HARVARD JOURNAL
on
LEGISLATION

VOLUME 5 | NOVEMBER, 1967 | NUMBER 1

CONTENTS

ARTICLES

Legislative Record Keeping in a Computer Journal
Mary Ellen Caldwell 1

The Politics of Racial Imbalance Legislation
James Bolner 35

BUREAU PROJECTS

Expediting Act Revision 55

A Model Professional and Occupational Licensing Act 67

NOTE

Massachusetts Racial Imbalance Act 83

BOOK REVIEW

Julius Cohen: Materials and Problems in Legislation
Albert M. Sacks 121

Published four times during the academic year (November, January, March and May) by the Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138.

Subscriptions per year : United States, $6.00 (single copy, $1.50); United States, student rate, $5.00 (single copy, $1.25); foreign, $7.00 (single copy, $1.75). Subscriptions are automatically renewed unless a request for discontinuance is received.

Notification of change of address must be received one month in advance of publication to insure prompt delivery. Notification should include both new and old addresses as well as ZIP codes.

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Journal Commentary

With this first issue in its fifth volume the *Harvard Journal on Legislation* wishes to announce a number of substantive and technical changes in content, format, and editorial policy. Such changes hardly constitute a break with the past; rather, they evidence a spirit of experimentation influenced to some extent by the genuine excitement among both students and faculty at the prospect of continued reform in legal education at the Harvard Law School.

Some changes in the *Journal* format — such as the new cover design, the new cover and text papers, or the change in type face from Caslon to Baskerville — can hardly lay claim to any kinship with fundamental reform in legal education. These changes are the result, on the one hand, of practical preference for a paper which shows less the smudges and yellowing of wear and age and for a type face which in combination with off-white paper has a softer impact on the reading eye, and on the other hand, of the purely personal aesthetic preference of the editors. We hope that our change in format will induce readers to take a fresh look inside the *Journal* to sample its content and that thus new readers will be attracted to our modest enterprise.

Other contemplated innovations are connected to a greater extent with a spirit of reform in legal education at the Law School. Our predecessors in volume 4 gave the *Journal* its first student note (4 *Harv. J. Legis.* 149); we are continuing the development of this aspect of *Journal* activity on two fronts: (1) by fostering and supervising the writing of notes among the membership of the *Journal* staff and (2) by publishing notes submitted by students in the Harvard Law School.

During the spring of 1967 students at the Law School submitted a report to a joint student-faculty committee suggesting improvements in the curriculum, the grading system, the status of honorary student organizations, and in the general methodology through which the law and creative legal thought are fostered at the Law School. Among the suggestions urged was greater encouragement of original student contribution to legal literature through the creation of yet another student-edited, student-written legal periodical. We applaud the enthusiasm of the authors of that suggestion and of all those of similar mind. For the present time, we urge them to turn their attention toward the three legal periodicals presently soliciting student contributions at the Law School, especially toward the *Harvard Journal on Legislation,* as an outlet for their creative efforts.

The Journal began its publishing schedule in 1963-64 with two issues per annum, moved to trienniel publication with the third volume in 1965-66, and announces quarterly publication, November through May, this year. With four issues, the availability of space for

student writing is greater than ever. The *Journal* will continue to rely heavily on its own staff for student-written and -edited material, but it is our position that the submission for publication of writing by members of all classes at the Harvard Law School must be encouraged. First, due to a vast increase in the number, significance, and legal complexity of research and drafting problems in statute law submitted by private and governmental clients, the work load of the members of the Legislative Research Bureau has increased to such a point that a limit to the internal resources which can be deployed to meet the growth rate of the *Journal* has been reached. Second, we believe that individual legal writing among today's law students has too long been allocated in ways which waste the possible contribution which the student could make to the dialogue on current issues and problems in law and society.

In most law schools the published writings of students are limited to those of a small group of academically outstanding students, the measure of whose excellence has in recent years come under serious challenge as far too narrow and exclusive an indicator of professional as well as intellectual competence. It is to those students who do not have the opportunity to write for a standard, class-standing based law review that we address our solicitation.

Student notes will be signed by the person or persons chiefly responsible for the content and labor contributed. Although editorial changes in substance as well as style may add to a submission to such an extent that the product could be said to approach that of a group, nevertheless, the express credit and responsibility for this product — undertaken under the pressure of but without the official recognition given to law school course work — should fall in the first instance on the person who originates the research and writing and who submits his handiwork repeatedly to the harassment — however constructively critical — of the *Journal's* editors.

In order to suggest to its contributors generally — law teachers, students, or practitioners — a frame of reference, as well as to lay certain guidelines for and receive outside criticism on its own editorial thinking, the *Journal* will attempt to focus on some general criteria for writing which is to appear between its covers. Dean Griswold in his preface to the first issue of the *Journal,* in expressing the hopes of that group of editors, noted with respect to the prospective editorial policy of the *Journal* that,

> . . . the plan is to have one or more articles on legislative matters, written by members of the Faculty, or by others, either in academic life, in private practice, or in governmental work.

> In addition, the *Journal* will print selected examples of the work done by students of the Bureau in drafting statutes, together with the memoranda prepared to accompany these statutes.

Although much has been said, among the several generations of editors and staff members involved in the *Journal's* initial volumes, on the subject of defining a substantive editorial policy, no part of this discussion has reached the readership of the *Journal* or its community of prospective contributors. We hope to give voice to our policy through the medium of this column for the purpose of involving readers and commentators, through their responses to our ideas, in the process of fitting the resources and potentials of the *Journal* to the contributions which stand ready to be made to society and professions.

In addition to greater emphasis on student notes the *Journal* hopes to continue and broaden the book review section making its debut in this issue. With respect to notes and articles, and with respect to the content of books submitted for reviewing, the substance of the submission should deal with analysis, reform, or logical exposition of legal problems and suggested solutions, in areas where statutes are the predominant form of the law or where legal reform through legislation would be an advantageous expedient. The comments of the readership on this and other expressions of editorial policy are solicited.

the editors

Erwin N. Griswold

The Harvard Student Legislative Research Bureau and the *Harvard Journal on Legislation* wish to congratulate Erwin N. Griswold for his recent appointment as Solicitor General of the United States. Although he will be missed in Cambridge, we wish Dean Griswold the same success in Washington that was his at the law school.

It is especially fitting at this time that we acknowledge the enthusiastic encouragement and support which he offered the Bureau and *Journal* throughout the years of his tenure as Dean. He has always expressed a strong personal interest in our enterprise and his advice and counsel have been important ingredients in our success. For this concern and assistance we thank him.

LEGISLATIVE RECORD KEEPING IN A COMPUTER-JOURNAL†

MARY ELLEN CALDWELL*

I. INTRODUCTION

The computer mystique has so fascinated some that they are drawn to electronic data processing and retrieval merely "because it's there." Encouraged by administrators at all levels of government — who are finding that the machine is an accurate, economical time-saver in handling mountains of paperwork — legislators are beginning to adapt automatic data processing techniques to law-making jobs. It has become stylish for a state legislative service commission to boast that all of its statutes are "on tape." What was once a novel application of the computer to legal literature is already a competitive commercial enterprise. Several organizations now seek to persuade state authorities that one or another of their respective processes and potential outputs will best serve long-range legislative purposes.

Antique and chaotic, the record-making and -keeping procedures of legislative bodies are due for a complete overhaul. And the computer will play more than a simple recording function when fully integrated into the legislative process. Integration of an electronic machine system implies the use of computers and their data bases for two distinct but interrelated legislative purposes. The first and more obvious use is that of record keeping. The second contemplates augmentation of the information and fact-finding function of the legislature as a policy-making body.

Experienced legislators do not have to be persuaded that radical improvements are needed in both of these functions. Since automation of the record-keeping function is more likely to precede the creation of large and versatile legislative "data banks," it seems appropriate to describe some of the applications and potential side-effects of computerizing the legislative journal.

Historically, the principle of legislative autonomy, coupled with a

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† A shorter version of this paper was presented at the Annual Meeting of the American Bar Association Committee on Electronic Data Retrieval, Honolulu, Hawaii, in August 1967. Parts of it will appear, in modified form, in the author's forthcoming book tentatively entitled LEGISLATIVE COMMUNICATION.

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realistic appreciation of the practical obstacles to precise recording during hectic legislative sessions, has supported a court-created presumption of constitutional regularity in the enactment of legislation. In some jurisdictions this presumption has operated to require affirmative pleadings pointing out the particular constitutional provisions alleged to have been violated, even in the face of the general rule that matters of law need not be pleaded.[1] It is also supported by several subsidiary rules which disregard non-constitutional formal, substantive, and procedural limitations designed to regularize the legislative process. One of these rules makes the enrolled bill, whatever its content, conclusive evidence of the legislature's will. The reasons given to support such decisions follow the line of the arguments advanced in *Weeks v. Smith:*[2]

> Legislative journals are made amid the confusion of a dispatch of business, and are therefore much more likely to contain errors than the certificates of the presiding officers are to be untrue. Moreover, public policy requires that the enrolled statutes of our state, fair upon their faces, should not be put in question after the public have given faith to their validity. No man should be required to hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate, and approved by the governor, is a statute or not. The enrolled act, if a public law, and the original, if a private act, have always been held in England to be records of the highest order, and, if they carry no "death wounds" in themselves, to be absolute verity, and of themselves conclusive.

For these practical, historical, and policy reasons, the enrolled bill rule has been held to preclude judicial consideration of legislative journals or other available records which would impeach the enrolled bill. Standard texts on legislation cite numerous instances in which the courts have not permitted the litigants to show that a bill was

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1. *Accord,* People v. Bristol, 92 Colo. 325, 20 P. 2d 309 (1933); Rio Grande Sampling Co. v. Catlin, 40 Colo. 450, 94 P. 323 (1907); Stelling v. Kansas City, 85 Kan. 397, 116 P. 511 (1911); Waterloo Woolen Mfg. Co. v. Shanahan, 128 N.Y. 345, 28 N.E. 358 (1891); *see* E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 138 (1940) [hereinafter cited as CRAWFORD].

2. 81 Me. 538, 547, 18 A. 325, 327 (1889), *cited with approval in* Field v. Clark, 143 U.S. 649 (1892).

not introduced within the prescribed time limit; that it was not properly read; or that it was not passed by the required vote.[3]

In jurisdictions where the enrolled bill presumption is not absolute, but merely prima facie, the enrolled statute still enjoys a strong presumption to be overcome only by unambiguous, affirmative, and contrary evidence from official journal entries. The courts in most states will not admit parol or other extrinsic evidence to impeach or amplify the contents of the official legislative journals.[4] Regardless of the amount, source, or credibility of the proffered evidence and despite the fact that the journal record may be highly unsatisfactory from an evidentiary point of view, courts have tended to follow this formula:

If (i) there is any room for doubt about what the legislative journals show, or
(ii) the journals are merely silent or ambiguous, or
(iii) it is possible to explain the journals upon the hypothesis that the enrolled statute is correct and valid,
Then it is the duty of the courts to hold that the enrolled statute is valid.[5]

Many eminently sensible reasons have supported the development of these decisional guides. Judicial distaste for overturning procedurally defective statutes "after the public have given faith to their validity" will doubtless continue to be a respectable justification for judicial refusal to overturn legislation that does not breach a substantive constitutional law. A radical change in the real world state of affairs in the legislative process, however, may rob such justifications of the collateral support they have heretofore received. The separation of powers inspired presumption of regularity may dissolve once legislatures acquire the capacity for regularity in fact. It was, and is, logical and

3. *Cf.* Tayloe v. Davis, 212 Ala. 282, 102 So. 433 (1924); Yolo County v. Colgan, 132 Cal. 265, 64 P. 403 (1901); Kelley v. Marron, 21 N.M. 239, 153 P. 262 (1915); State *ex rel.* Reed v. Jones, 6 Wash. 452, 34 P. 201 (1893); Annot., 40 L.R.A. (N.S.) 19 (1909); CRAWFORD § 139, nn. 24, 25, 27; J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 1403 (3d ed. F. Horack 1943) [hereinafter cited as SUTHERLAND].

4. Field v. Clark, 143 U.S. 649 (1891); Allen v. State, 14 Ariz. 458, 130 P. 1114 (1913); Sherman v. Story, 30 Cal. 253 (1866); De Loach v. Newton, 134 Ga. 739, 68 S.E. 708 (1910); State *ex rel.* Colbert v. Wheeler, 172 Ind. 578, 89 N.E. 1 (1909); Standard Underground Cable Co. v. Atty. Gen., 46 N.J. Eq. 270, 19 A. 733 (1889); People v. Devlin, 33 N.Y. 269 (1865); Perkins v. Philadelphia, 156 Pa. 539, 27 A. 356 (1893); *See generally* CRAWFORD § 142; SUTHERLAND §§ 1406-10, 1421, and the cases cited.

5. Variations of this formula are set out in numerous judicial opinions. *See, e.g.,* State v. Francis, 26 Kan. 724 (1882), *approved in In re* Vandenberg, 28 Kan. 173 [* 243] (1882), *cited in* CRAWFORD § 139.

legally sufficient to rely upon the presumption when the legislative record was essentially "made by hand." Antiquated man/machine systems, involving a battery of temporary typists, proofreaders, pages, and clerks, performing the varied tasks of writing, amending, substituting, deleting, and journal-recording functions are hardly likely to produce a procedural record or an end product free from error. The promise of an electronic man/machine system that will eliminate errors, save time, and augment the records appropriate for the legislative process is already a necessity. By eliminating the discrepancies between enrolled bill and journal, and by providing a man/machine double check on the completeness, regularity, accuracy, and reliability of all recorded legislative proceedings, legislatures can make clearer their "purpose." Judicial deference to "the confusion of a dispatch of business" will no longer have a solid grounding in fact.

II. Capabilities of a Computer-Journal Machine System

The computer industry is developing machines and techniques so rapidly that it would be foolish to link these proposals to the capacities of any particular item on the hardware market today. To do so would impose arbitrary limitations on the kinds and numbers of potential applications of such machines to legislative needs.

It is necessary, however, to specify some of the functional capabilities of a machine system that will be required to perform the record-keeping tasks of a modernized legislature. In order to do so, we ask (1) what records do we wish to keep, (2) what information do we wish to retrieve, (3) in what form do we wish to retrieve that information, and (4) whether we wish to prohibit unauthorized storage or retrieval, or both, of any of that information.

Clearly, a computer-journal should be capable of receiving all textual matter conventionally recorded in legislative journals, committee reports, and similar documents. It is also desirable that official votes and reports of relevant parliamentary decisions should be recordable in such a way as to prevent unauthorized changes. Similarly, certain items requiring secrecy (such as proceedings in "executive session" and the identity of *viva voce* voters) should be inaccessible to all but those authorized by law to inquire.

The system should have maximum flexibility for making changes in the texts of legislative measures — corrections, additions, deletions — at a minimum expenditure of typing and proofreading time. It should

be capable of printing edited and unedited versions of a given text at any stage of a bill's progress through the legislative process, together with a report on all action taken with reference to that bill. It should be possible to connect the computer-journal to a type composition machine for direct production of the promulgated acts of a given session. In short, the system should be designed to receive legislative inputs, to process the recorded action by the legislature on these inputs, and to provide a direct data-base for publication of legislative outputs.

These are the principal considerations that point to the following minimum capabilities of a machine system designed to supplant and augment the record-keeping potentials of legislative assemblies:

(1) Information storage through conventional typewriter keyboards, with simple methods for immediate correction of errors.

(2) Quick retrieval of stored items for addition or deletion of text, providing for retention in memory of a permanent retrievable record of all such modifications and of an "edited" version of such text, as most recently modified.

(3) Programs that will permit several different text-processing and data-handling activities to be performed simultaneously through multiple terminals.

(4) Performance of mathematical computations.

(5) Procedures to insure input and retrieval by authorized personnel only.[6]

(6) Production of a predetermined format output from rough inputs, including such features as automatic numbering, heading, and margin justification.

A machine system with these capabilities can effect substantial savings of time and manpower required in handling the input and processing of legislative proposals, and can greatly increase the accuracy and completeness of legislative records. If the computer-journal is thoughtfully programmed, it will also provide for an impersonal first-stage check on the conformity of all bills with constitutional and other legal requirements.

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6. In the IBM 1440/1460 Administrative Terminal System, information placed into storage can be kept confidential by tagging the record block with a security code to prevent unauthorized access to, or accidental modification of, the stored data.

III. Legislative "Inputs"

A. Preparation of Bills

Sam R. Haley, Legislative Counsel for the State of Oregon, has described a proposal for using equipment meeting the above criteria in a system of legislative drafting and bill preparation.[7] From his preliminary study, Haley estimated that 60 percent of the typing-proofreading and retyping-reproofreading connected with the preparation of bills by a legislative drafting service can be avoided, "through a system which stores information electronically as it is created and recalls it automatically — and accurately — when it is needed."[8] If the storage-retrieval unit is connected to a press, the input bill can be printed rapidly and accurately for distribution to members as the law and rules of the legislature may require.

Haley anticipated for such a system some of the further uses that are treated here. He noted, specifically, an extension of the system to the production of indexes and house calendars, and to the inclusion of journal entries, interim committee reports, and amendments through the use of terminals located in legislative research offices, committee rooms and elsewhere.[9] Precisely how the computer may be used in handling some of these jobs is discussed below.

B. Introduction of Bills

By building into the computer-journal program a number of queries which must be answered by the bill's sponsor, or by some other designated legislative official, before the machine will receive a proposed bill, the legislature can insure compliance with a number of constitutional and legislative rules more effectively than has been possible heretofore. Whether or not they have been traditionally included in journal entry rules, many constitutional and other limitations on the form and substance of proposed legislation may well be incorporated into the computer program as a preliminary check on the appropriateness of the proposed bill for legislative consideration. Examples of the kinds of records that a legislature may wish to keep are suggested by the following types of constitutional and statutory provisions:

7. Haley experimented with IBM's Administrative Terminal System. *See* Haley, *Legislative Information System,* 65 S.M.U.L.L. 93 (1965).

8. *Id.* at 94.

9. *Id.* at 97.

a. House of Origin. Under many constitutions, certain measures, notably, revenue bills, may originate exclusively in the lower house of a bicameral legislature.[10] The other house has the power to amend revenue bills, however, and such measures must have the approval of both houses before they can become effective. Where these restrictions are a matter of constitutional law, any bill of which the nominal legislator-sponsor cannot state affirmatively that it meets these requirements should be rejected by a computer-journal at the time of introduction.

b. Mode of Enactment. Because the procedural requirements for enacting legislation differ from those for adopting resolutions or joint resolutions, many constitutions require that "no law shall be passed except by bill," and resolutions, even if passed by unanimous vote are denied the status of "acts" for failure to follow the prescribed form and procedure required for the enactment of laws.[11] Measures relating to such subjects are not valid if adopted by mere resolution or joint resolution. Since the procedures for passage, particularly voting requirements and the participation of the chief executive, differ as between "acts" and "resolutions," the intended mode of legislative action should be specified at the time of introduction. On input-introduction into a computer-journal, the computer itself can be programmed to calculate and automatically print out the voting and other procedural requirements for legislative action on the designated measure.

c. Sponsorship. The general practice is to include on the title page of a bill the name of the legislator who introduced it. In jurisdictions where the number of sponsors is limited, several members may introduce identical bills.[12] The computer-journal could, of course, continue the requirement of a named sponsor for bills introduced.

d. Time of Introduction. In an effort to prevent hastily considered and improvident legislation, many jurisdictions have specified time limits within which bills may be introduced.[13] In some states, special

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10. PA. CONST. art. 3, § 14; S.C. CONST. art. 3, § 15; TEX. CONST. art. 3, § 33; INDEX DIGEST OF STATE CONSTITUTIONS 601 (2d ed. 1959) [hereinafter cited as INDEX DIGEST].

11. *See* State *ex rel.* Peyton v. Cunningham, 39 Mont. 197, 103 P. 497 (1909); INDEX DIGEST 600.

12. In the United States House of Representatives only one name may appear on a particular bill, "although several members may introduce identical bills." C. ZINN, HOW OUR LAWS ARE MADE 11 (1952).

13. *E.g.*, LA. CONST. art. 3, § 8; MD. CONST. art. III, § 27; MISS. CONST. art. IV, § 67; MO. CONST. art. 3, § 26; INDEX DIGEST 610-12.

procedures and votes are required for a waiver of these limitations.[14] Appropriately programmed, the computer could calculate the time lapse between the date of the opening of the session and the date of bill introduction, could reject, with stated reasons, those which had not met the time requirements, and, where applicable, could print out the procedural requirements for obtaining waiver.

e. Special or Local Laws. Where the enactment of special and local laws is not expressly prohibited, constitutional provisions or statutes usually make provision for "notice" of the introduction of such bills and may vary the effective date of such laws by special requirements for approval by the electors in the districts or subdivisions affected.[15]

These five requirements suggest a series of questions that can be programmed into a computer-journal as a part of the permanent record of the legislative body. Whether or not they are presently required as journal entries, their inclusion in an electronic journal would be calculated to serve as a preliminary check upon the regularity of bill introduction. The queries in the check-list set forth in Figure 1 illustrate some of the assertions which would be required for each item sought to be introduced.

C. Checklist of Input Queries.

An input checklist which included only the queries listed in Figure 1 would be incomplete. Numerous other formal and substantive requirements are contained in constitutional, statutory, and assembly rule provisions.[16] Still other desirable, but not mandatory, suggestions as to form have been spelled out in judicial opinions, law journal articles, and drafting manuals.[17] Many of these are susceptible to input programming and, when incorporated into the procedural requirements for bill introduction, can serve a useful function in insuring completeness and in eleminating at the outset egregious errors in the content of legislative measures.

F. Reed Dickerson, in his excellent manual on legislative drafting,

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14. *E.g.*, LA. CONST. art. 3, § 8; MD. CONST. art. III, § 27; MO. CONST. art. 3, § 26; INDEX DIGEST 610-12.

15. *E.g.*, MICH. CONST. art. IV, § 29; N.J. CONST. art. IV, § 7 ¶ 8; TEX. CONST. art. 3, § 57; CRAWFORD § 38.

16. *See* SUTHERLAND §§ 801-07.

17. *See* R. DICKERSON, LEGISLATIVE DRAFTING 53-60 *passim* (1954) [hereinafter cited as DICKERSON]; A. Conard, *New Ways to Write Laws*, 56 YALE L. J. 458 (1947).

Figure 1

1. DATE: .... SESSION: ....
2. HOUSE BILL? YES .... NO ....
3. SENATE BILL? YES .... NO ....
4. BILL NUMBER: .... (Automatically assigned by computer)
5. ACT? YES........ NO ....
   IF "YES," SPECIFY SUBJECT .... (Must be one on list specified by constitution or law)
   IF "YES," VOTE REQUIRED IS .... (Computer to supply voting requirement)
   IF "NO," JOINT RESOLUTION? YES .... NO ....
   IF "YES," VOTE REQUIRED IS ....
6. SPONSOR(S) ...., ..., ... (Computer verifies identity with master list of legislators in its memory core.)
7. IDENTICAL BILLS (Special computer program procedures required for identifying identical bills introduced previously, simultaneously, or subsequently to the instant bill)
8. REVENUE BILL? YES .... NO ....
   IF "YES," *AND*
   IF SENATE BILL, BILL REJECTED. (Computer checks query 3, above.)
   IF "YES," *AND NOT* SENATE BILL, BILL TIMELY? YES .... NO .... (Computer calculates time from previously stored date of opening of session and from entry 1, above, and supplies automatic response.)
   IF "NO," BILL REJECTED. (Computer printout gives instructions, if any, as to appropriate procedures available for late introduction of this measure.)
9. APPROPRIATION BILL? YES .... NO .... (Followed by queries similar to those set forth under "Revenue Bill?" above.)
10. SPECIAL LAW? YES .... NO ....
    IF "YES," NOTICE GIVEN? YES .... NO ....
      IF "NO," BILL REJECTED.
    IF "YES," *AND* IF NOTICE GIVEN, BILL TIMELY?
      YES .... No ....
      IF "YES," VOTE REQUIRED IS ....
      IF "NO," BILL REJECTED.
11. LOCAL LAW? YES .... NO ....
    (Subsequent entries similar to those shown at query 10)

has suggested the following (not inflexible) ordering of sections in a typical bill:[18]

(1) Short title, if any.
(2) Statement of purpose or policy, if any.
(3) Definitions.
(4) Most significant general rules and special provisions.
(5) Subordinate provisions, and exceptions large and important enough to be stated as separate sections.
(6) Penalties.
(7) Temporary provisions.
(8) Specific repeals and related amendments.
(9) Saving clauses.
(10) Severability clause, if any.
(11) Expiration date, if any.
(12) Effective date, if different from the date of enactment.

To this list might be added the title of the bill, the "style clause," enacting and amending clauses, emergency clause, and prescribed formats for incorporation by reference, and for indicating deletions from and inclusions of new matter in existing law. Some of these items doubtless would be included as standard or uniform entries in any input query list; others might be made optional in a computer-journal input program; still others could be devised for particular categories of legislation — criminal law or tax statutes, for example. Re-ordered, these supplemental queries can be classified as follows:

1. Standard Input Queries.

This group would follow the general arrangement of standard provisions of proposed bills: title, style, enacting, and amending clauses; sanctions; temporary and transitional provisions; effective date; saving, separability, and repealing clauses. Also included in this list would be particular format rules designed to make clear the full text of matter added to, or deleted from, existing law.

2. Optional Input Queries: General

Provisions which occur with some frequency in modern legislation but are not required in all proposed measures include: short title, statement of purpose or policy, definitions, incorporations by reference, and sections negativing or specifying retroactivity.

3. Optional Input Queries: Special

Constitutional amendments, statutes relating to particular subjects, and the adoption of codifications and uniform laws are obvious candi-

18. DICKERSON 57.

dates for special queries designed to insure conformity with particular requirements of constitutions and law.

How these sets of queries could be incorporated into the computer-journal program at the input stage is set forth in some detail below:

1. Standard Input Queries

a. Title. The constitutions of three-fourths of our states provide that a bill may cover only one subject which must be clearly expressed in its title.[19] In those states, the computer-journal could be programmed to reject any input bill which does not include a textual section labeled "title" and which fails to state affirmatively that the bill contains only one subject. Of course, neither the "clarity of expression" of the title nor the correctness of the "legal opinion" as to its singularity of subject matter could be tested by the machine. The principal utility of incorporating these two program queries is that of alerting the legislator-sponsor and journal clerks to possible defects in the title at this stage of the legislative process.

Similar introduction queries are possible where assembly rules require "a distinct reference to the subject or matter to which [bills]

19. ALA. CONST. art. 4, § 45 ("except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes"); ALAS. CONST. art. II, § 13 (except "an appropriation bill or one codifying, revising, or rearranging existing laws."); ARIZ. CONST. art. 4, pt. 2, § 13; CAL. CONST. art. 4 § 24; COLO. CONST. art. V, § 21 ("except general appropriation bills"); DEL. CONST. art. 2, § 16 ("except bills appropriating money for public purposes"); FLA. CONST. art. 3, § 16; GA. CONST. art. III, § 7, ch. 2-19, § 2-1908; HAWAII CONST. art III, § 15; IDAHO CONTS. art. 3, § 16; ILL. CONST. art. 4, § 13; IND. CONST. art. 4, § 19 (except "original enactments of codifications of laws"); IOWA CONST. art. 3, § 29; KANS. CONST. art. 2, § 16; KY. CONST. § 51; LA. CONST. art. 3, § 16; MD. CONST. art. III, § 29; MICH. CONST. art. IV, § 24; MINN. CONST. art. 4, § 27; MO. CONST. art. 3, § 23 (except general appropriation bills and certain bills authorizing the issuance of bonds by the state and the contracting of liability on behalf of the state); MONT. CONST. art. V, § 23 ("except general appropriation bills, and bills for the codification and general revision of the laws"); NEBR. CONST. art. III, § 14; NEV. CONST. art. 4, § 17; N.J. CONST. art. IV, § 7, ¶ 4; N.M. CONST. art. IV, § 16 ("except general appropriation bills and bills for the codification or revision of the laws"); N.Y. CONST. art. 3, § 14 (applying to any "local or private bill"); N.D. CONST. art. II, § 61; OHIO CONST. art. II, § 16; OKLA. CONST. art. 5, § 57 ("except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes"); ORE. CONST. art. IV, § 20; PA. CONST. art. 3, § 3; S.C. CONST. art. 3, § 17; S.D. CONST. art. III, § 21; TENN. CONST. art. 2, § 17; TEX. CONST. art. 3, § 35 (except "general appropriation bills"); UTAH CONST. art. VI, § 23 ("except general appropriation bills, and bills for the codification and general revision of laws"); VA. CONST. § 52; WASH. CONST. art. 2, § 19; W. VA. CONST. art. 6, § 30; WIS. CONST. art. 4, § 18 (applying to any "local or private bill"); WYO. CONST. art. 3, § 24 ("except general appropriation bills and bills for the codification and general revision of the laws").

relate" and to the section of existing law, if any, proposed to be amended or repealed.[20]

Bills proposing an appropriation and those containing an emergency section may also be subject to special title requirements.[21] These, too, can be incorporated into a programmed checklist which demands an affirmative assertion that they have been met before the computer will accept the proposed input as a numbered bill.

b. Style Clause. The occasional judicial struggles between *ipsissimis verbis* literalists and those who can tolerate substantial compliance with constitutional "style of laws" clauses may be permanently laid to rest by a computer program which automatically inserts at the appropriate point on all bills previously entered as "acts" (see Query 5, Fig. 1, *supra*) the sacred words: "Be it enacted by the General Assembly of the State of ...."

c. Enacting or Amending Clause. Where statutory law has been revised or codified, legislative drafting services often provide template clauses which can be programmed into a computer-journal to insure that appropriate reference is made to the statute or code sections intended to be enacted or amended.[22] The computer program can also include a doublecheck on the accuracy of title and amending or enacting clause references to particular section numbers. By including a routine which compares textual references to section numbers with those in such clauses, the computer can be made to perform the initial proofreading job and to accept only numerical references that conform to those set forth in the title and the introductory clauses.

d. Sanctions. The enforcement of law may be achieved by sanctions — imposing penalties or forfeitures for failure to comply, or conferring benefits upon those who do comply with its provisions. It is unnecessary to justify at length the inclusion of a query relating to the consequences that follow from noncompliance with the terms

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20. Joint Rule No. 5, 104th General Assembly (Ohio) provides that "bills shall have noted in their titles a distinct reference to the subject or matter to which they relate and also, if they propose the amendment or repeal of any law, to the section proposed to be amended or repealed." OHIO LEGISLATIVE SERVICE COMMISSION, BILL DRAFTING MANUAL 7, (2d ed. Sept. 1962) [hereinafter cited as OHIO MANUAL]. *See also* GEN. LAWS OF R.I., Title 43, ch. 2, § 2.

21. *E.g.*, CONN. GEN. STAT. ANN., § 2-34. "In all bills proposing an appropriation or containing an emergency section, references to such appropriation or emergency should be contained in the title." OHIO MANUAL 7.

