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INCORPORATION OF THE BILL OF RIGHTS: THE CROSSKEY-FAIRMAN DEBATES REVISITED

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Editorial Introduction

Alfred Avins has written prolifically on issues related to the Reconstruction Amendments. He has maintained that the Constitution should be strictly construed according to the intentions of the framers of the various provisions, and that any departure from the original intentions should be taken only by observing the procedures for constitutional amendment prescribed by Article V. As sometime legislative draftsmen, members of the Journal are in a position to be sympathetic to Avins' view of constitutional interpretation. Nonetheless, we must point out that Avins' position is open to serious challenge on a number of counts: the intentions of draftsmen are not always easy to discern; the understanding of those who passed upon the provisions is entitled to some weight; the Constitution must be reinterpreted in the light of shifting circumstances; and the amending process is not flexible enough to provide for the multitudinous and unforeseen situations which frequently arise. Even if one does not wholly accept Avins' view of constitutional construction, there is still much insight to be gained from a scrupulous treatment of legislative history. In this article, Avins exhumes the privileges and immunities clause, and argues that it was the vehicle by which the framers attempted to incorporate the Bill of Rights into the Fourteenth Amendment.

A very considerable literature has been recently built up on the original understanding and intent of the framers of the Fourteenth Amendment, especially in the area of political rights,[1] housing,[2] busi-

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1 Avins, *Literacy Tests and the Fourteenth Amendment: the Contemporary Understanding*, 30 ALBANY L. REV. 229 (1966); Avins, *The Right to Hold Public Office and the Fourteenth and Fifteenth Amendments: the Original Understanding*, 15 KAN. L. REV. 287 (1967), 18 MERCER L. REV. 367 (1967); Avins, *The Fifteenth Amendment and Literacy Tests: the Original Intent*, 18 STAN. L. REV. 808 (1966);

nesses,[3] schools,[4] criminal law enforcement,[5] social equality,[6] and other equal protection clause issues.[7] There are also a number of articles relating to the due process clause.[8] However, the original intent of the privileges and immunities clause has largely escaped periodical commentators, with two notable exceptions. These exceptions relate to the question of whether the Fourteenth Amendment incorporates the privileges contained in the first eight amendments to the United

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Avins, *Literacy Tests, the Fourteenth Amendment, and District of Columbia Voting: the Original Intent*, 1965 WASH. U. L. REV. 429; Avins, *The Fourteenth Amendment and Jury Discrimination: the Original Understanding*, 27 FED. B.J. 257 (1967).

2 Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and The Right to Buy Property*, 40 S. CAL. L. REV. 274 (1967); Tansill, Avins, Crutchfield & Colegrove, *The Fourteenth Amendment and Real Property Rights*, in OPEN OCCUPANCY VS. FORCED HOUSING UNDER THE FOURTEENTH AMENDMENT 68 (Avins ed. 1963).

3 Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966); Avins, *The Civil Rights Act of 1875 and The Civil Rights Cases Revisited: State Action, the Fourteenth Amendment, and Housing*, 14 U.C.L.A. L. REV. 5 (1966); Avins, *Racial Segregation in Public Accommodations: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 18 WEST. RES. L. REV. 1251 (1967).

4 Avins, *De Facto and De Jure School Segregation: Some Reflected Light on the Fourteenth Amendment from the Civil Rights Act of 1875*, 38 MISS. L.J. 179 (1967); Bickel, *The Original Understanding and The Segregation Decision*, 69 HARV. L. REV. 1 (1955); Kelly, *The Congressional Controversy Over School Segregation, 1867-1875*, 64 AM. HIST. REV. 537 (1959).

5 Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U. L. REV. 331 (1967); Avins, *Federal Power to Punish Individual Crimes Under the Fourteenth Amendment: the Original Understanding*, 43 N. D. LAW. 317 (1968).

6 Avins, *Social Equality and the Fourteenth Amendment: The Original Understanding*, 4 HOUS. L. REV. 640 (1967); Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: the Original Intent*, 52 VA. L. REV. 1224 (1966); Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws*, 43 N.C.L. REV. 92 (1964).

7 Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: the Original Understanding*, 8 ARIZ. L. REV. 236 (1967); Avins, *State Action and the Fourteenth Amendment*, 17 MERCER L. REV. 352 (1966); Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471 (1966); Avins, *The Equal "Protection" of the Laws: the Original Understanding*, 12 N.Y. L. FORUM 385 (1966); Avins, *The Right to Bring Suit Under the Fourteenth Amendment: the Original Understanding*, 20 OKLA. L. REV. 284 (1967).

8 Avins, *The Right to Work and the Fourteenth Amendment: the Original Understanding*, 18 LAB. L.J. 15 (1967); Corbin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 365 (1911); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371, 48 YALE L.J. 171 (1938); Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583 (1930).

States Constitution, commonly called the Bill of Rights, and makes them applicable as limitations on the powers of the states.

The debate between Professor Charles Fairman, then of Stanford University, and Professor William W. Crosskey, then of the University of Chicago Law School, on whether the Fourteenth Amendment incorporates the Bill of Rights,[9] constitutes the only full-dress discussion of this issue in legal periodicals, and is far more comprehensive than any of the United States Supreme Court cases on this point. This debate must therefore constitute the starting point of any serious discussion of the incorporation doctrine. Only after the evidence adduced in this prior scholarly research is analyzed, is it possible to evaluate additional evidence to determine the question of whether the Fourteenth Amendment incorporates the Bill of Rights.

I. The Positions of Fairman and Crosskey.

Professor Fairman's article, published in 1949, was intended as a rebuttal to Mr. Justice Black's dissent in *Adamson v. California*,[10] which took the position that one of the primary purposes of the first section of the Fourteenth Amendment was to make the Bill of Rights applicable to the states. Fairman's article first analyzed the debates in the *Congressional Globe* for the first session of the 39th Congress. This debate was considerable, and emphasis became important. Fairman's analysis considered not only the history of the privileges and immunities clause, but also set forth debate relevant only to the equal protection clause, as well as the due process clause. This mass of material has a tendency to confuse rather than focus on the Bill of Rights issue. Fairman admitted that Representative John A. Bingham, the Ohio Republican lawyer who drafted these clauses, said that they would give Congress power to see to it that the states obeyed the Bill of Rights. Fairman emphasized Bingham's point that the states were already obligated to obey the Bill of Rights, and then pointed out that under the authorities Bingham was wrong. After further confusing the reader by mixing up the discussion of the privileges and immunities clause with the equal protection clause, Fairman

9 Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. Chi. L. Rev. 1 (1954); Fairman, *A Reply to Professor Crosskey*, 22 U. Chi. L. Rev. 144 (1954); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949).

10 332 U.S. 46, 71 (1947).

concluded that the references by Bingham and others to the enforcement of the Bill of Rights were not conclusive as to the intent of the framers because the framers themselves were confused as to what they intended.[11]

Next, Fairman set forth newspaper reports of debates in Congress, and speeches by Republicans, which usually discussed the first section of the proposed amendment in generalities. But there are several references to the need to enforce freedom of speech in the South.[12] Fairman then reviewed the debates concerning ratification of the Fourteenth Amendment in the states. In a nutshell, his position was that if the state legislatures had in fact understood that they were fastening the Federal Bill of Rights on themselves, they would have conformed their own Constitutions and laws to the federal standard, or at least discussed the matter.[13] Fairman's litmus test is the federal guarantee of jury trials. After reviewing the debates, he concluded that references to incorporation of the Bill of Rights were very rare and that a number of states had provisions in their constitutions or laws inconsistent with the Bill of Rights, especially regarding jury trials. Fairman concluded that a failure to notice this inconsistency shows that many legislatures did not realize that the Fourteenth Amendment was meant to incorporate the federal guarantees. In addition, Fairman set forth a number of instances where it would have been appropriate for state officials to refer to or conform to Federal Bill of Rights standards but where they did not do so, and he argued that this showed that they, too, were unaware that federal guarantees were incorporated in the Fourteenth Amendment. Thus, he concluded that this omission by contemporaries to refer to the incorporation doctrine showed that no incorporation, or at least only selective incorporation, was intended.[14]

In 1954 Professor Crosskey wrote a lengthy reply to Fairman.[15] The cornerstone of Crosskey's argument was that Senator Jacob M. Howard, a former Attorney-General of Michigan, who drafted the

11 Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5, 6-68, (1949).

12 *Id.* at 68-81.

13 But Fairman himself has noted that even though the equal protection clause was clearly intended to apply to Art. I, Sec. 35 of the Oregon Constitution of 1857, this provision was not repealed until November 2, 1926, effective November 26, 1926. Ore. Laws 1927, p. 7. Fairman, *supra*, at 32, n. 58.

14 *Id.* at 81-139.

15 Crosskey, *supra*, n. 9.

declaration of citizenship in the first section of the Fourteenth Amendment, and Representative John A. Bingham, the Ohio lawyer who drafted the privileges and immunities, due process and equal protection clauses of this section, believed that the privileges and immunities clause of Article IV, section 2 of the original Constitution "was understood as if it read: 'The citizens of each state shall be entitled to all privileges and immunities of citizens *of the United States* in the several states.' "[16] [Emphasis in original]. Moreover, Crosskey declared that this view was "the common faith of the political party to which they belonged . . . and it is quite impossible to understand aright the debates over the Fourteenth Amendment, or to comprehend what Bingham had in mind when he drew the first section of that amendment in its initial form, unless these views are known and understood and kept constantly in mind."[17] Crosskey, however, noted that the emphasized words, "of the United States," did not actually appear in the privileges and immunities clause of Article IV, section 2, (which will hereafter be referred to as the interstate privileges and immunities clause), but that Bingham read this clause as if the clause had an ellipsis in it which had to be supplied by using this qualifying phrase to define the privileges and immunities guaranteed. Crosskey noted that Bingham and the other Republicans believed that the interstate privileges and immunities clause protected a citizen against his own state's legislation, although the clause had generally been interpreted only to prevent discrimination against interstate travelers. However, Crosskey explained that the Republicans considered these judicial decisions to be wrong and politically motivated in order to protect the institution of slavery. Crosskey quoted Bingham's speech against the Oregon Admission Bill to illustrate his ellipsis theory.[18]

Having established the fact that the Republicans of the Civil War and Reconstruction era considered much old jurisprudence inconsistent with the Constitution and wrong, and that Bingham and others held peculiar notions about constitutional law, Crosskey proceeded to plow through the debates of the first session of the 39th Congress to show that Bingham and other Republicans thought that the interstate privileges and immunities clause already included the guarantees of the Bill of Rights, and that it was only necessary to give Congress

16 *Id.* at 12.

17 *Id.* at 11. See also *id.* at 26, where Crosskey repeated that Bingham's ideas were "the common faith of the Republican party of the time."

18 *Id.* at 11-21, 25, 52.

power to enforce its provisions against the states. In this endeavor, Crosskey focused largely on the evidence that other Republicans held the same views as Bingham.[19] He also discussed the equal protection clause to a limited extent,[20] although this was not central to the incorporation problem and it seems clear that some of his analysis was erroneous.[21] Finally, Crosskey reviewed evidence of incorporation of the Bill of Rights from speeches delivered in 1871 on the Ku Klux Klan Bill.[22]

Turning to the other material presented by Fairman, Crosskey either explained away or belittled the failure of newspapers and local officials to discuss incorporation of the Bill of Rights. Where such mention was made, Crosskey made the most of it just as Fairman had made the least of it. Where there was silence, Crosskey made the least of it just as Fairman had made the most of it.[23] The result is a draw on a good deal of material. But Crosskey mentioned two points which will be adverted to later, that the new amendment was urged to guarantee freedom of speech and press in the South,[24] and that it was deemed "surplusage" even by many Republicans.[25]

Crosskey did, however, admit the validity of Fairman's point that some people were unaware of Bingham's intent to incorporate the Bill of Rights into the Fourteenth Amendment.[26] This unawareness extended even to judges.[27] Such negative evidence stands uncontra-

19 *Id.* at 21-84.

20 *Id.* at 53-58, 62, 64, 70.

21 For example, Crosskey seems to believe that the Civil Rights Bill was the forerunner of the equal protection clause. *Ibid.* In fact it was the forerunner of the privileges and immunities clause in some of its more important aspects, although some of its provisions embody an equal protection concept. See Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. CAL. L. REV. 274 (1967). See also Avins, *The Right to Be a Witness and the Fourteenth Amendment*, 31 MO. L. REV. 471 (1966). The equal protection clause was purely procedural and could not have supported the whole of the Civil Rights Bill. Avins, *The Equal "Protection" of the Laws: the Original Understanding*, 12 N.Y. L. FORUM 385 (1966).

22 Crosskey, *supra*, n. 9 at 88-100. For a general review of the debates on this bill, see Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 S. LOUIS U. L. REV. 331 (1967).

23 Crosskey, *supra*, n. 9 at 84-88, 100-119.

24 *Id.* at 105, 107-8.

25 *Id.* at 110.

26 *Id.* at 113-9. But see Pence, *Construction of the Fourteenth Amendment*, 25 AM. L. REV. 536, 538 (1891), asserting that the privileges and immunities clause incorporates the Bill of Rights.

27 See Twitchell v. Pennsylvania, 74 U.S. (7 Wall.) 321 (1869); Rowan v. State, 30 Wis. 129 (1872). But see The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 118-9 (1873) (Bradley, J., dissenting).

dicted, just as do the statements in the *Congressional Globe* supporting incorporation.

In a brief reply, Fairman attacked Crosskey for suggesting that the *Globe's* reporters made a few errors, and reiterated his belief that many Republicans, especially Bingham, were confused. He ridiculed the notion that the Republicans of the period rejected Supreme Court cases and embodied in the amendment their own special notions of constitutional law. Fairman reiterated the significance of widespread ignorance of the incorporation of the Bill of Rights. Finally, he renewed an assault on Crosskey's asserted unreliability in use and analysis of historical materials.[28]

II. The Confusion in the Original Understanding.

Fairman's stinging reply to Crosskey merits some brief attention. First, his sarcastic references to Crosskey's suggestions that reporters of the *Globe* for the period occasionally made some slight errors in reporting speeches is without merit. It is clearly demonstrable that reporters erroneously reported the names of cases referred to in speeches on occasion,[29] and if such errors were made, it is not unreasonable to believe that other slight errors might have been made also. Secondly, it is clear that Republicans of the period emphatically rejected the contention that the *Dred Scott* Case[30] was the law,[31] and sometimes rejected the position that they were bound by Supreme Court decisions

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28 Fairman, *A Reply to Professor Crosskey*, 22 U. Chi. L. Rev. 144 (1954). For another attack by Fairman on Crosskey's use of history, see Book Review, 21 U. Chi. L. Rev. 40 (1953). For other attacks on Crosskey by legal historians, see Goebel, Book Review, 54 Colum. L. Rev. 450 (1954); Sutherland, Book Review, 39 Corn. L.Q. 160 (1953); Hart, Book Review, 67 Harv. L. Rev. 1456 (1954); Nathanson, Book Review, 49 Nw. U. L. Rev. 118 (1954).

29 For example, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), has been referred to as Bradley v. Illinois, and Corfield v. Coryell, 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823), has been referred to as Canfield v. Coryell. 2 Cong. Rec. 415 (1874). Commonwealth v. Oldham, 31 Ky. (1 Dana) 466 (1833) has been referred to as Cann v. Oldham. S. Rep. No. 25, 38th Cong., 1st Sess. 8 (1864), Groning v. Devana, 2 Bailey 192 (S.C. 1831) has been referred to as Gleding v. Berana. S. Rep. No. 25, 38th Cong., 1st Sess. 5 (1864), Hobbs v. Fogg, 46 Pa. (6 Watts) 553 (1837) has been referred to as Hogg v. Fogg. Cong. Globe, 39th Cong., 1st Sess. 1121 (1866). Lane v. Baker, 12 Ohio 237 (1843) has been referred to as Lake v. Baker. Cong. Globe, 42nd Cong., 2d Sess. 385 (1872).

30 Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

31 Avins, *The Civil Rights Act of 1866, the Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. Cal. L. Rev. 274, 296-7 (1967). See also 2 Cong. Rec. 4148 (1874) (remarks of Sen. Timothy Howe, Rep.-Wisconsin).

at all.[32] Hence, Fairman's attack on Crosskey's position that Congress, in 1866, ignored Supreme Court doctrine in construing the interstate privileges and immunities clause is also insubstantial. Nor does it appear from this evidence that Republican lawyers in 1866 were, in general, as confused as Fairman contended.

The important point made by Fairman is that many lawyers and judges who were contemporaries of the Fourteenth Amendment apparently did not know that the first section of this amendment was designed to make the Bill of Rights applicable to the states. Nevertheless, the speeches in Congress by the framers give indications that this was their intention. It is certainly a legitimate inquiry, then, to search for the reasons why so many lawyers were ignorant of such an intent.

Before searching for the reasons, it is important to note that many lawyers who did not sit in the 39th Congress were aware of the intention to incorporate the Bill of Rights. In addition to the evidence which Crosskey adduced of this awareness, this author has found other, corroborating evidence. For example, Senator Allen G. Thurman, a Democrat and a former Chief Justice of the Ohio Supreme Court, declared that the privileges and immunities of citizens of the United States were already defined in the Constitution, and that the provisions in the Bill of Rights were included in such privileges and immunities.[33] His Republican colleague, Senator John Sherman, who had voted for the Fourteenth Amendment, seemed to agree that the Bill of Rights were among these privileges also.[34] Representative Roger Q. Mills, a Texas Democratic lawyer, likewise declared that the privileges guaranteed in the Fourteenth Amendment included the Bill of Rights.[35] Representative William Lawrence, a former judge and an Ohio Republican who had voted for the Fourteenth Amendment, quoted from the debates of 1866 to the same effect.[36] The same idea is found in the speeches of Representative William Herndon, a Democratic lawyer from Texas,[37] and Senator Thomas M. Norwood, a

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32 2 CONG. REC. 4088 (1874) (remarks of Sen. George Edmunds, Rep.-Vt.).

33 CONG. GLOBE, 42nd Cong., 2d Sess., app. 25-26 (1872); 2 CONG. REC. 4086 (1874).

34 *Ibid.* See also CONG. GLOBE, 42nd Cong., 2d Sess. 843 (1872). The Act of July 16, 1866, § 14, 14 Stat. 173, extending the Freedmen's Bureau, which is *in pari materia* with the Civil Rights Act and the Fourteenth Amendment, protects the right to bear arms. See CONG. GLOBE, 39th Cong., 1st Sess. 2773 (1866).

35 2 CONG. REC. 384-5 (1874).

36 2 CONG. REC. 412-3 (1874).

37 2 CONG. REC. 420 (1874).

Democratic lawyer from Georgia.[38] The fact that some lawyers who were neither Republicans nor members of the 39th Congress, agreed that the Bill of Rights was incorporated into the Fourteenth Amendment, vitiates Fairman's evidence of widespread ignorance. At best, Fairman's evidence is of a negative sort. In essence, it concludes that because a large number of lawyers did not know of incorporation, this proves that it did not occur. Such negative evidence only becomes persuasive when virtually nobody knew that the Bill of Rights was incorporated into the Fourteenth Amendment. This was Fairman's position in his reply article when he accused Crosskey of propounding a version of the Fourteenth Amendment of which nobody other than Crosskey had ever heard. However, the demonstration that even Democratic lawyers outside of Congress in 1866 had heard of the intention of the framers to incorporate the Bill of Rights detracts very materially from the weight of Fairman's negative evidence.

The explanation for Fairman's evidence that some lawyers were unfamiliar with incorporation no doubt differs in different cases. A variety of reasons are possible. First, the Fourteenth Amendment was an omnibus provision, and the politically-important second and third sections drew most of the attention. The first section was often slighted, especially since it was intended to give Congress power to enforce the interstate privileges and immunities clause, which was already in the Constitution.[39] In fact, the Chicago Tribune, a Radical newspaper, referred to the first section as "surplusage,"[40] a reference similar to one noted by Crosskey.[41] If the first section just reiterated what the Constitution already provided, it is hardly surprising that not much attention was paid to it.

Secondly, many lawyers and judges undoubtedly gleaned their information about the meaning of the Fourteenth Amendment from newspapers published in their locality. Thus, their information was no better than the newspaper reporting of the debates. Even Professor Fairman's small selection of newspaper reports shows that the standards of newspaper reporting of debates on legal questions a century ago was none too penetrating. Lawyers and judges who relied on such reports never found out that it was intended to incorporate the

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38 2 CONG. REC. app. 242 (1874).
39 TANSILL et al, *supra*, n. 2 at 76-82.
40 JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 123-4, 134-5, 145 (1956).
41 *Supra*, n. 25.

Bill of Rights, but this can hardly change the legal effect of the amendment.

Thirdly, there does not seem to have been any widespread reading of the debates in the *Congressional Globe* by lawyers or even judges outside of Congress to find out what the Fourteenth Amendment was intended to mean a century ago. Perhaps this was due to the widespread opinion that legislative debates were of little value in construing a legislative enactment.[42] Even in so important an opinion as *The Slaughter-House Cases*,[43] the judges largely relied on their own memory and general history of the times rather than analyzing legislative debates. By way of contrast, when members of Congress, who themselves had spoken and voted for the Fourteenth Amendment, desired to expound its meaning, they carefully re-read the speeches in the *Congressional Globe*.[44] By neglecting the debates, it was easy for even contemporary judges to mistake the intent of Congress.[45]

But even allowing for all of these possibilities, widespread ignorance of incorporation has not been fully explained. The complete explanation lies in the peculiar way in which the privileges and immunities clause found its way into the Fourteenth Amendment. Crosskey's analysis has failed to make this point entirely clear.

As previously noted, Crosskey pointed out that Bingham believed that the interstate privileges and immunities clause ought to be read as if there were an ellipsis in it, and that the ellipsis would define the nature of the privileges protected. Crosskey also explained that Bingham believed that this clause protected a person from legislation by his own state. Finally, Crosskey asserted that this position was the "common faith" of the Republican Party a century ago.

At the outset, it should be noted that Crosskey's connection between Bingham's belief about the ellipsis and the ultimate phraseology of the Fourteenth Amendment is a novel and important contribution

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42 United States v. Union Pac. R.R., 91 U.S. 72, 79 (1875); Aldridge v. Williams, 44 U.S. (3 How.) 1, 24 (1844).

43 83 U.S. (16 Wall.) 36 (1873).

44 CONG. GLOBE, 42nd Cong., 1st Sess. app. 115-6 (1871) (remarks of Rep. John Farnsworth, Rep.-Ill.); *id.*, app. 150-2 (remarks of Rep. James Garfield, Rep.-Ohio). See also n. 36, *supra*.

45 For a similar situation in respect to the Civil Rights Act of 1875, compare People v. King, 110 N.Y. 418, 426, 18 N.E. 245, 248 (1888), with Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations*, 66 COLUM. L. REV. 873 (1966); Avins, *The Civil Rights Act of 1875 and The Civil Rights Cases Revisited; State Action, the Fourteenth Amendment, and Housing*, 14 U.C.L.A. L. REV. 5, 23 (1966).

to our understanding of the framing of this amendment. But in his enthusiasm, Crosskey has been carried away into overstating his case, a habit apparently not confined to this article alone.[46] For, contrary to Crosskey's contention, there is ample evidence that Bingham's theories were not the "common faith" of the Republican Party. While some Republicans agreed with them, others either disagreed or did not even understand them.

Bingham's ellipsis theory, so far as diligent research has disclosed, appears only four times in the *Congressional Globe*. In addition to his 1859 speech against the Oregon Admission Bill,[47] noted by Crosskey, it appears in his 1862 speech in favor of the District of Columbia Emancipation Bill,[48] in his 1866 remarks giving notice of the introduction of what was later to become the Fourteenth Amendment,[49] and in his 1867 attack on a suffrage provision of the Nebraska Admission Bill.[50] Although a number of Republicans believed that the interstate privileges and immunities clause protected only the privileges of national citizenship,[51] no other specific reference can be found in the speeches of any other member of Congress of either party during that entire period to an alleged ellipsis in this clause. In its full-blown, articulated form, this theory was the pet theory of Bingham rather than the "common faith" of the Republican Party.

