS—A DESCRIPTIVE OVERVIEW OF CORRECTIONAL EDUCATION IN THE AMERICAN PRISON SYSTEM v (1973).

17 1970 CENSUS REPORT, *supra* note 1, at table 24. Another study found that 20 percent of the adult correction population was functionally illiterate. American Bar Association Commission on Correctional Facilities and Services, CLEARINGHOUSE FOR OFFENDER LITERACY PROGRAMS, FINAL REPORT 1974-75.

18 R. CARTER, R. MCGEE, & E. NELSON, CORRECTIONS IN AMERICA 116 (1975).

19 Education Commission of the States, The Challenge: Education for Criminal Offenders 5 (undated).

in many instances, almost nonexistent learning material budgets . . . ."[20]

The problem of inadequate education for the institutionalized population is compounded by that group's inability to improve its educational opportunities. For centuries those in institutions have been politically impotent, either as minors not yet franchised or as felons or mental incompetents denied franchise.[21] Even those fully franchised are prevented by both physical isolation and personal handicap from exerting meaningful influence in the political process. In such cases, where those whose rights are threatened lack power to effect a remedy through normal legislative processes, the judicial obligation to enforce those rights has traditionally been considered most compelling.[22] The next section will show that judicial intervention on behalf of the institutionalized is starting to occur.

B. *Judicial Standards*

The severe educational deficiency among institutionalized persons generally and among prison inmates in particular has encouraged courts to exert increasing pressure upon state institutions to erase the deficiency.

Three separate forms of legal entitlement can be marshalled to support court-ordered educational plans for institutions: the right of children to equal educational opportunity, the right to effective rehabilitation for committed persons, and the right of all citizens to equal educational achievement.

Two recent federal district court decisions have relied on the child's right to equal educational opportunity to compel Pennsylvania and the District of Columbia to educate all children with learning handicaps. In *Pennsylvania Associa-*

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20 American Bar Association Commission on Correctional Facilities and Services, Clearinghouse for Offender Literacy Programs, Coordination Bulletin No. 22 at 1 (December, 1973) [hereinafter cited as ABA Commission Bulletin].

21 *See, e.g.*, Judge Edmund B. Spaeth's comment that "nobody has fewer votes than a prisoner," quoted in *Prisoner's Rights and the Correctional Scheme: The Legal Controversy and Problems of Implementation-A Symposium*, 16 VILL. L. REV. 1029, 1099 (1977).

22 *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); A. BICKEL, THE LEAST DANGEROUS BRANCH 25-26 (1962).

tion of Retarded Children v. Pennsylvania,[23] the plaintiff class of Pennsylvania retarded children of school age consented in October, 1971, to an agreement enjoining the defendant state secretaries of education and welfare and the state board of education from applying any state law which would deny mentally retarded children access to publicly-supported education. The consent agreement further ordered defendants to provide appropriate education to all retarded children "as soon as possible but in no event later than September 1, 1972."[24]

In *Mills v. Board of Education,*[25] the parents and guardians of seven school age children brought a class action in which they asserted the right to a public education of all District of Columbia children with learning handicaps. The district court quoted the language of the U.S. Supreme Court in *Brown v. Board of Education:*[26]

> In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*[27]

The *Mills* court then expanded the application of this language from its context of racial discrimination to the new context of discrimination based on handicap,[28] and ordered the provision of a "suitable publicly-supported education regardless of the child's mental, physical or emotional disability or impairment."[29]

The theory of *P.A.R.C.* and *Mills* can be applied to all children, whether institutionalized or not, and should override state statutes which exclude the institutionalized handicapped from the educational obligation of the state.[30] But an

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23 334 F. Supp. 1257 (E.D. Pa. 1971).
24 *Id.* at 1258.
25 348 F. Supp. 866 (D.D.C. 1972).
26 347 U.S. 483, 493 (1955).
27 348 F. Supp. 866 (emphasis supplied by the *Mills* court).
28 348 F. Supp. at 875.
29 *Id.* at 878.
30 The Connecticut Legislature in 1977 voluntarily repealed such exclusionary legislation, CONN. GEN. STAT. § 10-76 to -84 (adopted 1961), in furtherance of the

independent doctrine of a right to treatment[31] has developed to provide further support for claims by the institutionalized handicapped to a suitable education from the state. *Wyatt v. Stickney*[32] held that all patients involuntarily confined for mental treatment in Alabama mental institutions have a "constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition,"[33] and included "opportunities for publicly supported education suitable to the educational needs of the patient" as part of the constitutionally guaranteed treatment.[34]

This right-to-treatment doctrine has been applied to juveniles who are civilly committed in institutions for behavioral problems.[35] Public education should be an element of the treatment to which such juveniles are entitled.[36] When the education of adult inmates of correction institutions is the issue, however, the legal compulsion to provide education is less clear. Most adult inmates are outside the age group which states obligate themselves to educate; thus the arguments concerning equality of education for all school-age children which were made in *Brown, P.A.R.C.,* and *Mills* are not so easily extended to them.[37] Moreover, although in principle prisoners retain all rights not expressly taken from them by law,[38] in practice the reverse is often true,[39] with the

equal education policy. Comment, *The Handicapped Child Has a Right to an Appropriate Education,* 55 NEB. L. REV. 637 (1976), suggests that the impact of *P.A.R.C.* and *Mills* is limited to noninstitutionalized children, *id.* at 658, 661, but such a limitation is not logical given the all-encompassing class of plaintiffs and the comprehensive orders of the courts.

31 The doctrine was first articulated in Rouse v. Cameron, 373 F.2d 45 (D.C. Cir. 1966).

32 325 F. Supp. 781 (M.D. Ala. 1971), *orders issued in* 334 F. Supp. 1341 (M.D. Ala. 1971), 344 F. Supp. 373 (M.D. Ala. 1972).

33 325 F. Supp. at 784.

34 344 F. Supp. at 385.

35 *See, e.g.,* Martarella v. Kelly, 349 F. Supp. 575, 598-600 (S.D.N.Y. 1972).

36 Silbert & Sussman, *Rights of Juveniles Confined in Training Schools,* 20 CRIME & DELINQ. 373, 378 (1974).

37 Some states obligate themselves to provide education to persons up to an age above the minimum for incarceration in an adult correction facility. *See, e.g.,* CONN. GEN. STAT. § 10-76a(b) (1977) (state obligated to provide education to age 21). For such inmates, the argument for equal educational opportunity can easily be made.

38 *See, e.g.,* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945).

39 *See* Goldfarb & Singer, *Redressing Prisoners' Grievances,* 39 GEO. WASH. L.

result that courts and administrators view criminal incarceration as a forfeiture of educational rights.

Nevertheless, if a general "right to rehabilitation" for criminal inmates is recognized,[40] educational opportunities would almost certainly be an integral component of this right. A number of commentators have advocated or predicted judicial acceptance of a right to rehabilitation,[41] with the right grounded either in explicit state recognition of rehabilitation as the primary goal of correction[42] or in a federal constitutional requirement under the cruel and unusual punishment clause.[43]

REV. 175, 186 (1970).

40 The concept of a right to rehabilitation arose through obvious analogy to the "right to treatment" in civil commitment cases first recognized in Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). *See* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967). Extension of the treatment notion to criminal incarceration cases may be impeded by ambiguity in the policy objectives of incarceration. Whereas the purpose of civil commitment is generally recognized to be cure and not punishment, rehabilitation of criminals may not be so clearly perceived as a social goal superior to other objectives such as punishment, deterrence, and isolation. *See* Goldfarb & Singer, *supra* note 39, at 210. Moreover, doubts have been expressed about the actual efficacy of rehabilitation programs in reducing recidivism. *See, e.g., Is Rehabilitation Dead?* in BEHIND BARS (R. Kwartles ed. 1977); Wilks & Martinson, *Is the Treatment of Criminal Offenders Really Necessary?* 40 FED. PROBATION 3 (1976). However, as early as 1870, the American Prison Association recognized that rehabilitation rather than punishment should be the goal of incarceration, and that prisons should "make available to each inmate every opportunity to raise his educational level." AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTION STANDARDS ix (3rd ed. 1966); *see* Singer, *The Coming Right to Rehabilitation*, in PRISONERS' RIGHTS SOURCE BOOK 189, 190 (M. Hermann & M. Haft eds. 1973); Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 662 (1971). A number of states give statutory or constitutional recognition to rehabilitation as the primary objective of criminal confinement. *See* note 42 *infra*.

41 *See, e.g.*, Singer, *supra* note 40, at 189 (1973); Goldfarb & Singer, *supra* note 39, at 208; Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights' Litigation*, 23 STAN. L. REV. 473, 502 (1971); Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 660 (1971); *see generally*, Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134 (1967); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Prison Reform*, 12 HARV. C.R.— C.L.L. REV. 367 (1977).

42 State constitutional or statutory provisions recognizing rehabilitation as a primary purpose of incarceration include ILL. CONST. art. 1. § 11; N.H. CONST., pt. art. 18; DEL. CODE tit. II, § 6502 (1974); N.H. REV. STAT. ANN. § 622:1 (1974).

43 U.S. CONST. amend. VIII, as applied to the states through amend. XIV. *See*, Comment, *Confronting the Conditions of Confinement: An Expanded Role for Prison Reform*, 12 HARV. C.R.—C.L.L. REV. 367 (1977), for discussion of various approaches under the eighth amendment. That article proposes a purposive analysis for determining eighth amendment mandates. Another possible approach under the eighth amendment is to look at practices in a majority of jurisdictions for a standard to define "cruel and unusual." As more states provide effective rehabilitative

Courts have moved far towards acknowledging inmates' rights to an opportunity for rehabilitation. The court in *Holt v. Sarver*,[44] for example, while declining to require a program of rehabilitation under the federal Constitution, nevertheless implied that the theory of rehabilitation might eventually "ripen into constitutional law."[45] Moreover, the opinion recognized that lack of rehabilitative opportunities was "a factor in the overall constitutional equation before the court," where conditions in the prisons actually militate *against* inmates' efforts at rehabilitation.[46]

Subsequent decisions have gone beyond *Holt* by actually requiring that education and other rehabilitative opportunities be provided for inmates as part of an extensive program of reform in overall prison conditions.[47] Thus in *Pugh v. Locke*,[48] the court set out an eleven-point program[49] which included a requirement that "each inmate have the opportunity to participate in basic educational programs . . . [and] in a vocational training program."[50] Similarly, in *Barnes v. Government of V.I.*,[51] the court ordered that each inmate have an opportunity for basic education,[52] with the threat that the court would refuse to sentence criminals to the prison system if the local government failed to follow its decree.[53] The fifty-four point decree in *Hamilton v. Landrieu*,[54] based on a Special Master's report, not only

and educational programs the failure to provide them would therefore come within the scope of the cruel and unusual punishment clause. *See* Note, *The Role of the Eighth Amendment in Prison Reform*, 38 U. CHI. L. REV. 647, 659 (1971). Some court decisions have invoked the equal protection clause of the fourteenth amendment where different classes of inmates were involved. *See, e.g.*, Nadeau v. Helgemoe, 423 F. Supp. 1250 (D.N.H. 1977).

44 309 F. Supp. 362 (E.D.Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

45 *Id.* at 379.

46 *Id.*

47 For discussion of this "totality of conditions" approach to judicial reform of prisons, *see* Comment, *Confronting the Conditions of Confinement*, *supra* note 44, at 372. *See also* Laaman v. Helgemoe, 437 F. Supp. 269 (D.N.H. 1977) (all the conditions of confinement must be considered in defining state's obligation to provide opportunities which avoid degeneration and minimize impediments to reform).

48 406 F. Supp. 318 (M.D. Ala. 1976).

49 *Id.* at 332.

50 *Id.* at 335.

51 415 F. Supp. 1218 (D.V.I. 1976).

52 *Id.* at 1226.

53 *Id.* at 1220.

54 351 F. Supp. 549 (E.D. La. 1972).

ordered New Orleans city officials to provide prison education, but also specified a method of administrative implementation very close to that which this article advocates:

> An educational program for inmates shall be developed and maintained. In this respect, the Orleans Parish School Board should be requested to include the prison within an established school district, *or create a school district for the prison and develop an education program for inmates* (emphasis added).[55]

In sum, where state institutions are not providing adequate educational opportunities for the persons confined within them, there is a growing tendency among courts to step in and order those institutions to implement satisfactory programs. Legislators are thus well advised to devise solutions to the problems of education within institutions before courts impose their own requirements.

The legal theories discussed above assume that the right to an *equal* educational opportunity can be claimed only by persons whose age is within the limits set by the state when it assumed the obligation to provide a public education.[56] The standard applied to older inmates requires the state to provide only an *adequate* educational opportunity, or one *appropriate* to the circumstances, as part of a larger obligation to provide treatment or rehabilitation. Equalization is not yet part of the mandate.

However, if equal educational opportunity were to be defined as continued educational opportunity until a certain level of achievement is reached, the age of the student, whether institutionalized or not, would become irrelevant. The state could be required to provide the same standard of educational opportunity to all citizens — adult or child, institutionalized or not.

This new notion of educational equality based on achievement instead of age is one direction in which the concept of equal educational opportunity may evolve. James Coleman, for example, has traced the growth of the concept through

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55 *Id.* at 552.

56 *See* note 15 and text accompanying note 37 *supra.*

four stages,[57] and sees in *Brown v. Board of Education*[58] the beginnings of a fifth stage, in which the defining characteristic of the state's obligation to educate becomes the results of schooling as reflected in the achievements and attitudes of students.[59] Edmund Gordon also sees the state's educational obligation as promotion of educational achievement: "Equalization of educational opportunity in a democracy requires parity in achievement at a baseline corresponding to the level required for social satisfaction and democratic participation."[60] The recent phenomenon of educational malpractice suits, in which a graduate of the state education system sues a state agency for failure to provide an education of sufficient quality to allow him to function in society,[61] reflects the new definition of the state's educational obligation.

The eventual recognition by courts or legislatures of this redefinition of the state's obligation to educate will have a tremendous impact on the provision of education to institutionalized persons. That recognition will demand the provision of an opportunity for education to the inmates that is equal to the opportunity available to the rest of the citizens of the state. The school district model, explored later in this article, offers structural guarantees of equality well-suited to fulfillment of this requirement of equality of educational opportunity for all.

C. *Organizational Conflicts*

Any attempt to provide education within state institutions will encounter an inherent conflict between the primary ac-

57 Coleman, *Equality of Educational Opportunity,* 38 HARV. EDUC. REV. 7, 14 (1968). In the first of Coleman's stages, the concept required all children to be exposed to the same curriculum in the same school. In the second, children with different occupational futures were exposed to different curricula. The third stage, with roots in Plessy v. Ferguson, 163 U.S. 537 (1895), defined the concept as requiring equal facilities, which could be separate. In the fourth, the Supreme Court required racially integrated educational facilities in Brown v. Board of Education, 347 U.S. 483 (1954).

58 347 U.S. 483 (1954).

59 Coleman, *supra* note 57, at 14.

60 Gordon, TOWARD DEFINING EQUALITY OF EDUCATIONAL OPPORTUNITY 17 (L. Miller & E. Gordon eds. 1974).

61 *See, e.g.,* Peter W. v. San Francisco Unified School District, 60 Cal. App.3d

tivities of the institution—custodial, psychiatric, or correctional—and the education activity which is inevitably a secondary concern. This conflict of functions surfaces most clearly in correctional education, which is the main focus of this article.

Amatai Etzioni, a renowned student of organizations, has analyzed this conflict within the principles of a theory of power dynamics. He categorizes power as "coercive," when it invokes physical sanctions, as "remunerative," when it distributes material resources, and as "normative," when it relies on symbolic rewards such as social acceptance, prestige, and ritual.[62] Thus, traditional goals of incarceration—isolating the criminal, deterring future crime, gaining retribution for past crime[63]—dictate primary application of coercive power, while traditional goals of education—instilling values of the society and teaching the skills needed to prosper in that society—demand primary application of normative power.

Etzioni's thesis is that the incarceration duty will tend to render education ineffective, because when two kinds of power are used within an organization, one will predominate.[64]

> Applying force, for instance, usually creates such a high degree of alienation that it becomes impossible to apply normative power successfully. This is one of the reasons why rehabilitation is rarely achieved in traditional prisons, why custodial measures are considered as blocking therapy in mental hospitals, and why teachers in progressive schools tend to oppose corporal punishment.[65]

An inmate is unlikely to identify with or absorb desirable social values and norms from an educational system within a prison that otherwise deals with him only coercively.

814, 131 Cal. Rptr. 854 (1976) (no cause of action for money damages); Comment, *Educational Malpractice,* 124 U. PA. L. REV. 755 (1976).

62 A. ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS 5 (1961).

63 *See* notes 40 & 42 *supra.*

64. A. ETZIONI, *supra* note 62, at 6-7.

65 *Id.* at 7. *See also* D. KATZ & R. KAHN, THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS 143 (1966) ("[t]he two functions of incarceration and rehabilitation have incompatible elements").

Etzioni's theories do not suggest that it is impossible for normative and coercive power to coexist within a single institution. Each may be applied alternately over time, or separated consistently by specializing the functions of those wielding power — prison guards separated from prison teachers, for example. But practical problems generated by role and power conflicts will continue to occur from time to time even in institutions where education and incarceration have been reconciled generally.[66]

Therefore, any scheme for providing education in correction institutions will stimulate tensions between the conflicting functions of those institutions. All such schemes should be evaluated for their ability not only to minimize those tensions, but also to recognize and protect the competing interests involved therein.

II. Alternative Models for Providing Correction Education

In responding to the correction education problem outlined above, whether voluntarily or under the threat or force of court order, policy makers can consider a range of administrative models. Returns to the author's questionnaire from state correction officials[67] indicate that four basic models are currently in use. One is the school district model which is the subject of this article. The other three models involve, respectively, an assignment of responsibility for correction education exclusively to the state department of correction, an assignment of that responsibility to the state department of education, and a sharing of responsibility between the two departments. This part will briefly describe the three alternatives to the school district model, and will identify a fundamental weakness which all share but which the school district model is designed to overcome.

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66 Educational programs will constantly compete with other correctional interests for a limited supply of financial resources, for a fixed set of physical facilities, and for the allocation of the inmates' time and energy. For a discussion of the competition between the use of remunerative and normative powers in the Connecticut Department of Correction, *see* text accompanying note 225 *infra*.

67 Appendix A *infra*.

A. *Responsibility Vested Exclusively in Correction Department*

One administrative structure for providing education to the inmates of correctional institutions assigns full responsibility for correctional education to the state department of correction. The assumption of responsibility can occur either by legislative order or by departmental initiative. The department is then free to choose the method of providing education in its institutions. Given sufficient funds, it may contract with other agencies or schools and colleges to provide the needed programs.[68] Of course, the practice of contracting outside the correction department for services is not restricted to this model.

An obvious weakness in this model is that the lack of extra-departmental constraints leaves correction education vulnerable to the changing philosophies of successive correction department administrators and to the fluctuating fortunes of correction budgets. Moreover, without a legislative mandate or an established bureaucratic structure for delivery of correction education, even the best intentioned departments of correction may founder in their efforts to implement education within their institutions. Thus, for example, after the South Carolina legislature repealed a law authorizing a school for inmates within the Department of Corrections in 1878, departmental efforts to organize educational programs made little headway for eighty-six years. Despite some attempts to offer basic education and on-the-job training, the state lacked the organization, materials, facilities, and personnel necessary for a successful program.[69]

In 1964, the South Carolina Department of Corrections instituted a program of internal responsibility for education by establishing a Division of Educational Services administered by a Superintendent of Education.[70] The Superintendent

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68 *See, e.g.*, responses of Iowa, Utah, and Washington state corrections administrators in Appendix A *infra*.

69 South Carolina Dep't of Corrections, First Grade to College 2 (Information Report of the Division of Educational Services, 1975).

70 *Id.*

reports to a Deputy Director, and ultimately to the Director, of the Department of Corrections.[71]

The South Carolina experience illustrates the energizing effect that specific state administrative responsibility can have on correction education. Within a decade, thirty percent of the 4,200 inmates in the correctional system were participating in studies such as Adult Basic Education,[72] college courses taught by faculty from the University of South Carolina, and a varied vocational education program preparing students for work release programs. The Superintendent has received cooperation and funds from federal, state, intradepartmental, and private sources.[73] This combination of efforts has made a difference. The recidivism rate for the nearly 8,000 men released from the state's main Pre-Release Center is only 14.5 percent, compared to a national rate of about 65 percent.[74] The recidivism rate of the more than 2000 inmates who participated in the Work Release program and were released through the five community Pre-Release Centers opened since 1968 has been only 9.5 percent.[75]

The South Carolina model of establishing and financing an educational division entirely within the department of correction is simple and effective, provided the legislature, the public, other state agencies and the correction department continue to furnish stable and generous financial and programmatic help. It should be emphasized, however, that the program ultimately remains dependent upon the good will and financial well-being of the correction department. The mere existence of a bureaucratic structure responsible for

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71 Organizational Chart, *id.* at 18.

72 *See* Adult Education Act, 20 U.S.C. §§ 1201-1211b (1970 & Supp. V 1975). "Adult basic education" is defined as "education for adults whose inability to speak, read, or write the English language constitutes a substantial impairment of their ability to get or retain employment commensurate with their real ability . . . ." *Id.* § 1202(v).

73 In particular, funds and other resources from the South Carolina Department of Education, its Division of Adult Basic Education, and federal agencies under Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236-244 (1970 & Supp. V 1975), are used in the academic program. *See* South Carolina Dep't of Corrections, *supra* note 69, at 4.

74 *Id.* at 12.

75 *Id.* at 13.

correction education may preclude a complete withdrawal of education funds, but it does not inherently prevent arbitrary cut-backs by the department or the legislature. A stronger guarantee may be necessary to garner the full benefits of institutional education over the long run.

B. *Responsibility Vested Exclusively in State or Local Education Agencies*

Pennsylvania uses a correction education program in which state educational agencies are responsible for providing education to the prison populations. The School District of Philadelphia, for example, provides classroom instruction, grades one through twelve, within the Philadelphia prisons for all individuals up to age twenty-one, and provides adult basic education and vocational skill training.[76] Similarly, the Pennsylvania Department of Education, which is responsible for the operation of correctional education in Pennsylvania state prisons, provides a high school equivalency degree program, basic adult remedial education, college courses, and vocational training.[77]

Such a model gives an independent status to prison education that tends to protect it from attack by the correction department administrators who oppose such programs on fiscal or philosophical grounds. The model, however, introduces the potential for constant interdepartmental conflict in that it assigns authority over a significant activity in the correction facilities to state educational agencies that may ignore or disagree with correction department needs and goals.[78] That such tensions exist in the Pennsylvania model may be inferred from the hope expressed by the Pennsylvania Commissioner of Correction that legislative action "will place

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76 Letter from L. S. Aytch, Superintendent of Philadelphia Prisons to the author (July 26, 1977) (on file at the office of the Harvard Journal on Legislation).

77 Letter from W. B. Robinson, Commissioner of Correction, to the author (July 19, 1977) (on file at the office of the Harvard Journal on Legislation).

78 *See* text at notes 62-66 *supra.* The ABA Commission on Correctional Facilities and Services cites a lack of "adaptivity to correctional educational needs" as a drawback to incorporating corrections education into a local school district. ABA Commission Bulletin, *supra* note 20, at 7.

the authority and responsibility for correctional education and vocational training directly under the control of the Bureau of Correction."[79]

State agencies might not perform candid supervision and evaluation of their own programs. Thus the quality of education may suffer.

Finally, the need to allocate scarce resources between programs affecting a large number of students and those benefiting an institutionalized minority may encourage education administrators to short-change the latter; for example, they might hire non-certified teachers to teach prison inmates. This model offers the potential for providing equality of educational opportunity, but does not generate counterbalancing forces to assure it.

C. *Interagency Responsibility*

The third alternative model involves a legislative mandate to two or more state bureaus to cooperate in the provision of correction education. For example, the Idaho Code provides:

> The state board [of education], in cooperation with the state board of correction, shall have prepared suitable courses of study, including vocational training, for all prisoners held under the jurisdiction of the warden of the state penitentiary, and the state board of correction shall make arrangements carrying into effect all provisions for the education of prisoners who are under the jurisdiction of said warden.[80]

In Oregon, responsibility for planning and development of adult correction education programs is vested by statute in the state Department of Education, while responsibility for custody and physical operation of such programs is assigned to the Corrections Division of the state Department of Human Resources.[81] To facilitate cooperation between these

79 W. B. Robinson letter, *supra* note 77.

80 IDAHO CODE § 33-123 (1963). The Idaho Department of Correction operates a school accredited by the Idaho Department of Education and the State Board of Education, although such accreditation is not required by law. Letter from D. Brannam, Head of Correctional Education, to the authro (June 30, 1977) (on file at the office of the Harvard Journal on Legislation).

81 OR. REV. STAT. § 421.077 (1975).

two state bureaus, the legislature in 1975 established a Joint Corrections Education Planning and Development Team, consisting of representatives from both bureaus.[82] The team is responsible for developing an educational delivery system which is then implemented by the Corrections Division.[83]

The model of interagency cooperation has the potential for providing a structure of external checks and balances to regulate the competition between educational and other interests, a structure lacking in the first two models. Furthermore, if the state departments of education and correction succeed in working together, the model encourages a continuing exchange of fresh perspectives.

Nevertheless, the model of interagency cooperation shares with the first two models a fundamental weakness: it singles out the education of institutionalized persons as a service that is politically, structurally and conceptually separate from the ordinary educational efforts of the state. Where bureau education can be dealt with separately from conventional education, it remains vulnerable to budget cutbacks and political prejudice. Even if there are advocates for bureau education, it is their burden each year to justify the value of its programs, or of its very existence, in order to maintain funding from legislatures or state bureaus. The complaint of a member of the New Hampshire Prison Concerns Committee illustrates how heavy this burden of justification can be:

> The state of New Hampshire . . . is lacking in any type of comprehensive educational program for its Prison population and the funds that are provided for even a meaningful part-time program. Our group has attempted to contact Legislators this year in order to convince them of the need for more adequate funds as these budget items are the first to be eliminated in Budget sessions . . . .[84]

The bureau school district model is designed to shift the

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82 *Id.* § 421.082 (1975).

83 *Id.;* letter from T. G. Toombs, Deputy Administrator, Corrections Division of the Oregon Department of Human Resources, to the author (June 28, 1977) (on file at the office of the Harvard Journal on Legislation).

84 Letter from Mrs. C. R. Wentzell, New Hampshire Prison Concerns Committee, to the author (June 28, 1977) (on file at the office of the Harvard Journal on Legislation).

burden of justifying decisions about education for persons in state institutions by making a fundamental shift in assumptions. Instead of treating correction education as an enterprise distinct from conventional education, the model assumes it to be an administratively and structurally equivalent enterprise. Thus equal treatment becomes the norm, and departures from equality the exception to be justified. The following part of this article will describe the bureau school district model in greater detail, identify the benefits that it can provide, and discuss its implementation.

III. A Model for a School District Within a Department of Correction

A. *Elements of the Ideal Model*

The proposed model for delivering correction education entails the formation of a school district with statewide jurisdiction over all persons sentenced to the custody of the state department of correction.[85] In its ideal form, the model includes the following basic elements: a policy-making body with powers and duties analogous to those of a local board of education, a chief educational administrator with the same professional qualifications as a conventional superintendent of schools, and with similar responsibilities, and a professional staff whose qualifications meet at a minimum the certification requirements of teachers and administrators in conventional schools.

Like traditional school districts, the correction district must meet the educational standards set by the legislature and by the state department of education. Its educational functions are routinely supervised or scrutinized under the same administrative procedures that the state applies to local school districts. It can become eligible for the same

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85 The legislature may directly establish the correction school district, as in Connecticut, Conn. Gen. Stat. §§ 18-99a to -99b (1977), or it may delegate the power to create school districts, as in Ohio, where the State Board of Education granted a school district charter to the Department of Rehabilitation and Correction on April 9, 1973, pursuant to the authority delegated to it by Ohio Rev. Code Ann. § 3301.16 (Page 1972).

grants, and its students are entitled to whatever quality or quantity of educational opportunities the state guarantees to students in local schools. In short, bureau education in the ideal model becomes a system equivalent to any conventional school system within the state's structure of educational administration.

Existing correction school districts do not always incorporate every feature ascribed to this ideal model, and departures from the model may be justified by particular circumstances.[86] If even an approximation of the bureau school district model is implemented, however, important benefits for bureau education are likely to result.

B. *Consequences of Adopting the Model*

School district status brings an immediate and practical benefit to state correction education programs: it enhances their ability to meet the eligibility requirements of federal and state education grants available to local school districts. Although state correction institutions without school district status may be included in the eligibility provisions of federal legislation,[87] important grants are unattainable without certification by the state department of education that all requirements have been met.[88] Such certification is unlikely without the department's supervision of the use of the grant. School district status lowers the administrative hurdles which previously blocked such certification and supervision. The department of education's oversight function need no longer involve extraordinary procedures or interdepartmental complications, once the correction department has ad-

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86 *See* the discussion of choices that arise in implementation of the school district model, Part III C *infra*, and the description of the particular school district scheme implemented in Connecticut, Part IV *infra*.

87 *See especially* 20 U.S.C.A. §§ 241c-3(a) (West Supp. 1977) (agencies responsible for education of children in institutions for neglected or delinquent children or in adult correctional institutions). *See also*, 20 U.S.C. §§ 244(b), 403(k) (1970); 20 U.S.C.A. §§ 241c-1a, 241c-z(a)(1) (West Supp. 1977). With school district status, correction education administrators no longer incur the burden of lobbying for such special provisions in each new piece of legislation.

88 *See, e.g.*, 20 U.S.C. § 1413 (Supp. V 1975) (education for handicapped); 20 U.S.C. § 453 (1970).

justed its education operations to satisfy the routine accountability requirements of the education department.

The prospect of instant eligibility for federal funding of correction education strongly attracts state legislators to the school district concept,[89] but the flow in funds from the established *state* education grants may be just as important. With status equivalent to that of conventional school districts, the correction district is entitled to the same grants.[90] Thus the higher the level of state support of local education, the greater the surge of state funding for the correction school district. That portion of state funding of the bureau education which is derived from generally applicable education grants is insulated from arbitrary or discriminatory policy decisions. In effect, school district status helps to overcome the political handicaps of a state bureau that serves a politically powerless constituency. Correction education can now ride the coattails of experienced and powerful local education lobbies in pursuit of funding in both state and national capitals.

This funding advantage inherent in school district status is one aspect of a more general administrative and political benefit which the model generates. Adoption of the school district model represents a second order change in legislative thinking about the organization of the educational delivery system in state correctional institutions.[91] Education of inmates traditionally has been "special"—funded if feasible, scheduled if convenient—and always the operating principle was that, as an exception, it had to be justified. School

89 *See, e.g.*, text accompanying note 167 *infra*.

90 *See, e.g.*, N.J. REV. STAT. ANN. § 30:4AA-6 (West Supp. 1977), which provides: "In all respects and for all purposes, *including state aid and funding* . . . except as otherwise specifically provided by law, the state school district for institutions shall be considered a local education authority" (emphasis added).

91 A first order change is a change that occurs under a given solution; a second order change is a change in solution. For example, when a thermostat signals a furnace to keep a room temperature at a certain level or when the legislature increases the appropriation to correction education to maintain service at a certain level, a first order change occurs. When the thermostat is reset or the legislature restructures the correction education system, a second order change occurs. For a discussion of second order changes, *see* P. WATZLAWICK, J. WEAKLAND & R. FISCHE, CHANGE: PRINCIPLES OF PROBLEM FORMATION AND PROBLEM RESOLUTION 77-91 (1974).

district status makes correction education the rule and requires justification of any exception to the standards applied to all school districts.

In practice, the model transfers the responsibility for policy decisions from an individual responsible for multiple bureau functions (the commissioner of correction) to a group focusing primarily on educational policy-making and only secondarily on other bureau functions (the bureau "school board"). It also transfers the administrative function from largely autonomous wardens of individual institutions to a professionally-trained school superintendent. Finally, the model removes determination of faculty and staff qualifications from the discretion of isolated correction officials, and places it under the governance of state education regulations. This restructuring of the administration of education in state bureaus along lines parallel to local school district management helps assure an equality of delivered services that is not built into existing alternatives.

The equality of structure has a more direct impact on the operation of correction education through its guarantee of equal application of legal regulation. For example, statutory changes in requirements for special education, for construction of classrooms, or for courses in computer science, would engender the same responsibilities in both the correction and the local school systems. Similarly, case law interpreting statutes governing school districts generally would apply to both correction and conventional districts to the extent that the same issues arise in both. Obviously, due to differences in circumstances, some statutory, administrative, or judicial exceptions may be necessary.[92] But the presumption will be that treatment is automatically equal until an exception is justified.

In sum, once the model is adopted, any existing prejudices about the status or condition of correction school students versus local school students are not as influential in

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92 *See, e.g.,* ILL. ANN. STAT. ch. 122, § 13-45 (Smith-Hurd Supp. 1977) (inapplicability of certain sections of School Code to corrections school district); TENN. CODE ANN. § 4-655 (Supp. 1976) (commissioner of education may grant waivers).

legislative or administrative decisions as before, whether those decisions involve funding, professional standards, or entitlement to educational opportunity. This second order change in assumptions and behavior is the unique feature of the school district model.

C. *Implementation of the Model*

In translating the basic elements of the bureau school district model into workable legislative and administrative schemes, state officials will need to make a number of subsidiary decisions. The major issues of policy to be confronted are: 1) providing a funding source equivalent to the local property tax; 2) determining the status of the board of education and superintendent in the school district; and 3) choosing between state and local laws or practices governing employees of the school district. Moreover, those who wish to pass school district legislation and see it successfully implemented must choose appropriate political strategy. Conditions that vary from state to state invite different policy choices. This section of the article points to some possible approaches to each issue.

1. Closing the Funding Gap

A handicap inherent in any model of a correction bureau education system is that the bureau lacks political access to any local tax base. While the local property tax is a significant source of revenue to conventional school districts, the bureau district has no taxing power to fill the funding gap between what it receives from grants and what it needs to operate schools equivalent in quality to conventional schools.

The extent to which local taxes, levied primarily against property, support local school districts varies, from a low of fourteen percent in New Mexico to a high of eighty-eight percent in New Hampshire.[93] The more a state relies on local

93 R. JOHNS, K. ALEXANDER, & D. STOLLAR, STATUS AND IMPACT OF EDUCATIONAL FINANCE PROGRAMS 59 (1971). For an elementary guide to school financing in 61 pages, *see* NATIONAL EDUCATION FINANCE PROJECT, U.S. DEPARTMENT OF HEALTH EDUCATION AND WELFARE, FUTURE DIRECTIONS FOR SCHOOL FINANCING (1971).

taxes rather than on statewide funding schemes to finance education, the more vulnerable to financial and political pressures a correction school district is likely to be. When the state earmarks annual appropriations for correction education in the budgets of its correction department or its education department or both,[94] the correction school district, with respect to that portion of its funding, suffers from the weaknesses of alternative models.[95] It must participate in intra-bureau and inter-bureau competition for scarce state funds. For example, security may hold higher priority than education in the budget requests of a commissioner of correction, while the commissioner of education may choose to reduce the correction school budget in order to provide more funds for conventional schools. The governor and legislature may compound this budget trimming in drafting the final state budget if departments with superior lobbies or greater popularity intervene. In short, although the school district model makes available a higher proportion of grant funds than the other models discussed in Part II of this article, this feature only partially insulates bureau education from the politics of prejudice, unless a funding source comparable to the local tax base can be provided.

When a correction school district lacks a local source of funds and is less than successful in the contest for its share of the state budget, state and federal grant funds will constitute a significantly higher portion of its operating budget than

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94 *See, e.g.,* ARK. STAT. ANN. § 46-1303 (Supp. 1975), (costs of the correction school district to be paid from funds appropriated out of general state revenues to the departments of correction and education); ILL. ANN. STAT. ch. 122, § 13-44.4 (Smith-Hurd Supp. 1977) ("regular appropriations" to correction department "for educational purposes"); MD. ANN. CODE art. 77, § 218(e) (Supp. 1976) (funds for correction school district provided in state budget for department of education, but department of correction and other agencies may contribute, as provided in state budget); N.J. REV. STAT. ANN. § 30:4AA-5 (West Supp. 1977) (amount of state aid payable for bureau education determined by Commissioner of Education; appropriations necessary to contract for post-secondary education may be made to Commissioner of Institutions and Agencies); TEX. EDUC. CODE ANN. § 29.04 (Vernon 1972) (cost of operating correction schools to be borne entirely by state, and paid from a school program fund; budget committee of the fund makes annual budget estimates).

95 Those weaknesses are discussed at the conclusions of parts II A, II B, and II C *supra.*

they do in local school districts. Although reliance upon federal grants may foil some attempts to cut back state support,[96] a disproportionate dependence upon grant funding produces at least two further problems.

First, an embryonic correction bureau district may have difficulty initiating grant-financed programs when the district must actually provide the program before being reimbursed by the grant.[97] Local districts can "prime the pump" for such reimbursement grants by raising property tax assessments or borrowing internally from other well established and relatively large educational accounts.[98] The bureau district, by contrast, often can only borrow from non-educational accounts within the bureau. Such a situation strains both bureau budgets and intra-bureau relations,[99] and inevitably retards development of programs. A revolving fund earmarked for programs financed by reimbursement grants would be a desirable solution to this problem, and is certainly preferable to abrupt fluctuations in the line item for education in the correction bureau budget.[100]

A second, more fundamental peril is excessive dependence upon grantsmanship to maintain the bureau schools. Because innovation tends to attract federal seed money grants, reliance on such funding may stimulate many imaginative programs.[101] Nevertheless, seed money is not intended to be maintenance funding, and it sometimes disappears abruptly,[102] thus endangering the continuity of programs.

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96 States may lose certain federal education grants if combined state and local support is not maintained at previous levels. *See, e.g.*, 20 U.S.C. § 241g(c)(2) (1970). Thus, for example, in Connecticut in 1976 the Commissioner of Correction had to retract an order to eliminate five teaching positions in prison schools, because the cutback would have meant loss of federal funding and resulting loss of a total of twelve positions.

97 *See, e.g.*, CONN. GEN. STAT. § 10-76g (1977) (special education).

98 *Id.* § 10-222 specifically allows local school districts to "transfer any unexpended or uncontracted-for portion of any appropriation for school purposes to any other item" in their budget.

99 *See* part I C *supra*.

100 *See* text accompanying notes 182-184 *infra*.

101 *See, e.g.*, text accompanying notes 189-199 *infra*.

102 *See, e.g.*, table of funding sources for Connecticut Department of Correction School District, reproduced as Appendix B *infra*. The figures for Appendix B were provided by Edmund J. Gubbins, Director of Education, Department of Correction.

The constant grantsmanship activity required of the superintendent of a correction school district is in the long run an inefficient use of administrative resources. Moreover, the element of opportunism it encourages may ultimately result in ill-conceived programs which wither away with the expiration of a grant.[103]

Therefore, improved access to grants does not alone enable the correction school district to provide an educational opportunity to those in institutional schools equal to that provided in conventional schools. If this opportunity is to be a genuine one, the bureau school district must have a source of non-grant funding comparable in dependability and continuity to the local tax base.

Correction school districts usually rely upon appropriations from the legislature, or upon budget allocations in one or more state bureaus to make up the difference between grant revenues and the cost of bureau education.[104] The preceding discussion, however, showed that this practice may subject the bureau school district to the political discrimination endemic to the other models for bureau education.

Perhaps the most effective approach to stabilizing correction school district finance is a statutory or regulatory formula to calculate state maintenance funding for the district. For example, this formula could base the line item for education in the correction department budget upon average per pupil expenditures supplied by local taxes in conventional school districts. A formula for annual maintenance support is, in effect, an official recognition that the bureau school district's regular annual allocation from the treasury or from

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103 According to one study of the process of change, decisions about project continuation appeared to parallel closely the motivations to initiate the project. Projects that were initiated with strong district support and that were seen as a solution to a particular problem were expected to be continued without exception. Conversely, those projects that represented an opportunistic response and received little or no support from district administrators typically were expected to wither away, even when the project objectives were met. RAND CORPORATION, FEDERAL PROGRAMS SUPPORTING EDUCATIONAL CHANGE, vol. III, THE PROCESS OF CHANGE 67 (1975).

104 *See* note 94 *supra.*

the bureau budget is equivalent to a local district's support from local taxation.[105]

Another method would actually tap the local property tax by requiring a conventional school district to pay "tuition" for each student transferred from it to the correction bureau district. This tuition could be determined on the basis of the local district's average contribution to its per pupil education expenditures. This approach results in higher tuition from rich districts than from poor ones. If the tuition were pegged to the amount actually needed by the correction district to close the funding gap, poor school districts would be burdened more heavily than rich districts for each pupil educated by the bureau district.

A statewide property tax for financing the non-grant portion of bureau education would be a more radical approach to achieving combined state and local funding of the correction school district. Such a tax has the capacity to distribute costs of correction education among wealthier and poorer districts on the basis of ability to pay. But as a scheme expressly tied to prison education, it may be politically unpopular.[106] The property tax has been traditionally the preserve of local government.[107] Even if the state earmarks the property taxes for correction education, there is no guarantee that it will spend them on it. Also, converting to uniform assessments and collecting the taxes levied is a formidable administrative task. Such a radical solution for such a relatively small problem is unrealistic except, perhaps, as part of a major reform of the education finance system for the benefit of all school districts.[108] The problem of providing a source of finance

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105 The American Bar Association Commission on Correctional Facilities and Services has recommended this formula approach to funding. ABA Commission Bulletin, *supra* note 22, at 2.

106 Texas correction school district legislation expressly provides that no part of the correction schools' operating costs be charged to local school districts. This provision appears to be designed to protect localities from the burden of financing prison education. TEX. EDUC. CODE ANN. § 29.04 (Vernon 1972).

107 *See generally* P. MUSGRAVE & R. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 431-35 (2d ed. 1976).

108 At least three state supreme courts have ruled that state education finance schemes which rely primarily on local property taxes violate the state constitution. *See* Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *decision*

equivalent to the local property tax is inherent in all bureau education systems, regardless of the administrative model under which they are implemented. But the bureau district model handles funding uncertainties better than the alternatives, even when the bureau school must compete annually for its state appropriation. With school district status comes political leverage. The bureau district superintendent can claim that the district must have sufficient funds to implement what the legislature has mandated for all school districts. Each appropriation merely confirms the previous legislative commitment to equal educational opportunity for those in state institutions, rather than establishing such a commitment anew. Similarly, when requesting funds for education in the correction budget, the school superintendent can point to the need for meeting statewide educational requirements and for satisfying the standards of an outside agency, the education department.

Nonetheless, a statutory formula guaranteeing an annual state appropriation comparable to conventional local support is desirable, and appears to be the most easily implemented of the approaches discussed in this section.

2. Board of Education

In conventional school districts, a board of education responsible for broad policy decisions and supervision of school district administration is commonly considered essential in order to give a voice in education to the community that the board represents.[109] Problems may arise, however, when a traditional school board is established with responsibility over education in correction institutions scattered across the state.

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on remand aff'd, 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273, *cert. denied*, 414 U.S. 976 (1973); Horton v. Meskill, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974), *aff'd*, 376 A.2d 359 (Conn. 1977). *Horton* is discussed in text accompanying notes 145-149 *infra*. The statewide property tax adopted by Maine to equalize the funding of local school districts was recently repealed by a large majority in a popular referendum. *See* N.Y. Times, Nov. 6, 1977, at 21, col. 1.

109 *See* N. GROSS, WHO RUNS OUR SCHOOLS? 90-91 (1958); J. KOERNER, WHO CONTROLS AMERICAN EDUCATION? 122-23 (1968).

First, because education is a secondary — and perhaps incompatible — service of the state correction bureau, a board of education with traditional powers may disagree with the head of the bureau over matters of educational policy and hiring of staff; it almost inevitably will disagree over the bureau school district budget. One possible cure for conflicts is to eliminate the board of education altogether, or to reduce it to a vestige. This approach was adopted by statute in the Connecticut and Tennessee correction school districts, where control over prison education policy resides in the commissioner of correction.[110] A comparable plan has been adopted in Arkansas and Texas. In both states a Board of Corrections, which is responsible for the business of the Department of Corrections as a whole, is also the school board for the district.[111] There is no separate body with power to make educational policy for correction schools.

The approach of Connecticut and Tennessee may be politically expedient, eliminate time-consuming board deliberations, and avoid stalemates between board and commissioner. Nevertheless, educational interests can easily suffer where a single officer, without a professional education background and with often incompatible bureau interests, is allowed to make the educational policy decisions traditionally entrusted only to a group selected to make decisions exclusively about education. Similar drawbacks are inherent in the Arkansas and Texas programs, where bureau education, lacking the advocacy of an independent policy-making group, can easily be subordinated to other correctional interests.