22. *E.g.*, "Section 1. That sections —, —, and —, of the Revised Code be amended to read as follows:" and "Section 1. That Sections — to —, inclusive, of the Revised Code, to be enacted to read as follows:" OHIO MANUAL 7.

of legislation that imposes a duty or obligation. Particular limitations on penalties imposed by criminal legislation[23] and the general interpretative principles that distinguish mandatory from directory or permissive statutes are sufficient grounds for including a reminder that the presence and content of a sanction clause may be crucial for effecting the purpose of a proposed bill.

e. Temporary and Transitional Provisions. Often it is necessary to make special provision for events occurring in the transition period between existing law and the effectuation of a new law. Administrative provisions creating or reorganizing a regulatory agency, for example, may take into account the practical and "due process" needs for administrative continuity. If these temporary provisions are set forth in separate sections of the act, they may later be dropped from subsequent compilations without destroying the fundamental text of the permanent law. The very frequency with which legislatures deal with the creation and modification of administrative agencies and competences warrants the inclusion of such an inquiry in the standard list of input queries.

f. Expiration Date. By definition, all temporary legislation expires either on a specified or a calculable date. This program item would require the sponsor to state the expiration date on the face of a bill containing temporary provisions, or to include in the text a statement of the formula or condition upon which its expiration could be determined.

g. Emergency Clause and Effective Date. Some state constitutions specify the date on which laws shall go into effect. In Ohio, for example, "No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. . . ."[24] Machine computation of the effective date of any such law would depend, of course, upon inclusion in the computer-journal a record of the date of delivery so specified.

The exceptions to this general rule vary from state to state. They may include laws providing for tax levies, appropriations for current expenditures of the state government, and emergency laws necessary

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23. Common examples are constitutional protections against *ex post facto* laws, bills of attainder, and cruel and unusual punishment. INDEX DIGEST 342 (punishment), 347 (rights of accused).
24. OHIO CONST. art. II, § 1(c).

for immediate preservation of public peace, health and safety.[25] Such laws may be required by the constitution to contain a special section setting forth the reasons for the emergency and generally are subject to a two-thirds (or more) vote of the members of each branch of the legislative body.[26]

h. Saving Clause. In some ways the saving clause parallels the transitional provisions mentioned above. Dickerson, noting that the usual saving clause is designed to preserve rights and duties that have already matured and proceedings that have already begun, suggests the following form:

> Sec. .... This Act [or "title," "part," or "section"] does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.[27]

i. Separability Clause. Although courts frequently hold that the invalidity of one provision of a statute does not affect the validity of other provisions that are severable from it, legislative draftsmen often prefer to include express directions to the courts so to hold. The use of such a section authorizing the separation of constitutional from unconstitutional sections, has become so common, however, "that some courts hesitate at least in doubtful cases to give effect to separability sections on the ground that they do not express the legislative intent."[28] Presumably, the courts read such sections as an admission on the part of the legislature that certain sections are or may be unconstitutional and they prefer to rely upon the presumption of constitutional regularity in construing controversial legislation. The template clause suggested by Dickerson[29] omits any reference to constitutionality:

> Sec. .... If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

25. *See*, ILL. CONST. art. 4, § 13; IND. CONST. art. 4, § 28; IOWA CONST. art. 3, § 26; ME. CONST. art. IV, § 16; OHIO CONST. art. II, § 1 (d); KY. CONST. § 55.

26. *E.g.*, CAL. CONST. art. 4, § 1; ILL. CONST. art. 4, § 13; KY. CONST. § 55; ME. CONST. art. IV, § 16.

27. DICKERSON 111.

28. SUTHERLAND § 4836.

29. DICKERSON 110.

j. Repeal Clause. If the sole purpose of a bill is the repeal of designated laws or parts of laws, the format of its first section parallels that of enacting clauses. The critical item is the accuracy of the citation to the articles or sections of the law sought to be repealed and the correspondence of that citation to the one set forth in the title.

If enacting or amending bills require the repeal of existing law, the repeal clause is usually set forth in a separate section of the bill, and an automatic conformity check provided by the computer program could ensure that the references to the particular sections or articles repealed are identical to those mentioned in the title of the bill.

k. Format for Deletions and New Matter. By rule, some legislatures prescribe the format of amending bills.[30] Such rules may require, for example, that

> any new matter contained therein shall be underscored; and when printed the matter so underscored shall be printed in italics; and when an amendment is sought by the omission or elimination of matter in an existing law, the author shall indicate such omission or elimination in its proper place by asterisks. . . . All matter denoted by asterisks shall be typewritten or printed at the foot of the bill. . . ."[31]

Format rules may further require that the deletions be numbered consecutively in the order in which they appear. The translation of these requirements into the program instructions for storage and printout of bills is an obvious and relatively simple one.

2. Optional Input Queries: General

a. Short Title. The inclusion of a short title is merely a matter of convenience in designation and citation. It is usually reserved for laws that are designed to be "a charter for a continuing program."[32]

b. Statement of Purpose or Policy. The preliminary declaration of policy has become a fairly common substitute for an older form, the preamble. As used today, the policy section states the facts on which the legislature bases its judgment and the purpose for which it acts. Text writers and experienced draftsmen insist that a properly written statute does not need a statement of purpose, and they counsel

30. *E.g.*, CONN. GEN. STAT. ANN., § 2-18.
31. OHIO MANUAL 10.
32. DICKERSON 104 and n. 14.

against including such a section on the ground that it tends to promote careless and slovenly drafting in the operative provisions of the act.[33] However, where the effective implementation of legislation depends upon a proper interpretation of "legislative intent," draftsmen may prefer to use a policy section to reinforce the message communicated in the body of the act.

c. Definitions. Almost all legislation contains or should contain definitions, and drafting problems relating to definitions require tremendous skill. The most that a computer program can do is to require that the legislator-sponsor note whether the proposed measure contains definitions, and, perhaps, to require that the definitions in input legislation are physically located within sections so labeled.

d. Incorporations by Reference. The advantages and disadvantages of incorporation by reference have been well stated by Dickerson[34] and need not be restated here. Unless such references are prohibited (by constitutional provision or by judicial opinion), draftsmen are likely to continue the practice. A computer query would be designed to require precision of citation, if possible, to the specific articles or sections of laws intended to be included in the incorporation by reference.

e. Retroactive Provisions. The prohibition on *ex post facto* laws is so limited that a large number of subjects may be acted upon by retroactive legislation. While all law is designed to effect future policy, much of it can also be interpreted to operate retrospectively to change the legal effects of action that occurred prior to its adoption. The question raised by this query in an input program would direct the sponsor's attention to the constitutionality and desirability of making a particular measure operate retrospectively. As is the case with many of the queries suggested here, the response to the query would hardly be determinative of the "legal" question involved, but it would be an important checklist item to be considered before the measure is introduced.

3. Optional Input Queries: Special

By constitutional provision and judicial interpretation, certain legislative action is subject to procedural and substantive require-

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33. DICKERSON § 9.1, at 107-8; DREIDGER, THE COMPOSITION OF LEGISLATION 94 (1958).
34. DICKERSON 96-99.

ments quite different from those relating to the general mass of legislation.

Legislative participation in the drafting, adopting, and amending of constitutions is usually governed by a special article or section of the constitution itself.[35] Statutes relating to collecting and spending public funds and disposing of government property; penal laws, including those specifying criminal conduct and imposing penalties therefor; and acts creating and granting powers to administrative agencies and political subdivisions are commonly subject to limitations not imposed upon general legislation on other subjects.[36] The procedures for adopting as law a codification or revision of statutory law and the inclusion of certain standard provisions in uniform or model acts when they are adopted as local law also are regulated by special rules.[37]

Whether or not separate queries for these types of legislative action should be incorporated into the computer-journal input program is a question to be answered by the designers of the particular program.

a. Constitutional Amendments. Typical constitutional requirements that might be included in such a program are limitations on the subject matter of the amendment (e.g., the state capital may not be changed); notice of proposed amendment; form of legislative action (e.g., joint resolution, not an act); voting requirements in each house; number of legislative sessions required to propose amendments; statement of subject on ballots; manner of calling and votes required at public vote on amendments.

b. Appropriations and Public Grants. Proscriptions on "gifts" of public monies or property and special requirements relating to house of origin, time of introduction, contents of title of the bill, time limits on the period for which made, vote needed to pass, and effective date form the basis for a number of queries relevant to such acts. (See Queries 8 and 9, Fig. 1, above.) Thus, one entry might require the assertion that the bill is "NOT A GIFT." Another would ask "APPROPRIATION?", to be followed by a series of sub-queries

35. *E.g.*, KY. CONST. §§ 46, 47; TENN. CONST. art. 2, §§ 17-20; VA. CONST. § 50; INDEX DIGEST 10, 11, 14-17, 19-23 (constitutional amendments).

36. *E.g.*, MICH. CONST. art. IV §§ 28-32; N.Y. CONST. art. 3, §§ 15, 18, 20, 22; TEX. CONST. art 3, §§ 42-61; INDEX DIGEST 2333 (appropriations), 851-54 (grants of public property).

37. S.C. CONST. art. 6, § 5; *see also*, MICH. CONST. art. IV, § 36; TEX. CONST. art. 3, § 43; *but see*, ALA. CONST. art. 4, § 85 (no revision allowed); INDEX DIGEST 599-618 *passim*.

incorporating, where applicable, the substance of each of the requirements noted above.

c. Penal Statutes. Traditionally, where enforcement of statutes requiring or forbidding certain conduct is effected by fine, imprisonment, pecuniary penalty or forfeiture (of property, privilege, license, and the like), such statutes are subject to specific substantive and procedural limitations under both federal and state constitutions.[38] Incorporation of a set of sub-queries calling attention to these limitations at "Sanctions" in the Standard Input Query list[39] might be considered desirable in a given computer-journal program.

d. Revenue. Bills relating to taxation are subject to the house of origin, uniformity, and general legislation clauses of most state constitutions, and the judicial limitations imposed upon the reasonableness of classification.[40] Whether as separate sectional requirements or as sub-queries related to title,[41] statements of purpose,[42] or some other standard input query, many of those limitations can be formulated for input checklist purposes.

e. Administrative Agencies. The delegation of law-making power to administrative agencies is limited by constitutional law as interpreted by the courts,[43] but little or no guidance is provided by law or by drafting manuals on the internal structure of regulatory acts. Four types of provisions are critical in legislation creating a new agency or reorganizing an old one: (1) administrative — providing for the creation of an organization, for the selection of its officers and employees, and specifying their qualifications, tenure, and salary; (2) jurisdictional — prescribing powers and duties to be exercised by the organization; (3) legislative "standards" — of permitted and proscribed conduct, accompanied by provisions for the review of administrative rule-making and enforcement; and (4) sanctions.

38. U.S. CONST. art. I, § 9; art. III §§ 2-3; amends. V, VI, VIII, XIII, XIV. MICH. CONST. art. I, §§ 9-12, 14-21; art. IV, § 46; PA. CONST. art. 1, §§ 7-19; TEX. CONST. art. 1, §§ 8-22.

39. *See* p. 17 *supra.*

40. *E.g.,* IND. CONST. art. 4, § 17 (origin), art. 10, § 1 (uniformity), art. 4, §§ 17-23, 25-28 (general legislation); PA. CONST. art. 3, § 14 (origin), art. 9, § 1 (uniformity), art. 3, §§ 1-3 (general legislation); INDEX DIGEST 993-95 (uniformity). *See* n. 10 *supra* (house of origin).

41. *See* p. 16 *supra.*

42. *See* p. 22 *supra.*

43. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Anderson v. Commissioner of Highways, 267 Minn. 308, 126 N.W. 778 (1964); Backman v. Salt Lake City, 13 U. 2d 412, 375 P. 2d 756 (1962); City of Florence v. George, 241 S.C. 77, 127 S.E. 2d 210 (1962); INDEX DIGEST 1 *passim;* SUTHERLAND § 304.

The fourth item — sanctions — is sometimes the subject of drafting rules requiring that sanctions be included at the end of the statute, and that civil and criminal sanctions be seated in separate sections.[44] A study of some of the models provided in texts on legislative drafting[45] will supply the information upon which appropriate sub-queries can be formulated to insure the inclusion of minimal-to-optimal content and legislative direction in the establishment of administrative direction in the establishment agencies.

f. Political Subdivisions. Although legislation creating and granting law-making, taxing, and other powers to counties, municipalities, and special purpose districts is generally limited by constitutional requirements for general and special legislation, many constitutions contain separate provisions setting forth the procedural and substantive restrictions on legislative action relating to such subdivisions.[46] Some of these require notice to the citizens of the area to be affected.[47] Others specify, in detail, the contents of charter acts and set external limits upon the police power which may be delegated to particular types of subdivisions.[48] General legislation which uses a population classification system must conform to judicially-announced tests of reasonableness.[49] Statutes which purport to abolish or merge existing political subdivisions or to change county seats or boundaries, are often prohibited by constitutional provisions that impose special limitations and procedures upon legislative and local participation in such changes.[50] "Home rule," enshrined in constitutional law,[51] sets limits upon the respective legislative powers of state and local government. Whether some or all of these restrictions can or should be incorporated into an input query checklist is a matter for local determination.

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44. SUTHERLAND §§ 4826-31; OHIO MANUAL 35.

45. SUTHERLAND chs. 48, 49, at 342-480; DICKERSON 53-60, 89-114. *See also* the excellent materials collected in READ, MACDONALD, AND FORDHAM, LEGISLATION, ch. 7 (2d ed. 1959).

46. *E.g.*, CAL. CONST. art. 11, §§ 3, 8, 20; FLA. CONST. art. 3, § 21; OHIO CONST. art. II, § 31; INDEX DIGEST 128 (counties), 61 (cities), 736 *et seq.* (municipalities), 354 (districts).

47. *E.g.*, FLA. CONST. art. 3, § 21; LA. CONST. art. 4, § 6; N.J. CONST. art. IV, § 7, ¶ 8; INDEX DIGEST 938-39.

48. *E.g.*, CAL. CONST. art. 11, §§ 8½, 11; LA. CONST. art. 14, § 14. *See* n. 46 *supra*.

49. Opinion of the Justices, 95 N.H. 537, 64 2d 320 (1949).

50. The provisions are manifold and various. *See generally* INDEX DIGEST 133-36.

51. *E.g.*, CONN. CONST. art. X; ILL. CONST. art. 10; TEX. CONST. art. 9, § 3.

g. Revised Statutes and Codes. The statutes of most of our states are now "revised."[52] The agencies charged with updating revised statutes follow formal revision rules and try to see to it that new legislation is adopted as a part of the revised statutes, not as separate acts which must be adapted to the revised statutory scheme. The wholesale revision, compilation, or codification of the law of a given jurisdiction is an infrequent occurrence. When a state does authorize the re-enactment of a large body of law, however, the bill proposing such a measure must be "enacted" in the same manner as any other bill. It must contain a title, a style clause, and must be processed through both houses of the legislature in conformity with the procedures required for any other bill. The principal exceptions to the general rules are suspension of (1) the requirement for three readings and (2) the strict limitation of the body of the bill to "one" subject expressed in its title.

Because revision of particular "titles" of revised codes or statutes is usually committed to an experienced body of skilled draftsmen, it may be unnecessary to include input checklist queries in the computer-journal to cover this form of legislation.

h. Uniform and Model Acts. The drafts of uniform and model acts sometimes contain particular provisions that retain or abolish rights or remedies previously available at common law, that specify certain interpretative rules, and that stipulate an effective date which does not correspond to the usual date upon which legislation in a given jurisdiction becomes effective. Because the draft acts may not always call attention to the importance of these and other considerations involved in wholesale adoption of template legislation, it would be advisable for the programmers to consider the incorporation of input queries which would alert sponsors to some of the more significant contingencies.

IV. LEGISLATIVE "PROCESSING"

Once a bill has been introduced, constitutional and parliamentary procedures govern its progress through the legislative machinery. Constitutional provisions relating to the contents of the official record of

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52. Ala., Alas., Ariz., Ark., Cal., Colo., Conn., Del., Ga., Hawaii, Idaho, Ill., Ind., Iowa, Kan., Ky., La., Me., Md., Minn., Miss., Mont., Neb., Nev., N.H., N.J., N.M., N.Y., N.C., N.D., Ohio, Okla., Ore., R.I., S.C., S.D., Tenn., Tex., Utah, Vt., Va., Wash., W. Va.

the legislative process differ from state to state.[53] These requirements may specify the number of times a bill must be "read" or make it mandatory to record the number of votes on final passage of a bill, and on a vetoed bill. Whatever the particular rules, however, one overriding judicial principle governs: if the constitution requires certain proceedings to be entered in the legislative journal, the entry is a condition precedent to the validity of the act.[54]

By custom, all legislative assemblies make daily reports of the proceedings of each house and enter them in a permanent record.[55] Journals ordinarily contain only a skeletal record of legislative action, but they are not the sole source of "legislative history." An essential part of the context of an act may be reflected in other records of its consideration from the time of introduction until final adoption as a statute. Transcripts of committee hearings, the texts of amendments or substitute acts, majority and minority reports explaining the bases of standing, special, and conference committee action on a bill; comments by law revision agencies and uniform law commissioners; and legislative floor debates are recordable. When recorded, they become a part of the permanent history of the legislative body and of the action that it takes.

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53. ILL. CONST. art. 4, § 10 ("Each house shall keep a journal of its proceedings, which shall be published. In the senate at the request of two members, and in the house at the request of five members, the yeas and nays shall be taken on any question, and entered upon the journal. Any two members of either house shall have liberty to dissent from and protest, in respectful language, against any act or resolution which they think injurious to the public or to any individual, and have the reasons of their dissent entered upon the journals."); CAL. CONST. art. 4, § 10 ("Each house shall keep a Journal of its proceedings and publish the same, and the yeas and nays of the members of either house, on any question, shall, at the desire of any three members present, be entered on the Journal."), art. 4, § 28 ("In all elections by the Legislature the members thereof shall vote *viva voce,* and the vote shall be entered on the Journal."), art. 4, § 16 (Governor's objections to bill returned unapproved to legislature, which shall enter such objections in journal.), art. 4, § 15 (vote on all bills to be entered in journal); FLA. CONST. art. III, § 12 ("Each House shall keep a Journal of its own proceedings, which shall be published, and the yeas and nays, of the members of either House on any question, shall, at [*sic*] the desire of any five members present, be entered on the Journal."), art. 3, § 17 ("The vote on the final passage of every bill or joint resolution shall be taken by yeas and nays, to be entered on the Journal of each House; . . ."); INDEX DIGEST 641-42.

54. State *ex rel.* Board of Commissioners, Indian River Mosquito Control Dist. v. Helseth, 104 Fla. 203, 140 So. 655 (1932); State *ex rel.* Landis v. Thompson, 121 Fla. 561, 164 So. 192 (1935); People v. Hatch, 33 Ill. 9 (1863); People v. Knopf, 198 Ill. 340, 64 N.E. 842 (dissent at 1127) (1902). *Contra,* Spaulding v. Desmond, 188 Cal. 783, 207 P. 896 (1922); *see* CRAWFORD § 46, n. 141.

55. Few states provide daily printed records of legislative proceedings, however. The general practice is to publish journals at the close of the session.

While lawyers and judges debate the credibility and relevance of federal "legislative history" for the interpretation of statutes, the lack of such records is deplored by interpreters of state legislation. The programmers of the computer-journal may well find themselves in a jurisprudential bog when they attempt to answer the question: which records do we wish to keep, and why?

A. The Legislative Journal

Whatever is presently required by constitutions to be recorded in a legislative journal should be entered in a computer-journal.[56] As noted above, mandatory entries may be minimal — limited to a record of the vote on final passage of the bill. The crucial point is the fact that constitutional requirements tend to be construed strictly and until provisions relating to journal entries are updated to meet contemporary demands for a comprehensive legislative history, the legislature is well-advised to retain the essentials of its manual record-keeping activities in a computerized journal.

Sutherland notes that many courts have held it "unnecessary to enter in the journals a statement of facts showing compliance with all constitutional directions concerning legislative procedure."[57] This rule merely relieves the legislature of a "duty" to record certain constitutionally required action; it does not impose any limits upon the range of recordable legislative action, nor does it suggest that one category of recorded information is to be accorded greater or lesser weight or credibility because it is included in the legislative journal.

56. *E.g.*, MICH. CONST. art. IV, § 18 ("Each house shall keep a journal of its proceedings, and publish the same unless the public security otherwise requires. The record of the vote and name of the members of either house voting on any question shall be entered in the journal at the request of one-fifth of the members present. Any member of either house may dissent from and protest against any act, proceeding or resolution which he deems injurious to any person or the public, and have the reason for his dissent entered in the journal."), art. IV, § 19 ("All elections in either house or in joint convention and all votes on appointments submitted to the senate for advice and consent shall be published by vote and name in the journal.").

57. SUTHERLAND § 1415; Bachelor v. State, 216 Ala. 356, 113 So. 67 (1927); Garrett Transfer and Storage Co. v. Frost, 54 Idaho 576, 33 P. 2d 743 (1933); Miesen v. Canfield, 64 Minn. 513, 67 N.W. 632 (1896); State *ex rel.* Davis v. Cox, 105 Neb. 75, 178 N.W. 913 (1920); *accord,* People *ex rel.* Manville v. Leddy, 53 Colo. 109, 123 P. 824 (1912); Jessup v. Mayor and City Council of Baltimore, 121 Md. 562, 89 A. 103 (1913); Frazier v. Bd. of Commissioners, Guilford Co., 194 N.C. 49, 133 S.E. 433 (1927). *But see* Cotting v. Kansas City Stock Yards Co., 82 Fed. 839 (1897); State *ex rel.* Board of Commissioners, Indian River Mosquito Control Dist. v. Helseth, 104 Fla. 208, 140 So. 655 (1932).

B. Computer-Journal Entries: Input

The previous section on legislative *inputs* sets forth in detail most of the information that would become a part of the legislative record at the time bills are introduced. The suggested contents of the computer-journal input program apply only to regular legislative sessions. Appropriate modifications can be made to adapt the program to the limitations imposed on special or extraordinary sessions and to the interim "budget" sessions convened in some states in alternate years between regular biennial meetings. Where the constitution requires executive proclamation, a special message, or formal "call" for convening special sessions, and where the subjects to be considered are limited by the constitution or by the contents of the executive message, the input program can be adapted to reflect these limitations.

Similarly, the program must be modified to accommodate post-introduction amendments and substitutions. These modifications will tend to blur the discrete line suggested by the trichotomous terms "input," "processing," and "output" by incorporating in the "processing" phase certain "input" queries relating to committee and floor amendments, for example. The items dealt with in the next section illustrate the kinds of entries that might be included in the complete computer-journal.

C. Computer-Journal Entries: Processing

1. Reading and Printing Proposed Legislation.

Originally, the reading requirement was intended to insure that legislators were properly informed concerning the content of measures on which they would be called to vote.

> The first reading was to disclose the purpose and character of the bill in order that the house might determine whether it should be accepted. The second reading was to refresh the legislator's memories in order that intelligible amendments might be made to it. The third reading was to inform members of the contents of the bill as amended prior to final vote. These steps were of practical importance to effective legislative consideration; particularly during that period of history when illiteracy was common among legislators and printing was a slow and expensive process.[58]

58. F. HORACK, CASES AND MATERIALS ON LEGISLATION 789-790 (2d ed. 1954).

With the increase in volume of legislative proposals and the development of more efficient means of providing full texts of pending bills, reading rules have not been abolished, but they have been substantially relaxed. The computer-journal program can be adapted to reflect existing "reading" practices in a particular jurisdiction, until such time as the rules of legislative procedure are updated to reflect more modern means of communication and notice.

In 1966, John C. Wahlke noted that ten states do not yet provide legislators with copies of bills on which action is expected, and that the character and quantity of information given legislatures about the status of bills varies widely among the several states.

> Some states present each day a rather full list of what bills are to be brought to the floor of a chamber, what committees will hold hearings on what bills, and so on. Others provide only an end-of-the-day chalk-up on a blackboard in the chamber of likely business for the coming day, with at best a brief oral announcement on the floor of committee meetings or hearings.[59]

If the computer-journal is connected with a type composition machine, copies of bills can be provided with much greater speed and accuracy than is now possible. Appropriately programmed, these machines will be capable of reproducing, at any stage of its consideration in either house, a copy of any given bill as then modified.

2. Legislative Committees.

The committee structure of contemporary legislative bodies is rather complex.[60] Several different types of committees function in the divi-

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59. THE AMERICAN ASSEMBLY, STATE LEGISLATURES IN AMERICAN POLITICS (G. Heard ed. 1966) 126, 137. (Author does not cite the ten states. He mentions also that one third of the states do not provide printed copies of bills, and that ten do not provide any kind of copy.)

60. The Maryland Legislature, for example, has a joint standing committee known as the Grand Inquest Committee, twenty-nine standing committees for the Senate appointed at the beginning of each session by the president unless otherwise ordered by the Senate, and thirty-five standing committees for the House appointed by the Speaker. The Speaker and four other members compose the Rules Committee. The Committee on Chesapeake Bay and its Tributaries is composed of members who represent the counties concerned. Minority membership on House committees is prescribed according to the total number of members, with the exception of the Committee on Currency, which has a fixed minority membership of six. There is also frequent use of local committees: "All bills affecting a single county or subdivision thereof, or Baltimore City, are assigned in the House to the county delegation or that of Baltimore City acting as a standing committee for such proposed legislation. Where counties have only two delegates, which is

sion of procedural and deliberative labor. Steering or "sifting" committees, composed of the chairmen of important standing committees, determine priorities in limited legislative sessions. Permanent standing committees specialize on specific fields of legislation during legislative sessions; interim committees study problems and prepare legislation between sessions. Joint committees and conference committees are created to achieve economic consideration of and inter-house accord on particular proposals. And the parliamentary device known as the Committee of the Whole affords a device for informal debate by the entire house unhampered by constitutional restraints on formal legislative procedure.

While a computer-journal program may provide for record-keeping of the activities of all committee action, the suggestions made here refer only to the routine proceedings of the standing committees. The modifications required for recording action by other committees, including the Committee of the Whole, are readily apparent to those familiar with the operation of the committee system. A cogent reason for including complete records of committee action is summarized in Woodrow Wilson's sardonic observation about the consequences of assignments to a standing committee:

> When [a bill] goes from the clerk's desk to a committee room it crosses a parliamentary bridge of sighs to dim dungeons of silence whence it will never return. The means and time of its death are unknown, but its friends will never see it again.[61]

a. *Assignment.* If the constitution makes it mandatory that all bills be referred to a committee before being voted upon, that requirement must be met before the bill can be validly enacted into law. In jurisdictions having this requirement, the computer-journal program would contain an automatic query requiring committee assignment, which, if not entered, would inhibit any further entries relating to the bill.

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true in six cases, some other delegate is appointed to sit with them on the committee." C. WINSLOW, STATE LEGISLATIVE COMMITTEES 49 (1931). In the Senate, local bills are referred to a "select" committee, composed, in the case of Baltimore City, of the six senators therefrom. In the case of any county measure, the committee consists of the senator from that county acting as chairman, and two other senators, usually, although not always, from nearby counties. *Id.* at 48, 49; *see also* A. BLAIR, AMERICAN LEGISLATURES: STRUCTURE AND PROCESS ch. 8 (1967); J. BARBER, POWER IN COMMITTEES: AN EXPERIMENT IN GOVERNMENTAL PROCESS (1966).

61. W. WILSON, CONGRESSIONAL GOVERNMENT 63 (1885).

It is conceivable, but politically doubtful, that the computer would also be used to make automatic assignments to committees. Whether automatic assignments would result in more equitable and economical distribution of proposals among the various committees is a matter that would have to be determined from past experience with the traditional assignment techniques.

b. *Hearings and Reports.* While lawyers and judges debate the interpretative competence of voluminous federal records of committee hearings and legislative debates, they also deplore the imcompleteness of legislative deliberation on state statutes. State legislative hearings patterned on federal proceedings are relatively few; permanent records of testimony received and committee reports are even more scarce. It is difficult to estimate the potential impact of accurate and more comprehensive legislative histories upon judicial review of state legislation.

The man/machine system contemplated here could be used (1) to provide public notice of committee hearings, (2) to record full texts or summaries of testimony and other evidence received in the hearings, (3) to record and publish majority and minority reports on proposed legislation, (4) to modify original texts by amendment or substitution, and (5) to produce a daily record or digest of the status of bills under consideration.

3. Floor Debates, Amendments, and Votes.

Whether or not the contents of floor debates are considered sufficiently important for full recording, the computer-journal will certainly provide a more competent means for making a parliamentary record of proceedings in the legislative assembly. The amendment routines developed for recording committee processing can be modified to fit the needs of house and senate clerks in making the changes effected by the two chambers in the final stages of bill consideration.

Formulae for calculating the number of votes required for passage are readily programmable.[62] The most critical vote, of course, is that which records final action in a given legislative chamber. Ordained by constitutional provision in most states, the final vote must be "by

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62. For a brief summary of voting requirements for passage of certain classes of acts, *see* SUTHERLAND § 1301.1 (Supp. C. Sands ed. 1966).

yeas and nays," and the total yeas must consist of a majority of all members elected to each house.[63]

Where the constitution imposes a time limit on voting, legislators often "stop the clock" — a parliamentary move concurred in by all members — in order to create a journal record which does not disclose a violation of the constitutional rule. Computerizing a journal would not necessarily alter the practice, for the machine is as flexible as its programmers choose to make it. Whether the efficiency of the whole recording system would effect sufficient savings in time to obviate the need for clock-stopping is a question which cannot be answered here.

4. Presentation to Executive.

After an act has been passed by the legislature, a copy of the law as passed is prepared for the signatures of the presiding officers of each house and for that of the executive. As currently done, by a Committee on Enrollment or by enrollment clerks, this is a formal procedure. It consists merely of an examination of the copy of the bill as concurred in by the two houses.[64] After the enrolled bill is properly authenticated by the presiding officers, it is transmitted to the executive.

A man/machine system with the capabilities listed above could be "programmed" to produce an exact copy of the measure, as modified in the course of its passage. The automatic enrolling feature would eliminate the need for the so-called enrolled bill rule, as well as the occasion for resort to exceptions to that rule.[65]

Whether to open the computer-journal to executive entries, including a notation of the date of executive approval or veto, the contents of the veto message, and the date of delivery of approved acts to the appropriate officer for recording and promulgation, will be determined by those who design and install an electronic recording system. The veto will require a separate set of journal queries, however, to reflect

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63. *E.g.*, CAL. CONST. art. IV, § 15; FLA. CONST. art. III, § 17; ILL. CONST. art. IV, § 12; INDEX DIGEST 609, 679-80.

64. However "formal," the preparation of the enrolled bill may be a tedious, time-consuming task. In the Congress, for example, the enrolling clerks must collate the original engrossed bill, the engrossed amendments, signed conference reports, and several other documents. Occasionally, enrolled bills reflect as many as 300 amendments, exactly as passed, and with all punctuation in accord with the action taken.

65. *See* pp 2-4 *supra*.

post-veto legislative action in accordance with local constitutional requirements.

V. LEGISLATIVE "OUTPUTS"

A permanent, accurate record of what was done, how, and why is the principal purpose of keeping legislative journals and publishing enacted laws. Each step in programming the computer-journal is calculated to produce the desired legislative output.