Only one other Republican, Representative Samuel Shellabarger, Bingham's colleague from Ohio, ever phrased the interstate privileges and immunities clause with the words "of the United States," so as to specifically use these words as a definition of the privileges protected by that clause. This occurred at the close of the first session of the 39th Congress when Shellabarger explained his bill to enforce the interstate privileges and immunities clause. He was careful to confine his bill to cases where travelers from one state were going temporarily into another, and did not "attempt to enforce the enjoyment of the rights of a citizen within his own State."[52] In so construing this provision of the original Constitution, Shellabarger, although he was a Republican lawyer, was following the weight of judicial interpretation

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46 For other similar criticisms, see n. 28, *supra*.
47 CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859).
48 CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862).
49 CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866).
50 CONG. GLOBE, 39th Cong., 2d Sess. 450 (1867).
51 See, e.g. 2 CONG. REC. 4087 (1874) (remarks of Senators Howe and Morton).
52 CONG. GLOBE, 39th Cong., 1st Sess. app. 293 (1866).

to which, as Crosskey noted, the Democrats adhered.[53]

Another good example of Republican thinking of the period came from Senator Lyman Trumbull, a former Justice of the Illinois Supreme Court, who as Chairman of the Senate Judiciary Committee handled most of the Reconstruction legislation and who drafted the Civil Rights Act of 1866.[54] Speaking of cases interpreting the interstate privileges and immunities clause, Trumbull said:

> Those cases . . . were based upon that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and they relate entirely to the rights which a citizen in one State has on going into another State, and not to the rights of the citizens belonging to the State. I never denied that.[55]

Senator Frederick T. Frelinghuysen, a former Republican Attorney-General of New Jersey, asserted that the interstate privileges and immunities clause was less comprehensive than the privileges and immunities clause in the Fourteenth Amendment, likewise relying on prior case law.[56] Senator Matthew H. Carpenter, an able Republican lawyer from Wisconsin,[57] also said that the original Constitution only prevented interstate discrimination.[58] Even Bingham himself admitted:

> . . . the first section of the fourteenth article of amendment, to wit, 'no State shall make or enforce any law which shall

53 See the able speech of Rep. Michael C. Kerr, an Indiana Democratic lawyer and former Reporter of the Indiana Supreme Court, who later became Speaker of the House of Representatives when the Democrats gained control in 1875. CONG. GLOBE, 39th Cong., 1st Sess. 1269 (1866).

54 14 Stat. 27 (1866).

55 CONG. GLOBE, 39th Cong., 1st Sess. 600 (1866).

56 He said: "The other provision is article four, section two, which declares that the citizens of each State are entitled to the privileges and immunities of citizens of the several States. This, whatever may have been the intention of the framers of the Constitution, has been by construction held to mean only that there shall be no discrimination against citizens of other States as to their fundamental rights. (Conner v. Elliot, 18 Howard, 593). None of these provisions affirmatively assert that the citizenship of the United States has incident to it privileges and immunities which the General Government will enforce . . . . The fourteenth amendment . . . asserts United States citizenship and defines some of its privileges and immunities." CONG. GLOBE, 42nd Cong., 1st Sess. 500 (1871).

57 He had been Trumbull's co-counsel in Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1867), 74 U.S. (7 Wall.) 506 (1868), which saved Congress' reconstruction policy from Supreme Court review.

58 CONG. GLOBE, 42nd CONG., 1st Sess. 576 (1871); CONG. GLOBE, 42nd Cong., 2d Sess. 762 (1872).

> abridge the privileges or immunities of citizens of the United States,' never were in the original text of the Constitution. The original text of the Constitution reads that the citizens of each State shall be entitled to the privileges and immunities of citizens of the several States; which were always interpreted, even by Judge Story, . . . to mean only privileges and immunities of citizens of the States, not of the United States.[59]

So convinced were many Republicans that the interstate privileges and immunities clause did not protect a citizen in his own state that they justified their votes for the Civil Rights Bill in 1866 on a theory of the general rights of American citizens floating, as it were, in mid-air and not derived from any clause of the Constitution.[60] It is thus quite apparent that Bingham's ideas were certainly not the "common faith" of the Republican Party of his day.

The peculiar way in which the privileges and immunities clause came into the Fourteenth Amendment goes far to explain the confusion surrounding its meaning by contemporaries of this amendment. The clause was originally a grant of power to Congress to enforce the interstate privileges and immunities clause, with no change in the language of the latter.[61] Due to objections from other Republicans, its language was changed by Bingham to make it a negative limitation on the powers of the states, similar to those found in Article I, section 10, of the original Constitution. In the process of redrafting, Bingham supplied the words "of the United States" to describe the kinds of privileges and immunities he meant to cover, which included the Bill of Rights. In short, he intended to cover "the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State."[62]

However, members of Congress who had sat through the 1866 debates and other lawyers familiar therewith knew that the privileges and immunities clause in the Fourteenth Amendment was designed to give Congress power to enforce the interstate privileges and immunities clause and was largely a copy of the older clause. Hence, a number of lawyers, even those who had sat through the debates in the 39th Congress, believed that the privileges and immunities protected by the new clause were the same as those guaranteed by the

59 CONG. GLOBE, 42nd Cong., 1st Sess. app. 152 (1871).
60 Avins, *supra*, n. 31, at 300-3.
61 CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).
62 CONG. GLOBE, 42nd Cong., 1st Sess. app. 84 (1871).

older clause.[63] For example, Senator Trumbull, Chairman of the Judiciary Committee during this whole period, who should have been alert to the legal implications of the amendment, said of the new clause:

> That is substantially what the Constitution was before, and I do not know that it enlarged at all the provision of the Constitution as it before existed. . . . In my judgment, that amounts to the same thing. It is repetition of a provision in the Constitution as it before existed.[64]

The uniform rule of construction of a constitutional or statutory provision a century ago was that if the new provision was copied from an older provision which had received a judicial interpretation, the new provision was deemed to carry the same meaning as the old one.[65] Even Bingham himself, in his report on women suffrage as Chairman of the House Judiciary Committee, declared:

> The clause of the fourteenth amendment, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2. The fourteenth amendment, it is believed, did not add to the privileges or immunities before mentioned, but was deemed necessary for their enforcement as an express limitation upon the powers of the States. It had been judicially determined that the first eight articles of amendment of the Constitution were not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article.[66]

In this report Bingham himself quoted from older, *ante-bellum* cases construing the interstate privileges and immunities clause to illustrate the meaning of the Fourteenth Amendment. This is what most lawyers of the period would have done. Since there had never been a case holding that the interstate privileges and immunities clause in-

63 For some typical views of Republicans who had voted for the Fourteenth Amendment in Congress, see *id.* at app. 152 (Rep. James Garfield, Ohio); CONG. GLOBE, 42nd Cong., 2d Sess., app. 3 (1872) (Sen. Lot M. Morrill, Me.).

64 CONG. GLOBE, 42nd Cong., 1st Sess. 576 (1871).

65 Avins, *Freedom of Choice in Personal Service Occupations Revisited*, 18 SYRAC. L. REV. 515, 520-1, n. 29-31 (1967), and the cases cited therein.

66 H.R. REP. No. 22, 41st Cong., 3rd Sess. 1 (1871).

corporated the Bill of Rights, and since *Barron v. Baltimore*[67] is inconsistent with such a theory, it is hardly surprising that many lawyers followed the older case law in construing the Fourteenth Amendment and concluded, erroneously but not illogically, that there was no intent to incorporate the Bill of Rights therein.

Unlike the equal protection clause, which virtually defines itself,[68] the privileges and immunities clause of the Fourteenth Amendment, as Senator Trumbull pointed out, is no more self-explanatory than the interstate privileges and immunities clause, and unless one can list what these privileges and immunities are, it is impossible to correctly construe the clause.[69] The Fourteenth Amendment can be read in one of two ways on this point. The way Bingham intended it to be read was that the words "of the United States" would define the nature of the privileges and immunities protected. But it is also possible to read these words as merely indicating whose privileges would be protected, and not limiting, therefore, the nature of the privileges covered by the clause. This would make the definition of "privileges and immunities" an open one.

It is clear that some lawyers, even among those who voted for the Fourteenth Amendment, were misled into erroneously reading the privileges and immunities clause in this latter sense. Thus, Senator John Sherman, from Bingham's home State of Ohio, declared that the privileges and immunities protected by the new amendment were "as innumerable as the sands of the sea. You must go to the common law for them."[70] This is obviously far more expansive than Bingham intended. George Boutwell, a Massachusetts Republican who served with Bingham on the Joint Committee on Reconstruction, also appears to have understood the privileges and immunities clause in this latter view,[71] and this misunderstanding led him into the error of asserting that this clause covered the right to vote or "any privilege or immunity which he may enjoy, or which any other citizen may enjoy as a citizen of the State in which he resides."[72] Of course, Boutwell never under-

67 32 U.S. (7 Pet.) 243 (1833).

68 Avins, *The Equal 'Protection' of the Laws: the Original Understanding*, 12 N.Y. L. FORUM 385, 425-7 (1966).

69 CONG. GLOBE, 42nd Cong., 1st Sess. 576-7 (1871).

70 CONG. GLOBE, 42nd Cong., 2d Sess. 843 (1872).

71 3 CONG. REC. 1793 (1875).

72 CONG. GLOBE, 40th Cong. 3rd Sess. 558 (1869). See Avins, *Literacy Tests and the Fourteenth Amendment: the Contemporary Understanding*, 30 ALBANY L. REV. 229 (1966).

stood Bingham's intention even though they served on the same committee,[73] but then Boutwell read his law with a patent lawyer and had almost no legal background.[74]

Bingham's character, as reflected in his speeches, also helps to explain why he was not more closely understood. Bingham was testy, and peevish even with fellow Republicans,[75] and often inflated with his own rhetoric. One can well imagine that when Mr. Windbag got up to speak the House chamber quickly emptied. This does not change the legal effect of the Fourteenth Amendment, but it may help to explain the confusion over Bingham's meaning.

The interpretation given in *The Slaughter-House Cases*[76] to the privileges and immunities clause by Mr. Justice Miller arrived at the right conclusion via the wrong route. In construing this provision, he cited no legislative history whatsoever, but rather relied on general knowledge, or "events . . . which are familiar to us all."[77] Mr. Justice Miller noted that the first sentence of the Fourteenth Amendment created two classes of citizenship, and from this he reasoned that the privileges and immunities clause protected only the privileges of national citizenship.[78] He asserted that the privileges and immunities protected by the Fourteenth Amendment were the same as those guaranteed in Article IV, section 2, of the Constitution, and relied on *Corfield v. Coryell*[79] for a definition of them.[80]

The first sentence of the Fourteenth Amendment containing the declaration of citizenship has nothing to do with the proper interpretation of the privileges and immunities clause. It was not drafted by Bingham, but was added in the Senate by Senator Jacob Howard,

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73 Boutwell later said: "The part [of the Fourteenth Amendment] relating to 'privileges and immunities' came from Mr. Bingham of Ohio. Its euphony and indefiniteness of meaning were a charm to him." 2 BOUTWELL, REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 41-42 (1902).

74 Boutwell was always prevented from practicing law by the duties of public office which he held. Thus, between 1862, when he was admitted to the bar in Massachusetts, and 1869, when he became Secretary of the Treasury, he made only one argument in court. It was only after leaving public service in 1878 that he became an active, practicing lawyer. *Id.* at xiv-xxiii.

75 A good example of this is his squelching of Representative John Farnsworth, a prominent Illinois lawyer and former Union general, who was a fellow Radical Republican, during debate on the anti-Ku Klux Klan bill. See CONG. GLOBE, 42nd Cong., 1st Sess. app. 83, 86 (1871).

76 83 U.S. (16 Wall.) 36 (1873).

77 *Id.* at 71.

78 *Id.* at 74-75.

79 6 Fed. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).

80 83 U.S. (16 Wall.) at 75-76.

a Michigan Republican.[81] However, there was a clear dichotomy in Bingham's speeches between the privileges of national citizenship and the privileges of state citizenship, and it was only the latter that he intended to protect.[82] Thus, Mr. Justice Miller's analysis is faulty, but his result is correct.

III. Policy Considerations in 1866 Favoring Incorporation

In addition to the evidence of a specific intent to incorporate the Bill of Rights into the Fourteenth Amendment, it is also relevant to consider whether the rights set forth in the Bill of Rights were deemed to be privileges of American citizenship a century ago. In determining this question, it will be most fruitful to focus initially on freedom of speech.

Southern restrictions on freedom of speech before 1860 were designed to protect the institution of slavery by preventing incitement of slaves to revolt. Mindful of the massacre in Haiti a half century before, and inflamed by the Vesey and Turner plots, the southern states took extraordinary precautions to forestall anti-slavery agitation. For example, free Negroes, the natural leaders of such revolts, were forbidden to travel in the South,[83] and it was a penitentiary offense to teach any Negro, slave or free, to read or write.[84] No Negro could become a letter-carrier for the Post Office, as that would give him the opportunity to travel around without arousing suspicion.[85] The southern states criminally prosecuted the dissemination of abolitionist literature and the making of abolitionist speeches,[86] and the mails were rifled in the

81 Cong. Globe, 39th Cong. 1st Sess. 2890, 3040 (1866).

82 For example, in arguing that a provision of the Nebraska Admission Bill forbidding racial discrimination in qualifications for voting violated the Fourteenth Amendment, Bingham declared that the right to vote was not covered by the interstate privileges and immunities clause. He said: "I deny that it ever was enacted that the citizens of the United States are entitled as such to the privilege of voting in any State. That is the privilege of the citizens of an organized State, and it is the privilege of nobody else. . . ." Cong. Globe, 39th Cong., 2d Sess. 454 (1867).

83 Cong. Globe, 31st Cong., 1st Sess. app. 288-9, 1656 (1850) (remarks of Sen. Butler, S.C. and Davis, Miss.). See also Cong. Globe, 33rd Cong., 1st Sess. app. 1556 (1854) (remarks of Sen. Butler, S.C.).

84 Cong. Globe, 36th Cong., 1st Sess. 1685 (1860).

85 Cong. Globe, 38th Cong., 1st Sess. 838 (1864) (remarks of Sen. Sumner, Mass.).

86 See State v. McDonald, 4 Port. 449 (Ala. 1837); State v. Read, 6 La. Ann. 227 (1851); State v. Worth, 52 N.C. 488 (1860); Bacon v. Commonwealth. 7 Grat. 602 (Va. 1850); Commonwealth v. Barrett, 9 Leigh 665 (Va. 1839). For a celebrated trial, see Commonwealth v. Douglas, 7 Am. St. Tri. 45 (1853).

South to destroy such publications.[87]

The Republicans were incensed at this limitation on freedom of speech. Thus, in his maiden speech on the Kansas Contested Election, delivered on March 6, 1856, Bingham protested that a Kansas law which abridged the right to agitate against slavery violated the First Amendment and the due process clause of the Fifth Amendment.[88] In his speech on the Oregon Bill on February 11, 1859, Bingham once again declared that the right "to argue and to utter, according to conscience . . . is the rock on which that Constitution rests — its sure foundation and defense."[89] On April 24, 1860, in attacking the Supreme Court's decision in *Dred Scott v. Sanford*[90] most vigorously, Bingham said: "While I would condemn *armed resistance* to any decision of the Supreme Court, or to the execution of any statute of the United States, I would claim for myself, in common with all my fellow-citizens, the right to question their propriety, to denounce their injustice, and to insist that whatever is wrong therein shall be corrected."[91]

In 1864 Senator Henry Wilson, the Radical Republican from Massachusetts, attacked slave states for stifling any discussion against slavery, and asserted that "slavery disregards the supremacy of the Constitution and denies to the citizens of each State the privileges and immunities of citizens in the several States."[92] That same year Rep. Ebon C. Ingersoll, an Illinois Republican lawyer, said:

> Sir, I am in favor in the fullest sense of personal liberty. I am in favor of the freedom of speech. The freedom of speech that I am in favor of is the freedom which guarantees to the citizen of Illinois, in common with the citizen of Massachusetts, the right to proclaim the eternal principles of liberty, truth, and justice in Mobile, Savannah, or Charleston with the same freedom and security as though he were standing at the foot of Bunker Hill monument . . . .[93]

Rep. James M. Ashley, an Ohio Republican lawyer, observed that slavery "made free speech and a free press impossible within its

87 CONG. GLOBE, 33rd Cong., 1st Sess. app. 1012 (1854) (remarks of Sen. Sumner, Mass.).
88 CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856).
89 CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).
90 60 U.S. (19 How.) 410 (1857).
91 CONG. GLOBE, 36th Cong., 1st Sess. 1839 (1860).
92 CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).
93 CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

domain. . . ."[94] Rep. John Kasson, an Iowa Republican lawyer, said:

> Let me say here that it is necessary to carry into effect one clause of the Constitution of the United States which has been disobeyed in nearly every slave State of the Union for some twenty-five or thirty years past. I refer to that clause of the Constitution which declares in section two of the fourth article that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. . . . Who does not know that innocent ladies, . . . have been driven from the cities and States of the South, not for any legal offense committed by them, but because they had dared to say something offensive to this intolerant spirit of slavery?[95]

Rep. Green C. Smith, a Kentucky Unionist lawyer, said: "If slavery is not wrong, then what is wrong? It prevented a man from speaking his sentiments in the South."[96]

On January 9, 1866, in the first session of the 39th Congress, which proposed the Fourteenth Amendment, Bingham, in advocating a constitutional amendment to give Congress the power to enforce the privileges and immunities clause of Art. IV, sec. 2, which the South had disregarded before the Civil War, said:

> Time was, within the memory of every man now within hearing of my voice, when it was entirely unsafe for a citizen of Massachusetts or Ohio who was known to be the friend of the human race, the avowed advocate of the foundation principle of our Constitution — the absolute equality of all men before the law — to be found anywhere in the streets of Charleston or in the streets of Richmond.[97]

Representative Hiram Price, an Iowa Republican, advocated the con-

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94 CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865).

95 CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

96 CONG. GLOBE, 38th Cong., 2d Sess. 237 (1865). He also said: "The Constitution declares that every citizen of the United States shall have equal privileges in every other State. That principle was denied to the whole North by the South unless the man adhered to the sentiments of the South. The very fact that slavery could not be discussed in the South killed it. The very fact that men from the North could not go to the South and speak their real sentiments induced the people of the North to become bitter towards the institution. . . . my judgment is that that principle of the Constitution will not become fully established until the man from Massachusetts can speak out his true opinions in the State of South Carolina, and the man of Mississippi shall be heard without interruption in Pennsylvania." *Ibid.*

97 CONG. GLOBE, 39th Cong., 1st Sess. 157 (1866).

stitutional amendment which Bingham had introduced to enforce the privileges of citizens. He said:

> But I state a fact well known to every man who has taken the trouble to know anything, that for the last thirty years a citizen of a free State dared not express his opinion on the subject of slavery in a slave State. I know that to be true; and there are hundreds of men who know it to be true from experience. A citizen of a slave State could come into a free State at any time during the last quarter of a century and express his opinion on any subject connected with State rights or any other which agitated the public mind; but if a citizen of a free State visiting a slave State expressed his opinion in reference to slavery he was treated without much ceremony to a coat of tar and feathers and a ride upon a rail.[98]

Representative John Broomall, a Pennsylvania Republican lawyer, also advocated enforcement of the privileges and immunities clause. He observed: "For thirty years prior to 1860 everybody knows that the rights and immunities of citizens were habitually and systematically denied in certain States to the citizens of other States: the right of speech. . . ."[99] Finally, in reporting the Fourteenth Amendment to the Senate from the Joint Committee on Reconstruction, (on May 23, 1866), Senator Jacob M. Howard of Michigan, a Republican lawyer, member of the Committee and former Attorney-General of Michigan, declared that the privileges and immunities of citizens include the freedom of speech and press.[100]

Two years later, Senator Orris S. Ferry, a Connecticut Republican, complained that the slave states "had destroyed liberty of speech and freedom of the press." He added:

> In 1856 I visited nearly every section of my own State, urging the election of a Republican candidate for the Presidency. I could not have gone to one of these ten States and asked the people to vote for that candidate without endangering my own life. . . .[101]

Senator Oliver P. Morton, an Indiana Republican, likewise said: "For many years before the war the people of the North were subjected to indignity and outrage in the South on account of their political

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98 CONG. GLOBE, 39th Cong., 1st Sess. 1066 (1866).
99 CONG. GLOBE, 39th Cong., 1st Sess. 1263 (1866).
100 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).
101 CONG. GLOBE, 40th Cong., 2d Sess. 926 (1868).

sentiments. It was not safe for a man of avowed anti-slavery principles to travel in the South."[102] Senator Trumbull echoed similar sentiments when he asserted: "It is only in the last dozen years that there has been freedom of speech, freedom of thought, and freedom of the press in this country.[103]

The same idea was expressed from a legal point of view. In 1870, Senator George Vickers of Maryland, although a Democrat, said that freedom of speech and press were privileges of citizens protected by Art. IV, sec. 2, the interstate privileges and immunities clause.[104] Representative Horace Mayard, a Republican and former Attorney-General of Tennessee, said the same thing the following year.[105] Bingham, too, declared that freedom of speech and press were protected by the privileges and immunities clause of the Fourteenth Amendment.[106] Other Republicans expressed similar ideas.[107]

If the Fourteenth Amendment is placed in perspective, it at once becomes clear that the privileges and immunities clause must have been intended to include freedom of speech and press. The amendment was in the nature of a peace treaty, supplemental to the abolition of slavery and designed to eliminate those abuses which the northern members of Congress felt led up to the war.[108] As Senator Sherman said, the amendment, although it was "moderate" in his opinion, "contained all that is vital, and all that is necessary to secure peace and quiet and harmony in this great country of ours."[109] Bingham similarly declared that the "necessity for the first section of this amendment to the Constitution . . . is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict. . . ." This lesson, according to Bingham, was that it was necessary to give Congress the power "to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights

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102 CONG. GLOBE, 42nd Cong., 1st Sess. app. 252 (1871).
103 CONG. GLOBE, 42nd Cong., 1st Sess. 579 (1871).
104 CONG. GLOBE, 41st Cong., 2d Sess. 1559 (1870).
105 CONG. GLOBE, 42nd Cong., 1st Sess. app. 310 (1871).
106 CONG. GLOBE, 42nd Cong., 1st Sess., app. 84, 86 (1871).
107 See CONG. GLOBE, 42nd Cong., 1st Sess. 382 (1871) (remarks of Rep. Hawley); *id.* at 414 (remarks of Rep. Roberts); *id.* at 475 (remarks of Rep. Dawes); *id.* at 486 (remarks of Rep. Cook).
108 S. REP. No. 112, 39th Cong., 1st Sess. (1866) (Joint Committee on Reconstruction).
109 CONG. GLOBE, 39th Cong., 2d Sess. 128 (1866).

of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State."[110]

The northern Republicans felt that the southern slaveholders could never have developed sufficient popular support in the South to carry their states out of the Union and start the Civil War if they had not first had the power to exclude persons or periodicals with anti-slavery sentiment, and thereby to influence the South with their ideas alone. The Republicans believed that the persecution of persons with Unionist sentiment was a necessary adjunct to secession which no state could be permitted to copy in the future.[111] They reasoned that a free flow of information was the vital cure for this problem. Senator Henry Wilson, a Radical Republican from Massachusetts, therefore said:

> . . . the people of the free States should insist on ample protection to their rights, privileges, and immunities, which are none other than those which the Constitution was designed to secure to all citizens alike, and see to it that the power which caused the war shall cease to exist, to the end that the curse of civil war may never be visited upon us again, and that the citizen whose home is in the North shall be as free to assert his opinions and enjoy all of his constitutional rights in the sunny South as he whose roof-tree is the magnolia shall to the same ends be free amid the mountains of New England and the sparkling lakes of the North and the West. An equal and exact observance of the constitutional rights of each and every citizen, in each and every State, is the end to which we should cause the lessons of this war to carry us.[112]

Fairman admitted in his article that some of the Bill of Rights may be incorporated by the Fourteenth Amendment and made applicable against the states. However, he argued for a theory of "selective incorporation," that is, that only parts of the first eight amendments were so incorporated. It is difficult to find any evidence in support of this theory. It rests largely on conjecture. It is certainly inconsistent with the debates in the *Congressional Globe* which touch on this subject, and which contradict this theory of divisible incorporation. In particular, it is inconsistent with Bingham's enumeration of the first eight amendments as the privileges and immunities of citizens pro-

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110 CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

111 See Avins, *Fourteenth Amendment Limitations on Banning Racial Discrimination: the Original Understanding*, 8 ARIZ. L. REV. 236, 237-246 (1967).