For these reasons, the American Bar Association Commission on Correctional Facilities and Services recommended, as

110 CONN. GEN. STAT. § 18-99a(b) (1977); TENN. CODE ANN. § 4-644 (Supp. 1976). In Conncecticut, an ad hoc surrogate school board with no statutory powers serves an advisory function, while the statute provides for correction department "consultation" with the Council of Correction. *See* text accompanying notes 138-152 *infra*. New Jersey enabling legislation for bureau school districts makes no provision for a board of education. N.J. REV. STAT. ANN. §§ 30:4AA-1 to -8 (West Supp. 1977).

111 ARK. STAT. ANN. § 46-1301 (Supp, 1977); Description of Windham School District in Texas Department of Corrections, attachment to letter from Chris Tracy, Assistant Superintendent, Windham School District, to the author (July 7, 1977) (on file at the office of the Harvard Journal on Legislation) [hereinafter cited as Description of Windham School District]. The Texas school district enabling legislation,

a major part of the bureau school district concept, a policy-making school board "whose function is solely that of supporting viable education programs for individuals within the penal system."[112] Such a board can serve as a powerful advocate and intermediary for education interests.[113] Both Illinois and Maryland have established by statute correction school district boards of education with the independent powers requisite to serving such a function.[114]

If there is to be an independent board of education for the bureau school district, the related question of its composition arises.[115] The community whose interest the board must represent is not so clearly identifiable in a bureau school district as it is in the traditional geographical community of taxpayers and parents. Moreover, education within correction institutions will usually involve specialized knowledge in the fields of both correction and education, as well as expertise in other social science disciplines. The perceived constituency of the board and the expertise considered necessary for its policy decisions will vary from state to state, as will the methods for assuring that such constituency and expertise are represented.

Some states have adopted a practice of representing only general correction department interests on the so-called school board.[116] This approach appears undesirable in that such a policy-making body is not a genuine board of education at all. No special constituency is identified for representation, and no additional expertise outside the correction field is brought into policy decisions.[117]

Other states have adopted the procedure of legislatively identifying the interests to be represented in correction

TEX. EDUC. CODE ANN. §§ 29.01-.05 (Vernon 1972), makes no explicit mention of a board of education.

112 ABA Commission Bulletin, *supra* note 20, at 1.

113 *Id.* at 4.

114 ILL. ANN. STAT. ch. 122, § 13-40 (Smith-Hurd Supp. 1977); MD. ANN. CODE § 218(a), (b) (Supp. 1976).

115 *See* ABA Commission Bulletin, *supra* note 20, at 2.

116 *See* note 111 *supra.*

117 In Texas, where the Board of Corrections (which is also the board of education) is composed of "nine outstanding business and professional men from throughout the state," Description of Windham School District, *supra* note 111, at 4, correction experts may go unrepresented. Such a board does, however, allow men in other disciplines to contribute their ideas.

bureau educational policy-making and fixing the composition of the board by statute. For example, the Maryland enabling legislation specifies a school board consisting of the State Superintendent of Schools, the Commissioner of Correction, the head of the State Board of Community Colleges, one county school superintendent from a county in which a correctional institution is located, and one "public member" appointed by the Governor.[118] This kind of statute indicates that the legislature has actually weighed certain aims and interests of correction education policy and provides some assurance that the board of education will not be later coopted by a single interest. It creates inflexibility, however, in that changed goals or needs of the bureau school district may not be represented without amendment. In this aspect, the Illinois legislative scheme presents an auspicious compromise. Although it specifies certain ex officio board members and identifies certain areas of expertise, the statute allows for flexibility in that six of the nine board members are appointed for limited three-year terms by officers in state education agencies.[119]

Legislators or administrators with the power to appoint board members should carefully consider the possibility of enlarging the nonprofessional membership of bureau school boards to include such constituencies as the institutionalized students, parents of minor students, the public at large, or possibly the courts and the legislature. This alternative would approximate the conventional local school board, where the judgment of professionals intimately connected with the school district is often considered biased and prone to conflict of interest. A correction school board composed primarily of members unconnected with either correction or education would preserve the traditional separation between lay policymaking and professional administration that exists in the operation of conventional school districts.[120]

118 MD. ANN. CODE art. 77, § 218(b) (Supp. 1976). *Cf.* OR. REV. STAT. § 421.002 (1976) (Joint Corrections Education Planning and Development Team to consist of representatives from departments of education, employment and corrections, higher education, and the local community college).

119 ILL. ANN. STAT. ch. 122, § 13-40 (Smith-Hurd Supp. 1977).

120 Two Connecticut officials expressed their opposition to lay representation on

3. Superintendent of Schools

Empowering a superintendent for the correction school district is no less troublesome than selecting a board. In the traditional school district, the elected board of education is typically responsible for choosing a superintendent of schools as the executive agent of the board.[121] The superintendent usually must be certified by the state board of education.[122] As chief administrative officer of a school district, the superintendent derives significant powers and responsibilities directly from statute and indirectly as agent for the board of education.[123]

Introducing such a figure into the bureaucratic hierarchy of a state correction department and its scattered institutions creates organizational tensions. Individual institutions are likely to experience one form of stress. A warden with autonomy may not lightly yield control over programs within his fiefdom, particularly when the superintendent of correction schools introduces outside teaching personnel into the institution or presses for changes in staff behavior toward inmates in order to further educational aims.

Correction bureaus may experience a second kind of stress. The bureau school district superintendent, even if nominally subordinate to the head of his bureau, is certified by the department of education and responsible for fulfilling its standards. As such he may appear to endanger the exclusive authority of the head of the bureau.

The legislature could dispense with a separate superintendent as it could the school board. This approach was adopted

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the board, in an interview with the author. The Superintendent of Correction Education noted that it was almost impossible to persuade parents of inmates to participate in PTA-type activities, and the Commissioner of Correction observed that permitting lay persons to create rules and policies in the correction setting could cause mischief. Interview with Commissioner of Correction John R. Manson and Superintendent Edmund J. Gubbins, in Hartford, Connecticut (Oct. 13, 1977).

121 *See, e.g.*, CONN. GEN. STAT. §§ 10-47, -157 (1977) (granting regional and town boards of education the power to elect the superintendent).

122 *Id.* §§ 10-145, -146.

123 *See, e.g.*, CONN. GEN. STAT. § 10-157 (1977); Wood v. Town of Clinton, 10 Conn. Supp. 404, 408 (Super. Ct. 1942), holding that "[t]he superintendent of schools is not an employee to be hired by contract but a public officer to be elected [by the board of education]."

by the legislatures in both Connecticut and Tennessee, where the correction district enabling acts grant the commissioners of correction the exclusive administrative powers of a superintendent.[124] A correction commissioner, however, will in most cases lack credentials and expertise in education, a deficiency which is an even greater handicap for day-to-day educational administration than it is for general decisions about policy. For this reason, the Connecticut Commissioner of Correction chose to delegate his administrative authority to a professional superintendent of schools, though he was not required to do so under the enabling act.[125]

Other states, such as Maryland, New Jersey, and Illinois, make express statutory provision for a superintendent of correction schools.[126] Although correction officials in each of these states report that the superintendent is certified,[127] only New Jersey has an explicit legislative requirement that the superintendent be "qualified by training and experience."[128] Specific requirements provide better assurance of competent administration in correction education than does mere reliance upon the good will or good sense of a commissioner of correction. Presumably, statutes that specify administration by a superintendent imply the applicability of state regulations concerning certification of superintendents.

A further issue that must be resolved by legislatures or administrators is whether the superintendent will answer to the commissioner of correction or to the correction board of education. Only Illinois provides by statute that the superintendent follow the direction of the board.[129] Such an

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124 CONN. GEN. STAT. §§ 19-99a, -99b (1975); TENN. CODE ANN. § 4-655 (Supp. 1976).

125 *See* text accompanying note 212 *infra*. Although Texas legislation does not mention a superintendent, TEX. EDUC. CODE ANN. §§ 29.01-.05 (Vernon 1972), correction officials report that a certified superintendent administers the correction school district. Description of Windham School District, *supra* note 111, at 4.

126 MD. ANN. CODE art. 77, § 218(f) (Supp. 1976); N.J. REV. STAT. ANN. § 30:4AA-3 (West Supp. 1977); ILL. ANN. STAT. ch. 122, § 13-43.6 (Smith-Hurd Supp. 1977).

127 Appendix A *infra*.

128 N.J. REV. STAT. ANN. § 30:4AA-3 (West Supp. 1977).

129 ILL. ANN. STAT. ch. 122, § 13-43.6 (Smith-Hurd Supp. 1977).

approach may engender tension between the superintendent and the commissioner of correction. Nevertheless, it best reflects the traditional status of a superintendent in a school district and thus is most consistent with the underlying rationale of the model. Of course, the full extent of the superintendent's power and of his relationships with the commissioner, the board, and the wardens of institutions cannot be legislated. Such matters will inevitably be resolved according to the political skills and personalities of the individuals involved, rather than by statutory mandates.

4. Personnel

Correction school districts will need rules for the treatment of their personnel. The legislature must first decide whether to require certification of all bureau district teachers by the state department of education. Although a major purpose for the school district model is to bring the quality of education provided in state institutions up to the level provided in conventional schools,[130] there are some educators who argue that certification should not be a requirement for correction district teachers because "certification requirements are generally inappropriate measures of a person's fitness to teach in a correctional institution."[131] Not surprisingly, at least one bureau school district has claimed exemption from state certification and other professional requirements.[132]

This solution, however, allows the quality of teaching services to vary with budgetary success or failure, and violates the underlying principle that the bureau school district is equivalent to conventional districts. If the work of a teacher in a correction setting requires additional or alternative skills and experience, a preferable approach is to add such requirements to the state's basic certification requirements, as

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130 *See* text accompanying notes 91 & 92 *supra.*

131 Interview with Dr. John Pittenger, Senior Lecturer on Education, Harvard Graduate School of Education, in Cambridge, Mass. (Oct. 5, 1977).

132 *See* text accompanying note 120 *infra. See also* TENN. CODE ANN. § 4-655 (Supp. 1976) (commissioner of education may grant waivers for education requirements which correction schools cannot meet due to penal functions).

is often done for special education teachers or administrators.[133]

The legislature must also decide whether to subject employees of the correction school district to statutes governing state employees or to statutes governing local and regional school districts. The choice determines which employment and dismissal procedures, bargaining rights, and retirement plans will apply to correction district teachers. Collective bargaining, for example, may be more easily accomplished for widely scattered state bureau teachers by permitting affiliation with a state employees' union rather than with a conventional district teachers' union. On the other hand, statutes governing local school districts may provide better tenure protection.

While other states have left many of these issues to resolution through the actual operation of the school district,[134] the Illinois enabling act explicitly states what laws govern employment, compensation, and retirement of teacher personnel.[135] Such a statutory approach eliminates ambiguities, but at a risk of paralyzing the legislature with the very complexity of such detailed decisions. This phenomenon is part of the broader question of political strategy for making the school district concept a reality.

5. Political Strategy

In drafting the correction district statute, legislators seeking adoption of the model must make tactical decisions about how many policy issues to resolve. Comprehensive bills may impress legislators as too complicated, exposing the proposed school district to opponents' charges that it will add layers to a bureaucracy that is already excessive. Moreover, the greater the detail in the proposal, the greater the opportunities for disagreement among legislators. But vague one-

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133 *See, e.g.*, 1 REGULATIONS OF CONN. STATE AGENCIES § 10-146-24, which requires special certification for teachers of handicapped children.

134 *See* text accompanying note 136 *infra*.

135 ILL. ANN. STAT. ch. 122, § 13.43.17 (Smith-Hurd Supp. 1977).

page bills may be questioned as not thoroughly considered, and bureaucrats may be unable to resolve many questions left open in the legislation.

Enactment of correction school district legislation has taken several forms. The Connecticut and Texas acts are brief,[136] while the Illinois statute describes in detail matters of structure, process, rights, and duties through five-and-a-half pages.[137] In Ohio, the state board of education created the correction school district, pursuant to its statutory authority to grant "school district charters."[138] The Maryland enactment is buried in an elementary and secondary education reorganization act.[139]

The choices of strategy and substantive policy will differ among states, and the statutory schemes which emerge from the same ideal model may vary widely. The actual experience of implementation may produce even more divergence. What follows is an examination of the experience of one state with the school district model.

IV. THE CONNECTICUT EXPERIENCE

The Connecticut Constitution evidences the value which the state places on equality of education. The 1818 constitution established a fund and declared that the interest be used for "the support and encouragement of the public or common schools throughout the state, and for the equal benefit of all the people thereof . . . ."[140] In 1965, the revised constitution commanded that the general assembly implement the principle of free public elementary and secondary education by "appropriate legislation."[141] The concept of equal access to education is elaborated in the statutory declaration that:

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136 CONN. GEN. STAT. §§ 18-99a, -99b (1977). TEX. EDUC. CODE ANN. §§ 29.01.-05 (1972).
137 ILL. ANN. STAT. ch. 122, §§ 13-40 to -45. (Smith-Hurd Supp. 1977).
138 OHIO REV. CODE ANN. § 3301.16 (Page 1972).
139 MD. ANN. CODE art. 77, § 218 (Supp. 1976).
140 CONN. CONST. art. 8, § 2 (1818).
141 *Id.* § 1 (1965).

> [It is] the concern of the state 1) that each child shall have for the period prescribed in the general statutes equal opportunity to receive a suitable program of educational experiences; 2) that each school district shall finance at a reasonable level an educational program designed to achieve this end; and 3) that the mandates in the general statutes pertaining to education within the jurisdiction of the state board of education be implemented.[142]

Nevertheless, implementation of this concept has been slow even in the conventional school systems.[143] Exclusion of undisciplined and severely handicapped children has been common.[144]

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142 CONN. GEN. STAT. § 10-4a (1977). The Connecticut statutes further mandate that local boards of education

> shall maintain in their several towns good public elementary and secondary schools, implement the educational interests of the state as defined in section 10-4a and provide such other educational activities as in their judgment will best serve the interests of the town; . . . and shall give *all the children of the town as nearly equal advantages as may be practicable* . . . [emphasis added].

Id. § 10-220. Another section of the statutes was recently amended to provide:

> Within the limits of existing expenditures in any one school year, any child attending a public school shall have an *equal opportunity to participate* in the activities, programs and courses of study offered in such public school. [emphasis added].

Id. § 10-15.

143 In 1856, the General Assembly abolished school societies and adopted the legal structure of school districts managed by boards of education. O. Sweeting, Roots of Education in Connecticut 14 (unpublished paper based on an address to Conn. Ass'n of Boards of Education, Nov. 15, 1969). But a decade later less than half the school age children found seats. *Id.* at 16. Advocates argued for publicly-supported high schools so that "all classes" could benefit. *Id.* at 16. By 1897, strong pleas for a statewide, publicly supported system of schools managed by a state superintendent were made "to give each boy a chance." W. SCOTT, EQUAL EDUCATION IN CONNECTICUT 13 (1897). Though the plan was not passed, the arguments used that "the smallest and poorest town ought somehow to have as good high school facilities for their children as the larger and richer ones . . . ," *id.* at 10, foreshadowed the arguments made nearly eighty years later in Horton v. Meskill, 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974), *aff'd*, 376 A.2d 359 (Conn. 1977), a successful challenge of the Connecticut school finance system. The case is discussed in text accompanying notes 145-149 *infra*.

144 CONN. GEN. STAT. § 10-76d(a) (1977) provides:

> No school age child requiring special education shall be excluded or exempted from school privileges except with the express approval of the secretary based upon appropriate professional advice. Said secretary shall immediately report any child so excluded or exempted to any state agency responsible by law for any aspect of the welfare of such child.

By definition, however, profoundly retarded children were not eligible for special education:

Recent judicial affirmation of the constitutional entitlement to education in Connecticut, however, promises significant progress toward the mandatory provision of equal access to education. In *Horton v. Meskill,*[145] a Connecticut superior court found that the state system of financing schools primarily through local property taxation within each school district produced disparities in public school education,[146] and held in a declaratory judgment that such disparities violate the Connecticut Constitution.[147] The Connecticut Supreme Court affirmed the decision, declaring:

> Children requiring special education includes any exceptional child who (1) is mentally retarded, . . .(f) A "mentally retarded child" . . . shall not include any child who requires custodial care, or does not have clean bodily habits, responsiveness to directions or means of intelligible communication; . . . .

Id. § 10-76a.

The 1977 General Assembly amended § 10-76d(a) to allow parents to have "advisors of their own choosing" at the meeting in which the eligibility of their child for special education is decided. Conn. Pub. Act No. 77-36, April 21, 1977 (Jan. Sess.).

Pursuant to CONN. GEN. STAT. §§ 10-186 (1977) (appeals concerning disciplinary exclusions), 10-76d (1977) and its antecedent, § 10-75b (1958) (concerning handicapped children), the State Board of Education annually approved exclusion of hundreds of children decades ago. The Board permitted but twenty-seven exclusions in 1972-73, and only four in 1975-76. Interview with Robert I. Margolin, Bureau Chief, Bureau of Pupil Personnel and of Education, Conn. Dep't of Education, Hartford, Conn., June 22, 1976.

145 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974), *aff'd,* 376 A.2d 359 (Conn. 1977).

146 332 A.2d at 117. Per-pupil expenditures by school districts ranged from $857 to $2,059 in the 1975-76 school year. CONN. PUBLIC EXPENDITURES COUNCIL, LOCAL PUBLIC SCHOOL EXPENSES AND STATE AID IN CONNECTICUT 3 (Feb. 1977).

147 332 A.2d at 118-19. The court reasoned as follows:

> Under the present statutory system, the legislature ignores the disparities in the tax base of the municipalities and thereby ensures disparities in public school education. The constitutional duty to educate the children of the state is a constitutional duty of the state; it is not the constitutional duty of the municipalities. If the state delegates that duty to the municipalities, the legislation that delegates that duty must, under article eight, § 1, be "appropriate." The disparities in educational opportunity that are inherent in the present duty-delegating legislation make that legislation not "appropriate" legislation for discharging the state's constitutional duty, and that legislation therefore violates article eight, § 1, of the Connecticut constitution.

332 A.2d at 118.

The court recognized that art. 8, § 1, of the Connecticut constitution does not provide in so many words that education is a fundamental right, but it saw such a right as correlative to and deriving from the General Assembly's duty to provide free public education. 332 A.2d at 118. Since a fundamental right was involved, the court applied a strict scrutiny test and held that the Connecticut system violated article first, § 20, the equal protection provision of the Connecticut constitution. 332 A.2d at 120.

> that in Connecticut, elementary and secondary education is a fundamental right, that pupils in the public schools are entitled to the equal enjoyment of that right, and that the state system of financing public elementary and secondary education as it presently exists and operates cannot pass the test of strict judicial scrutiny as to its constitutionality. . . . [148]

The court remanded the case to the superior court for "proceedings not inconsistent with this opinion,"[149] but did not further specify what remedies the superior court should devise.

Although the decision dealt with the financing of conventional school districts, its language of equal educational opportunity reflects an educational goal that can include school-age inmates of all institutions. The school district model, because of the equality of treatment inherent in its structure, is uniquely designed to meet that goal.

Poor educational conditions in the Connecticut correctional institutions prompted adoption of the school district model. In 1969, the Connecticut correction department's education effort consisted of scattered and largely autonomous education programs in separate penal institutions, with each institution contracting for teachers and none sharing services.[150] The educational problems were staggering. In an inmate population of 1750,[151] the average prisoner had only a sixth grade education and ninety-four percent of the prisoners had no marketable skills.[152] There was only one teacher for every eighty students.[153] Teacher salaries were noncompetitive; an average starting salary for an auto mechanics teacher at a prison school, for example, was $6400, but was $7900 at a state technical school.[154]

148 Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977).

149 *Id.* at 376.

150 Conn. H.B. 6446, Statement of Purpose, at 4 (Jan. Sess. 1969) [hereinafter cited as H.B. 6446 Purpose].

151 *Id.* at 4.

152 *Hearings on H.B. 6446 before the Joint Comm. on Correction, Conn. Gen. Assembly,* Jan. Sess., stenographer's notes at 14 (Feb. 13, 1969) [hereinafter cited as *Hearings on H.B. 6446*]. Commissioner of Correction MacDougall testified that many inmates were retarded, *id.* at 81, and that "the average man in our institution is there for house breaking and he is illiterate." *Id.* at 19.

153 H.B. 6446 Purpose, *supra* note 150, at 4.

154 *Hearings on H.B. 6446, supra* note 152, at 21.

The Commissioner of Correction alerted the Connecticut General Assembly to these conditions, and the legislature held hearings on the department's proposal to establish a Correction school district. Director of Education W. DeHomer Waller argued in these hearings that: (a) because inmates were not in a school district, they were denied both federal and state funds for education; (b) rehabilitation was fashionable, but unfunded, and given low priority in the allocation of resources; (c) the population in penal institutions was a captive audience made up of disadvantaged persons who could benefit from the innovative programs developed during the nineteen sixties; (d) self-fulfilling prophesies of deviancy could be broken with new motivation and vocational training; (e) reorganization of correctional education was needed to alter staff attitudes and inflexibility and to find a new accomodation between the frequently conflicting goals of custodianship and rehabilitation.[155] In order to meet these needs, the Joint Committee on Correction reported favorably, and the General Assembly adopted, substitute House Bill 6446,[156] which permitted the commissioner of correction to establish a school district within his department. The only recorded opposition was expressed by a legislator who viewed prisoners as rebels against society: "I can see providing [them] with an education, up to a point, but I don't think they have the same rights as individual citizens who have conformed to society."[157]

House Bill 6446 specifies a correction school district which contains few of the elements of the ideal correction district. The next section describes the Connecticut version of the school district model and analyzes its performance.

155 *Id.* at 11-17. Commissioner Waller's colorful testimony included as an example of misplaced priorities the statutory requirement that a district board of education provide an adult instructor if 15 persons requested instruction in bridge, whereas a request by prisoners for a course in basic reading skills would, by statute, be denied. *Id.* at 12-13. In fact, the statute does not deny such a prisoners' request; the statute simply omits a procedure for dealing with it, CONN. GEN. STAT. § 10-69 (1977).

156 Conn. Pub. Act No. 636 (Jan. Sess. 1969), codified in CONN. GEN. STAT. §§ 18-99a, -99b (1977).

157 *Hearings on H.B. 6446, supra* note 152, at 18. The legislator made the same point on the floor of the House of Representatives. 13 CONN. GEN. ASSEMBLY HOUSE PROCEEDINGS, pt. 11, 4893 (1969).

A. *Elements of the School District Legislation*

The Correction school district legislation empowers the commissioner of correction to establish and maintain a school district in order to educate or assist any youth or adult "sentenced or transferred" to any institution of the department, until that youth or adult is released from its control.[158] The data on the size of the correction population that is eligible for education is imprecise, but of an average prison population of 3300, about sixty percent have been sentenced or transferred to the correction department and are under the jurisdiction of the school district.[159] The school district shares jurisdiction over inmates with the wardens and superintendents of the individual institutions, and it must negotiate with a warden or superintendent to gain any control over physical plant.

The commissioner of correction is responsible for supervision, administration, and coordination of education services and activities, which include such "vocational and academic education, research and statistics, training and development programs" as he considers necessary or advisable.[160]

Although the correction school district has many of the attributes of town or regional school districts in Connecticut, there are important distinctions. There is no statutory provision for a board of education or for employment of a superintendent of schools.[161] No budgeting procedure or

158 CONN. GEN. STAT. § 18-99a(a) (1977). Parolees are expressly included.

159 Interview with Edmund J. Gubbins, Director of Education, Department of Correction, Hartford, Connecticut, June 21 and 23, 1976 [hereinafter cited as 1976 Gubbins Interview]. In June, 1976, the number of inmates actually enrolled averaged 850 in the Adult Basic Education and secondary education programs. Another 300 were enrolled in the college program. *Id.*

160 CONN. GEN. STAT. § 18-99a(b). The Commissioner may, in consultation with the Council of Correction: (1) establish schools of different grades; (2) establish school libraries; (3) purchase, hold, and convey personal property for school purposes; (4) make agreements and regulations to conduct such schools and employ or dismiss teachers; and (5) receive federal, state, and private funds for rehabilitative, educational, or vocational programs. *Id.* § 18-99b(a) (1)-(5).

The Council of Correction is an appointed body of seven members, including at least one psychiatrist. Its task is to "recommend to the governor and the general assembly such legislation as will in its judgment provide effective and humane correctional and rehabilitative custody and treatment of offenders." *Id.* § 18-79.

161 Despite the absence of reference to these officials, the employment and dismissal of teachers is governed by the statute which applies to other school

discrete tax base is provided, but the statute implies that the commissioner may include the school district in the departmental budget funded by the state treasury.[162]

Statutory omissions rather than inclusions may explain why the General Assembly passed the bill. Certainly, the potential expense to the state was not as apparent as the possibility of tapping federal funds.[163] The gaps in the statutory framework, however, required both the commissioner of correction and the commissioner of education to make major administrative decisions on the following issues: whether the school district could be adapted to existing grant programs and whether its lack of a local tax base could be compensated, whether education policy should be set by a school board, whether the district should be administered by a certified superintendent of schools, and whether laws governing town and regional school districts or laws governing state bureaus applied to the new district, particularly with reference to professional personnel. The succeeding sections will discuss the choices the administrators made and their implications for the operation of the correction school district in Connecticut.

B. *Funding Education in the Correction School District*

The Correction school district in Connecticut has proved capable of diverting increasing amounts of outside funds into prison education. In the six fiscal years from 1972 to 1977, state and federal funds independent of those in the Department of Correction budget have more than quadrupled, from

districts and which requires action by a board and a superintendent. *Id.* § 10-151 (1977) (incorporated by reference into the correction school district legislation in § 18-99(b)(a)(4)).

162 The school district is to be established "within the state department of correction," *id.* § 18-99a(a), and exercise of the commissioner's various powers demands the spending of department money. *Id.* § 18-99(a)(1)-(5) (summarized in note 160 *supra*).

163 1976 Gubbins Interview, *supra* note 159. Mr. Gubbins indicated that he has repeatedly advised correctional officers in Massachusetts to propose a simple bill. Several times the Massachusetts General Court has refused to enact more elaborate proposals, such as the twelve-page House Bill No. 6513 favorably reported by the Committee on Education on May 1, 1973.

$392,000 to $1,586,900.[164] While the inmate population eligible for education services appears to have increased only moderately in that period,[165] the number of participating inmates increased from 120 in 1970 to 1350 in 1976.[166]

1. Federal Funds

The most persuasive argument made to the General Assembly on behalf of the proposed correction school district was that it would funnel federal funds to Connecticut, provide better educational and rehabilitative services to inmates, and decrease operating costs of the Department of Correction.[167] The new legal status of the prison schools has indeed proved successful in drawing federal grant monies into the Department. The Correction school district received approximately $997,000 of federal funds in fiscal year 1976, while state and local sources contributed only $832,000.[168] The primary federal sources have been titles I, II, and III of

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164 *See* Appendix B *infra.*

165 Approximately 1900 inmates were eligible for such services in June, 1976. 1976 Gubbins Interview, *supra* note 159. The Statement of Purpose of the original special school district bill indicated that the population for educational purposes in 1969 was 1750. H.B. 6446 Purpose, *supra* note 150, at 4.

166 1976 Gubbins Interview, *supra* note 159. These figures represent approximately 7 percent and 71 percent, respectively, of the eligible prison population. Such percentages can only be rough approximations, however, because all the figures are estimates of a constantly changing population.

167 13 CONN. GEN. ASSEMBLY HOUSE PROCEEDINGS, pt. 11, 4894 (1969) (remarks by Rep. Prete of the 114th district). Rep. Prete argued in support of the bill that inmates generally had a poor education in common, and that:

> This is a good bill. It costs the State of Connecticut nothing. All it does is make the system within the Department of Correction eligible for Federal funds. The funds are available. They will go to other states. If we are not eligible, they will not come to the State of Connecticut. It is as simple as that.

13 CONN. GEN. ASSEMBLY HOUSE PROCEEDINGS, pt. 11, 4897 (1969). Another supporter called it "a dollar and cents measure, with a 99% return...." *Id.* at 4898. The House of Representatives agreed, *id.*, and the Senate passed the bill after Senator Barlow made the crucial point:

> this act simply makes a provision for a school district within the correctional system. Under the existing statute, no school system could be set up and the Department of Correction could not receive state or federal funds because they are not considered a district for educational purposes.

13 CONN. GEN. ASSEMBLY SENATE PROCEEDINGS, pt. 7, 3346 (1969).

168 *Conn. Dept. of Correction, The Free Venture Model in Connecticut* 24 (approx. 1976) (proposal for implementing a new prison industry program within the Department of Correction).

the Elementary and Secondary Education Act of 1965,[169] and the Adult Basic Education program.[170]

2. State Grants

Equally significant but less obvious than access to more federal money is the access to important state educational grants distributed on the same terms to all Connecticut school districts. In the 1969 General Assembly some legislators overlooked the potential expense to the state which such access entailed, while others downplayed it.[171] The two largest state grant programs, Average Daily Membership[172] and Special Education,[173] provided a total of $406,500 for fiscal year 1977,[174] considerably more than the Correction Department contributed to education from its own budget.[175] Notwithstanding this drain on the state treasury, the one attempt to reduce the state budget by repealing the Correction school district's entitlement to educational grants failed.[176]

School district status alone may not automatically capture state grant monies. For example, the formula for state special education grants[177] provides reimbursement for a portion of the additional cost of educating pupils who require special education.[178] The formula assumes that a readily ascertained

169 20 U.S.C. §§ 236-244 (aid to disadvantaged children); §§ 821-827 (library resources); §§ 841-848 (supplementary educational centers and services) (1970 & Supp. V 1975).

170 20 U.S.C. §§ 1201-1211b (1970 & Supp. V 1975). Appendix B *infra* contains a detailed breakdown of funding sources over the seven years of the district's operation.

171 *See* note 161 *supra.*

172 CONN. GEN. STAT. § 10-262 (1977).

173 *Id.* § 10-76g.

174 *See* Appendix B *infra.*

175 The Department's contribution was roughly $300,000. *See* note 186 *infra.*

176 Memorandum by Edmund Gubbins re "Proposed Bill No. 8166, An Act Concerning Elimination of the ADM Grants to the Department of Correction" (circulated in the 1975 session of the Connecticut General Assembly) [hereinafter cited as Gubbins Memorandum]. The Governor's office, on advice from the Commission on Finance and Control, sought to reduce the state budget through such a repeal, but the General Assembly buried the bill in the 1975 session. Telephone interview with Edmund J. Gubbins, July 6, 1976 [hereinafter cited as 1976 Gubbins Tel. Interview].

177 CONN. GEN. STAT. § 10-76g (1977).

178 *Id.* § 10-76a(e). Children requiring special education are defined to include children who are "mentally retarded, physically handicapped, socially and emotionally maladjusted, neurologically impaired, . . ."

differential exists between the cost of providing special educational services and normal educational services. But in the Correction school district, the exceptional students are in effect the norm.[179]

Despite this technicality, the superintendent of the correction schools was able to devise a classification scheme which satisfied the Department of Education with regard to the special education formula and made the Correction school district eligible for special education grants totalling more than $575,900 since 1972.[180] This successful outcome illustrates how school district status engenders beneficial cooperation between state agencies. The combination of status as a school district and reliance on a superintendent of schools who is fully certified to handle such educational and administrative tasks facilitates reasonable administrative resolution of complicated problems of educational funding.

The Correction school district has also encountered the typical problem created by federal and state reimbursement grants: the district must fund and provide the program before receiving grant funds. To date, the Correction district has been forced to meet this problem by constantly borrowing funds from other accounts in the budget of the Department of Correction.[181] This is not an effective solution because the ability to provide such programs is dependent upon the power to negotiate loans. The correction superintendent of schools, Edmund Gubbins, asked a state senator in October, 1977, to introduce legislation which provides for the establishment of a revolving fund for the district,[182] a

179 Interview with Dr. Raymond Vitelli, Special Education, Correction School District, Hartford, Conn. (June 23, 1976) [hereinafter cited as Vitelli Interview]. Dr. Vitelli indicated that 97 percent of the inmates came from urban centers and that the average reading level for young men sentenced to the Cheshire correctional institution was third grade.

180 Appendix B *infra.*

181 Gubbins Memorandum, *supra* note 176.

182 Letter from Edmund J. Gubbins to the Hon. Joseph I. Lieberman, Connecticut State Senator (October 5, 1977) (on file at the Harvard Journal on Legislation). Superintendent Gubbins also requested in the letter that the Average Daily Membership grants, CONN. GEN. STAT. § 10-262 (1977), and Special Education grants, *id.* § 10-176g, be appropriated directly to the Department of Correction instead of an appropriation distributed to school districts by the Department of Education. Such action is inadvisable, as it would seriously undermine the basic

solution which guarantees availability of reimbursement grant seed money up to the size of the fund. A 1974 revolving fund proposal passed the General Assembly but was vetoed by Governor Thomas Meskill.[183] Gubbins had argued to the General Assembly that the proposal would "considerably reduce the quantity of transactions and relieve the Department of Correction of unnecessary financial burden," and would "reduce the overall budget by approximately one hundred thousand dollars."[184]

C. *Local Support*

The major distinction between conventional town or regional school districts in Connecticut and the Correction school district is that the latter lacks a local property tax base. In Connecticut, the property tax is by far the most significant source of support for local school districts. It provided $610,848,824, or 69.7 percent, of their funding in fiscal year 1976.[185]

The Correction Department budget provides some funds

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premise of the school district model by distinguishing the Correction school district from other school districts. It would also cripple the quality control exercised by the Department of Education which can withhold grant funds until state standards are met.

183 The Connecticut Commission on Finance and Control urged the veto. The Commission objected to the revolving fund because fiscal control over the initiation of correction programs would be beyond its direct control. The General Assembly had the votes to override the veto, but after the Commission on Finance and Control warned the Department of Correction that it would "never see the money," Superintendent Gubbins asked the legislators not to act. Though angered by this development in an ongoing struggle over administrative expenditures, the legislators dropped the matter. Interview with State Senator Barbara D. Reimers, clerk of the Joint Education Committee of the General Assembly in the 1974 session, Oct. 6, 1977; interview with former State Senator Ruth O. Truex, Chairman of the Senate Committee on Education in the 1974 session, Oct. 11, 1977; interview with Correction Commissioner John R. Manson and Superintendent of Schools Edmund J. Gubbins, Oct. 13, 1977.

184 Gubbins Memorandum, *supra* note 176.

185 For the 1975-76 school year, local, state, and federal sources contributed the following amounts to Connecticut school districts:

Local Funds	$610,848,824	69.7%
State Funds	$215,442,196	25.5%
Federal Funds	$50,703,858	5.8%

CONN. PUB. EXPENDITURES COUNCIL, *supra* note 146, at 3-4. The above amounts are the expenditures for net current expenses which "is defined in Section 10-261 of the Connecticut General Statutes as 'the current expenses of the public schools, less the expenses for pupil transportation and the amount of tuition received on account of non-resident pupils . . . .'" *Id.*

for the Correction school district, and this funding is referred to as the district's "local support" because it is analogous to the local school districts' property tax revenues. The department budget, however, provides no more than $300,000 to the district annually.[186] This amount represents only $160 per eligible student per year, or $222 per student actually served. When these amounts are contrasted to the $1372 average annual per pupil expenditure of property tax dollars in conventional school districts during the 1975-76 school year,[187] it becomes clear how large a gap between correction education and conventional education still remains.

Whether the Connecticut General Assembly will devise a formula that guarantees roughly equal funding for the Correction school district cannot yet be determined. The Correction Department's yearly contributions to the school district have been low, but stable. The Connecticut Supreme Court's recent decision in *Horton v. Meskill*[188] declaring that funding inequalities among local school districts violate the state constitution, may have significance for the Correction district as well. If the principle of equalized funding among school districts can be extended to the Correction district, *Horton's* judicial mandate could fill the funding gap.

4. The Use of Funds

The flow of these federal, state, and "local" department funds to the Correction school district has produced a multiplicity of programs that attempt to respond to variations in age and educational needs among its student population. Adult Basic Education programs throughout the district concentrate on fundamental skills, including English as a second language, that are taught in grades one through eight.[189] All institutions have a high school program that prepares students for the GED high school equivalency ex-

186 1976 Gubbins Interview, *supra* note 159. Mr. Gubbins indicated that $300,000 was a generous estimate of the amount in the departmental budget set aside for "education," including chaplains and recreation directors.

187 CONN. PUB. EXPENDITURES COUNCIL, *supra* note 146, at 3.

188 31 Conn. Supp. 377, 332 A.2d 113 (Super. Ct. 1974), *aff'd*, 376 A.2d 359 (Conn. 1977). *See* note 147 and text accompanying notes 145-149 *supra*.

189 Conn. Dep't of Correction, A New Concept in Education and Training (undated); Director of Education, Report to the Educational Advisory Committee (Feb. 8, 1973).

amination.[190] The pass rate on that examination is impressive; the rate at the Cheshire Correctional Institution reached sixty percent.[191] These programs have also promoted more natural learning environments. Secondary education at Niantic State Prison, for example, is coeducational.[192]

Post-secondary education includes vocational and academic programs, some within Connecticut penal institutions and others outside them. These programs are provided through agreements with community colleges, state technical colleges, and private liberal arts colleges such as Quinnipiac.[193] At Niantic, coeducational courses offered by the Mohegan Community College are attended by both inmates and staff members.[194] Offering scholarship aid and an opportunity to participate in educational opportunities to staff members has minimized any resentment of the program which they might reflect while performing their roles.[195] The Correction Department also cooperated in converting the bachelor officers' quarters and the institutional superintendent's home into educational release facilities for young men sentenced to the Cheshire Correctional Institution.[196]

A pilot program in guidance and extensive testing at Cheshire screens students for vocational aptitudes to make individualized vocational training more effective, and the merger of the State Prison Industries with the Correction school district assured coordination of educational and vocational programs for a time.[197] Painters and poets visit the institutions, where they pursue their art and instruct the in-

190 *Id.*

191 Vitelli Interview, *supra* note 179.

192 Conn. Dep't of Correction, *supra* note 189.

193 *Id.*

194 Director of Education, Report to the Educational Advisory Committee 3 (Feb. 8, 1973).

195 1976 Gubbins Tel. Interview, *supra* note 176.

196 *See* Conn. Dept. of Correction, A New Concept in Education and Training (undated); Director of Education, Report to the Educational Advisory Committee (Feb. 8, 1973).

197 Address of Mr. Gubbins to the Correctional Education Association, American Correctional Conference, at a national convention in Louisville, Ky. (Aug. 5, 1974); Report of the Superintendent of Schools to the Educational Advisory Committee (Dec. 3, 1973). The vocational training opportunities are numerous. They include auto body repair, automobile mechanics, machinery, carpentry, furniture making and reupholstering, health care, key punch operation, typing and stenography, training chefs, home economics, small engine and radio-TV repair, welding, bricklay-

mates.[198] Further, inmate students help each other learn to read through the methods designed by Literacy Volunteers, a national organization.[199]

Although the range of programs is impressive, the relatively small size of the school district, the distance between institutions, the immobility of prisoners, and the experimental nature of many of the projects and their funding still limit efforts to give all inmates an equal opportunity for choice of programs.

B. *A Surrogate Board of Education*

The original version of the Correction school district enabling legislation[200] proposed creation of a separate educational bureaucracy in the Department of Correction, headed by a Board of Education and Services with powers analogous to those of the state and local boards of education. Members of the Board would have included the governor and the chief justice of the supreme court or their designees, and the Board would have appointed and supervised a director of education.[201] The substitute bill which was adopted, however, does not mention a board of education.[202] By leaving the Commissioner of Correction unencumbered by board supervision, the bill evaded the issue of potential intra-departmental conflicts and other legal complications.[203] The legislation places the Council of Correction in the formal role of an advisory board, but that Council is concerned about non-educational goals.[204]

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ing, typewriter repair, dental labwork, lens grinding and related work, data process-

198 Director of Education, Report to the Educational Advisory Committee 4 (Feb. 8, 1973). The program is supported by grants from the Connecticut Commission of the Arts. *Id. See* Appendix B *infra.*

199 In 1973, the Connecticut Correction school district became the first correctional affiliate of Literacy Volunteers, Inc., in the nation. The program "provides one-to-one tutoring to help functional illiterates learn to read and write. LVI trains tutors in its basic reading workshop and then matches students with tutors." Conn. Dept. of Correction, A New Concept in Education and Training 3 (undated).

200 Conn. Gen. Assembly House Bill 6446 (Jan. Sess. 1969).

201 *Id.*

202 CONN. GEN. STAT. §§ 18-99a, -99b (1975). It appears that the elimination of the board of education was a change supported by the commissioner of correction. *See* Hearings on H.B. 6446, *supra* note 154, at 18, 20.

203 *See* text accompanying notes 108-114 *supra.*

204 *See* note 160 *supra.*

To fill the need for nondepartmental support and advice, the Director of Education later attempted administratively to create a surrogate board of education. With the approval of the Correction Commissioner, Director of Education Edmund Gubbins organized an Educational Advisory Committee, whose members were two inmates and representatives of other departments or institutions which were important to the development of the Correction school district.[205]

The Advisory Committee was instrumental in bringing a team from the State Department of Education to assess existing education programs and to suggest educational priorities. The Committee, however, had no power to intervene in the decisions of the Commissioner of Correction or of his agent, the Director of Education. Its failure to meet during the 1975-76 school year[206] illustrates the problem that a board with no real power or statutory mandate loses energy over time.

The Commissioner of Correction thus holds sole responsibility for the policies of the school district by default. Such a structure, where one person has conflicting duties of prison security and education, invites weak advocacy for education. It also creates the potential for misuse of educational funds and equipment to satisfy needs in other areas of greater concern to the commissioner. An illustration of this possibility occurred when vocational shops, originally built and equipped for the vocational program administered by the Correction school district, were appropriated for use by the Prison Industries Program, which is not subject to supervision by the school district's superintendent or by the State Department of Education.[207]

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205 The author, as Executive Director of the Connecticut Association of Boards of Education, served on the Advisory Committee from its inception in 1971 until December, 1973. During that period the membership also included the Chancellor of Higher Education, the House and Senate Chairmen of the Joint Committee on Education of the General Assembly, a vice president of WTIC-TV and Radio, and representatives from the Connecticut Business and Industry Association, Connecticut Bankers Association, Connecticut Labor Council, the Department of Education, and the Department of Labor.

206 1976 Gubbins Interview, *supra* note 159.

207 Interview with Edmund J. Gubbins, Hartford, Conn., March 9, 1977 [hereinafter cited as 1977 Gubbins Interview].

The Connecticut experience indicates that the legislature should establish within a bureau school district a board of education with traditional powers over education policy, in order to reduce the possibility that education will be subordinated to other functions and interests within the bureau. The possible administrative difficulties in operating this additional level of authority within a correction department should not obscure the benefits of consistent advocacy of education.

C. *The Correction School Superintendent*

The Correction school district enabling legislation empowered the Commissioner of Correction to perform both the policy-making function of a board of education and the administrative function of a superintendent of schools.[208] In contrast, Connecticut town and regional school districts are required to elect boards of education,[209] which are responsible for selecting a superintendent of schools.[210] Certification by the State Board of Education is a prerequisite for the position of superintendent.[211]

The Commissioner of Correction chose not to retain complete power over the school district. Instead, he employed a fully certified and experienced superintendent of schools as "Director of Education."[212] His decision to delegate school district powers to a superintendent proved to be a wise one. The presence of a certified superintendent facilitated application for state and federal grants, as many of those grants require that a certified superintendent inform the State Board of Education that the conditions attached to the grants have been met in his district.[213] Moreover, the professional status

208 CONN. GEN. STAT. §§ 18-99a, -99b (1977).

209 *Id.* §§ 9-202 through 9-206a (town school districts), 10-45 (regional school districts).

210 *Id.* §§ 10-47, -157.

211 *Id.* §§ 10-145, -146.

212 1976 Gubbins Interview, *supra* note 159.