A. Publication of Statutes and Other Legislative Records

All states provide for the publication of their session laws in bound volumes. Because the time lag between passage and publication is so long, most states also provide for newspaper editions, advance sheets, printer's signatures, or slip laws to make copies of new laws available more quickly. Publication of journals, records, and other legislative materials takes second place to session laws and depends upon the amount of money which the legislators are willing to appropriate for the preservation of these records.

The advent of automatic type-composition machinery has made it possible to bypass the high costs involved in setting hot lead type. Once the data is in machine-readable form it can be fed directly into an automated press at higher speed and lower cost than was heretofore possible with traditional linotype machines. Not only can the bound volumes be made available sooner than before, but official newspaper editions and advance sheets can be produced immediately upon signature and delivery by the executive to the secretary of state.

B. Compilation, Indexing, and Annotating

Mere speed of publication and general availability to the public does not, however, answer current needs for "information" about legislative outputs. Integrating of new laws in revisions or compilations, indexing, and annotating these enactments with significant references to legislative history takes enormous effort and an inordinate amount of time when done by hand. The accumulated experience of computer services, such as that begun by John Horty at the University of Pittsburgh, has already pointed the way to efficient and quick computer updating of statutory compilations, to comprehensive machine-generated indexing techniques, and to the development of more

systematic cross-referencing schemes. In time, even these programs for improving the usefulness of legislative outputs will be made more sophisticated. They will then become a part of the ordinary routine for reporting on the work of a legislative session.

VI. Conclusion

This outline of the essential elements of a systematic query program points up the need for analysis and re-evaluation of present input, processing, and output procedures in legislatures. It illustrates one of the by-products of the computer era: the very existence of the machine has precipitated re-examination of traditional procedures with a view toward programming future action.

In 1961, the National Legislative Conference made twelve concrete proposals for modernizing legislatures.[66] They were re-indorsed in 1964.[67] The creation of a computer-journal and the introduction of modified legislative procedures required to achieve optimal functioning would provide a substantial step towards realization of at least two of those recommendations:

> 7. *Legislation.* Some states should consider limiting by rule the period when new bills may be introduced. States where bulk of bills has been a problem should consider authorizing and encouraging the drafting, filing, and printing of bills before the opening of the session.
>
> Where annual sessions are held unrestricted as to subject matter, consideration should be given to a system of carrying over bills on calendar from the first to subsequent sessions of the same legislature, both to expedite the legislative process and to reduce printing costs.
>
> All bills and important amendments introduced should be printed prior to public hearings on them and before consideration by the legislature, and whenever possible they should be inspected before printing by bill drafters or revision clerks. Editorial review and appraisal of final enactments by competent staff should be provided much more widely than at present as a means of detecting errors and conflicts, prior to transmittal to the governor.
>
> Adequate provision should be made for printing new laws and making them generally available at the earliest possible time after final enactment and before they become effective. If the

66. National Legislative Conference, American State Legislators in Mid-Twentieth Century 2-3 (1961).

67. National Legislative Conference, 17th Annual Meeting, 1964.

volume of session laws cannot be thus available, new laws, adequately indexed, should be reproduced in some alternate form such as "slip laws" or "advance sheets."
8. *Modern equipment.* Legislatures should explore the wide range of electronic and other technological devices now available with an eye to their use in various aspects of the legislative process, *e.g.*, roll-call voting, reproduction of legislative measures, preparation of journals, recording of hearings and debates.[68]

One of the advantages of this proposal is that it, unlike most programs for legislative reform, does not depend upon a climate for change on the part of the voting public. Even without the installation of expensive machinery, a legislative body may find it expeditious to begin to filter its input through manual checklists that ask essentially the same questions suggested above. A house or senate clerk may wish to adapt a portion of his record keeping activities to those already being used by other legislatures. John Horty's description of some of these uses is suggestive:

> At present the Iowa legislature and others use a computer system for keeping track of bills introduced. The computer charts the introduction of a bill, its assignment to a committee, schedules it for hearing when it is reported out of committee, and keeps track of its passage in one chamber and action in the other. In short, the system acts as an inventory of the position of legislation and makes more widely and quickly available to the members of the legislature and their staff, information about legislation in process. As the number of bills introduced and the complexity of the legislative process increases, such systems will replace the present manual methods of keeping track of bills.[69]

An indirect effect of systematizing input checklists for proposed legislation might be the decision to codify a number of standard clauses. An example is provided by the suggested query relating to separability. The designers of the program may choose to follow the example of Minnesota by suggesting the adoption of the following law:

> Unless there is a provision in the law that the provisions shall not be severable, the provisions of all laws shall be severable. If any provision of a law is found to be unconstitutional and void, the remaining provisions of

68. NATIONAL LEGISLATIVE CONFERENCE, *supra* note 66, at 18-20.
69. Horty, *Use of the Computer in Statutory Research and the Legislative Process*, in COMPUTERS AND THE LAW 48, 54 (R. Bigelow ed. 1966).

> the law shall remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the legislature would have enacted the remaining valid provisions without the void one; or unless the court finds the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent. Minn. Stat. Ann. § 645.20.

The computer query would be framed in language requiring the addition of a section, *if and only if* the sponsor wished to declare that the provisions of the bill are not separable.

Standardization of constantly recurring provisions might help to economize legislative work and avoid duplication and inconsistency. Standardization is not new. We have it in our codes of procedure, in administrative procedure acts, in interpretation statutes, and, perhaps, in others.[70] What is new is the suggestion that the input checklist be made comprehensive enough to remind legislative draftsmen of the existence of standardized provisions elsewhere in the law and to prevent inadvertent omissions and errors in the preparation of bills.

Another byproduct of input programming may bring about a modification of more fundamental legislative rules. In the historical development of parliamentary government, the limitation of the legislative term has spawned procedural rules that inhibit efficient processing of legislative proposals. One of these rules ordains that legislative bills die with the body in which they were introduced. Reintroduction in each new legislature is mandatory. Whatever the political or psychological merits of this practice, the computer-journal may provide technological and informational grounds for re-assessment. The computer itself could be used to "study" the content of "new" legislation introduced in a given session to determine how much of it consists only of old bills re-introduced in the same or slightly different form. If it were discovered that a simple constitutional amendment authorizing continuance of bills on the legislative calendar after adjournment would substantially reduce the clerical and paperwork of introducing bills at a subsequent session (by retaining the computer-

70. For a discussion of earlier proposals along this line, *see* FREUND, STANDARDS OF AMERICAN LEGISLATION 306-309 (1917); *see also* UNIFORM STATUTORY CONSTRUCTION ACT.

71. *See* F. HORACK, *supra* note 58, at 755.

journal record of prior introduction and action), constitutional modification might be forthcoming at last.[71]

It is also possible that manual or machine implementation of the checklist idea will result in greater individual responsibility of the legislators themselves. Notwithstanding the nominal attribution of a legislative sponsor, many bills are introduced "by request," and the authorship and actual sponsorship are often unknown. The "by request" tag is a tacit admission that the introducing member assumes no responsibility for the form or content of the bill. Interposition of a pre-introduction checklist would be a step toward legislative responsibility in more than a merely formal way. For the most part, the suggested queries are grounded on a substantive substructure and demand at least an affirmative assertion that the named sponsor has adverted to the substantive questions implicit in the checklist form.

Legislative draftsmen may comment that many of the queries suggested for an input program are superfluous, *if* draftsmen are properly trained, and *if* legislative service bureaus operate with adequate authority and efficiency at the pre-induction phase of bill preparation. They may complain that the projected computer-journal program does not begin to reach the heart of the problem because it deals only with "formal" matters. There is some merit in such observations. Yet, one of the most obvious implications of this proposal is the desirability of formulating the checklists. Experts in legislative drafting have been moving in this direction, and the principal lesson to be learned from the trend is that there is need for more and more systematic questioning, organizing, and double-checking of legislative drafts in the drafting stage.

Ninety-eight years ago, Thomas A. Edison patented the first electric legislative voting device. It involved a switch at each desk which, when moved to the YES or NO position, would energize the member's name in either the YES or NO column on a lighted board. It took almost fifty years for a legislature to come around to the adoption of this electric roll-call machine.[72] The computer is much younger and far more precocious. Hopefully, it will be incorporated into the legislative process before it, too, reaches a settled middle age.

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72. The first such device was installed by the Wisconsin Assembly in 1917.

APPENDIX

The Council of State Governments and the Public Administration Service have collected some statistics on legislative uses of automatic data processing. As of March, 1967, they reported that nine states have in operation some type of program relating to the history of bills (committee and floor action and current stages of progress). Two more states were known to be designing such programs. Statutory retrieval programs were operating in four states, and in the design or near-operational status in five. Their survey also showed computer applications relating to budget status, indexing of journals, and bill drafting. In a private communication to the author, dated August 3, 1967, the Director of Research for The Council noted that legislative uses of the computer are changing so fast that the above figures are already out of date. The following table* reflects current applications as of August 3, 1967:

History of bills	Statutory retrieval	Budget status	Bill drafting	Journal Indexing
		in operation		
Connecticut	Nebraska**	Ohio		
Florida	New Jersey	Virginia		
Illinois**	New York			
Indiana	Ohio			
Iowa	Pennsylvania			
Kansas				
Michigan				
Missouri				
North Carolina				
New York				
Tennessee				
Wisconsin				
		in design or completed		
Texas	Alaska	Alaska	Oregon	New York
Vermont	Hawaii	Wisconsin		
	Iowa	Iowa		
	Kansas			
	Massachusetts**			
	Texas			
	Wisconsin			

*Taken from Table XVIII, AMERICAN STATE LEGISLATURES: THEIR STRUCTURES AND PROCEDURES 38 (The Council of State Governments, March, 1967).

**Information supplied by George A. Bell, Director of Research, The Council of State Governments, August 3, 1967.

THE POLITICS OF RACIAL IMBALANCE LEGISLATION: MASSACHUSETTS 1965†

JAMES BOLNER*

In the summer of 1965 the Massachusetts General Court enacted the first and, at this writing, the only state law requiring racially balanced public schools.[1] The law climaxed a two-year drive by a coalition of civil rights forces to have the Boston School Committee take action on *de facto* public school segregation. Bills on this subject had been introduced in 1964, but civil rights forces had been divided over tactics and, more importantly, the measures had failed to attract the support of the executive and legislative leadership.[2] In 1964, however, the foundation for legislative success was being laid by state education authorities through the device of a prestigious Committee on Racial Balance in the Schools. Its report in April, 1965, declared education in racially imbalanced schools injurious for both white and non-white pupils and urged the enactment of a state law requiring

†This study is based on research done in connection with a broader study of the enactment of the racial imbalance law which is to be published by the Bureau of Government Research of the University of Massachusetts. The author wishes to thank Professor Irving Howards, Director of the Bureau, for his encouragement and assistance. Professor Sheldon Goldman deserves special thanks for making available much of the data and offering timely advice. The author alone, of course, is responsible for any errors of fact or judgment.

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1. MASS. GEN. LAWS ch. 71, §§ 37C-D (Supp. 1966); MASS. GEN. LAWS ch. 15, §§ 1I-K, added by Act of August 18, 1965, ch. 641, [1965] Mass. Acts & Resolves 414. ILL. ANN. STAT. ch. 122, §§ 10-21.3, 10-22.5 (Supp. 1963) makes it a duty of school boards to change existing attendance areas as soon as practicable with a view toward eliminating racial segregation; this is not, of course, a requirement of racial balance.

For the texts of the pronouncements of state education officials *see New York Commissioner of Education Memorandum of June 14, 1963*, 8 RACE REL. L. REP. 738 (1963); *Statement of California Authorities (1962)*, 7 RACE REL. L. REP. 1267 (1963); *Decision of the Commissioner of Education of New Jersey*, 8 RACE REL. L. REP. 731 (1963). A survey of the literature on racial imbalance is presented in UNITED STATES COMMISSION ON CIVIL RIGHTS, 1 RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967); *see also* ELIZABETH W. MILLER, THE NEGRO IN AMERICA: A BIBLIOGRAPHY, 118-120 (1966); and Bolner, *Defining Racial Imbalance in Public Educational Institutions*, to appear in J. NEGRO EDUCATION (Spring, 1968).

2. *See* H.R. 2548, H.R. 2549, H.R. 2550, H.R. 2298, H.R. 3339, 88th Cong. 2d Sess. (1964).

local school committees to maintain racially balanced schools.[3] In early June, 1965, Republican Governor John Volpe's proposal for a racial imbalance law provoked the Democratic leadership of the Democratic-controlled legislature to attempt to seize the initiative from the Republicans.[4] Working under the pressure of threatened civil rights demonstrations, the leaders of both parties cooperated in guiding the law through the legislature.

The law defines racial imbalance as

> a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of students in such school.[5]

If local school committees fail to remedy racial imbalance, state education funds may be suspended.[6] The law makes available additional funds for school committees which take steps to alleviate imbalance.[7] Racial balance plans submitted by local authorities are required to "detail the changes in existing school attendance districts, the location of proposed school sites, the proposed additions to existing school buildings, and other methods for the elimination of racial imbalance."[8] The phrase "other methods" was recognized by opponents of the law as a euphemism for transportation (busing), and another provision forbids state officials from requiring school committees "to transport any pupil to any school outside . . . the school district established for his neighborhood" if the child's parent or guardian files an objection in writing.[9]

As of this writing the law has had limited success.[10] Public school authorities in Springfield and a number of smaller communities affected met the state officials' requirements with relative ease, but the Boston School Committee, after attempting to have the law repealed

3. MASSACHUSETTS STATE BOARD OF EDUCATION, BECAUSE IT IS RIGHT—EDUCATIONALLY (1965).
4. For the text of Volpe's proposal see Mass. S.R. 1037 (1965).
5. MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966).
6. MASS. GEN. LAWS ch. 15, § 1I (1966).
7. *Id.*
8. MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966).
9. *Id.*
10. *See generally* Note: *Massachusetts Racial Imbalance Act*, p. 82 *et seq. infra.*

TABLE 1. PARTY SUPPORT AND PARTY COHESION ON RACIAL IMBALANCE ROLL CALL VOTES IN THE MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

Roll Call	PARTY SUPPORT*										PARTY COHESION**	
	Number Voting For Racial Balance		Percentage Voting For Racial Balance		Number Voting Against Racial Balance		Percentage Voting Against Racial Balance		Percentage Of All Voting		Democratic Call Against Racial Balance	Republican Call For Racial Balance
	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.	Rep.		
226	53	46	36	70	95	20	64	30	88	93	—	—
225	107	48	72	86	41	8	28	14	88	81	—	—
167	88	58	56	88	66	8	44	12	92	93	—	—
168	92	50	60	77	62	15	40	23	91	94	—	—
217	78	42	51	68	76	208	49	32	91	90	—	—
213	71	41	49	65	75	22	51	35	86	91	2	30
214	74	42	47	65	83	22	53	35	93	93	6	30
215	65	44	42	70	88	19	58	30	91	91	16	40
216	61	40	41	64	89	23	59	36	89	91	18	28
165	53	46	36	70	95	20	64	30	88	93	28	40
218	55	35	36	56	97	28	64	44	90	91	28	12
166	46	36	29	54.5	111	30	71	45.5	93	95.7	42	9
176	32	42	21	74	113	15	79	26	85	83	58	48
Mean	67.3	43.8	44.3	69.8	83.9	19.2	55.7	30.1	89.6	90.7	24.8	29.6

*Votes are *treated* as for or against "correcting racial imbalance" and not necessarily as "yes" or "no" votes on particular motions; thus, on all roll calls except numbers 225 and 226 a "yes" vote (in favor of obstructive or crippling amendments) was actually a vote against "correcting racial imbalance."

The votes (arranged in order of greatest "difficulty" *from bottom to top*) were as *follows*: No. 176, *on a motion to* reconsider the vote by which an amendment barring busing without parental consent had been rejected; the amendment was then adopted by a standing vote, 75-55; No. 166, on adoption of an amendment prohibiting the State Board of Education from requiring school committees to bus pupils to achieve racial balance; No. 218, on adoption of the anti-Communist amendment; No. 165, on a motion to suspend the rules in order to recommit the bill; No. 216, on an amendment requiring notice to parents of a school committee's intention to bus pupils to achieve racial balance; No. 215, on an amendment requiring notice to parents and their consent as a condition to busing; No. 214, on an amendment prohibiting busing without written notice to parents and the consent of both parents; No. 213, on an amendment forbidding the State Board of Education from requiring school committees to bus pupils to achieve racial balance; No. 217, on the motion to reconsider the adoption of No. 216; No. 168, on a motion (made June 21, 1965) to postpone consideration of the bill to August 2, 1965; No. 167, on a motion to refer the bill to "next annual session"; No. 225, on adoption of the emergency preamble on the bill thereby providing for it to go into effect immediately; No. 226, on final passage.

**The index of cohesion is the difference between the percentage of a party's votes for and against a given measure; it is meaningful only when a majority of one party opposes a majority of the other party. On the first five votes above, a majority of one party failed to oppose a majority of the other.

and challenging it in state court, did not reach agreement with state officials before March, 1967.[11] The Boston accommodation involved alleviation of imbalance in a limited number of schools, and may, indeed, be regarded as a very limited victory for the civil rights forces.[12]

In view of the fact that Massachusetts is the first state to require racially balanced public schools, this is, of course, the first opportunity to assess the sources of legislative support for and opposition to the policy of racial balance. The methodology can be explained briefly. All roll calls on the racial imbalance question in the 1965 legislature were identified. The chief legislative crises of the 1965 Racial Imbalance Act took place in the House of Representativs. Three of the four racial imbalance votes in the Senate involved the successful campaign by the managers of the bill to repulse attempts of other proponents of racial balance to refine the definition of racial imbalance. The fourth Senate vote dealt with an oblique aspect of the racial imbalance act, the "incentive" factor for school construction. The relatively ambiguous way in which the racial imbalance issue was presented in the Senate votes (as contrasted with the thirteen racial imbalance votes in the House) underlay the decision to discard the Senate votes as inappropriate for more intensive analysis.[13]

The thirteen House votes on racial imbalance were first analyzed to determine party support and party cohesion. Next, the votes were ranked in order of "difficulty" with roll calls revealing the least support for correcting racial imbalance being considered as the more difficult. Each legislator's vote on each roll call was then recorded, and a simple scalogram was constructed.[14] (The coefficient of reproductibility was .93). In this way, "consistent" legislators, those who consistently favored or opposed racial balance measures, were identified. Legislators with scale scores of 13 and 12 were considered as "high" scorers; those with scores of 0 and 1 were classified as "low" scorers. Party, constituency, religion, and other variables were then related to the legislators' voting behavior. The Springfield and Boston delegations in the House were singled out for closer study.

Table 1 shows that once the votes are translated into votes "for" and "against" measures corrective of racial imbalance, Republican

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11. *See* Boston Globe, March 16, 1967, at 1, col. 1 (evening ed.).
12. *Id.*
13. *See* JOURNAL OF THE SENATE (July 26, 1965).
14. *See* the method outlined in ANDERSON, WHITE & WILCOX, LEGISLATIVE ROLL-CALL ANALYSIS 105-110 (1966).

legislators were considerably more favorable to racial balance measures than their Democratic colleagues. This is true whether one examines the measure of party support (44.3 per cent of the Democrats as opposed to 69.8 per cent of the Republicans, on the average, voted in favor of racial balance measures) or party cohesion (on eight votes on which the parties were opposed the Democrats had a cohesion index of 24.8 *against* racial balance measures while the Republicans had an index mark of 29.6 *in favor*). Moreover, as the measures increased in "difficulty" the proportion of Democrats in opposition to racial balance measures increased consistently. Finally, it may be noted by glancing at column 5 of Table 1, that the incidence of non-voting within each party was approximately the same (10 per cent).

By using the scaling technique described above, 142 representatives — 59.2 per cent of the 240-member House — were identified as consistent supporters and as consistent oppponents of racial balance measures. Legislators favoring racial balance legislation were found in both parties (*See* Table 2), but 45 of the 51 Republicans (88.2 per cent) in the consistent category were supporters (*i.e.*, had high scale scores) of the racial balance cause while the 90 Democrats were almost equally divided between high and low scorers. One of the "consistent" legislators was an Independent.

TABLE 2. PARTY AFFILIATION OF HIGH AND LOW SCALE SCORES ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

PARTY	SCALE SCORE			
	High		Low	
	N	%	N	%
Democratic (N = 90)	49	54.4	41	45.6
Republican (N = 51)	45	88.2	6	11.8
TOTAL	94		47	

The 85 Catholic legislators who were "consistent" voters on the racial balance question were almost evenly divided between high and low scorers. (*See* Table 3). In contrast, 34 of the 38 consistent Protestant law-makers were supporters of racial balance. All of the 13 Jewish "consistents" were high scorers.

When party is added to religion as a variable (*See* Table 4), one finds that although they were only 13 in number, the most consistent proponents of racial balance measures were Jewish legislators of both

TABLE 3. RELIGIOUS AFFILIATION OF HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965*

RELIGION	SCALE SCORE			
	High		Low	
	N	%	N	%
Catholic (N = 85)	42	49.4	43	50.6
Protestant (N = 38)	34	89.5	4	10.5
Jewish (N = 13)	13	100.0	0	—
Unknown (N = 5)	5	100.0	0	—
TOTAL	94		47	

*See Table 4.

parties and Protestant Democrats. The consistent Protestant Republicans came next with 87.9 per cent of them in the high scorer category. The high incidence of Protestant and Jewish legislators who were high scorers, combined with the fact that the Catholic Democratic legislators were sharply split, left the Catholic Democrats accounting for 41 of the 47 low scorers.

TABLE 4. PARTY AND RELIGIOUS AFFILIATION OF HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965*

RELIGION	PARTY							
	Democratic				Republican			
	High		Low		High		Low	
	N	%	N	%	N	%	N	%
Catholic	34	45.3	41	54.7	8	80.0	2	20.0
Protestant	4	100.0	0	—	29	87.9	4	12.1
Jewish	7	100.0	0	—	6	100.0	0	—
Unknown	2	100.0	0	—	2	100.0	0	—
	48		41		45		6	

*Does not include Representative Dukakis, whose religious affiliation is Greek Orthodox.

Generally speaking, there was no discernible relationship between the legislators' voting behavior on racial balance and the percentage of Negroes per constituency. (*See* Table 5). The three Negro legislators from Boston's Roxbury section voted consistently in favor of racial balance measures, and their constituencies were the only ones in the state with a majority of non-whites. One hundred and twenty-five (88 per cent) of the 142 "consistent" legislators came from districts with

less than 2 per cent Negroes; 74 and 41 of these Representatives were in the high and low scale score groups, respectively; thus, in terms of percentages, 77.9 per cent of the high scorers and 87.2 per cent of the low scorers, respectively, came from constituencies with 2 per cent or less Negroes. The 5 low scorers in the "over 8 per cent Negro per constituency" range were from Boston. The one Catholic legislator with a high scale score and a significant (19.9 per cent) number of Negroes in his constituency was Democrat Charles Ianello of Boston. Ianello, noted for his opposition to anti-discrimination legislation, nevertheless received a "perfect score" of 13. However, he voted on only 7 of the 13 votes, and presents a borderline scaling case; but he did vote affirmatively on the "most difficult" vote and negatively on only two occasions. The make-up of Ianello's constituency appears to have been a relevant consideration, but his voting behavior offers little justification for concluding that white Catholic legislators with significant Negro populations in their districts were more disposed to be opposed to racial balance requirements.[15] Such a conclusion is hazardous, because of the absence of Protestant "scale types" with comparable Negro percentages in their districts. No pattern appeared among the 4 Protestant legislators with less than 2 per cent Negro per constituency who were consistently opposed to racial balance proposals.

TABLE 5. PERCENTAGE NEGRO PER CONSTITUENCY OF HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

SCALE SCORE	PERCENTAGE NEGRO PER CONSTITUENCY									
	0 – 2.0		2.1 – 4.0		4.1 – 6.0		6.1 – 8.0		8.1 & over	
High (N 95)	74	77.9	12	17.6	2	2.1	2	2.1	5	5.3
Low (N 47)	41	87.2	2	4.3	0	—	0	—	4	8.5

As Table 6 indicates, Catholic and Protestant legislators in the "consistent" category with less than 2 per cent Negroes in their constituencies exhibited marked differences in voting behavior. Thus, of the 85 Catholic and 38 Protestant legislators who emerged as "consistents," 68 and 29, respectively, had fewer than 2 per cent Negroes

15. For a sampling of Ianello's views, see his attack on Yankeeism and his praise for immigrant ethnic groups in LOCKARD, NEW ENGLAND STAFF POLITICS 310 (1959).

in their constituencies. Catholic representatives from these districts were almost evenly divided (31 high scorers and 34 low scorers) while, characteristically, Protestant legislators were clearly in support of racial balance (25 high scorers and 4 low scorers). There seemed to be no meaningful relationship between religion, percentage Negro per constituency, and consistent support or opposition to racial balance. Examination of the low scale scorers on Table 6 would suggest, however, that Catholic legislators with about 20 per cent of their constituencies non-white favor racial balance in public schools.

TABLE 6. RELIGIOUS AFFILIATION AND PERCENTAGE NEGRO PER CONSTITUENCY OF HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

PERCENTAGE NEGRO PER CONSTITUENCY	RELIGIOUS AFFILIATION							
	Catholic				Protestant			
	High		Low		High		Low	
	N	%	N	%	N	%	N	%
0 – 2.0	31	73.8	37	86.0	25	73.5	4	100.0
2.1 – 4.0	8	19.0	2	4.7	4	11.8	0	–
4.1 – 6.0	1	2.4	0	–	1	2.9	0	–
6.1 – 8.0	1	2.4	0	–	1	2.9	0	–
8.1 & over	1	2.4	4	9.3	3	8.8	0	–
TOTALS	42	100.0	43	100.0	34	99.9	4	100.0

When party affiliation is treated in combination with percentage Negro per constituency (*See* Table 7), the general pattern of a divided Democracy and a unified G.O.P. is maintained. The 71 consistent Democratic legislators from constituencies with fewer than 2 per cent Negroes were divided 35 to 36 among high and low scorers, respectively; of the 43 Republican lawmakers from constituencies with the same negligible non-white population, 38 were high and 5 were low scorers.

Having considered the variables of party, per cent Negro per constituency, and religion, the analysis focused on classifying constituencies as to "urban," "suburban," and "rural." Two approaches were employed. One is based directly on the classification of the Bureau of the Census with only slight modifications; the other is derived from the classificatory scheme developed by Professor Edgar Litt in his study, *The Political Cultures of Massachusetts*,[16] and takes into consideration

16. LITT, THE POLITICAL CULTURES OF MASSACHUSETTS (1965).

TABLE 7. PARTY AFFILIATION AND PERCENTAGE NEGRO PER CONSTITUENCY OF HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

PERCENTAGE NEGRO PER CONSTITUENCY	PARTY AFFILIATION							
	Democratic				Republican			
	High		Low		High		Low	
	N	%	N	%	N	%	N	%
0 – 2.0	35	71.4	36	87.8	38	84.4	5	83.3
2.1 – 4.0	7	14.3	1	2.4	5	11.1	1	16.7
4.1 – 6.0	1	2.0	0	–	1	2.2	0	–
6.1 – 8.0	1	2.0	0	–	1	2.2	0	–
8.1 and over	5	10.2	4	9.8	0	–	0	–
TOTALS	49	99.9	41	100.0	45	99.9	6	100.0

the percentage native stock and the median level of education to ascertain the "life-style" of the inhabitants of legislative districts. Thus, a constituency is not considered urban, suburban, or rural merely by standards of population density. Using Litt's "life-style" categories, we find that legislators from urban constituencies were consistently divided on the question of racial balance; suburban representatives tended to favor racial balance; and rural legislators earn even higher scores in favor of this cause. (*See* Table 8).

TABLE 8. CLASSIFICATION OF CONSTITUENCY BY REGION (WITH EMPHASIS ON "LIFE-STYLE") FOR HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

REGION	SCALE SCORE			
	High		Low	
	N	%	N	%
Urban	37	54.4	31	45.6
Suburban*	29	72.5	11	27.5
Rural	29	85.3	5	14.7

*Includes Representative Stevens, an Independent.

The pattern of divisiveness within Democratic ranks and cohesion among Republicans on the question of racially balanced public schools persists when "life-style" of the districts and party are related to scale scores (*See* Table 9). Of the 12 rural Democrats, however, 9 had high scale scores. Nevertheless, the small number of lawmakers in this

TABLE 9. PARTY AFFILIATION AND CLASSIFICATION OF CONSTITUENCY BY REGION ("LIFE-STYLE") FOR HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

REGION	PARTY							
	Democratic				Republican			
	High		Low		High		Low	
	N	%	N	%	N	%	N	%
Urban	27	49.1	28	50.9	10	77.0	3	23.0
Suburban	13	56.5	10	43.5	15	93.8	1	6.2
Rural	9	75.0	3	25.0	20	90.9	2	9.1

*Does not include Representative Stevens, an Independent.

group makes it an unsatisfactory basis for generalizing about rural legislators.

If the Bureau of the Census' data are used, but modified so as to classify cities within Standard Metropolitan Statistical Areas as urban (*See* Table 10), the number of constituencies in each "region" category is altered. The "life-style" classification yielded 68 urban, 40 suburban, and 34 rural constituencies for the legislators "consistent" on the racial imbalance issue in the 1965 legislature. The "straight census" data yield 58 urban, 66 suburban, and 18 rural constituencies

TABLE 10. CLASSIFICATION OF CONSTITUENCY BY REGION (BASED ON THE U. S. CENSUS)* FOR HIGH AND LOW SCALE SCORES ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

REGION	SCALE SCORE			
	High		Low	
	N	%	N	%
Urban	25	43.1	33	56.9
Suburban	55**	83.3	11	16.7
Rural	15	83.3	3	18.7

*This classification is based on the U. S. Bureau of the Census' Standard Metropolitan Statistical Area, modified so that Cambridge is considered urban in the Boston SMSA, and all cities in the SMSA's other than Boston's are considered urban.
**Includes Representative Stevens, an Independent.

for these legislators. A comparison of Tables 8 and 10, however, shows that there were no significant differences in the voting behavior on racial imbalance when the census classifications were abandoned in favor of the "life-style" grouping.

When party is added as a variable and the scale scores are considered by the legislators' constituency type (*See* Tables 9 and 11), analysis is weakened by the fact that there are a small number of rural Democrats and Republicans and a small number of urban Republican constituencies. Nevertheless, division among the Democrats in the cities and the high support of suburban Republicans seems to explain the success of the racial imbalance law. Put another way, the law was most strongly supported by representatives from suburban and rural constituencies and from cities other than Boston and Springfield. It was most strongly opposed by Democratic legislators from urban and suburban constituencies.