112 CONG. GLOBE, 38th Cong., 1st Sess. 1203 (1864).

tected by the Fourteenth Amendment in 1871.[113] It is also inconsistent with the same enumeration by Senator Jacob Howard, the former Attorney-General of Michigan, who reported the amendment to the Senate for the Joint Committee on Reconstruction in 1866.[114]

Fairman's litmus test in support of his theory is the jury provisions in the Fifth, Sixth, and Seventh Amendments. His strongest evidence goes to support his theory that these provisions, at least, were not incorporated into the Fourteenth Amendment. Hence, if the intent of the framers to incorporate these provisions can be shown, it can be assumed that all other provisions were likewise incorporated.

Preliminarily, it should be noted that the trial of slaves, even in criminal cases, was not always assimilated to the trial of white citizens, and that in the *ante-bellum* South slaves did not have, in all states, the same right of trial by jury enjoyed by white persons.[115] On the other hand, it had been held that free colored persons had a right of trial by jury guaranteed by the state constitution.[116] It had also been held that Congress had the constitutional power to withhold the right of trial by jury in cases involving the rendition of fugitive slaves.[117] All of this background is important because the forerunner of the privileges and immunities clause of the Fourteenth Amendment was the Civil Rights Act of 1866,[118] which was designed to overturn the old slave codes.[119]

There is ample direct evidence that the right to trial by jury was included in the privileges and immunities clause, and none to the contrary. As early as 1859, Bingham denounced the Oregon Constitution, saying: "how will this burning disgrace . . . hiss among the nations, that your boasted trial by jury is to be withheld from eight hundred thousand of our own citizens and their posterity, forever, because they were so weak or so unfortunate as to be born with tawny skins!"[120] In 1861 he branded a fugitive slave law amendment as

113 CONG. GLOBE, 42nd Cong., 1st Sess. app. 84 (1871).
114 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866).
115 See State v. Peter, 14 La. Ann. 521 (1859); State v. Dick, 4 La. Ann. 182 (1849); Dowell v. Boyd, 11 Miss. (3 Smed. & M.) 592 (1844); State v. Nicholas, 2 Strob. 278 (S.C. 1848). But see Stephen v. State, 11 Ga. 225 (1852); State v. George, 8 Rob. 535 (La. 1844).
116 Doram v. Commonwealth, 31 Ky. (1 Dana) 331 (1833).
117 United States v. Scott, 27 Fed. Cas. 990 (No. 16, 240b) (D. Mass. 1851); In re Sims, 61 Mass. (7 Cush.) 285 (1851).
118 14 Stat. 27 (1866).
119 See Avins, *supra*, n. 31 at 292-5.
120 CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859).

unconstitutional because it vested the power to decide whether a Negro was a fugitive slave in a commissioner and denied him trial by jury.[121] Accordingly, it is not surprising that Senator Howard's list of the privileges and immunities of citizens in reporting the Fourteenth Amendment included the right to be tried by an impartial jury of the vicinage.[122]

During the debates on the readmission of certain southern states in 1868, a Democrat protested that one of the new state constitutions infringed on the right of trial by jury. A Republican who voted for the Fourteenth Amendment did not assert that no such right existed; rather, he pointed out that a jury was only eliminated in petty cases which were not capital or infamous crimes.[123] Senator Joseph Fowler, a Tennessee Republican lawyer, suggested in 1870 that the right to trial by jury was a privilege of citizenship.[124] The following year Bingham pointed out that "before the ratification of the Fourteenth Amendment, the State could deny to any citizen the right of trial by jury, and it was done," but that now this was a privilege of citizens which Congress could enforce.[125] Senator John Sherman, a Republican lawyer from Ohio, asserted:

> I would go back again to the fourteenth amendment; and I say that the right of trial by jury is one of the privileges and immunities of every American citizen. . . . The right to be tried by an impartial jury is one of the privileges included in the fourteenth amendment; and no State can deprive any one by a State law of this impartial trial by jury. 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' and one of these privileges and immunities, as old as the common law, is the right of trial by an impartial jury of a man's peers.[126]

Probably one of the most significant items of evidence regarding incorporation of the jury trial provisions of the Bill of Rights into the Fourteenth Amendment is found in a speech by Representative William Lawrence, a Republican from Ohio and a former state judge.

121 CONG. GLOBE, 36th Cong., 2d Sess. app. 83 (1861).

122 CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866). See also CONG. GLOBE, 40th Cong., 2d Sess. 1081 (1868) (remarks of Sen. Thomas W. Tipton, Rep.-Nebr.).

123 CONG. GLOBE, 40th Cong., 2d Sess. 2448 (1868) (remarks of Rep. Beck); *id.* at app. 314 (remarks of Rep. Paine).

124 CONG. GLOBE, 41st Cong., 2d Sess. 515 (1870).

125 CONG. GLOBE, 42nd Cong., 1st Sess. app. 84-85 (1871). To the same effect, see *id.* at 475 (remarks of Rep. Dawes).

126 CONG. GLOBE, 42nd Cong., 2d Sess. 844 (1872).

Lawrence had also been editor of the scholarly *Western Law Monthly,* and his ample legal background is well illustrated by the lengthy brief, complete with citations to cases, statutes, treaties, textbooks, and other legal authorities, which he filed in support of the Civil Rights Bill in 1866.[127] It can therefore be assumed that he fully understood the legal implications of the Fourteenth Amendment which he voted for a month later.

Lawrence argued in 1871 that where states took land for school purposes under their power of eminent domain, the value of the land would have to be fixed by a jury, and that it would be unconstitutional to have it determined by commissioners. He contended that the Seventh Amendment right to trial by jury was a privilege of citizens of the United States protected by the Fourteenth Amendment, and that if a citizen was deprived of his property in such a way as to deprive him of this privilege, the property was taken without due process of law. Lawrence supported his analysis by numerous citations to federal and state cases, treatises, and other authorities then current. He reasoned that condemnation of private property for public use was not an equity or statutory proceeding with which a jury could be dispensed. Lawrence declared:

> In all cases, too, where the power of eminent domain is to be exercised under State authority to appropriate private property for public uses a trial at law by a common law jury is now a matter of constitutional right. I know doubts have been entertained on this subject prior to the adoption of the fourteenth article of amendments to the Constitution, and there was authorities to show that a jury trial was not matter of right. . . . But since the adoption of the fourteenth article, it may well be maintained that a common-law jury trial is secured.[128]

IV. Conclusion.

The evidence adduced by Professor Crosskey, when added to other evidence presented above, shows that the framers of the Fourteenth Amendment deemed the various provisions of the first eight amendments to the United States Constitution to be among the privileges and immunities of United States citizenship which no state could abridge. A taking of life, liberty, or property in violation of any of

127 Cong. Globe, 39th Cong., 1st Sess. 1832 (1866).
128 Cong. Globe, 41st Cong., 3rd Sess. 1245 (1871).

these provisions would therefore be a denial of due process of law. Insofar as the Supreme Court applies the Bill of Rights as understood in 1866 to the states, therefore, it is merely carrying out the express intent of the framers. This is precisely what its duty is.

To some extent, application of the Bill of Rights in toto would produce inconveniences in today's society. Professor Crosskey has pointed out that the jury trial provision of the Seventh Amendment is ill-adapted to a variety of more modern cases, and that it may unduly hinder procedural law reform. The right to keep and bear arms in the Second Amendment may require re-examination. The requirement of a grand jury indictment in cases of capital and serious crimes, and of trial by petit jury in such cases, is probably one that most people would want retained as a desirable check on overzealous criminal prosecutions.

But whatever changes are necessary in the Bill of Rights as applied to either the federal government directly or the states via the Fourteenth Amendment must be made in the Constitution by the amending process in Article V. The Supreme Court has no right to ignore any part of the Constitution. It is the duty of the Court to construe the Fourteenth Amendment exactly as the framers intended it to be construed. This precludes any theory of selective incorporation. The whole of the Bill of Rights already applies to the states, and hence Supreme Court decisions holding particular aspects thereof to be applicable merely carries the Constitution into effect. This conclusion does not touch the question of whether the Court's interpretations of the provisions of the Bill of Rights are correct or not, but merely points out that whatever the provisions of the Bill of Rights mean, they are equally applicable to the federal government and the states.

HABEAS CORPUS AND THE CONFINEMENT OF THE MENTALLY DISORDERED IN NEW YORK: THE RIGHT TO THE WRIT

GRANT H. MORRIS*

"[I]t is an ancient truth that freedom cannot be legislated into existence. . . ."

Letter from Dwight D. Eisenhower to the American Library Association Convention, June, 1953.

I. INTRODUCTION

Within this decade, the laws pertaining to the confinement of the mentally ill in New York have come to the attention and scrutiny of at least three major studies.[1] The recommendations of the Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York[2] resulted in a major revision in and modernization of the statutes for civil commitment of the mentally ill.[3] Legislation based on recommendations of the other studies is anticipated in the near future. It is unfortunate that little[4] of this

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1 *See* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & CORNELL LAW SCHOOL, MENTAL ILLNESS AND DUE PROCESS (1962); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & FORDHAM UNIVERSITY LAW SCHOOL, MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT (1968); INSTITUTE OF PUBLIC ADMINISTRATION, A NEW MENTAL HYGIENE LAW FOR NEW YORK STATE (1968).

2 *See generally* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & CORNELL LAW SCHOOL, *supra* note 1.

3 N.Y. Sess. Laws 1964, ch. 738.

4 The Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York in its first report, stated simply that the right to petition for a writ of habeas corpus is always available. The Committee noted that, "Hospital directors commented that they sometimes welcome the granting of a writ, such as, for example, one in favor of a patient who is in fairly good shape but may be dangerous when drinking. The hospital may be reluctant to court the legal hazards and the risk of criticism involved in releasing this patient. The judge who releases him is immune from suit and protects the hospital from all the risks of doing what it would itself like to do for the patient." ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & CORNELL LAW SCHOOL, *supra* note 1, at 186.

extensive research has been directed to the unresolved questions concerning the writ of habeas corpus — the time honored remedy available to confined persons to challenge the legality of their detention. The purpose of this article is to examine the extent of the remedy available to the mentally disordered in New York, the problems raised and disposed of in court opinions, and new problems of recently enacted statutes. Recommendations are made suggesting new legislation to clarify the "right to the writ."

The statutes relating to the writ of habeas corpus are found primarily in Article 70 of the New York Civil Practice Law and Rules (C.P.L.R.).[5] There is a separate provision in Section 426 of the New York Mental Hygiene Law[6] as to persons confined in mental institutions. Specifically, the provisions found in Article 70 of the C.P.L.R. are designed to permit the petitioner to test the legality of the *original* confinement. Section 426 of the Mental Hygiene Law is designed to permit a patient, who was lawfully confined originally, to test the legality of *continued* confinement by raising the issue of his present mental condition.

The C.P.L.R., itself a revision and recodification of the New York Civil Practice Act, became effective September 1, 1963. The Advisory Committee on Practice and Procedure which revised the Civil Practice Act stated:

> The proposed article is primarily a condensation and simplification of the fifty-four sections of article 77 of the civil practice act which relate to habeas corpus proceedings. . . .
>
> No effort has been made to reexamine the situations in which the writ may be issued, since the committee considers this a substantive matter beyond the scope of its authority. . . . Indeed, one of the hallmarks of the writ has been its great flexibility and vague scope. . . .
>
> Nothing in the proposed article should be construed as an attempt to delineate the "shadowy" area between "a void judgment" for which the writ will furnish relief and "an

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5 N.Y.C.P.L.R. §§ 7001-7012 (McKinney 1967).

6 N.Y. Ment. Hy. Law § 426 (McKinney 1967).

7 The work of the Committee was conducted under the supervision of the Senate Finance Committee and the Assembly Ways and Means Committee of the New York State Legislature.

> erroneous judgment" for which it will not. . . . The grounds for the writ are left unchanged.[8]

Recently, the New York Court of Appeals, after examining legislative history, reached the conclusion that in enacting the C.P.L.R. the Legislature did not intend[9] to change the instances in which the writ was available.[10] Nonetheless, the issue remains as to whether changes were made inadvertently in situations where the C.P.L.R. is read together with other recent legislation in the area.

II. Availability of the Writ

A. *To Test Original Detention*

Section 7002(a) of the C.P.L.R. provides, in part: "A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf, may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance."[11] Seemingly, a person who claims that he was not mentally ill at the time of his involuntary commitment to an institution, could contest his initial confinement by a writ of habeas corpus pursuant to Section 7002(a), unless proscribed from doing so by succeeding sections of the C.P.L.R.

However, Section 1231(2) of the old Civil Practice Act provided that a person was not entitled to a writ of habeas corpus "[w]here he has been committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction. . . ."[12] That statute, as revised, became a part of Section 7003(a) of the C.P.L.R. The new provision mandates: "If it appears from the petition or the documents annexed thereto that the person is not illegally detained . . . the petition shall be denied."[13] Both Section

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8 State of N.Y., Third Preliminary Report of the Advisory Committee on Practice and Procedure 49, 50 (1959).

9 Even if the Committee had desired to alter the grounds for the writ, People *ex rel.* Tweed v. Liscomb, 60 N.Y. 559 (1875) was cited by the Committee for the following proposition, "This writ cannot be abrogated, or its efficiency curtailed, by legislative action." 60 N.Y. at 566.

10 People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 220 N.E.2d 653, 273 N.Y.S.2d 897 (1966). Interestingly, the decision in this case vastly expands the potential use of the writ. *See* McLaughlin, Supplementary Practice Commentary to N.Y.C.P.L.R. § 7002 in McKinney's 1967 Supp. at 57-58.

11 N.Y.C.P.L.R. § 7002(a) (McKinney 1967).

12 N.Y. Ment. Hy. Law § 426 (McKinney 1967).

13 N.Y.C.P.L.R. § 7003(a) (McKinney 1967).

7003(a) and its predecessor were specifically designed to prevent the use of habeas corpus as an alternative to the normal channels of appeal from the judgment of a court.[14]

Article 5 of the Mental Hygiene Law, providing for the admission of the mentally ill under the modern principle of physician certification, became effective September 1, 1965. Involuntary mental patients are now hospitalized pursuant to a two physician certificate.[15] Since there is no *court* order of detention in the first instance, a patient may now challenge the original physicians' "order" or certification of detention by claiming not to be mentally ill and/or not in need of institutional care and treatment.

B. *To Test Recovery Subsequent to Admission*

Section 426 of the Mental Hygiene Law provides: "Any one hospitalized as a mentally ill person, mental defective or epileptic, or in custody as a drug addict pursuant to section two hundred six of this chapter or in custody as an inebriate pursuant to section two hundred twenty-three of this chapter, is entitled to a writ of habeas corpus. . . . Upon the return of such writ, the fact of his mental illness, mental defectiveness, epilepsy, drug addiction or inebrity [*sic*] shall be inquired into and determined."[16]

That Section 426 is designed to test the *recovery* from the condition for which the patient was institutionalized was established in *In re Andrews*.[17] The court, in discussing a predecessor statute to Section 426, stated:

"In addition to the remedy for a discharge on writ of habeas corpus in case the detention is without lawful process, the Legislature, by this section, expressly extended the writ of habeas corpus to cases of lawful commitments of persons as insane who have subsequently, while held under such lawful commitments, recovered their reason."[18] The question remains whether this statute is necessary in light of the remedy provided by Article 70 of the C.P.L.R.

14 *See* STATE OF N.Y., *supra* note 8, at 62. It is interesting to note however that the writ may be utilized as a substitute for appeal in cases involving an error violating a fundamental constitutional or statutory right. People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 220 N.E.2d 653, 273 N.Y.S.2d 897 (1966) cert. denied sub. nom. *Keitt v. New York*, 376 U.S. 972 (1964).

15 N.Y. Ment. Hy. Law § 72 (McKinney 1967).

16 N.Y. Ment. Hy. Law § 426 (McKinney 1967).

17 126 App. Div. 794, 111 N.Y.S. 417 (1st Dep't 1908).

18 *Id.* at 799-800, 111 N.Y.S. at 421.

Section 426 of the Mental Hygiene Law originated from Section 73 of the Insanity Law of 1896,[19] and has continued without substantive change for these last 72 years. However, even before the adoption of that particular statute, at least one court[20] held that a writ of habeas corpus would issue for the purpose of securing the discharge of one who had been legally and regularly committed to a lunatic asylum, and who had subsequently recovered his sanity. The court stated:

> To detain him after his restoration to sanity, would be like detaining a prisoner after he had served out the period of his sentence. . . .
>
> The tribunal who gave the certificate of insanity in this case was only competent to imprison for and during the insanity. When the insanity ceases, the power to longer detain the patient ceases.[21]

Since this decision was rendered prior to the enactment of Section 426 or its equivalent predecessor, the need for such a statute is doubtful.

Section 1253(2) of the old New York Civil Practice Act specifically authorized the discharge of a prisoner who was in custody by virtue of a mandate in a civil cause, "[w]here, although the original imprisonment was lawful, yet by some other act, omission or event, which has taken place afterwards, the prisoner has become entitled to be discharged."[22]

That this statute could effectively eliminate the need for Section 426 is demonstrated by the statement of the revisers of the Civil Practice Act, who wrote:

> Subdivision 2 of present section 1253 provides for the case of lawful imprisonment where subsequent events entitle the prisoner to discharge. If the mandate to keep the prisoner expired by a condition subsequent, then his continued detention is "illegal" and he would be released under any formulation. If exercise of judgment with respect to the need for continued imprisonment is required, application should be made for a modification of the original order and not by collateral attacks.[23]

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19 N.Y. Sess. Laws 1896, ch. 545, § 73.
20 *In re* Dixon, 11 Abb. N. Cas. 118 (Sup. Ct. 1st Dist. 1882).
21 *Id.* at 119.
22 N.Y. Sess. Laws 1920, ch. 925, § 1253(2).
23 STATE OF N.Y., *supra* note 8, at 63.

It has been previously mentioned that the enactment of Article 70 of the C.P.L.R. was not intended to alter any of the substantive grounds upon which a writ of habeas corpus shall be issued. Section 7003(a) supposedly incorporates the principle of Section 1253(2) and other sections, when it provides: "If it appears from the petition or the documents annexed thereto that the person is not illegally detained . . . the petition shall be denied."[24]

It appears that the revisers, through over-generalization, may have inadvertantly changed the substantive law, if Section 7003(a) is read literally by the courts. If the original detention was admittedly lawful, the petition of the patient and supporting documents may not indicate that he is "illegally detained" due to a change in his mental condition. Unless this situation is clarified, retention of Section 426 seems desirable as a specific authorization to test mental condition at the time of the habeas corpus proceeding.

C. *To Test the Need for Continued Detention*

Section 87 of the Mental Hygiene Law establishes the grounds by which a patient may be discharged from an institution.[25] Release is provided for persons who are recovered, or not mentally ill, or who are not recovered but whose discharge, in the judgment of the director, will not be detrimental to, the public welfare or injurious to the patient. As to this last proviso, there is a procedure available to the patient by which he may obtain a court hearing reviewing the director's decision not to release him.

A person can be involuntarily hospitalized upon a two physician certificate alleging that he is mentally ill *and in need of care and treatment.*[26] However, to obtain release pursuant to a Section 87 hearing, the unrecovered patient must show, not that he is no longer in need of institutionalized care and treatment, but rather, that: (1) he has made a formal request for discharge to the director of the institution, (2) that the director has refused in writing to certify the discharge, and (3) that the patient's discharge will not be detri-

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24 N.Y.C.P.L.R. § 7003(a) (McKinney 1967).

25 N.Y. Ment. Hy. Law § 87 (McKinney 1967). *See* INSTITUTE OF PUBLIC ADMINISTRATION, *supra* note 1, at 147-149 for recommendations for legislative changes in these more usual methods of patient release.

26 N.Y. Ment. Hy. Law § 72(1) (McKinney 1967).

mental to the public welfare, or injurious to the patient.[27] The court may require a security bond for the good behavior and maintenance of the patient to be released.

Since the grounds for release of the patient pursuant to Section 87 are arguably not the same as the grounds for which he was institutionalized, is the writ of habeas corpus available to the unrecovered patient who claims to be no longer in need of care and treatment? The writ provided for by Section 426 of the Mental Hygiene Law specifically inquires into and determines the "fact of mental illness"[28] of the patient. One can question whether such inquiry includes consideration of whether an admittedly mentally ill patient has sufficiently recovered to be no longer in need of inpatient care and treatment. A court could construe a Section 426 habeas corpus hearing to require such an analysis of "the fact of mental illness" since the Mental Hygiene Law itself defines a mentally ill person as "any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or the community, he requires care and treatment."[29] Even without considering this problem, *People ex rel. Eskenazi v. Corcoran*[30] held that a patient in a mental institution who had recovered to a degree warranting release therefrom and was confined solely because his wife objected to his release, should be released on convalescent status within five days; otherwise the court would order discharge from the hospital pursuant to the writ.

The great paucity of judicial opinion in this area may be attributable to the unwillingness of courts to release unrecovered patients over the objections of the treating physicians and staff of the mental hospitals.[31] As a practical matter, problems of proof may bar an unrecovered patient from using the judicial process to obtain release.[32] Additionally, as long as the grounds for involuntary admission of a

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27 N.Y. Ment. Hy. Law § 87 (1) (d) (McKinney 1967). *Quaere:* Must this discharge statute be read so that "need for care and treatment" is equivalent to and exists whenever granting the patient's freedom would "be detrimental to the public welfare, or injurious to the patient"? If so, the grounds for discharge would be the same as the grounds for institutionalization.

28 N.Y. Ment. Hy. Law § 426 (McKinney 1967).

29 N.Y. Ment. Hy. Law § 2 (8) (McKinney 1967).

30 195 Misc. 340, 89 N.Y.S.2d 769 (Sup. Ct. 1949).

31 *See,* Application for the Discharge of Frank, 18 Misc, 2d 468, 189 N.Y.S.2d 809 (Sup. Ct. 1959) as it relates to the discharge of an unrecovered patient from a licensed private institution pursuant to N.Y. Ment. Hy. Law § 87 (McKinney 1967).

32 *See generally* discussion in text accompanying notes 42-58, *infra.*

patient are different from the grounds for release of an unrecovered patient, courts will have difficulty determining whether the discharge hearing of Section 87 is exclusive, or whether patients may seek release by writ of habeas corpus. The recommendation of the study conducted by the Institute of Public Administration appears meritorious. It proposed an elimination of the Section 87 hearing[33] and a securing[34] of the unrecovered patient's right to test by habeas corpus the question of his continued need for care and treatment.

D. *Related Problems*

(1) Finality of the Habeas Corpus Proceeding.

The final sentence of Section 1262 of the old Civil Practice Act provided:

> A final order made in a proceeding (i.e., habeas corpus proceeding) brought on behalf of a person imprisoned or detained in any of the state hospitals . . . or in the Matteawan State Hospital or in the Dannemora hospital for insane convicts, shall be conclusive evidence, upon a hearing of any subsequent proceeding involving the detention of the same person, of all the facts determined by the court, unless such final order shall otherwise specify.[35]

The procedure revisers stated: "The last sentence of present section 1262 has been deleted. Its provisions are now fully covered by section 204 (now Section 426) of the Mental Hygiene Law, by virtue of a 1921 amendment to its predecessor, the Insanity Law. N.Y. Laws 1921, c. 673, § 5."[36] By employing this line of reasoning, the revisers, therefore, did not include a similar provision in the new C.P.L.R. However, as previously noted, the C.P.L.R. provisions apply to writs contesting original detention and may or may not be applicable to writs to test recovery subsequent to admission. Section 426 only tests recovery or improvement in mental condition subsequent to the original detention. Therefore, the provision in Section 426 that the court order in the prior writ is "conclusive evidence of

33 INSTITUTE OF PUBLIC ADMINISTRATION, *supra* note 1, at 148.

34 *Id.* The Institute's recommended statute on habeas corpus includes this statement: "The court may decide that an unrecovered patient no longer needs care and treatment in a facility." INSTITUTE OF PUBLIC ADMINISTRATION, *supra* note 1, at 162.

35 N.Y. Sess. Laws 1920, ch. 925, § 1262.

36 STATE OF N.Y., *supra* note 8, at 79.

the facts stated therein unless such order shall otherwise specify"[37] must of necessity refer not to writs based on original unlawful detention but only to writs testing recovery or improvement in mental condition subsequent to the original detention. Therefore, a final order in a habeas corpus proceeding brought pursuant to Article 70 of the C.P.L.R. to test the legality of the original detention, is *not* necessarily conclusive evidence of the facts determined therein, in a subsequent writ brought by a patient at a state institution who again attempts to test the legality of his original detention.