213 CONN. GEN. STAT. § 10-4 (1977) directs the state board of education to "provide leadership and otherwise promote the improvement of education in the state . . . ," and regulations issued under § 10-4 specify that the board shall "distribute state and federal funds for the promotion and improvement of education

of the correction director of education encouraged good relations with other school superintendents and boards of education.[214]

One example of the benefits received from such relations is the positive response to a letter from the state school boards association to town and regional boards of education. The letter urged them to issue diplomas to inmates certified by the correction superintendent to have met the Correction district's graduation requirements.[215] Another example of the superintendent's success in interdepartmental relations is his solution of technical difficulties barring access to special education grants, as discussed above.[216]

The correction superintendent has also had considerable success in intra-departmental bargaining. Despite the Correction school district's low priority in the department budget, it has had consistent access to department money during a period of recession and department cut backs by Governors Meskill and Grasso.[217] Moreover, the school district's access to outside money enhanced the superintendent's bargaining power, resulting in intra-departmental negotiations that were mutually beneficial. For example, the district provided a new

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in the several school districts . . . ." 1 REGULATIONS OF CONN. STATE AGENCIES § 10-4-1 (1973). The practice of the State Board in distributing funds to a local school district has been to require that the district's superintendent submit and verify fund request and compliance forms. Since that superintendent must be certified, CONN. GEN. STAT. § 10-145 (1977), the presence of a certified superintendent in the Correction district fit the district into the Board's fund distribution scheme. *See also* note 88 *supra.*

214 In Connecticut, this cooperation is encouraged through membership in the Connecticut Association for the Advancement of School Administration and the Connecticut Association of Boards of Education.

215 A letter from Ronald S. Gister, Executive Director, Connecticut Association of Boards of Education, (May 16, 1974), urged adoption of the following policy:

> When notified by a high school principal of this district that a student has completed his education within the Correctional School District of the State of Connecticut and has met all requirements for graduation as certified by the Superintendent of Schools of the Correctional School District, the Superintendent of the local district shall notify the board of education and have issued at the earliest date a diploma in the name of the successful student. Further, the Correctional School District scholastic record of the student shall be placed on his present record within the school.

216 *See* text accompanying notes 177-180 *supra.*

217 1976 Gubbins Interview *supra* note 159. During that year, the commissioner retracted an order to eliminate five teaching positions as part of a general cut back in state employment. *See* note 96 *supra.*

library to an institution in return for the provision of space for educational programs, and it built an auto body shop in return for an institution's cooperation in launching a vocational education program.[218] This power to bargain internally, however, depends to a large extent upon success in obtaining state and federal grants.

In June, 1973, the correction superintendent of schools achieved considerable control over inmate programs within the Department of Correction when the Commissioner placed the large inmate work program, State Prison Industries, under the school district's jurisdiction.[219] Initially employed as Director of Education, the correction superintendent for a time became the "Superintendent of Schools and Training,"[220] and coordinated all vocational and educational programming for inmates.[221]

In January, 1977, however, the Commissioner again separated the work program from the school district.[222] Although supported by a consultant's report,[223] the decision may represent a shift in the balance of power within the department, or more interestingly, a manifestation of the inherent conflict between the functions of education and incarceration. While the Prison Industries Program was educationally oriented when under the school district superintendent's control,[224] the new separate program seems to reflect

218 1976 Gubbins Interview, *supra* note 159.

219 Conn. Dep't of Correction, A New Concept in Education and Training, back cover (undated). This twelve-page, illustrated pamphlet reviews departmental programs. In the meeting of the Correctional Evaluation Committee on Aug. 2, 1971, Francis E. Woods, who was evaluating the vocational education programs, named the State Prison Industries as one of "the problems we have encountered in operating MDTA [Manpower Development Training Act] vocational training programs in Correctional Institutions . . . ." Correctional Evaluation Committee, Minutes of Meeting, August 2, 1971, at 2.

220 Connecticut Dep't of Correction, A New Concept in Education and Training, inside front cover (no date).

221 1976 Gubbins Interview, *supra* note 159.

222 1977 Gubbins Interview, *supra* note 207.

223 CONN. DEP'T OF CORRECTION, THE FREE VENTURE MODEL IN CONNECTICUT (approx. 1976).

224 When reporting to the Correctional Education Advisory Committee concerning the merger of correctional industries with the school district, Director of Education Gubbins noted a conversation with an inmate "who told him that in the course of his incarceration he had made 2,100 arms for chairs." He observed that ". . . such a situation would soon change and that all indications show that the staff is very

an emphasis on the custodial and entrepreneurial interest of correction institutions.[225]

The superintendent, as the appointee of the commissioner of correction who is an appointee of the governor, can be caught in the middle of political power plays between the legislature and the governor.[226] Advocacy of the correction school district would be more likely to persist if the superintendent were the appointee of a correction board of education, provided that the board membership did not include representatives of the governor, the commissioner, or professional employees of the department of correction.

This Connecticut experience with the superintendent reveals that his presence in a correction department has educational advantages that outweigh inevitable administrative conflicts. As a professional educator, the superintendent in the department of correction is trained to supervise the correction school district in a manner consistent with the goals of the state board of education and the department of education. The professional status of the

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willing to cooperate . . . ." Correctional Education Advisory Committee, Minutes of Meeting, December 3, 1973.

The tenor of the pamphlet which described the operation of Prison Industries under the jurisdiction of the school district, Connecticut Department of Correction, A New Concept in Education and Training, (undated), conveys the new educational philosophy. Not until the back cover does the text refer to "inmates," and then it refers to "inmate/students." Otherwise the nouns used are "man," "woman," and "student." To the extent that labels affect self-image and potential success, this small step was an important one. *Cf.* Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification,* 121 U. PA. L. REV. 705 (1973).

225 The proposal for the new Prison Industries program outside the school district, FREE VENTURE MODEL, *supra* note 223, states that it seeks "to emulate the world of work as closely as is possible within the prison setting," *id.* at 46, but its view of the world of work is open to question. The proposal establishes complete daily schedules for working inmates, a four-tiered job hierarchy, detailed hiring, firing, and advancement practices, and complicated wage and profit-sharing compensation schedules. It notes that:

> Some realities of the correctional environment will necessarily impinge upon the schedule, regardless of location. Parole and Pardon Board hearings, Sentence Review Commission hearings, and visits from lawyers will necessitate that inmates miss some work periods. However, the Department is pledged to keep these interruptions to the necessary minimum, knowing that allowing unnecessary interruptions would be the first step in destroying the viability of the project.

Id. at 50-51.

226 Interviews cited in note 183 *supra.*

superintendent also helps him negotiate with other officials of the department of correction for promotion of educational priorities. The same status carries weight with the legislature, which respects the advice and testimony of such professionals.

D. *Employment of Professional Personnel*

Under its statutory authority to "employ and dismiss, in accordance with the applicable provisions of section 10-151, such teachers as are necessary . . .,"[227] the Correction school district has hired more than eighty teachers.[228] Because separate sets of statutes govern state employee relations and local school district employee relations, the creation of a school district within the state correction department raised complicated questions about which set of statutes should regulate the rights and qualifications of those teachers.

The Connecticut enabling legislation, through its incorporation of section 10-151, indicates that teacher dismissal and tenure requirements in the Correction school district are the same as those in local districts.[229] Its omission of all other potentially disputable issues probably aided its progress through the Assembly.[230] This section of the article will illustrate that the legislature's omission did not disturb the practical operation of the district. State law on personnel issues is varied and often complicated. But to the extent that the Connecticut experience can be generalized, legislators can assume that a simple bill that is likely to pass easily will not necessarily result in serious problems of implementation.

The key personnel issues revealed by use of the school district model are imbedded in the processes of certification, hiring and firing, collective bargaining, and retirement of professional employees. Absent legislative resolution, administrators will find guidance in the implications of school district status, other statutes and regulations, or past practice.

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227 CONN. GEN. STAT. § 18-99b(a)(4) (1977).
228 1976 Gubbins Interview, *supra* note 159.
229 CONN. GEN. STAT. § 10-151 sets those requirements for local districts.
230 *See* text at notes 134-139 *supra.*

1. Certification

Though the enabling act is silent about whether correction teachers must be certified, the State Department of Education in fact requires all such professional personnel to hold appropriate certification.[231] The change to school district status can create personnel dislocation if the department of correction has not previously required state certification of its teachers. In Connecticut the State Department of Education is tightening enforcement of certification in all schools, but is cooperating with the correction superintendent to reach the statutory goal of full certification with as little employee hardship as possible. The State Board of Education granted the superintendent's request for approval of an experimental school project pursuant to another statute permitting waiver of normal certification standards for limited programs of innovation.[232] The project permits noncertified teachers to continue employment while working toward certification in a planned program financed by a grant.[233]

2. Employment

The Connecticut General Assembly specified that the correction school district shall use the same teacher employment and dismissal procedures as are used by local school districts.[234] In practice, the correction superintendent also relies on statutory exemption of professional employees from the state civil service system[235] to maintain flexibility in choosing personnel.[236] Two methods for obtaining teaching services are used by Connecticut school districts: the "Agreement for Personal Services" with an independent contractor,

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231 W. Sanders, Commissioner of Education, Circular Letter No. C-9, Series 1970-71, effective Sept. 1, 1971. *See* CONN. GEN. STAT. §§ 10-145, -146 (1977) (governing certification of teachers).

232 CONN. GEN. STAT. § 18-76i (1977).

233 Interview with Edmund J. Gubbins, Oct. 11, 1977.

234 *See* CONN. GEN. STAT. § 18-99a (1977), which incorporates by reference § 10-151 (employment procedures).

235 CONN. GEN. STAT. § 5-198(1) (1977).

236 Interview with Edmund J. Gubbins, February 10, 1976 [hereinafter cited as February, 1976, Gubbins Interview].

and the employment contract. None of the statutes governing school districts regulates agreements with independent contractors, but the predominant method of staffing federally funded programs is to use such agreements.[237] Outside contractors are not "employees" of the district. Thus the local school district employment procedures legislatively applied to the correction school district[238] do not emcompass this relationship. Significantly, the federal grant opportunism discussed earlier[239] could take its toll in human terms in this unlegislated territory, in that these contractors are ineligible for tenure, collective bargaining rights, or retirement benefits. However, their remuneration reportedly compensates for any monetary discrepancy in fringe benefits.[240]

The rest of the professional staff is employed in accordance with the local school district statutory procedures, except that since there is no board of education, administrators have interpreted the statute by substituting "Commissioner of Correction" whenever the statute grants a power to or imposes an obligation on the board of education.

The Connecticut enabling act is silent as to how Correction district teacher salaries are to be set, but it does indicate use of local school district employment procedures generally.[241] Nevertheless, in classifying teachers and setting salaries, the director of education simply relied on practices of the meager correction education program that preceded the Correction school district, on the unspoken assumption that school district personnel were still state employees.[242] He continues to key classification and salary scales to other state-operated vocational and technical schools:[243] for example, district teachers received 120 percent of the salary paid to other state school instructors for ten months' work, because Correction

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237 *Id.*

238 *See* CONN. GEN. STAT. § 18-99a (1977), which incorporates by reference § 10-151 (employment procedures).

239 *See* text accompanying notes 101-103 *supra.*

240 February, 1976, Gubbins Interview, *supra* note 236.

241 *See* text accompanying note 234 *supra.*

242 February, 1976, Gubbins Interview, *supra* note 236.

243 June, 1976, Gubbins Interview, *supra* note 159.

schools operate year-round.[244] The state director of personnel continued to exercise his power to approve salary increases[245] despite the school district status of Correction schools.[246] In this instance, it appears that only express statutory language can change the momentum and direction of past practice.

3. Collective Negotiations

At the time the Correction school district was created, local school district employees had the statutory right to bargain;[247] state employees did not. The enabling legislation was silent as to whether Correction district teachers could claim a right to organize and negotiate pursuant to local school district law. They apparently acquiesced in the assumption that past practice and status still governed, because they never raised the issue during the period when their rights under the new status were open to question. The new state employee bargaining act[248] now permits them to organize and negotiate only as state employees.

4. Retirement

The statutory ambiguity in the status of Correction district teachers has not created problems in the area of retirement benefits because Connecticut statutes facilitate portability of benefits and mobility between plans.

Employees of the Correction school district who perform the functions of "teacher, principal, supervisor, or superintendent"[249] are eligible for membership in two retirement funds:[250] the State Employees' Retirement Act[251] or the Teachers' Retirement Association.[252] Membership can be

244 February, 1976, Gubbins Interview, *supra* note 236.

245 This power now resides in the position of commissioner of personnel and administration, described in CONN. GEN. STAT. § 5-199 (1977).

246 June, 1976, Gubbins Interview, *supra* note 159.

247 CONN. GEN. STAT. §§ 10-153a to -153g (1977).

248 CONN. GEN. STAT. §§ 5-270 to -280 (1977).

249 CONN. GEN. STAT. § 10-160 (definition of "teacher" for purposes of the Teachers' Retirement Association) (1977).

250 *Id.* § 5-160(g).

251 *Id.* §§ 5-152 to -192b.

252 *Id.* §§ 10-160 to -183.

transferred from one to the other, though membership in both at the same time is prohibited.[253] Employees of the district who serve in other capacities are eligible only for the first fund.[254] Contractors performing service for the school district under an Agreement for Personal Services are not eligible for either fund.[255]

Legislators in other states should be aware that given different laws on retirement, the status of bureau school district employees could be crucial in determining the vesting of benefits. The issue is too important to individual employees to leave the choice to chance interpretation by administrators or courts.

E. *Other Applications of the School District Model*

1. The Department of Children and Youth Services

The success of the Connecticut Correction district in obtaining state and federal education funds prompted interest in other state bureaus. There was growing support in the Department of Mental Health and Welfare for the idea of a school district to serve institutionalized children, at the time when the General Assembly transferred many of the services of those departments to the Department of Children and Youth Services (DCYS) in 1975.[256] DCYS in effect inherited the school district idea when the General Assembly enacted a companion bill mandating a DCYS school district.[257] The legislation is similar to that for the Department of Correction except that it adds an express provision for a superintendent.[258] Ironically, whereas the Commissioner of

253 *Id.* § 10-175.

254 *Id.* § 5-154(1) (definition of "state employee"); §§ 5-152 to -192b (State Employees' Retirement Act).

255 Telephone interview with Edmund J. Gubbins, July 6, 1976.

256 CONN. GEN. STAT. §§ 17-410 to -439 (1977). The transfer to DCYS of those services which the departments of Welfare and Mental Health provided to children under the age of eighteen was recommended by a commission established by the General Assembly in Conn. Special Act No. 74-52 (1974); *see,* Commission to Study the Consolidation of Children's Services, A Plan to Transfer Psychiatric and Related Services for Children to DCYS (1975).

257 CONN. GEN. STAT. § 17-441 (1977).

258 *Compare id.* §§ 18-99a, -99b (Department of Correction) *with id.* § 17-441 (DCYS).

Correction voluntarily established a superintendency and employed a certified superintendent to implement his new power to create a school district,[259] the Commissioner of DCYS operated the school district without a certified superintendent for most of the two years after enactment of DCYS legislation. Only recently has he appointed his first superintendent of schools.[260]

Although the State Department of Education provided a planning grant to DCYS to assess the needs and suggest strategy for development of the DCYS district, the Commissioner relied primarily upon consultants outside the Department of Education.[261] Despite a voluminous report[262] and the help of a superintendent temporarily supplied by the Department of Education, progress in unification of DCYS institutions under the school district has been slow. As late as 1977, there was no central office headed by a superintendent of schools.[263] The heads of the various institutions disagreed whether the school district was subject to the laws governing education, because of the adjective "special" before the designation "school district" in the statute.[264] Opponents of the school district within the department of DCYS were claiming exemption from the certification laws with respect to the employment of teachers and a superintendent.[265] Each institution had a director of education who chose not to be part of the school district, and each DCYS institution independently applied for grants and handled payroll operations.[266]

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259 *See* text at note 212 *supra.*

260 Richard Olson, the assistant to the Correction superintendent, was appointed to the post in the summer of 1977. Interview with Edmund J. Gubbins, Director of Education, Department of Correction (Oct. 11, 1977).

261 Interview with Mark R. Shedd, Commissioner, State Department of Education, Hartford, Conn. June 23, 1976. *See also* Special School District Planning Committee, Recommendations for Implementing the Special School District Within the Department of Children and Youth Services iv (March 5, 1976) (prepared for DCYS) [hereinafter cited as Planning Report].

262 Planning Report, *supra* note 261.

263 Telephone interview with Theresa McKeon, former Acting Superintendent of Schools, DCYS, March 16, 1977.

264 *Id.*

265 *Id.*

266 *Id.*

The departmental difficulties of the DCYS,[267] within which the school district exists, in part explain the difficulties of the district. First, the organizational problems, inherent in the departmental merger of DCYS[268] retarded the development of the district. Second, the possibility of encouraging voluntary placement[269] with an attractive combination of education and treatment without ensuring concomitant increases in funding[270] dampens the Commissioner's enthusiasm for change.[271] Perhaps the chief lesson to be derived from the DCYS experience to date is that the successful development of a bureau school district is greatly dependent on the strength of the bureau and on the stresses existing within it at the time the school district model is adopted. It should be emphasized, however, that what was only enabling legislation for the Correction Department is a statutory mandate for DCYS. Enforcement of the mandate, combined with the lure of financial benefits that accrue from district status, may yet foster change in the educational services provided under the aegis of DCYS.

2. The Department of Mental Retardation

The Connecticut General Assembly also applied the bureau school district model to the state Department of Mental

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267 *See* Review Team of DCYS Advisory Council, Critical Review of Mandates and Resources (Feb. 1977) (on file at the Harvard Journal on Legislation).

268 *See id.* CONN. GEN. STAT. §§ 17-410 to -439 (1977), part of a general reorganization of the Connecticut mental health care system in 1975, assigns to DCYS the responsibility for children and youths formerly supervised by the Departments of Welfare and of Mental Health.

269 DCYS is empowered to accept voluntary admittees who are seeking treatment. CONN. GEN. STAT. §§ 17-412, 17-419 (1977).

270 The education of voluntarily committed children and youth is funded by state and federal funds, for the DCYS school district, like the Correction school district, has no access to the property tax. A local school district faced with the costly alternative of providing an emotionally disturbed child with special education, or tuition for it, might press for admission of the child to DCYS facilities, especially if the education offered there were satisfactory because, at present, the local district would be relieved of expense.

271 Commissioner Maloney has expressed concern that development of a good education program will increase pressures from parents to institutionalize children, if the parents are dissatisfied with local services or live in school districts seeking to lower their costs. Interview with Francis H. Maloney, Commissioner of DCYS, in Hartford, Conn. June 21, 1976.

Retardation in the spring of 1977.[272] The enabling legislation provides for an Education Council with policymaking powers[273] and a Superintendent appointed by the Commissioner of Mental Retardation upon the recommendation of the Education Council.[274]

The school district's jurisdiction extends only to "severely or profoundly mentally retarded children requiring functional education to age twenty-one,"[275] and the Act specifies at length the level of incapacity signified by these terms.[276] Furthermore, for children in Department of Mental Retardation residential facilities, an individual determination must be made as to whether the child is to be educated in the bureau school district or in a conventional school district, and parents may appeal such determinations.[277] These provisions, as well as past opposition by groups like the Connecticut Association for Retarded Citizens (CARC) to any proposals that might discourage integration of the mentally retarded into conventional schools,[278] hint at the difficulties of extending the school district model to cover children segregated by mental capacity. In such a context, the ultimate test of the school district model, which aims to ensure that educational resources and opportunities are as equally available to a special group as they are to the community at large, may be whether the model is flexible enough to avoid isolation of that special group from the larger community.

272 Conn. Pub. Act No. 77-587, July 12, 1977.

273 *Id.* § 2. The Act specifies that after 1979, members of the council "shall not be employees of the department of mental retardation or the state department of education."

274 *Id.* § 3. The Superintendent falls "under the general supervision" of the Commissioner, but shall act "in consultation with" the Education Council.

275 *Id.* § 2.

276 *Id.* §§ 1, 7.

277 *Id.* § 5.

278 Telephone interviews with Margaret Dignoti, Program Consultant, CARC, June 28, 1976, and March 10, 1977. The long-range position of CARC is that the State Department of Education and local school districts should be held responsible for the education of *all* children, including the profoundly retarded.

> Education is the province of the State Department of Education and the local school districts (LEA's) which are responsible to the children of their town. The town should not be absolved of its basic responsibility to its children, regardless of the degree of their handicap. To place the responsibility for education outside the child's town is to ignore the basic rights to that child and to classify him as a second-class citizen . . . .

Conclusion

Faced with the present inadequacy of education in state institutions and with the development of social and judicial theories supporting an equal entitlement to educational opportunities, legislators are under increasing pressure to ensure an adequate or equal education to those confined in state institutions. They may find in the bureau school district model an administrative structure which effectively provides that assurance. With school district status, the delivery of education to residents in state institutions becomes an integral element in the overall educational effort of the state. It gains some guarantee of an equitable share of state and federal funds, as well as consistent advocacy and direction from state education authorities.

In adopting the school district model, legislators should seek to enact laws that include at least the major features of the model described in Part III above, in spite of the political and bureaucratic opposition which some of those features may arouse. An independent school board should set education policy within the bureau; a certified school superintendent should administer the district; a properly qualified faculty and staff should provide its educational services. If it is politically feasible, the school superintendent should be accountable to the school board rather than to the commissioner of correction and that board should include members outside the circle of professional correction and education administrators. To ensure continual funding comparable to that

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> Placing responsibility with local school districts provides parents with access to locally-elected officials in both an informal and formal manner which, in many cases, may be more responsive than dealing with a state agency.
> The creation of additional education facilities *within* institutions seems counterproductive to the deinstitutionalization and normalization concepts
> ....

The Association feared that the special school district structure would result in some children being dropped or at least bounced between jurisdictions, that segregated facilities would not be in the children's best interest, and that "education" funds might be used for other purposes by the Department of Mental Retardation. Memorandum to CARC Board of Directors from CARC Representatives on Joint Task Force on Functional Education, Mandatory Education for Currently-Excluded Children (Dec. 15, 1975).

of conventional school districts, legislation should provide a surrogate for local tax support; the best method is likely to be a statutory formula for state appropriations to bureau education which is based on the average per pupil expenditure of local school districts. The legislature should also establish a revolving fund to facilitate receipt of state and federal reimbursement grants. The Connecticut experience has demonstrated that all these features are needed to safeguard the effective operation of the bureau education system.

Although conceived in many states merely as a means of channeling federal funds into state bureaus, the school district model carries the broader potential for establishing and fulfilling a mandate for universal entitlement to equal education. Equality of treatment inheres uniquely in both the means and the end, and the current experiments with correction school districts hold promise for persons in the care of any state bureau.

APPENDIX A

SURVEY RESPONSES OF DEPARTMENTS OF CORRECTION

State or city Department of Correction	Correction school district established? Yes	No	*If yes:* a) citation of the statute?	b) Is program administered by cert. supt.? Yes	No	c) Is there a board of education Yes	No	*If no:* Has legis. defeated sch. dis.? Yes	No	If yes, when?	Any current proposals? Yes	No
ALABAMA		X							X	1976		
ALASKA		X						X				X
ARIZONA		X							X	1975		X
ARKANSAS	X		Act 279 (March 1973)	X		X						
CALIFORNIA		X		X				X			X	
COLORADO		X			X		X	X				X
CONNECTICUT		X	Conn. Gen. Stat. (1975) 18-99a; 18-99b	X			X	X				
DELAWARE		X			X		X	X				X
FLORIDA		X							X	Did not get out of 1974 committee		X
GEORGIA					X But person more than qualified.		X		X	HB 1722 (1976) HB 1676 (1977) Did get out of committee	X	
HAWAII		X			X Board of Regents of Hawaii		X Bd. of Ed. Dept. of Ed.		X			X

State or city Department of Correction	Correction school district established? Yes	No	*If yes:* a) citation of the statute?	b) Is program administered by cert. supt.? Yes	No	c) Is there a board of education Yes	No	*If no:* Has legis. defeated sch. dis.? Yes	No	If yes, when?	Any current proposals? Yes	No
IDAHO		X						X				X
ILLINOIS	X		Public Act 77-1779 1972 Illinois	X		X						
ILL./COOK COUNTY												
INDIANA		X							X	1972	X	
IOWA		X										
KANSAS								X				X
KENTUCKY		X		X			X	X			X*	
LOUISIANA		X							X			X
MAINE		X						X		1975		X
MARYLAND	X		H.B. No. 973	X		X		X		1975, 1976		
MASSACHUSETTS		X			X		X	X		1976-77	X	
MICHIGAN		X							X			X
MINNESOTA		X							X			X
MISSISSIPPI		X							X			X
MISSOURI		X							X			X
MONTANA		X			X		X		X			X
NEBRASKA		X							X			X
NEVADA									X			X
NEW HAMPSHIRE		X							X			X
NEW JERSEY	X		Ch. 98, Laws of N.J., 1976	X			X					
NEW MEXICO		X			X		X		X		X	
NEW YORK (STATE)		X						X		1975		?
NEW YORK (CITY)		X			X		X	X				X
NORTH CAROLINA		X							X			X

State or city Department of Correction	Correction school district established? Yes	No	*If yes:* a) citation of the statute?	b) Is program administered by cert. supt.? Yes	No	c) Is there a board of education Yes	No	*If no:* Has legis. defeated sch. dis.? Yes	No	If yes, when?	Any current proposals? Yes	No
OHIO	X		3301.16 Ohio Revised Code Power to grant school district charters rests with state Bd. of Ed.	X			X	X				X
OKLAHOMA		X						X		1975 "defeated" put in quotes		X
OREGON		X						X				X
PENNSYLVANIA		X										
PHILADELPHIA		X										
RHODE ISLAND		X			X		X		X	1975, 1976, 1977	X	
SOUTH CAROLINA		X		X			X	X				X
SOUTH DAKOTA												
TENNESSEE		X			X		X	X				X
TEXAS	X		Senate Bill 35 by 61st Texas Legis., 1969 Texas Educ. Code 29.01	X		X						X
UTAH		X							X			
VERMONT		X							X			X
VIRGINIA												X
WASHINGTON (STATE)		X							X			X
WEST VIRGINIA		X							X			
WISCONSIN											X	
WYOMING		X							X			X

State or city department of correction	Do you favor such school district legislation? Yes	No	Indiff.	Why? (Comments are not edited)	In the 1976 school year, did your department of correction receive funds under the following Titles of ESEA?: Title I (disadvantaged youth) No	Yes	(amount)	Title II (library) No	Yes	(amount)	Title III (education centers) No	Yes	(amount)
ALABAMA	X			Funding would be enhanced, but this would add another administrative level to our agency.		X	—		X	—		X	
ALASKA		X		Our institutions are too small to justify such action at this time.	X				X			X	
ARIZONZA	—	—	—			X	299,145		X	524		X	
ARKANSAS						X	90,775	X				X	
CALIFORNIA		X		We need to study the ramifications of such a neutral change.		X	280,885		X	LSCA Title II 9,748 old 19,200 new			
COLORADO		X		Presently going through many changes organizationally, administratively and programmatically. Changing from program emphasis to work ethic concept.		X	26,000	X	X	2,100		X	
CONNECTICUT													
DELAWARE	X			Improved basis on which to improve educational services.		X	140,000		X	Title IV? 200		X	
FLORIDA	—	—	—	I am unsure at present. I have favored it in the past but tend to feel adequate formula funding and proper structure within agency may be just as desirable.		X	582,000	X				X	2,000
GEORGIA	X			Better management structure, formula finding, motivation toward standards, linkage with other educational efforts, federal and state.		X	69,000, Dept. Correc. 250,000, Dept. Educ.	X				X	

State or city department of correction	Do you favor such school district legislation? Yes	No	Indiff.	Why? (Comments are not edited)	In the 1976 school year, did your department of correction receive funds under the following Titles of ESEA?: Title I (disadvantaged youth) No	Yes (amount)	Title II (library) No	Yes (amount)	Title III (education centers) No	Yes (amount)
HAWAII	X			Education is the only defined program within the correctional system.	X	34,000				
IDAHO	X			Idaho Dept. of Corrections has an accredited school approved through the Idaho Dept. of Educ. and by the Idaho State Bd. of Ed. (More in comments)	X	32,000	X	N.A.	X	
ILLINOIS	—	—	—	—	X	80,000 approx.	—	—	X	—
ILL./COOK COUNTY										
INDIANA	X			Many ways it would be better. Money for one. Another is the directions would be given by professionals.	X	282,485 youth	X	5,000	X	Vocational Title III 160,000
IOWA		X		We have satisfactory arrangement at present through provision of education services by area community college on contract.	Answered by Division of Adult Corrections					
KANSAS	X			It would lend greater organization and better educational opportunities for the incarcerated felon.	X	—	—	—	—	—
KENTUCKY	X			It will be quite an efficient method for correctional education.	X	74,000	X	13,000	X	
LOUISIANA		X		Other options available.	X	400,000	X	—	X	
MAINE	X			See attached copy of L.D. 797—"Statement of Fact" and Recommendation #46 of the Report of the Governor's Task Force.	X	129,202	X	4,951	X	

State or city department of correction	Do you favor such school district legislation? Yes	No	Indiff.	Why? (Comments are not edited)	In the 1976 school year, did your department of correction receive funds under the following Titles of ESEA?: Title I (disadvantaged youth) No	Yes	(amount)	Title II (library) No	Yes	(amount)	Title III (education centers) No	Yes	(amount)
MARYLAND	X			I started the legislation with the help of an interested senator.		X	298,000		X	No funds were available under this Title.	X		
MASSACHUSETTS	X			—		X	168,000		X			X	100,000
MICHIGAN		X		Most regulations which pertain to school districts apply to children. Most are not applicable to adult corrections. A Dept. sch. dist. would proliferate paper work. A Zero-based budget approach to Cor. Ed. would be simpler, less bureaucratic and more cost efficient.		X	701,286		X		X		
MINNESOTA				Through joint power agreements we can do what is needed without adding another layer of legislation.		X	500,000		X	13,500	X		
MISSISSIPPI	X			This would entitle us to be under the State Dept. of Education and assure us money on ADA.		X	90,000		X		X		
MISSOURI	X			Schools are under Inst. Heads who are not educationally oriented, and also because of budgetary reasons. We would have access to more state and federal monies. Salaries are lower than public schools and we are "boxed in" with state merit system.		X	21,200		X	1,400		X	ABE ? 117,000

State or city department of correction	Do you favor such school district legislation? Yes	No	Indiff.	Why? (Comments are not edited)	In the 1976 school year, did your department of correction receive funds under the following Titles of ESEA?: Title I (disadvantaged youth) No	Yes	(amount)	Title II (library) No	Yes	(amount)	Title III (education centers) No	Yes	(amount)
MONTANA		X		The existing system of having to meet accreditation standards works satisfactorily. (More comments on second reply).	X			X			X		
NEBRASKA		X		—		X	75,000	X		5,000	X		
NEVADA													
NEW HAMPSHIRE	X			A recognized school district would more easily facilitate the obtaining of both state and federal funding.		X		X		12,000 approx.	X		
NEW JERSEY	—			—									
NEW MEXICO	X			Presently Educ. is line itemed in the departmental budget—under a district concept it would be funded under the Educ. Sch. Finance Act. Also, greater flexibility in curriculum planning and exemption of teaching personnel from the State Personnel Act.		X	739,800 280,000	X X			X X		
NEW YORK (STATE)	X			It would give education personnel in prisons more autonomy. More resources would be available to educators in corrections.		X	750,000	X			X		
NEW YORK (CITY)	X			—	X			X			X		
NORTH CAROLINA	X			The Division cannot adequately secure resources under present method. Also, it has very little say over quality of educ. services that it does receive.		X	—	X			X		
NORTH DAKOTA		X		We seem to be able to provide legally the education programs without the need for such legislation.		X	53,000 approx.	X		Youth Correc. Facility	X		

State or city department of correction	Do you favor such school district legislation? Yes	No	Indiff.	Why? (Comments are not edited)	In the 1976 school year, did your department of correction receive funds under the following Titles of ESEA?: Title I (disadvantaged youth) No	Yes	(amount)	Title II (library) No	Yes	(amount)	Title III (education centers) No	Yes	(amount)
OHIO		X		Not necessary in Ohio—State Bd. of Education empowered to grant charters by law.	X		—	X		—	X		
OKLAHOMA		X		Long term unwillingness of legislature to fund needed positions.	X		—	X		12,000	—	—	—
OREGON	X			To a degree. (Another legislative approach).	X		109,834	X			X		
					Title IV, Part B (Guidance Counseling & Testing) 2,099								
PENNSYLVANIA													
PHILADELPHIA													
RHODE ISLAND	X			Increase funding, recognition, certification, and delivery system.	X		29,620 Juv. 22,263 Adult	X			X		
SOUTH CAROLINA	X			—	X		378,000	X		974	X		300
SOUTH DAKOTA													
TENNESSEE		X		—	X		—	X		—	X		—
TEXAS					X		225,960	X		619	X		
UTAH		X		Utah State Prison favors to contract educational services through appropriate educational agencies.	X		7,800	X			X		
VERMONT			X	— Not sure	X		55,000	X		6,331? in margin	X		
VIRGINIA													
WASHINGTON STATE)			X	We are moving to put education under contractual arrangements with the community colleges in the state of Washington.	X		162,713	X			X		

State or city department of correction	Do you favor such school district legislation? Yes	No	Indiff.	Why? (Comments are not edited)	In the 1976 school year, did your department of correction receive funds under the following Titles of ESEA?: Title I (disadvantaged youth) No	Yes	(amount)	Title II (library) No	Yes	(amount)	Title III (education centers) No	Yes	(amount)
WEST VIRGINIA	X			To provide accredited and coordinated educational programs.		X	235,000		X	4,000		X	
WISCONSIN													
WYOMING		X		—		X	38,000	X				X	

APPENDIX B

TABLE FUNDING SOURCES FOR CONNECTICUT DEP'T OF CORRECTION SCHOOL DISTRICT

Fiscal Year	71/72	72/73	73/74	74/75	75/76	76/77
A.D.M.	$ 45,000	65,000	155,000	224,000	224,000	$248,500
Voc. Educ.	85,000	147,000	224,000	182,000	182,000	147,500
A.B.E.	12,000	24,000	100,000	149,000	40,000	40,900
M.D.T.A.	250,000	250,000	180,000	4,000*	-0-	-0-
C.E.T.A.	-0-	-0-	-0-	137,145	235,000	216,000
Title I	-0-	33,000	147,000	300,000	640,000	563,500
Title II (now IV)	-0-	-0-	400	4,700	4,700	9,600
Title III	-0-	25,000	22,000	31,400*	-0-	18,200
Comm. on the Arts	-0-	6,000	3,000	3,000	3,000	30,000
Special Education	-0-	66,000	86,000	99,000	168,000	158,000
LEAA	-0-	-0-	-0-	-0-	146,000	140,000
SADC	-0-	-0-	-0-	-0-	66,000	14,700
Totals	$392,000	616,000	917,400	1,133,845	1,708,700	1,586,900

EXPLANATIONS:

A.D.M.	Average Daily Membership.
Voc. Ed.	Vocational Education—Woodworking and Carpentry, Small Engine Repair, Optical Shop, Counselors, etc.
A.B.E.	Adult Basic Education
M.D.T.A.	Manpower Development Training Act—Enfield
C.E.T.A.	Comprehensive Employment Training Act Enfield (replaces M.D.T.A.)
Title I	Disadvantaged Youth in Public School District
Title II	Library Needs
Title III	Educational Centers and Services (Testing and Guidance)
Comm. on the Arts	Commission on the Arts—Artist-in-Residence Programs
Special Education	Special Education—provided for economically and culturally deprived physically and emotionally handicapped
LEAA	Law Enforcement Assistance Agency
SADC	State Aid to Disadvantaged Children

*Program funds no longer available

Source: E. J. Gubbins, Superintendent of Schools, Correction Department, June 21, 1976, and Oct. 13, 1977.

ORGANIZATIONAL CONFLICT OF INTEREST AND THE GROWTH OF BIG GOVERNMENT

DANIEL GUTTMAN*

As the federal government has grown, it has relied less upon the civil service and more upon "professional services" contractors to perform research and management functions. However, unlike the civil service, where the public interest in impartiality is protected by conflict-of-interest laws and regulations, these contractors' conduct is not subject to conflict-of-interest laws. Regulations which purport to govern "organizational conflicts of interest" protect not the public interest in impartiality but the private interests of competitors. Mr. Guttman argues that conflicts of interest infect professional services contracting; moreover, the conflicts are related to other problems of contracting, such as unaccountability, delegation of authority, and inefficiency.

Attempts to eliminate this contracting conflict-of-interest problem by imposing a flat prohibition on conflicts have floundered in the face of arguments that contract arrangements which necessarily involve conflicts must continue because they serve the public interest. However, Mr. Guttman considers the evidence which is available and concludes that the public interest is not served by these arrangements. He then proposes reforms aimed at exposing the conflicts of interest and at minimizing the adverse effects associated with conflicts.

Introduction

Strictures against conflicts of interest are basic to the American way of government. Briefly, the governing presumption is that "no man can serve two masters."[1]

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1 *Matthew* 6:24.

Whether by common law, statute, or regulation, this presumption is applied by all levels of American government. If a job is assigned to the federal civil service, the activities will be subject to the statutes and regulations governing conflict of interest which are discussed in section I.

There is, however, a category of public servants which is not subject to conflict of interest prohibitions. Section II shows that when a task, even one which the civil service normally performs, is assigned to an "independent contractor" — a term referring generally to organizations employed under contract[2] — no conflict-of-interest prohibitions are likely to apply.

Although the government lacks basic data on the extent of contractor use and influence,[3] it is clear that decisions and actions which are central to the government's operations — *i.e.*, management and evaluation of spending and regulatory programs, developing and promoting policy — are made with the assistance of a large cadre of private contractors.

The work of the contract bureaucracy — a term hereinafter used to mean "professional services" contractors[4] and the promoters of such contracting within the executive branch — is invisible in every sense. Contractors are not listed on the government organization chart. The public often has no way

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2 The term "contractors" is hereinafter used to include, where relevant, "grantees" as well. Historically, grants have been available solely to nonprofit agencies. In practice, the legal status of an organization may have little relation to the services it renders the government. A study of military policy, for example, may be performed by RAND Corporation (nonprofit) or a division of Westinghouse. In the recent past, following claims of discrimination by profitmaking corporations, Congress and the executive have begun to reconsider the grant/contract distinction.

3 There is no single source of data on the federal government's contract employment of "professionals" or "experts". As a practical matter, it is impossible to collate the data that is kept, sporadically, by agencies. There is no uniformity (even within an agency) as to categories of manpower purchased. Thus, a contractor who purveys "technical assistance" may be engaged in routine clerical work or higher mathematics. Nor is there any effort to determine how much technical manpower is employed on subcontract or subgrant. Thus, there is little data on the percentage of the billions of dollars of grant money that state and local recipients re-contract. *See* note 5 *infra*.

4 This term will be used nonrigorously to apply generally to those who have been variously called "consultants," "experts," "systems analysts," "policy researchers," "management consultants," "planners," etc. It does not include contractors which supply guns and paper clips, mow lawns, or prepare chipped beef for Marines.

of knowing whether an official statement was drafted by government officials, or is literally the application of an official imprimatur to a study researched, written and typed by outsiders.

The government has never sought to examine the roles played by private "experts."[5] As discussed in Section III, the outsiders have come to 1) direct the social and industrial engineering that takes place under the official name of research and development ("R&D"); 2) assist in the management of ongoing regulatory and spending programs; and 3) help top political appointees manage the civil service.

Services performed in each function often take on patterns which, when held to the light of tradition and law, must be called conflicts of interest. Because of the invisibility and apparent disorganization of the contract bureaucracy's operations, it might be assumed that the patterns of conflict of interest represent coincidence and not design. Since the government generally does not call on contractors to disclose their further interests and affiliations, for example, there may be no formal signal to officials that a conflict exists. Ignorance undoubtedly does account for some conflicts. Ignorance aside, however, conflicts frequently occur by design. In brief, the daily operations of the contract bureaucracy have enshrined conflict of interest as a governing principle.

Nonetheless, there is a body of regulations which purport to regulate "organizational conflict of interest." The contemporary concept of "organizational conflict of interest"

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5 Under the auspices of the Senate Committee on Governmental Affairs, Subcommittee on Reports, Accounting and Management, the Congressional Research Service was engaged in the first comprehensive survey to "determine what information on professional services by contractors/consultants was available, to develop a preliminary data base on the extent and cost of their use and to determine whether there was a need for a government-wide reporting system related to professional services." The preliminary results of the CRS survey are presented in SUBCOMM. ON REPORTS, ACCOUNTING AND MANAGEMENT OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., CONSULTANTS AND CONTRACTORS, A SURVEY OF THE GOVERNMENT'S PURCHASE OF OUTSIDE SERVICES 21(1977) [hereinafter cited as CONSULTANTS SURVEY]. As summarized by Senator Lee Metcalf, the late Chairman of the Sub-committee, the survey's "most important finding is the fact that the Federal Government does not know how many consultants and contractors it employs, what they do or how much their services cost." Letter of Senator Metcalf to Daniel Guttman (September 6, 1977).

operates (when it does operate) to protect some contractors from doing injury to other contractors. It does not contemplate an independent public interest which might be injured when those with private interests work for the public. The concept, as will be shown, not only does not regulate conflicts of interest, but provides evidence that the omission of such regulations is part of the design of the contract bureaucracy.

If contracting conflicts were merely coincidence, it would be relatively easy to draft legislation that would prohibit them. To the extent that they are essential to the operation of the contract bureaucracy, however, the task becomes more difficult. Any prohibition will be resisted. Section IV suggests that the opponents will not contend that the conflict-of-interest tradition is invalid or ambiguous. They will argue, instead, that the existing relationships, whether called conflicts or not, must be preserved because they serve the public interest.

Rather than allowing such opposition to prevent enactment of needed conflict-of-interest rules, proponents of new conflict rules may settle for half a loaf. A compromise, for example, might be legislation to a) prohibit conflicts generally, but provide for exceptions where the executive deems them necessary; or b) require potential contractors to disclose affiliations, so that possible conflicts might be discerned and precluded, or at least, made visible. Such legislation, indeed, has recently been proposed.

While half a loaf is better than nothing, it is insufficient. Section V argues that the proponents of existing arrangements should be met on their own terms of debate. The existence of conflict is not a small cost of better government, but one symptom of the generally invisible, unaccountable, and inefficient operations of the contract bureaucracy. In the absence of an express statutory presumption in favor of contracting, there should be a presumption that patterns of contracting conflicts are not justified and should be curtailed. R&D spending presents a special case. R&D spending is often based on explicit or implicit statutory preferences for the development of "free enterprise." Congress should

recognize that R&D is perceived by the executive and its contract constituency as a license to promote political and economic change. Congress should address the working vision that guides R&D spending and the consequences of this vision. It should articulate a framework by which R&D contracting can be rendered visible and subjected to meaningful public control.

I. THE TRADITION OF RESTRICTIONS ON CONFLICTS OF INTEREST

The government hires civil servants with the expectation that they will perform their public duties responsibly. Whenever a government employee's economic interests clash, or appear to clash, with the public's interest in impartial decision-making, there is a conflict of interest.[6] Prohibitions against conflicts of interest in public employment are found in all levels of American government.[7]

The rationales motivating conflict-of-interest legislation can be broadly divided into public and private concerns.[8] The government protects its interests — the public interest[9] — in impartial decision-making by regulating situations in which a government employee's private economic interests might affect his official decisions.[10] The second major rationale for

6 B. MANNING, FEDERAL CONFLICT OF INTEREST LAW 2-3 (1964) [hereinafter cited as MANNING]. "Conflict of interest" does not include stealing or bribery, although they fit within the broad definition given, because they are subject to other prohibitions. *See also* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE (1960) [hereinafter cited as BAR ASS'N, CONFLICT OF INTEREST].

7 Federal prohibitions are discussed in this section; states restrict conflicts of interest in a variety of ways, and with differing severity. *See, e.g.* COUNCIL OF STATE GOVERNMENTS, CONFLICT OF INTEREST AND RELATED REGULATIONS FOR STATE LEGISLATURES (1971).

8 *See* Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1118 (1963). Perkins lists a number of goals served by conflict statutes, which can be broadly grouped into public interests and private interests.

9 As employed in this article, the term "public interest" is equated with a) the enforcement of the law and the consistent application of legal tradition; b) a government whose operations are visible and accountable; c) a government that pursues its tasks in a rational and efficient manner. Although these ends may not be unqualifiedly good (and are not always easily "operationalized"), they provide a cutting edge by which the more pronounced deficiencies of the contract bureaucracy's operations may be made apparent.

10 Perkins, *supra* note 8, at 1118.

conflict-of-interest laws and regulations is to protect private individuals who may find themselves unfairly or unequally treated when their interests are in competition with those of government employees. The decision also reflects a moral judgment that a person hired to work for the government — that is, for the people — should not receive more for the job than the normal salary and benefits.[11]

The federal conflict-of-interest law developed over the last century. It is now expressed in a statute and the regulations which are based on that statute. The Supreme Court interpreted the statutory tradition in a major 1962 decision. The statute, the regulations, and the Court's opinion form the basis of the present federal conflict-of-interest law.