TABLE 11. PARTY AFFILIATION AND CLASSIFICATION OF CONSTITUENCY BY REGION (BASED ON U. S. CENSUS) * FOR HIGH AND LOW SCALE SCORERS ON RACIAL IMBALANCE VOTES, MASSACHUSETTS HOUSE OF REPRESENTATIVES, 1965

REGION	PARTY							
	Democratic				Republican			
	High		Low		High		Low	
	N	%	N	%	N	%	N	%
Urban	20	40.0	30	60.0	5	62.5	3	37.5
Suburban	25	71.4	10	28.6	29	96.7	1	3.3
Rural	4	80.0	1	20.0	11	84.6	2	15.4

See note, Table 10 *supra*.

A closer scrutiny of the Boston and Springfield delegations is only mildly informative. Boston's legislators were either decidedly for or against racial balance measures, with not even a single representative displaying ambivalence. All scored either 13, 12, or 11 on the scalogram's positive extreme, or 2, 1, or 0 at the opposite extreme. Table 12 shows that all Catholic Democrats in the Boston delegation, with the exception of Representative Ianello, whose behavior is commented on elsewhere (*See* page 41), were consistently opposed to racial balance proposals. At the same time, Jewish legislators (all three of them Democrats) and Protestant legislators (four Democrats and two Republicans, respectively) were high scorers.

Springfield's one Jewish representative, who was the sole Republican from that city, had a "perfect" 13 scale score; the remainder, all Democratic Catholics, had scores of 11, 10 (2), 8, 7, 3, and 0, respectively. There was no meaningful relationship between party, religion, scale score, and percentage Negro per constituency.

TABLE 12. SCALE SCORE ON RACIAL IMBALANCE VOTES FOR THE BOSTON DELEGATION IN THE MASSACHUSETTS HOUSE, 1965: ANNUAL MEDIAN FAMILY INCOME, PERCENTAGE OWNER-OCCUPIED DWELLINGS, PERCENTAGE FOREIGN STOCK, PERCENTAGE OF TOTAL POPULATION OF IRISH AND ITALIAN FOREIGN STOCK, PERCENTAGE NEGRO, BY LEGISLATIVE DISTRICT, AND PARTY AND RELIGIOUS AFFILIATION FOR THE BOSTON DELEGATION, 1965

Suffolk County House District Number	No. of Representatives	Scale Score (s) *	Annual Median Family Income	Percentage Dwellings Owner-occupied	Percentage Foreign Stock	Percentage of Total Population of Irish Foreign Stock	Percentage of Total Population of Italian Foreign Stock	Percentage Negro	PARTY		RELIGION		
									Democratic	Republican	Catholic	Protestant	Jewish
3	3	13 (3)	$5904	2.0	9.6	20.8	3.3	2.1	1	2		3	
6	1	13	4293	74.9	39.5	8.1	9.3	19.8	1		1		
7	3	13 (3)	4537	13.63	42.2	3.2	1.5	62.2	3			3	
10	1	13	5390	22.8	65.6	37.5	2.7	14.1	1				1
16	2	12 (2)	6049	8.2	54.5	8.2	4.5	.5	2				2
9	1	11	5330	24.7	40.8	13.9	4.4	3.2	1		1		
8	3	2, 1 (2)	6245	28.2	44.4	14.7	5.4	15.0	3		3		
4	3	2, 0 (2)	4681	9.3	41.8	11.8	2.6	15.3	3		3		
1	2	1 (2)	5332	27.8	50.2	2.4	42.0	.1	2		2		
15	2	1, 0	7452	71.1	47.8	14.6	6.4	.1	2		2		
2	1	1	5316	25.95	36.7	16.6	4.9	.1	1		1		
5	1	0	5407	22.3	41.9	16.9	33.3	.5	1		1		
11	1	0	6052	30.7	39.4	17.9	58.3	.1	1		1		
12	2	2, 0	6485	43.8	47.4	19.9	5.2	.1	2		2		
13	2	0 (2)	6464	41.5	18.4	5.0	1.8	.7	2		2		
14	3	0 (3)	6462		47.6	9.5	10.6	.2	3		3		
17	2	0 (2)	6519	39.2	49.3	15.9	6.7	.7	2		2		

*Figures in parentheses refer to the number of representatives with the score indicated.

TABLE 13. SCALE SCORE ON RACIAL IMBALANCE VOTES FOR THE SPRINGFIELD DELEGATION IN THE MASSACHUSETTS HOUSE, 1965: ANNUAL MEDIAN FAMILY INCOME, PERCENTAGE OF DWELLINGS OWNER-OCCUPIED, AND PERCENTAGE NEGRO, BY LEGISLATIVE DISTRICT, AND PARTY AND RELIGIOUS AFFILIATION FOR THE SPRINGFIELD DELEGATION, 1965

District	No. of Representatives	Scale Score (s)	Annual Median Family Income	Percentage Dwellings owner-occupied	Percentage Negro	PARTY		RELIGION*	
						Democratic	Republican	Catholic	Jewish
8	1	13	$6318	41.8	.2		1		1
17	1	11	6672	76.6	.7	1		1	
6	2	10, 8	5007	19.8	21.0	2		2	
7	1	10	5993	53.4	15.5	1		1	
10	1	7	4569	14.3	13.8	1		1	
9	1	3	6938	76.0	.1	1		1	
5	1	0	6225	60.8	.6	1		1	

*There were no Protestants in the Springfield delegation.

In addition, a glance at Tables 12 and 13 reveals no strong connection between the voting behavior of the Boston and Springfield delegations on the racial imbalance question and such constituency factors as family income or percentage of dwellings owner-occupied. Neither does the percentage foreign stock, or the percentage Irish or Italian "foreign stock" of a legislative district seem to have had any bearing on the position taken by Boston's delegation on the imbalance question.

Summary

Analysis of the legislative voting behavior on the question of racial imbalance in the 1965 Massachusetts General Court warrants the following conclusions. Democrats, and especially the relatively large number of Catholic Democrats, were keenly split over the issue of racial balance. Republicans and Democrats from suburban and rural constituencies were considerably more cohesive in their support of racial balance measures. There was no identifiable relationship between the percentage Negro per constituency and legislative voting behavior on the racial balance votes. Finally, a survey of the voting behavior of the Boston and Springfield delegations revealed that while votes of the Springfield lawmakers did not conform to a pattern, the Boston delegation's white Catholic Democrats, with but one exception, opposed racial balance measures while Boston legislators who were either Jewish or Republican were consistent proponents of racially balanced schools.

Since civil rights issues in the Massachusetts legislature have traditionally been resolved without the benefit of roll calls, it was not possible to compare the voting on the racial imbalance law with voting on the state's laws requiring nondiscrimination in employment, public accommodations, housing, and education. The findings of the present study, however, are in general accord with the conclusions of Professor Duane Lockard.[17] Lockard studied the politics of the enactment of state civil rights legislation on a comparative basis and found that there is a tendency for such laws to be passed during non-election years. 1965 was such a year in Massachusetts. He found that Massachusetts was among those "deviant cases" of states where the small Negro population seemed to have no relationship to the enactment of anti-

17. Lockard, *The Politics of Antidiscrimination Legislation,* 3 HARV. J. LEGIS. 3 (1965).

discrimination legislation. Moreover, the fact that Massachusetts is the pioneer state in the matter of racial imbalance legislation is consistent with Lockard's view that states of the northeast have been inclined to lead the way in the enactment of civil rights laws more than states in other regions. Finally, the tactics of the civil rights forces in the struggle for enactment of the Massachusetts racial imbalance law did not differ in substance from those employed in the enactment of related legislation in Massachusetts and in sister states.

In one major respect, however, the conclusions of the present study diverge from Lockard's findings. He found that:

> Civil rights legislation has fared better when Democrats control a legislature than when Republicans do. There are notable exceptions to this rule, but the most common pattern on roll call is for a majority of Democrats to favor an antidiscrimination bill while a minority of them object, whereas the Republicans tend to divide more evenly, with frequent majorities in opposition.[18]

Perhaps in this latter respect, the voting on the racial imbalance law of 1965 will go down as another of the idiosyncracies of Massachusetts politics.

18. *Id.* at 32.

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HARVARD STUDENT LEGISLATIVE RESEARCH BUREAU: ITS PURPOSE AND FUNCTIONS

PURPOSE

The primary purpose of the Harvard Student Legislative Research Bureau is to make available to governmental and public service groups technical services in the preparation and drafting of legislation. Since its organization in 1952, the Legislative Research Bureau has drafted legislation dealing with a variety of subjects in response to requests submitted by federal, state and local legislators and officials, state attorneys-general and law revision commissions, members of law school faculties, and civic groups.

While assisting clients in a practical manner, the Bureau provides valuable educational experience for its members. The responsibility for the work of the Bureau rests entirely with its students selected annually on a competitive basis.

The Bureau is financed by a grant from Harvard Law School and dotes not accept remuneration from clients.

SELECTION OF PROJECTS

Since the Bureau receives more requests for assistance each year than it can accept, selection of projects is necessary to insure that the projects undertaken will receive prompt and thorough treatment.

When a request is received, the legal and drafting problems which it poses undergo a preliminary study and analysis for the purpose of determining whether the project is one which the Bureau can accept. Several factors are considered in making this decision. Among them are: the importance of the proposed legislation to the community in which it may be enacted, the educational experience which the project offers to the membership, the availability of personnel, the interest of the membership, and the likelihood of the bill's being enacted into law.

The Bureau does not accept projects involving research alone, but only those which include the drafting of special legislation.

Drafting and Editing

A project, once accepted, is referred to a committee of the membership which does the actual research and drafting. Experienced third-year members act as committee chairmen, overseeing the work and guiding its progress. Work on projects begins shortly after the opening of the academic year, and project deadlines are established according to the requirements of the client and the complexity of the problems involved.

The completed draft and the explanatory memorandum which accompanies it are next submitted to critical review by student editors. Most of the projects are also submitted to a member of the Harvard Law School faculty for review and comment. When the staff is satisfied with the form and content of the completed draft and the covering memorandum, they are forwarded to the client for consideration. The Bureau tries to keep in close contact with clients to be certain that its draft conforms to clients' policy determinations. The procedure is flexible enough to allow adaptation to the particular needs of clients.

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The Bureau serves the community by assisting proponents of legislation in presenting their ideas in statutory form appropriate for legislative consideration. I tis entirely technical and non-political in function. Drafts are based on the policies of clients, and neither the Bureau nor Harvard Law School endorses any of these policies. Neither the Bureau nor any of its members will lobby for the passage of any bill.

Project requests should be directed to the Director of Research, Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138.

EXPEDITING ACT REVISION

Criticism of the Expediting Act procedures for trial of antitrust cases by three judges and compulsory appeal to the Supreme Court of civil actions in which the United States is a complainant appears in numerous comments in scholarly and government publications and bills in Congress. The Bureau draft modifies certain of these bills in order to incorporate recommendations by several experienced students of the subject into a more satisfactory set of procedures.

INTRODUCTION

The Expediting Act as it applies to antitrust cases, section 28 of Title 15 of the United States Code Annotated, provides:

a) that the Attorney General may require the convening of a three-judge district court to hear antitrust cases initiated by the Justice Department, and

b) that, whether or not a three-judge court has been convened, an appeal from an antitrust action initiated by the Justice Department in any district court shall lie only to the Supreme Court.

The Supreme Court has held that the Expediting Act also cuts off any interlocutory appeal in the cases covered by the act. *Baltimore & Ohio R.R. v. United States,* 215 U.S. 216 (1909).

Doubts have been expressed about the desirability of the Expediting Act, particularly the direct appeal feature. *Brown Shoe v. United States,* 370 U.S. 294, 355 (1962); *United States v. Singer Manufacturing Co.,* 374 U.S. 174, 175fn. 1 (1963). A number of bills that would amend the Act in various ways have also been introduced. These bills are: S. 1644, S. 1721, H.R. 4186, H.R. 9063, and H.R. 9181 in the 86th Congress (1959-1960); H.R. 6766 in the 87th Congress (1961-1962); S. 1811 and S. 1892 in the 88th Congress (1963-1964); and S. 1305, H.R. 1575, H.R. 5584, H.R. 5567, H.R. 5587, and H.R. 10806 in the 89th Congress (1965-1966). The American Bar Association has recommended the amendment proposed in SUPPLEMENTAL REPORT NO. I, ABA ANTITRUST SECTION (1966). S. 1811, S. 1892, and the proposal of the ABA are of particular interest in the development of the draft statute below. Therefore, more detail about these proposals is in order.

S. 1811 provided the normal certiorari procedure for final orders. That bill was "specifically disapproved" by the Judicial Conference

of the United States in 1963. No reason for that disapproval was given. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 76-77 (1963).

S. 1892 applied only to actions in which equitable relief was sought and provided for normal certiorari procedure for final orders unless the case was certified to be "of general public importance." That certification could be made either by the Attorney General or by the court, either on its own motion or on that of any party. The bill also allowed review of interlocutory orders only under § 1292(a). S. 1892 was approved with one modification by the Judicial Conference of the United States. That modification allowed certification by the Attorney General only with leave of the district court on a rationale that otherwise the Attorney General would be given a privilege that the defendant did not have. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 76-77 (1963).

The ABA proposal applies regardless of the relief sought and provides normal appellate review of final orders unless immediate review of a case or of any question therein is certified either by the Attorney General or by the district court. The Attorney General may certify on the ground of "general public importance;" while the court, on either its own motion or that of any party, may certify if "in the interests of justice." Review of interlocutory orders is allowed under § 1292(a) or (b).

AN ACT

To amend the Expediting Act by eliminating three-judge courts and by revising some methods of appeal in antitrust cases.

SECTION 1. Section 28 of Title 15 of the United States Code is hereby repealed.

COMMENT: This section eliminates resort to a three-judge court in cases arising under the Sherman and Clayton Acts. This provision had been little used.[1]

Several reasons have been advanced for the retention of this special procedure:

1) it increases the precision of fact-finding;

1. Six times between 1937 and 1952. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31 (1952); Note, *The Antitrust Expediting Act—A Critical Reappraisal*, 63 MICH. L. REV. 1243, 1249 (1965).

2) it produces a better record for Supreme Court review;
3) it checks the concentration of decree-making power;
4) it allows the circumvention of an improperly attuned judge;
5) it adds prestige to the determination.

Against these advantages are weighed (1)the demand that the three-judge court makes on the scarce time of two additional judges — a significant disadvantage because of the peculiarly long duration of trials under the antitrust acts;[2] and (2) the availability of ordinary appellate review in the courts of appeals and on certiorari to the Supreme Court. The draftsmen believe the disadvantages outweigh the advantages.

The need for precise fact-finding is the most persuasive reason for retaining the three-judge system. The trial records in antitrust cases are frequently long and complex.[3] Yet Judge Wyzanski, who decided the *International Shoe Machinery* case,[4] felt that the extra judges would not aid the precision of the fact-finding, and the Judicial Conference of the United States implies agreement with this point of view.[5] Its thesis is that judicial initiative and firm control at the pre-trial stage can largely reduce the peculiar problems of fact-finding in a protracted case. Even assuming that the three-judge court would be slightly better at fact-finding than a single judge, will not normal appellate review check inaccuracies, particularly since courts of appeals should exercise more rigorous review in cases presenting questions of fact and law?

The second putative justification for retention of the present system, the clarity of the record, is closely associated with the first. Effective pre-trial procedure should obviate the danger here. Indeed, if all three judges are not involved in the crucial pre-trial stage, they are only likely to add confusion. In any case, three judges forced to decide a broad range of issues in controversy are at least as likely to fail

2. In 1956, the index of burden of government antitrust cases was 23.52 while no other type of case has an index of more than 9.63. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 183 (1956). In 1965, the revised index for government antitrust cases was 8.0 while the next highest indexes were private antitrust suits and patent cases each with an index of 4.0. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 158 (1965). Annual calendar congestion has increased despite the creation of new judgeships. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 115-116 (1964).

3. B. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950).

4. 110 F. Supp. 295 (1953).

5. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 39 (1951) urges more effective use of pre-trial procedures.

properly to bring the record into focus as is one judge. More importantly, under the discretionary direct review provided in section 3 of the draft statute, the Supreme Court will hear only those cases or questions which, in its opinion, are sufficiently well focused to be presently reviewed.

The third argument in favor of the present system, the need to restrict the discretion of the trial judge, was stressed by Judge Wyzanski in the *International Shoe Machinery* case, *supra,* and has been repeated in his private conversation with the drafting committee. However, the drafting committee felt and Judge Wyzanski agreed that the courts of appeals could adequately limit the trial court's discretion. Presumably, the Supreme Court will only rarely allow direct appeal on questions of remedy.

The possibility that three judges will be more abreast of the current movement of the law is also a reason given for the use of three-judge courts in cases involving the constitutionality of state and federal statutes. Professor Archibald Cox, former Solicitor General of the United States, has mentioned this reason during discussions with the drafting committee. Analysis of the cases, however, lends no support. In civil antitrust cases brought by the United States between 1954 and 1966, the Supreme Court reversed or vacated the order in 27 of the 49 cases which it decided on other than procedural issues and reversed in part four others.[6] However, of the 24 civil cases heard on certiorari from the courts of appeals during the period from 1954 to 1963, 18 were reversed or had judgment vacated while two additional cases were reversed in part.[7] The two sets of cases are not perfectly comparable since the Supreme Court may deny certiorari in a higher proportion of cases which it would eventually affirm than those it would eventually reverse. The comparison is revealing nonetheless, for the courts of appeals are presumed to be more competent than the three-judge court and have the advantage of the decision below.

The argument of prestige has no force. In the area of constitutionality of state statutes and administrative orders, delicate problems of federalism are involved.[8] In the area of constitutionality of federal statutes, there has been the intense political battle over the

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6. Appendix I.
7. *Id.*
8. Comment, 61 MICH. L.REV. 1528 (1963); Note, *The Three Judge Court Reassessed: Changing Roles in Federal-State Relationships,* 72 YALE L.J. 1646 (1963).

New Deal.[9] In the antitrust area, there is little public emotion over the issues, and both parties will be sophisticated enough to criticize a decision made by three judges as well as a decision by one.

The only other alternative to repeal suggested by the literature is the creation of a special panel of judges skilled in antitrust. This proposal, however, has been disapproved by the Judicial Conference of the United States.[10] Therefore the drafting committee has suggested repeal of the three-judge provision. Our conclusion is buttressed by the views of the wisdom of the other three-judge court provisions.[11]

SECTION 2. Section 29 of Title 15 of the United States Code is hereby repealed.

COMMENT: This section eliminates the compulsory appeal to the Supreme Court in civil actions in federal courts where the United States is the complainant.

SECTION 3. In any civil action brought in a District Court by the United States under the antitrust laws, (sections 1-7 of Title 15 of the United States Code or any other Acts having a like purpose that hereafter may be enacted), appeal may be taken

(a) from a final judgment

(1) regardless of the relief sought to the proper Court as provided in section 1291 of the United States Code, or

(2) if equitable relief is sought and unless otherwise provided by section 1252 of Title 28 of the United States Code, to the Supreme Court

(A) upon certification by the Attorney General of such a case or any question therein within forty-five days after final judgment, if the Supreme Court shall decide that such an appeal is necessary for the effective administration of the antitrust acts, or

(B) upon certification by the defendant of such a case or question therein within forty-five days after final judgment, if the Supreme Court shall decide that such an appeal is necessary in the interests of justice, or

9. Comment, *The Three Judge Federal Court in Constitutional Litigation: A Procedural Anachronism,* 27 U. CHI. L.REV. 555 (1960).

10. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 68 (1961).

11. In 1950, Congress repealed resort to a three judge court in suits seeking injunction of administrative orders, except a few specialized orders and those of the ICC. Act of Dec. 29, 1950, 64 Stat. 1129, 5 U.S.C. § 1031 (1952).

(b) from an interlocutory order pursuant to sections 1292 (a)(1) and (b) of Title 28 of the United States Code, unless otherwise provided by section 1252 of Title 28 of the United States Code.

COMMENT: This section provides for normal appellate review of both final and interlocutory orders in any civil action filed by the United States. In addition, this section provides a special direct appeal only from final judgments in suits by the United States seeking equitable relief. The direct appeal would be allowed only where the Supreme Court decides that the general statutory standards are met either as to the entire case or any question therein. The statutory standard differs with the nature of the party requesting the direct appeal. This section differs from the ABA proposal in giving the Supreme Court greater control over its own docket. It also differs in not giving the Attorney General power to obtain direct review by a procedure not available to the defendant. The drafting committee felt that automatic direct review was unnecessary. The major purpose in adopting the Expediting Act in 1903 was to facilitate review of important cases.[12] But today that act does not accomplish its purpose if expedition is measured by the length of time necessary to obtain one full-dress review of a given case. During the 1954-1963 period, the median time interval between trial court disposition and court of appeals disposition was 17 months;[13] the median interval between disposition by the district court and disposition by the Supreme Court on direct appeal was 16 months.[14] (The figure is 18.0 months if per curiam opinions are excluded.)[15] The *average* time necessary for a direct appeal if per curiam cases are excluded was 18.8 months.[16] The average time for an appeal to the court of appeals was 21.2 months.[17] However, the latter average is particularly inaccurate, for it is based on only 15 cases and one of them, *Lawlor v. National Screen Serv. Corp.*, took 63 months — approximately 1/5 of the total months for all cases and almost twice as long as the next longest case.[18] If that figure is excluded, the average is 18.2 months.[19]

12. 36 CONG. REC. 1679 (1903).
13. APPENDIX I.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

If expedition is measured by the time necessary to get to the Supreme Court, then, of course, the Expediting Act does expedite.[20] In addition, that act guarantees that certain cases will be heard by the Supreme Court where they might not be so heard otherwise. Unfortunately, that latter advantage is gained at the sacrifice of an appeal in more routine cases,[21] and at the sacrifice of any full-dressed review in others that are appealed (17 of the 49 civil cases decided on other than procedural issues by the Supreme Court from 1954 through 1966 were per curiam).[22]

Another and a very important cost is the extra burden on the Supreme Court. Eight justices in *United States v. Singer Mfg. Co.* complained of that burden.[23] The Attorney General has recognized this burden.[24] These men ought to be in the best position to judge such a burden. An analysis of the cases decided on direct appeal from January of 1954 through November of 1966 supports their judgment. Not counting cases disposed of per curiam, 18 presented at least one important issue (other than the propriety of the decree after full trial) that would require the examination of long records.[25] The question of a proper decree arose six times.[26] Although the relevant portions of the record here would not necessarily be as long or complex, particularized factual judgments would be involved. Although any distinction between law and fact is a dangerous one, particularly in these cases, 23 cases (per curiam cases excluded) involved at least one important fact question or mixed question of law and fact.[27] Although some of these cases did involve important issues affecting large segments of the economy, and therefore would probably have been heard on certiorari, most of the cases heard on certiorari would involve fairly pure legal issues not necessitating a close scrutiny of the record. Moreover, the issues would have been narrowed by an intermediate court. That the courts of appeals are quite frequently reversed does not necessarily indicate that the intermediate review does not aid the Supreme

20. *Id.*
21. Professor Archibald Cox, former Solicitor General, in conversation with the drafting committee, said that the Solicitor General had occasionally refused to authorize an appeal that would have been authorized to an intermediate court.
22. APPENDIX II. (Eleven were on motions to affirm. One was on confession of error.)
23. 374 U.S. 174, 175 (1963) (Justice White disagreeing).
24. ABA SUPPLEMENTAL REPORT No. 1, ANTITRUST SECTION 2-3 (1966), citing letter of April 25, 1963 from Attorney General transmitting S. 1892.
25. APPENDIX II.
26. *Id.*
27. *Id.*

Court's decision, for this fact ignores the proportion of denials to grants of certiorari.[28]

Why expedite a hearing by the Supreme Court? First, it is believed by some that the Supreme Court will be significantly more favorable to the spirit of the statutes than will the lower courts. Second, the detrimental effects of delay in the proper interpretation of the statutes will be grave. This is the essence of Congressman Celler's position.[29] And the high percentage of reversals of the courts of appeals in cases to which the direct appeal provisions do not currently apply demonstrates the validity of the first proposition.[30] The second proposition has much less validity. Even in the electrical equipment price-fixing case, where the underlying situation had such a deterimenal effect on the economy as to spawn thousands of suits,[31] the problem could be corrected by damage actions. Had an extra year elapsed before a Supreme Court ruling, the damage judgments simply would have increased. Of course there are indirect effects such as the possible elimination of a new entrant into the market and the possible worsening of inflation. Although these effects are quite speculative, they are worthy of note where the theoretical foundation of the economic structure is being undermined.

There is a special problem in merger cases. On one hand, it may be impossible to unscramble the omelet should the merger prove illegal. On the other hand, the benefits of the merger both to the companies involved and to the economy may be lost if that union is delayed during a long period of trial and appeal. The interlocutory appeal provisions in the draft statute should sharply limit the ill effects of delay. It is quite possible that the interlocutory order could be brought to the Supreme Court before the entire case would reach the Court on direct review since a district court decision on a preliminary injunction would not involve a lengthy trial. Although the Court has said that it would not grant certiorari on interlocutory orders "unless it is necessary to prevent extraordinary inconvenience and embarrassment to the conduct of the cause,"[32] Professor Wright indicates that the Court has granted certiorari on a number of occasions.[33] Therefore the hazards

28. APPENDIX I.
29. E. Celler, *Case in Support of Application of the Expediting Act to Antitrust Suits,* 14 DE PAUL L.REV. 29 (1964).
30. APPENDIX I.
31. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 119 (1964).
32. *American Construction Co. v. Jacksonville T. & K.W.R. Co.* 148 U.S. 372 (1893).
33. FEDERAL COURTS 416 (1963).

of delay are not great enough to justify continuance of the special provision making direct appeal automatic. However the risk of damage is high, the normal procedures are time-consuming, and, even with the allowance of an interlocutory appeal, the possibility of delay is significant enough to warrant a discretionary direct appeal.

The discretionary appeal is open to two avenues of attack. The first is that fewer important cases will be decided by the Supreme Court either because of that body's refusal to grant certiorari or because of the Solicitor General's refusal to request certiorari in order to protect his certiorari record. This argument assumes that high levels of the judicial system are not functioning properly. The drafting committee could not accept that judgment, and, if that judgment were true, a far more basic reform would be needed. The second attack is that the discretionary appeal was unnecessary since the Supreme Court already has discretion to review a case docketed, but not decided, in the courts of appeals.[34] However, the Court has said that "this is a power not ordinarily to be exercised,"[35] and any exercise of that power would be at the complete discretion of the Supreme Court. The drafting committee felt that such sporadic direct review would be insufficient. We hope that the fact that Congress would single out antitrust cases for special treatment will assure more frequent and adequate direct review.

Our standards are phrased in terms of the necessity of the appeal, as are the ABA's, and not in terms of the nature of the question involved. Therefore, the Court can allow direct review where undue delay can be prevented or refuse direct appeal where the lower courts can adequately handle the issue or the record is improperly molded. Our standards are designed only to indicate Congress' special concern and to initiate the proper line of analysis. The incomplete evidence indicated that more explicit standards are doomed.[36] The Court is in a better position to judge the necessity of direct review because of its involvement in prior cases and its ability to view the necessity on a case-by-case basis with an eye toward the changing effectiveness of the lower courts. We rejected the equally broad "public importance" test of the ABA because that standard seemed to look to the drama of the particular case.

34. *Gay v. Ruff*, 292 U.S. 25 (1934).

35. *The Three Friends*, 166 U.S. 1 (1897).

36. More explicit standards have been ignored under the analogous section 1292(b). Note, *Section 1292(b): Eight Years of Undefined Discretion*, 54 GEO. L.J. 940 (1966).

We felt compelled to allow direct review at the request of the defendant because of the Judicial Conference's amendment of S. 1892.[37] The two standards do not violate the principle of mutuality that inspired the action of the Judicial Conference. They only recognize the different viewpoints of the parties to the suit. The defendant would be in an awkward position arguing the necessity of the effective administration of the antitrust laws; therefore he must argue for what is necessary in the interests of justice.

The Supreme Court was given the power of ultimate decision to allow the Court control of its own docket, in light of the evolution of the Court's appellate jurisdiction.[38] In addition, the Court is in the best position to decide what is necessary for effective enforcement or necessary to do justice.

Direct appeal is allowed of any question in a case as well as of an entire case. This should encourage the Court to grant direct review more frequently, since it will not simultaneously have to decide inconsequential questions requiring close examination of voluminous records. For the same reason, the Solicitor General will more frequently authorize the request for direct review.

The discretionary direct appeal was limited to actions seeking equitable relief since such relief is the sufficient and primary mode of enforcing the antitrust laws. If the government seeks legal relief, it would do so essentially as a private party. Where both equitable relief and damages are sought, direct appeal would lie.

The importance of section 1292(a)(1), especially if the automatic direct review is eliminated, has already been explained. The general debate whether section 1292(b) would expedite or delay has been decided by Congress when it adopted that provision.[39] Experience with that section has shown the wisdom of the Congressional decision.[40]

SECTION 4. Where appeal is sought under section 3 (a)(ii), any question not so heard may be appealed to the proper United States Court of Appeals pursuant to section 1291 of Title 28 of the United States Code. The second paragraph of section 2107 of Title 28 of the

37. REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 76-77 (1963), approving S. 1892 with amendment deleting unqualified right only in Attorney General to file a certificate for direct review.

38. C. WRIGHT, FEDERAL COURTS 410 (1963).

39. H.R. REP. No. 1667, 85 Cong., 2d Sess. 1 (1958); *Hearings Before Subcomm. No. 3 of House Comm. on the Judiciary*, 85 Cong., 2d Sess., ser. 11 at 8 (1958).

40. Note, 75 HARV. L.REV. 351, 379 (1961); *Section 1292(b): Eight Years of Undefined Discretion, supra* note 36.

United States Code to the contrary notwithstanding, the appeal must be taken within 45 days after the grant or denial of appeal under section 3(a)(ii) except that the District Court may extend the time for appeal to no later than 45 days after a decision by the Supreme Court on any question in the case appealed under section 3(a)(ii).

COMMENT: This section provides that any case or issue not being heard by the Supreme Court on direct review may be appealed to the court of appeals. Where only one of many issues in a particular case is heard on direct review, a problem of a split trial results. The drafting committee followed the precedent of section 1292(b) and required the rest of the case to proceed unless the district judge orders otherwise. The district judge, being more familiar with the case than the court of appeals, is in a better position to judge the appropriateness of the case for appeal without the issue being heard by the Supreme Court.

SECTION 5. Any judgment entered by the United States Court of Appeals under sections 3(a)(i), 3(b), or 4 shall be subject to review by the Supreme Court of the United States as provided in section 1254(1) of Title 28 of the United States Code.

COMMENT: This section provides that antitrust cases or issues heard by the courts of appeals may be heard on certiorari by the Supreme Court regardless of the fact that the Court has already refused direct appeal.

SECTION 6. This act shall not apply to any case in which a notice of appeal to the Supreme Court of the United States has been filed prior to the enactment of this act.