The courts may be able to circumvent this dilemma by reasoning as follows: First, Section 426 of the Mental Hygiene Law applies to all writs based on recovery or improvement in condition subsequent to detention. Second, although res judicata has no application to the writ of habeas corpus,[38] Section 7003(b) of the C.P.L.R. provides:

> [a] court is not required to issue a writ of habeas corpus if the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus[39] and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it.[40]

Successive applications for writs testing the legality of the original detention brought pursuant to Article 70 of the C.P.L.R. will be denied as a matter of court procedure unless new grounds for the writ are presented in the petition.

This proper denial of subsequent writs to test the legality of original detention should not be confused with a potential improper use of Section 7003(b) to deny subsequent writs based on recovery or improvement in condition. If, for example, a patient claims to have recovered and his writ is denied, will a subsequent petition six months, one year, or even ten years later be refused as not presenting a new

37 N.Y. Ment. Hy. Law § 426 (McKinney 1967).

38 People *ex rel.* Lawrence v. Brady, 56 N.Y. 182 (1874); Note, *The Application of Res Judicata to Habeas Corpus: Section 7.3(b) of the Proposed Civil Practice Law*, 46 CORN. L. Q. 483 (1961).

39 N.Y.C.P.L.R. § 7002(c) (6) (McKinney 1967) requires that the petition set forth every previous application for the writ. In People *ex rel.* Dunn v. McMann, 23 App. Div. 2d 510, 255 N.Y.S.2d 189 (3d Dep't 1965), the court construed that statute to require in every habeas corpus petition a specific statement either setting forth any previous applications or asserting the lack thereof. The relator's petition was held to be fatally defective by the unsympathetic court, in failing to state whether previous applications for a writ had been made.

40 N.Y.C.P.L.R. § 7003(b) (McKinney 1967).

"ground"? If read literally, the new petition would be on the same ground — recovery — and could be denied by the court. Section 1234(7) of the old Civil Practice Act commanded that the petition "must also state what new facts, if any, are shown upon such subsequent application that were not previously shown."[41] This old terminology appears more desirable. A petition claiming recovery, brought several months after a previous writ, of itself constitutes "new facts" through lapse of time, even though it may not be brought on a different "ground."

(2) The Right to Counsel and the Right to Independent Psychiatric Examination

Section 35(1)(a) of the New York Judiciary Law, enacted in 1966, authorizes a court to assign counsel to indigents in a habeas corpus hearing inquiring "into the cause of detention of a person in custody in a state institution, or when it orders a hearing in a civil proceeding to commit or transfer a person or to retain him in a state institution when such person is alleged to be mentally ill. . . ."[42] Later that year, the New York Court of Appeals held that an indigent mental patient confined in a civil state hospital was entitled to assignment of counsel as a matter of constitutional right in a habeas corpus proceeding brought to establish his sanity.[43]

The 1966 enactment of Section 35(3) of the New York Judiciary Law also recognized the critical nature of independent psychiatric testimony by providing that "the court which ordered the hearing *may* appoint no more than two psychiatrists or physicians to examine and testify at the hearing upon the condition of such person."[44] In addition, Section 35(4) made all expenses for compensation and reimbursement for attorneys and doctors a state charge[45] rather than a charge on the county in which the institution was located.[46] Prior to the amendment, judges were loathe to order independent psychiatric examinations since the cost was borne solely by those counties.

41 N.Y. Sess. Laws 1930, ch. 81, § 1.
42 N.Y. Sess. Laws 1966, ch. 761, § 6.
43 People *ex rel.* Rogers v. Stanley, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966).
44 N.Y. Sess. Laws 1966, ch. 761, § 6 (emphasis added).
45 N.Y. Sess. Laws 1966, ch. 761, § 6.
46 *Compare* N.Y. Jud. Law § 35(4) (McKinney 1967) *with* repealed N.Y. Jud. Law § 32, formerly § 31, N.Y. Sess. Laws 1915, ch. 295; renumbered § 32, N.Y. Sess. Laws 1945, ch. 649, § 17, repealed by N.Y. Sess. Laws 1966, ch. 761, § 5.

While Section 35 does not mandate an independent psychiatric examination in all cases — leaving the constitutional question unanswered — the amendment may, as a practical matter, increase the number of judicially ordered independent psychiatric examinations.

In *DeMarcos v. Overholser*,[47] the United States Court of Appeals for the District of Columbia noted that the right of an indigent person in a mental hospital to bring a habeas corpus hearing would be valueless unless

> expert testimony were available to him to rebut the opinion evidence of the staff of the institution who believed he should be continued in custody . . . No careful judge is likely to assume the responsibility of allowing an alleged insane person to go free when the sole expert opinion in the record advises him that such a course is dangerous to the community.[48]

For this reason the court considered it more important to provide the patient with an independent psychiatric examination than to provide him with counsel.

If, as *DeMarcos* suggests, independent psychiatric examinations are in fact more essential than counsel for the full exercise of legal rights by mental patients, the *Rogers* case, requiring counsel at habeas corpus hearings, should be read to require independent psychiatric examinations as well.[49]

(3) The Physcial Custody Requirement.

Can a person who has been conditionally released from a mental hospital on convalescent status[50] seek absolute discharge through a writ of habeas corpus even though he is not presently physically institutionalized? Traditionally, the writ does not lie unless the petitioner

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47 137 F.2d 698 (D.C. Cir. 1943).

48 DeMarcos v. Overholser, 137 F.2d 698, 699 (D.C. Cir. 1943).

49 People *ex rel.* Rogers v. Stanley, *supra* note 43.

See Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFF. L. REV. 651 at 683 (1968) for an argument urging the extension of the right to independent psychiatric examination to mentally ill prisoners, presently serving sentence, who are confined in Matteawan and Dannemora State Hospitals.

50 Patients are granted convalescent status in accordance with the rules prescribed by the Commissioner of Mental Hygiene. N.Y. Ment. Hy. Law § 87 (1) (d) (McKinney 1967).

is physically restrained.[51] Without this physical restraint, there is no person to produce the body to whom the writ can be directed.[52]

Section 1230 of the Civil Practice Act offered the writ of habeas corpus to a person "imprisoned or restrained in his liberty. . . ."[53] The 1966 revision inserted the word "otherwise" before the word "restrained" in recommending the enactment of C.P.L.R. Section 7002(a). However, there was no explanation for the language addition.[54] The revisers noted only that the word "detained" was substituted for the words "imprisoned or restrained" throughout the proposed article on habeas corpus. All three words were used in the proposed section, however, to make it clear that no change in existing meaning was intended.[55]

If the new statutory language itself offers no solace to persons on convalescent status who seek absolute discharge, then perhaps a recent court decision points the way to the use of habeas corpus for this purpose. While research discloses no court opinions on the precise question under discussion, the situation of a patient on convalescent status is analogous to a criminal who has been sentenced but who is on parole and not in custody. In fact, one authority on treatment of the mentally ill refers to conditional release of mental patients as "parole."[56] In *People ex rel. Zangrillo v. Doherty*,[57] the court, after thoroughly examining the divided authority of other states, concluded that the bonds connected with parole of prisoners are sufficiently confining to permit use of the writ.[58]

III. Other Patient Classifications

A. *Mental Defectives*

Section 426 specifically permits a person who is "hospitalized" as

51 *See, e.g.*, People *ex rel.* Albert v. Pool, 77 App. Div. 148; 78 N.Y.S. 1026 (1st Dep't 1902); People *ex rel.* Modica v. Hoy, 51 Misc. 2d 579, 273 N.Y.S.2d 634 (Sup. Ct. 1966).

52 *See, e.g.*, White v. Gladden, 209 Ore. 53, 64, 303 P.2d 226, 231 (1956).

53 N.Y. Sess. Laws 1920, ch. 925, §1230.

54 The recommendation was accepted by the Legislature, and the statute as enacted became N.Y.C.P.L.R. § 7002(a) (McKinney 1967).

55 State of N.Y., *supra* note 8, at 54.

56 A. Deutsch, The Mentally Ill in America 438 (2d ed. 1949).

57 40 Misc. 2d 505, 243 N.Y.S. 2d 694 (Sup. Ct. 1963).

58 Surprisingly, this liberal approach to utilization of habeas corpus by persons conditionally released from confinement has not yet spread to defendants in criminal cases who have posted bail bonds. People *ex rel.* Modica v Hoy, 51 Misc. 2d 579, 273 N.Y.S. 2d 634 (Sup. Ct. 1966).

a mental defective to test by a writ of habeas corpus the fact of his mental defectiveness. In *Vona v. State*,[59] it was held that the writ of habeas corpus is available on the issue of whether the original confinement is lawful, as well as on the issue of whether one who has been lawfully committed initially is no longer a mental defective. The wording of this decision is ludicrous, for at no time in the history of medical science has there ever been any claim that mental defectiveness is "curable." However, while a person may not, as yet, "recover" from his mental deficiency, he may be "educated" to the extent that he no longer requires institutionalization. At this point a release procedure should be available to him.[60] Therefore, habeas corpus is needed initially to test the question of mental defectiveness and need for institutional care at time of the original detention and subsequently to test the need for continued confinement. At the latter hearing, matters other than the issue of mental defectiveness are relevant. Examples would include the ability of the patient to obtain employment and to capably manage himself, his property and his affairs and the availability of immediate family and close relatives to support and care for him.

B. *Inebriates*

Section 423(4) of the Mental Hygiene Law provides for the availability of the writ of habeas corpus to an "inebriate" who has been certified to a private licensed institution pursuant to Section 423. At the hearing, if it appears that such person may properly be discharged,

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59 54 N.Y.S. 2d 453 (Ct. Cl. 1945).

60 N.Y. Ment. Hy. Law § 133 (1) (McKinney 1967) provides: "Any patient *may* be discharged from an institution for mental defectives by the director in accordance with rules of the commissioner of mental hygiene." (emphasis added). Similar permissive-sounding language is found in statutes governing the discharge of the mentally ill and institutionalized epileptic. N.Y. Ment. Hy. Law §§ 87, 160 (McKinney 1967). *See* the first paragraph of note 73, *infra*, for the argument that these statutes, though permissively worded, require the discharge of patients who are not mentally disordered at the time of initial confinement or who are no longer in need of institutionalization. Surprisingly, the legislative recommendation of the Institute of Public Administration also uses the word "may" in discussing the authority of the director of an institution to release patients who no longer belong in that institution. INSTITUTE OF PUBLIC ADMINISTRATION, *supra* note 1, at 147.

There is no judicial procedure prescribed by either the existing law or by the Institute proposal for the patient to contest the legality of his continued confinement. Thus the unrecovered, involuntary patient seeking release is forced to use the extraordinary remedy of habeas corpus to obtain discharge as being no longer in need of institutional care and treatment.

the judge shall so direct; but if it appears that the condition of the person is such as to render further treatment desirable, the person is to be remanded to the care and custody of the institution. That provision is derived from Section 176 of the New York Insanity Law.[61] When it was enacted in 1913, the general habeas corpus statute in the Insanity Law, Section 93, provided for the writ to test the fact of "insanity."[62] Research has not disclosed any definition of "insanity" within the meaning of that statute, but it is certain that inebriety was *not included.* This is deduced from the fact that even "idiots," "feeble-minded" persons, and epileptics were not included in the definition of "insane" at that time.[63] It is significant to note that the State Charities Law of 1909 dealt with the subject of inebriate women at Saint Savior's Sanitarium and the House of the Good Shepherd. Sections 344 and 348 of that code elucidated the right of those confined women to the writ of habeas corpus.[64]

Unlike the general habeas corpus statute found in the Insanity Law, the present statute, Section 426 of the Mental Hygiene Law, contains a provision permitting an inebriate in custody pursuant to Section 423 to test the fact of his inebriety. This statute appears to offer ample protection to inebriates. The continued utility of Section 423(4) is dubious, and it should be eliminated.[65]

C. *Dangerous Civilly Admitted Patients*

(1) Discharge

Section 85 of the Mental Hygiene Law authorizes the director of a state hospital to apply to a court for an order of transfer of a dangerously mentally ill patient to Matteawan State Hospital, an institution within the jurisdiction of the New York Department of Correction.[66] At the time of the proposed transfer, the patient, or someone on his behalf, may demand a court hearing on the question of his alleged

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61 N.Y. Sess. Laws 1913, ch. 526, § 1.
62 N.Y. Sess. Laws 1909, ch. 32, § 93.
63 N.Y. Sess. Laws 1909, ch. 32, § 80.
64 N.Y. Sess. Laws 1909, ch. 57, §§ 344, 348.
65 The Institute of Public Administration study recommends that § 423 be repealed in view of the 1965 enactment of Article 10 of the Mental Hygiene Law, dealing fully with the problem of alcoholism. N.Y. Ment. Hy. Law §§ 300-309 (McKinney 1967). INSTITUTE OF PUBLIC ADMINISTRATION, *supra* note 1, at 131.
66 N.Y. Corr. Law § 400 (McKinney 1967).

dangerous mental illness.[67] Section 135 similarly provides for patients who have become dangerously mentally defective. Does a patient who has been transferred from an institution within the Department of Mental Hygiene to an institution within the Department of Correction due to his dangerous mental condition, have a right to habeas corpus to test *continued* confinement at that institution?

Assuming the person claims to be recovered from his mental illness and seeks to be discharged from Matteawan, a refusal by the director of Matteawan to discharge the patient pursuant to Section 409 of the New York Correction Law, can be attacked by a writ of habeas corpus. Section 409[68] specifically authorizes the director of Matteawan to discharge non-prisoner patients who have recovered. The habeas corpus provisions of C.P.L.R. Article 70 are available to civilly admitted patients who have been transferred to Matteawan and who claim to have recovered, on the same basis as was previously discussed in relation to patients who have not been transferred and who claim to have recovered.[69] Also, Section 426 of the Mental Hygiene Law guarantees the writ to "any one hospitalized as a mentally ill person. . . ." There is no limitation in the wording of the statute to indicate that it is applicable only to patients physically within Department of Mental Hygiene institutions. It is probable that Section 426 is applicable to civilly admitted patients who have been transferred to Matteawan pursuant to Section 85.[70]

As amended in 1965,[71] Section 409 of the Correction Law authorizes

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67 N.Y. Ment. Hy. Law § 85 (McKinney 1967).

68 N.Y. Corr. Law § 409 (McKinney 1967).

69 *See* discussion in text accompanying notes 16-24.

70 N.Y. Ment. Hy. Law § 426 (McKinney 1967). In People v. Dionisou, 24 Misc. 2d 338, 201 N.Y.S.2d 220 (Ct. Gen. Sess. 1960), the court held that the Mental Hygiene Law habeas corpus statute was available to another classification of patient confined in Matteawan. *See* note 99 *infra*.

71 N.Y. Sess. Laws 1965, ch. 879. Prior to the amendment, § 409 dealt only with the release of mentally ill criminals from Matteawan at the expiration of their sentences of imprisonment. The superintendent of Matteawan was concerned that the Department of Mental Hygiene, which had the duty to retransfer to Department of Mental Hygiene hospitals those patients who were no longer dangerously mentally ill, simply refused to do so. The 1965 amendment of § 409 gave the Superintendent a wedge, since if the Department of Mental Hygiene refused to re-transfer a patient, the patient could be released from Matteawan though he was still mentally ill. This power has not been used, however. Morris, *supra* note 49, at 674.

the director[72] of Matteawan to discharge non-prisoner patients who are still mentally ill, but who, in his opinion, are reasonably safe to be at large. There is no judicial procedure provided by the statute whereby the patient can review the director's decision not to release him. Since a Section 85 patient has been transferred into Matteawan only because he was dangerously mentally ill, habeas corpus appears to be the proper remedy to obtain his release if his condition improves.[73]

(2) Retransfer

Section 85(4) of the Mental Hygiene Law provides that the dangerous mentally ill person who has been transferred to Matteawan is to be

> retained there until he is no longer dangerous to safety . . . whereupon he may be released as provided in section four hundred nine of the correction law[74] or, if he is in need of continued hospitalization, he may be transferred to any hospital in the department (of Mental Hygiene) upon the order of the commissioner (of Mental Hygiene).[75]

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72 Interestingly, N.Y. Corr. Law § 402 (McKinney 1967) provides that the Commissioner of Correction shall appoint a medical *superintendent* for Matteawan State Hospital. N.Y. Corr. Law § 405 (McKinney 1967) states that the superintendent is the chief executive officer of the hospital. Technically no person holds the position of "director" of Matteawan referred to in N.Y. Corr. Law § 409 (McKinney 1967).

73 Although the wording of § 409 authorizes, but does not by its language require, the director to release patients who are reasonably safe to be at large, similarly permissive language is used in the general discharge statute for release of civilly admitted mental patients. Thus, N.Y. Ment. Hy. Law § 87(1)(b) (McKinney 1967) provides that the director of a hospital *may* discharge a patient who, in his opinion, is not mentally ill. Since a person who is not mentally ill cannot legally be confined in a mental hospital, the word "may" must, in this context, be read as "shall."

It is arguable that a proceeding in the nature of mandamus may be an alternative procedure to habeas corpus. If the director of Matteawan is under a legal duty to release those patients who in his opinion are reasonably safe to be at large, then failure to do so is subject to challenge pursuant to N.Y.C.P.L.R. § 7004 (McKinney 1967). The New York Court of Appeals has recently held that even where petitioner has prosecuted his action in an improper form and requested relief to which he was not entitled, there is no bar to the receipt of the relief he was entitled to. The Court relied on N.Y.C.P.L.R. §§ 103(c), 105(d), and 3017(a) (McKinney 1967). Phalen v. Theatrical Protective Union No. 1, 22 N.Y.2d 34, 290 N.Y.S.2d 881 (1968). Apparently New York courts are empowered to treat writs of habeas corpus as proceedings in the nature of mandamus where this is appropriate.

74 *See* discussion in text accompanying notes 66-73.

75 N.Y. Ment. Hy. Law § 85(4) (McKinney 1967).

There is a similar provision in Section 135 of the Mental Hygiene Law as to dangerous mentally defective patients. May a patient claiming to be no longer dangerously mentally ill use habeas corpus to be transferred back from Matteawan to a civil state hospital?

In *Kruse v. McNeill*,[76] the court, while deciding the case on other grounds, considered the above question. In its dictum, it stated summarily:

> The question of whether petitioner claims he is fully sane and deprived of his liberty is not before me; if it were, the proper proceeding would be habeas corpus.
>
> "However, a matter of release or transfer of a patient under the Mental Hygiene Law is purely administrative and, unless the power is abused, it is not for the court to determine.[77]

The court in *Kruse* seems to have erred in its conservative approach to habeas corpus. It categorizes both release and transfer as purely administrative. "Release" is subject to the writ of habeas corpus and is not wholly administrative. Further, the issue of whether a person is rightfully confined in a Department of Correction institution as opposed to a civil state hospital under the jurisdiction of the Department of Mental Hygiene is more than just a question of an administrative transfer between equally situated institutions. Matteawan is a maximum security hospital. It has no open wards such as those that house 71.2 per cent of the patients in the civil state hospitals.[78] Patients at Matteawan cannot utilize convalescent status and trial release procedures that are available to patients at civil state hospitals.[79] Most significantly, the average period of confinement of patients at Matteawan is between *six and seven years*.[80] This must be compared with the *four month* average length of hospitalization at the Department of Mental Hygiene hospitals.[81]

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76 23 Misc. 2d 96, 198 N.Y.S.2d 920 (Sup. Ct. 1960).

77 *Id.* at 98, 198 N.Y.S.2d at 922.

78 N.Y. STATE DEP'T OF MENTAL HYGIENE, Monthly Statistical Report for June 1966 at 3 (1966). This is the June 15, 1966 figure.

79 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & FORDHAM UNIVERSITY LAW SCHOOL, *supra* note 1, at 47.

80 Letter and accompanying data from W. C. Johnston, M.D., to Grant H. Morris, November 22, 1966, *See generally*, Morris, *supra* note 49, at 654-9; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & FORDHAM UNIVERSITY LAW SCHOOL, *supra* note 1, at 214-215.

81 N.Y. STATE DEP'T OF MENTAL HYGIENE, State Programs for the Mentally Ill and Mentally Retarded 4 (1965).

Between September 1933 and September 1956, 204 patients were transferred from civil state hospitals to Matteawan. Of this group, 16 were transferred due to "escapes" from other hospitals. These patients were not included in other listed categories that indicated dangerous activity after escape (as, for example, "escape and rape" or "escape and murder").[82] The possibility that some patients were transferred to Matteawan due solely to their escape potential, rather than possible dangerous mental illness, would seem to make their transfers a fit subject for habeas corpus.

The case of *People ex rel. Brown v. Johnston*,[83] discussed below in relation to mentally ill criminals, seems to indicate that the Court of Appeals will no longer allow patients to be forever "lost" in Department of Correction mental institutions. Surely, the Court would be even less hesitant when dealing with patients who were initially civilly admitted to hospitals within the Department of Mental Hygiene, but who have been transferred and are now confined in a Department of Correction institution. In view of the legal problems in transferring civil patients to a Department of Correction institution and the deficiencies in treatment potential at Matteawan, the Association of the Bar of the City of New York has recently recommended that Section 85 of the Mental Hygiene Law be abolished and that dangerously ill patients be hospitalized under appropriate conditions within the Department of Mental Hygiene.[84] However, there is still a question whether "transfer" of dangerous patients between institutions run by the Department of Mental Hygiene or between wards within one institution would be subject to challenge by writ of habeas corpus or whether it would fall within the category of medical judgment. If Section 85 is eliminated, this question should be answered by either the Legislature or the courts.[85]

D. *Persons Convicted of Crimes Who Become Mentally Ill*

Men who are convicted of misdemeanors and women who are convicted of misdemeanors or felonies and who become mentally ill while

82 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & FORDHAM UNIVERSITY LAW SCHOOL, *supra* note 1, at 47.

83 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S. 2d 44 (1961).

84 ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK & FORDHAM UNIVERSITY LAW SCHOOL, *supra* note 1, at 60-69. People *ex rel.* Brown v. Johnson, *supra* note 83, though involving another classification of patient, indicates that the writ is a proper remedy for the transfer of a patient between institutions within the same Department.

85 People *ex rel.* Brown v. Johnston *supra* note 83.

serving their sentences are transferred by the Department of Correction from prisons and penitentiaries to Matteawan.[86] Men who are convicted of felonies and who become mentally ill while serving their sentences are similarly transferred by the Department of Correction into Dannemora State Hospital,[87] an institution within its jurisdiction.[88] May a prisoner properly convicted of a crime and confined in a prison or penitentiary challenge by writ of habeas corpus his transfer into Matteawan or Dannemora as a mentally ill person?

The New York Court of Appeals in *People ex rel. Brown v. Johnston*[89] answered the above question affirmatively. The court stated:

> Although under ordinary circumstances a mere transfer (as distinguished from a commitment for insanity) is purely an administrative matter, and a prisoner has no standing to choose the place in which he is to be confined, we do not feel that the courts should sanction, without question, removals, in cases of alleged insane prisoners, which can conceivably be uncontrolled and arbitrary.[90]

The case is significant in that there was no question of loss of civil rights through confinement in a mental institution. The prisoner had been convicted of the felony of rape in the first degree and sentenced to Attica State Prison for an indeterminate sentence of from one day to life, losing his right to vote and other civil rights. The Court based its decision on the fact that confinement — even of a criminal — as a mentally ill person is "*further* restraint *in excess* of that permitted by the judgment."[91] The state has the duty to protect non-mentally ill prisoners "from unlawful and onerous treatment, mental or physical."[92]

At the time of the decision, the statute authorized purely administrative transfer of prisoners into Dannemora.[93] Subsequent to the Court's decision, and in direct response to it, the statute was amended.[94] Prisoners about to be transferred are now given an opportunity to demand a judicial hearing on the issue of mental illness.

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86 N.Y. Corr. Law § 408 (McKinney 1967).
87 N.Y. Corr. Law § 383 (McKinney 1967).
88 N.Y. Corr. Law § 375 (McKinney 1967).
89 9 N.Y.2d 482, 174 N.E.2d 25, 215 N.Y.S.2d 44 (1961).
90 *Id.* at 484, 174 N.E.2d at 726, 215 N.Y.S.2d at 45.
91 *Id.* at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 45 (emphasis in original).
92 *Id.* at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 46.
93 N.Y. Sess. Laws 1950, ch. 229, § 1.
94 N.Y. Sess. Laws 1962, ch. 393.