A. *Statutory and Regulatory Framework*

Conflicts of interest are prohibited at the federal level by statutes, executive orders, and agency regulations, which have accumulated since the mid-nineteenth century in response to particular evils.[12] The earliest statute, "An Act to Prevent Frauds on the Treasury of the United States,"[13] was directed at government employees who assisted persons with claims against the United States.[14] Later statutes responded to the administrative abuses of the Civil War, particularly contract procurement scandals,[15] and the assistance by former government employees to claimants against the government.[16]

In 1962, Congress revised and consolidated the conflict-of-interest statutes that had been proliferating for over a century,[17] changing the organization and wording of former laws, but leaving their substantive provisions largely intact.[18] The Senate Report identified the bill's two purposes:

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11 *Id.*
12 BAR ASS'N, CONFLICT OF INTEREST, *supra* note 6, at 29-66.
13 Ch. LXXXI, 10 Stat. 170 (1853).
14 BAR ASS'N, CONFLICT OF INTEREST, *supra* note 6, at 37.
15 *Id.* at 41.
16 *Id.* at 45.
17 Act of Oct. 23, 1962, Pub. L. No. 87-849, 18 U.S.C. §§ 201-218 (1976).
18 MANNING, *supra* note 6, at 6-8.

> First, it would simplify and strengthen the conflict laws presently in effect. Second, in the interest of facilitating the Government's recruitment of persons with specialized knowledge and skills for service on a part-time basis, it would limit the impact of those laws on the persons so employed without depriving the Government of protection against unethical conduct on their part.[19]

Pursuant to the 1962 legislation, President Johnson issued Executive Order 11222, which established "ethical standards" for government employees.[20] That order set forth the "appearance" standard as the basis for judging the propriety of employee conduct. Section 203 provides that employees may not "have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees."[21]

The order also requires considerable disclosure from "special employees." Section 306 provides:

> Each agency shall at the time of employment of a consultant, advisor, or other special Government employee require him to supply it with a statement of all other employment. The statement shall list the names of all the corporations, companies, firms, State or local government organizations, research organizations and educational or other institutions in which he is serving as employee, officer, member, director, trustee, advisor, or consultant.[22]

Individual agencies have enacted further, highly particularized, ethical codes. For example, the regulations of the Federal Energy Regulatory Commission (formerly the Federal Power Commission) are 26 pages long[23] and provide for employees to report: a) security interests in companies subject to Commission jurisdiction; b) security interests in enterprises otherwise affected by the Commission's actions;

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19 S. REP. NO. 2213, 87th Cong., 2d Sess. 4 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3852, 3853.

20 Exec. Order No. 11,222, 3 C.F.R. 156 (1974).

21 *Id.* at 157.

22 *Id.* at 158.

23 18 C.F.R. Part 3c (1977).

c) outside employment; d) employment and financial interests; and e) their acknowledgement of the Commission's standards of conduct.[24]

B. *The* Dixon-Yates *Case*

The Supreme Court interpreted the conflict-of-interest statutes in *United States v. Mississippi Valley Generating Co.*[25] The case resulted from (and took its popular name from) the "Dixon-Yates" scandal. The Atomic Energy Commission (AEC) had contracted with the Mississippi Valley Generating Company for construction of a steam generating plant to provide AEC facilities with electricity. The government cancelled the contract before completion, because it no longer needed the power. The company sued in the Court of Claims, which awarded damages for breach of contract. The Supreme Court reversed, holding the contract unenforceable because of a conflict of interest inherent in its inception.[26]

The Court found a violation of 18 U.S.C. section 434, which provided that:

> Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years or both.[27]

The individual at issue in *Dixon-Yates,* Adolphe H. Wenzell, was a Vice President and Director of First Boston Corporation, one of the nation's leading investment banks. First Boston's chairman suggested and subsequently the Bureau of the Budget requested that Wenzell advise the government and act on its behalf in contract negotiations

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24 *Id.*

25 364 U.S. 520 (1961).

26 *Id.* at 523-24.

27 Act of June 25, 1948, ch. 645, § 434, 62 Stat. 703 (1948) (current version at 18 U.S.C. § 208 (1976)). *See* notes 17 to 19 *supra* and accompanying text regarding the revision of federal conflict statutes following the *Dixon-Yates* case.

between the government and the Mississippi Valley Generating Company.[28] Mississippi Valley received the contract and hired First Boston as project underwriter. Wenzell had no official role in awarding the contract and received no compensation for his advice to the government. There had been no formal commitment between First Boston and Mississippi Valley prior to the award. Nevertheless, the Court held that the indirect link between Wenzell's advice and First Boston's award violated the statute and precluded enforcement of the contract.

The Court affirmed the basic purpose of conflict-of-interest statutes as a protection of the government's interest in impartial decision-making: "The obvious purpose of the statute is to ensure honesty in the government's business dealings by preventing federal agents who have interests adverse to those of the government from advancing their own interests at the expense of the public welfare."[29]

The Court applied an objective standard of behavior because of the difficulty of accurately determining the climacteric factors in decision-making. The Court noted that the federal statues are

> directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning of men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.[30]

Thus, the government was not required to prove Wenzell's private interests *actually* influenced his behavior as a govern-

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28 364 U.S. at 523. Wenzell worked without pay, but did receive $10 per day in lieu of subsistence, plus transportation expenses. *Id.* at 533.

29 *Id.* at 548.

30 *Id.* at 549-50.

ment employee, but only that he *could* have favored his private interests over those of the government.

The Court strictly interpreted the statute "to protect the United States, as a Government, from the mistakes, as well as the connivance, of its own officers and agents."[31]

It is clear from this brief history that conflict of interest has received substantial attention from Congress, the courts and the executive branch. The present laws, as interpreted in *Dixon-Yates*, provide a legal model for judging the way the government conducts its business. The standard is objective, and the primary purpose is to prevent injury to the government, by separating government employment from private interests.[32]

II. CONTRACTING CONFLICTS OF INTEREST

The tradition of prohibitions on conflicts of interests demonstrates the strength of national concern about this issue. However, until recently the tradition had never been applied to government contractors. This section will show that the conflict-of-interest restrictions that govern individual employees were not carried over to contractors.

In the *Dixon-Yates* case, Wenzell's simultaneous service to the government and to the underwriter of a government contract fell easily within the realm of conflicts of interest as

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31 *Id.* at 561.

32 A federal district court in Minnesota held that conflict-of-interest laws and regulations are inapplicable in civil suits between private parties. The case involved an attempt by the plaintiff bank to disqualify a state court-appointed receiver for an insolvent corporation from prosecuting a civil action against it, on the grounds that the receiver had been a paid government advisor and witness in the criminal prosecution against the previous owners of the insolvent corporation. The court found that private parties are not protected by either the conflict-of-interest statutes, or Executive Order 11,222. The standards of ethical conduct were said to exist for the benefit of the government. Exchange Nat'l Bk. v. Abramson, 295 F. Supp. 87 (D. Minn.), *appeal dismissed* 407 F.2d 865 (8th Cir. 1969).

This decision strongly supports the predominance of the "public interest" rationale for conflict-of-interest laws, as private parties who claim injury due to government employee's conflicts of interest would seem to have no right to bring suit against the government for their damages. Competing private interests apparently would not be protected against abuses of government employees' power by the conflict-of-interest rules.

defined by tradition. Very few would disagree that his position did present a conflict of interest, and that such conflicts are undesirable. One would be hard pressed to say that the conclusion should differ if Wenzell, as an employee of First Boston, had advised the government in the generating plant negotiations under a contract between First Boston and the government. In either case, applying the objective standard makes the conflict of interest obvious. Of the two, the contract variation would seem the more objectionable because the same company has signed both contracts — one as project adviser and one as project underwriter. Thus the contracting conflicts of interest present when an advisor retains ties with government and industry fit the objective standard of behavior adopted by the *Dixon-Yates* Court.[33]

But the courts have not applied the standard to contracting conflicts of interest because Congress has not included independent contractors within the limits of the conflict-of-interest statutes. When an opportunity to do so arose in 1962, Congress deferred to the recommendations of the President and failed to act on any proposals for control over contracting conflicts of interest. At least three explanations can be suggested for congressional inaction. First, narrow perceptions about the possible sources and effects of conflicting interests limited congressional attention to contractors engaged in technical direction. Analysts ignored the more subtle conflicts of private employees with pro-industry bias and their influence on national policy.

Second, concerns about recruitment and expertise of government contractors made Congress hesitant to impose conflict-of-interest requirements that would inhibit close interaction between government and private institutions. The value of private "expert" consultants appeared to lie precisely in their ability to serve both the federal government and private industry as an intermediary for personnel and information. Contractors themselves expressed confidence that

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33 *See* text accompanying notes 29 to 30 *supra.*

they could assume these roles without injuring the public interest.[34] The development of alternatives within the government itself was not adequately considered.

Third, the adoption of "organizational conflict of interest" restrictions by some administrative agencies created an illusion that potential contracting conflict-of-interest problems had been anticipated. Hardware ban clauses in military procurement contracts prevented contractors from bidding to perform the same projects upon which they had rendered advice. These restrictions were said to preserve some competition among industrial contractors by limiting potential monopolization of hardware contracts by researchers and management consultants. But they failed to protect the public interest in impartial decisions because consultants could still fill their staffs with industry personnel and thus further overall industry interests through service to the government.

This section introduces the first two explanations in a discussion of the independent contractor exemption of the 1962 conflict-of-interest amendments. The third element will be examined in a separate evaluation of organizational conflict-of-interest rules.

A. *The Independent Contractor Exemption*

Congress initially ignored the potential for abuse by private advisors of their relationships with the government. During the 1950's, "no Congressmen chose to make political capital out of an investigation of the interlocking structure of corporate and government interests in the field of research and development."[35] Congress was primarily concerned that America mobilize the free enterprise system to fight the Cold War.

When Congress did turn its attention to contracting conflict of interest in the early sixties, it reacted to criticism that

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34 *See, e.g.*, the reaction of the Federal Railroad Administration officials to the suggestion that Wyer, Dick had a conflict of interest when working for both the FRA and Penn Central, at text accompanying note 96 *infra*.

35 D. PRICE, THE SCIENTIFIC ESTATE 51 (1965).

advisory organizations could not reconcile their roles as advisors and competitors for procurement contracts. Two House reports examined the influence of research and development contractors over subsequent contracts and concluded that these advisors possessed an unfair competitive advantage over their industry rivals.[36]

These problems of competitive advantages and contracting conflicts of interest were never, however, addressed by Congress in a statute. In retrospect, the 1962 revisions of the conflict-of-interest statute[37] would have been an ideal opportunity to impose restrictions on contracting conflicts of interest. But the new statute did not cover government contractors. As Bayless Manning, who worked on a major study behind the 1962 revisions, said:

> Services may be performed by employees. But services may also be performed by persons who are not "employees" — those who are considered by the law to be "independent contractors.". . . . It is clearly understood that Section 281, while applicable to those who render services to the government as "employees," is not applicable to those who render services (even the same services) to the government as "independent contractors."[38]

Those who promoted the 1963 legislation were aware of the importance of its failure to cover "independent contractors."[39] A summary of the laws by Roswell Perkins, chairman of the Special Committee which drafted an early version of the 1963 legislation, said "it is clear that conflict-of-interest problems relative to 'contracting out' need intensive and coordinated analysis in Washington."[40]

One possible explanation for excluding contracting from the conflict-of-interest statute's coverage is that the role of

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36 HOUSE COMM. ON GOV'T OPERATIONS, ORGANIZATION AND MANAGEMENT OF MISSILE PROGRAMS, H.R. REP. NO. 1121, 86th Cong., 1st Sess. (1959); HOUSE COMM. ON GOV'T OPERATIONS, AIR FORCE BALLISTIC MANAGEMENT (FORMATION OF AERO SPACE CORPORATION), H.R. REP. NO. 324, 87th Cong., 1st Sess. (1961).

37 *See* notes 17 to 19 *supra* and accompanying text for a discussion of the 1962 revision of the conflict-of-interest statutes.

38 MANNING, *supra* note 6, at 30-31.

39 *See* BAR ASS'N, CONFLICT OF INTEREST, *supra* note 6, at 239-40.

40 Perkins, *supra* note 8, at 1167.

contractors was perceived as a narrow one which did not influence national policy. One commentator echoes this narrow view: "[T]he problem of organizational conflicts in the procurement area . . . has arisen in the cases of a few highly specialized contractors engaged in what is called 'systems engineering' and 'technical evaluation,' or in evaluating or advising on specifications for items ultimately to be purchased . . . ."[41]

Contractors were seen as technicians who simply advised the government on the best way to achieve goals which were set elsewhere. The contractors had no input as to the goals or policies of the government. Thus, it was unnecessary to protect the impartiality of government policy decisions by prohibiting contracting conflicts of interest.

A second explanation for not imposing conflict prohibitions on contractors was the fear that such prohibitions would eliminate the beneficial function of contractors as intermediaries between government agencies and the private sector. This explanation prevailed where the contractors were influencing national policy. In 1962, a report on government contracting for research and development was prepared by a panel which Budget Director David Bell chaired. That report concluded that contractors with a variety of clients were objective. "In the case of organizations in the area of operations and policy research . . . , the principal advantages they have to offer are the detached quality and objectivity of their work. Here, too close control by any Government agency may tend to limit objectivity. Organizations of this kind should not be discouraged from dealing with a variety of clients, both in and out of Government."[42]

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41 Pasley, *Organizational Conflict of Interest in Government Contracts*, 1967 WISC. L. REV. 1, 6-7.

42 Report to the President on Government Contracting for Research and Development 226-27 (April 30, 1962) [hereinafter cited as Bell Report]. The Bell Report appears as Appendix 1 of *Systems Development and Management: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 87th Cong., 2d Sess. (1962) [hereinafter cited as *Systems Development and Management*], *reprinted in* H.R. DOC. 94, 87th Cong. 2d Sess. (1962).

On July 31, 1961, President Kennedy appointed David E. Bell then Director of the Bureau of the Budget, to chair a seven-member interpartmental group to

The Bell Report never squarely faced the question of the desirability of depending upon private parties with unexamined private interests to determine national policies and exercise management functions. It left these "philosophical issues" for another study to resolve, while it adopted as a premise the intermingling of federal agencies and private contractors:

> We accept as desirable the present high degree of interdependence and collaboration between Government and private institutions. We believe the present intermingling of the public and private sectors is in the national interest because it affords the largest opportunity for initiative and the competition of ideas from all elements of the technical community. Consequently, it is our judgment that the present complex partnership between Government and private institutions should continue.[43]

The Bell Report and the *Dixon-Yates* case demonstrate the radical difference between the perceptions in 1962 of conflicts of interest in contracting and in government service. While the Supreme Court, in the *Dixon-Yates* opinion, said service to private interests was inherently inconsistent with service to the public interest,[44] the executive branch, speaking through David Bell, failed to acknowledge that the so-called

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review the use of government contracts with private institutions and enterprises to obtain scientific and technical work needed for public purposes. The Bell Report presented the findings and recommendations of the group, whose members included Robert S. McNamara, Secretary of Defense; Dr. Glenn T. Seaborg, Chairman, Atomic Energy Commission; James E. Webb, Administrator, NASA; Dr. Alan T. Waterman, Director, NSF; John W. Mach, Jr., Chairman, Civil Service Commission; Jerome B. Wiesner, Special Assistant to the President for Science and Technology; and Chairman Bell.

See also BAR ASS'N, CONFLICT OF INTEREST, *supra* note 6, at 177:

> . . . The scientist's situation underscores how difficult it is to work out satisfactory solutions to modern conflict of interest problems. Simple reiteration of the injunction against serving two masters will not do. It is now clear, as it was not in the last century, that any pattern of restrictions, however admirable in purpose, must be carefully measured against its possible negative effect upon the government's efforts to meet its urgent need for personnel and information. Restraints on conflicts of interest in the mixed economy of today can no longer be geared to sharp distinctions between government and non-government. Rigorous application of even the existing conflict of interest statutes could severely cripple governmental recruitment in a most critical area—scientific development.

43 Bell Report, *supra* note 42, at 209-10.

44 United States v. Mississippi Valley Generating Co., 364 U.S. 520, 560 (1961).

"interdependence" of government and private industry created any conflicts of interest. While the court saw great possible injury to the government from such intermingling,[45] the executive branch thought it "desirable . . . in the national interest."[46]

B. *Organizational Conflicts of Interest and the Failure to Control Contracting Conflicts of Interest*

The growing use of government R&D contractors who possessed pronounced industry affiliations might have provoked the public to lobby for the inclusion of independent contractors in the traditional prohibitions against conflicts of interest. In the post-war period, for example, defense analysis groups such as RAND and TRW that maintained ties with government and industry assumed an increasingly influential role in military planning. Their dual functions threatened both to distort planning in favor of larger expenditures for industry-produced hardware and to close out potential competitors through carefully tailored requirements and selective access to internal information. Close working relationships between contractors and government agencies frustrated both private interests in open markets and the public interest in unbiased contract decisions.

But the primary pressure came not from the public but from the defense contracting establishment. The response of defense contractors to research and management groups, however, stopped short of protecting the public interest. Perceiving danger to their interests only in the possibility that consultants could later become hardware manufacturers, the defense industry succeeded in obtaining administrative rulings that led to "hardware ban" clauses prohibiting consulting contractors from later competing in military procurement. Rather than severing financial ties between consulting firms and industry, these regulations simply forbade consulting firms from acting as both advisors

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45 *See* text accompanying notes 25 to 31 *supra.*
46 *See* text accompanying note 42 *supra.*

and suppliers. In fact, conflict of interest was institutionalized, as the private experts came to resemble holding companies for the defense establishment. Moreover, the application of the standards to contracts in other areas remained within the sole discretion of agency administrators. This section will demonstrate that restraints on these "organizational conflicts of interest"[47] in military procurement did not merely divert attention from the significant aspects of contracting conflicts of interest but actively furthered the legitimization of conflict of interest as a governing principle.

The dynamics by which the new principle evolved are clearly illustrated in the evolution of the RAND Corporation, the archetypical "think tank."

Though still wards of the Army following the Second World War,[48] the Air Force's leaders perceived that they could ride new technology and the ready-made constituency of the private air industry to a powerful and independent role. In late 1945, Air Force General "Hap" Arnold told Donald Douglas that the Air Force was willing to award a multimillion dollar contract for the study of German rockets to the Douglas Aircraft Corporation. Douglas accepted the contract and established "Project RAND."[49]

However, Douglas' competitors were suspicious of the

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47 "Organizational conflict of interest" is a term of art. ERDA's General Counsel defined it for Congress in 1975:

> We use the term [organizational conflict of interest] to describe situations in which performance of a particular government contract might confer on the contractor a competitive advantage, which is unfair to other contractors, or involves the contractor in providing advice and assistance which may be biased by its potential for inducing further business opportunities specifically for that contractor.

Organizational Conflict of Interest in Government Contracting: Hearings Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. 88 (1975) (statement of R. Tenney Johnson) [hereinafter cited as *Organizational Conflict Hearings*]. The formal definition expressly provides for the protection of private business interests, to the exclusion of a primary concern for a more generally public interest.

48 On the growth of military R&D during World War II, *see* V. BUSH, PIECES OF THE ACTION (1970); and D. PRICE, *supra* note 35. *See generally* G. LYONS, THE UNEASY PARTNERSHIP (1969). Lyons' book is a comprehensive discussion of the relationship of the social sciences and the federal government in the twentieth century.

49 The early history of RAND is recounted in B.L.R. SMITH, THE RAND CORPORATION: CASE STUDY OF A NONPROFIT ADVISORY CORPORATION 38-66 (1966) [hereinafter cited as THE RAND CORPORATION].

RAND/Douglas/Air Force relationship. They feared that the RAND contract would cause the Air Force to discriminate in favor of Douglas when awarding contracts for the expensive hardware that would flow from RAND's work. Douglas feared discrimination against itself because of its RAND connection. Tensions were temporarily alleviated with an arrangement giving Douglas' competitors a role in overseeing the RAND contract. When this proved unsatisfactory, RAND severed its ties with Douglas.[50]

With a guarantee of financial support from the Ford family, a new board of trustees reorganized RAND into an independent non-profit corporation.[51] An implicit condition of non-profit RAND's reorganization was the assurance that RAND would not compete for the contracts to produce the costly hardware resulting from its advice.[52]

Thus, the Defense Department protected the interests of Douglas and its competitors in lucrative defense contracts from competition by imposing a "hardware ban" on RAND. While RAND became an "independent" corporation, the terms of this independence were carefully structured by the aerospace industry. In addition to the "hardware ban," the RAND Corporation was born with a Board of Trustees, composed of those with affiliations to other organizations (law firms, investment organizations, high technology manufacturers and other research organizations) that are heavily dependent on, or serve those dependent on, government largesse.

When the Air Force hired private experts in the early fifties to manage the Intercontinental Ballistic Missile program, the "hardware ban" surfaced as an explicit and formal condition in the Air Force's contracting for expertise.[53] Management of the missile program had been delegated to a small consulting firm, headed by Simon Ramo and Theodore Wooldridge,

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50 *Id.* at 56-60.

51 *Id.* at 66-74. *See also* Speech by J.R. Goldstein, *reprinted as* RAND Paper P-2236-1 (March 1961).

52 THE RAND CORPORATION, *supra* note 49, at 76-78.

53 The story of the missile managers and the missile management controversy is retold in H. NIEBURG, IN THE NAME OF SCIENCE (1966).

which attained de facto authority over the expenditures for the development and construction of the missile system. Ramo and Wooldridge then acquired the means to compete for the lucrative hardware contracts related to the missile program by merging with an industrial corporation to become the Thompson-Ramo-Wooldridge Corporation (TRW).[54]

In a development paralleling the RAND/Douglas controversy, the industry and the Air Force determined that TRW's combination of capabilities posed a threat to the industrial establishment. The TRW controversy was resolved in the same way as the earlier RAND *contre-temps;* the missile management project was severed from TRW and housed in a specially created non-profit organization — the Aerospace Corporation. The Aerospace Corporation charter precluded bidding for hardware contracts.[55]

The concept of organizational conflict of interest crystallized around missile management and the "hardware ban" clause.[56] As a result, it evolved oblivious to any notion of the public interest. Not only was the sole express purpose the protection of private business, but by effect and implication, the exclusion of further prohibitions legitimized the use of private advisers who possessed strong ties to the industry at large.

The 1962 Bell Report on R&D contracting adopted the contract bureaucracy's position in favor of restrictions on organizational conflicts of interest.[57] Shortly after the Report was issued, procurement officials promulgated regulations which essentially provided that a hardware ban clause should be considered in specified circumstances,[58] which included, for example:

> [i]f a contractor agrees to prepare and furnish complete specifications covering nondevelopmental items to be used

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54 *Id.* at 200-17.
55 *Id.* at 210-11.
56 *Id.* at 214-17.
57 Bell Report, *supra* note 42, at 225-27.
58 Armed Services Procurement Regulations § 1-113.2 & Appendix G, *codified in* 32 C.F.R. § 1-113.2 & Appendix G (1976) [hereinafter cited as ASPR].

> in competitive procurement, that contractor shall not be allowed to furnish such items, either as a prime or subcontractor, for a reasonable period of time, including, at least, the initial procurement.[59]

The hardware ban clauses were meant to apply only to competitors for hardware contracts; they did not contemplate conflicts in professional services contracts where no follow-on hardware contracting was involved. Even so, there are important qualifications on the applicability of these clauses. First, of the two major sets of procurement regulations for the federal government, only the Armed Services Procurement Regulations impose the clause; the Federal Procurement Regulations do not.[60] Second, the regulations concern only the fields of systems engineering and technical direction — other government contracting is ignored.[61] Third, the regulations do not require the hardware ban clause in every applicable contract. The contracting officer has discretion over when to include the hardware ban clause.[62] Finally, the regulations require that the application of the clause and its terms be negotiated with the contractor.[63]

The commentaries on these regulations made clear that they were not designed to protect any independent public interest, but simply to protect the interests of ill-defined "competitors."[64] That purpose evidently has influenced the decisions about the contracts in which to include the clause. In practice, contracts have included the clause only where potential competitors were strong enough to demand its ap-

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59 *Id.* at Appendix G.

60 J. MACBRIDE & J. WACHTEL, GOVERNMENT CONTRACTS, § 14.190[1] (1977). ASPR governs Department of Defense and NASA procurements. The Federal Procurement Regulations cover all other federal procurement.

61 ASPR, *supra* note 58, at Appendix G. *See also* MACBRIDE & WACHTEL, *supra* note 60, at § 14.190[1].

62 ASPR, *supra* note 58, at § 1-113.2 (b) (1). *See also* 49 Comp. Gen. 463 (1970).

63 ASPR, *supra* note 58, at § 1-113.2(a).

64 *See generally* Pasley, *supra* note 41, at 5. "What is feared is that this type of work [planning, technical, analytical, or other consulting services relating to a product or service to be later procured] might be done in such a way as to favor the contractor's prospects for later production of "hardware" items." *Id.* at 10.

plication.[65] Thus, Douglas Aircraft's and TRW's aerospace industry competitors could insist that RAND separate from Douglas and Aerospace split from TRW. However, when one or two firms dominate an industry (*i.e.*, where the government has spawned or reinforced oligopoly), agencies hesitate to use the clause, so its possible benefits are foregone. For example, General Electric and Westinghouse established their expertise in nuclear energy through contracts with the Atomic Energy Commission, and are now the dominant suppliers of nuclear energy hardware.[66]

III. THE CONTRACT BUREAUCRACY

A. *Structure*

The public interest which prompted restrictions on conflicts of interest has been ignored as the government has increased its reliance on contractors. The public interest protected by conflict-of-interest laws is the interest in impartial decisions.[67] According to the Supreme Court, protecting that interest requires decision-makers who are free from extragovernmental interests.[68]

RAND, Aerospace, and other private think tanks bill themselves as sources of independent expertise.[69] But even where the private entities have historically received funding primarily from public sources, the term "independent" is a misleading public relations device. At best, such organizations are "independent" of strong ties to particular private

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65 The Comptroller General apparently approved of this use of the contracting officer's discretion in one case:

> A complaint that a competitor would obtain an unfair advantage through the conduct of a study of a computer system at a large post office was rejected because the competitor already had a prime contract with the Post Office Department and was in an advantageous position, and if the study led to the procurement of equipment that procurement would be competitive, [Comp. Gen.] Unpublished Opinion B-155135, October 23, 1964.

MACBRIDE & WACHTEL, supra note 60, at § 14.190 [2].

66 *See* text accompanying note 84 *infra*.

67 *See* text accompanying note 29 *supra*.

68 *See* text accompanying note 30 *supra*.

69 *See, e.g.*, R. Levien, *Independent Public Policy Analysis Organizations - A Major Social Innovation*, RAND Paper P-4231 (November 1969).

corporations. This "independence," however, is profoundly qualified by strong ties to industry at large.[70] As Aerospace management explained to Congress in 1972, eighty percent of Aerospace's management and technical staff come from industry. Those who leave return to industry. Understandably, "the sentiment is strong for industry among present employees."[71]

In contrast with their pro-industry sympathies, non-profits may depend almost entirely on the federal government for financial support. The Bell Report considered the relation between these contractors and the government.

> [T]he developments of recent years have inevitably blurred the traditional dividing lines between the public and private sectors of our Nation. A number of profound questions affecting the structure of our society are raised by our

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70 *See* text accompanying notes 49 to 52 *supra* for a discussion of the founding of RAND. As a RAND official explained to Congress, the board of trustees were drawn "one-third from industry, one-third from the academic field, and one-third which we call the public interest, like foundation presidents and so on." *Systems Development and Management*, *supra* note 42, at 940 (testimony of F.R. Collbohm, President, RAND Corporation).

Aerospace's incorporators were a Wall Street counsel for Boeing and General Dynamics, a research administrator in an organization that was reliant on defense contracts, and a career air industry executive. Trustees were drawn from those with similar backgrounds. The Wall Street counsel, Roswell Gilpatric, subsequently was the subject of allegations of conflict of interest for his role, as a Defense Department official, in the TFX controversy. The Senate's Brief against Gilpatric appears in SENATE COMM. ON GOVERNMENT OPERATIONS, TFX CONTRACT INVESTIGATION, S. REP. NO. 1496, 91st Cong., 2d Sess. 38 (1970). The allegations are notable because defenders of the elite system of non-profit governance suggest that principles of honor (and not law) are adequate to govern the non-profits. *See also Systems Development and Management*, *supra* note 42, at 940.

71 Letter from James McCormack, Aerospace Corporation, to David Packard, Deputy Secretary of Defense (June 7, 1971) *reprinted in Fiscal Year 1973 Authorization for Military Procurement, Research and Development, Construction Authorization for the Safeguard ABM, and Active Duty and Selected Reserve Strengths: Hearings Before the Senate Comm. on Armed Services*, 92d Cong., 2d Sess. 3239 (1972) [hereinafter cited as *Fiscal Year 1973 Authorization Hearings*]. The reader should avoid confusing RAND's and Aerospace's ties to industry which now exist with the direct ties which existed before the severances with Douglas and TRW discussed in text accompanying notes 49 to 56 *supra*. Whereas RAND and Aerospace were formerly subsidiaries of particular manufacturers, they now have less direct, but broader connections with the entire industry, of the kinds described in the text.

> inability to apply the classical distinctions between what is public and what is private. For example, should a corporation created to provide services to Government and receiving 100 percent of its financial support from Government be considered a "public" or a "private" agency? In what sense is a business corporation doing nearly 100 percent of its business with the Government engaged in "free enterprise."[72]

Great potential for harm to the public interest dwells in the non-profits' financial dependence on government and allegiance to industry. Yet there has never been a meaningful, *independent* evaluation of the work of these non-profits.[73] Instead, periodic evaluations are entrusted to "independent" groups whose composition parallels the make-up of the non-profits' boards of trustees.[74] Thus, Aerospace offered Congress an "independent" evaluation of its work, meaning an evaluation performed by industry executives. Aerospace explained with this curious syllogism: "Since Aerospace necessarily gets deeply involved in the affairs of these companies, one need not fear any undue bias toward Aerospace

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72 Bell Report, *supra* note 42, at 209-10. The questions the Report raised have more than philosophical significance. The dependence of the non-profits on federal money also raised a legal question. The Government Corporation Control Act of 1945, 31 U.S.C. §§ 841-71 (1970), prohibits the creation of government corporations without the approval of Congress. Non-profit corporations such as RAND do not fall within the prohibition, but Harold Seidman notes:

> In many respects the not-for-profit corporations are indistinguishable from early Government corporations chartered under law. Seemingly, the Government Corporation Control Act provision that "no corporation shall be created, organized, or acquired by any officer or agency of the Federal Government . . . for the purpose of acting as an agency or instrumentality of the United States, except by or pursuant to an Act of Congress specifically authorizing such action" would apply to not-for-profit corporations.

H. SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION 259-60 (1970). Even Seidman recognizes that an amendment to the act would be necessary to bring non-profits within its prohibition. *System Development and Management*, *supra* note 42, at 57-58.

73 D. GUTTMAN & B. WILLNER, THE SHADOW GOVERNMENT 134-49 (1976), pieces together the public evidence regarding the performance of the Mitre Corporation. This evidence suggests that Mitre has been continually associated with multi-million (and multi-billion) dollar efforts that are at best "style changes" and, at worst, failures. The authors found, however, no comprehensive independent public analysis of the sum of Mitre's work for the Air Force.

74 *Id.* at 143-46.

by these gentlemen."[75] Not surprisingly, the evaluations treat the non-profits gently.[76]

These materials lead to the conclusion that the non-profits are independent of neither industry nor the government, but, in fact, depend on both for their livelihood. The dual service of the non-profits is particularly troublesome because many of the functions the non-profits have been created to assume have traditionally belonged to public officials.[77] The military non-profits were created to serve as an alternative to the civil service and a lever by which top political officials could circumvent civil service bureaucracies that, it was said, were wedded to old technologies.

The RAND experience is illustrative. As recounted by Bruce Smith, Curtis LeMay, the Air Force manager of the RAND contract, was dispatched to squelch an incipient rebellion among military procurement officials against contractor assistance in military planning. LeMay overruled a proposal that involved "telling the contractor what it should do and specifying [a research program] in rigid detail . . . .

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75 Letter from James McCormack, Aerospace Corporation, to Dr. John S. Foster, Director, Defense Research & Engineering, Department of Defense (March 25, 1973), *reprinted in Fiscal Year 1973 Authorization Hearings, supra* note 71, at 3237.

76 *See* THE SHADOW GOVERNMENT, *supra* note 73, at 143-49.

77 Even the Comptroller General, head of the General Accounting Office and protector of federal monies, condoned this delegation:

> In one report of May 19, 1960, on our review of the administrative management of the development programs of the THOR, ATLAS, & TITAN missiles, we stated that the Air Force had, since inception of the programs in 1954, relied on a private contractor for the systems engineering and technical direction of the programs without taking steps to develop its own staff to perform these functions. We pointed out the disadvantages of delegating to a private contractor the management of programs so vital to the welfare of the Nation.
>
> We recommended that the Secretary of Defense take appropriate steps to develop capability within the Air Force to provide systems engineering and technical direction. The Air Force subsequently made a study of the problem and, pursuant to the recommendation of the study group, a private non-profit corporation was established to provide certain technical support for future balistic missile programs. However, the contractor who is providing systems engineering and technical direction for the current missile programs will continue to serve in that capacity for those programs.

COMPTROLLER GENERAL, COMPILATION OF GENERAL ACCOUNTING OFFICE FINDINGS AND RECOMMENDATIONS FOR IMPROVING GOVERNMENT OPERATIONS FISCAL YEAR 1960, H.R. DOC. 212, 87th Cong., 1st Sess. 80 (1961). *See* Homann, *Weapons System Concepts and Their Pattern in Procurement*, 17 FED. B.J. 402, 406-07 (1957).

[T]he purpose of the project was not to state a requirement and tell the contractor what to do. Rather, the contractor was to perform long-range research that might form the basis for future military requirements."[78]

Harvey Sapolsky, a student of the weapons systems of the fifties, describes the delegation of public spending functions to STL (Aerospace's predecessor):

> The Air Force . . . retained financial control of the projects . . . STL, however, was acting as the Air Force's Technical Staff in the highly technical development effort, and, in this capacity, it obviously gained substantial influence over dollar allocations and contractor selection. Thus, in the Air Force ballistic missile program, STL directed the missile developments, advised on the formation of development goals, and evaluated progress toward meeting the announced development goals.[79]

Conflict-of-interest laws seek to protect the public interest with independently-made government decisions. The hardware ban regulations which govern "organizational conflict of interest" seek to protect only private competitors' interests and neither attempt nor succeed in assuring the independence of government decisions.

B. *Patterns of Contracting Conflicts of Interest*

The tradition of prohibiting conflicts of interest has a giant loophole — contracts.[80] The RAND and Aerospace examples only hint at the size and the importance of the loophole. Contractors perform services other than R&D, and they work for agencies other than the Defense Department. Moreover, RAND and Aerospace are atypical insofar as they grew in primary reliance on funding from the public agencies that created them. More typically, contractors possess mixes of public and private clientele. The cadre of contract experts has become far more than an incidental appendage to the official bureaucracy: contractors undertake sensitive and important public functions, sometimes without any public official ready to, or capable of double-checking the contractor's work.

78 THE RAND CORPORATION, *supra* note 49, at 46-47.

79 H. SAPOLSKY, POLARIS SYSTEM DEVELOPMENT 84-85 (1972) [hereinafter cited as SAPOLSKY].

80 *See* Section II *supra.*

In broadest terms, the contract bureaucracy has taken on three roles:

> A) as developers and promoters of solutions to political, social, and economic problems — the R&D role;
> B) as liaison between the federal government and the world of private and public, non-federal organizations — the management role; and
> C) as agents of top political appointees — contractors are the means by which each generation of new appointees seeks to control the civil service bureaucracy.

In each of these roles contracting conflicts of interest can be identified. The lack of prohibitions on such conflicts is linked, in the analysis which follows, to a variety of harms. In R&D, contractors have been enabled to manipulate social priorities and national policies. As management contractors, private organizations distort governmental regulation of the private sector, and stifle attempts to oversee federal spending programs and make them accountable. Finally, when used to control the civil service, contractors adversely affect the morale of federal employees.

The contractor may be chosen precisely because of, and not despite, his private affiliations. The reasons for this choice become more apparent when the functions served by contractors are examined. An enumeration and brief sketch of these functions will, in turn, suggest the problems posed by the daily use of contractors. While many of these problems fit within the traditional notion of "conflicts of interest," other types of government malaise, such as inefficiency, can also be seen in the examples.

1. Patterns of Conflict in Research and Development Programs

Since World War II, the federal government has been the major source of R&D funds. To the citizen the term "R&D" may conjure up the image of the laboratory scientist. If it does, it is testimony that Uncle Sam is no less an image maker than Madison Avenue.

The common denominator of federal R&D spending is not

scientific but bureaucratic and political. R&D is a budget category, and the classification of something as R&D does not necessarily imply judgment about its substance. For example, in the early fifties, as science acquired celebrity, much defense spending was simply reclassified as "R&D" in order to attain further public support. The classification of funding as R&D generally implies considerable agency discretion in the direction and administration of funds. Typically, this discretion is used to spend money on private contractors (or grantees). Above all else, R&D is a contract sport. The central theme of R&D spending is not science but industry. Specifically, R&D is the means by which the government creates new industries or stimulates old ones. As a leading business journal recently lamented, "The government created the nuclear industry . . . and the industry survives today only with government support . . . . [T]he federal government, unhampered by bottom-line considerations, could spawn whole new industries that never learn to stand on their own."[81]

"Industry," it must be noted, is defined generically by practitioners of R&D. Public agencies and private non-profit ones, as well as profit-making corporations, are all viewed as industrial organizations. Thus, HEW funds provide R&D dollars to "reform" the "education industry," which includes public schools, public education agencies, teachers' colleges and textbook publishers.

The contractors who will reap the long-term profit of R&D spending often have important influences in the direction of spending. For example, Bechtel Corporation was awarded a contract to study alternative means of transporting coal from the mines in the Western states to consumers in the East. At the same time, Bechtel had a substantial interest in a company which hoped to receive government assistance in building a coal slurry pipeline — one of the alternatives Bechtel was to consider.[82]

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81 BUS. WEEK, April 4, 1977, at 80.

82 The Bechtel example is discussed more completely at text accompanying notes 134 to 135 *infra*.

A better known example is the Atomic Energy Commission (AEC; recently split into the Nuclear Regulatory Commission and ERDA) which performed all of its research in laboratories administered by private contractors. The contractors included Westinghouse and General Electric, which are now the dominant suppliers of nuclear hardware.[83] Two analysts of AEC activity have noted that:

> Some think that Westinghouse and GE attained their present dominant positions as the leading manufacturers and suppliers of nuclear power plants because of technological "know-how" obtained from their earlier experience as AEC prime contractors .... And of course this is true. But some significance must be attached to the evidence that certain professionals at Bettis and Knolls Laboratories — who were Westinghouse and GE employees, respectively, and at the same time, quasi-employees of the AEC — occupied strategic positions which provided them with unique access to responsible officials within both the AEC and their own companies .... [T]hey were able to act as agents for bringing policy positions of their industrial employers and the AEC into closer working accord.[84]

Along with NASA and the Defense Department, the AEC set the "model" for R&D spending.[85] The essence of this model is use of public dollars to subsidize the birth and growth of entire industries. The "success" of the DOD/NASA/AEC model (as measured by the ability to attract funding and public and congressional support) served to inspire the growth of "civilian" R&D spending in the sixties.

The R&D programs conducted by the Great Society sought to apply the Defense/AEC model with a novel theoretical

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83 *See, e.g.*, Arthur D. Little Co., Competition in the Nuclear Power Supply Industry (December 1968) (Report to U.S. Atomic Energy Commission and U.S. Department of Justice). This report is discussed more fully at notes 90 to 94 *infra*.

84 R.R. BLACK & C. FOREMAN, TECHNOLOGICAL INNOVATION IN CIVILIAN PUBLIC AREAS, 23 (1967). For descriptions of the nuclear laboratories, *see generally* U.S. Atomic Energy Commission, Office of Information Services, Atomic Energy Commission Research and Development Laboratories: A National Resource (September 1973), *reprinted in AEC December 1, 1973 Report on Energy Research and Development: Hearing Before the Joint Committee on Atomic Energy*, 93rd Cong., 1st Sess. Appendix 4 (1973).

85 The primary variant on this model is the highly successful (in terms of dollars) government support of biomedical research.

twist.[86] The R&D offices of agencies such as HUD, the Office of Education, the Office of Economic Opportunity, the Urban Mass Transit Administration, and even the Postal Service contended that the primary cause of "social" problems was the technological and managerial backwardness of those entrusted with the provision of social services.

Housing problems, for example, were said to be caused by the parochial interests of local builders, who, in a league with local unions and zoning and building officials, resisted the introduction of management and technological innovation in housing.[87] In housing, the government was not simply funding one competitor over another, but one vision of an industry over another. Simply put, it pitted "progressive" corporations like Lockheed and Westinghouse against the relatively small corporations that characterized the "traditional" housing industry. While the aim of the game was quite clear to the "old" housing industry, it lacked the clout to dissuade the government from its efforts to create an alternative industry.

The solution promoted for the housing crisis was also promoted in other social service establishments, such as health, transportation, and education. In the trade, the proponents of social R&D called for "market aggregation" — this meant the creation of enough business (through federal subsidies) to attract large private companies into the battle against social ills.

The contemporary government R&D program, in short, makes the evils which traditional conflict of interest law sought to prevent appear minor. In choosing to fund and promote one form of industrial organization over another, the government is not simply providing special privilege for one individual, but for entire industries. Moreover, the consequence of this privilege is not simply the potential for private

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86 The themes and theory of "technological reform" are discussed in THE SHADOW GOVERNMENT, *supra* note 73, ch. V.

87 White House Panel on Civilian Technology, Executive Office of the President, U.S. Office of Science and Technology, Better Housing for the Future (1963). *See also* D. NELKIN, POLITICS OF HOUSING INNOVATION (1971); President's Committee on Urban Housing, A Decent House 5 (1967).

gain but, by intention, the remaking of the political and economic structure. While the modern concept of organizational conflict of interest serves to protect the interests of certain powerful players in the game, the interests of those unlucky enough to receive no funding are wholly unprotected.

2. Patterns of Conflict in Management Contracts

While R&D budgets are excessively devoted to nourishing private "expertise," the federal government also relies on private contractors in the planning and management of virtually all of its everyday activities. For want of a better word, these contracts will be called "management contracts." As a practical matter, the substance of work under a management contract may be identical to work under an R&D contract. For example, under either type of funding, the contractor may be hired to "survey the literature" or to broker relations between the government and the private sector. This overlap should not be a surprise, since, as discussed previously, the classification of work as "R&D" has more to do with political arts than political science. There are, however, certain consequences of the categorization.

First, only R&D contracts are subject to hardware ban regulations. Second, many statutes which authorize R&D monies prefer that those monies be spent by private enterprise.[88] Thus, whether or not it is wise policy to contract for

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88 The first statutory statement which could be called a general federal policy favoring contracting was included in the 1974 Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-12 (1976). "The functions of the Administrator shall include — . . . (3) monitoring and revising policies, regulations, procedures, and forms relating to reliance by the Federal Government on the private sector to provide needed property and services . . . ." 41 U.S.C. § 405(d). This statute hardly carved a pro-contracting policy into stone. Moreover, the Act denied that it made any change in policy: "Procurement policies, regulations, procedures, or forms in effect as of August 30, 1974 shall continue in effect, as modified from time to time, until repealed, amended, or superseded by policies, regulations, procedures, or forms promulgated by the Administrator." 41 U.S.C. § 409. Presumably, the policy established by OMB Circulars A-49 and A-76 would be among the procurement policies continued under this section. *See* note 89 *infra*.

The Office of Federal Procurement Policy interprets its authorizing statute as a

R&D, it is at least in some instances congressional policy. There have been administrative efforts to limit the use of contracts (both R&D and otherwise) to avoid de facto "delegations" of "management functions" (personnel selection, organization, planning, evaluation) to contractors.[89] As this section will show, these administrative efforts have not been enforced — contractors play an important, if obscure role in designing, administering, and evaluating programs by which the federal government subsidizes and regulates the world of public and private organizations about it.

a. The Regulation of Industry

With seeming elan, the government seeks aid from contractors with industry affiliations to perform a wide range of tasks necessary to the government's regulatory functions. The conflicts of interest which contractors encounter when hired by regulatory agencies fall into three patterns. First,

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statement of a general policy favoring contractors. Telephone interview of Bill Russell, Deputy Assistant Administrator, OFPP, by Tom Singer, November 11, 1977.