APPENDIX I[1]

	Type of Case			Disposition			Lengths in Months	
	F.T.C.	Private	Government Civil	Reversed in Part	Affirmed	Reversed	District Court to Court of Appeals[2]	District Court to Supreme Court
A. CASES HEARD ON DIRECT APPEAL (1954-Dec. 1966)								
1. *Cases With Full Opinions*								
U.S. v. Employing Lathers Ass'n., 347 U.S. 198			×			×		8
U.S. v. Borden, 347 U.S. 514			×	×				14
U.S. v. Plasterers Ass'n., 347 U.S. 186			×			×		8
U.S. v. Shubert, 348 U.S. 222			×			×		13
U.S. v. International Boxing Club, 348 U.S. 236			×			×		12
U.S. v. McKesson & Robbins, Inc., 351 U.S. 377			×			×		35
U.S. v. E. I. DuPont, 351 U.S. 377			×		×			30
U.S. v. E. I. DuPont, 353 U.S. 586			×			×		30
Nor. Pac. Ry. v. U.S., 356 U.S. 1			×		×			21
U.S. v. R.C.A., 358 U.S. 334			×			×		13
International Boxing Club v. U.S., 358 U.S. 242			×		×			18
U.S. v. Parke-Davis, 362 U.S. 29			×			×		19
Maryland & Virginia Milk Producers Ass'n v. U.S., 362 U.S. 458			×	×				16
U.S. v. E. I. DuPont, 366 U.S. 316			×			×		18
U.S. v. Borden Co., 370 U.S. 460			×			×		16
Brown Shoe v. U.S., 370 U.S. 294			×		×			31
Pan Am. v. U.S., 371 U.S. 296			×			×		22
Los Angeles Meat Drivers Union, Local 626 v. U.S., 371 U.S. 94			×		×			17
U.S. v. Loew's, Inc., 371 U.S. 38			×	×				23
White Motor v. U.S., 372 U.S. 253			×			×		23
U.S. v. Singer Mfg. Co., 374 U.S. 174			×			×		13
U.S. v. Philadelphia National Bank, 374 U.S. 321			×			×		17
U.S. v. First National Bank of Lexington, 376 U.S. 665			×			×		28
U.S. v. El Paso Gas, 376 U.S. 651			×		×			N.A.[3]
U.S. v. Alcoa, 377 U.S. 271			×			×		13
U.S. v. Penn-Olin Chemical, 378 U.S. 158			×			×		14

Case						
U.S. v. Continental Can., 378 U.S. 441		X			X	N.A.[3]
First National Bank of Lexington v. U.S., 382 U.S. 34		X			X	11
U.S. v. Pabst Brewing, 16 L.Ed.2d 765		X			X	22
U.S. v. General Motors, 16 L.Ed.2d 415		X			X	21
U.S. v. Grinnell Corp., 16 L.Ed.2d 555		X	X			21
U.S. v. Von's Grocery, 16 L.Ed.2d 555		X			X	21
TOTAL 32 cases	Median 18					
Reversed 22 68.7%	Average 18.8					
Affirmed 6 18.7%						
Reversed in part 4 12.6%						
2. *Per Curiam Cases*						
United Shoe Machinery v. U. S., 347 U.S. 521		X		X		15
Holophane, Inc. v. U.S., 352 U.S. 903		X		X		33
United Liquors v. U.S., 352 U.S. 991		X		X		8
New Orleans Ins. Exch. v. U.S., 355 U.S. 22		X		X		8
Nationwide Trailer Rental v. U.S., 355 U.S. 10		X		X		27
U.S. v. National Malleable & Steele Casting, 358 U.S. 38		X		X		9
Guerlain, Inc. v. U.S., 358 U.S. 915		X			X	17
U.S. v. Parke-Davis, 365 U.S. 125		X			X	13
Turpentine & Rosin Factors, Inc. v. U.S., 365 U.S. 298		X		X		6
U.S. v. Diebold, Inc., 369 U.S. 654		X			X	14
U.S. v. Continental Oil, 377 U.S. 161		X			X	N.A.
Columbia Artists Management v. U.S., 381 U.S. 348		X		X		22
Kennecott Copper v. U.S., 381 U.S. 414		X		X		11
U.S. v. New Orleans Chapter of Contractors, 382 U.S. 17		X			X	21
Alcoa v. U.S., 15 L.Ed.2d 1		X		X		13
U.S. v. Huck Mfg. Co., 15 L.Ed.2d 268		X		X		11
Schlitz Brewing v. U.S., 17 L.Ed.2d 35		X		X		8
TOTAL 17 cases	Median 12					
Reversed 5 29.4%	Average 13.7					
Affirmed 12 70.6%						
Reversed in part 0 00.0%						

SUMMARY OF ALL CASES HEARD ON DIRECT APPEAL:

TOTAL 49 cases[4]			Median 16
Reversed	27	55.1%	Average 17.1
Affirmed	18	36.7%	
Reversed in part	4	8.2%	

B. CASES HEARD ON CERTIORARI (1954-1964)

Case							
Theatre Enterprises, Inc. v. Paramount Films, 346 U.S. 537		×		×			N.A.
Moore v. Mead's Fine Bread Co., 348 U.S. 115		×			×		N.A.
FTC v. American Crayon, 352 U.S. 806	×				×		N.A.
FTC v. National Lead Co., 352 U.S. 419	×				×	35	49
Radovich v. N.F.L., 352 U.S. 445		×			×		N.A.
Lawlor v. National Screen Service Corp., 352 U.S. 992		×	×			63	67
Safeway Stores, Inc. v. Vance, 355 U.S. 389		×			×	11	24
FTC v. C. E. Niehoff & Co., 355 U.S. 411	×				×	19	33
Nashville Milk v. Carnation Co., 355 U.S. 373		×		×			N.A.
FTC v. Standard Oil, 355 U.S. 396	×			×		15	36
Moog Indus., Inc. v. FTC, 355 U.S. 411	×			×		19	33
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207		×			×		N.A.
FTC v. Simplicity Pattern, 360 U.S. 55	×		×			14	27
FTC v. Henry Broch & Co., 363 U.S. 166	×				×	12	30
FTC v. Anheuser-Busch, Inc., 363 U.S. 536	×				×	19	33
Radiant Burners, Inc. v. People's, 364 U.S. 656		×			×	10	22
Eastern Railroads President's Conference v. Noerr Motor Freight, 365 U.S. 127		×			×	26	40
Tampa Electric v. Nashville Coal, 365 U.S. 320		×			×	17	27
FTC v. Henry Broch & Co.., 365 U.S. 360	×				×		N.A.
Poller v. CBS, 368 U.S. 464		×			×	17	32
Sunkist Growers v. Citrus Prod., 370 U.S. 19		×			×		N.A.
Continental Ore v. Union Carbide, 370 U.S. 690		×			×		N.A.
FTC v. Sun Oil Co., 371 U.S. 305	×				×	30	48
Silver v. New York Stock Exchange, 373 U.S. 341		×			×	10	23

TOTAL	24 cases		
	Reversed	18	75.0%
	Affirmed	4	16.7%
	Reversed in part	2	8.3%

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[1]Some information for this Appendix has been adapted from Appendix, Note, *The Antitrust Expediting Act: A Critical Reappraisal*, 63 MICH. L. REV. 1240, 1254 (1965).

[2]Or the Federal Trade Commission where appropriate.

[3]The date of the district court's decision was not available. Consequently, it was impossible to determine the length of time required to appeal the case.

[4]Cases appealed under the Expediting Act which raised only questions of federal procedure are not included.

APPENDIX II

	CASE INVOLVED AN IMPORTANT FACT OR MIXED FACT-LAW QUESTION — TOTAL 23[2]	CASE DID NOT INVOLVE AN IMPORTANT FACT OR MIXED FACT-LAW QUESTION — TOTAL 8
REACHED SUPREME COURT BEFORE FULL TRIAL BELOW — TOTAL 10	Nor. Pac. Ry. v. U.S., 356 U.S. 1 U.S. v. Parke, Davis Co., 362 U.S. 29 White Motor v. U.S., 372 U.S. 253 U.S. v. Continental Can, 378 U.S. 441 U.S. v. Pabst, 16 L.Ed.2d 765	U.S. v. Employing Lathing Ass'n., 347 U.S. 198 U.S. v. Plasterers Ass'n., 347 U.S. 186 U.S. v. International Boxing Club, 348 U.S. 236 U.S. v. Shubert, 348 U.S. 222 U.S. v. R.C.A., 358 U.S. 334
REACHED SUPREME COURT AFTER FULL TRIAL BELOW — TOTAL 21[2], [3]	U.S. v. Borden, 347 U.S. 514 U.S. v. E.I. DuPont, 351 U.S. 377 U.S. v. E.I. DuPont, 353 U.S. 586 International Boxing Club v. U.S., 358 U.S. 242[1] Maryland & Virginia Milk Producers Ass'n. v. U.S., 362 U.S. 458[1] U.S. v. Borden, 370 U.S. 460 Brown Shoe v. U.S., 370 U.S. 294 Los Angeles Meat Drivers Local 626 v. U.S., 371 U.S. 94 U.S. v. Loew's, Inc., 371 U.S. 38[1] U.S. v. Alcoa, 371 U.S. 271 U.S. v. First National Bank of Lexington, 376 U.S. 665 U.S. v. Singer Mfg. Co., 374 U.S. 174 U.S. v. El Paso Gas, 376 U.S. 651 U.S. v. Philadelphia National Bank, 374 U.S. 321 U.S. v. Penn-Olin Chemical Co., 378 U.S. 118 U.S. v. Von's Grocery, 16 L.Ed.2d 555[1] U.S. v. Grinnell Corp., 16 L.Ed.2d 778[1] U.S. v. General Motors, 16 L.Ed.2d 415	U.S. v. McKesson & Robbins, Inc., 351 U.S. 377 Pan Am v. U.S., 371 U.S. 296 First National Bank of Lexington v. U.S., 382 U.S. 34

[1]Case involved both an important factual or mixed legal and factual question and a question of the proper decree.

[2]In addition, U.S. v. E.I. DuPont, 366 U.S. 316, involved a question of the proper decree which is a mixed fact-law question and which arose after full trial below.

[3]Only 32 cases are involved since the 17 per curiam decisions were excluded.

A MODEL PROFESSIONAL AND OCCUPATIONAL LICENSING ACT

Only a few state legislatures have laid the groundwork for an economical and reasonable centralization of most of the routine work involved in licensing members of diverse professions and occupations. The Bureau draft could serve as an example to encourage other legislatures to rid their states of the unnecessary encumbrances upon various methods of licensing and to coordinate these methods in a mature and flexible system.

INTRODUCTION

The ever expanding effort by state legislatures to fulfill their duty of protection to their citizens has necessitated the establishment of administrative agencies to which they delegate varying amounts of police power. The present proliferation of such agencies has come about gradually over the years, and as might be expected at the present time in most states there is no integration of the various licensing boards either by way of uniform procedures or centralization of ministerial functions.

Several factors have contributed to both the lack of integration and the lack of uniformity. The doctrine of separation of powers allowed the use of licensing boards to expand only as rapidly as the idea of a "fourth branch" became acceptable to the centers of power in the established structure.[1] But even when the idea of having a system of licensing boards was accepted their creation did not follow immediately. The need for licensing of particular professions arose at different times, so creation of boards to that end has been a sporadic undertaking.[2] Pressured by both the practical demands of time and the political demands of professional lobbies, legislatures generally have found it easier to act *ad hoc* than to expend the effort necessary to achieve intra-code consistency. The general result has been a lack of integrated and uniform licensing provisions within the state codes. This has resulted in duplication of functions and unnecessary complexity which in turn has produced inefficiency and high expense in the total licensing operation. The effort is often made to rationalize

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1. *See generally,* L. JAFFE, ADMINISTRATIVE LAW 3 (1961).
2. O. Thompson, *Recommendations for Statutory Uniformity in Relation to the Oregon Licensing Boards,* 17 ORE. L. REV. 145 (1938).

divergent board practices by saying that only in such a method of trial and error may one find the most effective system. However, it would seem to

> be wiser to frame a model form for a statute licensing occupations, and then to deviate from that form in statutes for particular occupations only when special conditions justify such deviations. Experience could then be centered on perfecting the model form.[3]

Knowledge of the seriousness of this lack of uniformity has been largely limited to the attorney faced with an appearance before one of these boards. Once he is prepared to appear before one board, he may still be totally unprepared for any other board. The variety of procedures used by the different boards of any one state may be overwhelming.

Today an emerging new aspect of this licensing process has drawn the problem to the attention of the legislators themselves. Growing in number and expanding in influence as a result of the increasing size of most trade memberships, licensing boards are coming to represent a substantial influence in the state budget. Seen as a drain on the state treasury, the need for economies of administration in board operations is clear. While procedural uniformity has been achieved in several states by the enactment of statutes based to a greater or lesser degree upon the model State Administrative Procedure Act,[4] the diseconomies arising from lack of centralization of the "non-expert" functions of the boards have not been alleviated.

The Model Professional and Occupational Licensing Act is an attempt to provide an integrated licensing structure that will afford the state desirable economies and at the same time provide for procedural uniformity.

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3. F. Hanft & J. Hamrick, *Haphazard Regimentation Under Licensing Statutes,* 17 N.C.L. REV. 1, 7 (1938).

4. ALASKA COMP. LAWS, §§ 44.68.010-.74.080 (1962); CAL. GEN. LAWS ANN. (GOV'T.) §§ 11371-11445 (West 1966); COLO. REV. STAT. ANN. §§ 3-16-1 to -16-6 (1964); CONN. GEN. STAT. REV. §§ 4-41 (1960); ILL. REV. STAT. ch. 110, §§ 264-79 (1965); IND. ANN. STAT. §§ 63-3001 to -3030 (1964); KAN. GEN. STAT. ANN. §§ 77-415 to -434 (1964); KY. REV. STAT. §§ 13.075-.125 (1962); ME. REV. STAT. ANN. 5 §§ 2301-2452 (1964); MD. ANN. CODE 41 §§ 244-56 (1957); MICH. COMP. LAWS §§ 3.560 (7) -.560 (21.10) (1961); MINN. STAT. §§ 15.01-.049 (1962); MO. REV. STAT. §§ 536.010 -.150 (1949); NEB. REV. STAT. §§ 84-901 to -919 (1966); NEV. REV. STAT. §§ 233B .010 to -.130 (1960); N.C. GEN. CODE §§ 143-306 to -316 (1964); N.D. CENT. CODE §§28-32-01 to -22 (1960); OHIO REV. CODE ANN. §§ 119.01-.13 (Page 1965); ORE. REV. STAT. §§ 183.010-.510 (1965); TENN. CODE ANN. §§ 27-901 to -914 (1965); VA. CODE ANN. §§ 9-6.1 to -6.14 (1950); WASH. REV. CODE §§ 34.04.010 to -.930 (1965); W. VA. CODE §§ 29A-1-1 to -7-4 (1966); WIS. STAT. §§ 227.01-.26 (1958).

Professional and Occupational Licensing

> Students of government and law are likely to favor such centralization of administrative power on the ground that like functions should be grouped together, and that a failure so to group them leads to a multiplicity of independent agencies, the proper supervision of which is difficult if not impossible. . . . There seems to be no good reason, however, why supervision of the examination, and the routine administrative and enforcement work, cannot be done by a central agency.[5]

The draftsmen feel that economical operation and effective coordination of a state's licensing structure can be accomplished only through a special department created for that purpose. The justification for licensing boards being to permit control of the quality of persons practicing various professions and occupations within the state,[6] expertise is relevant solely in determining qualifications and adjudging misconduct. A department which will itself handle all "lay" duties to avoid duplication of functions by the boards will not interfere with the exercise of this expertise while achieving all of the benefits of a centralized administration. Three states[7] have adopted this departmental structure and four others[8] have adopted some uniform provisions covering licensing boards. It is not possible categorically to determine at what stage in the growth of its licensing program each state should adopt such a plan. However, many benefits would accrue to states with even a few boards and certainly growth within a uniform framework would avoid serious transitional difficulties later.

AN ACT

To provide uniform administration and procedures for professional and occupational licensing.

CHAPTER ONE — GENERAL

SECTION 101. *Title; Effective Date*

(a) This Act may be cited as the Model Professional and Occupational Licensing Act.

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5. W. Graves, *Professional and Occupational Restrictions,* 13 TEMP. L.Q. 334, 363 (1939).

6. *See* F. Aumann, *The Growth and Regularization of the Licensing Process in Ohio,* 21 U. CINC. L. REV. 97 (1952).

7. CAL. BUS. & PROF. CODE §§ 1-452 (West 1962); LA. REV. STAT. §§ 37:1-15 (1964); UTAH CODE ANN. §§ 58-1-1 to -43 (1953).

8. ALASKA COMP. LAWS ANN. §§ 08.01.010 to .110 (Supp. 1966); GA. CODE §§ 84-101a to -107a (1955); NEB. REV. STAT. §§ 71-101 *et. seq.* (1958); W. VA. CODE §§ 30-1-1 to -14 (1966).

(b) The effective date of this Act shall be ——————.

COMMENT: Because this Act is intended to replace all existing provisions relating to licensing boards within the state, all such provisions should be repealed as of the effective date of this Act. The legislature should set the effective date of the Act far enough in the future so that new appointments can be made before the effective date.

SECTION 102. *Definitions*

(a) Department — Whenever used in this Act, "department" shall refer to the Department of Professional and Occupational Licensing.

(b) Director — Whenever used in this Act, "director" shall refer to the Director of the Department of Professional and Occupational Licensing.

(c) Board — Whenever used in this Act, "board" shall refer to the specific professional or occupational board appropriately empowered to control the licensing of the profession, trade or occupation under consideration.

CHAPTER TWO — DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL LICENSING

SECTION 201. *Creation of the Department*

There is hereby created a Department of Professional and Occupational Licensing.

COMMENT: This Department is intended to have full and coordinate power with the other administrative departments of the state.

SECTION 202. *Director of the Department*

The Department shall be under the supervision and control of a Director who shall be appointed by the Governor, and serve a term concurrent with that of the Governor. His salary shall be ———— per year. He shall qualify by taking the constitutional oath of office. The Governor may remove the Director for neglect of duty, incompetence or dishonorable conduct.

COMMENT: The Director should have complete responsibility for the operation of the department and, consistent with the importance of his position, be answerable only to the Governor. It is intended that the usual method of qualification for office by state officials be followed by the Director. This will normally include a constitutionally estab-

lished oath of office. The Director may be removed by the Governor after a showing of cause. *See* LA. REV. STAT. § 37:5 (1964). *Contra,* CAL. BUS.. & PROF. CODE § 151 (West's 1962); UTAH CODE ANN. § 58-1-2 (1953).

SECTION 203. *Qualifications of the Director*

The Director shall not be affiliated with any college or school of any of the professions, trades or occupations which are or may be within the scope of this chapter. He shall be of good moral character, a citizen of the United States, and a resident of this State.

COMMENT: Because the duties of the Director are primarily administrative, no professional competence in any of the fields of licensing is required. Beyond this, however, this section is intended to forestall any conflicts of interest between the state's educational or trade institutions and the director. *See* LA. REV. STAT. § 37:5 (1964); UTAH CODE ANN. § 58-1-3 (1953). The citizenship and character requirements are standard in high official positions.

SECTION 204. *Functions of the Department*

The Department shall provide the following services for the boards:

(1) designation of dates on which examinations are to be held, arrangement of space therefor and notification of the public of the date and place of examinations;
(2) publication of notice of examinations reasonably prior to the dates set therefor;
(3) issuance and receipt of application forms;
(4) collection of fees and issuance of receipts;
(5) notification of applicants of acceptance or rejection for examination;
(6) conduct of written examinations;
(7) notification of applicants of results of examinations;
(8) issuance of licenses upon receipt of an appropriate fee;
(9) compilation and maintenance of a public, correct register of licenses;
(10) maintenance of records relating to individual licensees including refusals, suspensions, revocations, and records of hearings;
(11) issuance of duplicate licenses upon proof of loss of the original;
(12) notification of licensees of renewal dates at least 60 days before the expiration date of their licenses and issuance of renewal licenses upon the payment of the licensing fee;

(13) answer of routine inquiries;
(14) purchase of supplies; and
(15) performance of other services which may be required by a board.

COMMENT: This section is intended as a non-exhaustive listing of those activities the Department should undertake. *See* ALASKA COMP. LAWS ANN. § 08.01.050 (Supp. 1966); LA. REV. STAT. § 37:11 (1964). In general the secretarial requirements of the boards are to be met by use of department facilities. All official interaction with license applicants and licensees short of board hearings should be handled by the Department. This means that all communication, examining, and licensing will be within its ambit.

SECTION 205. *Rules and Regulations of the Department*

The Director may prescribe and enforce such rules and regulations as are necessary to the performance of any of the duties and powers of the Department.

COMMENT: This is a general grant of power to enable the Department to expand its services both to the boards and the licensees and to give it flexibility for future years. *See* ALASKA COMP. LAWS ANN. § 08. 01.080 (Supp. 1966); UTAH CODE ANN. § 58-1-12 (1953).

SECTION 206. *Contents of Licenses*

Every license issued by the Department shall bear a serial number, the full name of the applicant stating that he is authorized to practice the profession, trade or occupation stated thereon within this state in accordance with the provisions of law, the date of issuance and expiration, the seal of the Department and the signature of the Director.

COMMENT: There would seem to be very little reason to vary the nature and content of the licenses issued. The serial number will be most helpful if it is used to identify the licensee in all official records and transactions. *See* NEB. REV. STAT. § 71-105 (1958); UTAH CODE ANN. § 58-1-18 (1953); W. VA. CODE § 30-1-7 (1966).

CHAPTER THREE — BOARDS

SECTION 301. *Creation of Boards*

There are hereby created the following boards each of which is under the supervision of the Department of Professional and Occupational Licensing:

(1) . . . .

COMMENT: There should be included in this section a complete list of those boards which will come within this Act. *See* ALASKA COMP. LAWS ANN. § 08.01.010 (Supp. 1966); CAL. BUS. & PROF. CODE § 101 (West's 1962). *Contra,* NEB. REV. STAT. § 71-111 (1958); UTAH CODE ANN. § 58-1-5 (1953). Boards which may from time to time be created will need to be named here and a new chapter dealing with the non-uniform aspects of each additional board will have to be added to the Act.

SECTION 302. *Appointment of Board Members*

Each board member shall be appointed by the Governor. In making appointments the Governor shall give due consideration to recommendations submitted by the appropriate professional organizations of the State. The chairman of each board shall be designated by the Governor.

COMMENT: Each profession or trade licensed will in most cases have a state organization. Because such bodies are best equipped by training and acquaintance in the area to know those who are qualified to serve as board members, consideration should be given to their recommendations. However, in the event they offer no recommendations or if it appears to the Governor to be in the best interests of the people of the state to disregard their recommendations, he is not bound to follow such recommendations. *See* ALASKA COMP. LAWS ANN. § 08.01.020 (Supp. 1966); GA. CODE § 84-107a (1955); NEB. REV. STAT. § 71-117 (1958).

SECTION 303. *Qualifications of Board Members*

In addition to all other qualifications provided by law, each board member must be a citizen of the United States, and be a member in good standing and licensed to practice in this State in the profession, trade or occupation of the board to which he is appointed.

COMMENT: In recognition of the fact that some states may have additional requirements which would apply to board members, the qualifications listed are to be in addition to such other requirements. Because the duties of the board are centered on questions of professional competence, members must be licensed in the profession which they regulate. *See* NEB. REV. STAT. §§ 71-114 to -115 (1958); UTAH CODE ANN. § 58-1-6 (1953). *Contra,* GA. CODE § 84-105a (1955). The drafters are opposed to any state citizenship requirement for board

members. This is especially true for states which contain metropolitan areas which overlap with other states.

SECTION 304. *Term of Office of Board Members*

The term of office of each board member shall be equal in years to the number of members comprising the board to which he is appointed. However, in no case shall terms exceed six years. The members first appointed to each board after this Act becomes effective shall serve the following terms: the first such member for a period of one year, the second for two years, the third for three years, the fourth for four years, the fifth for five years, and all additional members for six years. Each board member shall be eligible for reappointment.

COMMENT: The intent of this section is to provide for the staggering of board vacancies to assure a continuing expertise on the board. The size of a board will determine the term of office of its members; for example, if a board has four members each will serve four years once the transitional period is completed. *See* UTAH CODE ANN. § 58-1-6 (1953). *Contra,* ALASKA COMP. LAWS ANN. § 08.01.020 (Supp. 1966); GA. CODE § 84-104a (1955); NEB. REV. STAT. §§ 71-116 (1958). Note that no term may exceed six years.

SECTION 305. *Oath of Board Members*

Each board member shall take the oath of office as provided by the constitution [and/or statutes] of this State.

COMMENT: The board member should take the constitutional, civil service, or other existing statutory oath of office. *See* CAL. BUS. & PROF. CODE § 105 (West's 1962); UTAH CODE ANN. § 58-1-2 (1953); W. VA. CODE § 30-1-2 (1966).

SECTION 306. *Removal of Board Members*

The Governor may remove from office any board member for neglect of duty, incompetence, or unprofessional or dishonorable conduct.

COMMENT: Removal of board members is within the power of the Governor. However, his discretion is not unlimited and cause must be shown. *See* CAL. BUS. & PROF. CODE § 106 (West's 1962); NEB. REV. STAT. § 71-118 (1958).

SECTION 307. *Filling of Board Vacancies*

The Governor shall fill any vacancy in the memberships of a board

by appointment in compliance with the provisions of section 302 (Appointment of Board Members). Each such appointment shall be for the unexpired term of the vacant office.

COMMENT: In order not to upset the staggered term of office structure, vacancies are filled only for the unexpired term.

SECTION 308. *Rules and Regulations*

Each board shall make such rules and regulations, not inconsistent with this Act, as are necessary to regulate its proceedings and to carry out the purposes and enforce the provisions of this Act.

COMMENT: This is a general grant of power to enable the board to act effectively. *See* W. VA. CODE § 30-1-4 (1966). *Contra,* UTAH CODE ANN. § 58-1-12 (1953).

SECTION 309. *Expenses of Board Members*

Each board member shall be reimbursed for all reasonable and necessary expenses incurred in carrying out the duties of his office.

COMMENT: Under this Act the activities of composing examinations for applicants and conducting hearings become the dominant functions of the board members. However, these functions still may require expenses to be incurred. *See* CAL. BUS. & PROF. CODE § 103 (West's 1962); LA. REV. STAT. § 37:6 (1964); NEB. REV. STAT. § 71-122 (1958); UTAH CODE ANN. § 58-1-6 (1953); W. VA. CODE § 30-1-11 (1966).

SECTION 310. *Per diem Wage of Board Members*

Each board member shall receive ——— dollars for each day spent in performing the duties of his office.

COMMENT: This entire section is optional. The drafters feel that under this act a considerable amount of the mundane labor formerly involved in board membership will be taken over by the Department. Beyond this, it should be considered an honor to be a member of a professional licensing board. Thus in many cases a per diem wage is undesirable so long as actual expenses are reimbursed. If, of course, board membership approaches a full time job despite the existence of the Department, then a compensation is necessary. *See* ALASKA COMP. LAWS ANN. § 08.01.040 (Supp. 1966); CAL. BUS. & PROF. CODE § 103 (West's 1962); LA. REV. STAT. § 37:6 (1964); NEB.

REV. STAT. § 71-122 (1958); UTAH CODE ANN. § 58-1-6 (1953); W. VA. CODE § 30-1-11 (1966). For those states that wish to differentiate between boards by compensating some and not others, the per diem wage should be covered in that board's own chapter and not in a general section such as this one.

CHAPTER FOUR — EXAMINATIONS AND HEARINGS

SECTION 401. *Application for Examination*

Every person desiring to obtain a license shall apply to the Department in writing upon forms prepared and furnished by the Department. Each applicant shall transmit with his application proof of the particular qualifications required of each applicant seeking examination for such license and the examination fee required for that examination.

COMMENT: The qualifications which an applicant must possess under this Act must be met before any examination may be taken. *See* ALASKA COMP. LAWS ANN. § 08.01.060 (Supp. 1966); NEB. REV. STAT. § 71-125 (1958). *Contra,* W. VA. CODE § 30-1-6 (1966). These will range from age to educational requirements, and proof of compliance should accompany each application for examination. *See* UTAH CODE ANN. § 58-1-17 (1953).

SECTION 402. *Procedure for Examination*

An examination for each profession, trade or occupation covered by this Act shall be conducted by the Department at least once each year and at such other times as the Director, with the advice of the appropriate board, shall deem necessary. Each board shall submit to the Director the questions which are to be required in written examinations for licensing within their particular profession, trade or occupation. All written examinations shall be administered in standard form in the manner and places designated by the Director. Completed examinations, identified only by number, shall be transmitted to the appropriate board for grading. Each board shall conduct oral and practical examinations at times reasonably corresponding to written examinations where such are considered necessary to ascertain the fitness of applicants to practice the profession, trade or occupation for which the examination is given and shall pass upon the qualifications of such applicants. Graded examinations and the results of any oral

or practical examinations shall be returned to the Director who shall issue licenses to applicants designated acceptable by the board.

Comment: The frequency of giving examinations should depend upon the demand for them and the needs of the profession or trade. At least one exam of each type should be given each year. Where necessary, practical examinations are to be given by the boards. If only a practical examination is given it is assumed that the reasonable frequency will correspond to the result of those considerations that in general dictate a minimum of one per year. The total effect of the section is to put complete control for the final decision of who shall receive and who shall be denied a license in the control of the board. Actual conduct of written examinations and issuing of licenses will be under the auspices of the Director. *See* Neb. Rev. Stat. §§ 71-127 to -138 (1958); Utah Code Ann. § 58-1-7 (1953). *Contra,* W. Va. Code § 30-1-6 (1966).

Section 403. *Re-examination*

Each board shall make reasonable rules providing for re-examination of any applicants for the profession, trade or occupation under its control.

Comment: Because of the varied needs of the various boards, no set period is provided in this general section. Rather, each board, drawing upon its knowledge in the field, should determine when and under what conditions re-examination may be had. *See* Utah Code Ann. § 58-1-16 (1953). *Contra,* Neb. Rev. Stat. § 71-110 (1958); W. Va. Code § 30-1-6 (1966). Implicit in the section is the right to re-examination.

Section 404. *Refusal and Revocation of Licenses*

A board may refuse to approve the issuance or renewal of a license or may revoke or suspend a license if the applicant or holder of such license

(1) has been guilty of unprofessional conduct;
(2) has been convicted of a felony or any crime involving moral turpitude;
(3) has obtained or attempted to obtain a license by fraud or deceit;
(4) has come within any of the special grounds established by that particular profession, trade or occupation as set forth in this Act.

COMMENT: This section is intended to be an exhaustive list of the causes which will support refusal, revocation, and suspension of licenses. Unprofessional conduct is a matter within the special competence of the board and a large measure of deference to its determinations is expected. Crimes which are *malum in se* are sufficient grounds to support denials on the theory that in granting a license the state is fulfilling a function of public trust and protection. The discovery of fraud or deceit in the obtaining of a license constitutes a breach of faith sufficient to show the person presumptively unfit to serve the public in most licensed occupations. *See* NEB. REV. STAT. § 71-147 (1958); UTAH CODE ANN. § 58-1-25 (1953). Note especially, that the section permits use of the enumerated grounds but does not demand it.