In two recent cases,[95] the Supreme Court, Appellate Division, Third Department, has affirmed orders dismissing writs of habeas corpus obtained by sentence-serving patients at Dannemora who claimed they were no longer mentally ill. The court reasoned that the basis for the *Brown* decision has been altered by amendment of the statute, and stated that the return of the prisoner serving a sentence to prison is governed by Section 386 of the Correction Law.[96]

It is submitted that the Appellate Division decisions are in error. Although arbitrary administrative transfers of prisoners *into* Dannemora are no longer a possibility, there is no judicial hearing provided by Section 386 for a prisoner to contest the need for his continued retention in Dannemora. Since arbitrary administrative refusals to discharge remain a distinct possibility, the need for the remedy of habeas corpus continues. The appellate court has confused the question of legality of original confinement with the question of legality of continued confinement.[97]

E. *Mentally Ill Persons Accused of Crimes*

Pursuant to the New York Code of Criminal Procedure,[98] a defendant in a criminal case who is found to be in such a state of idiocy, imbecility or insanity as to be incapable of understanding the charge against him or of making a defense is confined in a mental institution. He is afforded the opportunity of a judicial hearing to contest initially the finding of such mental state. However, once the person has been confined, whether in Matteawan or a civil state hospital, there is no judicial hearing prescribed for him to contest the continuance of the condition. The writ of habeas corpus is his only available remedy.[99]

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95 People *ex rel.* Carroll v. Herold, 27 App. Div. 2d 958 (3d Dep't 1967); People *ex rel.* Conover v. Herold, 24 App. Div. 2d 488, 263 N.Y.S.2d 858 (3d Dep't), *appeal denied*, 16 N.Y.2d 488 (1965).

96 N.Y. Corr. Law § 386 (McKinney 1967).

97 *See* Association of the Bar of the City of New York & Fordham University Law School, *supra* note 1, at 23-24.

98 N.Y. Code Crim. Proc. §§ 662(b) (1), 872(1), 875 (McKinney 1967).

99 People v. Dionisiou, 24 Misc. 2d 338, 201 N.Y.S.2d 220 (Ct. Gen. Sess. 1960). The court held that neither a motion by the defendant to vacate the order committing him to Matteawan, nor writ of *error coram nobis* were proper remedies. It concluded that the defendant who maintains that he is mentally ready to stand trial should resort to a writ of habeas corpus.

There is one other possible "remedy" available. Pursuant to N.Y. Code Crim. Proc. § 662(3) (McKinney 1967), a defendant may move for a dismissal of the indictment. The court may dismiss the indictment on the consent of the district attorney. The district attorney is authorized, but is not required, to consent.

The test that should be applied in that habeas corpus proceeding is the present capability of the defendant to understand the charge against him *and* of making his defense. It is not sufficient that the defendant understand the charge against him; he must also be capable of making his defense.[100]

F. *Persons Acquitted of Crimes by Reasons of Insanity*

When in a criminal case the defendant is acquitted on the ground of a mental disease or defect, New York law[101] requires the court to commit the defendant to the custody of the Commissioner of Mental Hygiene to be institutionalized. A committed person is authorized to apply to the court for his release or discharge.[102] If the court is satisfied, either with or without a hearing, that the person can be discharged or *released on condition* "without danger to himself or others", the court is required to order his discharge.[103] While this statute would seem to obviate the need for habeas corpus, the New York Court of Appeals has recently held that in addition to the statutory remedy, a confined person can always challenge the validity of his continued detention by alleging in a writ of habeas corpus that he is not in fact insane.[104] This curious ruling leaves unanswered the ques-

Without the district attorney's cooperation, release of the patient through this route is not possible. Habeas corpus appears to be the only remedy by which the patient may legally force his release.

100 People *ex rel.* Butler v. McNeill, 30 Misc. 2d 722, 219 N.Y.S.2d 722 (Sup. Ct. 1961). The court found the defendant capable of understanding the nature of the charge, but had to call in an independent, disinterested psychiatrist to reach its decision as to the defendant's ability to make a defense.

101 N.Y. Code Crim. Proc. § 454(1) (McKinney 1967). Although the New York Court of Appeals upheld the constitutionality of the statute in People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966), the validity of that decision is subject to grave doubts. For example, in Lally, the Court placed undue reliance on Lynch v. Overholser, 369 U.S. 705 (1962) and Ragsdale v. Overholser, 281 F.2d 943 (1960) to support its position. The issue before the Supreme Court in Lynch was whether one could be confined pursuant to a mandatory commitment statute when at trial he neither claimed nor presented any evidence that he had been insane at the time the offenses were committed. The Supreme Court held that he could not be so committed. Justice Clark's dissent specifically chastized the majority for not reaching the constitutional issue of whether a mandatory commitment statute violates due process.

Although the U.S. Court of Appeals held in Ragsdale that a District of Columbia statute similar to § 454 was not unconstitutional, in Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968), the unanimous court specifically modified its holding in Ragsdale, and in effect, eliminated the mandatory commitment statute.

102 N.Y. Code Crim. Proc. § 454(5) (McKinney 1967).

103 N.Y. Code Crim. Proc. § 454(3) (McKinney 1967).

104 People v. Lally, 19 N.Y.2d 27, 33, 224 N.E.2d 87, 91, 277 N.Y.S.2d 654, 659 (1966).

tion of whether the court may place conditions on the release of a person who successfully uses the habeas corpus route rather than the application for discharge route.[105] It also raises the question as to whether additional classifications of mental patients mentioned above may circumvent the judicial procedures required by other statutes, and obtain immediate release through the writ of habeas corpus. The Court's decision illustrates the confusion presently surrounding the writ of habeas corpus as it is available to the person confined in a mental institution today.

IV. Conclusions and Recommendations

A. *Conclusion*

The general principles concerning the right of a confined mentally disordered person to the writ of habeas corpus may be easily stated:

> "Where a mentally ill person is committed, his detention is authorized only during the continuance of the condition. If he recovers while under lawful commitment, he may apply for a writ of habeas corpus to secure his release. If he establishes his mental soundness he will be released. . . . His release will be refused, however, where the evidence indicates that the relator requires further care and treatment."[106]

However, it is evident that the statutes as found in the C.P.L.R. in attempting to encompass all situations in which the writ of habeas corpus is applicable, do not clearly define the specific principles governing issuance of the writ to persons confined for mental disorder.

B. *Specific Recommendations*

(1) C.P.L.R. Section 7003

Since much of the confusion surrounding the right of the confined mentally disordered person to the writ of habeas corpus is attributable to the existence of two separate statutes governing its issuance, the most logical solution is to clarify one statute and eliminate the other.

105 This question may be of major significance in that if a person is conditionally released pursuant to the terms of N.Y. Code Crim. Proc. § 454 (McKinney 1967), the conditions that can be imposed are any that the court determines to be necessary. Also, at any time within five years of the conditional release, the court may order a hearing and if it determines "that for the safety of such person or the safety of others his conditional release should be revoked, the court shall forthwith order him recommitted. . . ."

106 Rosario v. State, 42 Misc. 2d 699, 702, 248 N.Y.S.2d 734, 737 (Ct. Cl. 1964).

If C.P.L.R. Section 7003 is amended as suggested below, the continued utility of Mental Hygiene Law Section 426 is doubtful. The latter is an unneeded remnant from the past, when the prime emphasis of the mental institution was custodial care, rather than treatment and release.

C.P.L.R. Section 7003(a) should be amended to indicate that a person who is confined in a mental institution is entitled to the writ pursuant to C.P.L.R. Article 70 whether he is contesting the legality of his initial confinement or the legality of continued confinement due to a change in his mental condition.[107] Specifically, the statute should provide that a person is entitled to discharge if:

I. he was not mentally disordered at the time he was confined initially;

II. he has recovered and is not mentally disordered at the time of the habeas corpus hearing;

III. although he has not recovered from his mental disorder, he is no longer in need of care and treatment in the institution in which he is confined;

IV. although he has not recovered from his mental disorder, he is no longer suitable for care and treatment in the institution in which he is confined.[108]

C.P.L.R. Section 7003(b) should be amended to provide that a final order in a habeas corpus proceeding brought to test the legality of the original confinement, (basis I *supra*), shall be conclusive evidence of the facts determined by the court upon a subsequent proceeding involving the same question unless such final order shall otherwise specify.[109] However, in a habeas corpus proceeding brought to con-

107 Thus the wording of old Civil Practice Act § 1253(2) is preferable. *See* discussion in text accompanying notes 22-24, *supra*.

108 These proposals are designed to conform the right of release pursuant to habeas corpus to an absence of the conditions for which the person was initially confined, regardless of what the existing discharge statute authorizes. *See* discussion in text accompanying notes 25-34, *supra*. The term "mentally disordered" as used in these recommendations includes all mental conditions under which patients are or will be institutionalized pursuant to the Mental Hygiene Law; e.g., mental illness, mental deficiency, epilepsy, drug addiction, alcoholism, and inebriety.

The decision in Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966) is significant, insofar as it relates to the need and suitability of a person for treatment. The U.S. Court of Appeals for the District of Columbia held that in a habeas corpus proceeding the court hearing the petition was under a duty to explore alternatives to continued confinement. This position seems highly desirable.

109 *See* discussion in text accompanying notes 35-40, *supra*.

test the legality of continued confinement due to a change in the patient's mental condition, (i.e., basis II, III, or IV *supra*), Section 7003(b) should also provide that a prior habeas corpus hearing determination that the person was lawfully confined originally or that there had been insufficient change in the patient's condition to warrant release, is not determinative of the issue, nor admissible as relevant evidence, in this subsequent proceeding.[110] It is arguable that some patients might abuse such a provision and write out writs daily. However, when one considers that the average length of hospitalization in Department of Mental Hygiene hospitals is only four months,[111] courts should not be permitted to look at stale habeas corpus determinations that are two years, one year, or even six months old, and summarily decide that the patient's mental condition has not improved to the extent that he may be released.

(2) C.P.L.R. Section 7009(d)

This statute provides that if the court is satisfied "that the person detained is too sick or infirm to be brought to the appointed place, the hearing may be held without his presence. . . ."[112] The provision should be limited to "physical" illness or infirmity, not affecting the legality of the confinement. The alleged severity of a person's mental illness should not of itself constitute such sickness or infirmity as would warrant the absence of a patient at a habeas corpus hearing on that issue.

(3) Mental Hygiene Law Section 426

If Section 426 is retained, certain major changes seem desirable. The statute should specify that its provisions are not exclusive. This is necessary in that C.P.L.R. Section 7001 provides that Article 70 of the C.P.L.R. is to apply "except as otherwise prescribed by statute."[113] Section 426 is designed to afford the patient the additional right to seek release upon recovery or improvement in mental condition. This is not exclusive of the Article 70 right to test the legality of the original detention.

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110 *See* discussion in text accompanying note 41, *supra*.
111 N.Y. STATE DEP'T OF MENTAL HYGIENE, *supra* note 81.
112 N.Y.C.P.L.R. § 7009(d) (McKinney 1967).
113 N.Y.C.P.L.R. § 7001 (McKinney 1967).

As presently written, a Section 426 habeas corpus hearing determines "the fact of his (the patient's) mental illness, mental defectiveness, drug addiction or inebrity [sic]. . . ."[114] The statute should be reworded to clarify that its purpose is to test the need for continued confinement.[115] Specifically, the statute should provide that a person is entitled to release on basis II, III, or IV *supra.*

In 1965, Mental Hygiene Law commitment provisions were enacted for alcoholics.[116] Through an apparent oversight, Section 426 was not extended to persons confined due to their alcoholism. Section 426 should be amended either to specifically include alcoholics, or reworded so as to include any type of patient who is now or may in the future come within Department jurisdiction.[117]

(4) Mental Hygiene Law Section 206(7)[118]

This statute provides that if upon a writ brought on behalf of a person confined as a drug addict, the judge determines that he may be properly discharged he shall so direct. Since Mental Hygiene Law Section 426 specifically includes drug addicts within the purview of its provisions, Section 206(7) is apparently unnecessary.

(5) Mental Hygiene Law Section 423(4)

This statute is almost identical to Section 206(7), except that it applies solely to inebriates. Section 426 adequately deals with inebriates and there appears to be no need for Section 423(4) which states generally what the court will do in any habeas corpus proceeding in which the court determines that the person is improperly confined.

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114 N.Y. Ment. Hy. Law § 426 (McKinney 1967).

115 *See* discussion in text accompanying notes 25-34, 59-60, *supra.*

116 N.Y. Sess. Laws 1965, ch. 813, § 1.

117 There are other wording changes that should be made to Section 426 that are of less importance. For example, Section 426 begins: "Any one *hospitalized* as a mentally ill person, *mental defective,* or epileptic. . . ." In the strictest sense, mental defectives are not hospitalized. The word "hospitalized" should be changed to "institutionalized" or to some other appropriate word to include mental defectives who have been admitted to State schools.

Section 426 refers to a person "in custody as an inebriate pursuant to section *two hundred twenty-three.* . . ." Mental Hygiene Law Section 223 was renumbered 423 by the Legislature in 1965, (N.Y. Sess. Laws 1965, ch. 813, § 2), and this change should be noted in Section 426 by reference to the appropriate number.

Upon the return of the writ applied for by an inebriate, Section 426 provides that the fact of his "inebrity" shall be inquired into. There is no such word as "inebrity." The correct word is "inebriety."

118 As renumbered by N.Y. Sess. Laws 1968, ch. 772, § 1.

C. *General Recommendations*

Whichever approach is followed in correcting the defects in existing legislation, certain basic decisions must be made about the nature of the writ of habeas corpus and its availability to the mentally disordered. This does not mean that all the decisions to be made are necessarily legislative. The New York Court of Appeals decision[119] permitting convicted criminals to use the writ to review violations of fundamental constitutional or statutory rights must be clarified as to its applicability to the involuntary, civilly-admitted mental patient.

The right of a person on convalescent status to seek absolute discharge through habeas corpus is in need of resolution. Though he is no longer physically restrained in an institution, his life is subject to regulation through the rules of the Commissioner of Mental Hygiene.[120]

The fate of certain classifications of mental patients remains in doubt. For example, a Section 426 habeas hearing is presently available to "[a]ny one hospitalized as a mentally ill person. . . ."[121] Can it be urged that a patient who was initially civilly admitted to a Department of Mental Hygiene hospital but who has been transferred to Matteawan pursuant to Section 85 is not a "mentally ill person" but rather a "dangerously mentally ill person" and is not entitled to the writ? As whimsical as this contention may seem at first glance, it could be reasoned that Section 426 was aimed at patients who are either in Department of Mental Hygiene institutions or institutions that come under the Department's jurisdiction, and that this was the reason that the statute was originally placed within the Mental Hygiene Law. Since Matteawan is within the Department of Correction, Section 426 is arguably not available to patients confined therein.[122]

The availability of the writ to persons confined as: dangerously mentally ill or dangerously mentally defective,[123] mentally ill crim-

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119 People *ex rel.* Keitt v. McMann, 18 N.Y.2d 257, 220 N.E.2d, 653, 273 N.Y.S.2d 897 (1966).

120 *See* discussion in text accompanying notes 50-58, *supra.*

121 N.Y. Ment. Hy. Law § 426 (McKinney 1967).

122 Similarly, in People *ex rel.* Ledwith v. Board of Trustees, 238 N.Y. 403, 410-413, 144 N.E. 657, 660-661 (1924), Judge Lehman, in dissenting, reasoned that a person confined as an *allegedly* mentally ill person was not confined as a mentally ill person and was not entitled to the writ under the predecessor statute to § 426.

123 *See* discussion in text accompanying notes 66-85, *supra.*

inals,[124] mentally incompetent to stand trial,[125] or not guilty of crimes by reason of insanity[126] remains clouded. What is needed is a statutory basis for release from confinement as a patient falling within one of the above classifications, even though the ex-patient may possibly continue in confinement, or at least in custody, under some other classification. Thus through habeas corpus an ex-dangerously mentally ill patient should be able to obtain retransfer from Matteawan to a Department of Mental Hygiene hospital. A mentally ill criminal, presently under sentence, should be able to obtain retransfer to prison if he is no longer so mentally ill that he is in need of continued care and treatment in Dannemora or Matteawan. A person who is no longer mentally incompetent to stand trial should be able to force his immediate trial, even though he may still be mentally ill and in need of continued institutional care and treatment.

Thus, a proposed habeas corpus statute should include a fifth basis for release. A person should be entitled to discharge if:

V. although he has not recovered from his mental disorder, he no longer satisfies the conditions which initially required his institutionalization. Discharge pursuant to this provision shall not be dependent on the abilty of the patient to obtain absolute discharge from custody or other institutionalization.

Practical problems of patients in mental hospitals must also be considered. What protection is actually afforded to those patients who cannot read or write, or are too feeble physically to write out a petition? Are writing materials easily available? How difficult is it for a patient to obtain an all-important independent psychiatric examination?[127] Are patient's records made available by the institution to the patient's attorney, or to an independent psychiatrist? To what extent does the existence of the Mental Health Information Service[128] alleviate these problems?

Finally, the very purpose of the writ is in need of re-examination. Until recently, legal thinking has been limited to substantive and procedural law reform to insure that persons who were institutional-

124 *See* discussion in text accompanying notes 86-97, *supra.*
125 *See* discussion in text accompanying notes 98-100, *supra.*
126 *See* discussion in text accompanying notes 100-104, *supra.*
127 *See* discussion in text accompanying notes 42-49, *supra.*
128 N.Y. Ment. Hy. Law § 88 (McKinney 1967). Each of the four judicial departments of the State has such a service.

ized were actually sufficiently mentally ill to require institutionalization. Now a "right to treatment" cult has asserted itself.[129] These crusaders advocate the creation of a legal right of mentally ill patients in public mental institutions to adequate mental treatment. They argue that if a person is incarcerated by the state involuntarily because he needs mental treatment, the state has the obligation to furnish that treatment. Even if the test of commitability is danger to self or others, there is a duty on the state to make that confinement as short as possible, by providing adequate treatment. Further, adherents to these tenets would enforce this "right to treatment" by authorizing confined persons to utilize habeas corpus to obtain release in situations where the state has not fulfilled its treatment obligation.

In 1966, the New York Court of Appeals rejected a patient's claim that he should be released on a writ of habeas corpus since he was allegedly receiving inadequate rehabilitative and custodial care and treatment.[130] In a memorandum opinion, the Court stated that recourse for the patient was to the Commissioner of Mental Hygiene under his statutory[131] power to investigate and correct abuses in the treatment of mentally ill patients.[132]

Later that year, the United States Court of Appeals for the District of Columbia, per Chief Judge Bazelon, accepted the right to treatment argument in the landmark case of *Rouse v. Cameron*.[133] The statute provided: "a person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."[134] The court broadly construed the statute to require adequate treatment and ruled that "[c]ontinuing

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129 *See, e.g.*, Bassioun, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 DE PAUL L. REV. 291 (1966); Arens, *Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch*, 13 CATH. U. L. REV. 3 (1964); Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

130 People *ex rel.* Anonymous no. 1 v. LaBurt, 17 N.Y.2d 738, 217 N.E.2d 31, 270 N.Y. 2d 206, *cert. denied*, 385 U.S. 936 (1966). *See* also, People *ex rel.* Anonymous v. LaBurt, 14 App. Div. 2d 560, 218 N.Y.S.2d 738 (2d Dep't 1961), *appeal denied*, 14 App. Div. 2d 700, 219 N.Y.S.2d 948 (1961), *appeal dismissed*, 9 N.Y.2d 794, 175 N.E.2d 165, 215 N.Y.S.2d 507, *cert. denied and appeal dismissed*, 369 U.S. 428 (1962).

131 N.Y. Ment. Hy. Law § 86 (McKinney 1967).

132 The "right to treatment" doctrine has been argued in the United States Supreme Court on an allegation of denial of "medical due process." Lynch v. Overholser, 369 U.S. 705 (1962). The Court, however, decided the case on other grounds.

133 373 F.2d 451 (D.C. Cir. 1966).

134 D.C. CODE ANN. § 21-562 (1967).

failure to provide suitable and adequate treatment cannot be justified by lack of staff or facilities."[135] It held that the right to treatment is cognizable in habeas corpus.[136]

The ultimate decision as to the extent of the writ of habeas corpus in the area of adequate treatment of the confined mentally ill is a difficult one and should not be determined summarily, as the N. Y. Court of Appeals has attempted to do. At the minimum, a careful examination should be made of the ability and willingness of the Commissioner of Mental Hygiene to correct deficiencies in the treatment of individual patients.

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135 Rouse v. Cameron, 373 F.2d 451, 457 (D.C. Cir. 1966).

136 For an argument that the principle of a "right to treatment" should be extended to mentally ill criminals as well as to persons civilly committed, *see* Morris, *supra* note 49, at 679-681. However, the question remains as to the obligation of the state when there is no effective treatment method known for a particular illness and the committed person is adjudged dangerous.

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LEGISLATION TO PRESERVE AND CONTROL OPEN SPACE LAND*

INTRODUCTION

The Model Open Space Statute is a response to problems of land development in the New York urban area. For that reason it was thought necessary to include a Model Interstate Open Space Compact to allow for interstate cooperation in solving problems which in other areas might be attacked equally well solely on an intrastate basis. Indeed, the problems which would arise in enforcing a stringent Interstate Compact have led the drafters to believe that the primary advantage from an interstate effort is the increased coordination and cooperative spirit which might well result even in the absence of the Compact. Federal legislation has also been proposed, principally because existing federal legislation shows a keen interest in closely related problem areas.

Following this introduction appear first, suggested Federal legislation, second, The Model Interstate Open Space Compact, third, The Model Open Space Act. Explanatory comments follow immediately after each section, except for a Special Comment on the Public Purpose Doctrine which appears at the end of the Model Open Space Statute because it relates to the Statute as a whole.

The proposed statutory package is predicated on the assumption that both federal and state governments should be more active in the area of open space acquisition and control, but that state and interstate activity is generally more desirable than direct federal intervention in this area. While it is clear that the federal government itself has a general interest in the preservation of open space, especially in urbanized and urbanizing areas (see 42 USC §§ 1500c-1 and c-2), it is also clear that the quality of life in the New York metropolitan area specifically, and of the entire northeastern "megalopolis" in general, is primarily of interest to the governments of the states in each respective area. Thus proposed revision of federal law is limited to an expansion of the federal government's planning and ad-

*Drafted by Richard B. Child, LL.B., Harvard Law School, 1968 and William A. Gregory and Diane G. Van Wyck, members of the class of 1969 in the Harvard Law School.

visory responsibilities in this area, with particular emphasis on attempting to reconcile the federal "conservation" and "open space" programs.

In part, moreover, the drafters' bias toward state and interstate action reflects the conclusion that since some state action is necessary, federal action should be minimized to avoid confusion of function. While it is probable that most of the techniques available at the state level would also be available to the federal government, the state could deal with a number of problems that the federal government could not realistically undertake, such as the financial problems created for local governments by the loss of property tax revenues due to the taking of public conservation interests in their lands. In addition, focus at the state level appears highly practical since the use of certain techniques by either state or federal authorities may incur difficulties from state constitutions, and the state legislatures alone have power to act to remove these obstacles. Finally, some techniques available to state government agencies, like control of local zoning, are *wholly* unavailable to the federal government.

From the standpoint of financing, a state level program is preferable because any federal program which involves minimal state financial participation might be vetoed by Congress as an improper redistribution of income towards the most populous states. If it was made national to overcome this first objection, a federal program would result in insufficient aid to the metropolitan areas since the available funds would have to be spread over a vastly greater territory. (See, *e.g.*, the grant-in-aid formula in 16 USC § 4601-8(b)).

Having chosen a primarily state-level approach, the drafters saw the need for inter-state cooperation at least in the New York urban area. The greater New York area is essentially a unit in which state boundary lines bear no relation to the problems the area faces. Cooperation is necessary not only to assure rationality in planning and to minimize duplication and waste of precious resources, but also to enlist as many creative people as possible in the solution of the many difficult legal, economic, and political problems which an open space program presents.

The intricacy of the problems necessitates the formation of some sort of permanent body which will have the time and resources to conduct the necessary background studies. Because of the controversial nature of land acquisition, and the desire of the drafters to remove

the program as far as possible from the political arena, an independent agency seemed appropriate. The necessity of continued administration of the program also militated in this direction.