89 This limitation on contracting is reflected in Use of Management and Operating Contracts, Bureau of the Budget Circular A-49, 2 GOV'T. CONT. REP. (CCH) ¶7700 (Feb. 25, 1959). This circular set guidelines for the hiring and supervision of private companies under "management" and "operating" contracts; urged agencies to evaluate contractor performance; and provided suggested standards for evaluations (*id.* at Attachment A). A-49 apparently has been forgotten by the Bureau (now the Office of Management and Budget) and the contract industry. Supporters of the liaison of the contract bureaucracy and the Office of Federal Procurement Policy rely, mistakenly, upon a later circular which creates a presumption that the government will acquire products and services from private industry whenever time, technology, and cost efficiency permit. Policies for Acquiring Commercial or Industrial Products and Services for Commercial Use, Office of Management and Budget Circular A-76, 1 GOV'T. CONT. REP. (CCH) ¶ 990 (March 3, 1966).

A-76 does state the "general policy of relying on the private enterprise system to supply [the government's] needs" for products and services available from private industry. *Id.* §2. But Circular A-76 also restates the underlying premise of the earlier directive, A-49, that contracting policies do not "alter the . . . requirement that executive agencies will perform for themselves those basic functions of management which they must perform in order to retain essential control over the conduct of their programs. These functions include selection and direction of government employees, assignment of organizational responsibilities, planning of programs, establishment of performance goals and priorities, and evaluation of performance." *Id.* § 4(b). Nor does A-76 apply to "managerial advisory services such as those normally provided by . . . Government staff organizations or . . . private sources as deemed appropriate by executive agencies." *Id.* § 4(c).

agencies hire contractors to conduct studies and gather data on industries with which the contractor is affiliated. Second, contractors advise agencies on the treatment of industries which include the contractor's clientele. Third, contractors closely connected with the regulated industry audit and reorganize regulatory agencies.

When government agencies need information about the industries they regulate, they often turn to contractors to conduct surveys, gather data, and analyze the results. The contractors frequently have close connections with the industry being studied. For example, in the mid-sixties, the Atomic Energy Commission and the Department of Justice jointly commissioned Arthur D. Little Co. (ADL) to study "competition in the nuclear power supply industry."[90] The study was "designed to develop economic and technical information [to] help the government promote the sound and competitive growth of an industry still in its formative stages . . . ."[91] While ADL refused to reveal publicily its affiliations with the industry "because most of our [ADL's] work with private clients is confidential . . .,"[92] it served as a consultant to major companies in the energy industry and actively involved itself in research on energy technologies.[93]

Why did the government rely on a private contractor with industry connections to perform such an important study? As ADL explained:

> [The study relied] on the cooperation of government and of the industry and its customers . . . . To a large extent industry cooperation was enhanced by assurances from the Department of Justice and the Atomic Energy Commission that confidential treatment could be accorded by Arthur D. Little, (ADL) to information provided by the industry. The Department of Justice and the AEC stated

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90 Arthur D. Little Co., Competition in the Nuclear Power Supply Industry, (December 1968) (Report to U.S. Atomic Energy Commission and U.S. Department of Justice).

91 *Id.* at 3.

92 Arthur D. Little Co., *Annual Report* 13 (1969).

93 An ADL employee, for example, has been a leading promoter of increased expenditures for solar technology. The firm has also performed studies of utilities, such as Virginia Electric Power and Consolidated Edison, and has studied energy use for major energy users, such as General Motors.

> that they would "not use ADL's files as a source of information for investigative purposes and do not intend to request from ADL detailed information in order to enforce laws subject to their jurisdiction." It would be the intent of both agencies to obtain information for such purposes directly from the companies and the individuals involved.[94]

Thus, the government delegated its data-gathering function to a private corporation under terms carefully drafted to insure that neither the public nor responsible official agencies would have access to the basic data collected. The terms of the contract called into question the meaning and usefulness of the information.

A second pattern arises when contractors influence the regulatory treatment of an industry. The influence may be specific — when the contractor advises the agency concerning a particular company — or general — when the contractor drafts regulations applicable to a whole industry.

An example of the former is found in the simultaneous service of Peat, Marwick, Mitchell and Company (PMM), the large accounting and consulting firm, to the Department of Transportation and the Penn Central Transportation Company (PCTC). From 1959 until 1970, PMM's auditing and consulting work for the Penn Central (and its predecessors) earned it $5 million.[95] Federal funds partially supported Penn Central's Metroliner project. In 1969 the Department of Transportation wanted an accounting of the project's costs; it hired PMM. Against charges of conflict of interest, PMM vigorously defended its employment: "We maintain that because of the mutual interest of both PCTC and FRA in the study, the selection of a consultant that had the necessary qualifications and expertise and that possessed the mutual confidence of both parties at interest was necessary to an acceptable result.... We did not then, and do not now, consider

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94 Competition in Nuclear Power Supply Industry, *supra* note 90, at 3-4.

95 The information on the Peat, Marwick/Penn Central consulting was initially presented in *Legislative Oversight Review of the Civil Service Commission: Hearings Before the Subcomm. on Investigations of House Comm. on Post Office and Civil Service,* 92d Cong., 2d Sess., 166-67 (1972) (testimony of Daniel Guttman and Barry Willner). PMM's response to this testimony appears at pages 236-49.

the Firm's role on this project as representing any conflict of interest."[96]

The Department, for its part, agreed with PMM. It not only had singled out the PMM partner in charge of the Penn Central audit to work on the contract but also extended PMM's contract even after the firm's services with the bankrupt Penn Central were terminated.[97]

A similar use of "interested" contractors may occur when agencies through rulemaking are seeking to set industrial standards. The effort to establish federal occupational health standards for asbestos is demonstrative. Paul Brodeur, author of a study on industrial hygiene, found that after the Department of Labor had apparently settled on appropriate levels for asbestos regulations, ADL was commissioned to perform a study that reopened questions which seemed to have been resolved. The ADL study concluded that appropriate safeguards could be more lenient than those on which the Department appeared to have settled. ADL's study had relied on a panel of industrial advisors. Moreover, ADL performed the study while advising a private client in the asbestos business on the desirability of relocating to avoid strict occupational health standards. Despite the apparent conflicts of interest, the Department of Labor questioned neither the decision to hire ADL nor the impartiality of ADL's recommendations.[98]

A third pattern of conflict in the regulation of industry arises when contractors are involved in administrative reforms, the pattern of which is well established. Following irrepressible evidence of failure, agencies commission studies to point the path to reform. Following such studies, agencies reorganize themselves. Very often, "interested" contractors

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96 *Id.* at 245.

97 *Id.* at 246. The continuation of the contract illustrates that the actual operations of the contract bureaucracy are often stranger than what might be assumed. While there is a rationale, however questionable, to the public employment of Penn Central's auditor, the continued employment of the auditor following the calling into question of its work for Penn Central might not be expected.

98 P. BRODEUR, EXPENDABLE AMERICANS (1974).

are employed to point the path to reform, and even to direct the reorganization.

An example of an evaluation of an agency by an interested contractor was revealed in 1970, when congressional concern over the decline in rail passenger service led to an investigation of the Interstate Commerce Commission's methods of approving passenger service abandonment applications.[99] The ICC required applicants to submit evidence that abandonment would result in substantial savings. The railroads often hired consulting firms to produce these "avoidable cost" studies. Inevitably, the studies predicted substantial savings; but no analysis of the accuracy of the predictions had ever been conducted.

When the House Interstate and Foreign Commerce Committee asked the Federal Railroad Administration for such an analysis, the FRA hired Wyer, Dick and Company to perform the work.[100] Wyer, Dick was one of the consulting firms that had produced the "avoidable cost" studies, and, at the time of the contract, was on retainer to two of the eight railroads the contract required Wyer, Dick to study. Instead of producing the analysis the committee had requested, Wyer, Dick provided another study predicting savings from passenger service reductions. When the committee chairman, Harley Staggers, voiced his objection to the choice of Wyer, Dick, the FRA stood fast. All the qualified firms, it explained, worked intensively for the railroads.[101]

Contractors affiliated with regulated industries are often hired to reorganize regulatory agencies. The Food and Drug Administration (FDA) in the mid-1960's hired Booz Allen and Hamilton, a management firm that had diversified into a "professional services" conglomerate, to conduct an "across-the-board analysis of field activities, goals, objectives,

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99 *Passenger Train Service: Hearings Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce,* 91st Cong., 2nd Sess. (1970).

100 The Wyer, Dick study is debated in exchanges that appear in *id.* at 77-80, 90-94.

101 *Id.*

organization, and opportunities" in the FDA's Bureau of Compliance.[102] Booz was intimately connected with the food and drug industries. James Allen, of the firm's title, served as director of both Abbott Laboratories, a major drug producer, and Jewel Companies, a major warehouser and distributor of drugs, groceries, and other consumer goods. A division of Booz specialized in consulting for health organizations, and an affiliate, Foster D. Snell Co., provided assistance to the biomedical industry, specifically in the preparation of applications for FDA licensing of new drugs.[103] Finally, at about the same time as this FDA contract, one of the major drug industry trade associations hired Booz to study its organization.[104]

Consistent with industry wishes, Booz recommended reducing legal action by the Bureau of Compliance. "Industry self-regulation and other voluntary efforts within established guidelines are expected to increase in significance as the FDA places greater reliance on cooperation by state agencies and industry."[105] Booz's emphasis on voluntary compliance was doubly curious. Booz's study not only failed to document its conclusions on industry's response to a policy of voluntary compliance but, in urging this policy, provided a conclusion not called for by the contract. The firm had been hired to study the FDA's Bureau of Compliance; the FDA had a distinct bureau for voluntary compliance.[106] Thus,

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102 Contract FDA 66-186 (1966) (presumably on file at the Food and Drug Administration).

103 Moreover, Snell advertised that its services "are supported as required by the experience and assistance of other parts of Booz, Allen and Hamilton." Product and Process Development, Foster D. Snell Inc., (1970).

104 THE SHADOW GOVERNMENT, *supra* note 73, at 151.

105 The quotation appears in the reports for contracts FDA 66-186 and 67-59.

106 The true relation between Booz's work for FDA and its work for the industry remains a subject for conjecture. Booz itself refused to volunteer the names of clients, much less the substance of its work. The FDA contract files revealed no record of the firm's private clientele and FDA officials stated that no request for disclosure was made.

The denouement of the Booz story is an example of the way in which the true role of the contractor may be more perverse, if less culpable, than the apparent role. Booz' initial study led to a second contract to "implement" the firm's reorganization proposals. The contract's termination approximately coincided with the inauguration of Richard Nixon in 1969. Nixon chose Dr. Charles Edwards, a Booz Allen consultant with special experience in consulting for health organizations, to head FDA.

agencies are evaluated by contractors affiliated with regulated industries.

In the preceding examples, the regulatory agencies relied on a contractor to perform some function which was essential to the agency's operation. By turning to contractors which were affiliated with the industry which the agency regulates, the agency invited the contractor to incorporate industry positions in the contract product. The public interest in impartial decision-making was sacrificed.

2. The Administration of Spending

Thus far, this section has shown how the government regulatory agencies employ private contractors with affiliations to the industries that are the objects of regulation. Patterns of dual service by contractors extend to the administration of spending programs as well.[107] There, the object of federal management includes the contract bureaucracy itself. Conflicts of interest in this role arise in two ways: 1) when the government calls upon a single contractor to perform more than one function with regard to a particular program, and 2) when the contractor works simultaneously for a federal program and for (or as) the direct recipient of the program's funds.

When one contractor performs more than one function on a

Edwards stated that he was not, as a Booz employee, associated with the FDA study. As an FDA official, he saw nothing inappropriate in the employment of Booz — despite its private interests. Later, as a government official, he stated that Booz recommendations had evidently been neglected.

107 The growth of domestic grant programs which accompanied the growth of federal social spending in recent decades spawned and sustained new varieties of contract experts. Federal highway funding gave birth to highway planners. N. ABEND & M. LEVIN, BUREAUCRATS IN COLLISION (1971); H. LEAVITT, SUPERHIGHWAY — SUPERHOAX (1970). The Housing Act of 1954 encouraged "comprehensive" urban planning. Under the Model Cities Act, local programs were to "include to the maximum extent feasible (1) the performance of analyses that provide explicit and systematic comparisons of costs and benefits . . . of action designed to fulfill urban needs; and (2) the establishment of programming systems designed to assure effective use of such analyses." 42 U.S.C. § 3303 (1970). Now, environmental legislation supports experts who turn out environmental impact statements. *See* Schindler, *The Impact Statement Boondoggle,* 17 JURIMETRICS J. 1 (1976), *reprinted in* 192 SCIENCE 509 (1976).

particular program, the government loses opportunities to have the contractor's work analyzed impartially. For example, in the past decade and a half, a small number of private organizations have been instrumental in the development of management systems which Congress and the public have been told would end wasteful defense spending. One such system computerized information about progress under a construction program;[108] the theory was that adequate information would be used to halt wasteful spending. Private experts helped the military write regulations which required construction contractors to adopt such systems, taught the new rules to public and private procurement officials, helped contractors comply with the regulations, and helped the military oversee the contractors.[109]

By the late 1960's, it was apparent that the management systems had not controlled costs[110] and that the private experts had no special claim to wisdom. Peat Marwick, for example, designed and helped manage a cost control system for

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108 For those familiar with the jargon, the particular system is "PERT." PERT was developed by a consultant team hired by the Navy management of the Polaris submarine project. The success of the Polaris project led to the assertion (by management consultants) that PERT was the key to all manner of management activities. THE SHADOW GOVERNMENT, *supra* note 73, at 183. The Defense Department employed PERT in all major weapons projects over the decade following the Polaris project, without similar success. The Polaris success could also be attributed to the fact that the Navy managed the project in-house. *Id.*

109 *See generally* A.E. FITZGERALD, THE HIGH PRIESTS OF WASTE (1972). Fitzgerald tells of McKinsey's work for the Department of Defense on the Cost Management Improvement Program during the 1960's.

110 The rise and fall of the reforms during Robert McNamara's tenure as Secretary of Defense produced numerous volumes of hearings. On their rise, *see generally Systems Development and Management, supra* note 42. On their fall, *see The Military Budget and National Economic Priorities: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Committee,* 91st Cong., 1st Sess. (1969); *Capability of GAO to Analyze and Audit Defense Expenditures: Hearings Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations,* 91st Cong., 2d Sess. (1970); *TFX Contract Investigation (2d Series): Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations,* 91st Cong., 2d Sess. (1970); *Policy Changes in Weapons System Procurement: Hearings Before A Subcomm. of the House Comm. on Government Operations,* 91st Cong., 2d Sess. (1970); *The Acquisition of Weapon Systems: Hearings Before the Subcomm. on Economy in Government of the Joint Economic Comm.* 91st Cong., 2d Sess. (1970); *Weapon System Acquisition Process: Hearings Before the Senate Comm. on Armed Services,* 92d Cong., 2nd Sess. (1972).

a Navy project whose costs rose from an estimated $680 million to an estimated cost of almost $4 billion during the sixties.[111] Yet those who promised to pick up the pieces relied on the very same expertise that had designed the earlier management systems. Thus, the General Accounting Office hired PMM to study cost overruns in defense spending,[112] and PMM and other firms were hired by the Defense Department during the Nixon Administration to design curriculum and provide instruction for a training school for a new generation of procurement managers.[113]

Similarly, the Department of Transportation has continuously employed contractors to tell it how to manage its R&D spending — *i.e.*, how to give money to contractors. Its advisors on R&D management were, in succession, a nonprofit contractor specializing in the study of capital-intensive projects (Applied Physics Laboratory), a large industrial corporation with sizable R&D contracts with the Department (Sperry Rand), and a corporate consulting firm with numerous transportation industry clients (McKinsey).[114]

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111 PMM's role in the Mark 48 Affair is described in *Legislative Oversight, supra* note 95, at 161-64 & 239-42.

112 Contract GAO-715 (Oct. 29, 1969). According to Hassell Bell, the GAO official who employed PMM, the agency had no knowledge of PMM's work on the Mark 48 when the contract award decision was made. Bell knew only that the PMM principal had "gained his background on the subject through several years' employment with a large aerospace contractor and two separate management firms." (The contractor was Boeing, and the firms were Management Systems Corporation and PMM). These "details" were provided to the GAO only upon the request of the GAO bureaucracy, and were not part of the hiring decision. In short, according to Bell, the GAO made no inquiry into the usefulness of the work performed for the Defense Department by PMM. Interviews with Hassell Bell, Winter 1971-72; Letter from Bell to Daniel Guttman (undated). Even the lowest-grade GAO employees are required to place more of their background in the record than PMM did. The PMM track record was later filed with the GAO. Letter of Pohn Sieck to Bell (Oct. 15, 1969).

113 The educational "reform" is described in Scott, *Educating the DOD Program Manager*, DEF. MANAGEMENT JOURNAL (April 1972). Curriculum details were provided in Letter of William O. Thurston to Daniel Guttman (undated).

114 The Department initially denied a Freedom of Information request relating to the Sperry Rand studies on grounds, *inter alia*, that "we regard them as intra-agency memoranda." Letter of Oscar O. Griffin, Jr., Acting Director, Office of Public Affairs, Office of the Secretary of Transportation, to Daniel Guttman (January 14, 1972). Letter of John W. Barnum, General Counsel, Department of Transportation, to Daniel Guttman (March 31, 1972). Of course, Sperry Rand is not on the agency's official organization chart.

A final example comes from the block grants program administered by the Law Enforcement Assistance Administration (LEAA). As in most domestic grant programs, a potential recipient must submit plans to receive a grant. Federal funds are provided for "planning grants" to employ the experts necessary to prepare the plan. When plans are approved, federal funds for "technical assistance" are available to hire experts to implement the plans.[115] The experts, of course, are often contractors.[116]

A large part of Indiana's early LEAA grants, for example, went to Ernst & Ernst, a major accounting firm. Ernst & Ernst won contracts to prepare Indiana's application for a planning grant, to prepare the 1969 plan, the 1970 annual report, the 1970 plan, the 1971 planning grant application, the 1971 comprehensive plan, and the 1972 comprehensive plan. When the plans were approved, Ernst & Ernst received the contract to implement the plans. Thus, Ernst & Ernst was involved in planning, evaluating, and implementing Indiana's program. A $7,200 planning grant led to a $20,000 action grant.[117] When the Indiana planning agency was called to testify before Congress, Ernst & Ernst served as its consultant. "It sounds to me," marvelled Representative Dante Fascell, "as if an outsider prepares the whole plan for state operations starting at the local level, subgrantee, region, and the state, and he gets paid for that. Then the same consultant

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115 *See generally* Executive Office of the President, Office of Management and Budget, Catalog of Federal Domestic Assistance (1971). Consultants have promoted such spending since early in its history. It was the wisdom of the time that the Eisenhower Administration would turn back the tide of federal grant spending. Instead, the Eisenhower Commission on Intergovernmental Relations (Kestenbaum Commission) endorsed the grant economy. In studies for the Commission, McKinsey and Company tracked federal dollars to America's grassroots. McKinsey was "impressed with the influence of the grant-in-aid device, over a period of time, in lessening the power of the executive heads of state and local government." Local power, McKinsey predicted, would shift from politicians to "program professionals" and "professional groups" as the flows of grant dollars proceeded. *Background Papers on Washington State, Final Report of the Commission on Intergovernmental Relations* 88 (1955).

116 *See* THE SHADOW GOVERNMENT, *supra* note 73, at 198-99.

117 *See generally* HOUSE COMM. ON GOVERNMENTAL OPERATIONS, 92ND CONG., 1ST SESS., BLOCK GRANT PROGRAMS OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION (12TH REPORT) 48-60 (1971). Ernst & Ernst's fees from Indiana under the LEAA grants totaled $286,000 as of November 1971. *Id.* at 52.

gets paid to see that it is implemented, and at this point one begins to wonder what the state agency is doing."[118]

The second type of conflict of interest in the administration of spending occurs when the contractor works simultaneously for the federal government and for the recipient of federal funds. Ernst & Ernst's work for the Indiana planning agency under the LEAA grants also falls within this type of conflict of interest. The grants required regional plans as well as state plans. Ernst & Ernst prepared plans for both regions and states and evaluated and implemented plans for both.[119]

The conflicts between the contractor's functions as advisers for both the federal government and the recipient of federal funds[120] invite the contractor to consider interests other than the federal government's when performing contracts. Just as in the conflicts of interest identified in the regulatory area, these examples from spending programs illustrate that the government has invited contractors with conflicting interests to influence the direction of government policy. This public interest in impartial decision-making is the concern of conflict-of-interest laws in the public employment area; when governmental authority in regulatory and spending programs is delegated de facto to contractors (as the examples show it has been) the concern for impartial decision-making should not be lessened.

3. Contractors as Weapons Against the Civil Service

High level administrators, including political appointees, regularly use contractors to manage and control the civil ser-

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118 *Id.* at 56.

119 *Id.* at 54-55.

120 For a measure of the size of the state, local, and federal clientele of the large accounting firms, *see* SUBCOMM. ON REPORTS, ACCOUNTING, AND MANAGEMENT OF THE SENATE COMM. ON GOVERNMENT OPERATIONS, 94TH CONG., 2D SESS., THE ACCOUNTING ESTABLISHMENT, A STAFF STUDY (1976). The Staff found that the number of offices within the United States for each of the "Big Eight" accounting firms ranged from 48 (Arthur Andersen) to 112 (Ernst & Ernst). In response to a Senate questionnaire the firms listed a vast number of state and local clients. In 1975, for example, Price Waterhouse performed services for more than 30 state agencies, more than 80 local government agencies, 18 local authorities, and 15 schools or school districts. In addition, the firm worked for two dozen federal agencies that year. *Id.* at 375-78.

vice.[121] This section will illustrate the government's use of contractors to organize and reorganize agencies and to select personnel.

While the public image of big government is that of an unchanging monolith, the fact is that each new political appointee does his best to reorganize and revivify the civil service bureaucracy. In doing so, he inevitably calls on the private expert — for the civil servant is prima facie to be suspected where the reform of the civil service is concerned. Pursuant to contractor study, the organization chart is redesigned and new faces are brought on board. However much this use of contractors would appear to be justified by the alleged disorganization and torpidity of the civil service bureaucracy, the justification represents the triumph of the short-term rationality over the type of "systems analysis" that is the private experts' ballyhooed stock in trade. Within a year or two, the agency receives a new administrator seeking to gain control over strange territory: he calls in a contractor and the cycle is repeated. Ultimately, the effect on the civil service and the quality of public management must be disorienting and demoralizing.

The pervasive role of contractors in the design of government agencies not only weakens the civil service bureaucracy, but facilitates the growth of contracting. Contractors, by organizing agencies, may literally divert functions from the civil service to contractors. For example, the first NASA administrator hired McKinsey & Company, a private consulting firm that serves many of America's largest corporations, to help "design" the new agency.[122] McKinsey's studies, both directly for NASA and for a blue ribbon review committee empaneled by NASA (at McKinsey's suggestion) urged that NASA contract out as

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121 This pattern easily could have been considered under the preceding subsection, for it is a type of management contracting. This pattern, however, deserves special attention because it is here that the greatest dangers from contracting conflicts of interest arise.

122 The story of NASA's early years is retold in R. ROSHOLT, AN ADMINISTRATIVE HISTORY OF NASA, 1958-63 (1963).

much as possible.[123] By 1960, nearly 85 percent of the NASA budget was being contracted. While McKinsey itself did not receive many, if any, NASA contracts in the 1960's, its potential private clientele were heavy beneficiaries of NASA contracting.

The public has never been permitted to focus on the odd relationship involved in private management of the civil service. For example, while the "poverty agencies" were continually attacked by politicians for mismanagement, it was blue chip corporate consulting firms that had designed the "management controls" which were to ensure the efficient operation of these agencies.[124]

Contractors may also lessen the civil service's influence by selecting key government personnel. Since at least the Eisenhower Administration, successive administrations have used private management consultants to help locate candidates for top public offices.[125] The Department of Health, Education and Welfare, for example, called on Peat, Marwick to locate top officials for the Department.[126] PMM filled,

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123 Rosholt states that the work of the blue ribbon group was essentially an exercise in blandness. "There is no doubt that its recommendations were cautious and conservative and in most cases invoked continuation of the status quo." In only one area did the report provoke controversy. "Most NASA officials felt that in-house activity had to be more than the minimum necessary to keep tabs on out-of-house efforts." *Id.* 168-69.

124 When Booz Allen reorganized OEO, for example, the major accomplishment was a redesign of the organization chart. OEO also implemented two other Booz recommendations — technical assistance (*i.e.,* contract) funds were increased and the selection process for VISTA volunteers was contracted to General Electric. *See* THE SHADOW GOVERNMENT, *supra* note 73, at 73.

125 President-elect Eisenhower retained McKinsey and Company to identify key decision-making positions in the Executive branch, and to locate individuals to fill them. In the course of their work, McKinsey produced a multi-volume set (for distribution to cabinet level managers). McKinsey & Co., Restaffing the Executive Branch of the Federal Government at the Policy Level (1952). McKinsey was hired to perform similar work for the Kennedy Administration, and former McKinseyite Fred Malek later headed the Nixon Administration's "talent search" office. That office's politicization of the "merit system" has been the subject of congressional investigation. *See, e.g.,* SUBCOMM. ON MANPOWER AND CIVIL SERVICE OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 94TH CONG., 2D SESS., FINAL REPORT ON VIOLATIONS AND ABUSES OF MERIT PRINCIPLES IN FEDERAL EMPLOYMENT TOGETHER WITH MINORITY VIEWS (1976).

126 Office of Education Contract OEC-O-70-4570(099) (1970). The firm was to report to William Marumoto, a former PMM employee.

among others, the Assistant Secretary for Administration position, which has authority over the type of contracting in which PMM engaged. For the position, PMM located a former employee, Rodney Brady.[127]

Other agencies utilize the same employment network. During the bulk of the 1961-73 period, for example, four men held the position of Assistant Secretary of the Army for Installations and Logistics. This position includes responsibility for much contracting. Each one of them came to the Army from prior experience as Cambridge (Massachusetts)-based weapons-management consultants. Paul Ignatius and Robert Brooks had worked at Management Systems, which had been founded by Harvard Business School Professor Sterling Livingston. Livingston was instrumental in the establishment of the Logistics Management Institute (LMI), a military-funded non-profit research outfit. He helped select Barry Shillito to head LMI; Shillito ultimately became Secretary of Installations and Logistics for the entire Defense Department during the Nixon administration.[128]

In sum, by organizing agencies and selecting government personnel, contractors not only have considerable control over the future of their own estate, but over the tenor of relations between their private clientele and public agencies. Of

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127 Under the HEW procurement regulations then governing, when management services were to be procured, the contract had to be approved by the Assistant Secretary for Administration.

128 *See* THE SHADOW GOVERNMENT, *supra* note 73, at 175-78. These examples pose direct conflicts of interest in the possibility that the contractors will improve their own business. But that is not the most troublesome problem raised. The development of contract organizations as employment offices, way stations, and retirement homes for top government officials limits the opportunities for advancement for government employees and thus affects their morale. Moreover, this development undermines the potential of the civil service to breed and keep the talent necessary to govern effectively. The bright young person seeking to advance is ill-advised to join the civil service. A job in a prestigious contract organization will provide higher pay and the same opportunity for advancement without a long-term commitment to the official bureaucracy.

The weakening of the Civil Service is encouraged by the President's Commission on Personnel Interchange. Created in the waning days of the Johnson administration, the Commission conducts an exchange program by which middle managers in government and business switch bureaucracies for a year. *See* Weiss, *Why Business and Government Exchange Executives,* HARV. BUS. REV., July-Aug. 1974, at 129.

equal importance, their activities do not merely suggest to the civil servant that the civil service may not be trusted to perform the central tasks of government, but effectively ensure the perpetual disorganization of public agencies.

IV. The Costs and Benefits of Conflict Prohibitions

Over the past century, a tradition of prohibitions against conflicts of interest has developed.[129] There can be little question that the current operations of the contract bureaucracy are inconsistent with this tradition. As the foregoing examples demonstrate, the operations of the contract bureaucracy are characterized by patterns of conflict of interest. Why not, then, draft legislation to prohibit contracting conflicts of interest? The effort would be worthwhile. However, as this section will show, any proposed flat prohibition of contracting conflicts will be defeated or significantly weakened in response to arguments from the contract bureaucracy that its continued operation serves the public interest.

The dynamics of the discussion have been illustrated by a debate over the District of Columbia Bar's proposed conflict rules for lawyers.[130] The issue of the public interest and conflict-of-interest rules has been characterized in terms of a weighing of costs and benefits: the benefits of prohibiting conflicts against the costs of eliminating the arrangements which involve conflicts. The opponents of the proposed rules claim to agree that conflicts of interest are bad; as a prominent Washington attorney wrote:

> The issue is not whether one is for or against conflicts of interest. We all agree that they are illegal and unethical, that the appearance of conflict can be as bad as the reality, and that what would appear to a reasonable man to be a conflict ought to be ruled improper.[131]

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129 *See* section I *supra.*

130 The proposal, Disciplinary Rule 9-101 of the Code of Professional Responsibility of the District of Columbia Bar, as the redraft appeared in May 1977, and comments thereon are found at 63 A.B.A.J. 724-28 (1977).

131 Cutler, *New Rule Goes Too Far,* 63 A.B.A.J. 725 (1977).

However, the attorney goes on to propose a cost-benefit approach. "Before adopting even stricter ethical rules we would be well advised to prepare a political impact statement and to be very certain that the benefits outweigh the costs."[132]

Though they use slightly different language, the opponents of a proposal by Senator Abourezk to prohibit contracting conflicts employ the same kind of cost-benefit rhetoric. Those opposing the prohibition do not directly attack the conflict-of-interest tradition, nor do they assert that conflict prohibitions are unnecessary. Rather, they argue for exceptions to the prohibitions. They contend that the public interest lies in waiving the tradition when it impairs the operations of the contract bureaucracy. Thus, the opposition evades the issue of conflict of interest, seeking, instead, to debate the public value of conduct which may involve conflicts.

A. *The Abourezk Proposal*

The Abourezk proposal resulted from a congressional reawakening to the problems of contracting conflicts of interest. From 1962 — the year of the Bell Report[133] — until 1975, Congress showed little awareness of, much less interest in, this problematic area. The revival of interest was occasioned by concern over an executive branch action in response to the energy crisis.

A Senate subcommittee convened hearings to review the Department of Interior's decision to hire the Bechtel Corporation to study alternative modes of transporting Western coal to market.[134] The award of the contract troubled certain congressmen because Bechtel itself had announced plans to build (through a subsidiary) one of the competing alternatives.

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132 *Id.* at 725-26.

133 *See* note 42 *supra.*

134 *Organizational Conflict Hearings, supra* note 47. After ERDA was established, the contract was transferred from the Department of Interior to ERDA. ERDA maintained that the contract was not for the study of alternatives, but for the preparation of a cost formula of one alternative only — the coal slurry pipeline. ERDA has since become part of the new Department of Energy (DOE).

The subcommittee learned that the contracting agencies did not seek information regarding Bechtel's private interests, and did not, upon learning of them, find cause to terminate or impose conditions on the contract. Moreover, the subcommittee found that the Bechtel arrangement was not precluded or deterred by existing laws, including hardware ban rules.[135]

Senator Abourezk, following the hearing, proposed an amendment to the fiscal 1977 ERDA authorization bill which would have prohibited contracting conflicts of interest.[136] It has since been proposed for government-wide application as an amendment to the Defense Production Act of 1950.[137]

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135 *Id.*

136 Amendment No. 1947 to ERDA Authorization, S. 3105, 94th Cong., 2d Sess. (1976). The bill was reintroduced the following year, S. 36, 95th Cong., 1st Sess. (1977). The Senate adopted S. 36 on April 4, 1977.

Correspondence relating to the development and construction of the proposals is collected as an appendix to Senator James Abourezk's statement in *Conduct of Government Personnel: Hearings on S. 695 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. 129-221 (1977).

137 Amend. No. 192 to S. 695, 95th Cong., 1st Sess. (1977), *Hearings on S. 695, supra* note 136, at 26-28. The text of the amendment follows:

> TITLE IX — ORGANIZATIONAL CONFLICT OF INTEREST
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> SEC. 901. (a) The Administrator of each Federal department and independent agency shall by regulation require any person proposing to enter into a contract, agreement, or other arrangement, whether by advertising or negotiation, for the conduct of research, development, evaluation activities, or for technical and management support services to provide the Administrator, prior to entering into any such contract, agreement, or arrangement, with all relevant information bearing on whether that person has a possible conflict of interest with respect to (1) being able to render impartial, technically sound, or objective assistance or advice in light of other activities or relationships with other persons or (2) being given an unfair competitive advantage. Such person shall insure, in accordance with regulations published by the Administrator, compliance with this section by any subcontractor of such person, except supply subcontractors: *Provided*, That this requirement shall not apply to subcontracts of $10,000 or less.
>
> (b) The Administrator shall not enter into any such contract, agreement, or arrangement unless he affirmatively finds, after evaluating all such information and any other relevant information otherwise available to him, either that (1) there is little or no likelihood that a conflict of interest would exist, or (2) that such conflict has been avoided after appropriate conditions have been included in such contract, agreement, or arrangement: *Provided*, That if he determines that such conflict of interest exists and that such conflict of interest cannot be avoided by including appropriate conditions therein, the Administrator may enter into such contract, agreement, or arrangement, if he determines that it is in the best interests of the United

The proposed amendments[138] are brief and share three salient characteristics. First, both explicitly recognize that conflict-of-interest prohibitions are to protect the public interest in impartiality. Thus, the amendments make it clear that more than the interests of competitors, which hardware ban clauses protect, is at stake. The inadequacy of the contemporary concept of "organizational conflict of interest"[139] is expressly recognized. Senator Abourezk specifically stated his intent to alter the government's definition of conflicts in terms which focus solely on preventing injury to private contractors.[140]

Second, the amendments require, for the first time, that contractors must provide "all relevant information" bearing on whether . . . [the contractor] has a possible conflict of interest . . . ."[141] This is a substantial departure from prior practice. As suggested in section III, the executive branch has often acted in complete ignorance (at least as a matter of record) of the private affiliations of its contractors. Under the proposals, agencies would be required to promulgate regulations which would implement the disclosure requirement.

The third characteristic of the amendments is an exception which undercuts the basic prohibition. The amendments provide that the executive, as a rule, cannnot enter into a contract where a conflict would exist. They then provide, however, that a conflict will not be a bar to a contract where the agency administrator "determines that it is in the best interests of the United States to do so [enter into the contract] and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict."[142]

States to do so and includes appropriate conditions in such contract, agreement, or arrangement to mitigate such conflict.

(c) The Administrator shall publish rules for the implementation of this section, in accordance with section 553 of title 5, United States Code, as soon as possible after the date of enactment but in no event later than one hundred and eighty days after such date.

138 The proposed amendment to the ERDA Authorization bill was altered by congressional conferees. 122 CONG. REC. H11422; H. REP. NO. 1718, 94th Cong., 2d Sess. 18-19, 61-62 (1976).

139 *See* subsection IIB *supra*.

140 *Hearings on S. 695, supra* note 136, at 38.

141 Amend. No. 192 to S. 695, *supra* note 137.

142 *Id.*

The provision for exemptions was not in the initial Abourezk proposal. It was added in the House-Senate Conference on the ERDA bill.[143] Ironically, its addition was not prompted by the executive or by industry, but by the GAO. When reviewing the bill for Congressman Hechler, the Comptroller General suggested that the proposed flat prohibition might be "overly restrictive since it may not always be in the Government's best interests to refuse to award a contract on the basis of a remote, as opposed to a clear and direct, conflict of interest."[144]

While the Comptroller General's analysis implies that a flat ban on "clear and direct" conflicts would be appropriate, the statutory language suggested by the GAO does not distinguish among conflicts. Instead, the language in the final version of the amendment permits exceptions without regard to the severity of the conflict involved.

Even with the broad exception, the contract bureaucracy was not willing to accept the amendment. ERDA "strongly" opposed the proposed amendment. It stated, in correspondence with Congress and the GAO, that any such legislation should be applicable to other agencies as well, and that the legislation would create paperwork and delay.[145] ERDA also purported to demonstrate that no legislation was necessary. Specifically, it included disclosure requirements in certain requests for proposals and published organizational conflict rules.[146]

ERDA's actions were not a capitulation to Senator Abourezk. Its new rules, ERDA explained to Senator Abourezk, were being applied in limited situations.[147] ERDA did not propose to apply them at all, for example, to research

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143 *Hearings on S. 695, supra* note 136, at 40; H. REP. NO. 1718, 94th Cong., 2d Sess. (1976).

144 *Hearings on S. 695, supra* note 136, at 171 (Letter from the Comptroller General to Congressman Hechler, August 5, 1977).

145 *Id.* at 176, 212 (Letter from ERDA's Acting General Counsel to Senator Abourezk, April 20, 1977).

146 *Id.* at 181 (Letter from Deputy Comptroller General to Congressman Hechler).

147 *Id.* at 212-13 (Letter from Hudson Ragan, Acting General Counsel of ERDA, to Senator Abourezk, April 20, 1977).

and development contracts. Since R&D is the essence of ERDA's mission, this qualification is overwhelming. Moreover, in regard to management contracts, the ERDA regulations provide for waivers of "any or all restrictions."[148]

In sum, while not directly disputing the validity of conflict principles, ERDA did its best to suggest the impossibility of the proposed legislation:

> At the outset, we cannot overstress the complexity and importance of this subject and the possible adverse effects which hasty legislation might have on the accomplishment of ERDA's mission. In this sensitive and difficult area, the adoption of legislative standards without a careful and considered review of possible impact, could seriously affect the accomplishment of ERDA's Congressionally mandated goals. This could arise because of industry's reaction to such new legislative requirements and may result in fewer companies bidding for ERDA's work which would not only lessen competition for such work but could also prevent ERDA from obtaining the best qualified firm to do a particular job.[149]

While introducing the amendment to the Defense Production Act, Senator Abourezk stated, "it should be clear that this ["national interest"] exception [to the prohibition of conflicts of interest] will be a last resort."[150] In view of the recalcitrance of the GAO and ERDA, and the pervasiveness of the contracting practices and assumptions which the provision would eliminate, the exception may become a monstrous loophole. There is no shortage of precedents in procurement law for the expansion of such supposedly limited exceptions.[151]Moreover, since the history of professional services contracting, as discussed above, is a history of

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148 *Id.*

149 *Hearings on S. 695, supra* note 136, at 212.

150 *Id.* at 40.

151 For example, the basic government procurement policy favors competition. This policy, however, has been so riddled with exceptions that the exceptions are now the operating rules. *See, e.g.*, Memorandum of Joseph Califano, Secretary of Health, Education and Welfare, to All Assistant Secretaries, Re: Actions Required to Correct Major Deficiencies in the Contracting and Grant Processes 5 (May 18, 1977) (on file at the *Harvard Journal on Legislation*). The memorandum highlighted, once again, the large gap between the aim of competitive procurement and the real-

conflicts of interest justified by the "national interest," an exception for the "national interest" invites a permissive reading allowing the conflicts which now occur to continue unabated.

Thus, although the Abourezk proposals attempted to prohibit conflicts, opposition from the contract bureaucracy prevented an effective prohibition. The opponents succeeded by arguing that conflicts serve the public interest (at least often enough to justify an exception). The supporters of conflict prohibitions failed to answer in the same terms. They argued that conflicts are bad, and everyone agreed. But they did not deny, as they must, that the public interest is served by arrangements which involve conflicts of interest.

In the interim since Senator Abourezk made his proposal, the Office of Management and Budget (OMB) has proposed organizational conflict regulations for government-wide application. Although these guidelines have not yet been made final, the draft regulations would codify the logic just discussed. On the one hand, OMB, following Abourezk, would expressly recognize that "organizational conflict" rules are designed to protect the public interest as well as the interests of competitors. On the other hand, the proposed regulations would give broad discretion to agencies wishing to hire contractors in the face of conflicts, while purporting to require "disclosure" from prospective contracts. The draft did not require disclosure at all. Instead it merely required contracts to attest to whether their receipt of a contract would pose a conflict. This method of determining the existence of a conflict, in addition to being a misuse of the term "disclosure" is wholly inconsistent with the *Dixon-Yates* standard that the determination of conflict is a matter for outsiders and not for the interested parties. The proposed

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ity. The memorandum records that, for fiscal year 1976 and the "transition period" (when the beginning of the fiscal year was moved from July 1 to October 1): a) "70 percent in number and 47 percent in amount of new contracts were awarded noncompetitively," b) "Contract renewals equaled 69 per cent of the amount of new contracts," and c) "Modifications increasing the cost of contracts equaled 90 percent of the amount of new contracts."

OMB regulations, in short, may well be the sort of reform that permanently institutionalizes existing evils.[151a]

B. *Professional Services Contracting and the Public Interest*

The examples in section III were intended to illustrate how conflicts infect professional services contracting. But, those conflicts often were associated with other objectionable practices, the costs of which are ignored by supporters of the contract bureaucracy. These costs are invisibility, unaccountability, and de facto delegation of authority.

First, the contract bureaucracy is invisible. It is not located on the official government organization chart. It is not subject to the Freedom of Information Act.[152] The citizen (or even the congressman) often has no knowledge of its presence behind decisions or studies, much less the significance of that presence.[153]

Second, the contract bureaucracy is unaccountable, and it breeds unaccountability. Formal evaluations of contractor performance are sporadic and often inadequate.[154] Contractors frequently evaluate other contractors.[155] Moreover, where a contractor performs multiple functions for an agency (*e.g.*, recommending, managing, and reviewing a program[156]), where it functions at several levels of a program (*e.g.*, state and local[157]), where it performs over a lengthy period of time (and may stay on the job longer than the official contract

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151a *See Development of a Uniform Reporting System for Federal Consultants and Contractors: Hearings Before Subcomm. on Reports, Accounting and Management of the Comm. on Governmental Affairs,* 95th Cong., 1st Sess. 434-77 (1977) (statement of Daniel Guttman) [hereinafter cited as *Uniform Reporting Sytem*].

152 *See, e.g.,* the response of the Department of Transportation to a FOIA request concerning its contract with Sperry Rand, note 114 and accompanying text *supra.*

153 CONSULTANTS SURVEY, *supra* note 5, at 45.

154 *See* text accompanying notes 73 to 76 *supra.*

155 *See* text accompanying note 75 *supra.*

156 *See* text accompanying notes 108 to 118 *supra.*

157 *See* text accompanying notes 119 to 120 *supra.*

monitor), the civil service may lack the ability to evaluate the contractor's work.[158]

As a corollary, contracting inevitably, and often explicitly, embodies a de facto delegation of public authority to private interests. This development itself is contrary to existing law,[159] and can hardly be justified as policy. The continual delegation of authority to contractors (often at the explicit direction of political appointees or the implicit direction of Congress through the imposition of ceilings in the civil service) has undermined the civil service. The civil service cannot be expected to develop as a stable and reliable force when important work, including the management of the civil service itself, is continually placed beyond its reach.

Any "cost-benefit" analysis of the public interest served by arrangements which involve contracting conflicts must take these costs which accompany conflicts into account. Supporters of the contract bureaucracy ignore them. At the same time, they exaggerate the benefits of contracting.

One of the most common justifications for contracting is that contractors are more efficient than civil servants. There is, however, little evidence that the contract bureaucracy is a source of efficiency. The examples in section III show contractors performing work inadequately,[160] and providing advice or recommendations different from that which was requested.[161] The results are often duplicative,[162] or released in a form which is of limited value.[163]

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158 *See, e.g.,* Califano memorandum, *supra* note 151. As one of the primary problems in contracting the memo singles out "[f]ailure to ensure that contracts are performed." Among the causes cited were "monitoring duties not specifically assigned to personnel who should perform them" and "alleged lack of sufficient trained staff." *Id.* at 7.

159 *See* note 89 *supra.*

160 *See generally* THE SHADOW GOVERNMENT, *supra* note 73, and *Uniform Reporting System, supra* note 151a, at 81-116.