SECTION 405. *Hearings for Refusal and Revocation of Licenses*

A board member or any other person may file charges with the appropriate board alleging a ground in section 404 as the reason why an applicant should be refused issuance or renewal of a license or why any license issued by that board should be revoked or suspended. If the board considers the charges well founded and sufficient to warrant consideration, it shall hold a hearing not later than 90 days after the filing of the charges. Refusal to grant a license for any of the reasons specified in section 404 shall entitle the applicant to a hearing.

COMMENT: Whenever it appears that a person should not hold a particular license, either the board or a private citizen may initiate proceedings to achieve denial, suspension, or revocation. Note that the initiation of proceedings is discretionary with the board but that a denial, suspension, or revocation for the reasons specified in section 404 gives the applicant a right to a hearing.

SECTION 406. *Notice of Hearing*

The board shall give the applicant or license holder at least 30 days written notice of his right to a hearing, the consequences of failure to appear and answer, the date, time and place set for the hearing, and shall include a copy of the charges filed.

COMMENT: Because a hearing will be called only if the charges filed are considered sufficent to make out a prima facie case against the accused, their inclusion in the notice should be enough to allow appropriate preparation by the accused. *See* NEB. REV. STAT. §

71-153 (1958); UTAH CODE ANN. § 58-1-26 (1953); W. VA. CODE § 30-1-8 (1966).

SECTION 407. *Procedure of Hearings*

Each board shall have the power to issue subpoenas for witnesses and order the production of papers, books, accounts and documents at the instance of any party, and to administer oaths. The appropriate trial court for the county in which the hearing is held shall compel obedience to subpoenas and orders of the board by contempt proceedings and shall punish perjury. Each witness who shall appear before a board by its order shall receive the fees and mileage provided for witnesses in civil actions before the county trial courts. The accused may appear in person or by attorney, introduce evidence in his own behalf and be confronted by and cross-examine witnesses appearing against him. The rules of evidence in force in the courts of this State shall apply to all such board hearings. An official record and transcript of each hearing shall be kept by the board.

COMMENT: Each board is given the power to conduct hearings in such a manner as to allow an authoritative determination of the issues. Under this Act the county trial courts or their equivalent are the first judicial bodies which may be involved in licensing board action. To assure a willing compliance with the needs of the hearing and to encourage private initiative in enforcing this Act, witness expenses should be paid according to the method of the county trial courts. The rules of evidence of the State apply. The drafters believe that the requirement of a mere residuum of evidence is not sufficient to protect the interests of one faced with the prospect of losing his means of livelihood. The transcript and record will become a part of the personal file of the licensee maintained by the department. *See* NEB. REV. STAT. § 71-155 (1958); UTAH CODE ANN. § 58-1-28, -29, -31 (1953); W. VA. CODE § 30-1-8 (1966).

SECTION 408. *Decisions of the Board*

The decisions of a board shall be in writing and shall be based only upon the evidence produced at the hearing and shall be final 30 days after a copy of such decision is given the applicant or license holder unless within that 30 day period appeal is taken to the appropriate state trial court.

COMMENT: It is important that the board confine its determinations

to evidence adduced at the hearing. Private consultation by the board members with staff or experts should not be allowed since it may violate the accused's right of due process.

SECTION 409. *Appeal*

If an appeal is taken by the applicant or license holder, he shall file notice of such appeal with both the board and the appropriate trial court. The board shall promptly certify a copy of the record of hearing to that court. The findings of fact of the board shall be final if supported by substantial evidence on the record considered as a whole.

COMMENT: The standard of review is intended to conform to that which is gaining uniformity throughout the states. The substantial evidence test is sufficiently elaborated by decisional law to provide an adequate standard. *See* NEB. REV. STAT. § 71-159 (1958); UTAH CODE ANN. § 58-1-36 (1953); W. VA. CODE § 30-1-9 (1966).

CHAPTER FIVE [and following] — (NAME OF THE SPECIFIC BOARD)

INTRODUCTORY COMMENT: The remaining chapters of the Act are devoted one each to the boards created in Section 301. The first four chapters having provided a uniformity of structure and procedure, it now remains to provide for those aspects of operation which are peculiar to each board. As far as possible the sections of each chapter should be constructed in parallel fashion.

SECTION 501. *Definitions*

(a) . . . .

COMMENT: Whenever it would be helpful, a definitions section at the beginning of a chapter should be provided. This will eliminate uncertainty if words common to other chapters are used with different meanings.

SECTION 502. *Number of Board Members*

The Board shall be composed of . . . . members.

COMMENT: Because of the varying needs of each board the number of members on each board is left to the legislature.

SECTION 503. *Qualifications of Applicants*

(a) Each applicant for examination shall be at least . . . . years of age and of good moral character.

(b) Each applicant for examination shall meet the following minimum educational requirements:

(1) . . . .

(c) . . . .

COMMENT: Age, character, and educational requirements are usually very important aspects of the remaining chapters. In addition, this section may include experience requirements and any other requirement properly legislated prior to actual examination construction.

SECTION 504. *Examinations*

The examination to determine qualification for licensing as a . . . . shall be in written form covering:

(1) . . . .

[and/or oral or practical form covering:

(1) . . . .]

COMMENT: If it is considered necessary to enact the minimum or maximum ambits of examination coverage it should come next in each chapter. The draftsmen feel, however, that this matter should be left to board discretion as much as possible consistent with the proper implementation of legislative ends.

SECTION 505. *Grounds for Refusal and Revocation*

In addition to the grounds given in section 404, the board may refuse to approve the issuance or renewal, or may revoke or suspend a license for any of the following causes:

(1) . . . .

COMMENT: If the legislature has specific grounds which it wishes to make sufficient for a refusal or revocation of a particular license, it should set them forth here. Care must be taken, however, to avoid granting discretion without standards for its exercise. Such a free hand in a board will not be acceptable either as a matter of protection of an applicant's or licensee's interest in not unintentionally violating the conditions of his license or in providing the board with a workable test to be applied in its hearings.

SECTION 506. *et. seq.*

CLOSING COMMENT: The remainder of the sections in each chapter are devoted to the particular profession, trade or occupation.

NOTE: MASSACHUSETTS RACIAL IMBALANCE ACT

*Local customs, however hardened by time, are not decreed in heaven.**

I. INTRODUCTION

The importance of education to happiness, advancement, and success in American society is beyond doubt.[1] It is needed both for full and effective participation in our form of government and for securing satisfactory employment opportunities in a world of rapidly changing technology; it is the main conduit through which youngsters hemmed in by poverty and limited backgrounds are enabled to surmount those barriers.[2] Further, education of a country's citizens is a strong determinant of its future. As the President said on November 17, 1965, "[the] future of our nation rests on the quality of the education its young people receive. And for our Negro children quality education is especially vital because it is the key to equality."[3]

Although the necessity of making quality education available to Negro children has been already recognized, the problem of implementation has not been so clearly focussed upon. Massachusetts is one of the handful of states that have attempted to deal with the problem of how a state, a city, a school board or the citizens of a community can provide a "key to equality" to the relatively large numbers of Negroes who are presently receiving inferior educations. Furthermore, Massachusetts is the only state that has attempted to

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*Frankfurter, J., concurring in Cooper v. Aaron, 358 U.S. 1, 25.

1. *See* Brown v. Board of Education, 347 U.S. 483, 493 (1954); MASSACHUSETTS STATE BOARD OF EDUCATION, ADVISORY COMMITTEE ON RACIAL IMBALANCE AND EDUCATION, BECAUSE IT IS RIGHT—EDUCATIONALLY (1965) [hereinafter cited as THE KIERNAN REPORT]; Peck & Cohen, *The Social Context of De Facto Segregation*, 16 W. RES. L. REV. 572 (1965); CONANT, SHAPING EDUCATIONAL POLICY (1964); CONANT, THE COMPREHENSIVE HIGH SCHOOL (1967).

2. U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 194 (1967) [hereinafter cited as RACIAL ISOLATION].

3. *Id.* at iv (Letter to John A. Hannah, Chairman of the U.S. Commission on Civil Rights).

solve this problem by the enactment of comprehensive legislation.[4] This Note will discuss problems of interpretation, effectiveness of the remedy, community reaction, school board responses, and other questions surrounding the Massachusetts statute.

A discussion of the reasons for enacting legislation to eliminate racial imbalance in the public schools is beyond the scope of this Note. That such imbalance exists is well established.[5] But a brief survey of the basic theories may be helpful in understanding some of the later analysis.

Some basic hypotheses are:

(a) Racial separation in the schools is socially and psychologically harmful to the students.[6]

(b) Class or economic integration is necessary to "free achievement from the impact of the home."[7] Culturally heterogeneous schools can perpetuate the social influence of the home and its environs. Since as a practical matter there are not enough middle class Negroes, economic integration of the schools will be impossible without racial integration in the foreseeable future.[8]

(c) There appears to be a significant relationship between a student's sense of control over his destiny and his achievement in school.[9]

4. MASS. GEN. LAWS ch. 15, §§ 1I-K and ch. 71, §§ 37C-D (Supp. 1966). Illinois has tried a statutory program, but it was repealed three months after passage. ILL. ANN. STAT. ch. 122, §§ 10-20.10, 10-20.11 (Supp. 1966). New York and New Jersey have turned to administrative action to reduce imbalance. *See* Moslow. *De Facto Public School Segregation,* 6 VILL. LAW REV. 353, 359 (1961) (N.Y. State Board of Regents acted on January 28, 1960); Mitchell v. Board of Education (Hempstead), N.Y. Comm'r of Ed. No. 7240 reported in 8 RACE REL. L. REP. 735 (1963); Balaban v. Rubin, 14 N.Y.2d 193, 199 N.E.2d 375 (1964), *cert. denied* 379 U.S. 881 (1964); Fisher v. Board of Education (Orange), 8 RACE REL. L. REP. 730 (N.J. 1963); Morean v. Board of Education of Montclair, 42 N.J. 237, 200 A.2d 97 (1964). Both the New York and New Jersey procedures rest on the education laws of each state—a duty to provide all with equal educational opportunities —and not on state civil rights and court action. *See* Jackson v. Pasadena City School District, 31 Cal. Rptr. 606, 59 Cal. 2d 876, 382 P.2d 878 (1963). *See also,* Model Anti-Discrimination Act § 504 *discussed in* 4 HARV. J. LEG. at 240 (1967).

5. RACIAL ISOLATION, *supra* note 2 at 2-10 Appendix A; COLEMAN *et al.,* EQUALITY OF EDUCATIONAL OPPORTUNITY 3 (1966).

6. Pettigrew & Pajonas, *Social Psychological Considerations of Racially Imbalanced Schools,* and Kvaraceus, Scruggs & Scruggs, *Self-Concept and Education of Negro Children,* in THE KIERNAN REPORT, *supra* note 1, at 77, 87; RACIAL ISOLATION, *supra* note 2; CONANT, *supra* note 1.

7. Coleman, *Equal Schools or Equal Students,* PUBLIC INTEREST 70, 74 (Summer, 1966); COLEMAN, *supra* note 5 at 21, 298, 307; Jencks, *Education: The Racial Gap,* NEW REPUBLIC 21, 24 (October 1, 1966).

8. Jencks, *supra* note 7; RACIAL ISOLATION, *supra* note 2 at 195.

9. COLEMAN, *supra* note 5 at 23, 323-35 ("as the proportion white in the school increases, the child's sense of control of environment increases" at 323).

To develop in Negroes a sense of control over their environment racial integration may be necessary.[10]

(d) One way of eliminating racial bigotry is integration, especially in the formative years of a child's life.[11]

(e) American society views predominantly Negro schools as inferior. Consequently they suffer from neglect in general and when budgets are cut. One way to insure the Negro child against neglect in the public schools is to have integrated schools.[12]

(f) There may be a constitutional requirement that racial imbalance be corrected.[13] But it is being recognized that the courts are ill-

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10. *Id.;* Jencks, *supra* note 7.

11. Pettigrew & Pajonas, *supra* note 6, at 87; SILBERMAN, CRISIS IN BLACK AND WHITE 292 (1964).

12. Federated Organizations Opposing all Amendments to the Racial Imbalance Act (CORE, NAACP, American Jewish Congress, fair housing groups, etc.), Preserve the Race Imbalance Law! (unpublished, March 13, 1967); Interview with Paul Parks of NAACP, Mass. Federation for Fair Housing and Equal Rights, METCO and members of an Advisory Committee to the Board of Education in Boston, Mass., March 15, 1967; Pettigrew & Pajonas, *supra* note 6, at 87.

13. In Taylor v. Board of Education, 294 F.2d 36 (2d Cir.) *cert. denied* 368 U.S. 940 (1961) the court found that the defendant New Rochelle, New York, school board had deliberately created and maintained a racially segregated school by racially gerrymandering a school district, employing a transfer plan to maintain it and, after ceasing these discriminatory acts, failing to correct the evil. The court ordered the defendant to submit a plan for desegregation. This case was decided under the holding of Brown v. Board of Education, *supra* note 1, Brown v. Board of Education, 349 U.S. 294 (1955). A more difficult legal problem arises when the plantiff is only able to prove *de facto* segregation. There is no Supreme Court decision on whether *de facto* segregation is unconstitutional. The Supreme Court of California has indicated that *de facto* segregation is unconstitutional. Jackson v. Pasadena City School District, 59 Cal. 2d 876, 382 P.2d 878 (1963). In Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D. Mass.) *vacated on other grounds* 348 F. 2d 261 (1st Cir. 1965), the district court found "that non-white attendance of appreciably more than 50 per cent in any one school is tantamount to segregation," 237 F. Supp. at 545, and in violation of the Constitution. *See also* Branche v. Board of Education of the Town of Hempstead, 204 F. Supp. 150 (E.D.N.Y. 1962); Blocker v. Board of Education of Manhasset, New York, 226 F. Supp. 208 (E.D.N.Y. 1964). But the view that the Constitution outlaws *de facto* segregation or at least requires school boards to take steps in an attempt to correct the situation is not the majority view today. *See* Bell v. School City of Gary, Indiana, 213 F. Supp. 819 (N.D. Ill.), *affirmed* 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964); Downs v. Board of Education of Kansas City, 336 F.2d 988 (10th Cir. 1964), *cert. denied* 380 U.S. 914 (1965); Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966). For an excellent discussion of these problems, *see* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concept,* 78 HARV. L. REV. 564 (1965). *See also,* Wright, *School Desegregation: Legal Remedies for De Facto Segregation,* 40 N.Y.U.L. REV. 285 (1965); Sedler, *School Segregation in the North and West: Legal Aspects,* 7 ST. LOUIS U.L.J. 228 (1963); Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions,* 16 WEST. RES. L. REV. 502 (1965).

suited to handle the problem; legislative and executive action is needed.

These theories provide a basis for seeking to achieve racial integration in the public schools. While they also suggest the need for many other changes and innovations,[14] this Note will not attempt to deal with the larger problem of reform in general. For our purposes, it is sufficient to note that the Massachusetts Racial Imbalance Act is a response to the need for educational reform which is at the heart of these theories. The remainder of this Note is an analysis of Massachusetts' response and an examination of problems which surround it.

II. Background

It appears that the Massachusetts Racial Imbalance Act was designed to deal with a problem primarily located in Boston and, to a lesser extent, in Springfield. Its support came from the civil rights groups, the fair housing societies, and suburbia.[15] The chief opposition came from within the city of Boston.[16]

Although at one time Boston's schools were praised as "a model for the world,"[17] in recent years the city's school system has reached what appears to be an unacceptable level of deterioration.[18] Clearly the Boston educational problem is broader than racial imbalance. But

14. For example, use of teachers who are familiar with social and economic experiences of their students; meaningful parent participation in school decision-making; new and larger schools that will be economically able to make use of innovations such as computers.

15. On the final vote in the House on the Massachusetts Racial Imbalance Act, 58 representatives from Norfolk and Middlesex Counties voted against and 7 abstained. 1965 *Journal of the House* 2. The bill became law by a vote of 166 to 34 with abstentions. 1965 *Journal of the House* vol. II, Yea and Nay Supplement No. 226.

16. Of the 34 votes cast against the Racial Imbalance Act in the House, 15 came from Suffolk County which contains the city of Boston. Suffolk County also cast 18 votes in favor of the bill and had 6 abstentions. It is interesting to note that Representatives from Springfield cast 6 votes in favor of the bill and one against it with one abstention. *Id.*

17. Barnard, School Architecture 76 (1855) (Horace Mann's comment).

18. Sargent, Boston Schools — 1962 (1962); Sargent, Look to the Schoolhouses (1953) (a report by the Center for Field Studies, Harvard Graduate School of Education, to the Boston School Committee); Strayer, Digest of the Report of the Boston School Survey (1944); Schrag, Village School Downtown: Politics and Education, A Boston Report (1967); Kozol, Death at an Early Age (1967); McCarthy & Kessler, *A Report Card on Boston Schools* a series in the Boston Herald beginning on Feb. 27, 1966, § 4, at 1; Nilles, Report of the Special Commission to Investigate and Study Educational Facilities in the Commonwealth of Massachusetts, Quality Education for Massachusetts (1965); Clark, Kein & Burks, American Secondary School Curriculum (1965); Ragan, Modern Elementary Curriculum (1966); Lee, Principles and Methods of Secondary Education (1963).

the predominantly Negro schools are by and large victimized the most by the lack of the essentials of quality education.

Against this background, the National Association for the Advancement of Colored People began, in 1962, to raise its voice for the betterment of the public school education of Boston's Negroes. One of its primary goals was to eliminate de facto segregation (*i.e.,* racial imbalance) in the Boston public schools.[19] Continuous pressure was brought to bear on the Boston School Committee, and the NAACP's activities were a significant factor leading to the passage of the Racial Imbalance Act.[20]

The fight to eliminate racial imbalance reached the Massachusetts legislature in 1964.[21] No legislation on the subject was enacted in that year, however.[22] The fight was continued in the 1965 session of the legislature. Representative Bolling, who had introduced a bill in 1964 aimed at correcting racial imbalance, did so again in 1965.[23] The initial legislative response was to refer his bills to the next session.[24]

At this point the *Kiernan Report*[25] was issued. This report, written by the Massachusetts State Board of Education's Advisory Committee on Racial Imbalance and Education, examined the racial imbalance problem in the state, concluded that it was sufficiently real and ought to be eliminated, and offered several possible alternatives as means of reducing imbalance. Reaction to the *Kiernan Report* was mixed. The Boston School Committee, which, in general, had been

19. Interview with Tom Atkins, an NAACP officer, in Cambridge, Massachusetts, March 13, 1967. The NAACP filed a suit in April, 1965, to eliminate *de facto* segregation in the Boston schools. Boston Globe, April 20, 1965, at 1, col. 7. Apparently this suit has never come to trial and is still pending.

20. On June 26, 1963, a boycott organized by the NAACP and the Citizens Committee for Human Rights Organization, involving 2,500 students, took place. Although the 2,500 boycotting students seemed to have little effect on the Boston School Committee, they did arouse the concern of many state legislators. Indicative of this concern were the bills submitted by Representatives Bolling, Brothers, Campbell and Pope, and Senator Cohen at the 1964 opening of the General Court. In 1964 there was another school boycott involving more than 10,000 Negro students.

21. *Supra* notes 19 and 20.

22. Of the seven bills dealing with racial imbalance introduced into the Massachusetts legislature in 1964, six were referred to the next annual session, *Journal of the Senate* at 912 (April 21, 1964); *Journal of the House* at 1500 (April 14, 1964), and one was referred to the House Committee on Ways and Means, *Journal of the House* at 574 (Feb. 5, 1964), where it apparently died.

23. *Journal of the House* at 78 (January 6, 1965) (House No. 2647).

24. *Journal of the House* 862,903 (March 10, 11, 1965). The Senate was notified of the decision. *Journal of the Senate* 829 (April 5, 1965).

25. *Supra* note 1.

unenthusiastic towards suggestions for correcting racial imbalance in the Boston schools,[26] took a negative attitude toward the report's findings and suggestions.[27] On the other hand, Cambridge and Medford, two of the four cities where racial imbalance was found (Boston and Springfield being the other two), responded positively to the criticism.[28] Springfield did not publicize its reaction.

The *Kiernan Report* seems to have been a turning point in the history of the enactment of Massachusetts' Racial Imbalance Act. After it was issued, Representative Bolling succeeded in getting the House to reconsider its earlier decision on his bill.[29] Although resistance was still offered, including two attempted filibusters, the bill, combined with one offered by Governor Volpe, was enacted and became effective on August 18, 1965, when it was signed by the Governor.[30]

III. The Massachusetts Racial Imbalance Act: Operation and Some Lesser Problems of Interpretation

The Massachusetts Racial Imbalance Act is an attempt to present a unified and comprehensive scheme for the elimination of racial imbalance throughout the state wherever it exists. However, the statute uses ambiguous terminology and definitions, and it suffers from errors in overall design. This section will describe the mechanics of the legislation and related difficulties of interpretation; the next section will go into broader questions of interpretation. The entire Act is set forth in the Appendix.

The purpose of the Act as set forth in the preamble is clear: it is

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26. *See* Teele, Jackson & Mayo, Family Experiences In Operation Exodus 3 (1966) (unpublished report presented to the Annual Meeting of the Massachusetts Psychological Association). *See also* Boston Globe, April 18, 1965, at 77, col. 1.

27. *See* statement by School Committeewoman Hicks, Boston Globe, April 15, 1965, at 11, col. 5. *See also, id.* at 1, col. 7 (Committeeman Lee); Boston Globe, April 20, 1965, at 14, col. 5 (Committeeman Eisenstadt). School Committeeman Gartland was the only bright spot throughout 1961-66. *See* Boston Globe, April 25, 1965, at 10, col. 1 (evening ed.).

28. Boston Globe, April 25, 1965 (morning ed.) (Cambridge); Boston Globe, April 15, 1965, at 10 col. 5 (evening ed.) (Medford).

29. *Journal of the House* 1455 (April 20, 1965). The bill was referred to the House Committee on Ways and Means. The Senate was notified of this action. *Journal of the Senate* 956 (April 21, 1965).

30. Interview with Tom Atkins of the NAACP in Cambridge, Mass., March 13, 1967. It should be noted that support by Governor Volpe and Lieutenant Governor Richardson, as well as activities of the NAACP and the Kiernan Report, were significant in the passage of the Racial Imbalance Act.

"to eliminate forthwith racial imbalance in the public schools."[31] Basic to that purpose is a racial census of the student bodies. Only by a census can the racially imbalanced schools become known. The Act requires each school committee in the Commonwealth to "submit statistics sufficient" to determine the per cent of non-white pupils in the school.[32] This duty can be enforced by the board of education in an action for an injunction.[33]

The state board of education then makes a finding of whether each school is racially balanced or imbalanced. If a school is found to be racially imbalanced, the state board of education must give the school committee written notice of its finding. Upon receipt of the notice the school committee must "prepare a plan to eliminate such racial imbalance and file a copy of" it with the state board of education.[34] There is no explicit provision for judicial review of the board's finding that a school is imbalanced.

If a school committee believes that the determination of racial imbalance and notice thereof is unjustified, it can simply refuse to file a plan for correcting the alleged imbalance. However, if no plan is filed, the school committee exposes itself to the loss of financial assistance,[35] and the board can have it enjoined to submit a plan.[36] As an alternative, the school committee could file a "do-nothing" plan. By doing so, the school committee avoids sanctions under the Act. At the same time, if the plan is rejected, it will have a right to judicial review of the state board of education's decision on the adequacy of the plan,[37] which in effect is review of its initial determination that imbalance exists.

The notice triggers the school committee's duty to submit a plan. While the Act does not establish a specific time period within which

31. MASS. GEN. LAWS ch. 71, § 37C (Supp. 1966). There are some ambiguities in the introductory portion of the Act. The second sentence in ch. 71, § 37C, if given its rational meaning is a mandate imposing a legal duty on school committees never to make a site or distribution decision in which considerations of balancing have not been influential. But such a mandate would be impractical to enforce. Further, the Act provides no sanction for enforcement. Consequently, this sentence should be treated as a statement of a goal.

32. MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966).

33. *Id.*

34. *Id.*

35. MASS. GEN. LAWS ch. 15, § 1I, par. 2 (Supp. 1966).

36. MASS. GEN. LAWS ch. 71, § 37D, par. 5 (Supp. 1966). It would appear that this section should be read as authorizing injunctive relief to compel the filing of a formal document entitled "plan to eliminate racial imbalance." Ch. 15, § 1J, par. 1 appears to grant authority for relief relating to the contents of a plan.

37. MASS. GEN. LAWS, ch. 15, § 1J, par. 1 (Supp. 1966).

submission must occur, it does provide that "if, following the receipt of notification from the board . . ., a school committee . . . does not show progress within a reasonable time in eliminating racial imbalance," state financial assistance may be withheld.[38] A protracted refusal to file probably amounts to a failure to "show progress" and, therefore, this provision would seem to serve as an effective check against unreasonable delays in submission. But what is a "reasonable time?" Presumably "reasonable time" will be judged in light of such factors as the seriousness of the imbalance situation, the need for field research, and the availability of experience in other cities which can be used as a basis for planning.

The state board of education is required "to provide technical and other assistance in the formulation and execution of plans to eliminate racial imbalance."[39] The Act further provides that if the state board of education determines that the school committee has failed to file a plan in compliance with the Act, the board "shall consult with and make specific recommendations" to the school committee.[40] It is not clear that the duty to provide technical and other assistance is also conditioned on the failure of the school committee to file an acceptable plan. The sensible reading would allow the state board of education to assist school committees during the plan formulation stage. It should be noted, however, that the Act provides no express sanctions for the enforcement of either of these obligations. Perhaps it could be argued that a "reasonable time" to show progress does not elapse until the state board of education has furnished assistance and made specific recommendations. This would put pressure on the board to give such aid, since if a reasonable time after notice of imbalance has not elapsed, the board has no authority to withdraw financial assistance from the local schools in its efforts to have the local school committee eliminate imbalance.

If the state board of education finds a plan to be in compliance with the Act, it can "require each school committee to submit to . . . [it] a report on the progress of the plan and its implementation."[41] Although the Act does not require a school committee to submit another plan or an amended plan for approval after it has already had a plan approved by the board of education, this clause does contem-

38. Mass. Gen. Laws, ch. 15, § 1I, par. 2 (Supp. 1966).
39. Mass. Gen. Laws, ch. 15, § 1I, par. 1 (Supp. 1966).
40. *Id.*
41. Mass. Gen. Laws, ch. 71, § 37D (Supp. 1966).

plate contact between the two bodies after plan approval. Whether such contact can lead to a required second plan is not spelled out. It is possible to argue that the power to require submission of revised plans after initially approved plans prove inadequate in operation is implicit in the power to withhold state aid. Since additional plans will often be necessary if the legislation is to function in a workable manner, the omission should be treated as a lapse in draftsmanship to be cured by interpretation. The board of education has the power to seek enforcement of an approved plan.

When a submitted plan is found inadequate, the board of education must consult with and make specific recommendations to the school committee. When a school committee "does not show progress within a reasonable time in eliminating racial imbalance in its schools," the Act directs the commissioner of education to withhold his certification of the amount of state aid available under section nine of chapter seventy-one of the Massachusetts General Laws (equalization aid).[42] The commissioner of education "may" also notify the commissioner of corporations and taxation and the comptroller to withhold all funds certified but not yet disbursed. In addition, the state board of education can prevent the school building assistance commission from approving any project for school construction under chapter 645 of the Acts of 1948, as amended, in the whole school district containing the imbalanced school(s) by delivering to the building commission a notice that racial imbalance exists in any school in that district.[43] What is a failure to "show progress?" Refusal to submit a plan, refusal without timely petition for judicial review to adopt a plan recommended by the state board of education, refusal to adopt a plan recommended by the state board of education which has been affirmed on judicial review, and refusal to abide by a plan that has been adopted would all seem to be cases in which a school committee has failed to "show progress." But can the state board of education go outside the plan submission and approval process? Since the statutory provisions for judicial review at a school committee's behest are limited to a review of the substance of the plan, the implication is that the board cannot go outside the "plan" review process.

The Act provides that "the school building assistance commission upon receipt of notice from said board that racial imbalance exists"

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42. *Id.*
43. MASS. GEN. LAWS, ch. 15, § 1I (Supp. 1966).

shall not approve any of the school committee's construction projects. While the provision relating to loss of equalization aid depends on the school committee's failure to "show progress," this provision does not. This apparently was an error in draftsmanship. It would seem reasonable to interpret the statute as applying the same condition precedent to both the loss of building aid and the loss of equalization aid.

Upon receipt of a plan acceptable to the board of education, the commissioner of education may replace the withheld funds in such amounts and at such times as he may designate, and the school building assistance commission may approve school construction.[44] There is a question whether the school committee has a right not only to future aid but also to aid which has been withheld. The Act itself is silent on this issue. But in *City of Boston v. Crane*[45] the court acted on the assumption that a failure to comply with the Act permanently deprived the school committee of any funds withheld. In terms of providing an effective sanction such a result is highly desirable. It is, however, a harsh result to arrive at without statutory support. Consequently an amendment explicitly providing for the non-receipt of funds withheld during a year of non-compliance would improve the effectiveness of the Act while clarifying the present difficulty.

The board of education has another tool to induce compliance. This is an incentive and not a sanction. Under the Act, the school committees can receive sixty-five per cent of the approved cost of school construction or enlargement for the purpose of reducing or eliminating racial imbalance in the school system.[46] The Act contains procedures for judicial review and enforcement.[47] It also creates an advisory committee on racial imbalance.[48]

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44. *Id.*

45. City of Boston v. Crane, Civil No. 86456 Eq. (Superior Ct., Suffolk County, *filed* Dec. 22, 1966, *decided* Jan. 31, 1967), *appeal filed* Feb. 12, 1967. This case became moot on March 15, 1967, when the Board of Education approved the Boston plan.

46. MASS. GEN. LAWS, ch. 15, §1J (Supp. 1966).

47. *See also,* MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966).

48. "The board of education, with the advice of the commissioner, shall appoint an advisory committee on racial imbalance and no individual shall be appointed to this advisory committee on racial imbalance who has been listed in any state or federal document as being a member of a *communist* front organization. The members of the committee shall serve without compensation except that they may be reimbursed for the necessary expenses actually incurred in the performance of their duties." MASS, GEN. LAWS ch. 15, § 1K (Supp. 1966) (emphasis added). On August 17, 1965, prior to the date on which the Act became law, Attorney

IV. Further Questions of Interpretation

Part III of this Note pointed out a number of ambiguities and interpretive problems which surround the operation of the Massachusetts Racial Imbalance Act. However, further and more fundamental ambiguities and questions of interpretation in the Act remain for analysis in Part IV.

The most important question under the Act is: when is a school racially imbalanced? The Act defines racial imbalance as follows:

> The term "racial imbalance" refers to a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of non-white students in any public school is in excess of fifty per cent of the total number of students in such school.[49]

Today, there is much debate over "tipping points" both in schools and neighborhood housing.[50] The evidence is inadequate and hence precludes a precise sociological-psychological definition of "balance." But a statute must have some definition in order for it to operate efficiently and effectively. The inconclusiveness of sociological evidence should not deter states from beginning to correct racial imbalance. In the present Act a figure of fifty per cent non-white, although an arbitrary number, is such a beginning.[51] As a suitable starting point fifty per cent has support in New York,[52] the federal courts,[53] and the U.S. Commission on Civil Rights.[54] Here it is made all the more

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General Brooke issued an opinion that this section of the Act violated the equal protection clause of the fourteenth amendment to the United States Constitution. He also found that the unconstitutional portion of the Act was severable from the remainder. This section may also raise bill of attainder difficulties. *See* United States v. Brown, 381 U.S. 427 (1966) and U.S. Const. art. I, § 10.