There are ample precedents for inter-state cooperation in setting up independent authorities. Many exist in the metropolitan area already; they have been established to administer parks (for instance the Palisades Interstate Park Authority), sewer districts and other utilities, to control pollution and carry on other functions which could only be handled cooperatively. On the whole, these authorities have had limited functions and fairly specific powers; the areas involved have tended to be non-political and non-controversial. One exception to this is the Port of New York Authority, which has broad powers to acquire land, to build, to maintain and to administer a welter of transportation facilities in the metropolitan area.

Despite these precedents, the drafters decided to place primary emphasis in their scheme upon state open space agencies, with the interstate agency acting as a general coordinating body. Essentially all powers and duties rest with the state commissions. While this structure in part reflects a general feeling to be as conservative as possible with respect to constitutional delegation problems, it also aims to preserve state control over matters thought by the general public to be local, rather than state prerogatives, such as zoning and property taxation. There is, in any case, no precedent in the Port Authority's history or elsewhere for many of the delegation problems raised by this draft, so that the constitutionality of a statute giving all the power to an interstate commission would be exceedingly difficult to predict.

FEDERAL OPEN SPACE LEGISLATION

42 U. S. C. Section 1500 (f) (proposed)

A United States Open Space Commission is hereby established, to consist of the Secretary of Housing and Urban Development, the Secretary of the Interior, and three other individuals to be appointed by the President with the advice and consent of the Senate. The Commission shall be provided with a research staff. The Commission shall study the implementation and coordination of the federal programs under Chapter 8C of this Title and Section 4601-8 of Title 16, with regard to existing and future needs for preservation and development of open-space land in the

rapidly urbanizing portions of the nation. The Commission shall further conduct studies of the legal and organizational techniques most desirable and convenient for the public acquisition and development of interests in open-space land, especially in rapidly urbanizing areas, by government agencies at the federal, regional, state, and local levels, and of the federal programs most desirable and convenient to assist such acquisition and development.

The Commission shall make recommendations to the Congress, based on its studies, of the federal programs appropriate to fulfill the purposes of this Chapter, and of Section 460 of Title 16. The Commission shall advise and consult with state and interstate agencies desiring information on their rights under this Chapter and under Section 460 of Title 16, or desiring advice on the legal and organizational techniques most desirable and convenient for the public acquisition and development of interests in open-space land.

COMMENT: The principal purpose of creating a federal commission is to stress the importance of the problem and the degree of public commitment to its solution. The Secretaries of HUD and Interior are essential participants, in part because of their responsibilities under the most directly relevant existing federal legislation, and in part because they have an overview of the federal government's total involvement in the field. The Secretary of the Interior, for example, is responsible for the National Park Program.

The Commission's duties are two-fold: (1) to attempt to relate the federal government's "conservation" program to its "open-space" program (which President Johnson tried to do in an unsatisfactory executive order — see the end of Section 460 in 16 USC), and (2) to study means by which the entire problem can be handled by further innovations. The Commission is directed to share its wisdom with the Congress and with state and local governments seeking advice.

II. INTERSTATE OPEN-SPACE COMPACT

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The Interstate Open Space Compact is hereby agreed to and enacted into law, subject to execution by the governor as provided in said compact. The compact is as follows:

Whereas the signatory parties find that a combination of economic, social, governmental and technological forces are causing an unprecedented degree of growth in the greater metropolitan area which has simultaneously resulted in a greatly increased demand in the interstate area for open recreational, conservation and scenic areas and, at the same time, in a great reduction in the undeveloped open space available for these purposes in the interstate compact area; and

Whereas the planned control, acquisition and development of open space land in the interstate area for recreational, conservation, and scenic purposes is a vital public purpose of the signatory parties, and is essential to the health and welfare of the residents of the interstate compact area; and

Whereas it is the purpose of the signatory parties to coordinate planned efforts for public protection of open space land in the interstate compact area in order to curb the spreading of urban blight, to encourage the development of open space land in the public interest, and to conserve and develop for present and future use essential recreation, conservation and scenic areas in the interstate compact area; and

Whereas it is likewise the purpose of the signatory parties to cooperate with the Secretaries of Housing and Urban Development and of the Interior (and with the Federal Open Space Commission) in attaining federal cooperation and financial aid under Chapter 8C of Title 42 of the US Code, under Section 460 of Title 16 of the US Code, and under any other applicable federal program, and in developing plans for new national parks, national forests, historic areas and wildlife preserves in the interstate compact area; and

Whereas the signatory parties have determined to establish an interstate agency with jurisdiction and powers adequate to provide for the preservation of open space within the interstate compact area;

Now therefore, the states of , , and hereby solemnly covenant and agree with each other, upon the enactment of concurring legislation by the Congress of the United States and by the respective state legislatures, having the same effect as this part as follows:

COMMENT: This is necessary to lay the factual basis for the use of the state police power, which may be used only in the public interest. Courts find it easier to sustain legislation as in the public interest where the legislation itself contains a legislative finding that the bill is essential to the public welfare. This is particularly important here, since the notion of an open-space program is new, and there may be doubts about the need for it. A fuller discussion of this will be found in the comments to the Model Open Space Act.

ARTICLE I: *Definitions*

(A) "Open space land" means predominantly undeveloped land which has value for (1) park and recreational purposes; (2) conservation of land and other natural resources; or (3) historic or scenic purposes.

(B) "Open space use" means any use of open space land which does not tend to destroy or substantially diminish over time its value as open space land.

(C) "Interstate Compact Area" means the area encompassed by the party states.

COMMENT: See comments to Art. II of the Act, *below.*

ARTICLE II: *The Interstate Open Lands Commission*

(A) There is hereby created the Interstate Open Lands Commission, hereinafter referred to as the Commission. The Commission shall be composed of the chairmen of the , , and Open Space Commissions, with the chairmanship to rotate annually.

(B) The members of the Commission shall meet at least once every third month, with their first meeting to occur within three months after the effective date of this compact. Each member shall have one vote, and no action shall be taken by the Commission without a majority of its members having voted in favor of said action. The minutes of their meetings shall be submitted to the governors of the three signatory parties, and the signatures

of the three governors upon these minutes shall signify approval of the actions taken therein.

(C) The Commission shall enact rules and regulations to govern its internal affairs.

COMMENT: The Interstate Commission is intended to be a coordinating body which serves as liaison between the federal government and the three state commissions. The drafters selected the chairmen of the state commissions as the members of the Interstate Commission because they will probably be the most experienced members of the state commissions (at least after the program has been in action for a while) and are in the best position to carry the policy decisions of the Interstate Commission back to the states to secure action. As chairmen, they will have a firm grasp on the activities of their own commission and on the problems of their state.

It is expected that the Interstate Commission will meet regularly to supervise the execution of the comprehensive plan and probably more often than every three months during the preparation of the plan. The minutes of their meetings, like those of the Port of New York Authority, will be sent to the governors for their approval. The Commission would not take an action of which the governors disapproved. However, this is largely perfunctory in most cases, though it provides some check on the discretion of the Commission.

ARTICLE III: *Jurisdiction and Powers*

(A) The jurisdiction of the Commission shall be the Interstate Compact Area.

(B) In addition to the other powers vested in it by law, the Commission shall have the power

(1) to cooperate with the Federal Open Space Commission in studies of the legal and administrative techniques most convenient and desirable for public control of open space development in metropolitan areas;

(2) to coordinate the preparation of a comprehensive plan for interstate public open space development in the Interstate Compact Area. The plan shall be prepared by the state Open Space Commissions in cooperation with the officials of the signatory parties, and shall be designed to:

(i) conserve unique scenic resources, particularly in portions of the Interstate Compact Area where

they are most endangered by expanding commercial land development; and

(ii) provide new or expanded recreational facilities in accordance with projected population and transportation patterns and public recreational preferences for the next forty years, making additional recreational facilities available as soon as they become necessary; and

(iii) provide for desirable controlled residential and commercial development in close proximity to these scenic and recreational areas, to the extent of each state's constitutional authority.

(3) to publish studies of the comprehensive plan and of the public needs it is designed to serve, and of the means, private as well as public, of achieving its ends.

COMMENT: (1) Cooperation with the federal government will give the research of the interstate and state commissions more depth at less cost. Contact with the federal government will also make readily available information about federal aid for open space acquisition.

(2) The Interstate Commission's main job is coordinating the work of the three state commissions into the Comprehensive Plan which will set the guidelines for open space acquisition in the metropolitan area. For more about the plan, see the comments to Art. VII of the Act.

(3) It is expected that the Interstate Commission will publish studies of its experience with an open space program for the information of agencies in other areas of the country.

ARTICLE IV: *Concurrent Jurisdiction*

The establishment of the Interstate Open Lands Commission shall not derogate the independent powers of state and local governments to acquire interests in open lands within the Interstate Compact Area.

COMMENT: This was not necessary, except as a clarification, since the Interstate Commission itself has no powers of land acquisition, and acquisition under the plan will have to be done by the state and local governments.

ARTICLE V: *Staff and Finances*

(A) The Commission shall be provided with a full-time administrator, and with such other staff as the Commission shall deem necessary.

(B) The expenses of the members of the Commission shall be borne by their respective states; other expenses of the Commission shall be apportioned among the signatory parties in accordance with such equitable cost-saving formulae as the members of the Commission may adopt by unanimous vote.

COMMENT: Compensation for the members of the Interstate Commission will be taken care of by the compensation provisions of the Act. Attendance at interstate meetings is one of the duties of the chairman of each state commission. Individual expenses will be taken care of in the same way. Expenses of the Commission as a whole, such as those incurred in publishing studies, will be allocated among the states in whatever manner seems fair to all the members of the Commission. The drafters decided against a blanket formula allocation because of the unforeseeability of the kinds of expenses that the Commission would incur and the possibility that they might in some instances benefit one member more than others. This provision may, however, be politically unwise, since state legislators may feel their only recourse against the Commission on finances is to withdraw from the Compact.

ARTICLE VI: *Constitutional and Statutory Changes*

The signatory parties pledge themselves to seek prompt passage of legislation substantially identical to the Model Open Space Act appended to this Compact and to make any statutory or constitutional changes desirable in light of the aims of this Compact.

ARTICLE VII: *Acquisitions*

The signatory parties pledge themselves to act with all due speed to carry out the recommendations of the Commission for the control of future development of open space land and for the acquisition of interests in open space land within their respective states.

ARTICLE VIII: *Changes in Membership*

(A) Additional states may be added to this compact, and their

representatives to the Commission, upon an affirmative vote of two-thirds of the Commission.

(B) Any signatory party may leave the compact, upon the vote of its legislature, after six months notice is given to the other parties.

ARTICLE IX: *Effect on Existing Law*

Nothing in this Compact shall be construed to abrogate, impair, or in any way prevent the enactment or application of any state or local law, code, ordinance, rule or regulation not inconsistent with this Compact.

ARTICLE X: *Construction and Severability*

The provisions of this Compact shall be severable, and if any phrase, clause, sentence or provision of this Compact is declared to be unconstitutional or the applicability thereof to any signatory party is held invalid, the constitutionality of the remainder of the Compact and the applicability to any other signatory party shall not be affected thereby. It is the intent of the parties that the provisions of this Compact be reasonably and liberally construed.

III. THE MODEL OPEN SPACE ACT

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SECTION 1: *Purpose*

The purpose of this act shall be to help preserve the unique scenic resources of this state and to provide the necessary open space for the present and future scenic and recreational needs of the rapidly expanding population of the metropolitan area. The legislature finds that the haphazard development of this region threatens destruction of the open space lands available to meet these needs and that their protection is a vital public purpose. The legislature also finds that this purpose can be accomplished only through the combined use of the state and local police powers, through public land acquisition for recreation and conservation facilities and for light density residential-commercial buffer zones, and through cooperation with the state governments of and in the Interstate Open Space Compact.

COMMENT: Legislative findings and statutory purpose are important in meeting the constitutional tests of public use (of tax revenues) and public purpose (in the taking of privately-owned land by eminent domain). The first two sentences of this section are designed to establish what the problem is, and the third sentence is designed to show that the general approach of the statute is the only possible solution.

Because of its constitutional importance, this section would probably be improved by a more detailed series of findings on the growing open space shortage in the northeast and in the particular state; the same is true of the preamble to the interstate compact. However, the drafters felt themselves unable to prepare such findings at this time. As Shirley A. Siegal points out in *The Law of Open Space* (1960), such expanded findings would also "represent official recognition of the problems" to which this statute is addressed.

SECTION 2: *Definitions*

(a) " Interstate Compact Area" means the lands in the area covered by the Interstate Open Space Compact, namely .

(b) "Open Space land" means predominantly undeveloped land which has value for (1) parks and recreational purposes, (2) conservation of land and other natural resources, or (3) historic or scenic purposes.

(c) "Open space use" means any use of open space land which does not tend to destroy, or substantially diminish over time, its value as open space land.

(d) "Non-open space use" means any use of open space land which tends to destroy, or substantially diminish over time, its value as open space land.

COMMENT: The definition of "open-space land" is taken directly from the relevant existing legislation in the United States Code (see 42 USC § 1500c). This provides a basic standard for the legislation which is compatible with the federal government's standards for granting federal financial assistance. It also seems a good standard in its own right. Finally, to instruct the state that it is "primarily" to take land with value for one of several clearly public purposes (see Section 6) helps to establish the public purpose of every individual taking.

"Predominantly undeveloped" is left undefined partly to avoid incompatibility with the federal statute, but more because any definition would be purely arbitrary. One possibility would be to specify a certain percentage of each parcel of land which must be free from permanent structures. Such percentage guidelines would be very difficult to draw, however, and would ignore the facts that some types of land "development" do not involve the construction of permanent structures, and that some types of development are more permanent, and hence more corruptive of "open-space" value, than others.

The definition of "open-space use" is different from that in the U.S. Code, because of the use of the term later in the act (see especially Section 10). The drafters see no need for the state to buy any non-detrimental private uses of open-space land far in advance of public open-space development.

SECTION 3: *Area Covered by the Act*

This Act applies to the entire state.

COMMENT: The decision to make the act applicable to the whole state is based primarily on the consideration that Title 16 § 460-8(d) of the U.S. Code requires "a comprehensive statewide outdoor recreation plan" for states wishing to qualify for federal assistance under recent federal conservation legislation. The language of Section 6

should make it clear that the most rapidly urbanized areas are the areas to be stressed in implementing the program.

If, despite the federal legislation, the statute were to be limited to an interstate area containing less than the whole of each state, some provisions of the act might run into constitutional attack on the basis of limited state constitutional bans on "local laws" like Article IV § 7 par. 9 of the New Jersey Constitution, and Article III § 17 and Article IX § 2(b)(2) and 3(d)(1) of the New York Constitution. The drafters would be prepared to file a brief arguing that the Act, even if applied in terms to only part of a state, should be sustained against such attacks.

SECTION 4: *The Open Space Commission*

(a) Purpose

There is hereby created a Open Space Commission, hereinafter referred to as the Commission. The purpose of the Commission shall be to establish, with its counterpart commissions in and , a plan designating certain areas within the Interstate Compact Area as open space areas of different types, and to work in cooperation with other state agencies and with local governments in this state to achieve the conservation, recreation, and scenic aims of the plan through land acquisition, zoning controls, and other means.

(b) Composition; Forbidden Activities

The Commission shall consist of five members to be appointed by the Governor on a non-partisan basis with the consent of the Senate. The term of each member shall be five years, except that the members first chosen shall be appointed for terms of 1, 2, 3, 4, and 5 years respectively. If a member of the Commission is unable to complete his term, another member shall be appointed. The members of the Commission shall at all times include two of the following: a conservationist, a recreational planner, a landscape architect, or regional planner. No member of the Commission shall have a financial interest in any land which the Commission seeks to acquire.

(c) Voting Power

Each member of the Commission shall have one vote. No action shall be taken by the Commission on any matter unless approved by a majority of its members.

(d) Compensation

Members of the Commission shall receive compensation of dollars per day of work plus reimbursement of any necessary expenses incurred in the performance of their duty. The commission shall be provided with a paid administrator and with a research and advisory staff, which shall be properly compensated.

(e) Rules and Regulations

The Commission shall adopt rules and regulations to govern its own organization, meetings and transactions, subject to the terms of this Act.

COMMENT: The Open Space Commission is designed to be as divorced from partisan politics as possible. Since the interests of the whole state are meant to be served, nothing is said about regional distribution of membership on the commission, for fear that the commissioners might think they were intended to represent local interests, rather than the general public interest. Expertise is highly desirable on the commission, however, and thus at least two of the commissioners are to be chosen from the four fields considered by the drafters to be most relevant to the administration of the act, other than law.

Such an apolitical commission still seems justified under federal constitutional law, but it must be mentioned that the United States Supreme Court might be moving in the direction of eventually applying its "one-man-one-vote" standard to state bodies exercising "legislative" functions, even if the bodies in question are non-elective. This is very speculative at this time, but provides an added reason for having the state legislature approve the commission actions which might best be called "legislative" — namely, the adoption and revision of the comprehensive plan.

SECTION 5: *Open Space Acquisition Reporting*

(a) Park and Recreation Boards

Within six months of the effective date of this Act, all public park and recreation boards in the state shall report to the Commission and to the State Park Commission on their own present facilities, the availability of other public and private park and recreation facilities within their area, and their present and anticipated needs. Thereafter, such reports shall be made annually.

(b) State and Local Governmental Bodies

Within six months of the effective date of this Act, all state and local governmental bodies within the state shall report to the Commission all their holdings of open space land. Thereafter these bodies shall report to the Commission the acquisition of any new open space land, whether by tax foreclosure or otherwise, within one month of the date of acquisition.

COMMENT: Inter-governmental communication is one of the most important features of a managerial scheme of the magnitude of this act. Since it is anticipated that the Open Space Commission will be a clearing-house for long-range planning and land acquisition in the broad open-space field, it is necessary that every agency of state and local government assist the commission by providing detailed information on existing facilities and needs. The first paragraph of this section requires such assistance.

By the "state park commission" is meant any state agency or agencies with broad responsibilities in the park and recreation field. The proper names of such agencies should be inserted for each individual state.

This section requires reports on all existing and future open space acquisitions in the state. Since these lands are free from alienation under the next section of the act, and cannot be developed for many non-open-space uses because of the constitutional requirement of a public purpose or use for all expenditures of public funds, these lands should be a ready source of open-space land for the commission at minimum cost.

SECTION 6: *Alienation of Open Space Land*

(a) No state or local body government agency shall alienate any open space land without the written permission of the Commission.

(b) The restriction imposed by this section shall not detract from any other restriction imposed by state or federal legislation or by judicial decision, but is imposed in addition to such other restrictions.

COMMENT: This section is intended to make clear that no change is intended in prior law, but merely that the Commission shall have the first opportunity to decide how to use open-space land, if at any time it is decided to use the land for some purpose other than open-space

purposes. In addition, it is intended that our statute comply with Title VII of the Housing Act, 42 U.S.C. 1500 et seq. which provides for grants to states and municipalities for open-space land on condition that if the land is ever developed, land equivalent in area and value be acquired to replace it. But for Section (b), it would be a legitimate inference that land acquired for open-space purposes could be freely alienated so long as the Commission consented.

SECTION 7: *The Comprehensive Plan*

(a) Purpose

The Commission shall meet with the comparable commissions of the staes of and to draft a comprehensive plan for open space development in the Interstate Compact area. The plan shall be designed to (a) conserve unique scenic resources, particularly in those portions of the Interstate Compact area where they are most endangered by expanding commercial land development; (b) to provide new or expanded park and recreational facilities in accordance with projected population and transportation patterns and public recreational preferences for the next forty years making additional recreational facilities available as soon as they become necessary; (c) to provide for desirable controlled residential and commercial development in close proximity to these scenic and recreational areas. The plan shall contemplate execution primarily through the acquisition by the state commissions and by local governments in cooperation with the State Commission, first of public conservation interests in open space lands and later of full legal interests in such lands.

(b) Preparation of Studies

Prior to the preparation of the plan, the Commission shall make studies of population, transportation resources, public recreational preferences, and any other subject matter which the Commission finds (a) essential to drafting and revising the comprehensive plan, and (b) inadequately dealt with in the existing studies.

(c) Consultation

In the preparation of the plan and thereafter, the Commission shall consult regularly with affected local governments, the State Park Commission, independent park and recreation au-

thorities within the state, and any other state board or commission with substantial interest in the scenic and recreational resources of the state. The Commission, through the Interstate Open Space Commission, shall also consult with the Department of Interior, the Department of Housing and Urban Development, [and the United States Open Space Commission] prior to the enactment of the plan, and thereafter.

(d) Publication

Upon completion, the plan shall be made public, and a public hearing shall be announced through all the newspapers with a circulation exceeding 25,000 within the Compact area. The hearing shall be held between four and six weeks from the date of its announcement. At such hearing, any interested party may be heard on the subject of the portions of the comprehensive plan which relate to this state. The plan shall then be submitted to the legislature, where it may be rejected by a vote of both chambers within one month of submission.

(e) Revision

The plan shall be revised from time to time through the cooperative efforts of the three state commissions, and public hearings as are relevant to this state; in no case shall public hearings be called more frequently than once every six months nor less frequently than once every twenty-four months, regardless of whether any change in the comprehensive plan has in fact been made. Every substantive revision of the plan shall be submitted to the legislature and may be rejected by a vote of both chambers within one month of submission.

COMMENT: The comprehensive plan is the heart of the act. While flexible, the plan is designed to serve two purposes which a wholly flexible arrangement could not: first, to guarantee that the public funds devoted to open-space acquisition are spent in an orderly, rather than a haphazard fashion, as a result of careful planning and allocation of priorities with first priority to the most rapidly urbanizing areas; second, to support a finding of public purpose in individual land acquisitions in the same manner that a detailed urban renewal plan supports such a finding.

The comprehensive plan is to be worked out between the state commissions because over-all coordination is essential. Since each commission is necessarily most concerned with the political and constitu-

tional situation in its own state, however, individual state public hearings are contemplated. The public hearings are designed mostly to take political pressure off the state legislatures. The provision of regular hearings even when the plan has not been revised, moreover, gives private groups a chance to berate the commission for inertia, among other things.

Legislative "adoption" of the plan and its revisions by each state is provided for primarily to avoid the possibility of constitutional challenges to the whole scheme as delegation of unlawfully broad powers by the legislatures to the commissions. (Another motive was discussed in the comment to Section 4, *above*.) The history of such agencies as the Port of New York Authority (which acts, within some statutory limitations, whenever the governors sign the minutes of the authority's meetings) suggests that this legislative-adoption provision may not be constitutionally necessary; however, it seems fair to say that the commissions' land-acquisition powers are considerably more broadly defined than those of the Port Authority.

Both background research and consultation with federal, state and local officials are required by this section (the former only under certain conditions) in connection with the comprehensive plan. However, it seems impossible to specify in advance exactly what type of research, consultation, and communication should be carried on by the commission. These matters are of considerable practical, but little constitutional significance, and hence can be left highly flexible in the act.

The use of the word "primarily" in subsection (a) has two purposes. First, there will be some cases where the commission will want to proceed immediately to acquire full legal interests and not go through the two-step procedure set out. Second, the commission may want to acquire some interests in non-open-space lands in satisfaction of the comprehensive plan, especially for the buffer zones of low-density residential and commercial development.

SECTION 8: *Powers of the Commission*

(a) Power to Bring Suit

The Commission shall have the power to sue and be sued.

(b) Power to Issue Subpoenas

The Commission, or such member of the Commission as may be designated by the Commission for that purpose shall have the power to issue subpoenas effective throughout the state to

compel the attendance of witnesses and the giving of testimony or production of other evidence, and to administer oaths in connection with any hearing. Subpoenas issued by the Commission shall be enforced by any court of competent jurisdiction within the state.

(c) Contracts With Municipalities

The Commission is empowered to enter into contracts with municipalities and counties to pay up to 100% of the costs of any land acquired by such bodies in partial or complete satisfaction of the requirements of the Comprehensive Plan for their areas. The Commission may grant additional compensation to local bodies faced with extreme financial hardship from anticipated loss of substantially all property tax revenues due to the taking of development easements pursuant to the plan.

(d) Purchase and Exchange of Land. Eminent Domain

Subject to the limitations of Sections 9, 10 and 11, and in furtherance of the objectives of the plan, the Commission shall have the power to purchase or exchange land, to purchase and lease back land, and to condemn fee interests, and also interests less than a fee, in open space land.

(e) Acceptance of Gifts

The Commission shall have the power to accept in the name of the state gifts and bequests of interests in land to be devoted to the furtherance of the objectives of the Comprehensive Plan.