161 Booz Allen recommended to the FDA's Bureau of Compliance that it rely on voluntary compliance, while the FDA had a separate Bureau for Voluntary Compliance, text accompanying notes 102 to 106 *supra.*

162 Wyer, Dick provided an "avoidable cost" study when it was supposed to study the accuracy of past avoidable cost studies, text accompanying notes 99 to 101 *supra.*

163 ADL gathered and stored data for the AEC and the Department of Justice

Moreover, contracting breeds inefficiency in the civil service. Many public employees must administer contracts instead of carrying out governmental tasks. When contractors perform important government functions,[164] assist in selecting top political appointees, and often serve as springboards for those appointees,[165] the integrity and morale of the civil service are inevitably affected. In addition, the role of contractors in the continued reorganization of public agencies has a little announced but probably equally significant effect.

After adding the costs which have been ignored and diminishing the benefits to a more realistic level, the "cost-benefit" analysis is much less favorable to contracting conflicts of interest than the contract bureaucracy maintains.

These conclusions about the costs and benefits of contracting conflicts are, of course, impressionistic. They are based on the author's own study and subject to qualification upon the development of further evidence. The fact is, however, that alternative evidence — especially evidence relating to the efficiency of contractor use and its impact on the civil service — has never been developed. Until it is developed, the presumption should be that the political costs, which this Article has demonstrated, outweigh the unproven and uncertain benefits of arrangements which involve contracting conflicts of interest.

V. Reforming Professional Services Contracting

While flatly prohibiting contracting conflicts of interest may be impossible due to the opposition of DOE, the Defense Department, GAO and others, there are steps which can be taken in the interim. The initial step must be the development of better information about the number and dollar volume of professional services contracts, the tasks being contracted, the contractors themselves, and the contractors'

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without providing either access to the basic data, text accompanying notes 90 to 94 *supra*.

164 RAND and Aerospace both exercised delegated functions, text accompanying notes 78 to 79 *supra*.

165 *See* text accompanying notes 125 to 128 *supra*.

financial interests. This section begins by discussing reforms to develop such information.

If there were no information on the contract bureaucracy, the contract bureaucracy's assertion that contracts which involve conflicts serve the public interest could not be challenged. It would be necessary to settle for legislation which, like the amended Abourezk proposal, matches a broad prohibition of conflicts with an equally broad exception from the rule upon executive assertion of need. This should be a choice of last resort. While better information about contracting should be developed, enough information exists to identify the patterns of contracting conflicts of interest. This information suggests that conflicts are symptoms of deeper contract bureaucracy failures.

Opponents of conflict prohibitions argue that the benefits of eliminating conflicts are outweighed by the costs of losing the useful public functions which are performed by contractors with conflicting interests. Proponents of conflict prohibitions can now respond with a "cost-benefit" analysis of the value of contracting conflicts. Although the analysis is crude because complete information is not available, it should be sufficient to shift the burden of developing better data onto those who argue that arrangements which involve contracting conflicts serve the public interest. The cost-benefit analysis, too, favors restrictions on contracting conflicts of interest.

To protect the public interest in impartial decision-making, Congress has available restrictions on contracting ranging from revised hardware ban clauses to outright prohibitions of professional services contracting. The former, as has been shown, is inadequate. The latter, though arguably desirable, may be unnecessarily severe and is probably inconsistent with some federal statutes which establish preferences for relying on private enterprise.

Since there are relevant distinctions between management and R&D contracts in regard to their desirability and the congressional preference for the private sector, it is reasonable to treat them as separate problems and to provide different

solutions. The second subsection advocates certain restrictions for each type of contract.

A. *Disclosure Requirements*

Despite the failure of the Abourezk proposal to eliminate contracting conflicts of interest, it deserves support because, as mentioned in the preceding section, the proposal includes two elements other than the conflict prohibition which are important. First, it recognizes that the public interest in impartiality would be served by conflict-of-interest prohibitions in the contracting area. It would announce that competitors are not the sole concern of contracting conflict rules, but that the public interest must be protected as well.

Second, the proposals would establish, for the first time, disclosure requirements for professional services contractors. This is a necessary step. The information available on the contract bureaucracy is limited and of poor quality.[166] Although this Article expresses a clear view of the contract bureaucracy's general nature and operations, this view is the product of a low-budget private inquiry. Adequate regulation of contracting conflicts requires more detailed information on the complex intertwinings of modern corporate and government units.

The Abourezk bill would require disclosure of activities or relationships which might prevent the contractor from providing sound, objective advice or assistance. Contracting agencies would be required to promulgate regulations implementing this disclosure requirement. Any such regulations should require disclosure of at least the following information.

First, contractors should be required to disclose their non-federal clientele that may be directly or indirectly affected by the operations of any public agency for which they work. This disclosure should include narrative descriptions of the types of work performed. Where the subject matter of the public employment is similar to work undertaken for non-federal

166 *See* note 3 *supra.*

clientele, there must be provision for further disclosure of the work performed for non-federal clientele.[167]

Contractors should also be required to provide information indicating the relationship between federal and non-federal work. For example, contractors should have to reveal whether their internal structure encourages communication between employees working for potentially conflicting interests, and whether they use the fact of their affiliations with the government in soliciting private clients.[168]

Moreover, contracting organizations and their employees should be required to disclose direct financial interests. Such disclosure should include details of the ownership of the contracting organization, the financial interests of trustees and directors, and the interests of those assigned to work on government projects.[169]

Finally, the public should be given access to all information which is developed by organizations working under government contracts. A private organization should not be permitted to collect and store information about an industry for the government without divulging that information to the government.[170] If information is to be held privileged from

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167 These proposals are aimed specifically at the patterns in which contractors work for a recipient of federal funds or for a regulated industry. *See, e.g.*, the LEAA/Ernst & Ernst arrangement, text accompanying note 117 *supra*, and the FDA/Booz Allen contract, text accompanying notes 102 to 106 *supra*.

168 These disclosure requirements would allow the government to understand, for example, the influence of Booz Allen's subsidiary, Foster Snell, on the FDA contract work. *See* text accompanying notes 102 to 106 *supra*.

Contractors also use their government experience to develop their business with private industry. For example, one company's brochure advertises that:

> For sixteen years, Harbridge House has maintained a close relationship with the Federal agencies and their major contractors. In the theory and practice of defense procurement policies and source selection practices, our experience exceeds that of any other civilian organization .... This capability is made available to the defense-aerospace industry through the services of the Harbridge House Government Marketing Division.

Harbridge House, Government Marketing Services for Industry (undated).

169 The non-profits would be affected by this requirement because of the interlocking of their directorates with the aerospace industry. *See* subsection II C *supra*. This disclosure requirement is similar to current civil service disclosure requirements, in that it asks for a list of financial interests. *See* subsection IA *supra*.

170 Recall the AEC/Justice/ADL contract for data collection, discussed at text accompanying notes 90 to 94 *supra*.

the public, that determination should be made on the basis of Freedom of Information Act.[171]

The requirement of disclosure will meet resistance. Proponents of the contract bureaucracy can be expected to argue that disclosure infringes the privacy rights of both contractors and their employees. But intrusions will be neither extreme nor unprecedented. The disclosure requirements for individuals could be similar to the requirements currently governing civil service employees.[172] The confidentiality of information thus disclosed could be protected under the Freedom of Information Act[173] if it is not already.

Contracting conflicts of interest often occurred because of a simple lack of information. No one bothered to ask questions about the contractor's affiliations because the law did not require it. Required disclosure would make the contracting officers face the question of the contractor's conflicts directly. It would not prohibit the use of a particular contractor because of a conflict, but it would record the conflict and document the responsible decision-maker.

Of course, the information gathered pursuant to disclosure regulations could serve as a predicate to a further reform of the contract system.

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171 The Freedom of Information Act, as amended by the Federal Privacy Act of 1974, established a presumption in favor of disclosure of information to the public. There are narrow exceptions for personnel rules, national security information, confidential commercial data, and other information exempted by statute. 5 U.S.C. § 552 (Supp. IV 1974). *See also* note 173 *infra.*

172 *See* text accompanying notes 20 to 22 *supra.*

173 *See* note 171 *supra.* The FOIA does not require agencies to disclose "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4) (Supp. IV 1974). Commercial or financial information is considered confidential "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). If a petitioned agency does not resist disclosure of competitively harmful data, the source of the information may initiate proceedings to block disclosure. Charles River Park "A", Inc. v. Dep't of Hous. and Urban Dev., 519 F.2d 935, 939 (D.C. Cir. 1975) (jurisdiction conferred by Administrative Procedure Act, 5 U.S.C. §§ 701-06 (1970)). If present protections prove insufficient to encourage full disclosure of contractor's business associations to government agencies, Congress might enact a corporate parallel to the Federal Privacy Act of 1974, 5 U.S.C. § 552a (Supp. IV 1974), which restricts FOIA dissemination of information about citizens and resident aliens but has no applicability to proprietorships, partnerships, or corporations.

B. *Reforms Aimed at Patterns of Conflict*

From the perspective of the government administrator, the use of contractors appears very rational. Administrators are obliged only to justify individual contracts. They can justify professional services contracts in terms of efficiency, expertise, and flexibility. These justifications are plausible enough to allay any public concerns that the contracts might be undesirable.

Moreover, administrators may believe that contractors can serve their political interests better than civil servants. An administrator charged with implementing new legislation will, for example, hire a contractor who will not only purport to be expert in "organizational design," but will also have connections to the groups that the new legislation regulates or subsidizes. Given a difficult task, the hiring official hopes that he can minimize his risks by employing advisors who at least have the ear of the agency's constituency.

Though individual contracts may be justified as necessary and benign, the proliferation of contracts which involve conflicts of interest is, as suggested above, inefficient and substantially irrational. Unless restrictions are placed on professional services contracting, this proliferation of conflicts and concomitant inefficiency will continue. These restrictions should be designed with a view to the patterns of contracting conflicts identified in section III. Only in those instances where a statute specifically mandates reliance on the private sector should contracts presenting conflicts of interest be acceptable. Thus, the restrictions should distinguish between management contracts and R&D contracts.[174]

1. Management Contracts

Where no statute requires use of a private enterprise, contracting conflicts should be presumed to be unjustified, and prohibitions against conflicts of interest should be applied strictly.

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174 *See* text accompanying notes 88 to 89 *supra.*

Proponents of the contract bureaucracy argue that management contracting offers three benefits over the civil service: efficiency, expertise, and flexibility.[175] The response to the efficiency argument already has been made — there is no proof that contractors are a source of efficiency in either the management or the R&D roles.[176] As to the other two arguments, a response tailored to the particular role is necessary.

First, contractor expertise in management is frequently exaggerated. In highly technical R&D the government may not want to develop independent experts within the civil service. But in performing government management functions, reliance on outside expertise is totally unjustifiable as a matter of policy. This is especially true when, as now, the government requires no demonstrable competence of its contractors. Often, indeed, expertise is an euphenism for association with managerial disaster. For example, the primary organizer of Amtrak, the quasi-public agency created by Congress to preserve rail passenger service following Penn Central's bankruptcy, was the same consulting firm the New York Central and Pennsylvania railroads had called upon to insure the success of the Penn Central merger.[177]

The term "expert" implies the possession of an uncommon skill. Actually, the contract "experts" employed by the government through management contracts possess relatively common skills. Business schools, law schools, and schools of public administration teach these skills. Moreover, while the experts work for numerous specialized agencies, the services they offer are often generic. Thus, an expert in "budgeting," "personnel selection," or "organization" will claim to be suited for employment by the Department of Agriculture, the Department of Defense, or the Smithsonian Institution. Similarly, a purveyor of "planning," "technical assistance," or "information analysis" will declare himself

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175 *See, e.g.*, Wash. Star, May 7, 1977, at A-10, col. 1.
176 *See* text accompanying notes 160 to 165 *supra*.
177 THE SHADOW GOVERNMENT, *supra* note 73, at 48-57.

able to aid any number of social programs.[178] There is no reason why these skills cannot be located within the government itself.

Second, supporters of the contract bureaucracy maintain that contracting allows flexibility. They argue that contractors, unlike civil servants, are not tenured, and do not expand the federal bureaucracy. While it may be true that civil servants cannot be hired to perform individual tasks which arise and be fired when a task is completed, it does not follow that contracting is a sensible alternative. Certainly where the management of government operations is involved, the government itself should be responsible instead of a contractor. Moreover, the contract bureaucracy has become as much a part of the government as the civil service. Contractors remain affiliated with the government much as if tenured, and, though less visible, expand the federal bureaucracy just as an increase in the civil service size would.

In short, management contracting began, and continues, because of myths. It was pointed out above that, contrary to myth, there is no proof that private expertise is more efficient than public expertise. Contrary to myth, the typical management contract does not involve unique expertise. Finally, contrary to myth, the use of management contractors has not reduced the public workforce.[179] It has merely created a less visible contract work force. Without relying on these myths, there is no justification for using management contracts where conflicts of interest are involved.

It is time to develop, within the government, expertise in the management of government. The civil service should

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178 For example, in 1971, Westinghouse created a "Public Management Services" division, and promoted it to federal administrators. Westinghouse had no experience in management services but planned to "[u]se Federal contracts as a basis for developing understanding of state and local needs and to gain credentials and visibility." Despite this inexperience, the Postal Service contracted with the new Westinghouse division to evaluate and redefine the jobs of over 700,000 postal employees. A subsequent congressional inquiry found that none of the Westinghouse personnel had ever performed job evaluations. *See* THE SHADOW GOVERNMENT, *supra* note 73, at 9.

179 The civil service's size has remained quite stable over the last thirty years. Special Analyses: Budget of the United States Government Fiscal Year 1978, 166-68 (1977). On the other hand, use of contractors has increased markedly.

reassume those tasks which are governmental functions, such as policy-making, planning, managing of government programs, evaluating, and hiring and firing employees. Only by enforcing strict prohibitions against contracting conflicts will the government be forced to rely on the civil service.

In most cases, individual agencies should maintain the expertise which is necessary to perform their functions. If some functions suggest the need for independence from the program or agency (*e.g.*, the evaluation of a program or agency, or the reorganization of an agency), civil service experts can be located in a central management agency.[180]

It will quickly be suggested that the civil service would become unmanageable as it expands to fill the vacuum left by the elimination of management contractors. But an expanded and uncontrollable civil service is not inevitable. First, the contract bureaucracy grows partly because of a profound distrust of the civil service.[181] This compulsion to restrain civil service growth would outlive the reduction in the contract bureaucracy. Second, the evidence suggests that much of the contract bureaucracy's work is inefficient, or counterproductive. The elimination of contractors therefore would not imply their replacement by a comparably large civil service work force.

There is no reason to believe, a priori, that the civil service cannot manage the government at least as competently as the contract bureaucracy;[182] just removing the burden of contract administration from the civil service necessarily would improve its efficiency.

2. R&D Contracts

Where contracting has a statutory basis, conditions should be imposed which will make visible and minimize conflicts of

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180 Such an agency might be modeled on the General Accounting Office, but would require broader powers.

181 *See, e.g.*, Gallup poll in *Wash. Post*, June 12, 1977, at A-10, col. 1-2.

182 The management of the Polaris System by Navy personnel may be indicative. *See* SAPOLSKY, *supra* note 79.

interest and the further costs of contracting. This would require not only the disclosure rules described above but a reexamination of the structure and purpose of R&D spending.

Since World War II, R&D spending has burgeoned. As discussed earlier, the common theme of post-war R&D spending is the use of public monies to stimulate or subsidize broad political and economic change. This theme postulates both that public change should be managed by non-federal (generally private) organizations, and that the pursuit of the public interest may be equivalent to the promotion of private enterprise. The management, by private interests, of the promotion of private interests creates an obvious potential for conflicts of interest. Conflicts of interest, in brief, cannot be eliminated without altering the basic premise behind R&D spending.

Congress must recognize that a commitment to R&D is taken by the executive branch and its contract constituency as a license to engineer economic and political change. If Congress is going to grant such a license, it should recognize that it may be used in many ways.

Recent energy R&D efforts illustrate the political and economic implications of "technical" spending.[183] Depending upon the contractors chosen, there may be great variations in the types of energy alternatives furthered, the manner in which they are furthered,[184] and the government's (and the

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183 *See generally Nonnuclear Energy Research & Development Fiscal Year 1977: Hearings Before the Subcomm. on Energy Research and Water Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 2d Sess. (1976). ERDA's FY 1977 budget is approximately $5.3 billion. *Id.* at 46-49. This sum provides for numerous costly high technology demonstration projects, nearly all of which are operated on contract. *See, e.g., id.* at 116-28.

The Department of Energy has relied on "interested" contractors for work no less central than the creation of President Carter's national energy plan — and it has done so while providing the public with no disclosure of the contractors' role in the planning. *See* Guttman, *Getting Rich by Serving Two Masters: The Energy Hustle,* THE NEW REPUBLIC, March 11, 1978, at 16.

184 There is increasing public awareness of the variety of "mixes" of alternative "energy futures." The country may choose (or be forced to choose) among fuel alternatives (*e.g.*, solar, nuclear, coal, synthetic fuel), differing scales of development (*e.g.*, centralized solar collectors serving large population areas versus solar collect-

public's) ability to understand and control developments.[185] If new energy R&D programs are permitted to follow the Defense/NASA/AEC models, the public may expect "solutions" which rely upon costly technology or require the financing and marketing abilities of the large energy corporations.[186] Indeed, DOE's current panoply of multi-million dollar "demonstration" projects include large contracts with major oil and gas companies and industry trade associations.

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ing and conversion devices installed and the residential or commercial unit), and differing political controls (*e.g.*, continued growth of large energy corporations, centralized public development, or localized public or private development). *See generally* A. LOVINS, SOFT ENERGY PATHS: TOWARD A DURABLE PEACE (1977).

The choice among alternatives, and the speed with which any alternative is to be realized, will depend in part upon the institutions chosen to develop it. Large, integrated energy corporations might be expected to channel developments into paths consistent with their own preexisting marketing or technological structures. By the same token, reliance on established institutions might require assurance that now-profitable operations will not be injured by future development.

185 The "energy crisis" has revealed the extent to which the Government has come to rely on industry to supply it with basic data and analyses. The reliance is profound even in areas where governmental regulatory programs are relatively longstanding. The Federal Power Commission, for example, sets rates for natural gas sold in interstate commerce in reliance upon natural gas reserve data supplied by a subcommittee of the American Gas Association, an industry group that meets in private. The public has not been granted access to the raw data underlying the Association's published reserve statistics.

While the use of the industry's data has been severely questioned by the court in American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977), the Commission efforts to develop its own data through industry disclosure have been stalled temporarily by industry opposition. *See* Union Oil Company of California v. FPC, 542 F.2d 1036, 1038 (9th Cir. 1976).

The General Accounting Office has recommended the creation of a separate bureau for energy data collection within a new Department of Energy and National Resources. *See* statement of Phillip S. Hughes, Assistant Comptroller General, before the Senate Committee on Interior and Insular Affairs (March 9, 1970), *reprinted in Paperwork Review and Limitation Act of 1976: Hearings Before the Subcomm. on Oversight Procedures and the Subcomm. on Reports, Accounting and Management of the Senate Comm. on Government Operations*, 94th Cong., 2d Sess. 33-37 (1976).

186 Private contractors' solutions to the energy crisis may not be the best responses. As the "energy issue" has evolved, the public is offered an increasingly sophisticated array of alternatives. Barry Commoner contrasts the inefficient, capital intensive, high technology projects that characterize the operations of the energy industry with alternatives which provide better matches between "energy input" and energy need, and require less concentrated infusions of capital. B. COMMONER, THE POVERTY OF POWER: ENERGY AND THE ECONOMIC CRISIS (1976). A much-celebrated article in *Foreign Affairs* discusses an energy supply system based on regional (as opposed to centralized national) economies of scale. Lovins, *Energy Strategy: The Road Not Taken*, 55 FOREIGN AFF. 65 (1976).

In the energy area, as in all government R&D programs, any "solutions" proposed by contractors will reflect political and economic judgments which will be cast under layers of technical complexity. If Congress continues to abdicate responsibility for the control of R&D spending, it is likely that the country will lack the independent expertise necessary to decipher technical analysis, or to control the beneficiaries of funding as they exercise delegated authority in efforts to engineer the broad institutional changes upon which the success of any "solution" to the nation's energy problems depends.

In sum, the executive uses R&D to create new markets for industrial corporations, and, as a corollary, to alter the country's economic and political structure. Congress must consider the consequences of this approach and its alternatives. If R&D funding creates new industry, what are the limits of the government's commitment? Must the government, as in the case of the aerospace industry, perpetually purchase the technology and industry whose growth it has stimulated? In creating new "civilian" industry, is the government obligated to take all the risks of failure (by guaranteeing a market, for example)? Must the government's role in stimulating new industry include the funding of large capital projects, or can the government merely lay information on the table for anyone to use? When the government does choose to fund a form of change, what are its obligations to those who will suffer the negative consequences? For example, when the government bankrolls corporations to enter the public schools in competition with teachers, to what protections are the teachers entitled?[187] Finally, who should control R&D, and by what means? Should private contractors continue to be delegated broad discretion in the planning and management of spending, the brokerage of social change?

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187 A subquestion is the relevance of antitrust law to R&D funding. R&D may not merely favor one competitor over another, but one industrial type over another. Thus, as an example, HUD's Operation Breakthrough subsidized the entrance of large industrial corporations into housing, an industry traditionally dominated by small builders. *See* note 87 *supra* and accompany text.

This Article does not provide answers to these questions. At this stage, it is more important that the questions be publicly asked. The direction in which answers lie, however, does seem clear. If any statutory preference for private R&D remains, then Congress should articulate guidelines which: (a) curtail the de facto delegation of policy-making authority to contractors; (b) recognize the biases contractors may possess because of their interests and affiliations, and require the funding of contractors with contrasting interests and affiliations; (c) condition any R&D funding of private enterprise's experts on proof that the government and public will have continuing access to competent expertise capable of accounting for contractor work.

Conclusion

Professional services contractors have been excluded from the conflict-of-interest restrictions which apply to federal employees, and conflicts of interest are a common characteristic of the contract bureaucracy. The conflicts occur by design, not by accident. The available evidence suggests that the contract bureaucracy poses problems beyond conflict of interest, including unlawful, invisible government and inefficiency. Contracting conflicts of interest are not benign concomitants of beneficial arrangements, but symptoms of the more general malaise, termed "big government," which is conventionally identified with the civil service. Indeed, proposals to solve the problems of "big government" will inevitably be counterproductive in the absence of an understanding of the role of the invisible contract bureaucracy in the failure of public management.

The most obvious means of dealing with contracting conflicts — applying the restrictions on employee conflicts of interest to professional services contractors — poses difficulties. Initially, there is a substantial political obstacle. Any proposed flat prohibition on contracting conflicts will be met with arguments that current arrangements serve the public interest. The evidence presented in this Article compels a contrary conclusion.

Nonetheless a flat prohibition may not eliminate the problems associated with contracting conflicts. The money and power now in the grip of the contract bureaucracy was gathered slowly since World War II; ripping it loose now may simply redistribute the power and wealth, or, more likely, it will rework the network of influence. If contracting for expertise were curtailed, the executive's reliance on private expertise would become less visible, but might not disappear. The likely effect would be to increase the amount of expertise offered to the government by privately funded trade associations, research institutes, lobbyists, and law firms that already are fixtures in Washington. Many of the patterns of conflict discussed earlier would continue, and, in the absence of any formal legal tie between government and private experts, the relationships could be even less visible, less controllable, and more insidious.

Resolving the contracting conflicts-of-interest problem will require, first and most importantly, the development of better information both about the interests of individual contractors and about the contract bureaucracy as a whole. This will force the issue of conflicts of interest to the surface when a contract is awarded. In addition, it will allow more detailed studies of contracting conflicts with a view to further reforms.

Second, the patterns of contracting conflicts should be used as guides in drafting immediate reforms. In management contracting, conflicts are preventable, and should be prohibited. In R&D, contracting may be statutorily favored. Nevertheless, conditions should be imposed which eliminate conflicts, and require that alternative interests be funded.

It has been a tenet in contemporary America that existing institutions can be eliminated by superior political, economic, and intellectual force. Humility, and perhaps wisdom, compels a greater respect for tradition. It is, after all, not contract law that has failed, but the deployment of the contract in a setting antithetical to its usefulness. The proponents of the contract bureaucracy viewed the professional services contract as a means of expanding infinitely the federal government's operations by merging public funds with

private know-how. The contract offers the potential to order these relations so that they might be visible and accountable to the public at large.

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NOTE

THE EFFECT OF PRIOR JUDICIAL AND ADMINISTRATIVE CONSTRUCTIONS ON CODIFICATION OF PRE-EXISTING FEDERAL STATUTES: THE CASE OF THE FEDERAL SECURITIES CODE

FILIBERTO AGUSTI*

Many pieces of legislation are designed to clarify, modernize, and simplify existing law, whether originally enacted as a statute or developed at common law. Yet the intent of the drafters of such enactments to update the law can be and has been frustrated by judges who employ pre-existing principles and doctrines of law in construing new statutes.

In this Note, Mr. Agusti considers the possibility that the recently completed Federal Securities Code, drafted under the auspices of the American Law Institute, if enacted by Congress, may be emasculated by the continuing use of doctrines developed under the original securities laws. He analyzes those theories of construction that would allow old doctrine to be employed in the interpretation of new statutes and evaluates criticisms that have been raised against such theories. Concluding that courts asked to make rulings under the Code may accept these theories and apply pre-Code law, Mr. Agusti endorses the insertion in the Proposed Official Draft of a provision explicitly stating that case law developed since the enactment of the original securities laws has not been specifically endorsed by Congress in passing the Code.

Introduction

The Federal law of securities regulation had its genesis in the Securities Act of 1933 and the Securities Exchange Act of 1934. These statutes provided a general framework for securities regulation. The duty to build upon that

* B.A., Illinois, 1974; J.D., Harvard, 1977.

framework,[1] to decide the multitude of issues not addressed by the act, fell upon the federal[2] judiciary and the Securities and Exchange Commission.[3]

For more than a decade, a group of academicians, practitioners, and judges, under the auspices of the American Law Institute (ALI), has been drafting a new framework to govern securities trading. This new legislative scheme, the Federal Securities Code, will be far more comprehensive than its predecessor, but it cannot be expected to address and resolve all the issues that were considered by the courts or the Commission under the earlier legislation.

This Note discusses the possibility that courts construing the new Federal Securities Code may impose on it old judicial and administrative interpretations of the 1933 and 1934 Acts under a theory of legislative construction often employed by American courts. First, the general theory that would permit such a result will be explained and some criticisms of that theory will be advanced. The second section will consider the possible impact of the theory upon the Code, and will endorse a prophylactic section that has been added to the Code.

I. THE ENACTMENT THEORY

The reasoning by which a legislature's reenactment of a statute is deemed to codify earlier constructions of the statutory language by courts and administrative agencies will be designated in this Note as the "enactment theory." Only two conditions are necessary to invoke the theory. First, a section of a statute that is substantially identical to the original section must be reenacted. Second, there must be an

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1 This process, of course, is not endemic to the securities acts, but to some degree exists in all interpretation of statutory purpose. *See generally* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1144-1242 (tent. ed. 1958).

2 Section 27 of the Securities Exchange Act of 1934 gives federal courts "exclusive jurisdiction of violations" of the act or regulations promulgated thereunder. 15 U.S.C. § 78aa (1976). Section 22 of the Securities Act grants federal courts concurrent jurisdiction of all suits brought thereunder. 15 U.S.C. § 77v(a) (1976).

3 The Securities and Exchange Commission, created in § 4 of the 1934 Act, 15 U.S.C. § 78d (1976), was delegated several investigative and adjudicatory functions under the Act. *See, e.g.,* 15 U.S.C. §§ 78u and 78v (1976).

intervening judicial or administrative interpretation of the statute that the legislature did not expressly disapprove before or during reenactment. Under the enactment theory, prior interpretations would be assimilated to the reenacted language of the statute by the court.

The links in the argument supporting the theory are weak. The theory relies on a questionable assumption that the legislature had knowledge of all pre-existing interpretations of an act.[4] Silence by the legislature on an accepted interpretation of the act is regarded as proof that the legislature approved the interpretation. Furthermore, even though the initial interpretations were based upon one judge's or one agency's view of law or policy appropriate for that time, they cannot be reversed in the future by other judges or administrators because they become incorporated into the act and have the force of law. Although each of the above steps in the chain of logic is objectionable from the standpoint of legal process, the theory as a whole allows the statute to be radically transformed. The morally binding effect of the *stare decisis* principle now becomes absolutely binding through legislative fiat.

An examination of the origins and development of the enactment theory will reveal its tenuous foundation in a disputed rule governing the relationship between statutory and common law. Although the Supreme Court has raised the theory's status to a canon of legislative interpretation, it has given no persuasive justification for its frequent use.

A. *Origins of the Enactment Theory*

The theory appears to have had its genesis in the English hostility toward statutes in derogation of the common law. As early as 1541, in the *Earl of Southampton's Case,*[5] the

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4 *See, e.g.,* Magierowski v. Buckley, 39 N.J. Super. 534, 121 A.2d 749, 760 (1956); State ex. rel. Gladden v. Lonergan, 201 Ore. 163, 172, 269 P.2d 491, 496 (1954); State v. Healy, 58 Ohio L. Abs. 33, 95 N.E.2d 244, 251 (1950) *rev'd* 156 Ohio St. 229, 102 N.E.2d 253 (1951); Garwols v. Bankers' Trust Co., 251 Mich. 420, 423-26, 232 N.W. 239, 240 (1930).

5 1 Dyer 50a, 73 Eng. Repr. 109 (K.B. 1541).

King's Bench refused to read an act of Parliament, which stated that "all grants and letters patent to be made for term of life or years . . . shall be made and written by the clerk of [the local] court,"[6] as an abrogation of the common law principle that such documents could be made by the chancery. This was, the Court reasoned, because Parliament had not expressly evidenced an intent to repeal common law by using the words "and not by any other clerk."[7] English judges liked this doctrine because it increased their power, and it soon gained ascendancy. In his Commentary Lord Edward Coke restated the rule for his successors: "[A] statute made in the affirmative without any negative expressed, doth not take away the common law."[8] The theory was subsequently adopted in the new American republic.[9]

The additional step from non-derogation of common law to non-derogation of previous statutory interpretation by reenacted statutes can be traced to a unique interpretation of common law in American jurisprudence. English judges saw common law as a body of judicial opinions that incorporated custom and ancient broad statutes that had a long tradition of judicial interpretation.[10] They did not feel compelled to follow any special rules of statutory construction in setting forth the "common law" because the old statutes had no legislative history from which to infer intent.[11] Whatever original structure or import the statutes may have possessed were eroded by centuries of judicial embellishment.

In some American courts, the definition of common law

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6 *Id.* at 110.

7 *Id.*

8 1 INSTITUTES OF THE LAWS OF ENGLAND; OR A COMMENTARY UPON LITTLETON 115 (a) (17th ed. Butler ed. 1817).

9 *See, e.g.*, State v. Dalton, 134 Mo. App. 517, 527-30, 114 S.W. 1132, 1136 (1908); State v. Norton, 3 Zabriskie (23 N.J.L.) 33, 40-41 (1850) and authorities cited therein.

10 *See* Landis, *Statutes and the Sources of Law,* HARVARD LEGAL ESSAYS 213, 214-15 (1934).

11 This is vividly illustrated in the case of the 300-year-old Statute of Frauds. The Statute for the Prevention of Frauds and Perjuries was passed by Parliament in 1677. 2 A. CORBIN, CONTRACTS § 275 at 2 (2d ed. 1963). In discussing the development of the statute, it was noted in an elegant turn of the century work that "[w]ith the policy of the statute we are not at this junction particularly concerned." T. STREET, 2 FOUNDATIONS OF LEGAL LIABILITY 170 (1906).

moved beyond the English view to include decisions construing modern statutes. This development may be related to the twentieth-century legal realist attack on judicial interpretation of statutes. The realists argued that judges exercised substantial discretion in applying statutes to particular cases.[12] As a result, there was no basis for distinguishing common law adjudication from statutory interpretation by the court's freedom to ignore precedent and interpose its own view of policy.[13] Any deference paid to common law decisions through strict construction of subsequent legislative acts should also apply to judicial interpretation of statutes.[14]

Many legal scholars did not embrace this extreme position of equivalence between statutory interpretation and common law adjudication. Positively-enacted law should have no life of its own outside the will of the legislature. Moreover, in cases where specific statutory language and legislative intent are present, judges ordinarily do feel some constraint that they may not experience in common law controversies. Thus it would be unjustifiable to construe strictly all new statutes against judicial interpretation of older statutes as though the interpretations themselves had the force of common law. But if the legislature could be said to have given implied approval to the interpretations by reenacting a statute without disapproving the prior decisions, the same effect could be achieved

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12 *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 178-195 (1960); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

13 *See* Friendly, *In Praise of Erie-And of the New Federal Common Law,* 39 N.Y.U.L. REV. 385, 405 (1964).

14 A series of recent Michigan cases are especially illustrative. In Johnson v. Caldwell, 371 Mich. 368, 377-380, 123 N.W.2d 785, 791 (1963), the Michigan Supreme Court read the state statute of limitations as being tolled until the date of discovery of a wrongful act. Controversy over malpractice liability led to a subsequent statute stating that the malpractice action accrues for limitations purposes when the treatment complained of stops. MICH. COMP. LAWS §§ 600.5805, 600.5838 (1968). In Dyke v. Richard, 390 Mich. 739, 213 N.W.2d 185 (1973), the Michigan Supreme Court found that the "common law" holding of *Johnson* could not be implicitly overruled by the legislature. Since the legislators had not expressly mentioned the date of discovery rule, they were presumed to have approved it. *Id.* at 745-49, 213 N.W.2d at 187-88. It should be noted that the Michigan legislature has subsequently overruled *Dyke* and reaffirmed its intent by inserting the phrase "regardless of the time the plaintiff discovers or otherwise has knowledge of the claim." *See* MICH. COMP. LAWS § 600.5838 (Supp. 1977).

without distorting the concept of common law. If a legislature approves a judicial interpretation, it ceases to be reversible case law and becomes part of a binding statute. Thus the enactment theory emerged as a modified but parallel rule to the non-derogation of common law doctrine.

The advocates of the enactment theory adopted the two major assumptions of legislative knowledge and implied consent that underlay the non-derogation of common law. These assumptions may have seemed even more reasonable as applied to statutes because the legislature would have a particular interest in promoting proper interpretation of its own statutory language and intent during reenactment. First, if a court could assume that a legislature knew all judicial pronouncements of common law, it should also presume that the legislature was aware of judicial construction of previous statutes.[15] Second, if legislative silence in the face of knowledge of the common law marked assent, certainly such silence in view of previous statutory construction indicated approval.

The enactment theory has its roots in a legal principle of considerable antiquity. Its elaboration in American court decisions provided sufficient ground for its use by the Supreme Court in a number of cases to be examined in the next section. Nevertheless, its assumptions about legislative action must be subjected to serious scrutiny.

B. *The Enactment Theory in the Supreme Court*

The Supreme Court began to apply the enactment theory during the early 1900's to the new regulatory statutes that Congress had passed to meet the problems of a rapidly industrializing society. Initially, the theory incorporated administrative agency interpretations of the original statute into its reenacted version. In *United States v. G. Falk & Brother,*[16] the Attorney General of the United States had in-

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15 This analysis assumes that the first premise, that legislators are on notice of all common law, is valid. While the first premise will not now be challenged, this Note will later contend it is quite untenable.

16 204 U.S. 143 (1907).

terpreted a provision of the Customs Administrative Act of 1890 as applicable to merchandise imported after the act took effect.[17] Five years later, Congress reenacted the provision in another act without commenting on that construction. Without citing authority for its reasoning, the *Falk* court ruled that it was bound by the Attorney General's interpretation:

> This then is our view: The Attorney General having construed the proviso of § 50 of the act of 1890 . . . and this construction having been followed by the executive officers charged with the administration of law, Congress adopted the construction by the enactment of § 33 of the act of 1897.[18]

Less than a year later, the Court reaffirmed the doctrine in a similar case.[19]

The enactment theory was soon extended to implied legislative acceptance of judicial interpretations of a prior statute. In *Hecht v. Malley,*[20] for example, the Court held that, in view of the congressional reenactment of language used in an earlier act without comment on its interpretation, "Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment."[21]

The Court did not have occasion to use the enactment theory extensively until Congress established the comprehensive regulatory schemes of the New Deal period. These laws delegated substantial legislative power to administrative agencies and the judiciary by their vague terms.[22] The enactment theory may have been perceived as a method of protecting these administrative and judicial efforts by incorporation into the statutes themselves. During

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17 *Id.* at 149. The decision was reached on May 14, 1891. 20 OP. ATTY. GEN. 81.
18 204 U.S. at 152.
19 United States v. Cerecedo Hmnos. y Compania, 209 U.S. 337, 339 (1908).
20 265 U.S. 144 (1924); *see also* National Lead Co. v. United States, 252 U.S. 140, 146-47 (1920).
21 265 U.S. at 153 (citation omitted).
22 Landis, *supra* note 10, at 219.

the 1930's and 1940's, the Court enforced prior statutory construction in a significant number of cases involving interpretations by administrative agencies[23] or the courts.

Recent cases illustrate the continuing vitality of the enactment theory. In *Snyder v. Harris,*[24] the Court found the 1966 Amendments to Rule 23 of the Federal Rules of Civil Procedure establishing a "functional" approach to class actions insufficient to overcome a previous Court interpretation of the former Rule disallowing aggregation of claims to meet the $10,000 federal jurisdictional requirement,[25] even though the amended Rule strongly implied that aggregation was permissible. The Supreme Court again invoked the theory in *Georgia v. United States*[26] to uphold its previous extension of section 5 of the 1965 Civil Rights Act to "any state enactment which altered the election law of the covered state in even a minor way" in *Allen v. State Board of Elections.*[27] Although the *Allen* case had been mentioned in the Committee hearings before reenactment, it was never the subject of serious discussion and Congress gave no indication of an intent to overrule the decision.[28] Most recently, the Court in *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*[29] refused to permit the agency to change its prior enforcement policy excluding "managerial employees" from the protection of the National Labor Relations Act because Congress had reenacted the relevant provision of the Taft-Hartley Act after the NLRB's original interpretation.[30]

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23 *See* Shapiro v. United States, 335 U.S. 1, 16 (1948); Francis v. Southern Pacific Co., 333 U.S. 445, 450 (1948); Morgan v. Commissioner, 309 U.S. 78, 81 (1940); Electric Storage Battery Co. v. Shimadzee, 307 U.S. 5, 14 (1939); Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 114-15 (1939); Helvering v. Winmill, 305 U.S. 79, 83 (1938); Missouri v. Ross, 299 U.S. 72, 75 (1937); Old Mission Portland Cement Co. v. Helvering, 293 U.S. 289, 293-94 (1934); United States v. Dakota-Montana Oil Co., 288 U.S. 459, 466 (1933); Massachusetts Mutual Life Ins. Co. v. United States, 288 U.S. 269, 273 (1933); United States v. Ryan, 284 U.S. 167, 175 (1931); McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 492-93 (1931); Poe v. Seaborn, 282 U.S. 101, 116 (1930); Brewster v. Gage, 280 U.S. 327, 337 (1930).

24 394 U.S. 332 (1969).

25 *See* FED. R. CIV. P. 23 (1965).

26 411 U.S. 526 (1973).

27 393 U.S. 544, 566 (1969).

28 411 U.S. at 533 n. 5.

29 416 U.S. 267 (1974).

30 Before 1959, the National Labor Relations Board had interpreted § 2(3) of the

These cases exemplify the Court's employment of the enactment theory in the clearest cases of congressional unwillingness to repeal explicitly a previous judicial or administrative interpretation during reenactment of a statute. Further examination of past decisions reveals that the Court has also established a threshold for application of the theory by answering three subsidiary questions about its scope. First, how much must the language of the statute be altered before the Court will remove the implication of congressional approval? Second, how inconsistent with a prior construction must a subsequent act be to repeal the construction? Third, how entrenched must a judicial or administrative construction be to support the assumption that Congress is aware of it when it reenacts the statute? The Court's loose standards in this area may favor unduly prior judicial and administrative interpretation and frustrate the legislative will.

1. Reenactment of Statutory Language

The Supreme Court has often held that when the exact words of a statute have been reenacted into law by Congress, those words are to be interpreted as they were in cases decided under prior law.[31] Blind application of this doctrine,

Taft-Hartley Act of 1947 as excluding all "managerial" employees from the protections of the National Labor Relations Act. *See* Curtiss-Wright Corp., 103 N.L.R.B. 458, 464 (1953); Swift & Co., 115 N.L.R.B. 752, 753-54 (1956). In 1959, Congress reenacted the Act without altering the language of the statute. The NLRB attempted to modify its earlier position in 1970 by allowing NLRA protection to those managerial employees whose work was not susceptible to conflicts of interest in labor relations. *See* North Arkansas Electric Cooperative, Inc., 185 N.L.R.B. 550 (1970).

31 In *Missouri v. Ross,* the Court found itself especially persuaded by the fact that the phraseology of the section of the Bankruptcy Act in question had not *at all* been altered in a recodification of the Act, while the Act had been "amended . . . in other particulars." 299 U.S. 72, 75 (1936). Similarly, where Congress had passed an act substantially amending many portions of the National Labor Relations Act, the failure to alter the language of a section instructing the NLRB to enforce wage stabilization program hearings was viewed to enact into law the rules of procedure NLRB had developed for the hearings. Allen v. Grand Central Aircraft Co., 347 U.S. 535, 544-45 (1954). Further, although there have been no Supreme Court holdings to this effect, dictum abounds in some cases that would lead one to believe that once a section undergoes substantial wording changes, the implication of enactment of construction accompanying the section would evaporate, freeing the Court to scrutinize the validity of the previous holding. *See, e.g.,* Cammarano v. United States, 358 U.S. 498, 510-11 (1959).

however, may lead to a court's ignoring the context in which the reenactment took place, a context that may render application of the enactment theory inappropriate. In *Francis v. Southern Pacific Co.*,[32] the Supreme Court carried over an interpretation of the Hepburn Act "free pass" provisions[33] to their reenacted counterparts in the Transportation Act of 1940. These provisions had been held to exempt railroads for liability from injury to free pass riders. Three dissenting justices, however, argued that the addition of new groups to the pool of eligible participants negated any implication that Congress was aware of the prior interpretation because Congress would not wish to expose other individuals to injury without the possibility of recovery in tort from the railroad.[34] Nevertheless, the majority held that Congress had approved the earlier construction because it had reenacted the provision in substantially the same form.

A more recent decision of the Fifth Circuit, *United States v. Falletta*,[35] shows another example of judicial willingness to disregard significant alterations in the words of a statute. The Court applied an interpretation of 15 U.S.C. section 902(d) to the reenacted provision in 18 U.S.C. section 922(d). Under this interpretation, the original provision's penalties for the sale of firearms by any person to a convicted felon did not affect liability as an aider or abettor under 18 U.S.C. section 2 of a felon receiving firearms illegally under 18 U.S.C. section 1202(a).[36] But a change in language from any person under section 902(d) to a specific enumeration of licensed personnel under section 922(d) may have evidenced a congressional intent to narrow liability under the primary aiding and abetting statute for these groups.[37] The Court only stated that such an interpretation would strain the statute's credibility.[38] Although an alternative holding was sufficient

32 333 U.S. 445 (1948).
33 34 Stat. 584 (1906).
34 333 U.S. at 470-71 (Black, J., dissenting).
35 523 F.2d 1198 (5th Cir. 1975).
36 *Id.* at 1200.
37 *Id.*
38 *Id.* at 1201.

to support the result in *Falletta*,[39] the Court's opinion demonstrates that statutory word changes raising questions about congressional intent may be discounted if the court perceives that the reenactment is "substantially unchanged."[40]

Similar adherence to past constructions has been demonstrated in cases involving major changes in statutory context. In *Shapiro v. United States*,[41] the Court found a congressional ratification of the judicial construction of a provision taken from the Compulsory Testimony Act of 1893, even though the enactment into which it was placed, the Emergency Price Control Act, was a totally different statutory scheme.[42] The Price Control Act did not contain any other section from the Testimony Act and regulated a social activity that the laissez-faire Court construing the section at the turn of the century could never have imagined would be a proper subject of legislation.[43]

The limited effect of negating an inference of congressional approval upon reenactment makes the willingness of the federal courts to sustain a prior statutory construction difficult to explain. If the implication of congressional acceptance evaporates because of a significant change in language or context and the legislative intent is unclear, the court is free to scrutinize the validity of the prior interpretation and reach its own conclusions. Thus the courts may be providing special protection for prior interpretations from uncertainty about subsequent congressional intent in reenactment only in cases where they agree with the previous construction. In any event, the cases discussed above demonstrate that the federal courts will retain prior constructions when the reenacted statute is "substantially unchanged" in words and

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39 *Id.* at 1200.

40 *Id.* at 1201.