49. Mass. Gen. Laws ch. 71, § 37D (Supp. 1966).

50. *See* Pettigrew & Pajonas, *supra* note 6 at 87, 100. They conclude that 20 per cent to 45 per cent Negro is an optimal transitional definition of "balance."

51. A bill now before the General Court proposes to amend this definition. *See* note 63, *infra.*

52. *See* N.Y. Times, June 19, 1962, at 1, col. 6; Note, 16 Syr. L. Rev. 728 (1964).

53. Barksdale v. Springfield School Committee, 237 F.Supp. 543 (D. Mass. 1965), *vacated,* 348 F.2d 261 (1st Cir. 1965). The court found "that a non-white attendance of appreciably more than fifty per cent in any one school is tantamount to segregation." 237 F.Supp. at 544.

54. Racial Isolation, *supra* note 2 at 209-10.

appropriate by the first sentence of the definition, which attempts to add flexibility; the Massachusetts definition is not strictly bound to a fifty per cent "yes-or-no" standard.

The first sentence in the Massachusetts definition presents some problems of interpretation.

> The term "racial imbalance" refers to a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve and work.[55]

The "sharply out of balance" phrase means that a school can be found racially imbalanced even though less than fifty per cent of its students are non-white.[56] This leaves two hard questions. First, what group composes the "society?" Is it the state, county, metropolitan area, city, precinct or "neighborhoods?" Second, what degree of variance from the "racial composition of the society" is needed to reach the "sharply out of balance" point?

The fifty per cent aspect of the definition indicates that the relevant "society" is not defined as one in which primarily non-white persons live. Since such a society is by hypothesis at least fifty per cent non-white, an internal inconsistency in the definition of racial imbalance seems to exist. If a school in a community with ten non-whites to one white person exactly mirrored this ratio, it *would not* be sharply out of balance with the racial composition of this "society," yet it *would* be racially imbalanced because it would have over fifty per cent non-white students. Since the percentage of non-whites in a city or a state is probably less than the percentage of non-whites in the public schools, a goal of achieving the former percentage in the public schools would be unobtainable. For example, if a city's population were twenty per cent non-white and if forty per cent of the public school population were non-white, it would be impossible to bring the percentage of non-whites in the public school population down to the city population's percentage.

To use a neighborhood would be capricious and unsatisfactory since this concept has no adequate and constant definition. Since

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55. MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966). This sentence is taken from the KIERNAN REPORT, *supra* note 1, at 1, n.1.

56. There is some confusing language on this point in School Committee of Boston v. Board of Education, _____ Mass. _____, 227, N.E.2d 729 (1967).

the racial composition of the public school population defines the basic limiting condition on what a school committee can possibly achieve, it should be taken as the relevant "society." Since the Act deals only with the public school population and provides no jurisdiction over parochial school students, such students cannot be included in the relevant "society."

What is meant by "sharply out of balance?" There is neither an absolute nor an abstract answer. The appropriate attack is a rule of reason. The focus should be on the point at which the percentage of non-white students in a school deprives them of an equal educational opportunity and not on whether each school has a minimum percentage of non-white students in its population.

Another important area of focus under the Act is that of plans which are to be submitted to eliminate racial imbalance. What measures does the statute require, permit or forbid? What are the statutory requirements for a satisfactory plan? What kind of *results* does the statute require a plan to promise?

The Act does not require that any particular measures be used. It does say that

> Said plan shall detail the changes in existing school attendance districts, the location of proposed school sites, the proposed additions to existing school buildings, and other methods for the elimination of racial imbalance.[57]

There is no intent, however, to confine a plan to the enumerated methods, nor to require the use of any one or all of them. All that is required is that they be mentioned as having been considered. For example, a school committee that stated, in its plan, that school construction had been considered but rejected would seem to have complied with this provision. Although the mandatory language of the quoted provision could be read to require the school committee to initiate action to eliminate racial imbalance in accordance with the provisions required to be detailed in the plan, such action could lead to school reorganization in excess of that needed to achieve racial balance. Such a reading ought not to be adopted. At best this provision is confusing.

Furthermore, the only restriction on the plan is that

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57. MASS. GEN. LAWS ch. 71, § 37D, par. 2 (Supp. 1966).

> Any plan to detail changes in existing school attendance districts, the location of proposed new school sites, and proposed additions to existing school buildings with the intention of reducing or eliminating racial imbalance, must take into consideration on an equal basis with the above mentioned intention, the safety of the children involved in traveling from home to school and school to home.[58]

This provision only specifies two factors which must be considered, but it does not limit consideration to the specified factors. The Act does not even forbid busing over the objection of parents; it only provides that a school committee's refusal to bus cannot be used by the state board of education as a ground for imposing sanctions.[59] The Act allows a school committee to work with other cities and towns in its attempt to eliminate racial imbalance.

What results must a plan promise? The preamble to the Act provides that the purpose "is to eliminate forthwith racial imbalance in the public schools."[60] It is clear that a plan devoted exclusively to "compensatory education" programs cannot satisfy the Act; it is also clear that a plan with no "compensatory education" programs can satisfy the Act. This leaves the words "eliminate" and "forthwith" for interpretation.[61] Clearly this language is not capable of any rigorous, scientific definition. On the other hand, it clearly suggests the attitude with which the board of education and the courts should critically approach a plan under review. The language seems to require a full scale attack on racial imbalance when it is found to exist. It may well require the submission of evidence in support of a statement on a plan that it will fully eliminate racial imbalance. And the language indicates that for a plan to be acceptable it must be expected to have an immediate effect on eliminating racial imbalance.

Another problem area concerns the procedure of the state board of education after rejecting a school committee plan to eliminate racial imbalance. If the plan is not acceptable to the board, it can withhold state aid, but the Act is vague on what is to be done next. It would seem that an unacceptable first plan should not prevent the school district from obtaining that year's state aid by filing an acceptable plan at a later date during that year. A further problem arises when

58. *Id.*
59. *Id.*
60. Act of 1965, ch. 641, [1965] Mass. Acts and Resolves.
61. *Id.*

a school committee refuses to obey the board of education's mandate to submit a plan. If a school committee does not desire the withheld state aid, the board has no power to compel the submission of an acceptable plan. This loophole appears to have been intended by the legislature — i.e., to leave the final determination of school policy in the hands of the local school committees.[62] Yet in terms of having an effective administration of the law, it might have been desirable to give the board the power to formulate and enforce a plan after a school committee has failed to respond within a reasonable time.[63] Such a power approaches that of the New York Commissioner of Education, who may determine the educational policy of any public school in the state.[64]

Another significant problem which arises under the Racial Imbalance Act involves a possible conflict with federally established programs. Consider the following situation. In January, 1965, a school committee enters a contract with an agency of the federal government for federal funds and other aid in the construction of a school at a specified site in the committee's jurisdiction. Later that year the state legislature passes the Massachusetts Racial Imbalance Act. If

62. Massachusetts' citizens have a strong belief in the local control of schools. Telephone interview with Representative Maurice E. Frye, Jr., Massachusetts House of Representatives, in Boston, Mass., March 21, 1967. Furthermore the General Court probably thought that the mere threat of withholding funds would be sufficient to gain compliance. *See* Note, *Duty to Integrate Public Schools? Some Judicial Responses and a Statute,* 46 B.U.L.Rev. 45 (1966). This has not proved to be the case, since funds have been withheld in Boston and Springfield.

63. Part of a bill to amend the Massachusetts Racial Imbalance Act is a poor attempt in this direction.

> If the school committee fails to file a plan with said board pursuant to its recommendations, then it shall be deemed that such recommendations of the board shall constitute the plan for the elimination of racial imbalance . . . , and any funds withheld by the commissioner shall thereupon be released.

Mass. H.R. 2162 §2 (1967) (Petition of School Committeeman Thomas S. Eisenstadt and Representative Joseph C. DiCarlo). But this bill provides no means of enforcing the plan ,and in fact reduces the impact of one of the present techniques (the withholding of funds). The bill is deficient in three other respects. (a) It reduces the board's flexibility in defining racial imbalance by providing that "a school with fifty per cent or less negro students shall be conclusively presumed to be in balance, and a school with seventy-five per cent or more negro students shall be conclusively presumed to be imbalanced." (b) It substitutes "Negro" for non-white. (c) It forbids a school committee to transport a student if his parent files a written objection.

64. The New York Commissioner of Education derives his power from N.Y. Educ. Law §§ 301, 305 (McKinney 1953). For a discussion, *see* Vetere v. Allen, 41 Misc.2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1962), *modified,* 21 A.D.2d 561, 251 N.Y.S.2d 480 (1964), *aff'd,* 15 N.Y.2d 259, 258 N.Y.S.2d 77 (1964), *cert. denied,* 383 U.S. 825 (1965).

the school referred to in the contract with the federal government is built, it will open its doors to a student population which will be classified as "racially imbalanced" under the terms of the Act. Federal funds will thus be used in a manner in direct conflict with the purpose of the Act. At least two arguments exist for a resolution favoring the federal government. First, it can be argued that the Act impairs the contract with the federal government in violation of Article I, section 10, of the Constitution of the United States.[65] Second, it can be argued that the federal government has pre-empted the subject matter of the contract, especially if it is part of a program such as Model Cities.[66] In this situation the normal route would be renegotiation of the federal contract. But if some party to the contract is unwilling to take that route, the Act should be read to avoid the conflict.[67]

The last major problem area to be discussed is that of transporting students to reduce or eliminate racial imbalance. Although the Act provides that the *board of education cannot* require a school committee to bus a student outside the school district for his neighborhood if his parents file written objection,[68] the *school committee can* require such busing even though the parents object.[69] For political reasons a school committee is unlikely to require busing of students over parental objection. The Boston experience even demonstrates an unwillingness to finance voluntary busing under its "Open Eronllment Policy."[70]

But the board could require that a plan to eliminate racial imbalance redistrict in order to provide for larger attendance areas. The Act

65. *See generally,* Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95 (1938).

66. *See generally,* Pennsylvania v. Nelson, 350 U.S. 497 (1956).

67. In Commissioner of Labor and Industries v. Boston Housing Authority, 345 Mass. 406, 188 N.E.2d 150 (1963), a similar conflict arose between a state statute on wages in public housing projects [MASS. GEN. LAWS ch. 121, § 26T (Supp. 1966)] and the United States Housing Act [42 U.S.C. § 1416(2) (1964)]. The court said

> These constitutional considerations bear strongly upon the construction of [the state statute]. Accordingly, so as to avoid serious constitutional doubts, we interpret [the state statute] as not intended by the [state] Legislature to require action by the authority in conflict with proper explicit budgetary requirements of P.H.A. [the federal agency].

68. MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966).

69. *See,* Note, *Duty to Integrate Public School? Some Judicial Responses and a Statute,* 46 B.U.L.REV. 45, 72-3 (1966). Some proposed amendments to the Act are now before the Joint Committee on Education. Some provide that no school committee shall transport any student over parental objection. Mass. H.R. 2162 (1967). Another deals extensively but verbosely with transportation. Mass. H.R. 1783 (1967).

70. *See* Note, 46 B.U.L.REV. 45, 79 (1966); OHRENBERGER, THE BOSTON BLUEPRINT FOR EQUAL EDUCATIONAL OPPORTUNITY (1966).

specifically contemplates such action, provided the redistricting takes the safety of the children into account.[71] The enlarged attendance areas may require busing. Parental objection could not defeat such action because the students are not being bused outside the school district established for their neighborhood. Since the emphasis of the Act is on parental objection, the board could probably also require busing of students whose parents do not object.

Could the board require the school committee to pay the transportation costs of students bused under the plan? Chapter 71, section 68, of the Massachusetts General Laws gives the department of education the power to require towns to provide free transportation for students who live more than two miles from the school they are "entitled to attend."[72] If any town is under a plan to correct racial imbalance, the school that a student is "entitled to attend" is determined by the plan. Hence the state could require such towns to pay the costs of transportation. But the racial imbalance crisis is in the cities and not the towns.[73] Therefore, the state does not have specific power outside of the Racial Imbalance Act to require such action. Nevertheless, it would seem reasonable for the state to require a school committee to pay the costs of transportation in the limited case where the legislature has specifically provided state aid for transportation of pupils. The Racial Imbalance Act itself does not provide any state aid for transportation of pupils.[74] The laws of Massachusetts provide aid to reimburse the transportation costs of any pupil who resides more than one and one-half miles from the "school he attends."[75] The Racial Imbalance Act, however, draws no distinction on the basis of the availability of state aid; therefore it seems to follow that if the board

71. MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966).

72. The Attorney General has issued an opinion that this section is not violated by transportation of pupils to reduce or eliminate racial imbalance in the public schools. Opinion of Massachusetts Attorney General (Jan. 18, 1966).

73. Since a city is an incorporated town, the use of town in MASS. GEN. LAWS ch. 71, § 68 may include cities. MASS. CONST. amendments, art. II. This, however, is not clear.

74. *Supra,* note 72, finding that the authorization of the board to give "technical and other assistance" (MASS. GEN. LAWS ch. 15, § II) " does not imply that the [Board] may lawfully transfer funds to a municipality for the purpose of aiding pupil transportation plans . . . ."

75. MASS. GEN. LAWS *ch.* 71 §§ 7A, 7B, 16C (Supp. 1966). (These sections use town and city interchangeably.) Nothing appears to require a student to attend the school nearest his residence. Although MASS. GEN. LAWS ch. 71, § 37 (1958) gives the school committee general charge of the schools and specific power to regulate attendance, MASS. GEN. LAWS ch. 71, § 37D (Supp. 1966) is directed at a specific problem and would control.

can require transportation in one case, it should be able to require it in the other case.

The Act permits a plan to provide for the voluntary cooperation of other cities and towns.[76] In 1966 the General Court passed legislation (known as the METCO bill) allowing a student to attend a public school of a town in which he does not reside if such town has adopted, and the board has approved, a plan to eliminate racial imbalance.[77] The student no longer needs the approval of the school committee of the town in which he resides. The legislation also authorized state funds to give the receiving towns financial assistance, including payment of tuition and transportation costs. In addition the law made federal funds under the Elementary and Secondary Education Act[78] available to participating towns.

V. Two Years of Operation

In order to consider the implementation and effectiveness of the Act, it is necessary to examine its actual operation. Fortunately, the Massachusetts Act has been in effect for a little over two years and therefore substantial information concerning its operation is available. This part will examine the experiences of Cambridge, Medford, Springfield and Boston under the Act; in this process, some of the practical problems which can arise, such as delaying tactics used by a recalcitrant school committee, will become apparent. Part VI will then evaluate the Act, both in terms of its operational effectiveness and in terms of improvements which could be made.

Cambridge

In 1960, Cambridge had a population of 107,716 including 6,787 non-white residents.[79] In 1965 the *Kiernan Report* found one school, the Houghton Elementary School, to have a student body more than 50 per cent (51.9%) non-white.[80] Although this school was still racially imbalanced in October, 1966,[81] there are several develop-

76. Mass. Gen. Laws ch. 71, § 37D (Supp. 1966).
77. Mass. Gen. Laws ch. 76, §§ 12 A-B (Supp. 1966).
78. 20 U.S.C. §§ 881-85 (Supp. 1966).
79. Bureau of the Census, Department of Commerce, Census of Population, Massachusetts, Part 23 (1960).
80. Kiernan Report, *supra* note 1, at 64.
81. Massachusetts Department of Education, Distribution of White and Non-White Pupils in the Public Schools, October 1, 1966 Census (Nov. 7, 1966) (list of racially imbalanced schools) [hereinafter 1966 Racial Census].

ments which promise a balanced school in the future. First, a new school is being built. Although this school had been planned prior to the Racial Imbalance Act, the Act has had beneficial impact on the building program in at least two ways: (a) the size of the school is larger than originally planned, and (b) the construction of this school has been pushed ahead of two other elementary schools.[82] Secondly, it appears probable that a nearby parochial school will close when the new and better-equipped public school opens. Finally, Harvard University has recently located some of its student housing in this area, and members of the Harvard faculty have begun to purchase residences in the area at prices that the Negro owners cannot resist. The combined effort of these forces will undoubtedly produce a racially balanced Houghton School.

Medford

According to the October, 1964, racial census, 60.7 per cent of the students enrolled in the Hervey School were non-white.[83] Today Medford has no school with a Negro majority.[84] This achievement is due in large part to the positive attitude taken by the school administrators. Shortly after the *Kiernan Report* was released, the Medford School Superintendent issued a report on racial imbalance in the Hervey School. He said:

> The elimination of racial imbalance will remove a symptom of racial prejudice. It will not cure it, but it may, by example, tend to mitigate it. It proves that public schools can provide leadership to a community and not perform a completely servile role reflecting like a mirror all the aspects both good and bad of a community.
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> * * *
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> If adjustments can be made so that enrollments in the respective schools are balanced, the school committee should do it.[85]

Superintendent Houston made three recommendations to the Medford School Committee: (a) that students be reassigned and trans-

82. Interview with Dr. Francis Duehay, member of the Cambridge School Committee and of the faculty at the Harvard Graduate School of Education, in Cambridge, Massachusetts, March 9, 1967.

83. KIERNAN REPORT, *supra* note 1, at 53.

84. Letter from John Houston, Medford Superintendent of Schools, to the author, March 13, 1967; 1966 RACIAL CENSUS, *supra* note 81.

85. J. HOUSTON, REPORT TO MEDFORD SCHOOL COMMITTEE ON RACIAL IMBALANCE IN THE HERVEY SCHOOL at i and 13 (May 20, 1965).

portation provided; (b) that boundary lines be changed; and (c) that "white parents who believe firmly that racial imbalance is morally and educationally wrong" send their children to the Hervey School.[86] The Medford School Committee permitted the transportation of Negro students to another school to eliminate racial imbalance.[87]

Medford is an example of successful action to correct racial imbalance. To evaluate the process, more must be known about the city. Medford's population of 64,971, contains only 1,164 non-whites.[88] It is located on the outskirts of the City of Boston; if it is not a suburban community, it at least borders on being one. All of its schools are above the national norm.[89] The small non-white community has been segregated by a "tacit agreement among people not to sell homes to Negroes;"[90] their neighborhood, however, is one of well-kept modest homes. Medford does not illustrate the racial imbalance problem that typically confronts major American cities today. In a city such as Medford, where the reassignment of only a hundred students would eliminate any racial imbalance, the Act can be expected to work.[91] But such a city might have acted without legislation; it appears that the *Kiernan Report* may have been all that was needed to spur Medford to action.

Springfield

With a 1960 population of 174,463, Springfield is more typical of the city problem than the cities already considered. It has a non-white population of 13,361,[92] and according to the 1964 census eight of its schools had majorities of non-white students.[93] Springfield is a city with a recent history of Negro concern over the school system;[94] as will be seen, this history created problems in the implementation of the Racial Imbalance Act.

In September, 1965, Springfield initiated a modified open enrollment plan in an attempt to reduce racial imbalance. One hundred fifty non-white students requested and received transfers to eleven

86. *Id.*, at 22-4.
87. Letter from John Houston, *supra* note 84.
88. BUREAU OF THE CENSUS, *supra* note 79.
89. J. Houston, *supra* note 85, at 19.
90. *Id.*
91. In 1965 there were 108 whites and 167 non-whites in the Hervey School. *Id.* at 18.
92. BUREAU OF THE CENSUS *supra*, note 79.
93. KIERNAN REPORT, *supra* note 1, at 63-4.
94. *See* note 53, *supra*.

schools. No parents of white pupils requested transfers of their children to any of the racially imbalanced schools. The response may have been so small because the plan required the parents to provide transportation. One hundred thirty of these students were transferred out of racially imbalanced Buckingham Junior High School, but the non-white enrollment at the school increased from 63.22 to 65.61 per cent.[95] At best this plan constituted no more than a poor holding operation.

The revised Springfield plan for the 1966-1967 school year showed more promise of success. It provided for the abandonment of several schools, changes in school district lines, school construction, an open enrollment plan with state and federal funds to pay for the transportation costs, and a call for state assistance in gaining the voluntary cooperation of the suburbs.[96] As Table I illustrates, this plan failed to reduce racial imbalance.[97] The lack of success can be attributed to at least two factors. The Negro community demanded *forced* two-way busing[98] — a not unreasonable demand in itself but one contrary to chapter 71, section 37D, of the Act.[99] This demand resulted from the friction between the school committee and the Negro leadership which had developed from the active Negro concern with the schools and previous school committee responses. In addition, the Negroes boycotted the open enrollment program. Consequently, only three hundred[100] of the expected eight hundred transfers materialized.[101]

The Deputy Commissioner of Education, Dr. Thomas J. Curtin, believes that the new Springfield plan (1967-68) has a greater chance

95. Springfield School Committee, Revised Springfield Plan for the Promotion of Racial Balance and the Correction of Existing Racial Imbalance in the Public Schools 7 (April 1, 1966).

96. *Id.*

97. This table was compiled with information taken from the Revised Springfield Plan, *supra* note 95; the Kiernan Report, *supra* note 1, at 63-4; and the 1966 Racial Census, *supra* note 81. No information was available for the blank spaces.

98. Interview with Dr. Thomas J. Curtin, Deputy Commissioner of Education (a state office), in Boston, Massachusetts, March 7, 1967.

99. Mass. Gen. Laws ch. 71, § 37D (Supp. 1966).

100. Interview with Dr. Curtin, *supra* note 98.

101. A city-wide survey was conducted to determine whether parents would want to transfer their children from their neighborhood school to bring about better racial balance if transportation were paid for by another party. Of the total responses, 94% were opposed and 6% were in favor. The percent of Negro parents with an affirmative answer was 25.3. This survey showed that 822 pupils (212 white and 610 non-white) desired transportation. Hence the school committee's expectancy is not unfounded. Data from the Revised Springfield Plan, *supra* note 95.

of success. According to Dr. Curtin Springfield plans to build large schools (possibly educational parks) near the edge of the city.[102] These schools will draw students from the ghettos because no schools will be located near the center of the city. Such a school construction program could provide a city like Springfield with a long-range solution. In the short run there is hope that the open enrollment policy will be more effective next year. Such hope rests on the belief that the Negro parents are now convinced of the school committee's sincerity in these matters; they appear to be ready to work together.

From the school desegregation suit filed against the Springfield School Committee,[103] one might conclude that Springfield is a city that would not have taken steps to eliminate racial imbalance without the Act. But prior to that suit, the city had adopted a policy statement in favor of eliminating racial concentration in the schools.[104] How effectively this policy would have been implemented without legal compulsion in court or by legislation can never be known. The legislation exists, and the Act has reduced the tension between the Negro leadership and the school authorities. This by itself is no minor accomplishment. But the Act appears to have accomplished more than that for Springfield has begun to investigate new methods of educating its students. It is considering the construction of larger schools which may be able to bring to its students the benefits of a live theatre, a science complex and computer technology, to name a few.[105]

Boston

No Massachusetts city is confronted with the racial concentration that faces Cleveland,[106] New York,[107] and Philadelphia.[108] In those cities the public school enrollment is more than fifty per cent non-

102 Interview with Dr. Curtin, *supra* note 97. Syracuse, New York, plans to construct four educational parks. Each will serve approximately 5,000 students. RACIAL ISOLATION, *supra* note 2, at 168-69.

103. Barksdale v. Springfield School Committee, 237 F. Supp. 543 (D. Mass.), *vacated* 348 F.2nd 261 (1st Cir. 1965).

104. In September 1963 the Springfield School Committee resolved to "take whatever action is necessary to eliminate . . . racial concentration in the schools. . . ." Barksdale v. Springfield School Committee, *supra* note 53.

105. *See* RACIAL ISOLATION, *supra* note 2, at 171-177.

106. *Id.* at 3.

107. N.Y. Times, March 15, 1967, at 1, col. 3.

108. RACIAL ISOLATION, *supra* note 2, at 3.

white, while in Boston, where most of Massachusetts' Negroes live,[109] only twenty-six per cent of the 1966-67 public school enrollment was non-white.[110] But Boston has a rapidly increasing non-white population. Between 1950 and 1960 the Negro percentage of the city's population rose from five per cent to nine per cent,[111] an increase of 26,000.[112] By 1966, forty-nine of its 198 public schools were racially imbalanced under Massachusetts law.[113]

The Boston School Committee's attitude toward the Racial Imbalance Act was neither constructive nor cooperative. It repeatedly refused to accept the principle behind the Act — that racially imbalanced school are educationally harmful and ought to be eliminated. The school committee's initial and revised plans to eliminate racial imbalance demonstrate the unwillingness of a majority of its members to comply with the Act.[114] The state board of education rejected both plans and withheld state aid. The school committee refused to change them; instead it went to court. It sought a court order setting aside the determination of the board and decreeing the revised plan to be in compliance with the law.[115] In another suit it sought a declaratory judgment that the Act was contrary to the United States and Massachusetts constitutions.[116] Subsequently, members of the school committee submitted to the General Court several bills calling for the repeal of

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109. MASSACHUSETTS ADVISORY COMMITTEE to the U.S. COMMISSION ON CIVIL RIGHTS, DISCRIMINATION IN HOUSING IN THE BOSTON METROPOLITAN AREA 3 (1963) [hereinafter cited as HOUSING IN BOSTON].

110. BOSTON SCHOOL COMMITTEE, 1966-67 PLAN TOWARD THE ELIMINATION OF RACIAL IMBALANCE IN THE PUBLIC SCHOOLS 23 (Feb. 1967) [hereinafter cited as the 1966-1967 PLAN].

111. HOUSING IN BOSTON, *supra* note 109, at 2.

112. HOUSING IN BOSTON, *supra* note 109, at 7. In 1960 there were 68,493 non-white persons residing in Boston. BUREAU OF THE CENSUS, *supra* note 79.

113. 1966 RACIAL CENSUS, *supra* note 81.

114. This attitude was still prevalent in a report submitted to the U.S. Commission on Civil Rights. *See* OHRENBERGER, THE BOSTON BLUEPRINT FOR EQUAL EDUCATIONAL OPPORTUNITY (1966) [hereinafter cited as THE BOSTON BLUEPRINT].

115. School Committee of the City of Boston v. Board of Education, Civil No. 85853 Eq. (Superior Ct., Suffolk County, *filed* Aug. 5, 1966, *decided* Dec. 21, 1966), *appeal filed* Jan. 4, 1967. In the Superior Court, Judge Macaulay held that the Board's actions were based on errors of law and were arbitrary and otherwise not in accordance with law. The Board appealed. During the pending of the appeal the Boston School Committee filed a new plan which was approved. Consequently the appeal was mooted. __ Mass. __, 227 N.E.2d 729 (1967).

116. Eisenstadt v. Board of Education, Civil No. 86080 Eq. (Superior Ct., Suffolk County, *filed* Sept. 23, 1966, *decided* Dec. 30, 1966), __ Mass. __, 227 N.E.2d 729 (1967) (upholding the Act's constitutionality).

substantial weakening of the Act.[117] While this series of events was occurring, little if anything was being done to eliminate or reduce racial imbalance in the schools. The school committee was too busy with evasive action; it refused to begin to deal with a most difficult problem. Then on January 31, 1967, in a third suit filed by Mayor Collins' office to enjoin the withholding of funds, Judge Mitchell issued a decree permanently enjoining the Commissioner of Corporations and Taxation and the Comptroller from paying to the City of Boston any of the funds withheld unless the school committee submitted an acceptable plan within ninety days.[118] This decision came at the very moment that the school committee appeared to have a better bargaining position than the board; it threw the problem into a new light.

Throughout this period the school committee asserted that it was not responsible for the racially imbalanced schools. The question, however, was not who or what was responsible for their existence, but rather what was to be done about them. In reply the school committee placed continued emphasis upon its policy of having each pupil attend the school serving his neighborhood community. It felt that it was doing enough by offering various experimental programs including compensatory education programs,[119] in-service training on urban teaching problems,[120] inter-racial and inter-cultural exchanges,[121] and an open enrollment policy.[122] All these programs aided student achievement,[123] but they had little effect on reducing racial imbalance.

The Open Enrollment Policy (OEP) provides that:

> it is also the practice, at the request of the parents, to permit a child to attend any school having appropriate grades or courses — provided that particular school, after enrolling the children of its own locale, has adequate accommodations for

117. Mass. H.R. 188 (1967) (repeal); Mass. H.R. 728 (1967) (require the Board to approve school construction in any section of a city or town where it will have no effect on racial imbalance); Mass. H.R. 729 (1966) (places the power to withhold funds in the General Court); Mass. H.R. 1364 (1967) (changes some of the wording in the racial imbalance law from non-white to Negro); Mass. H.R. 2162 (1967) (for a discussion see notes 69 and 63, *supra*).

118. City of Boston v. Crane, *supra* note 45.

119. THE BOSTON BLUEPRINT, *supra* note 114, at 20-42.

120. *Id.* at 52-3.

121. 1966-67 PLAN, *supra* note 110, at 37.

122. THE BOSTON BLUEPRINT, *supra* note 114, at 5-19.

123. In a "parental evaluation" of the compensatory education programs (Operation Counterpoise) for 1965-66, the parents considered the program a success. *See* THE BOSTON BLUEPRINT, *supra* note 114 at 23.

> pupils from other districts, and *provided the parent assumes cost of transportation to and from such school.* [Emphasis added.][124]

Although each year several thousand students made use of this program, it was not until a group of Roxbury-North Dorchester parents formed Operation Exodus[125] that the program became an effective tool for reducing racial imbalance. The parents were more concerned with getting their children to good schools than they were with getting them to racially balanced ones; their objectives, however, led them to racially balanced schools. Operation Exodus began as a protest against school committee inaction in the fall of 1965, but it soon found itself busing about 400 students to schools outside their neighborhoods. Today the number has risen to over 850, and has confronted the organization with one financial crisis after another as it seeks the funds needed to meet its transportation costs.[126] The school committee claims some of the credit for Operation Exodus' success because of the vacant seat counts that it has regularly published,[127] but it has contributed little to Operation Exodus' major problem — finances.[128]

In the winter of 1965-66 the Metropolitan Council for Educational Opportunities (METCO) was organized to provide opportunities for integrated learning experiences and as a first step toward solving the problem of "de facto segregation" in Boston schools.[129] METCO currently transports 219 children from predominantly Negro areas of Boston to 28 schools located in seven suburban towns. Although the initial program required the approval of the Boston School Commit-

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124. 1966-67 PLAN, *supra* note 110, at 8. In December 1965 the School Committee asked Mayor Collins to provide funds under chapter 71, section 7B, for the purchase of MBTA (public transportation) car checks. *Id.* at 9. Open enrollment was designed to reduce overcrowding in the schools.

125. *See* TEELE, *supra* note 26.