(f) Deferral of Taxation

In furtherance of the objectives of the Comprehensive Plan, the Commission is empowered to make agreements with individuals who own open space land with development potential which would destroy the open space character of the land to defer taxation based on this development potential for so long as it remains unexercised.

(g) Issuance of Zoning Plan for the Compact Area

The Commission shall have the power to issue an overall zoning plan for the state, which shall conform to the specifications of the Comprehensive Plan. Except as specified in subsection (h) of this section, the zoning plan need not delineate the exact physi-

cal limitations of any particular zone required within a particular county or municipality, but the plan must indicate whenever the limitations of the zone are not so delineated. The Commission reserves the right to set such limitations at a later date.

(h) Issuance of substitute zoning plans for counties and municipalities

In cases where the Commission finds that a county or municipal zoning plan, together with variances and non-conforming-use permits made under that plan, is so substantially in conflict with the Comprehensive Plan and the over-all zoning plan so as to impede the fulfillment of one of the purposes of the Comprehensive Plan, as specified in Section 6 of this Act, the Commission shall have the power to enact in place of such county or municipal plan a substitute plan based on the state zoning plan, with such revisions as the Commission shall find appropriate due to fundamentally changed conditions. The Commission shall also have the power to enact such a substitute plan in place of any county or municipal plan, together with variances and non-conforming-use permits made under that plan, which the Commission finds to be in substantial conflict with the plan of a neighboring county or municipality so as to impede the fulfillment of the purposes of this Act. In either case, the substitute plan shall come into full force and effect upon enactment by the Commission as if enacted by the local legislature of the county or municipality which it governs. From that time, the substitute plan shall be administered in the same manner as the original plan, provided that, in any case, no substitute plan shall fail to specifically limit the geographical boundaries of all individual zones.

(i) Regulations

The Commission shall have the power to make and enforce any regulations essential to the implementation of this Act. Such regulations shall be duly promulgated.

(j) Implied powers

The Commision shall have such other powers as are granted or implied by other sections of this Act. All the Commission's powers are subject to such explicit limitations as are set out elsewhere in the Act.

COMMENT: A "powers" section is necessary in some form, but could have been left in considerably simpler form without depriving the commission of any of the powers here delegated. A more detailed section is provided here in order to summarize the commission's contemplated duties and to spell at least two of them out in considerable detail. Section 8(a) is not intended to abrogate the doctrine of sovereign immunity in those states in which it exists, but merely to give the Commission status as a legal entity. Sub-section (c) simply empowers the commission to act under Section 9, sub-sections (d) and (e) empower the commission to act under Sections 10 through 12, and sub-section (f) empowers the commission to act in accordance with Section 14; sub-sections (g) and (h), however, give the commission optional special powers over local zoning which are not referred to elsewhere in the act.

All local zoning power derives from the state; local exercise of the zoning power can be controlled by the state in one way or another, except perhaps in states with the broadest of constitutional home-rule provisions. Thus, it would be bizarre for states to provide for a comprehensive state-wide scheme of open-space development and not to provide for some resolution of basic incompatibilities between the state agency's comprehensive plan and local exercise of the state's zoning power.

Sub-sections (g) and (h) provide a framework for such a resolution, with a bias in favor of regional and state-wide consistency. Under sub-section (g), the commission may issue a state-wide zoning plan based on the comprehensive plan. Since the legislature has already approved the comprehensive plan, it seems unnecessary for it to approve the zoning plan as well. Since the zoning plan is not yet operative, it may include "floating" of geographically unspecific zones, which are constitutionally subject to grave question in operative zoning plans because of their vagueness. Note that issuance of the zoning plan is not required of the commission in any case. This is to help conserve the financial resources of the commission.

Sub-section (h) provides for enactment by the commission of a portion of the area-wide zoning plan — with any "floating zone" provisions amended so as to meet constitutional requirements of specificity — wherever a local zoning plan either directly conflicts with the comprehensive plan or conflicts with a neighboring local plan so as to detract from the comprehensive plan.

SECTION 9: *Contracts With Local Communities*

(a) Submission of Contracts

Local governments wishing to receive state aid for local land acquisition in accordance with the Comprehensive Plan shall submit proposed state-local contracts to the Commission. Each contract shall contain a precise description of each parcel of land proposed to be purchased, the extent of the legal interest to be acquired in such land, the purpose of such purchases, and the estimated price to be paid for such land.

(b) Consideration by the Commission

The Commission shall then consider the contract in light of the funds it has available, the other contracts presently before it, and the importance of the particular land to the overall success of the Comprehensive Plan. Factors to be weighed in determining the importance of the land to the Comprehensive Plan shall include: the accessibility of the land to urban areas, its propinquity to existing or proposed state parks, the importance of the particular natural, scenic or recreational resources found there, and the desirability of local, as opposed to state, controls of the land upon exercise of an easement in it.

(c) Decision

The Commission shall tender its decision on each contract to the proposing local body within ninety days. The Commission may reject a contract finally or provisionally, or, in accordance with Section 8(a), it may make a monetary offer to the local government in consideration of that body's performance of the contract.

(d) Additional Compensation

Once the Commission has agreed to provide funds for the acquisition of certain land, if the local government finds that its estimate of the costs of such acquisitions was too low, it may reapply to the Commission for additional aid. The Commission shall provide such aid if it finds that a bona fide effort was made to acquire the land for the lowest possible price.

COMMENT: The purpose of the Section 9 scheme is to encourage local communities to participate in the open-space program, and thus (1) stimulate local interest in and understanding of the purposes of the program, and (2) take some of the administrative burden of detailed planning, land acquisition, and land management off the

commission. Under Section 8(a), the commission can grant local communities up to 100% of the cost of land acquisition so that the only added expenses placed on the local community may be those of planning and submitting the contract, and later of developing and managing the land if they maintain local control. In return, the local community gets a much greater stake in planning.

Under Section 8(a), the up-to-100% state payments may be supplemented in extreme cases of rural communities going over to largely state ownership. Under Section 9, a low estimate of the cost of acquisition will not prejudice any local government which has acted in good faith.

The standards to be used by the commission in evaluating each contract are spelled out in greater detail than elsewhere in the act in order to minimize political pressure on the commission by local interests within the legislature.

SECTION 10 *Public Conservation Interests in Land*

(a) Power of the Commission; Constructive Notice

The Commission may acquire a public conservation interest in land by purchase, condemnation, or otherwise, for the purpose of carrying out the objectives of the Comprehensive Plan. Notice of such acquisition shall be filed in the land records, as well as the tax records, and shall be deemed constructive notice within the meaning of the applicable Recording Act.

(b) Effect on Prior Law

The purpose of this statute is to create a new type of interest in land, i.e., a public conservation interest in land. Public conservation interests in land shall not be subject to the legal or equitable requirements of privity, nor the rule against creating novel incidents, nor any judicial rule which requires that an interest in land touch and concern the land.

(c) Definition

A public conservation interest shall include the right to develop land for any non-open space use, subject to payment of compensation to the owner of the private interest in land for the rights which he retains. The private owner shall retain the right to continue any existing open space use of the land and to develop any other open space use. Provided that, while the owner of the land shall have the right to repair and maintain, or other-

wise modify any pre-existing structure, and to replace a pre-existing structure when such replacement is necessary for efficient open space use of the land, that such modification or replacement shall not increase the proportion of land covered by permanent structures by more than 1% of the total land area; where this requirement would render any efficient use of the land impossible, the Commission shall grant a permit to effect the minimum efficient modification or replacement.

COMMENT: The purpose of this section is to divide rights in land into two categories: open space uses and non-open space uses. The state will preserve open space land by buying up private owners' rights to develop their land for any non-open space use. The public interest is in keeping the land open. That interest is served equally well by any open space use. Therefore, maximum provision is made to insure the owner flexibility in using his land after the state acquires its conservation interest in land. The basic plan is to permit the owner to continue whatever use he was making of the land in the past as well as any new use which leaves the land open. Repair and maintenance, or even new construction, will be permitted as long as it does not exceed the specified limit of 1% of the area remaining open when the state acquired its interest in land. Even this restriction will be lifted if no efficient use whatever of the land is possible. However, in that event new construction would be limited to the minimum change necessary to make the land economically useful. The purpose of these provisions is to reduce the cost of acquiring interest in land. The rights the state acquires should be limited as narrowly as possible to those necessary to effectuate its purposes under the statute. This reduces the cost of the program as well as the interference with the rights of property owners.

SECTION 11: *Exercise of a Public Conservation Interest in Land*

The Commission may exercise a public conservation interest in land or other partial interest in a parcel of land by purchasing or condemning all interests in the land remaining in private hands, but only when in the public interest. When the Commission contemplates possible non-open space development of such open-space lands, it shall weigh the following factors in determining whether such development is in the public interest: (1) availability of other open space land in the area; (2) consequences of the development of the land on essential public services such

as education, streets, and highways, sewerage systems and other utilities; (3) economic efficiency of the open space use of the land, including intangible economic benefits to the public as a whole. Development projects in the public interest shall include, but not be limited to:

(a) a new or expanded state park preserve, state seashore preserve or state river valley preserve, planned in conjunction with the state park commission and any body having jurisdiction over the existing facility where an expansion is being made;

(b) a new or expanded state forest, planned in cooperation with the state forestry commission;

(c) a new national park, planned in cooperation with the Secretary of the Interior;

(d) a new or expanded state or local recreation facility, planned in cooperation with the state park commission and any body having jurisdiction over the existing facility where an expansion is being made;

(e) low-density residential and light commercial development adjacent and incident to any of the above.

The Commission shall submit plans for such projects, to be commenced within six months, and may proceed to implementation if the plans are not rejected by both chambers of the legislature within one month.

COMMENT: The purpose of this section is to make clear the conditions under which the state will exercise its public conservation interests in land. Definite criteria are set forth for non-open space development, both as a guide to and a restriction upon the discretion of the Open Space Commission. Following the criteria are enumerated several instances in which the Commission is to have full authority to exercise the public conservation interests in land. The listing is not intended to be inclusive; rather it is envisioned as a partial list of concrete examples of both open-space and non-open-space development. In most cases, the state will never exercise its public conservation interest in land since the purpose of acquiring the interest is to keep the land open. When it does so will be the exceptional case. If the state had unrestricted discretion to acquire and exercise public conservation interests in land, however, a constitutional problem would arise. See Comment on Public Purpose doctrine, below.

SECTION 12: *Compensation*

In any proceedings for condemnation under this Act, the owner

shall be entitled to compensation for the fair market value of the condemned interest in the land, disregarding the effects of any speculation about forthcoming public uses of the land or about the effect of such uses on land value. The record of any condemnation proceeding under this Act and any agreement for the purchase of an interest in land under this Act shall specify the interest acquired and the fair market value of the interest acquired. Where the Commission decides to acquire a full legal interest in land in which it had previously taken a public conservation interest in land, the compensation due the owner shall be the value of the open space uses retained by him after the development easement was taken.

COMMENT: The theory behind this section is that the total value of open space land can be broken down into two parts; that part attributable to its utility for its use as open space land, and that part attributable to its potential use as non-open space land, e.g., as a residential subdivision. When the state condemns the public conservation interests in land, it need only pay for that part of the land's value. However, when the interest in land is exercised, the state must pay for the private owner's remaining interest. The value of that interest is not necessarily constant. It may rise and fall as the conditions that affect land values change. However, it is no longer affected by the land's potential for development for a non-open space use since the state has already acquired the rights to that use.

The first sentence of Section 12 merely restates the common judicial rule that "any enhancement in value which is brought about in anticipation of and by reason of a proposed improvement is to be excluded in determining the market value of such land . . . ."[1]

SECTION 13: *Taxation of Land Partially Owned by the State*

In determining the fair market value of real estate or any interest in it for the purpose of taxation, the potential value which might result from residential, commercial, industrial, or other non-open space use shall not be considered in assessing the valuation of any land in which the state or a local government operating under a contract with the Commission holds a public conservation interest in land. Any land in which the state or a local government operating under a contract holds any partial legal interest shall be taxed only to the extent of the interests retained by the private owner.

[1]NICHOLS, EMINENT DOMAIN (4th ed., 1962), section 12.3151.

COMMENT: Section 13 merely states the obvious. Once the state acquires a public conservation interest in land, the private owner of the land in which the interest was acquired can expect his assessed valuation for purposes of taxation to be reduced since his land is now less valuable having lost any potential for development as non-open space land. The purpose of Section 13 is to make this interpretation of the effect of the Open Space Statute mandatory on all state and local taxing authorities in the state. Section 15(a) is intended to give the Open Space Commission power to enforce Section 13. The purpose is to coordinate the State's taxation and open space policies.

SECTION 14: *Deferred Taxation Agreements*

(a) Taxation on present value

Any owner of land who enters into a contract with the Commission in which he promises not to further develop his land shall be taxed only on the value of the property in its present state of use. Such agreements shall be filed, in the land records, as well as the tax records, and shall be deemed constructive notice within the meaning of the applicable Recording Act.

(b) Termination

The owner of land covered by a contract entered into under subsection (a) above shall not develop his land without giving 30 days notice to the state. In such event, there shall accrue and be immediately payable a tax equal to the taxes which would have been otherwise assessed on the land if an agreement had not been entered into, plus interest at the rate payable on civil judgments from the day each earlier tax would have been due.

COMMENT: This section provides an essentially equivalent alternative to the acquisition of public conservation interests in land. The purpose of our provision on taxation is to give moderate tax incentives to the owners of open space land to encourage them to keep it open. This purpose is accomplished by deferring taxes until the land is developed. The expectation is that the land will never be developed. In the event that it is, the state will not lose any revenue because the owner will be required to repay back taxes plus interest. This is only fair since the owner has lost nothing by delaying development. After the plan has been in operation for a number of years, the likelihood of development of the open space land declines. When the point is

reached at which back taxes plus interest is equal to the land's value developed for a non-open space use, the state, in effect, has purchased a public conservation interest on the installment plan since the owner would now make no profit by developing his land.

In Connecticut, there are no constitutional obstacles to our taxation provisions. Legislation exempting certain forest lands from taxation has been sustained by the Connecticut courts, *Baker v. Town of West Hartford*, 89 Conn. 394, 94 A. 283 (1915). Indeed, legislation providing for taxation of open space land by a more favorable rule of valuation already exists in Connecticut, C.G.S.A. § 12-63 (1949).

In New York, no constitutional problems appear assuming that the act is applied to the entire state.

In New Jersey, the state constitution prohibits any scheme of non-uniform taxation. A statute providing for assessment of farm land at its value as farmland, ignoring its development potential, was held unconstitutional in *Switz v. Kingsley*, 37 N.J. 566, 182 A.2d 841 (1962) by a unanimous decision of the state Supreme Court. However, the Constitution was amended in 1963 to provide for such tax incentives. See Art. 8, § 1, par. 1(b). The provision requires the owner to repay the difference between the taxes that would otherwise be due when he develops his land, but retroactive only for the preceding two years. Our statute would probably be upheld in New Jersey, though there is still some doubt. The basis of its constitutionality is that it does not violate uniformity of taxation since it never forgives any tax; all it does is defer the tax. The only way a taxpayer can avoid paying a tax is by never developing his land for a non-open space use, and if that it true, the state in effect has obtained a development easement; i.e., the private owner really has no additional value to be taxed on.

The purpose of requiring recording of the deferred taxation agreement is the same as the purpose of requiring recording of the public development easements in Section 10: to make the agreements binding on subsequent owners (or, in legal jargon, to make the agreements "run with the land"). Such an effect will be more controversial here than in Section 10, since the subsequent owner who wishes to develop will be liable for tax deferrals prior to his purchase of the land. Nonetheless, it is well established that a purchaser of land is responsible for knowing ("has constructive knowledge") of all documents properly filed in the land records which are relevant to the land he is purchasing. We think a court would find the deferred taxation agreements binding on subsequent owners.

SECTION 15: *Review by the Commission*

(a) Power of review

The Commission shall have the power to review the actions of local governmental bodies and state and local tax assessors at the request of a property owner who alleges that his property has been erroneously condemned, zoned, or otherwise restricted by a local body acting in cooperation with the Commission or that his tax assessment has not been correctly revised to reflect the taking of an interest in the land by the state or a local body.

(b) Mandamus

If the Commission finds that the action or failure to act complained of does not in fact comport with the Comprehensive Plan, it shall have the power to issue a writ of mandamus to the appropriate body or official to compel it or him to remedy the situation.

(c) Judicial review

Any order or determination of the Commission may be reviewed in a court of competent jurisdiction.

COMMENT: The purpose of the first two subsections of this section is to give the Open Space Commission authority to enforce the provisions of the Open Space Act, particularly Sections 8(e), 8(f), and 13. The Commission's powers under this section may be exercised only to effectuate the comprehensive plan authorized in Section 7, to coordinate local zoning as authorized in Section 8(e) and (f), and to enforce Section 13.

SECTION 16: *Effect on Existing Law*

Nothing in this statute shall be construed to abrogate, impair or in any way prevent the enactment or application of any state or local law, code, ordinance, rule or regulation not inconsistent with this statute or with any rule or regulation of the Commission.

SECTION 17: *Construction and Severability*

The provisions of this statute shall be severable and if any phrase, clause, sentence or provision of this statute is declared to be unconstitutional or the applicability thereof to any agency

or person is declared invalid, the constitutionality of the remainder of such statute and its applicability to any other agency, person, or circumstance shall not be affected thereby. It is the legislative intent that the provisions of such statute be reasonably and liberally construed. The singular number, when used in this act, also includes the plural.

SECTION 18: *Appropriation*

The work of the Commission, performed pursuant to this Act, shall be financed by an appropriation of dollars.

SECTION 19: *Effective Date*

This Act shall become effective on .

SPECIAL COMMENT ON THE PUBLIC PURPOSE DOCTRINE*

The public purpose doctrine imposes restraints on state action both in condemning land by eminent domain and in spending funds raised by taxation of the public. Though some theoretical differences may exist between the nature of the restraints imposed, for all practical purposes one may assume that the same objections that can be made to a program to acquire land by condemnation will also apply to a program to acquire land by purchase. In most states the doctrines have not been clearly distinguished with the result that identical results can be expected under either theory. A more pragmatic consideration is that any legislation which could be sustained under one theory but not the other would not be feasible.

The general rule is that the state can condemn land only for a *public* use. Some courts have construed a public use as use by the public, others as public advantage. Under either the narrow or the broad view the fact that private individuals will incidentally benefit from the taking will not invalidate the taking as long as the use for which the land is taken is public. Connecticut, New Jersey, and New York apparently adhere to the broad view of what constitutes a public use. Adequate precedent exists to sustain the use of

*This Comment was prepared by William A. Gregory, member of the class of 1969 in the Harvard Law School.

the condemnation and taxing powers to acquire blighted slum land, and even unblighted land, if necessary to the redevelopment of an area which considered as a whole is blighted. However, no court has squarely faced the problem of the acquisition of open-space land in a rural or suburban area, presently undeveloped, and its development by the state as part of a comprehensive plan for ultimately private uses (our residential-commercial "buffer zones").

Although such development by the state of open space land seems at first blush unconstitutional, at least two alternate routes remain for sustaining it. The first is an extension of the doctrine of *Berman v. Parker*,[1] that even unblighted property may be condemned by an urban renewal agency if the redevelopment of an area as a whole requires it. Obviously this rationale can cover a great many cases depending on how widely you define the relevant area. The second is the theory of excess condemnation. This long recognized exception to the public use doctrine permits the state to go slightly beyond the strict limits of necessity in condemning land if the additional land acquired is necessary for the complete fulfillment of the state's purpose. For example, in condemning land for a parkway, the state may condemn the land adjacent to the parkway and then insert deed restrictions that prevent any use of the land that would detract from its scenic beauty. The state is then free to resell the adjacent land to private owners as restricted.

§ 1(e) of Article IX of the New York State Constitution, for example, authorizes quite broad powers of excess condemnation for local governments. Local governments may take excess land, abutting on land taken for public use, in order "to provide for appropriate disposition or use" of such land. This may be constitutionally sufficient authorization for the taking of land for low density residential development adjoining public open spaces; even if public construction or subsidy of such residential development is not a public use. Even excess condemnation for private residential development adjoining public open space seems authorized by § 1(e), since the section goes on to empower local government "to sell or lease that land not devoted to such public (open space) use." § 7(e) of Article I also provides for narrower legislative authorization of local excess condemnation of lands abutting on parks, streets, and other public places, for suitable building sites.

1 348 U.S. 26 (1954).

Article 4, § 6, par. 3, of the New Jersey Constitution authorizes any agency or political subdivision of the state "to take interests in abutting property" to preserve and protect public facilities for which the state agency is authorized to acquire lands. This provision seems also to sustain excess condemnation for low density residential development adjacent to state owned property previously taken for some public purpose. The Appellate Division of the New Jersey Superior Court has sustained a highway authority condemnation of lands abutting on a parkway, in part as "insurance against unsightly structures," *N.J. Highway Authority v. Currie.*[2]

Nonetheless, there will still be some cases to which neither of these alternative theories would apply; therefore it is necessary to discuss in greater detail some legislative and judicial precedents.

The Housing Act of 1949 in authorizing urban renewal projects expressly includes:

> . . . land which is predominantly open and which because of obsolete platting, diversity of ownership, deterioration of structures or of site improvements, or otherwise, substantially impairs or arrests sound growth of the community, or (iii) open land necessary for sound community growth which is to be developed for predominantly residential . . . uses. . . . 42 U.S.C. 1460

However broad this authorization may appear, it must be remembered that it is implicitly limited by prior language which refers to an urban renewal area. It seems obvious that you cannot renew something that was never developed to begin with. At most this section of the Housing Act is merely authority for the area wide concept of *Berman v. Parker, supra.* However, in examining the legislative history of the Housing Act, its objectives seem far broader than any action taken to date by the federal government.

> "It is, of course, perfectly apparent that the elimination of residential slums in central city areas and their redevelopment in accord with a plan for the most appropriate use of the land therein (i.e., for public use, for industry, for housing at more appropriate density, etc.) makes necessary a dispersion of the families now living in such slums. Federal loan assistance for the acquisition and preparation of open unplatted urban or suburban land to be developed for pre-

2 35 N.J. Super. 525, 114 A.2d 587, 590 (Super. Ct., App. Div. 1955).

> dominantly housing use, so that adequate provision can be made for the necessary dispersion of some portion of the central city population, is therefore essential to any effective slum clearance operation, and is entirely appropriate."[3]

It can thus be seen that Congress has a very broad view of its powers to tax and spend for residential development outside the central city, and, though no judicial precedent exists which tests this interpretation of the Housing Act, the very fact that Congress would pass legislation of this nature raises a presumption in favor of its constitutionality.

The closest the state courts have come to deciding this question is in litigation over the constitutionality of urban redevelopment. The reasoning in many of these cases would support urban development equally well. In *N.Y. City Housing Authority v. Muller*,[4] the court stated,

> "It is also said that since the taking is to provide apartments to be rented to a class designated as 'persons of low income,' or to be leased or sold to limited dividend corporations the use is private and not public. This objection disregards the primary purpose of the legislation. Use of a proposed structure, facility, or service by everybody and anybody is one of the abandoned universal tests of a public use."[5]

In *Murray v. La Guardia*,[6] the Court of Appeals found no difficulty in the fact that a private corporation may ultimately reap a benefit. "If, upon completion of the project the public good is enhanced, it does not matter that private interests may be benefited."[7] Two cases indicate the limits which the public use doctrine places on the state. In *Denihan Enterprizes v. O'Dwyer*,[8] the facts indicated the purpose behind the condemnation proceeding was to provide parking facilities for a private apartment building. The end result of the project would be to provide parking spaces for 308 tenants of one apartment building, while only 17 spaces would be available for the general public. The Court of Appeals invalidated the action because there was no public purpose involved, stating:

3 Senate Report No. 84, Feb. 25, 1949, U.S. Code Cong. Service, 81st Cong. 1st Sess. (1949), p. 1564.
4 270 N.Y. 333, 1 N.E.2d 153 (1936).
5 1 N.E.2d at 155.
6 291 N.Y. 320, 52 N.E.2d 884 (1943).
7 52 N.E.2d at 888.
8 302 N.Y. 451, 99 N.E.2d 235 (1951).