41 335 U.S. 1 (1948).

42 *Compare* 49 U.S.C. § 9, *as amended* (1976), *with* 50 U.S.C. App. § 922 (a), (g) (terminated 1947).

43 The construction had been established in Wilson v. United States, 221 U.S. 361 (1911). The Court had six years earlier attempted a constitutionalization of classical liberal economic principles in Lochner v. New York, 198 U.S. 45 (1905).

context. The more stringent standards of verbatim replacement of a previous provision have not controlled judicial decisions.

2. Enactment of an Inconsistent Subsequent Statute

Affirmative statutory action by Congress repudiating a pre-existing construction has been held sufficient to overcome the inference of approval. *Girouard v. United States*[44] provides an example of the kind of statute, passed after a reenactment, that will negate the assumption.

The Supreme Court had construed the oath to be used under the naturalization laws to require an alien to swear a willingness to bear arms for the United States. In the Nationality Act of 1940, Congress had reenacted the oath without commentary on the Court's earlier construction. The dissenters, Justices Stone, Frankfurter, and Reed, insisted that

> [b]y thus [readopting earlier language] adopting and confirming this Court's construction of what Congress had enacted in the Naturalization Act of 1906 Congress gave that construction the same legal significance as though it had written the very words into the Act of 1940.[45]

The majority did not directly attack the enactment theory, but relied on the fact that the principle embodied in the earlier judicial construction had been rejected in a statute passed after the reenactment of the oath provision:

> [f]or us, it is enough to say that since the date of those cases Congress never acted affirmatively on this question but once and that was in 1942. At that time . . . Congress specifically granted naturalization privileges to noncombatants who like petitioner were prevented from bearing arms by their religious scruples. That was affirmative recognition that one could be attached to the principles of our government . . . even though his religious convictions prevented him from bearing arms . . . . [T]he affirmative action taken by Congress in 1942 negatives any inference

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44 328 U.S. 61 (1946).
45 *Id.* at 76.

> that otherwise might be drawn from its silence when it reenacted the oath in 1940.[46]

Thus, even if Congress had silently adopted the Supreme Court's holding in 1940, it subsequently repealed its silent enactment.

Girouard by itself does not determine when a subsequent statute will be sufficiently "inconsistent" with a reenactment to infer a repeal. Consideration of common law precedents on a similar issue may be helpful in devising a standard. *Girouard* presents the enactment theory analogue to the maxim that pre-existent common law inconsistent with a statute will be overruled. Several common law cases illustrate that most courts find no inconsistency unless the common law and the express words of the statute are mutually exclusive. Policy objectives and legislative preference in the statute do not outweigh the common law if it could coexist with the statute.[47]

In *Tilbro Home Builders, Inc. v. Leidel*,[48] the owner of a north parcel sought lateral support he would have been entitled to at common law; the south parcel owner had removed a natural slope during construction on the north parcel. The south parcel owner argued that the common law had been displaced by the New York Administrative Code, which provided that an owner "insisting on or maintaining" adjoining ground at a given level should bear the expense of reinforcing a structure. The court did not try to discern legislative intent, but noted that the common law had not been expressly repealed by the Code and that "[r]ules of common law are no further abrogated than the clear import of the language used in a statute absolutely requires."[49] From this the court

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46 *Id.* at 70.

47 A discussion of this issue necessarily relied to a large extent on state court decisions. In the forty years since Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), sounded the death knell of general federal common law, there have been few federal codifications influencing federal decisional law. Consequently, no coherent doctrine on the survival of common law after a statute has been developed by the federal judiciary.

48 42 A.D.2d 578, 344 N.Y.S.2d 614 (1973) (memorandum opinion).

49. *Id.* at 579, 344 N.Y.S.2d at 617.

reasoned that "insisting on or maintaining" *could* be interpreted as not encompassing the north parcel owner's relatively passive activity. Hence, the Code did not repeal the common law in this context.

In *People v. West Englewood Trust and Savings Bank,*[50] a bank argued that an act which required each bank where public funds are deposited to give the state a bond to secure repayment repealed the common law principle that the government is entitled to prior payment of undistributed tax moneys of an insolvent bank. Although the court noted that the depository act would be applicable in virtually every case where the state's prerogative had been, it refused to imply revocation. In justifying the result, the court stated that "[I]t is only where there is a clear repugnance between two laws and the provisions of both cannot be carried into effect that the later law must prevail, and the former be considered repealed by implication."[51]

The lesson of these common law decisions is that the courts will often give uncritical deference to prior law or legal interpretation when the legislature does not expressly provide for their repeal in a statute passed before or subsequent to reenactment of related legislation.[52] Perhaps the courts should make some effort to analyze the policy aims of the subsequent statute and temper the doctrine of strict adherence to interpretive precedents. Review of statutory construction should be more flexible than determination of implied repeal of common law because the legislative will is always paramount in a conflict between a statute and its successors.

The legislature could add comments to the statute in place

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50 353 Ill. 451, 187 N.E. 525 (1933).

51 *Id.* at 460, 187 N.E. at 529. *See also, e.g.,* Cohen v. Krigstein, 49 Del. 256, 114 A.2d 227 (Sup. 1955) (statutory and common law rule "may coexist and, therefore, it may not be concluded that the common law has been repealed. . . ."); Valdez v. New Mexico, 83 N.M. 720, 722, 497 P.2d 231, 233, *cert. denied* 409 U.S. 1077 (1972) ("common law is only abrogated by a statute which is directly and irreconcilably opposed to the common law").

52 *See, e.g.,* State v. Salafia, 29 Conn. Sup. 305, 312-15, 284 A.2d 576, 580 (1971) (repugnancy exists when statute specifies one punishment for a crime and common law specifies another).

of express repudiation in the words of the statute. Some courts have looked to these comments for guidance on the validity of old interpretations. In *In re Royal Electrotype Corp.*,[53] the Third Circuit construed section 9-303 of the Uniform Commercial Code. The Code did not indicate clearly which party to a secured transaction was responsible for assuring that instruments were properly recorded. Before the enactment of the UCC, Pennsylvania had placed that responsibility upon the party recording the instrument.[54] The court saw the language of the new Act as determinative. But it was persuaded by an official comment to the statute that the legislature had intended to overrule prior case law, even though there was no other legislative history to support the court's result.[55]

Legislative approval of draftsmen's comments to a statute could dispose of many problems created by excessive application of the enactment theory. Experience shows, however, that such enactments are difficult to realize in practice. Quite often, legislators prefer to employ vague language to conceal disagreement on substantive issues.[56] An all-encompassing commentary defining the significance of statutory language might commit its advocates to rigid positions that would defeat the legislation. Provisions specifying the proper considerations for interpreting the legislation as a whole may be a more useful means of undercutting the force of the enactment theory.

3. Knowledge of an Authoritative Construction

Before a court can infer that Congress had knowledge of a judicial or administrative construction of a statute it reenacts, the construction must be widely accepted. A number of factors affect the determination of general acceptance for a judicial construction, including the rank of the

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53 485 F.2d 394 (3d Cir. 1973).
54 *Id.* at 395.
55 *Id.* at 396.
56 *See* R. DICKERSON, ON THE INTERPRETATION AND APPLICATION OF STATUTES, 68-69 (1975).

originating court, the number of concurring or conflicting constructions, and the degree of notoriety the construction has attained. The determination is easier for administrative construction because the possibility of internal contradiction is remote.

The stature of the court may be the most significant element in justifying the assumption of congressional knowledge of judicial constructions. Supreme Court decisions carry tremendous weight.[57] Court of Appeals decisions are also highly influential when they are uncontroverted at the time of reenactment. In *Cammarano v. United States,*[58] only the Ninth Circuit had ruled on the question of whether deductions for "ordinary and necessary business expenses" included money expended for lobbying purposes before the 1939 reenactment of the section in the Internal Revenue Code.[59] A regulation had also existed on the subject prior to 1939. Yet the Supreme Court held that the reenactment of the provision by Congress in 1939 and 1954, without mention of the Ninth Circuit case or of the regulation, gave the holding and regulation "the force of [statutory] law."[60] Other cases have shown similar respect for Court of Appeals decisions.[61]

Even federal district court decisions have been considered "accepted" when they repeatedly reach the same construction. Prior to the Supreme Court's decision in *United States v. Ryan,*[62] seven district courts had construed section 3453 of

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57 There can be no more "accepted" construction. *See* Shapiro v. United States, 335 U.S. 1, 16 (1948); Francis v. Southern Pac. Co., 333 U.S. 445, 450 (1948); Snyder v. Harris, 394 U.S. 332, 337-39 (1969); Georgia v. United States, 411 U.S. 526, 533 (1973); Rath Packing Co. v. Becker, 530 F.2d 1295, 1312 (9th Cir. 1975).

58 358 U.S. 498 (1959).

59 *See* Old Mission Portland Cement Co. v. Commissioner, 69 F.2d 676, *aff'd on other grounds* 293 U.S. 289 (1927).

60 *Cammararo,* 358 U.S. 498, 510.

61 *See* United States v. Falleth, 523 F.2d 1198 (5th Cir. 1975). *See also* Consumers Co. v. Kabushiki Kaisha, 320 U.S. 249 (1943); *In re* Wisconsin Cooperative Milk Pool, 119 F.2d 999 (7th Cir. 1941), *cert. denied* 314 U.S. 475 (1941), Bakelite Corp. v. National Aniline & Chemical Co., 83 F.2d 176 (2d Cir. 1936) (one federal court of appeals); N.L.R.B. v. Gullett Gin Co., 340 U.S. 361, 365-66 (1951) (construction made by two federal courts of appeals).

62 284 U.S. 167 (1931).

the Revenue Act to apply to all chattels "associated with taxable articles possessed with the purpose to sell or remove in fraud of the revenues."[63] The 1866 version of the Act was substantially reenacted in the same section of the latest Act, although there were distinct textual differences.[64] The Ninth Circuit read the new section to reach a result that conflicted with the opinions of the courts issued prior to the reenactment. The Supreme Court reversed the Ninth Circuit, explaining that the alterations in reenactment were not sufficient to dispel the presumption that Congress had adopted the preexisting construction.

The existence of conflicts among federal courts prior to reenactment can reverse the inference of congressional knowledge. *United States v. Powell*[65] involved an attempt by the Internal Revenue Service to compel the production of records under section 7602(a) of the Internal Revenue Code of 1954. Prior to reenactment of section 7602(a) in the 1939 and 1954 Codes, several district courts in the Third Circuit had held that "probable cause" of wrongdoing by the taxpayer was required before the IRS could initiate proceedings.[66] The Supreme Court, however, refused to apply the enactment theory because one district court had ruled the other way; the cases thus did not represent a "settled judicial construction."[67]

Administrative constructions are more frequently considered "accepted" because there is no conflict among a single agency's interpretation in the judicial sense.[68]

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63 *Id.* at 171.

64 *Id.* at 174.

65 379 U.S. 48 (1964).

66 *See, e.g.*, Zimmerman v. Wilson, 105 F.2d 583 (3d Cir. 1939).

67 379 U.S. at 55 n. 13. *See also* Cammarano v. United States, 358 U.S. 498, 511 (1959) (dictum).

68 *See* N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 289 (1974); Allen v. Grand Central Aircraft Co., 347 U.S. 535, 544-45 (1954); Morgan v. Commissioner, 309 U.S. 78, 81 (1940); Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110, 114-15 (1939); Helvering v. Winmill, 305 U.S. 79, 83 (1938); Missouri v. Ross, 299 U.S. 72, 75 (1937); Old Mission Portland Cement Co. v. Helvering, 293 U.S. 289, 293-94 (1934); United States v. Dakota-Montana Oil Co., 288 U.S. 459, 466 (1933); Massachusetts Mutual Life Ins. Co. v. United States, 288 U.S. 269, 273 (1933); Poe v. Seaborn, 282 U.S. 101, 116 (1930); Brewster v. Gage, 280 U.S. 327, 337 (1930); United States v. Cerecedo Hmnos. y Compania, 209 U.S. 337, 339 (1908); United States v. G. Falk & Brother, 204 U.S. 143, 150-52 (1907).

Moreover, the interpretations are often intertwined with rules issued under delegated legislative authority and given the force of law.[69] Finally, congressional oversight of administrative agencies increases the likelihood that the congressional committees drafting reenactments will be aware of important administrative interpretations and enforcement policy.[70]

The notoriety requirement for both judicial and administrative constructions has usually been invoked defensively to dispel doubts raised by the imputation of constructive congressional knowledge. It provides support for an inference that Congress *in fact* knew about a prior interpretation when it reenacted a statute. The Supreme Court has employed the principle in a number of cases. Justice Harlan observed in *Cammarano*[71] that the construction was one whose notoriety would surely have caught the congressional eye.[72] Similarly, in his dissent in *Spiegel's Estate v. Commissioner of Internal Revenue,*[73] Justice Frankfurter explained his inference of approval from congressional silence by suggesting that "[a]n interpretation that 'came like a bombshell' certainly had the attention of Congress."[74] Again in *Georgia v. United States,*[75] the Court pointed to the fact that Congress had discussed the prior judicial construction, although it is clear that the discussions were not extended and Congress ultimately took no position at all.[76]

The Court's uneasiness about constructive implication of congressional knowledge represented by the notoriety rule has never been sufficient to pose a serious challenge to the hegemony of the enactment theory, although some justices and critics have advocated this position.[77] Indeed, the federal

69 "[V]alid legislative rules have force of law and interpretative rules sometimes do." 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 5.05 at 314 (1st ed. 1958).

70 *See, e.g.,* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 41, 45-48 (1965); Pearson, *Oversight: A Vital Yet Neglected Congressional Function,* 23 U. KAN. L. REV. 277, 277-81 (1974).

71 358 U.S. 498 (1959).

72 *Id.* at 509.

73 335 U.S. 632 (1948).

74 *Id.* at 682 (Frankfurter, J., dissenting).

75 411 U.S. 526 (1973).

76 *Id.* at 533 & n. 5.

77 *See, e.g.,* Girouard v. United States, 328 U.S. 61 (1946) (Douglas, J.)

judiciary has applied the enactment theory in situations where a prior construction was very inconspicuous. The Fifth Circuit in *Alabama Association of Insurance Agents v. Board of Governors of the Federal Reserve System*[78] inferred congressional approval upon reenactment of an obscure ruling of the Board authorizing the separate sale of liability insurance by a bank holding company agency under section 4(c)(8) of the Bank Holding Company Act of 1936.[79] Congress' total silence on the new interpretations and the short interval between the agency's construction and the reenactment did not influence the court's decision.[80] *Alabama Association* and similar cases demonstrate that the federal judiciary will infer approval of many constructions that escape the attention of the legislature. The legislature cannot guarantee that a prior interpretation will be discarded unless it explicitly provides for repeal in a reenacted statute. Expressions of intent through related acts or committee comments and reports can be evaded by judges whose policy interests coincide with prior constructions.

C. *A Critique of the Enactment Theory*

The courts must make two implicit judgments about the enactment theory to justify its frequent use as a maxim of statutory interpretation. First, they must believe that legislative drafters do take notice of all significant prior judicial and administrative interpretations of a statute and excise the opinions they do not like by changing the words, context, or legislative history upon reenactment. Alternatively, they may recognize that this assumption is unrealistic but feel that a duty should be imposed upon Congress to act this way. Second, the courts must find that the benefits of implying approval where it does not exist or penalizing Congress for neglecting its duty exceed the costs of frustrating the legislative will and deterring some future legislative action. Whatever validity these evaluations may have had

78 533 F.2d 224 (5th Cir. 1976).
79 *Id.* at 245.
80 *Id.*

when the enactment theory was first adapted from implied repeal of common law, developments in statutory and common law since that time have stripped away their foundation. Judges and administrators should make their own policy decisions about the construction of reenactments if they are to effectuate the will of Congress and avoid burdening it with rigid requirements of specificity.

1. Invalid Premises of the Enactment Theory

Common law courts have repudiated the rule that silence or inaction equals consent in contract cases because it leads to unjust results.[81] It is now well settled that, as a matter of human experience, silence is more likely to indicate a noncommittal or unaware state of mind than acceptance or rejection of a point of view. Thus the courts require that silence be clothed by circumstances demonstrating the silent party's awareness to signify assent.[82]

The conditions of modern legislative action make the doubtful import of silence even more tenuous in legislative reenactment or codifications. In the nineteenth and early twentieth centuries, the assumption that silence conveyed knowledge and acceptance of prior interpretations may have had some basis in fact. Legislatures were relatively inactive and keeping track of statutes was an easy task. Courts were relatively few in number and their dockets uncrowded.[83] With fewer statutes, fewer courts, and less litigation, courts were not often asked to construe statutes. Finally, there were only about a third as many administrative agencies in 1900 as there are today,[84] and delegation of power to them was far more limited.

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81 *See* Hatch v. Benson, 6 Barbour 28, 35 (N.Y. 1849) ("silence shows consent" termed a "much abused maxim").

82 *See, e.g.*, Wise v. United States, 38 F. Supp. 130, 134 (D.Ky. 1941); Consolidated Freight Lines v. Groenen, 10 Wash.2d 672, 676-78, 117 P.2d 966, 968 (1941); Harvey v. Richard, 200 La. 97, 102-03, 7 So.2d 674, 677 (1942); Lincoln v. Bennett, 135 S.W.2d 632, 636 (Tex. Civ. App. 1939).

83 In 1907, when the *Falk* case was decided, there were 106 federal judges, not including the members of the Supreme Court. *See* 147 F. iii-v. Today, there are 828 lower federal court judges. *See* 543 F.2d vii-xii.

84 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1:7, at 17 (2d ed. 1978).

But the Depression and Roosevelt's New Deal committed Congress to far more frequent intervention in private affairs. Statutes were enacted to govern many more activities of private enterprise.[85] The expansion of government regulation brought a corresponding growth in broad delegation of authority to administrative agencies to make complex decisions of policy and enforce statutory mandates. Such delegations invited administrators to engage in extensive interpretation of legislation through rules and regulations.[86] More recently, the explosion in litigation[87] stemming from improved access to legal services has demanded many more judicial decisions.[88] These factors have so increased the body of precedent in statutory interpretation that it would be virtually impossible for Congress to discover it all. The courts can no longer be justified in assuming that Congress knows all prior constructions of any general statute or that its silence is an expression of agreement to anything.

2. The Duty of Awareness and Legislative Action

Some supporters of the enactment theory concede that Congress may not be aware of prior statutory interpretations but argue that it has a duty to educate itself that must be enforced through a presumption in subsequent judicial proceedings. Justice Stone has suggested that

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85 These subject areas included telecommunications, *see* Communications Act of 1934, ch. 652, 48 Stat. 1064 (Federal Communications Commission); labor relations, *see* National Labor Relations Act, ch. 372, § 3, 49 Stat. 449, 451 (1935) (National Labor Relations Board); and the securities industry, *see* Securities Exchange Act, ch. 404, § 4, 48 Stat. 881, 885 (1934) (Securities and Exchange Commission).

86 Professor Davis has noted that the delegation doctrine has been so flaunted by Congress and the courts that it ought to be altogether abandoned and replaced by a new principle which would accept delegation of legislative power as an appropriate Congressional act. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 3:15 at pp. 206-16 (2d ed. 1978).

87 *See* Auerbach, *A Plague of Lawyers,* 253 HARPER'S 37 (Oct. 1976).

88 *See, e.g.,* Paul v. Davis, 424 U.S. 693, *rehearing denied* 425 U.S. 985 (1976) (deprivation of reputation interest by state officials not actionable in federal court); Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, 428 U.S. 397, 411-12 (1976) (limitation of federal court jurisdiction to enjoin labor strikes); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 37-41, *rehearing denied* 430 U.S. 976 (1977) (federal courts ought not imply a cause of action from a federal statute unless three conditions are satisfied).

> It is the *responsibility* of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language.... In any case, it is not lightly to be implied that Congress has failed to perform [its duty] and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it.[89]

This section will argue, however, that such a responsibility imposes an untenable judicial role upon Congress and could stifle legislative activity and administrative flexibility.

The Constitution provides little justification for the imposition by the courts of a congressional duty of awareness. A judicial inquiry into legislative knowledge and motive with an intent to second-guess congressional actions might violate modern due process principles in the field of economic regulation.[90] Furthermore, there is no constitutional requirement that the legislature specify its intent on all matters involving potential conflicts in interpretation. Just as the court need not resolve all issues presented in deciding a case, the legislature should be permitted to confine its attention during reenactment to the portions of a statute that are most critical to the statute's effective operation. The courts and administrative agencies should retain the power to reexamine prior interpretations of ancillary provisions.

Even if the duty could be justified, moreover, it would confuse legislative and judicial responsibilities. The duty of awareness reflects a view of Congress as an unchanging interpreter of its own past actions. Prior administrative and judicial constructions of congressional intent serve as forms of legislative *stare decisis* that Congress should be constrained to follow, or acknowledge, during reenactment of a statute much as a court does in interpreting common law. But a requirement that Congress implicitly sanction prior interpretations of statutory law ignores the prospective character of legislative action. The Constitution contemplated that statutes would ordinarily apply only to future

89 Girouard v. United States, 328 U.S. 61, 76 (1946) (Stone, J., dissenting) (emphasis added).

90 *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 487-88, *rehearing denied* 349 U.S. 925 (1955).

conduct by prohibiting *ex post facto* laws. If Congress attempted to override a court finding that an administrative agency had exceeded its delegated authority under a statute and reinstate an administrative sanction, it would violate the Constitution.[91]

Congress can only indicate the intent of its present members in reenacting a statute. The interpretation of the intent of the Congress that enacted the statute originally must remain within the province of the judiciary and administrative agencies exercising their quasi-judicial powers. If there are reasons to reaffirm or change a prior interpretation, courts and agencies should expound them or cite explicit legislative intent of the reenacting Congress. A court that invokes a duty of awareness to perpetuate a prior interpretation under the enactment theory undermines its own responsibility to interpret the law.

The duty of awareness may also disrupt the legislative process. First, it could stymie the preparation of statutes for reenactment. Congressional staffs would not have the capacity to compile, digest and discuss every accepted construction of every section in all recodified acts under the best circumstances. Actual time and budget restraints make the goal unapproachable.[92]

Second, the rule might extend the requirement of congressional debate beyond reason. An extensive adversary presentation of policy implications either in committee or on the floor would presumably be necessary to legitimize an interpretation contrary to the prior judicial or administrative construction.[93] But no Congress could be expected to predict and consider all of the possible ramifications of its action. Moreover, the range of interpretive issues for a reenacted statute could be so great that congressional time would be

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91 The Constitution proscribes *ex post facto* enactments. U.S. CONST. art. 1, § 9, cl. 3. An *ex post facto* law includes one which imposes a punishment for an act not punishable at the time it was committed. Burgess v. Salmon, 97 U.S. 381, 384 (1879).

92 *See* W. KEEFE & M. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES 154-55 (3d ed. 1973).

93 Congress seldom touches on more than a few aspects of proposed legislation. *See* R. DICKERSON, *supra* note 56, at 80.

monopolized to the detriment of legislation.[94] A more limited congressional role in deciding these questions mirrors the tradition of judicial silence on issues not raised by counsel or unnecessary to resolving the case.[95] General rules of legislative decisions by silence are imprudent.

Third, a duty of awareness could seriously hamper the formation of legislative consensus. Congress presently achieves accord on comprehensive measures by equivocating on matters that are not worth fighting about.[96] When it is worthwhile to reenact a section of a statute that engenders substantial disagreement about its construction in peripheral contexts, Congress reenacts without comment and defers to the courts to resolve the conflict.[97] Shifting the responsibility for choosing an interpretation back to Congress could delay needed reenactments by giving legislators an incentive to withhold approval from the entire bill until particular interpretations they or their constituents do not favor are explicitly removed. If Congress is denied the opportunity to remain neutral on controversial interpretations, it may forfeit the advantages of reorganizing areas of statutory law into coherent wholes.[98] It could be compelled to proceed slowly by very specific, piecemeal amendments upon which a majority of legislators can agree.

Finally, the duty of awareness can hinder achievement of legislative goals by introducing administrative inflexibility. On the one hand, meretricious agency rulings may be perpetuated because they are difficult to challenge in court

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94 *See* Fisher, *Congressional Budget Reform: The First Two Years,* 14 HARV. J. LEGIS. 413, 453-54 (1977) (Congress overloaded by burden of reviewing large number of impoundments as required by Impoundment Control Act).

95 *See* Ashwander v. TVA, 297 U.S. 288, 341 (1935) (Brandeis, J., concurring) (no need to reach issue of constitutionality of TVA where plaintiffs had no standing to bring action).

96 This equivocation often takes the form of legislative vagueness. *See* R. DICKERSON, *supra* note 56 at 50-51, 68-69.

97 *See, e.g.,* R. DICKERSON, *supra* note 56, at 182-83, J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 49.09 (4th ed. rev. C. Sands 1973).

98 *See* Loss, *Introduction,* in FEDERAL SECURITIES CODE at xv, xv-xvi (Proposed Official Draft, 1978).

The FEDERAL SECURITIES CODE will hereinafter be cited simply as CODE, making reference to the appropriate draft.

and Congress does not learn of the problems. In securities law, for example, the enormous practical penalty of losing acceleration privileges for noncompliance with SEC rules has discouraged private parties from challenging dubious agency positions in court.[99] On the other hand, the agency itself may be unable to change its policies if old interpretations have been codified by legislative silence. A rule that would allow agencies to alter policies as conditions in regulated fields change would seem to promote congressional objectives better than a rigid requirement of explicit legislative intent.

Imposing a duty of awareness punishes Congress unduly without guaranteeing that Congress will be able to improve its knowledge and consideration of prior statutory interpretation. Congress should be allowed to be explicit only on those general matters of policy that it feels capable of resolving within the constraints of time and consensus. In the final analysis, the courts are better able to decide on a case-by-case basis what weight should be accorded prior judicial and administrative interpretation. Only judicial analysis can ensure that the importance of precedent will hinge on the validity of its reasoning rather than on the vicissitudes of legislative acknowledgment and intent.

II. THE FEDERAL SECURITIES CODE AND THE ENACTMENT THEORY

The federal courts are unlikely to relinquish the enactment theory voluntarily. By choosing to apply the theory directly or qualify it, the courts can control the range of issues in cases involving interpretation of a reenacted statute. Moreover, the courts can avoid the task of justifying weakly-reasoned positions by investing them with legitimacy from implicit congressional approval. At the same time, a court can refuse to apply the enactment theory to a specific statute and issue its own interpretation if it strongly opposes the existing construction.[100] Nevertheless, the courts generally will

99 *See* L. LOSS, SECURITIES REGULATION 279-83 (2d ed. 1961).

100 The Supreme Court follows a similar practice in cases involving the Constitution, where it views its prior constructions as being open to reexamination. *See* Glidden Co. v. Zdanoh, 370 U.S. 530, 542-43 (Harlan, J.), *rehearing denied* 371 U.S. 854 (1962).

invoke the enactment theory because it reduces their workload. If a reenacted statute is to be protected from the harsh consequences of the enactment theory, the legislature itself must eliminate a court's discretion to apply the theory in the text of the reenactment.

The Federal Securities Code could have its aims frustrated by slavish judicial adherence to the enactment theory. It contains many sections that correspond closely to provisions of the current securities acts, and a few that repeat them verbatim. If Congress does not change these words, or fails to make explicit commitments to new legislative intent, or cannot incorporate the drafter's commentary into the reenactment in a way that clearly indicates a different interpretation, the enactment theory could engraft prior judicial and administrative constructions of the securities acts onto the Code.

This outline may contravene the purposes of the Code and its drafters in several ways. One goal of the Code is to replace unclear common law interpretations of terms and standards of conduct used in the securities acts with more precise Code definitions.[101] But the enactment theory would retain the maze of federal common law principles that the courts have devised to explain the meaning of the original statutes.

Another aim of the Code is to allow courts and agencies to adjust their constructions of the securities acts to fit new conditions in the securities industry and the market.[102] These institutions should be permitted to explore difficult questions of interpretation with a clean slate, free to glean whatever is persuasive and reasoned from pre-Code decisions, but also free to disregard judgments which, in retrospect, proved to be unworkable. The enactment theory, however, compels the courts and agencies to accept bad practices with the good and retards progress by entrenching outmoded regulations.

A third object of the Code is to eliminate those precedents

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101 *See* CODE § 101(c) (Proposed Official Draft, 1978).

102 *Id.* §§ 101(b), (d), (g), 2010(b) (Code does not ratify prior judicial or administrative precedents).

that do not further the protective purpose of the original securities acts or achieve the purpose at an excessive cost of harm to other desirable policies. Some previous decisions, for example, have reduced the substantive guarantees of the securities law because the courts disapproved of their effects on litigation under liberalized rules of procedure.[103] Under the enactment theory, the doctrines of federal common law propounded in these cases would prevail in all future cases unless they were literally inconsistent with the words of the Code.

To illustrate the potential adverse impact of the enactment theory, this section will first discuss some examples of present securities law and relevant Code provisions that could be affected. Then it will examine the choice between alteration of statutory language and separate preemption of the enactment theory by special provision. The section concludes that the second option could better protect the intent of the Code's drafters and Congress in the reenactment of the securities acts.

A. *Prior Federal Court Interpretations and the Code*

The Federal Securities Code represents a compromise between conformity to the original text of the securities acts for political acceptability and alterations that reflect experience under the present acts or combine disparate provisions more coherently.[104] Its ultimate effect upon securities law may depend largely upon judicial perception of changes in legislative intent reflected in the manner of reenactment. Two general techniques that the Code employs to modify interpretations of securities law could be neutralized by the enactment theory.

First, the Code leaves studied ambiguity in the commentary to some reenacted provisions of the original acts in an effort to encourage reconsideration of past federal common law

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103 *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

104 *See, e.g.*, Loss, *Introduction*, in CODE (Proposed Official Draft, 1978) at xv, xv-xxiv; Loss, *The American Law Institute's Federal Securities Code Project*, 25 BUS. LAW. 27 (1969). Professor Loss was Reporter for the Code.

constructions.[105] Although the comments for some of these sections were completed before the recent Supreme Court's restrictive interpretations,[106] they should affect the subsequent decisions as well because the rulings rest so heavily upon the specific words of the original acts and previous legislative intent.[107] But the enactment theory would nullify the subtleties of the Code's comments by exalting past interpretations unless the text of the statute explicitly overruled them. Moreover, the comments to the statute may never be given the same authority as the text.[108]

Second, the Code's actual intent to change existing interpretations sometimes exceeds the exact words of the text and the comment. The large number of prior judicial and administrative decisions that could conceivably be persuasive authority for a particular interpretation makes it difficult to provide an exhaustive listing of opinions contrary to the intent of the reenactment or the accompanying comments without sacrificing the generality that is necessary for such broad statutes as the securities laws. Thus the Code in some comments resorts to exemplification of the doctrines that specific provisions would overrule by citing several major decisions.[109] The enactment theory, however, might limit the influence of these comments to the particular cases cited. As a result, the spirit of the Code would be sacrificed to the letter of the law.

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105 *See, e.g.,* CODE § 1602(a) (Proposed Official Draft, 1978); CODE § 1301(a), Comment, (Tent. Draft No. 2, 1973) (No clear statement on whether recovery under Rule 10b-5 limited to purchasers and sellers).

106 *See, e.g.,* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (applying purchaser-seller rule).

107 *See id.* at 755, 755-60 (concurring opinion of Powell, J.).

108 In interpreting the Uniform Commercial Code, a statute to which voluminous "official comments" were attached by the drafters, one court has noted: "While the Comment accompanying [Texas U.C.C. § 2-206] does not rise to the level of judicial precedent, it does present assistance in attempting to clarify and ascertain the meaning to be given the particular code section." Farley v. Clark Equipment Co., 484 S.W.2d 142, 148 (Tex. Civ. App. 1972).

109 *See, e.g.,* CODE § 1714, note (2) (Proposed Official Draft, 1978), stating it was intended that § 1714(d) of the Code overrule McKesson, Inc. v. Provident Securities Co., 423 U.S. 232 (1976) and Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418 (1972).

This subsection will discuss some examples of controversial statutory interpretation in the securities laws that could be made irreversible by inappropriate application of the enactment theory. These illustrations will demonstrate that the courts should not be given the discretion to invoke the theory to ratify unpersuasive or obsolete constructions without marshalling good reasons to support them.

1. The Purchaser-Seller Requirement

Securities and Exchange Commission Rule 10b-5, promulgated pursuant to section 10(b) of the 1934 Act, makes it unlawful for any person to engage in certain manipulative, deceptive, and fraudulent practices "*in connection with* the purchase or sale of any security."[110] In *Blue Chip Stamps v. Manor Drug Stores*,[111] the Supreme Court held that these words mean that only purchasers and sellers of securities have standing to bring the private action for damages which federal courts have implied from the rule.[112]

In arriving at its construction, the Court was careful to note that in drafting section 17(a) of the 1933 Act, Congress had proscribed fraud in the "*offer* or sale" of securities — whereas in writing section 10(b), it had not addressed itself to offers. The court drew additional support for its holding from the history of Rule 10b-5, which was devised as a way to provide protection for "sellers," not to safeguard those who neither purchased nor sold.[113]

But the Court made clear that it was not relying solely upon the nebulous words of the rule. Rather, it grounded much of its holding in the policy ramifications of the purchaser-seller requirement.[114] Rule 10b-5 appeared to pose an especially serious threat of vexatious litigation.[115] Strike

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110 17 C.F.R. § 240.10b-5 (1978) (emphasis added).

111 421 U.S. 723 (1975).

112 The *Blue Chip* Court explicitly endorsed the standing rule which had first been developed in Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952), *cert. denied* 343 U.S. 956 (1952). *See Blue Chip*, 421 U.S. at 733-34, 749.

113 *Id.* at 731.

114 *Id.* at 737.

115 *Id.* at 739-40.

suits, encouraged by settlement values in 10b-5 cases,[116] would become even more common if the purchaser-seller requirement were not imposed because uncorroborated oral evidence could then be submitted to the jury.[117] If the Court's fear of strike suits diminished, however, a more liberal interpretation of 10b-5 could replace the purchaser-seller requirement.

The Code uses the method of studied ambiguity to allow change in the purchaser-seller restriction if future conditions should warrant it. Section 1602 uses much of the language of Rule 10b-5:

> § 1602 [Purchases, sales, proxy solicitations, tender offers, and investment advice] (a) [General] It is unlawful for any person to engage in a fraudulent act or to make a misrepresentation in connection with (1) a sale or purchase of a security, an *offer* to sell or buy a security, or an inducement to hold a security. . . .[118]

The text of section 1602 permits a strong but not dispositive defense of an expansion of relief. On the one hand, it includes inducements to hold and offers to sell or buy securities and separates each of them from the traditional language with a disjunctive "or." On the other hand, the provision is not self-executing because the authorization for private damage actions is in another section. Moreover, the comment to section 1602, drafted prior to *Blue Chip,* states in part that "[t]he addition of the 'holding' phrase does not mean that a mere holder has a private right of action."[119]

Section 1703(b), the private damage action provision is equally ambiguous in its phrasing. It provides that "[i]f the transaction is effected in a manner that would make the matching of buyers and sellers substantially fortuitous, a seller or buyer who violates section 1601(a)(1), 1602(b)(1)(A), 1603(a) or 1613 is liable for damages. . . ."[120] This language mirrors Rule 10b-5 as interpreted in *Blue Chip.*

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116 *Id.* at 740-43.
117 *Id.* at 743-44.
118 CODE § 1602(a)(1) (Proposed Official Draft, 1978) (emphasis added).
119 CODE § 1301, Comment 2(b) (Tent. Draft No. 2, 1973).
120 CODE § 1703(b) (Proposed Official Draft, 1978).

Taken as a whole, however, the comments to these sections appear to reopen the question of standing to sue on antifraud claims for those who neither purchase nor sell stock. The comments to predecessor drafts of section 1602 note that some courts have granted standing upon an allegation of affirmative acts of inducement[121] and conclude that "within that wise limitation, the possibility of violating section 1301(a)(1) without any transactions at all should be recognized as a matter of substantive law."[122] Furthermore, the comment to the civil liability provision, currently located in section 1703(b), explicitly contemplates judicial action:

> Persons who have been affirmatively dissuaded from selling have been given standing to sue under Rule 10b-5 as if they had newly bought [citation omitted]. But, because the shades of dissuasion from selling — or inducement to hold — fill the spectrum, it is more advisable to leave the question of a private right of action to the court's discretion under [the Code's section empowering implication of private causes of action] than to make it automatic under [current section 1703(b)].[123]

Finally, additional commentary to section 1603 makes reference to the meaning of sections 1602 and 1703: "The question whether relief is available to a person persuaded not to sell (or buy) is left to the courts under [the Code's section empowering implication of private causes of action]."[124]

The comments provide persuasive evidence that the drafters of the Code intended that the courts should reconsider the Supreme Court's interpretation of the purchaser-seller rule in *Blue Chip*. But the enactment theory leaves room for argument that the decision should be incorporated into the construction of the Code. The Code's commentaries may not be enacted as part of the statute. Congress may hesitate to include the comments because federal laws have

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121 CODE § 1301, Comment 2 (Tent. Draft No. 2, 1973) *citing, e.g.*, Stockwell v. Reynolds & Co., 252 F. Supp. 215 (S.D.N.Y. 1965).

122 *Id.*

123 CODE § 1402(a)-(c), Comment 3, (Tent. Draft No. 2, 1973).

124 CODE § 1303, Comment 5(a), (Reporter's Revision of Text of Tent. Drafts Nos. 1-3, 1974).

not been drafted in this form previously.[125] Although the comments may become part of the reenactment's legislative history, the defenders of *Blue Chip* could argue by negative implication that Congress did not intend to expand standing.

If the courts then look to the statutory text to resolve the question of standing, they may find additional justification for reapplying the purchaser-seller rule. In the first place, the tenets of the enactment theory require that inexplicit language added to a reenacted section be read in a manner most consistent with the previous construction. The new phrase "an offer to sell or buy a security, or an inducement to hold a security" in section 1602(a) might lose its persuasive force under this rubric. Moreover, it may be argued that section 1602 makes misrepresentations in offers unlawful and subject, perhaps, to SEC injunctive action but not to private actions for damages because *Blue Chip* is not mentioned in the text. This construction would be supported by the fact that the civil liability provision of the statute, section 1703(b), allows only "buyers and sellers" to sue. Proponents would argue, finally, that the addition of the word "offer" in section 1602 is of no moment because the Court's decision in *Blue Chip* was based more on policy considerations than linguistic niceties. Congress' reenactment of similar language in section 1602 coupled with the new civil liability sections, could indicate congressional acquiescence in the Court's policy analysis. Thus, if the commentary is not enacted, *Blue Chip* may well become an implicit corollary to the Federal Securities Code. This restriction curtails the intrinsic flexibility of the Code's position and might eliminate a valuable source of private enforcement of the securities law.

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125 This follows from Congress' reluctance to enact legislation prepared by "outsiders." The Federal Rules of Evidence arguably form an exception to this rule. Submitted by the Supreme Court with the Advisory Committee's notes attached, *see* 56 F.R.D. 183 (1972), the Rules were disapproved by Congress before becoming effective, Pub. L. 93-12, 87 Stat. 9 (1973), and were enacted into law, as modified, by Pub. L. 93-505, 88 Stat. 1929 (1975). Arguably, those rules unchanged by Congress (for which the Advisory Committee's notes continue to be relevant) were drafted much as the proposed Code has been.

2. Federal Remedies for Corporate Mismanagement

Among those activities prescribed by Rule 10b-5 is included "any act . . . which operates or would operate as a fraud or deceit upon any person."[126] Over the years, some courts have interpreted this language to extend the coverage of the securities acts over breaches of fiduciary duties to stockholders by corporate officers and directors even where there had been full disclosure of the acts in question.[127] The Supreme Court undercut this line of decisions in *Santa Fe Industries, Inc. v. Green.*[128] It found that a definition of "fraud" in Rule 10b-5 going beyond manipulative or deceptive devices employed by management in the course of a securities transaction would exceed the statutory authority conferred by the language of section 10(b):

> To the extent that the Court of Appeals would rely on the use of the term "fraud" in Rule 10b-5 to bring within the ambit of the Rule all breaches of fiduciary duty in connection with a securities transaction, its interpretation would, like the interpretation rejected by the Court in *Ernst & Ernst*, "add a gloss to the operative language of the statute quite different from its commonly accepted meaning."[129]

In most instances, management's disclosure of questionable actions would probably be sufficient to avoid liability for manipulation or deception under section 10(b).[130]

The majority opinion in *Santa Fe* repeats the underlying considerations of policy that disturb some members of the Court in securities cases.[131] Fears of vexatious suits are complemented by a belief in the importance of traditional state responsibility for the enforcement of fiduciary duties.[132] If the Court discounted these fears of federal intrusion or burdensome litigation in the future, it could expand the

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126 17 C.F.R. § 240.10b-5(3) (1978).

127 *See, e.g.*, Schoenbaum v. Firstbrook, 405 F.2d 215, 220 (2d Cir. 1968) (dictum) (en banc), *cert. denied* 395 U.S. 906 (1969); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374 (2d Cir. 1974) (dictum), *cert. denied* 421 U.S. 976 (1975).

128 430 U.S. 462 (1977).

129 *Id.* at 472.

130 *Id.* at 474-77.

131 *Id.* at 477-78. *See id.* at 480-81 (Stevens, J., concerning in part).

132 *Id.* at 480-81.

definition of unlawful acts under section 10(b) and the accompanying Rule 10b-5.

The Code again assumes a position of studied ambiguity on the application of antifraud provisions to disclosed corporate mismanagement. It does change the text of section 10(b) somewhat in codification; section 1602 makes it unlawful "to engage in a fraudulent act or to make a misrepresentation. . . ."[133] The definition of "fraudulent act" in section 262(a) of the Proposed Official Draft is "an act . . . that (1) is fraudulent or (2) operates or would operate as fraud."[134] This shift in language away from manipulative and deceptive devices and toward the broader words "fraudulent act" may serve as a signal to the courts that Congress favors more federal control over corporate mismanagement. The commentary to a draft of section 1603 provides the clearest evidence that the Code's drafters intended to allow the courts to determine the scope of the fraud standard for themselves. It states in relevant part:

> It has been suggested by a number of commentators that Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied,* 395 U.S 906, stands for the proposition that inadequate (some would say "grossly unfair") price coupled with controlling influence establishes a 10b-5 violation regardless of disclosure. . . . On the other hand, it is possible to rationalize that case on the basis of the parent buyer's nondisclosure of an oil strike to "the corporation" as represented by the stockholders in the absence of a disinterested majority of directors. . . . Although there may not be too much difference in end result, whichever theory is followed, and although most of the nondisclosure cases have involved Clause (2) of Rule 10b-5 (see Code § 259(a)(2)), the fact remains that there are two other clauses that speak in terms of a fraudulent "act" or "scheme" (see Code § 234D(a)). Affiliated Ute Citizens v. U.S., 406 U.S. 128, 153 (1972) . . . as the Supreme Court has reiterated, "Fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue

133 CODE § 1602(a) (Proposed Official Draft, 1978).
134 *Id.* at § 262(a).

> and unconscientious advantage is taken of another." 1 Story, Eq. Jur. § 187, quoted from Moore v. Crawford, 130 U.S. 122, 128 (1899), in SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963). . . . Here again, the Code leaves the courts free to develop the unfair price-cum-influence approach if they like or hew to more traditional concepts of nondisclosure if they prefer.[135]

Even though it was drafted before *Santa Fe,* this comment appears to anticipate the restrictive fraud doctrine by evincing an intent to avoid it.

But the enactment theory could skew the outcome in future cases if Congress does not enact the commentary into law along with the statutory text. Despite the obvious change in statutory language from "manipulative and deceptive" in section 10(b) to "fraudulent" in the Code, courts may still rely upon the restrictive notion of fraud developed in *Santa Fe.*

The history of the Code drafts indicates the true meaning of "fraud" in the Act. The label "deceptive" in the Tentative Draft[136] was altered to "fraudulent" in the First Proposed Final Draft,[137] which signifies that the range of activities covered by the Code was to be broadened. But the courts have traditionally held that legislative intent does not crystallize until the time of enactment.[138] Under this rule, the pattern of rejected drafts is irrelevant to the issue of congressional intent on the definition of "fraudulent act." The courts

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135 CODE § 1303, Comment 5(c) (Reporter's Revision of Text of Tent. Drafts Nos. 1-3, 1974).

136 CODE § 1301(a) (Tent. Draft No. 2, 1973).

137 CODE § 1602(a) (Proposed Official Draft, 1978).

138 The rule and its rationale was eloquently stated by the Earl of Halsbury in the House of Lords:

> My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done.