126. This information was gathered in an interview with Mrs. Marlene McIlvaine, Operation Exodus, in Boston, Mass., Feb. 2, 1967. In March 1967 Operation Exodus received a $70,000 federal grant. This will assure the life of the project for the rest of the year. Boston Globe, March 4, 1967, at 2, col. 2.

127. BOSTON BLUEPRINT, *supra,* note 114, at 6.

128. See text at note 116, *supra.*

129. METCO is funded under Title III of the 1965 Elementary and Secondary Education Act, 79 Stat. 27 (1965). In addition the Carnegie and Stern foundations provide funds. Arlington, Braintree, Brookline, Lexington, Lincoln, Newton and Wellesley are participating in METCO for the academic year 1966-67. Several other communities have joined METCO for 1967-68. Interview with Joseph E. Killory, Executive Director of METCO, in Boston, Mass., February 27, 1967.

tee[130] and although Mary E. Vaughan, Associate Superintendent of Boston Schools, serves on the Board of Directors of METCO,[131] the program originated in suburban communities as a by-product of the political activity surrounding the Racial Imbalance Act. Since METCO and Operation Exodus together are only able to transfer 1,000 students, they have little impact on the racial character of Boston schools.

Within thirty days of Judge Mitchell's ninety-day ultimatum,[132] the Boston School Committee submitted a "final plan" to the state board of education.[133] On March 15, the board, by a six to two vote approved the plan. The board's approval was "conditional." It said:

> With the expectation that the Boston School Committee will utilize significantly more of our previously stated recommendations for short term methods for the elimination of racial imbalance in the school year 1967-68, the plan of the Boston School Committee for 1966-67 is approved as a first step.[134]

The approval released $6.3 million in withheld state aid.[135]

The Boston plan provides for the continuation of past programs.[136] Two racially imbalanced schools will be closed.[137] It praises Boston's Open Enrollment Policy and Operation Exodus.[138] Three middle schools (grades six through eight) were to be opened in September 1967; these schools were to have larger capacities and will allow pupils leaving racially imbalanced schools to enter a racially balanced high school one year earlier.[139] The plan also enthusiastically supports METCO's current efforts to expand its operations, and the school com-

130. Under MASS. GEN. LAWS ch. 76, §12. But MASS. GEN. LAWS ch. 76, §12B alters the situation. See text accompanying note 77, *supra.*

131. BOSTON BLUEPRINT, *supra* note 153, at 8.

132. City of Boston v. Crane, *supra* note 45.

133. Boston Globe, Feb. 28, 1967, at 1, col. 4 (morning ed.).

134. Boston Globe, March 16, 1967 at 14, col. 1 (morning ed.).

135. Boston Globe, March 16, 1967, at 1, col. 1 (evening ed.).

136. These include compensatory and enrichment programs, urban teacher training seminars, inter-racial and inter-cultural exchanges, and multi-ethnic textbooks. *See* the 1966-67 PLAN, *supra* note 110 at 32-9.

137. The Asa Gray (98.8% non-white) and Aaron Davis (91% non-white) schools will be closed. *Id.* at 1. The parents at Asa Gray protested the closing of their school, but this reaction seems to be due to confusion over where the children will attend school next year. *Hearings on the amendments to the Racial Imbalance Act Before the Joint Committee on Education,* Massachusetts General Court, Boston, Mass., March 27, 1967. (The author observed the proceedings. There is no printed record.)

138. 1966-67 PLAN, *supra* note 110, at 10-11.

139. *Id.* at 27 (formerly most of the high schools contained only three grades).

mittee has sent letters to sixty-two suburban communities asking that they help reduce racial imbalance in the Boston public schools through participation in METCO.[140] The above measures are the only short-term ones in the plan. It is claimed that they will relocate 3,456 pupils in racially balanced schools and reduce the number of imbalanced schools by three.[141] But 2,039 of the 3,456 students are *currently* in racially balanced schools under the Open Enrollment Policy.[142] Another 500 are attributed to METCO (assuming there is an expansion of 280), but METCO would transport these students in any case. Consequently the activities of the Boston School Committee will affect *only 917 students* that would not otherwise have been affected.

It should be noted that the plan makes no provision for the redrawing of existing school district lines unless the construction of a new school is involved. Furthermore, the plan places much emphasis on the METCO program as part of a metropolitan solution.[143] METCO, however, does not regard its program as a solution to Boston's problems; it views it as a means of providing quality education with integration a desirable but incidental by-product.[144] To begin with, METCO could handle no more than 2,000 students.[145] Moreover, the burden of the program is on the non-white children; they must get up earlier and take the bus ride. Although at the present time two-way busing is politically unfeasible, this does not mean that one-way busing is a permanent solution to this complex problem. Finally, the students leaving the imbalanced school are getting a better education in an integrated atmosphere, but those left behind remain in racially imbalanced schools.

The plan shows more promise with its long term proposals because it calls for the construction of five new elementary schools (kindergarten through grade 5).[146] Each of these schools will have a capacity for roughly 1,000 pupils and will be located on the periphery of non-white neighborhoods. This will allow them to draw pupils from a larger geographic area and hopefully to maintain a racially balanced pupil population. In order to achieve this broader geographic district,

140. *Id.* at 6.
141. *Id.* at 31.
142. *Id.* at 11 and 30.
143. *Id.* at 7.
144. Interview with Joseph E. Killory, Executive Director of METCO, in Boston, Mass., Feb. 27, 1967.
145. *Id.* The limitation is due to the number of vacant seats available in the suburban towns.
146. 1966-67 PLAN, *supra* note 110, at 42-52.

the existing district boundaries in the vicinity of the new schools will have to be altered. Not only are the new schools strategically located, but the school committee also promises to adjust attendance lines to maintain the racial balance.[147] The plan recognizes that "population mobility, new home construction, and the changing racial composition of Boston's neighborhoods are some . . . factors that make long-range projections regarding racial compositions of proposed new schools educated guesses at best."[148]

In summary, the plan's short-term proposals are weak while its long-term ones, though subject to population changes over a two to three year period, are worthy of experimentation. In general the plan does not show great promise. Why then did the board approve it? There are several possible reasons. (a) The plan's language indicates that the school committee's attitude is now more cooperative than before. Its proposals indicate a movement toward acceptance of the Act's guiding principle[149] and hopefully will serve as precedent in the future. (b) Several amendments to the Act are now before the General Court. Most of these, if passed, would weaken the Act. The board may have felt that its approval of a Boston plan would make it easier for the legislature to reject these amendments.[150] (c) Three seats on the school committee were to be filled by the November 1967 elections. Perhaps the board desired to undercut the racial imbalance issue by making the operation of the Act the status quo.[151] (d) The

147. *Id.* at 42-3.

148. *Id.* at 40. *See also id.* at 42, 45, 48, 50 and 52. School Committeeman Lee believes that a two-year opening date is optimistic and that the schools are *so located that they will be majority non-white by the time they open.* Inerview with Mr. Lee in Boston, Mass., March 14, 1967.

149. For example, the plan shows a concern that schools racially balanced at present will become racially imbalanced. It attempts to prevent such events. *See* 1966-67 PLAN, *supra* note 110, at 48, 57. But the school committee has not embraced the concept that a school with varying class structure is a better school. Testimony at the *Hearings, supra* note 137. *See also,* Boston Herald, April 18, 1967, at 36, col. 1 (school committee approved the establishment of a *new* imbalanced school.)

150. For the amendments see note 117, *supra.* In addition there are Mass. H.R. 1783 (1967); Mass. H.R. 2160 (1967); Mass. H.R. 2362 (1967); Mass. H.R. 2363 (1967); Mass. S.R. 940 (1967, the Joint Committee on Education has given the petitioner leave to withdraw). From the testimony at the Hearings on these bills (see note 117, *supra*), it may be inferred that the bills will probably be defeated. The President of the Senate and the Speaker of the House both favor the present law as it stands.

151. Furthermore the school committee's position is one of protecting the status quo, and American society has a high regard for existing institutions, tending to call for change only in times of grave urgency. American cities seldom, if ever, experiment with unorthodox ideas. They need to be pushed from outside. *See*

leader of the opposition to the Act on the school committee, Mrs. Hicks, was then a candidate for mayor. Rumors of her impending candidacy had spread before March, 1967, when Boston's plan was before the board of education. Perhaps these rumors influenced the board.[152]

Acceptance of the Act's underlying principle may mean that in the future the school committee will take more effective short-run measures such as bearing the transportation costs of open enrollment and redistricting existing attendance areas.[153] But the growth and mobility of the Negro population will probably give Boston a majority non-white public school system within ten years.[154] Over the long run, possibly the only solution to racial imbalance in Boston public schools will be one relying on metropolitan cooperation, for example, in the construction of educational parks.[155]

VI. Evaluation

A. Operational Effectiveness

The examination in Part V of the experiences of four Massachusetts cities under the Massachusetts Racial Imbalance Act can serve as the basis for several observations about the operational effectiveness of the Act. First, it seems clear that school committee and community

E. BANFIELD, BIG CITY POLITICS 12 (1965) (also a chapter on Boston at 37-50). In addition the Boston Irish have a tradition of resisting the state. E. BANFIELD AND J. WILSON, CITY POLITICS 39 (1965).

152. The Mayor's Office could be influential on the question of racial imbalance. So far it has tried to stay out of the controversy. Telephone conversation with Thomas Francis, Mayor's Office, in Boston, Mass., March 7, 1967. (The problem is "political dynamite.") The Board may believe that Mrs. Hicks cannot win the mayoralty race.

153. Nine redistricting proposals had been prepared for the Board and the school committee. The latter rejected all of them as "educationally indefensible." Conroy, *Educational and Legal Aspects of School Integration,* Appendix G (Dec. 1966, unpublished paper).

154. In considering this estimate it must be remembered that 41 percent of the white elementary school population attend non-public schools. RACIAL ISOLATION, *supra* note 2, at 39. There is some feeling that the parochial schools will not be able to compete for the good teachers in the future. If this will return white students to the public schools, the result predicted will be delayed. The disappearance of the parochial school could also have a positive effect on the calibre of candidates for the school committee.

155. For a discussion of these new school concepts *see* RACIAL ISOLATION, *supra* note 2, at 163-83. Boston has over 90,000 students in its public schools. Nearly 25,000 are non-white. How many students would attend each school in an educational park? How many schools would be in one "park"? How many students would attend school at each "park"?

attitudes are crucial to the successful functioning of the Act. In Medford, racial imbalance in the public schools was eliminated more because of the relatively small non-white population and the attitudes of the school officials than because of the Racial Imbalance Act. In contrast, the attitudes of Boston school officials were and continue to be a major stumbling block.

Second, it seems that the speed and extent of reduction in imbalance can be expected to be a function of the total population and the relative white and non-white population in the society to which the Act is applied. The ease of correcting racial imbalance in a city such as Medford, where the shift of only a hundred students could be determinative, must be contrasted with the situation faced by a city such as Boston. In the latter, large populations coupled with large percentages of non-white persons add immeasurably to the difficulties attendant upon the correction of racial imbalance in the public schools. The difficulties which have faced Boston, even apart from its unresponsive school committee, suggest that perhaps the elimination of racial imbalance is not entirely feasible in large cities, especially cities larger than Boston. Perhaps these larger cities should give more consideration to the problem of how to achieve quality education in schools serving minority and/or poverty belt children even though they are racially imbalanced.

A third observation which can be made is that Boston's experience under the Act indicates that the sanction of withholding funds is not very effective. The Boston school committee's capitulation in the form of submitting an "acceptable" plan stemmed largely from the Superior Court decree forbidding payment of state educational funds to the City of Boston unless a satisfactory plan was submitted.[156] But the withholding of funds itself accomplished little, if anything. If the Act itself had made the above court decree a more visible result of non-compliance, the Act's effectiveness would have been improved.

Finally, the Massachusetts statute does not put sufficient power in the hands of persons at the state level to insure the smooth operation of the Act in the face of local opposition. The Boston School Committee succeeded in blocking the effective operation of the Act within its jurisdiction for almost two years. This can be blamed essentially on insufficient authority at the state administrative level. If the Massachusetts Board of Education had powers similar to those of the

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156. City of Boston v. Crane, *supra* note 45.

New York Commissioner of Education,[157] the problems faced in Boston might have been avoided.

B. Areas of the Massachusetts Racial Imbalance Act Needing Improvement

Parts III and IV point out numerous ambiguities and questions of interpretation which can arise under the Racial Imbalance Act. They are of greater or lesser moment, but ideally they all ought to be clarified. Some of the more important problems in this area which should be dealt with are as follows: (1) clarification of the definition of "racial imbalance;"[158] (2) a more explicit statement of the measures which shall or may be used in a plan to reduce racial imbalance as well as a more explicit statement of the factors to be considered in formulating a plan;[159] (3) clarification of whether funds, withheld because a plan is not approved, can subsequently be released upon approval of a new or revised plan;[160] (4) clarification of the effect of the Act on contracts between local school committees and the federal government providing federal funds which may be used to build racially imbalanced schools;[161] and (5) clarification of problems arising from the transportation of students under a plan to eliminate racial imbalance.[162] Other areas where clarification would be useful are (1) the type of aid and assistance which the board of education may or must give to school committee's, and at what stage it may or must be given;[163] (2) the steps the board of education can take if an approved plan proves ineffective or inadequate in operation;[164] and (3) whether state aid for school buildings can be withdrawn prior to a finding that a school committee has failed to show progress within a reasonable time.[165]

Besides improvement through clarification, certain substantive additions to or changes in the Act seem desirable. One area where improvement along these lines might be made is in the use of state funds to obtain compliance with a directive to eliminate imbalance. Since

157. See *supra* note 64 and accompanying text.
158. *See* pp. 93-95 *supra.*
159. *See* pp. 95-96 *supra.*
160. *See* pp. 91-92 *supra.*
161. *See* pp. 97-98 *supra.*
162. *See* pp. 98-100 *supra.*
163. *See* pp. 90-91 *supra.*
164. *Id.*
165. *See* pp. 89-90 *supra.*

the local school committees have the burden of carrying out the Act's policy in the first instance, some means must be available to spur unresponsive or recalcitrant school committees.[166]

Presently, the most important sanction available to the Board is that of withholding state funds.[167] Whether such a sanction is effective is a function of the dependence of the various school jurisdictions on state funds. For example, in 1966-67, Boston's school budget was $50.5 million[168] plus $6.3 million in state aid.[169] The Boston School Committee submitted a $59.2 million budget for 1967-68.[170] In addition Boston schools may receive some $21 million in returns from the state sales tax.[171] When the state funds are roughly thirty-three per cent of the city's school expenditures, the withholding power seems to pose a very potent threat. But when a particular school jurisdiction relies only marginally on state aid, the effectiveness of the sanction of withholding is seriously impaired. Furthermore, even a jurisdiction which relies heavily on state aid might seek to obtain money elsewhere (*e.g.*, through taxes or borrowing) rather than submit to the board of education's command to submit a plan which would eliminate racial imbalance.[172]

Although the manipulation of state funds may not in all cases be effective to foster the correction of racial imbalance, it can be effective in some. Therefore, it is worthwhile to consider what provisions, if any, would make this power over the purse *more* effective. One clear possibility is to apply the restrictions on state aid to aid which is not immediately connected with the school systems. Wider latitude in restricting state funds will give the board of education increased leverage with local school committees. Furthermore, although certain towns and cities may not use much state aid in education

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166. One of the difficulties with the Supreme Court desegregation decisions is that they call upon the local school authorities to present a desegregation plan. This has proved to be one of the impediments to integrating the Southern school system. Brown v. Board of Education of Topeka, 349 U.S. 294 (1954). *See,* U.S. COMMISSION ON CIVIL RIGHTS, SURVEY OF SCHOOL DESEGREGATION IN THE SOUTHERN AND BORDER STATES 1965-66 (1966); U.S. v. Jefferson County Board of Education, 372 F.2d 836 (5th Cir. 1967) (en banc).

167. MASS. GEN. LAWS ch. 15, § 1I (Supp. 1966).

168. Boston Globe, April 6, 1967, at 1, col. 4 (morning ed.).

169. Boston Globe, March 16, 1967, at 1, col. 1 (evening ed.).

170. Boston Globe, April 6, 1967, at 1, col. 4 (morning ed.). Mayor Collins indicated that he might not approve the increased budget. *Id.*

171. Boston Globe, March 16, 1967, at 1, col. 1 (evening ed.). This figure depends on the result of litigation brought by the city. *Id.*

172. MASS. GEN. LAWS, ch. 71, § 37O (Supp. 1966).

and thus cannot be pressured under the present system, no doubt most use state aid in some area. Thus wider latitude will enable the board of education to deal with more school jurisdictions by use of the power to withhold funds alone.

Another possibility, which can be used alone or in conjunction with the above suggestion, is to authorize the board of education to provide state aid to cover the transportation costs of students who are bused pursuant to an approved plan to correct racial imbalance. If a provision to this effect were enacted, it would probably alleviate one of the major factors presently operative which limits the use of busing as a means of eliminating racial imbalance.

Another innovation which might enhance the effectiveness of the Act is to give private citizens a right to bring a school committee into court and enjoin them to comply with the Act. This device would enable parents of children in racially imbalanced schools to put direct pressure on the school committee. It might be argued that a private right to sue should be implied under the present law,[173] but it is unlikely that the legislature intended such a result.[174]

Still another approach to improving the present law is to provide, at the state level, for the creation of multi-district schools.[175] This might be the best device to use in metropolitan areas.

It seems clearly desirable to provide expressly that the board of education may invoke its sanctions when a school committee continues to implement an approved plan which has been proved inadequate in operation, and refuses to formulate a new plan. It is not clear under the present law whether the board has such power.[176]

Finally, it is possible that two enforcement techniques other than those presently being used might be put into effect. These are the techniques of (1) the use of an administrative agency that has power to hold hearings, issue directives to local school committees and seek judicial enforcement of its orders and (2) a court order procedure. The former technique is being tried in New York.[177] [Although it is politically feasible in that state, it may not be so in Massachusetts.] The latter technique has three drawbacks. It is cumbersome and slow

173. *E.g.*, J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (Securities and Exchange Act of 1934).

174. *See* Note, *Duty to Integrate Public Schools? Some Judicial Responses and a Statute,* 46 B.U.L. Rev. 45, 80 (1966).

175. Such a bill is now before the General Court. Mass. S.R. 283 (1967).

176. *See supra* at pp. .

177. *See* cases cited note 64, *supra.*

and the courts lack the expertise in the area of education that an administrator would soon develop (and that the board of education has).

Aside from problems of enforcement, the Act may have shifted attention from the other major educational decisions facing schools today. An inordinate diversion of energy to the question of racial imbalance may damage the overall performance of the school system. Such a diversion is not a necessary consequence of the present law, but rather depends upon the peculiar characteristics of the area. When considering the adoption of similar legislation this possibility should be kept in mind.

VII. Conclusion

The Massachusetts Racial Imbalance Act, although effective in most of the state's communities, has been confronted by a serious challenge in the state's largest city. That challenge has arisen because of the role played by local school committees in the implementation of the Act. Although political factors may prevent Massachusetts from improving on the present law, other states in considering the problem of racial imbalance may be able to add effective enforcment procedures[178] and provide for meaningful metropolitan cooperation. Even without these improvements the mere presence of the law is beneficial to society. It keeps people aware of the problem and searching for solutions.

*Robert Schafer**

178. *E.g.*, chapter 15, section 1I, par. 1 could be amended to read:
The board of education shall provide technical and other assistance in the formulation and execution of plans to eliminate racial imbalance, made pursuant to section thirty-seven D of chapter seventy-one. Upon receipt of a plan, the board shall hold hearings to determine whether the plan is acceptable as in compliance with said section. If the plan is not acceptable the board shall make those changes which it determines are necessary to make it acceptable. The altered plan, or the original plan if acceptable, shall then be approved by the board and issued as an order to the school committee. The order shall be enforceable in the courts. If a school committee refuses to file a plan within a reasonable time, the board shall proceed without it and formulate a plan to be ordered into effect.

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APPENDIX*

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1965

Chap. 641. AN ACT PROVIDING FOR THE ELIMINATION OF RACIAL IMBALANCE IN THE PUBLIC SCHOOLS

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to eliminate forthwith racial imbalance in the public schools, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted, etc., as follows:

SECTION 1. Chapter 71 of the General Laws is hereby amended by inserting after section 37B the following two sections: —

Section 37C. It is hereby declared to be the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools. The prevention or elimination of racial imbalance shall be an objective in all decisions involving the drawing or altering of school attendance lines and the selection of new school sites.

Section 37D. The school committee of each city, town and district shall, annually, at such time and in such form as the commissioner shall determine, submit statistics sufficient to enable a determination to be made of the per cent of nonwhite pupils in all public schools and in each school under the jurisdiction of each such committee. Whenever the state board of education finds that racial imbalance exists in a public school it shall notify in writing the school committee or regional school district committee having jurisdiction over such school that such finding has been made. The school committee shall thereupon prepare a plan to eliminate such racial imbalance and file a copy of such plan with the board. The term "racial imbalance" refers to a ratio between nonwhite and other students in public schools which is sharply out of balance with the racial composition of the society in which nonwhite children study, serve and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of nonwhite students in any public school is in excess of fifty per cent of the total number of students in such school.

Said plan shall detail the changes in existing school attendance districts, the location of proposed school sites, the proposed additions to existing school buildings, and other methods for the elimination of racial imbalance. Said plan shall also include projections of the expected racial composition of all public schools. Any plan to detail changes in existing school attendance districts, the locations of proposed new school sites and proposed additions to existing school sites and proposed additions to existing school buildings with the intention of reducing or eliminating racial imbalance, must take into consideration on an equal basis with the above-mentioned intention, the safety of the children involved in travelling from home to school and school to home. Said plan may provide for voluntary co-operation by other cities and towns in rendering assistance and in making available facilities to effectuate said plan.

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*Mass. Gen. Laws ch. 15, § I was amended in 1966. The effect of the 1966 amendment was to change references to § 9 of chapter 70 to references to § 5 of chapter 70.

No school committee or regional school district committee shall be required as part of its plan to transport any pupil to any school outside its jurisdiction or to any school outside the school district established for his neighborhood, if the parent or guardian of such pupil files written objection thereto with such school committee.

Said board may, from time to time, require each school committee to submit to said board a report on the progress of the plan and its implementation.
The supreme judicial and the superior court shall have jurisdiction in equity upon petition of the board of education to enforce the provisions of this section.

SECTION 2. Chapter 15 of the General Laws is hereby amended by inserting after section 1H the following three sections: —

Section 1I. The board of education shall provide technical and other assistance in the formulation and execution of plans to eliminate racial imbalance, made pursuant to section thirty-seven D of chapter seventy-one. Whenever the board determines that a school committee or regional school district committee has failed to file a plan in compliance with the provisions of said section, it shall consult with and make specific recommendations for a plan by such school committee or regional school district committee.

If, following the receipt of notification from the board of education that racial imbalance, as defined in section thirty-seven D of chapter seventy-one, exists, a school committee or regional school district committee does not show progress within a reasonable time in eliminating racial imbalance in its schools the commissioner of education shall not certify the amount of state aid for such city or town or for such towns which are members of such regional school districts, as required by section nine of chapter seventy, and the school building assistance commission upon receipt of notice from said board that racial imbalance exists shall not approve any project for school construction for such city, town or regional school district under chapter six hundred and forty-five of the acts of nineteen hundred and forty-eight, as amended, and the commissioner of education may notify the commissioner of corporations and taxation and the comptroller to hold such funds as have been so certified under said section nine but have not been disbursed. The commissioner of education may thereafter upon receipt of a plan acceptable to the board of education notify the commissioner of corporations and taxation and the comptroller to pay any such withheld funds to such city or town in such amounts and at such times as he may designate, and the school building assistance commission upon receipt of notice from said board that a plan acceptable to it has been received may approve such projects.

The school building assistance commission shall, notwithstanding any contrary provision of chapter six hundred and forty-five of the acts of nineteen hundred and forty-eight, as amended, increase the amount of grants for schoolhouse construction to sixty-five per cent of the approved cost, whenever the board of education is satisfied that the construction or enlargement of a schoolhouse is for the purpose of reducing or eliminating racial imbalance in the school system and so notifies the school building assistance commission.

Section 1J. Within thirty days after (1) a school committee or regional school district committee declines to accept the recommendations submitted to it by the board or (2) the board disapproves a revised plan submitted to it by a school committee or regional school district committee, said committee may file a petition for judicial review in the superior court for the county in which it is located or in the supreme judicial court for Suffolk county. The court may affirm the board's determination of the recommendations submitted by it or its determination of disapproval of a revised plan submitted to it, and order compliance with the

recommendations of the board by appropriate decree, or if it finds and rules that the determination by the board is (*a*) in excess of the statutory authority or jurisdiction of the board, or (*b*) based upon an error of law, or (*c*) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, then it may set aside such determination by the board and remand the matter to it for further action.

The supreme judicial and the superior court shall have jurisdiction in equity upon petition of the board of education to order funds withheld as provided in section one I for such period of time as the court may determine.

Section 1K. The board of education, with the advice of the commissioner, shall appoint an advisory committee on racial imbalance and no individual shall be appointed to this advisory committee on racial imbalance who has been listed in any state or federal document as being a member of a communist front organization. The members of the committee shall serve without compensation except that they may be reimbursed for the necessary expenses actually incurred in the performance of their duties. *Approved August 18, 1965.*

BOOK REVIEW

MATERIALS AND PROBLEMS ON LEGISLATION, By *Julius Cohen.** Indianapolis: Bobbs-Merrill Co., 2d.ed. 1967, pp. 527, $11.50.

As Professor Julius Cohen candidly notes, this second edition of his "casebook" on Legislation follows essentially the pattern established in the original edition. Its appearance hardly calls for a book review, even in the pages of a Journal on Legislation, unless it can serve as the occasion for more general consideration of the teaching of courses on Legislation.**

Interest in Legislation as a course seems to have started in the late 1920's and early 1930's. Such courses multiplied in law schools after World War II, reflecting dissatisfaction with the narrow focus then prevalent on the courts and their decisional product. This development was clearly overdue. None could deny that statutes had, in scope and importance, become a major component of the total body of law. Obviously, the legislative engine responsible for this output deserved study as a distinct lawmaking institution, both as to its structure and its process.

Initially as a by-product but ultimately as a value in its own right, legislative drafting deservedly drew attention as a skill that lawyers should have. Its study was seen as a means of moving legal education from its excessive preoccupation with analytic and critical skills of case discussion toward the creative and synthesizing tasks of the lawyer's office practice. Legislative drafting was to be the vehicle for instruction in the skills and insights required for draftsmanship generally.

The study of statutory interpretation is one large step removed from the aspects of legislation thus far described, in that it brings the student back to the role of the courts. Yet, at a time when the law schools were still devoting most of their attention to common law subjects, with statutes barely noted in passing, emphasis on legislative construction could be seen as a forward looking step.

The early courses in Legislation had the advantage of assembling

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**For those interested in reviews of the original edition, see Herzog, 27 CHI-KENT L. REV. 349 (1949); Hunt, 35 CORNELL L. Q. 691 (1950); Radigan, 36 IOWA L. REV. 175 (1950); Tisdale, 27 N. D. L. REV. 238 (1951); Re, 1950 WASH. U. L. Q. 173; Wright, 59 YALE L. J. 593 (1950).

Those interested in the editor's early prescriptions for a course in Legislation should read Cohen. *On the Teaching of Legislation,* 47 COLUM. L. REV. 1301 (1948).

what at the time were novel, intrinsically interesting materials to satisfy student needs that were obvious and pressing. But they also encountered pitfalls. The case approach was so pervasive that there was little experience in teaching with other materials. Could the discussion method be sustained without cases? More important, what general themes should underlie a course which might select for its subject matter any of numberless statutes? Should the course stress the skills that a lawyer would need in contemporary private or government practice? Or should it stress the place of the legislature in the legal system and the distinctive features of legislation as a mode of law? Would an effort to do both succeed in doing neither effectively?

Professor Cohen's book represents an imaginative effort to resolve these questions and to realize the potential of the course. The major focus is on the points of contact between the lawyer and the legislature, and the stress is on the lawyer's art. Thus, the materials press the student to take on the role of lawyer as a draftsman (both as a craftsman in language and as an architect skilled in relating legal means to policy ends) as a lobbyist, and as counsel present at legislative investigations. Less clearly worked into the pattern of the course are the two chapters (comprising about 40% of the total) dealing with interpretation of statutes and the use of statutes as establishing principles to be used by courts as though they were judicial precedents. As previously noted, the lawyer is here laboring in the courts. To be sure, these chapters furnish valuable background to the draftsman, concerned with future judicial treatment of his work, and they afford training in the art of interpretation of the legislature's language. The editor has constructed a series of imaginative and interesting problems, which substitute for or supplement the presentation of cases.

The most distinctive feature of the book is its very considerable use of food and drug legislation in the chapters concerned with drafting and interpretation. As one who has taught from the original edition, I can testify that focusing on one field of legislation has distinct advantages. Students can quickly understand the drafting or interpretive problem without having each time to divine a new statutory scheme. The materials, as a result, are not limited to problems involving relatively simple substantive law. The gradual development of a comprehensive legislative program emerges over time. The variety of problems within the food and drug field is sufficient to convey a sense of the lawyer's art. Moreover, the focus carries with it a sense of

non-legal forces at work — political and economic interests and pressures — which is surely essential in any study of legislation.

The very success of this work in doing what it sets out to do — the teaching of lawyer's "legislative" skills — suggests the question whether that is a sufficient goal. To direct this question at any book — and particularly this one — may be unfair. To direct it at teachers of Legislation is essential. Drastic changes have been taking place in legal education over the past 20 years, and the pace of change shows no sign of slowing. Statutory law has found its way into virtually every course, so that drafting and interpretation can be carried on in their natural setting. In many schools there are increased extra-curricular opportunities to draft, as the existence of this Journal illustrates. Courses in Legislation, therefore, ought increasingly to be organized in terms of the function of the legislature in our contemporary legal system.

To serve this role, the course should canvass the major tasks performed by the legislature and by its committees and individual legislators. The various types of enactments, the appropriations function, the impact on law through non-enacting activities — all of these require study. How well is the legislature equipped to perform these tasks, in terms of its structure and organization, and the personnel with which it is staffed? How representative is the legislature, even after the massive reapportionments of the past decade, in light of the other election laws, the laws and practices on campaign contributions, and the workings of political parties? The efficiency and effectiveness of the legislative process, as well as safeguards that sacrifice those values to assure strong consensus, are not fully revealed by materials on lobbying and investigations. Study of legislative operation should reveal the tensions between legislation as a resultant of competing pressures of various groups and legislation as a reflection of principled judgment. The place of precedent within the legislative process deserves consideration.

Bypassing the question whether the legislature can be most fruitfully studied as part of an inquiry into the legal system as a whole, certainly the student of the legislature should seek to place it in the system. The present book, in its focus on food and drug problems, shows some of the interplay between legislature and courts. But the relations between the legislature and the electorate on one side and the

executive, administrative, and judicial branches on the other calls for a far more variegated treatment. Future courses on Legislation, together with other law school courses, should turn out lawyers who have acquired not only skill but insight as well.

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