Hilder v. Dexter, [1902] A.C. 474; *accord, e.g.,* Baltimore Retail Liquor Package Stores Ass'n v. Kerngood, 171 Md. 426, 430, 189 A. 209, 211-12 (1937); In re Morse, 247 N.Y. 290, 303-04, 160 N.E. 374, 378 (1928); *cf.* Flagg v. Johansen, 124 N.J.L. 456, 459-61, 12 A.2d 374, 376-77 (1940) (rejecting use of legislative history).

may assume that Congress meant to retain the limited scope of "fraud" from *Santa Fe* if there is no explicit contrary intent in the reenactment or the debates. Thus the drafter's words would be used to justify a result they might never have imagined.

3. Definition of a Security

The securities acts are designed to include all securities for which investors need the protection of disclosure, registration, and antifraud provisions. Section 2(1) of the 1933 Act covers a broad range of instruments:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or purchase, any of the foregoing.[139]

A number of federal court cases have clarified this definition for such investments as lessees' shares in a nonprofit housing cooperative,[140] shares in orange groves serviced by the promoter,[141] and fractional undivided interests in oil lands developed by the promoter.[142] The SEC has also embellished the term by exercising its discretion to delimit the definition in its rules and regulations.[143]

The Code appears to change some of the previous court interpretations on the definition of a security in its section 299.53(b),[144] which excludes certain sorts of instruments from the virtual restatement of 1933 Act section 2(1) in Code section 299.53.[145] For example, the explicit exclusion of "a note

139 *See* 15 U.S.C. § 77b (1976).
140 United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 840-43 (1975).
141 S.E.C. v. W. J. Howey Co., 328 U.S. 293, 299 (1946).
142 S.E.C. v. C. M. Joiner Leasing Corp., 320 U.S. 344, 351 (1943).
143 *See, e.g.*, 17 C.F.R. § 230.131 (1976).
144 CODE § 299.53(b) (Proposed Official Draft, 1978).
145 *Id.* at § 299.53(a).

or evidence of indebtedness issued in a primarily mercantile or consumer, rather than investment transaction, not involving a distribution" seems to overrule cases holding that a security interest in a predominantly mercantile transaction is a "security" under section 2(1)[146]. The willingness of the drafters to reverse some of the long-entrenched decisions on the definition of securities suggests that others should not be considered sacrosanct within the legislative intent of the Code. Some critics strongly believe that the Court erred in the prior decisions.[147] Moreover, many private parties may disagree with the SEC's regulations in this area even though their fear of penalties for noncompliance precludes court challenges.[148] The spirit of the Code that encourages judicial reexamination of securities doctrine is not denied by any language of the text in the sections or definitions.

But the enactment theory may define the words of the drafters with far more particularity than they would have expected. The word-for-word reenactment of old section 2(1) in new section 299.53(a) would establish some presumption in favor of the prior interpretations. Furthermore, the specific congressional overruling of disfavored decisions in section 299.53(b) raises a strong negative implication that other case law was to be retained. Finally, there is no commentary to section 299.53 that could justify judicial flexibility if enacted along with text. Advocates of previous court definitions of a security thus could make a strong case for incorporation and inhibit the securities law from adapting to the investment innovations of the market.

4. Standard for Recovery of Short-Swing Insider Profits

The securities law has placed a significant barrier in the path of potential manipulators of stock prices for profit who

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146 CODE § 299.53(b)(3). *See also* CODE § 297(b), Comment 2, (Reporter's Revision of Text of Tent. Drafts Nos. 1-3, 1974).

147 *See, e.g.*, Note, *The Supreme Court, 1975 Term*, 89 HARV. L. REV. 254, 259 (1975) Case Comment, 9 LOY. L.A.L. REV. 206 (1975) (questioning the reasoning of the Court).

148 Failure to register a "security" leads to *automatic* civil liability under § 12(1) of the 1933 Act, 15 U.S.C. § 77l(1) (1976).

could operate with inside information. Section 16(b) of the 1934 Act provides that

> [f]or the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months.[149]

This provision metes out harsh punishment for insider trading. Regardless of the issuer's innocence or good intentions, he will forfeit all profits from a purchase and sale or sale and purchase sequence that takes place within a period of six months.

The rigid structure of the penalty in section 16(b) has encouraged the courts to mitigate its impact in "unorthodox transactions," such as acquisition of stock pursuant to mergers, stock conversions, or stock reclassifications, where it is difficult to identify a purchase or sale. Federal courts initially took an absolute "objective" view that any pair of transactions will be viewed as a purchase and sale or sale and purchase giving rise to automatic liability.[150] Subsequent decisions developed a more "subjective" view that unorthodox transactions should be classified as purchases or sales unless they fall into a category that can be objectively verified as involving no possibility of insider abuse.[151] In

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149 15 U.S.C. § 78p(b) (1976).

150 *See, e.g.*, Heli-Coil Corp. v. Webster, 352 F.2d 156 (3d Cir. 1965); Park & Tilford v. Schulte, 160 F.2d 984 (2d Cir.), *cert. denied* 332 U.S. 761 (1947); Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir.), *cert. denied* 320 U.S. 751 (1943).

151 For instance, in Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), a conversion of convertible preferred stock into common stock was not a § 16(b) purchase. Then Judge Potter Stewart reasoned that once the price of common exceeded the redemption price of the convertible preferred, the latter became the economic equivalent of the former in the market — they would bring the same price in the

Kern County Land Co. v. Occidental Petroleum Corp.,[152] the Supreme Court extended the "subjective" view to a position of extreme subjectivity. It engaged in a detailed factual analysis of a particular tender offer and defensive merger to determine whether the defendant had an opportunity to obtain relevant inside information.[153] Finding no such opportunity in the case before it, the Court refused to classify the Occidental tender offer purchase and entitlement to stock exchange after a merger as a purchase and sale under section 16(b).[154]

The views of policy underlying the Court's interpretation of section 16(b)'s scope indicate both the mutability of the construction and its shortcomings. The Court appeared to be concerned that the unsuccessful tender offeror, Occidental, had no choice but to dispose of its shares once the defensive merger was consummated. This implicit endorsement of control transactions and its corollary of public subsidization through non-application of 16(b) could be received less sympathetically by some future Court.[155] Moreover, *Kern County's* emphasis on particular cases undermines the prophylactic effect of 16(b) by rendering its application less certain.[156] Subsequent cases have borne out the fear that courts

market. A call to redemption merely forced the exercise of the preference features of the preferred. *Id.* at 345-46. Similarly, in Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), the buying of convertible preferred and conversion within six months was held not violative of § 16(b) because of the economic equivalence of the stock acquired: normal market activity assured that the convertible stock has a value at least as great as that of the underlying stock. *Id.* at 521. The important point to note about these early departures from the "objective" view is that they were themselves objectively verifiable. Because of economic equivalency of stock purchased or sold, *as a matter of logic* the possibility of abuse was necessarily nonexistent. *Compare* Blau v. Lamb *with* Newmark v. RKO General, 425 F.2d 348, 354 (2d Cir. 1970), where the court refused to apply the economic equivalence test to a conversion between securities of *different* companies — and where the underlying value of the securities exchanged would not necessarily be the same.

152 411 U.S. 582 (1973).

153 *Id.* at 597.

154. *Id.*

155 The approach taken by the Supreme Court was particularly disconcerting in view of the fact that the transaction involved was susceptible to a more "objective" exception. In fact, the court of appeals in the case had selected a narrower, less ad hoc course. *See* Abrams v. Occidental Petroleum Corp., 450 F.2d 157, 162 (2d Cir. 1971) (Friendly, J.).

156 One might add that, in practice, courts will be loathe to impose such a harsh measure on violators, if the fact of violation is nebulous.

will use specific inquiries to justify *ad hoc* exemptions from 16(b).[157]

In this last example, the Code combines the strategies of textual revisions of prior interpretation and comment ambiguity to retain some flexibility in the standard for recovery of profits in unorthodox transactions. It substantially repeats the language of 16(b) in sections 1714(a) and 604(a). Section 1714(a) defines the proscribed activity[158] and 604(a) defines the class of individuals who may not engage in that activity.[159] But a series of subprovisions within section 1714 place some limits on the ultimate reach of the short-swing profit prohibition. Sections 1714(f), (g), and (h) specifically include or exclude certain unorthodox transactions from the classifications of purchase or sale.[160] The SEC has taken a similar path in promulgating Rules 16b-1 through 16b-11.[161] In addition, section 1714(g) allows an affirmative defense if the defendant can prove "that under the circumstances he could not have been advantaged by the use of information by reason of his relation to an involved issuer."[162] This section adopts a form of the possibility of abuse test that modifies any remnants of the strict objective view. Nevertheless, it does not resolve the issue of a court's authority to make its own inquiry and judgment about the potential for abuse in particular cases.

Section 1714's commentary, drafted just before *Kern County,* is ambivalent about the proper scope of judicial inquiry.

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157 Gold v. Sloan, 486 F.2d 340, 347-52 (4th Cir. 1973), *rehearing en banc denied* 491 F.2d 729 (1974), *cert. denied* 416 U.S. 969 (1975).

158 CODE § 1714(a) (Proposed Official Draft, 1978) provides:

> Sec. 1714. [Short-term insider trading.] (a) [Liability.] For the purpose of preventing the unfair use of information that may have been obtained by a person within section 605(a) by reason of his relationship to the issuer, any profit realized by him from a purchase and sale (or sale and purchase), within a period of less than six months, of securities of a class subject to that section inures to and is recoverable by the issuer irrespective of any intention on his part, in entering into the transaction, to hold the security purchased or not to repurchase the security sold for at least six months.

159 *Id.* § 604(a) (Proposed Official Draft, 1978) includes "an officer or director of a registrant, or a person who is the beneficial owner of more than 10 percent of a class of equity securities of a registrant. . . ."

160 *Id.* §§ 1413(f), (g), (h).

161 *See* 17 C.F.R. §§ 240.16b-4 to 240.16b-11 (1978).

162 CODE § 1714(g) (Proposed Official Draft, 1978).

The first comment expresses a desire to preserve the central concept of section 16(b), described as "*automatic* recapture of *certain* short-term profits of *certain* insiders."[163] These words seem to contemplate a far more objective standard for recovery of short-swing profits than *Kern County* would allow because they hint at exemptions for classes of transactions that pose no serious danger of abuse. A subsequent comment on a draft of section 1714(g) observes that the "possibility of abuse" standard exists, but takes no position on the permissible degree of judicial subjectivity:

> In other contexts the "possibility of abuse" test of *Ferraiolo v. Newman,* 259 F.2d 342 (6th Cir. 1958), *cert. denied,* 359 U.S. 927, has been endorsed by the Second Circuit (per Friendly, J.) and other courts. *Abrams v. Occidental Petroleum Corp.,* 450 F.2d 157, 162 (1971), *cert. granted sub. nom. Kern City [sic] Land Co. v. Occidental Petroleum Corp.,* 405 U.S. 1064. . . .[164]

The strongest inference from these comments may be that the Code supports the mildly "subjective" test of objectively verifiable classes of transactions with no potential for abuse.

Those favoring the extreme subjective position of *Kern County* could apply the enactment theory to the text and the comments of the Code on short-swing profits. First, section 1714(g) could be viewed by negative implication as an indication that Congress wanted the other interpretations on possibility of abuse to be incorporated into the reenactment. The existence of 1714(g) also answers any policy arguments about the need for a prophylactic rule. If Congress felt it was important, they would not have added the provision to the statute. Second, the Code and its commentary would have to be interpreted in a manner most consistent with the Supreme Court's ruling in *Kern County* because they do not explicitly oppose the decision. Finally, the Code overrules an earlier decision[165] that espoused the strict "objective" view because the drafters did not approve of the outcome.[166] The rejection

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163 CODE § 1413, Comment 1 (Tent. Draft No. 2, 1973) (emphasis in original).
164 *Id.* Comment 12(c).
165 Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418, 423-25 (1972).
166 *See* CODE § 1714, Comment (2) (Proposed Official Draft, 1978).

of the result might be interpreted as a rejection of the philosophy that led to it. Hence the extreme subjective view of *Kern County* may be hammered into the securities law beyond the review of any future court. The possibility of this inflexible application of the enactment theory will increase if Congress does not enact the comments as part of the statute.

B. *The Enactment Theory and Legislative Preemption: An Endorsement*

The persistent appeal of the enactment theory to the judicial imagination indicates that legislative changes may be necessary to dissuade the courts from employing it. Congress could take three different kinds of action to deflect the enactment theory. The choice among these courses should depend upon their relative effectiveness in preserving the intent of the drafters.

One way to negate the effect of the enactment theory would be to change the words of the statute or the comments, so that they embraced an unambiguous policy. To clarify the purchaser-seller requirement, for example, the Code could add the phrase "offerer or holder" to section 1703, which would grant automatic standing. Replacing the word "fraudulent" in section 1602 with a synonym like "dishonest," "furtive," "unconscionable," or "unscrupulous," moreover, could signal to the courts that the old restrictive definitions of fraud should not be carried over to the reenactment of the current section 10(b).

Although the alteration of language method offers clear evidence of an explicit change in congressional intent, it suffers from three significant shortcomings. First, the resulting statutory product may lack subtle shades of meaning that the drafters deliberately sought to achieve. For example, the drafters rejected the position of automatic standing, which adding "offerer or holder" to the statute would grant, in favor of an intermediate outcome that would vary standing according to the likely degree of dissuasion.[167] Fixed standards would destroy the pattern of studied ambiguity and

167 *See* notes 123-25 *supra* and accompanying text.

deny the courts the power to reconsider old doctrines in the light of future needs. Second, the use of new language creates uncertainties about future interpretations. There is no guarantee that courts will construe unfamiliar terms in a way that best promotes the policies of the Code. The repetition of previous terms at least tells the drafters where the courts are likely to begin their analysis. Third, specific changes in statutory language can be no more than a stopgap measure against the enactment theory. The draftsmen cannot foresee and reconstruct every provision in the Code where the theory could produce adverse results. Who is to say, for example, that the Code's reenactment of the language of section 2(3) of the 1933 Act — "sale" or "sell" — in its section 299.46 does not enact into *law* SEC Rule 145,[168] which arises out of section 2(3)? Unless one rejects the enactment theory, why is not SEC Rule 3a11-1[169] enacted into law by the substantial reenactment of the definition of "equity security" in section 248 of the Code? The possibilities are as numerous as the "accepted" judicial and administrative constructions of the securities acts.

Another means of evading the enactment theory would be to give the Code's commentary the same legal authority as legislation. Congress could enact the comments into law, although few states have given such approval to comments accompanying Uniform State Laws.[170] This option would shift the interpretation of congressional intent toward change in the areas of Rule 10b-5 standing and corporate mismanagement, but it also involves some significant problems. Initially, the courts may interpret the ambiguity of comments as an indication of legislative silence on interpretation and a proper case for the application of the enactment theory.[171] Thus the problem of construing legislative intent from the text of the reenactment is simply shunted over to

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168 17 C.F.R. § 230.144 (1978).

169 17 C.F.R. § 240.3a11-1 (1978).

170 *Cf.* ch. 330, § 2(2), 1965 Colo. Sess. Laws 1288, 1479-80. (No implication or presumption of legislative intent to be drawn from appending of official comments to Uniform Commercial Code in official Colorado version).

171 *See* notes 118-25 *supra* and accompanying text.

the comments. Furthermore, this technique does nothing for provisions that do not have explanatory comments, such as the definition of a security.[172] Finally, the draftsmen cannot anticipate all of the places in the statute where comments need to be upgraded to forestall the enactment theory. Some comments eventually might be used to contravene the drafters' intent if they receive the status of law.

The third alternative for defusing the power of the enactment theory would be to add a provision to the Code that explicitly states that Congress' silence on any pre-existing construction may not be interpreted as approval or enactment of that construction. Because the theory only operates in the absence of an express congressional directive, its artificial presumption would vanish. Such a provision was added as section 2010(b) of the Proposed Official Draft of the Code: "[Pre-Code Precedents] Enactment of this Code is not a legislative ratification of prior judicial or administrative precedents."[173]

This formulation may overcome many of the difficulties that plague the other choices. Congress could retain the drafters' studied ambiguity in the text and commentaries and still be confident that judges would interpret this ambiguity as an opportunity to reexamine the prior constructions.[174] Moreover, no new language in text or comment that could lead to uncertainty about subsequent court interpretations would be necessary. Furthermore, the clause would preempt all possible applications of the enactment theory in the Code. The spirit of the Code would have the best chance of being extended to the unforeseeable controversies over

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172 *See* CODE § 299.53 (Proposed Official Draft, 1978). *Cf.* CODE § 297(a), Comment (Tent. Draft No. 1, 1972) (asserting need to let definition of security remain unchanged.)

173 CODE § 2010(b) (Proposed Official Draft, 1978).

The original version of § 2010, CODE § 1707 (Tent. Draft No. 3, 1974) did not contain provisions comparable to those in § 2010(b). The Note to § 2010 in the Proposed Official Draft of the Code states the § 2010(b) "is designed to avoid the holdings to the effect that the reenactment of a statute without change gives its judicial interpretations the force of statutory law, which the courts are then able to change."

174 *See* CODE § 102 (Proposed Official Draft, 1978), stating one purpose of the Code is that it should continue to meet the problems and combat the abuses that led to the original enactment of the securities laws.

construction in future cases. Finally, the addition of the subsection imposes no policy cost because well-reasoned precedent is retained to the extent it is persuasive.[175] In sum, the simplicity of the provisions and its possible benefits justify its inclusion in the Code even if the possibility of misapplication of the enactment theory seems remote.

Yet the troubles that the enactment theory creates for the reenactment of the securities acts also demonstrate the need for a more realistic judicial attitude on the implications of congressional silence. The political realities of modern legislative deliberation virtually ensure that illogical and even inimical constructions of previous statutes will slip by Congress during the process of reenactment. Moreover, Congress will sometimes be unclear in its attempts to modify disfavored prior interpretations. Interpreting statutory law and contemporary congressional intent in a well-reasoned manner is an important part of the judicial role in American government. The courts could meet this responsibility better by resisting the temptation to hide behind prior constructions and determining for themselves the meaning of reenacted statutes.

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175 *See id.* § 2010(b), Note: "The effect [of § 2010(b)] is not, of course, to abandon *stare decisis.*"

BOOK REVIEW

THE INHERITANCE OF ECONOMIC STATUS. By *John S. Brittain.* Washington: Brookings Institution, 1977. Pp. xiii, 185. $8.95 cloth, $3.95 paper.

*Review by Martin Bronfenbrenner**

This study, by a senior fellow at the Brookings Institution, is an outstanding empirical contribution to a pervasive debate in contemporary income distribution theory. The debate concerns the relative importance of (largely inherited) material capital and (largely self-accumulated) human capital as determinants of the distribution of income and wealth in capitalist countries.

As an introduction to this debate, I note three extreme positions which Dr. Brittain's study tends to combat: (1) "Human capital," largely acquired in formal education, is almost the whole story, especially for labor income. This view is associated particularly with Gary Becker, Jacob Mincer, and others connected directly or indirectly with the University of Chicago.[1] (2) Inherited social position is almost the whole story, and human capital is merely its resultant or legitimizing "cover."[2] This is the view of "radical economists," exemplified by Samuel Bowles and Herbert Gintis of the University of Massachusetts.[3] (3) Neither of these variables is important, and the distribution process is largely sheer luck. This is the conclusion of an influential

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* Kenan Professor of Economics, Duke University.

1 *See* G. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (2d ed. 1975) and J. MINCER, SCHOOLING, EXPERIENCE, AND EARNINGS (1974).

2 This can be explained in terms of economic modeling. Let y be income, x_1 a numerical indicator of social position, and x_2 the number of years of formal education; all the other symbols below are statistically determined coefficients. Then, if we have both:

$$y = a+b_1x_1 + b_2x_2 \text{ and } x_2 = \alpha + \beta x_1$$

the result of their combination is:

$$y = (a+\alpha b_2) + (b_1+\beta b_2)x_1$$

with no significant additional contribution by x_2.

3 S. BOWLES & H. GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTIONS OF ECONOMIC LIFE (1976).

volume, *Inequality: A Reassessment of the Effect of Family and Schooling in America,* by Christopher Jencks and several co-workers at the Harvard University Graduate School of Education.[4]

This leaves open for Brittain the unexciting common-sense position that both inheritance and education are independently important, and he accepts it with alacrity. Whereas the principal value transferred by inheritance is generally considered to be tangible property, Brittain argues that it may be education. Financial bequests are less closely correlated with heirs' economic status, the author maintains, than are the years of education provided them by their deceased relatives.[5]

The importance of Brittain's work lies primarily in his demonstration of the empirical methodology used to assess the effect of the economic status of an individual's family on the individual's niche in the income distribution scale. Since it is desirable that legislators and policy analysts understand the meaning of the statistical-economic jargon used in this and similar studies, a major portion of this review will focus on Dr. Brittain's statistical methods. In addition, I will consider the policy implications of Dr. Brittain's conclusions and mention my own income distribution preferences.

The author termed the analysis used in determining the degree of inequality an "analysis of a sample of brothers." This technique compared the degree of economic inequality among brothers to the inequality among all men. The less the variation among brothers relative to all men, the stronger the role of inheritance — inheritance not only of income, but of education and social attributes. Use of brothers in the sample keeps the parental influence relatively constant and includes many subtle parental influences that could not be covered by even a detailed specification of traditional socioeconomic factors in a model.[6]

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4 C. JENCKS, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972).

5 J. BRITTAIN, THE INHERITANCE OF ECONOMIC STATUS 137-38 (1977) [hereinafter cited as BRITTAIN].

6 *Id.* at 14-15.

The set consists of 659 persons, a random 5 percent sample of all persons dying in the Cleveland metropolitan area in 1964-65 and their surviving descendants. Using this data, Brittain statistically tested certain hypotheses[7] which others have either deduced from less immediately relevant data, observed in casual empiricism, or simply fitted into their ideological preconceptions.[8]

Even Brittain's data set has its imperfections for his purposes, as he reminds us repeatedly. His sample is overweighted with the foreign-born, with Roman Catholics, and with large families. It includes only five non-whites. In addition to the omnipresent "no-response" bias, special problems arose in obtaining information on survivors living outside metropolitan Cleveland. Neither intelligence quotients nor any other measures of survivors' "ability" had been collected; such information was irrelevant to the original purposes of the survey. Age of both decedents and survivors are apt to enter as disruptive factors in studies of income distribution,[9] yet this sample was much too small for complete standardization by age groups or complete examination of the interactions between age and other variables.

Most studies of "economic status" are really about measured money incomes or the logarithms of these incomes.[10] Brittain has devised and used in addition a number of artificial composite variables. His favorite is called Croy, a weighted composite (C) of the residence class (r), the occupation class (o), and the logarithm of income (y). The non-income variables were assigned values from one to seven by the research interviewers, with higher values for the higher

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7 Brittain measures the effect of family size, race, religion, wealth, and parental age, education, and occupation on the son's economic status. Estate size and parental testacy were used as proxies for parental wealth. *Id.* at 77-83.

8 *See, e.g.*, B. CHISWICH, INCOME INEQUALITY: REGIONAL ANALYSES WITH A HUMAN CAPITAL FRAMEWORK (1974) and J. TINBERGER, INCOME DISTRIBUTION (1975).

9 For example, it is possible that the son's economic status (and, in particular, his income) could be positively related to his age, and thus to the age of the parent at death. Brittain divided age groups to minimize this effect. BRITTAIN, *supra* note 5, at 117-19.

10 When ordinary incomes are used, the difference between $5000 and $6000 is as important as that betwen $100,000 and $101,000. When logarithms of income are used, this difference is as significant as that between $100,000 and $120,000.

status classes, on the basis of reasonably unambiguous instructions. These variables are expected to tell us something about *permanent* incomes, and likewise something about *nonmoney* incomes, including the psychic income of high noneconomic social status. For example, it is assumed that residences are bought and maintained in accordance with the long-run wealth expectations of the buyers.

All income of a family is ascribed to the family head — a husband if he is living with the family. This is a conventional procedure, to which Women's Liberation has subsequently taken exception. This means in the present study that the income, residence, and occupation entries for surviving daughters of the Cleveland decedents are actually those of their husbands, the decedents' sons-in-law. When these cases are examined separately, the daughters' economic status revealed is related as closely to the status of the decedents as it would be "if they [the daughters] had married their brothers."[11] This pattern of ultra-selective marital choice is, however, inconsistent with the behavior of a "dummy variable"[12] used to distinguish sons-in-law from sons. This dummy has a negative sign, implying that sons-in-law are systematically less well off than surviving sons, when all other variables are held constant. This anomaly puzzles Brittain.[13] I wonder whether it may not be somehow *age*-related, considering that men ordinarily marry women younger than themselves. If each son-in-law entry had been keyed to the surviving daughter's age rather than to her husband's, I conjecture, the dummy might lose its significance.

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11 BRITTAIN, *supra* note 5, at 163.

12 In this instance, the "dummy variable" is an extra variable inserted into Brittain's regressions with a value of one for a son-in-law and zero for a surviving son. Its regression coefficient, as we shall see in a moment, is generally negative. *Id.* at 153-54.

13 Brittain posits that the negative variable may result from the fact that women marry men of the same educational levels. Since a woman's educational level is generally lower than her brother's, her husband's income level (assuming income level is partially a function of educational level) is lower than his brother-in-law's. The model suggests this may be a partial factor. Brittain also suggests that men's and women's differing perspectives of that income level may have distorted the questionnaires, but he does not think this is a major factor. *Id.* at 160-62.

Brittain's analysis of brothers concludes that all background influences, both measurable and immeasurable, have a potent effect on economic status. The inequality of economic status among brothers ranged from 47 to 68 percent of the inequality among men of different families. And "[a]djusting incomes to 1976 levels, the sample results suggest a 63 percent probability that such an advantaged son's [from the top 5 percent of wealth class] own family income is over $25,000, compared to a 1 percent probability for the son with the unfavorable background [lowest 10 percent]."[14]

Having determined that the overall degree of inheritance of economic status, resulting from an "inheritance" of all background factors, was substantial, Dr. Brittain attempts to determine the influence of known parental characteristics as determinants of a son's status. Parental education has had a significant effect on a son's economic status, but its influence decreased over time.[15] Educational factors, though important, account for only 25 to 40 percent of the influence of socioeconomic background on the economic status of sons in the sample.[16] Race and religious background and family size show a tendency to affect subsequent status. There are also "unexplained factors" — such as ability and home environment which are not quantified in the study. Marital selection, a process filtered by one's background, also influenced the economic status of children. Mating is far from random, agrees Brittain; the economic status of the daughters (as defined by the status of their husbands) in his sample was as closely related to that of their parents as the economic status of sons.[17]

The purpose of the Cleveland study was not to espouse policy decisions, but to define areas in which legislative change might be appropriate. Public policy cannot directly dictate the inheritance of many parental characteristics. As

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14 *Id.* at 71-72.
15 *Id.* at 20.
16 *Id.* at 26.
17 *Id.* at 163. *But see* the discussion of the anomaly of the negative "dummy variable," at the text accompanying note 13 *supra.*

Dr. Brittain notes, "no one proposes that the influence of parents over the speech and dress of their children be reduced, or that parents be discouraged from developing the motivation and productivity of their children; nor does anyone suggest that free choice be eliminated from marital selection."[18] Thus, education is chosen by Brittain as a likely focus of attention, if only because many other inherited characteristics are repugnant to regulation.

Although I assume that Dr. Brittain, like most of the Brookings group, is more activist than I, it is no part of his present study to advocate specific legislative changes. He does so only in the negative direction of downplaying the effectiveness of the estate and gift tax approach to income distribution, insofar as he recognizes that (a) other factors (like inheritance of human capital) will significantly weaken the effect of this measure and (b) although economists see the inheritance taxes as a justifiable public policy, the public at large seems to favor intensely the right to bequeath.[19] To support this argument, Brittain cites the public dissatisfaction with Senator George McGovern's 1972 campaign proposal to impose heavy inheritance taxes.[20]

I agree with this generalization. With a decent minimum of personal and social amenities removed from the "domain of inequality," by floors placed under incomes, I see no reason to interfere with the gift-cum-inheritance process at upper income levels, despite its effect on income equality. A person's taste for testatory benevolence toward relatives, friends, or servants is no less legitimate than other tastes which he may possess. Gratification of this taste is a matter of personal liberty like the gratification of any other taste, once such gratification avoids the externality of starving the poor.

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18 *Id.* at 28-29.

19 *Id.* at 30.

20 In an interview with BUSINESS WEEK, McGovern agreed that he changed his original plan to institute a 100 percent tax rate on income over $500,000 in response to blue-collar opposition, noting that working persons especially argued that it was un-American to tax anything 100 percent. *McGovern Cools His Radical Economics,* BUSINESS WEEK, May 27, 1972, at 54-55.

Moreover, estate taxes can be avoided in the highest income levels by lifetime "investments" in the younger generation through better education and capital goods.[21]

My own position on legislative approaches to income distribution or equalization disappoints most of my students by its relative conservatism. To me, equity of distribution is a matter of subjective preferences rather than scientific determination. Furthermore, I suspect the conventional preference for greater equality is governed more by envy and fear, and less by love and human kindness, than most intellectual egalitarians are willing to admit.

My subjective preference goes no further along the redistributional line than raising minimum incomes for families. This would include taking account of no more than four children per family, recognizing no communal families as families, and refusing to subsidize teenage marriages and experiments in individual living away from their families.[22] This is a variant of the negative income tax or "demogrant" proposals.[23]

All this could, I believe, best be done by federalizing relief at a uniform national level. Such a change would rapidly scatter the urban lower class among smaller towns and rural areas where living costs are lower. At the same time, I would reduce the federal minimum wage to, say, 10 percent above the "demogrant" level, thereby encouraging employment in such areas.

We do not know the efficiency loss of the foregoing proposals, despite the famous "New Jersey" and other experiments.[24] I hope that it would be small, and that it could be

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21 For a discussion of the impact of the Tax Reform Act of 1976 and of public policies involved in future changes in the law of inheritance taxes, *see* Pedrick, *Estate Planning and Future Shock,* 55 TAXES 226 (1977).

22 When a teenager leaves his family, his "demogrant" would be terminated until he reaches twenty. Neither he nor his family would be entitled to his previous "demogrant." This would tend to counter one of the main objections to the McGovern proposals — that the proposals provided an economic encouragement to teenage revolt and family breakdown.

23 For a thorough analysis of a negative income tax proposal, *see* J. PECHMAN & P. TIMPANE, WORK INCOMES AND INCOME GUARANTEES (1975).

24 The New Jersey experiment was conducted in 1968 by the Office of Economic Opportunity. It was an attempt to evaluate the feasibility of the grant of

compensated by the additional employment generated by lower minimum wages. The proposal would trade off social workers for revenue agents, needed to control "cheating." I am, however, much less certain than other advocates of the plan that this change would result in net saving.[25]

These views, being frankly subjective and normative, were not influenced significantly by the Brittain book except as noted above. Dr. Brittain himself is, to repeat, more activist in the pro-equality direction than I, but this difference in our personal predilections does not detract from the value of his work.

Brittain is a very model of a modern major statistician. Not only is he a knowledgeable and ingenious user of statistical data, he is also a well-read economist and no mere "computer jockey." He asks the right questions, and when his results are less than conclusive, the problem is usually with his data set. Without hesitation, future studies in this area will cite Brittain. But by the same token, the book is hardly one which he who runs may read. Its audience will and probably should remain limited to persons who have read other accounts first, and who have acquired considerable sophistication both in the economics and the statistics of personal income distribution.

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guaranteed income benefits (a negative income tax). The experiment which took place in five Pennsylvania and New Jersey cities, provided income benefits to 725 families and compared their work habits with 632 control families who received no benefits. The experiment was conducted for three years. The study concluded, in general, that the income grant had no major effect on the work behavior of the participants. Corcoran, *Guaranteed Income: The New Jersey Experiment*, 2 WORKING PAPERS FOR A NEW SOCIETY 19 (1974).

For an extended analysis of the program, *see* D. KERSHAW & J. FAIR, I THE NEW JERSEY INCOME MAINTENANCE EXPERIMENT: OPERATIONS, SURVEYS, AND ADMINISTRATION (1976), and H. WATTS & A. REES, II THE NEW JERSEY INCOME MAINTENANCE EXPERIMENT: LABOR SUPPLY RESPONSES (1978).

25 Most advocates of the negative income tax assume that the administrative burden likely to be imposed on the IRS by such a plan would be insignificant in comparison to the administrative structure of the present welfare system. *See, e.g.*, M. BARTH, G. CARCAGNO & J. PALMER, TOWARD AN EFFECTIVE INCOME SUPPORT SYSTEM: PROBLEMS, PROSPECTS, AND CHOICES 53-54 (1974).

RECENT PUBLICATIONS

ENVIRONMENTAL TOXICOLOGY: A GUIDE TO INFORMATIONAL SOURCES. By *Robert L. Rudd.* Detroit: Gale Research Company, 1977. Pp. 266, index. $18.00.

In light of increased legislative concern for the effects of toxic substances on the environment, the publication of an annotated bibliography of articles and books dealing with scientific and legal aspects of environmental toxicology is a timely occurrence. *Environmental Toxicology,* the seventh volume in the Man and Environment Information Guide Series, provides the researcher with 1,023 entries which exhibit a multidisciplinary approach to toxic substances. The bibliography is intended as a guide to leading sources on specific toxic substance issues. It is not intended as comprehensive work on the subject.

The bibliography is arranged in four major parts: General Sources on Environmental Toxicology, Consequences of International Environmental Pollution, Consequences of Unintended Environmental Pollution, and Special Aspects of Environmental Toxicology (including a section on Legislation and Regulation). Each part focuses on several narrower sections such as "Pesticides," "Metals," and "Animal Resistance to Toxicants." Important sections are further subdivided. For example, the section on "Metals" highlights source materials on cadmium, copper, lead, mercury, selenium, and zinc, six of the metals now known to present the most serious environmental risks. The book provides the user with both a subject and an author index. Two appendices offer guidance to abbreviations and terms and to chemical and common names of frequently cited compounds.

While any selection of the various foci for the detailed subdivisions can be criticized as arbitrary, one omission is striking. No special attention has been afforded to toxic substances which have caused or are suspected of having caused injury to humans such as asbestos (no entries), Kepone (one entry), or Phosvel (leptophos) (no entries). All of

these substances have injured humans. There are multiple entries relating to polychlorinated biphenyls (PCBs). Yet, inexplicably, there is but one entry for the chemical cousin of PCBs, polybrominated biphenyls (PBBs). The citation for PBBs is to an article discussing the effects of PBBs and other chemicals on the sleeping times of Japanese quail. How quaint. Given the fact that since 1973 the State of Michigan has been experiencing a widespread toxic poisoning disaster as a result of a PBB contamination that has led to the slaughter of over 30,000 head of cattle and which may have adverse effects on humans, the solitary PBB-related entry indicates a gross oversight.

Environmental Toxicology contains another puzzling oversight. Although this book contains a section on "Legislation and Regulation," the treatment of those topics is cursory, at best. In its own defense *Environmental Toxicology* notifies the reader, "[t]his sourcebook does not emphasize legislative and regulatory aspects of toxic pollutants. *Environmental Law,* another book in the Man and the Environment series, describes such matters in detail." The caveat appears reasonable. Upon scrutiny, however, the statement is curious. Though published in 1977, *Environmental Toxicology* includes no reference to the enactment of the Toxic Substances Control Act passed in October 1976, as one might have expected. According to an informational page discussing the Man and the Environment Guide Series, it is indicated that *Enviromental Law* edited by Mortimer D. Schwartz, was published earlier in 1977. That volume, too, contains no reference to the Toxic Substance Control Act, except for a citation to the hearings on the matter in 1971. Thus, the series contains no useful guidance to legislative or administrative research on the most significant piece of toxic substance-related federal legislation passed in history. Although admittedly it is often difficult to keep abreast of recent developments in an active legislative and administrative specialty, in a volume purporting to be a source book for basic research in the field of environmental toxicology, the editor reasonably could be expected to have updated the meager discussion of toxic substances that appears in *En-*

vironmental Law and to have taken great pains to provide complete legislative and administrative references for the Toxic Substances Control Act. Neither undertaking was performed.

Despite these shortcomings, this book is recommended for practitioners and students who will find that the entries and organization of this reference permit rapid access to technical and disparate sources. The synthesis of general and technical references provides the user with an otherwise unavailable handy reference on environmental toxicology. The Man and the Environment Information Guide Series has undertaken a much needed but difficult task. The shortcomings present in this work belie the inherent complexity in the field.

AMERICAN LAW OF ZONING, SECOND EDITION. By *Robert M. Anderson,* Rochester, N.Y.: Lawyer's Cooperative Publishing Co., 1977. 5 volumes, index. $162.50.

This five volume treatise updates Mr. Anderson's prior work and provides a comprehensive view of American zoning law. The first volume focuses on the traditional concerns of zoning law — the sources of the zoning power and the limits imposed on this power. Later chapters in the treatise cover less commonly litigated topics but ones which certainly will be litigated in the future — planned unit developments, growth controls and mobile home parks. Five chapters in the work are devoted to the various aspects of judicial review of zoning and planning regulations and/or decisions.

Planning as well as litigation aspects of zoning law are covered. In addition to general discussions on regional, metropolitan and municipal planning, the treatise also covers administrative procedures governing the enforcement of zoning ordinances. The treatise offers examples of various statutes, provisions, and ordinances relating to different aspects of land use control. Finally, sample forms relating to both the administrative and judicial control of zoning are provided, although one might wish for more detailed discussion of the merits and particular use of some of these forms.

The treatise is not patterned on a looseleaf service,

digesting the zoning laws of each state or municipality. It serves a different purpose in attempting to pull together unifying factors of the zoning law. Its general treatment is comprehensive in scope, provides over three thousand case citations, and would be a needed and welcome addition to any library.

THE FUTURE THAT DOESN'T WORK: SOCIAL DEMOCRACY'S FAILURES IN BRITAIN. By *R. Emmett Tyrell, Jr., ed.* Garden City, New York: Doubleday & Co., 1977. Pp. 208. $6.95.

Few doubt that Great Britain is currently facing a crisis of economic stagnation and political demoralization. It is the causes leading to this state of affairs and the implications for the United States that are the subjects of vigorous debate. *The Future That Doesn't Work* collects ten essays discussing the factors which the authors believe have contributed to England's economic and political problems.

The articles, contributed by both American and British authors, are unified by their conservative emphasis on private incentives, monetary policy and limited government intervention in the market place. Ten essayists urge policymakers in the United States to observe the results of adopting a system of extensive social programs and to abandon any movement towards the policies of the British social democracy.

Several of the pieces examine specific areas of the welfare state — the medical establishment, crime and the police, and the welfare programs. An analysis of the current popular sentiment which allegedly canonizes labor leaders and resents all other authorities is undertaken by another article. Others deal with the intellectual foundations of the socialist ideal and its failure in practice.

The essayists who deal with economic theory routinely apply the philosophy of Milton Friedman to the British economy. More interesting is a history of the failure of the British Conservative Party during the last thirty years to adopt an ideological position distinct from the social policies

of Labour. The split between the ideological Conservatives and the more pragmatic factions of that party provides an interesting comparison to the similar schism within the Republican Party of the United States.

THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS. By *Bernard Schwartz.* New York: Oxford University Press, 1977. Pp. 230, appendices, index. $11.95.

Schwartz blends a detailed examination of the legislative histories of the Bill of Rights and its antecedents dating back to Magna Carta with analysis of the political, economic, and cultural conditions underpinning the world-views of the draftsmen and legislators involved. The result is cohesive, allowing the reader to trace the philosophy and practicum of protection of individual liberty from the British past through the American revolution to the present.

Occasionally we are drowned in detail, as when each state's Constitutional ratifying convention is recounted. A few interesting glimpses into the personalities involved are nonetheless allowed, notably the relationship between Thomas Jefferson and James Madison, leading to Madison's ultimate acquiescence in the need for a Bill of Rights.

In the last chapter, Schwartz looks toward the future. He centers his thought on the question of limiting the increasingly broad interpretation that the Bill of Rights is receiving in the courts. He hints that overbroad interpretation of the Bill of Rights leading to excessive equality in society and a diminution of legislative power may be forthcoming.

Schwartz warns against the wholesale subjugation of individualism to philosopher John Rawls' *principle of redress.* Quoting Alexander Bickel, Schwartz stresses that "a levelling egalitarianism which does not reward merit and ability is harmful to all and unjust as well." He advocates a skeptical approach toward replacing the systemic goal of equality of *opportunity* with equality of *result,* a direction to which he sees the courts presently moving. In Schwartz's view, an obedient acceptance of this new doctrine would have our system

produce no more justice than it did when it blindly internalized Herbert Spencer's application of the theory of evolution to human social interactions.

The history Schwartz offers proves an excellent background against which changing interpretations of the Bill of Rights can be evaluated. The final chapter's examination of the future based on knowledge of the Bill of Rights' past proves both thought-provoking and challenging.

PRISON REFORM AND STATE ELITES. By *Richard A. Berk and Peter H. Rossi.* Cambridge, Ma.: Ballinger Publishing Co., 1977. Pp. 207, appendices and notes. $15.00.

Prison Reform and State Elites is an examination of an innovative framework from which prison reform strategy may be launched. The authors initially establish two fundamental principles: first, that it is possible to discern the composition of the decision-making elites, and second, that once this group is identified, potential support and opposition for specific reform proposals can be evaluated. Once the key proponents and opponents are isolated, it is argued that reform strategy can be more successfully designed.

The basis of this work is a pilot study of three states: Florida, Illinois and Washington. Within these states decision-makers were isolated and their views polled. The authors conclude from their questioning that in 1973 there was, within the "elites," a political climate symbolized by dissatisfaction with the present prison system and acceptance of the philosophy of liberal change in the ways prisoners are treated. Prison reform, the authors argue, was a real possibility in 1973.

The authors realize that by the time their pilot study was actually published political views of the general public and of the elite specifically had become more conservative. While they think that reform is still possible they feel the currently popular "deterrent" philosophy of penology would be a severe obstacle. However the basic theory of this book remains tenable: that by identifying and analyzing the decision-makers' reform strategy can more successfully be planned.

SETTING NATIONAL PRIORITIES: THE 1978 BUDGET. By *Joseph A. Pechman, ed.* Washington, D.C.: Brookings Institution, 1977. Pp. 443, index. $11.95 cloth, $4.95 paper.

The human talent of the Brookings "think tank" has again assembled a stimulating and thorough discussion of various items in the Federal budget. Pechman's introduction and general summary discuss the different philosophies of Presidents Ford and Carter on the budget, and the impact of an economy with frightening unemployment levels and inflation at 5 to 6 percent on budget policy. Pechman discusses the Carter campaign promises and illustrates how they emerge in (or are missing from) the 1978 budget. In the second chapter, he examines the new budget in conjunction with Federal budgets of previous years, "since the budget in any particular year reflects to a large extent decisions made in earlier years."

In subsequent chapters, Joseph Minarik discusses the strategy of employing fiscal policy tools in budgets to stimulate the economy, and employment training assistance programs, a pet project of the Carter administration. The defense budget is examined in light of past policy decisions and the projected defense needs of the United States. A special chapter on energy policies reflected in the budget, and issues involving inflation, employment and income distribution is included. Social security, welfare reform, urban problems, and medical care costs are also dealt with by various authors.

Finally, a discussion of Carter's proposed zero-based budgeting and administrative reorganization plans is presented, and two appendices deal with problems in determining a full employment budget and budget accounting. The variety of authors prevents total domination of one particular viewpoint in the book, although a bias favoring government intervention in the economy does seem to emerge.

Complete with index, this book is a necessary tool for all those who are interested in whether our elected representatives "put their money where their mouth is."

BOOKS RECEIVED

ADLAI STEVENSON AND THE WORLD. By *John B. Martin.* New York: Doubleday & Co., 1977. Pp. 946, index. $15.00.

AEI STUDIES ON CONTEMPORARY ECONOMIC PROBLEMS 1977. By *William Fellner, ed.* Washington, D.C.: American Economic Institute for Public Policy Research, 1977. Pp. 428. $6.75.

AUTO REPAIR REGULATION: AN ANALYSIS. By *Ruth W. Woodling.* Athens, Ga.; Institute of Government, University of Georgia, 1977. Pp. 80. $4.00, paper.

BIG CITY POLICE. By *Robert M. Fogelson.* Cambridge, Ma.: Harvard University Press, 1977. Pp. 374, index. $15.00.

CASE STUDIES IN MEDICAL ETHICS. By *Robert M. Veatch.* Cambridge, Ma.: Harvard University Press, 1977. Pp. 421, index. $15.00.

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