> ". . . the public use here may be only incidental and in large measure subordinate to the private benefit to be conferred on the Company and not for the purposes authorized by the statute. Of course, an incidental private benefit, such as a reasonable proportion of commercial spaces is not enough to invalidate a project which has for its primary object a public purpose . . . but the use is not public where the public benefit is only incidental to the private."[9]

In *Courtesy Sandwich Shop v. Port of New York Authority*,[10] the majority of Appellate Division justices, though agreeing that the World Trade Center represented a public purpose, found the statute on its face unconstitutional since it granted a power to condemn property for no other purpose than the raising of revenue for the expenses of the project. The Court of Appeals, 6-1, saved the statute by a limited interpretation of the power of eminent domain. The dissent would have held the statute unconstitutional.

Wilson v. Long Branch,[11] involved an urban redevelopment project of about 100 acres, 28 of which were vacant and unimproved. The New Jersey Supreme Court, relying heavily on *Berman v. Parker, supra*, sustained the constitutionality of the program. In *City of Trenton v. Lenzner*,[12] the New Jersey Supreme Court approved condemnation of property for off-street parking,

> "The public use may be proprietary as well as strictly governmental in nature. . . . What constitutes a proper use will depend largely on the social needs of the times and may change from generation to generation."[13]

In Connecticut an urban redevelopment program was sustained in *Gould Realty Co. v. City of Hartford*,[14]

> "In this state it is settled that public use means public usefulness, utility, or advantage, or what is productive of general benefit, so that any appropriating of private property by the state under its right of eminent domain for purposes of great advantage to the community, is a taking for public use."[15]

9 *Id.* at 238.
10 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.2d 1 (1963).
11 27 N.J. 360, 142 A.2d 837 (1958).
12 16 N.J. 465, 109 A.2d 409 (1954).
13 109 A.2d at 411.
14 141 Conn. 135, 104 A.2d 365 (1954).
15 104 A.2d at 368.

A review of the case law makes it clear that no decided cases are exactly in point on the constitutionality of our statute's "buffer zones." What is clear is that the objectives and purposes of those urban redevelopment programs that have been approved by the courts are the same as our proposed states' general objectives in acquiring land and rights in land. As Robbins and Yankauer conclude,

> "There is no difference, except one of degree, between blighted land which adversely affects health and welfare and open land which, by its non-use, keeps people crowded in unhealthful surroundings. . . . To deal with the problem adequately the courts must find that conditions today require the taking of vacant land for sound community development, which in itself is a public use."[16]

Cases like *Courtesy Sandwich Shop* are not really in point. They indicate that the cost of essential public programs cannot be financed by acquiring revenue-producing private property to make up deficits arising from unprofitable governmental programs. This line of cases imposes a limit on the types of property the state may acquire under the statute. All property condemned must be strictly related to accomplishing the purposes of the comprehensive plan, not just thrown in so that the state can make a profit as a land speculator. If those bounds are exceeded, then constitutional doubts begin to arise. The import of the New York cases is that condemnation of private property so that the state may acquire profitable sources of revenue is no proper public purpose. These constitutional doubts explain the restrictions we have put on the Open Space Commission's authority to condemn by eminent domain.

After the taking of land for low-density residential-commercial buffer zones, the portion of our statute most likely to offend the public purpose doctrine is the taking of interests in land to meet recreational needs for forty years. The question raised by that provision is as follows:

Can the power of eminent domain be used to acquire land if there is no present use for it?

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16 *Eminent Domain in Acquiring Subdivision and Open Land in Redevelopment Programs: A Question of Public Use*, pp. 463-513 in URBAN REDEVELOPMENT: PROBLEMS AND PRACTICES, (C. WOODBURY ed. 1953).

There is a division of opinion on this issue. We have found four cases which say that the power cannot be so used and two which hold that it can. In *State ex rel. City of Duluth v. Duluth St. Ry.*,[17] action of a municipality to condemn land for an extension of a street railway was held unconstitutional because there was no present need for it. (The population to be served was very small, most of the residents did not want the railway, and the cost was fairly substantial.) The court stated, "Necessity as here used, means now or in the near future." This case could easily have been decided on other grounds, *viz.*, that the real purpose of the extension was to benefit developers of certain lands at the terminus of the extension.

In *State v. O. 62033 Acres*,[18] a Superior Court of Delaware invalidated eminent domain proceedings which had been brought by the Highway Department. The court considered that possible future expansion of a two lane to a four lane highway was too remote and speculative to justify condemnation. The time within which actual use as a four lane highway would begin was estimated as thirty years. Possible appreciation of property values during this interval was held not to be an adequate reason for condemnation. Our statute is distinguishable, of course, since advance acquisition of interests in open space land serves the independent public purpose of conserving open space.

Winger v. Aires,[19] involved condemnation of land for a school site. Much more land was condemned than could be reasonably used.

> "One witness testified, for instance, that the vice president of the Board said that the Board could take more land than it needed for the school building and then sell what remained over. Obviously no school board can, even in this indirect fashion, go into the real estate business."[20]

Grand Rapids Board of Education v. Baczewski,[21] was similar. There was no present need for the land. The present high school was estimated to be adequate for the next thirty years. The Board's main purpose in buying early was to save money. "Such a practice could be highly commended in the Board's purchasing of property, but does

17 179 Minn. 548, 229 N.W. 883 (1930).
18 49 Del. 90, 110 A.2d 1 (1954).
19 971 Pa. 242, 89 A.2d 521 (1952).
20 89 A.2d at 522.
21 340 Mich. 265, 65 N.W.2d 810 (1954).

not meet the test of *necessity* in condemnation proceedings."[22] There is some hint that this result depends on the specific language in Michigan's Constitution rather than the public purpose doctrine.

In neither of the preceding two cases, apparently, was there a showing that the added acquisitions were necessary either (1) to protect the value of the school grounds for school purposes, or (2) to conserve otherwise unavailable open space for expansion purposes.

On the other side, *New Orleans v. Moeglich*,[23] was a condemnation proceeding to extend a street. One of the reasons for the condemnation was to save money by putting in the street early, i.e., before development. The court sustained the action. It indicated that cities might plan ahead for the "near future."

Carlor v. City of Miami,[24] sustained condemnation of land for a port and airport even though there were only very vague plans when the condemnation took place and nothing had been done for seven years thereafter. The decision referred to the duty of public officials to look to the future and to plan not only for the present but for the "foreseeable future." These remarks were probably mere dictum since the court could have decided the case on the ground that it was too late for a collateral attack of the original condemnation proceedings. (The action was brought several years after the land was condemned. It had risen in value in that time due to improved access.)

Though no cases have decided this issue in New York, New Jersey or Connecticut, there is no reason to believe that these states would not rely on the same type of reasoning used in other states. While the cases that have just been discussed indicate that some limits would not interfere with an open space program, all of the cases which hold takings of land for future use invalid can be distinguished on one of several alternate grounds: first, exceeding of powers granted by statute, second, no actual public purpose (where the real intent of the condemning authority is to benefit a private person), and third, using the condemnation power to appropriate the owners' appreciation of value.

An open space program specifically authorized by statute is open to none of those objections. The only real limit is the third. This does not go to the constitutionality of the *acquisition* of a public con-

22 *Id.* at 269.
23 169 La. 1111, 126 So. 675 (1930).
24 62 So.2d 897 (1953), *cert. den.* 346 U.S. 821.

servation interest, which is supported by an independent public policy in cases of conserving open space, but only to the *exercise* of such an interest. Because of this third objection, the Commission's power to develop land in which it holds interests has been restricted in this statute. The drafters feel that it is no proper independent public purpose for the Open Space Commission to make a profit on land development. If, in fact, the Commission is a net revenue-producing operation, that is completely incidental to the accomplishment of other valid public purposes. If primary weight is put on the revenue-producing operations of the Commission, *e.g.*, development of land in which interests are held when such development becomes necessary, for example, because of a shortage of middle income housing in an area where there is a surplus of open space, then grave constitutional problems arise. Whether such legislation could not be sustained, we are not prepared to say. We do think that there is sufficient doubt of its constitutionality to justify avoiding the problem by limiting residential development to incidental "buffer zones." No such limitation is necessary for public recreation facilities, however, since the necessity for public, rather than private development, is so well established. All this is not to say that the Commission, or an Open Space program, is per se unconstitutional if it makes a profit, but only that it would if profit is its sole intent and purpose.

A second compromise to the public purpose doctrine is made by the drafters in urging the state to take interests in land. In taking an interest in land, the state is not interfering with the owner's present use of the land; hence there should be less reason to object to takings that are necessary to provide for the foreseeable future. In balancing the owner's right to retain any interest in his land at all against the state's right to provide for the future, one might reasonably define public purpose very strictly. Nonetheless, our suggested interest in land avoids this balancing by coordinating their respective rights through a limited taking which allows the owner to continue his present use of the land.

However, the drafters do not really consider their public conservation interest device to be a compromise; it has an obvious independent value in keeping land open. In fact, we feel that possession by the state of such an interest, like possession of an anti-billboard "scenic easement," has an independent public purpose of conservation.

NOTES

EXPATRIATION LEGISLATION

In a recent line of cases,[1] the Supreme Court has held unconstitutional certain sections of the federal statutes providing for the loss of citizenship of Americans who commit various acts. The latest case in this line, *Afroyim v. Rusk*,[2] held that Congress had no constitutional authority to expatriate a citizen of the United States who voted abroad in a political election of a foreign country. While the constitutional aspects and the case-law precedents of *Afroyim* and its predecessors have been analyzed in detail elsewhere,[3] little attention has been given to the legislative history of the expatriation statutes themselves. The history of federal expatriation laws shows that Congress has failed to follow a coherent or rational policy and has used expatriation as a form of punishment rather than as the natural consequence of a shift of a citizen's allegiance from the United States to another country. The statutes should be rewritten to conform to constitutional and logical principles.

Under English common law, a citizen could not voluntarily expatriate himself. In spite of all temptations to belong to other nations, he remained an Englishman, a principle which not only contributed to nineteenth-century British musical tradition, but also was a factor in the War of 1812. In the early years of the United States, this common law principle was adopted by the courts and supported by such political figures as Alexander Hamilton. On the other hand, others such as Thomas Jefferson argued that concomitant with the citizen's duty to the sovereign was the sovereign's duty to the citizen; hence one of the justifications for the American Revolution was that England, through its illiberal conduct, forfeited the right to allegiance from Americans, and that Americans, therefore, had the right to expatriate themselves from England.[4]

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1 Schneider v. Rusk, 377 U.S. 163 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Trop v. Dulles, 356 U.S. 86 (1958).

2 387 U.S. 253 (1967).

3 U. FLA. L. REV. 115 (1967); 81 HARV. L. REV. 126 (1967); 20 VAND. L. REV. 1341 (1967).

4 Comment, 56 MICH. L. REV. 1142, 1147-48 (1958). The Declaration of Independence adopted this reasoning. *See generally* Roche, *Pre-Statutory Denaturalization*, 35 CORN. L. Q. 120 (1949).

At that time, there was a great debate as to whether American citizenship flowed from the individual states or from the federal government. Virginia apparently felt citizenship was a state matter because its legislature drafted a statutory mode by which a citizen could exercise what Jefferson termed the "natural right" of voluntary expatriation. But neither the states nor the federal government felt citizenship could be taken away involuntarily.[5]

In 1818 some congressmen attempted to pass a federal measure detailing a method for the exercise of the "right" of voluntary expatriation. One group of opponents to the measure felt it exceeded the constitutional power of Congress; other opponents felt expatriation matters were the concern of the states.[6] The measure was defeated, and in the view of one commentator: "The entire proposal was dropped only after the majority of the House became convinced that the measure was definitely unconstitutional."[7]

The first legislative action by Congress which had some connection with expatriation came during the turbulent Civil War years. A law enacted March 3, 1865, declared that all those who had deserted the military or naval service of the United States and had not returned by a certain date, or had illegally avoided conscription, were deemed to have voluntarily relinquished and forfeited "their rights of citizenship, as well as their rights to become citizens."[8] The exact meaning of the quoted words has been the subject of much discussion.[9] Probably the best construction gives the words their plain meaning: aliens would lose the right to become citizens, and citizens would lose the rights of federal citizenship, such as the right to vote.[10] Since at this point in history, despite Jefferson's position and the implication of the American Revolution, there was as yet no federal "right" of expatriation, voluntary or otherwise, it seems most unlikely that the Act meant to institute compulsory expatriation as such.

It has been assumed that the federal "right" of voluntary expatriation was first established in 1868. Congress declared by the Act of 1868 that: "[T]he right of expatriation is a natural and inherent right

5 Comment, 56 MICH. L. REV. 1142, 1147-48 (1958).

6 *Id.* at 1149.

7 I. TSIANG, THE QUESTION OF EXPATRIATION IN AMERICA PRIOR TO 1907, 61 (1942).

8 25 REV. STAT. § 1996 (1875).

9 Klubbock, *Expatriation: Its Origin and Meaning*, 38 NOTRE DAME LAW. 1, 4-5 (1962).

10 *Id.* at 5.

of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness. . . . [11] Actually, a close reading of the subsequent substantive language of that act clearly reveals that Congress was chiefly concerned with declaring the rights of *foreign* citizens who were emigrating to the United States with a view to expatriation, that is, to become citizens of the United States. Thus the Act declares:

> [W]hereas in recognition of this principle [of expatriation] this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; Therefore,
> *Be it enacted* . . . That any declaration, instruction, opinion, order, or decision of any officers of this government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this government.[12]

Two other sections of the Act of 1868 offer further proof that Congress was dealing with the rights of naturalized and prospective naturalized citizens. They reaffirmed the principle that naturalized citizens were entitled to the same protection of person and property by the federal government that was extended to native-born citizens, both inside and outside the borders of the United States. They also urged the President to examine the actions of foreign governments with respect to American citizens born, visiting, or residing abroad. Nevertheless, the broad preamble and the logical inference that the subsequent language should apply reciprocally to native-born American citizens, give some basis to the assumption that the Act of 1868 established the federal "right" of expatriation for all citizens.[13]

Subsequent to the Act of 1868, the United States entered into treaties with a number of foreign countries which provided for loss of citizenship in certain circumstances, especially where "dual nationality" was claimed — that is, citizenship in more than one country at

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11 25 REV. STAT. § 1999 (1875).
12 *Id.*
13 *Id. See also* Roche, *The Expatriation Cases*, 1963 SUP. CT. REV. 325, 329-330.

the same time.[14] Such treaties were desired because many naturalized American citizens chose not to expatriate themselves from either the country of their birth or the United States. Some resided abroad for long periods of time during which the United States was obligated to protect them. But loss-of-citizenship treaties were not signed with many foreign countries. Furthermore, the Act of 1868 spoke only of the voluntary right of expatriation and did not provide for involuntary expatriation by the Government. As a result of these two factors, the number of "dual nationals" in the United States grew despite the treaties, and several presidential statements between 1868 and 1905 urged Congress to act on the matter and eliminate "dual nationality."[15] Congress, however, did not act, and administrative agencies and procedures were developed to deal with the situation as best they could.[16]

At the turn of the century, immigrants began coming in waves to the United States and great concern was voiced about citizenship and expatriation policies. Finally, in 1906, a joint resolution of the Senate and House of Representatives authorized the establishment of a Citizenship Board.[17] The purpose of the Board was to review the matters of citizenship, expatriation, and "dual nationality," and to propose legislation on these matters. After a period of investigation and research, the Board published a long report which contained legislative proposals.[18]

The Board's report began by interpreting the Act of 1868 as a general assertion of the federal right of voluntary expatriation enjoyed by all citizens of the United States.[19] The Board felt that new laws had to be enacted declaring that in certain circumstances the Government would "assume" that the citizen had exercised, voluntarily, his right of expatriation. Purportedly, then, the Board established two basic principles:

1) Expatriation must be voluntary.
2) The Government could set up visible standards of such volition

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14 *See generally* Roche, *The Loss of American Nationality — The Development of Statutory Expatriation*, 99 U. PA. L. REV. 25-26 (1950).

15 *See* 8 J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897, at 241-2 (1899).

16 *Id.*

17 S. J. Res. 30, 59th Cong., 3d Sess. (1906). *See* 40 CONG. REC. 5184 (1906).

18 CITIZENSHIP OF THE UNITED STATES, EXPATRIATION, AND PROTECTION ABROAD, H.R. DOC. 326, 59th Cong., 2d Sess. 23 (1906-1907) [hereinafter cited as *Citizenship Report*].

19 *Id.* at 24.

and compel an individual to accept the consequences of his freely-willed decision — namely, expatriation.[20]

The Board listed four specific circumstances from which the Government should conclude that the citizen had voluntarily expatriated himself and should give effect to that expatriation:

1) When a citizen obtained naturalization in a foreign state;

2) When a citizen performed services for a foreign government which involved the taking of an oath of allegiance to that foreign government;

3) When a citizen became "domiciled" in a foreign state, such "domicile" being assumed when he resided in the foreign state for five years without intending to return to the United States;

4) When a female citizen married an alien.[21]

The third criterion was modified by a provision allowing an American citizen who resided in a foreign country to overcome the presumption of expatriation upon production of competent evidence to a diplomatic officer of the United States under regulations prescribed by the President. All four criteria were modified by the provision that a citizen could expatriate himself only during peacetime.[22]

The Board's recommended criteria were accompanied by observations and explanations. But the first and second criteria, which were radically new in that they deemed certain voluntary acts to be the equivalent of the voluntary exercise of the citizen's right of expatriation,[23] were supported by very little comment. The only basis for these two appears to be the Board's sentiment that an American citizen could not possibly give allegiance to both the United States and a foreign country at the same time. Thus:

> Other countries, like our own, do not naturalize foreigners until they have forsworn all other allegiance, and an American citizen *who forswears* allegiance to the United States has expatriated himself from the United States.
>
> He has done so with equal certainty when he takes an oath of allegiance to a foreign government in order to enter its service. . . . [N]o man should be permitted deliberately to place himself in a position where his services may be claimed

20 Roche, *The Expatriation Cases, supra* note 13, at 331.

21 *Citizenship Report* at 23.

22 *Id.*

23 As noted above in the text, the preferred interpretation of the Act of 1865 limits its effect to the deprivation of certain *rights* of citizenship. In any event, that act applied only to soldiers.

> by more than one government and his allegiance be due to more than one.[24]

When the Board said that one who forswears allegiance to the United States has expatriated himself, it was on quite sound footing. Surely one who literally forswears allegiance has voluntarily exercised his right of expatriation even without saying, "I hereby expatriate myself." It is more difficult, however, to understand how a citizen who *has not* renounced allegiance to the United States can be deemed to have "voluntarily" exercised his right of expatriation by becoming naturalized in a foreign country or taking an oath of allegiance to it in order to perform services for its government. He may very well have remained in allegiance to the United States. Also, the Board's own statement reveals that it was United States policy not to naturalize foreigners who did not renounce allegiance to other countries, on the presumption that those *who did not specifically renounce* retained allegiance to their mother country. It seems contradictory, in the face of this statement, to argue that one could lose American citizenship constructively even without specifically renouncing.

The Board was in actuality recommending the institution of *involuntary* expatriation based on an objective, rather than subjective, analysis of certain acts. If these acts were performed, the Board's position was that expatriation should be imposed irrespective of any sincere declarations of allegiance on the part of the citizen involved. Thus the Board said all "assumptions" and "inferences" about voluntariness could be made only during peacetime, not during war, though it is difficult to see how the circumstance of war or peace should affect in any one way or another the presumed "voluntariness" of the citizen's actions. If anything, one could argue persuasively that a citizen who voluntarily took an oath of allegiance to a foreign country during wartime was trying to avoid military service and sincerely *wanted* to expatriate himself. The Board's position forbidding such expatriation reveals that *for its own reasons* it did not want to allow citizens to expatriate themselves in wartime, and that it was not really concerned with the voluntariness of the acts performed.

The explanation accompanying the third of the Board's criteria was that it was aimed at naturalized American citizens.[25] The Board noted that immigration to the United States in those years was

24 *Citizenship Report* at 24 (emphasis added).
25 *Id.* at 25.

reaching very high proportions, and that most immigrants were becoming naturalized citizens. Such citizens, said the Board, were more apt to go abroad than native-born citizens because they are more accustomed to changing their domicile and in general come and depart with the flood of prosperity.[26] Once these people went abroad, concluded the Board, they could not "protect" the United States so the United States did not have to protect them. Though the Board said, "It seems to be clear that these people by their own act worked their own expatriation,"[27] such a conclusion does not seem clear at all. There was no suggestion that naturalized citizens residing abroad had ever refused to "protect" the United States, such as by refusing to abide by an order calling them to military service, nor was there an explanation why the ability to "protect" the United States was a criterion for the maintenance of citizenship. Similarly, there was no explanation why native-born citizens residing abroad were more able to "protect" the United States than were naturalized citizens.

Congress accepted the recommendations of the Citizenship Board, however, and they became law on March 2, 1907.[28] Between 1907 and 1938 numerous amendments and administrative rulings were adopted concerning expatriation.[29] Gradually the need for clarification and codification became apparent and was especially urged by the Department of State. In addition, war clouds were beginning to gather over Europe and many legislators and others felt the time had come for "dual citizens" to declare positively to which country they belonged.[30] President Roosevelt appointed a special committee comprised of Secretary of State Hull, Attorney General Cummings, and Secretary of Labor Perkins to codify the nationality laws. The committee issued its draft code on June 1, 1938, with full explanations, documentation, and historical references to the development of the nationality laws.[31] The code was submitted to Congress for consideration.

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26 *Id.*

27 *Id.* at 26.

28 Expatriation Act of 1907, 34 Stat. 1228 (1907).

29 *See* Roche, *The Loss of American Nationality — The Development of Statutory Expatriation, supra* note 14, at 34-48, 61.

30 Note, 40 CORN. L. Q. 365, 367 (1952).

31 *Hearings on H.R. 6127, superseded by H.R. 9980, Before the House Comm. on Immigration and Naturalization,* 76th Cong., 1st Sess. 289 *et seq.* (1940) [hereinafter cited as *Hearings*].

The policy of the committee was seemingly the same one announced by the Citizenship Board of 1906: to provide for loss of citizenship when citizens indicated by their voluntary actions that they were exercising their right of expatriation:

> None of the various provisions in the code concerning loss of American nationality . . . is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.[32]

The presidential committee affirmed two other policies of the Citizenship Board. It said that the right to protection was concomitant with the right of citizenship, so that a citizen who chose to reside abroad, and for all meaningful purposes abandoned the United States, could claim neither protection nor citizenship. Second, a naturalized citizen who abandoned his residence in the United States and took up residence in the country of his birth automatically lost his American citizenship. The committee explained that it wanted to halt the transmission of American citizenship to foreign-born children of naturalized citizens residing abroad.[33]

The proposed nationality code adopted the earler statutes and expanded certain provisions dealing with naturalized citizens who resided abroad. A formal renunciation procedure was incorporated for "dual nationals" who wanted to relinquish their American citizenship. Several important additions to the existing laws were also included in the code. Thus, it provided for the expatriation of citizens who served in the armed forces of a foreign state, voted in an election abroad of a foreign state, or performed any duty for a foreign state, even if an oath of allegiance was not required. The code also provided for the expatriation of those who committed treason, deserted the army in wartime, left the country or remained abroad to avoid conscription, or advocated the overthrow of the United States by force or violence. These were obviously *penal* provisions, aimed at expatriating "bad" Americans.[34]

The scope of the provisions of the proposed code, together with

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32 *Hearings* at 238.
33 *Id.*
34 Roche, *The Expatriation Cases, supra* note 13, at 337.

their respective explanatory comments, were evidence that the basic policies announced by the drafting committee were not followed. As the Citizenship Board had done, the committee actually proposed *involuntary* expatriation and even went further by wielding expatriation as a weapon of punishment for the commission of certain acts, despite the fact that the criminal law provided sanctions for those who were convicted of treason, desertion, or sedition.

In a reference to the expatriation of citizens who became naturalized in foreign countries, the committee noted:

> [This] is a corollary of a principle for which the Government of the United States has stood for many years past; that is, the so-called right of expatriation . . .
>
> The reasonableness of the proposed provision, which is based upon the principle of singleness of allegiance, will hardly be questioned.[35]

There was no explanation as to precisely why a citizen who swears allegiance to a foreign country cannot at the same time give allegiance to the United States, unless the two countries are at war with each other. Nor was there an explanation as to why the "principle of singleness of allegiance," though reasonable on its face, was one which every American citizen had to accept if he wished to remain a citizen. The committee's statement notwithstanding, there is a sense of uneasiness with respect to a law which expatriates a citizen who has become naturalized in a foreign country but who continues to pay taxes to the United States, to vote in elections in the United States, and to offer to serve in the armed forces of the United States. The citizen could exhibit his ties to the United States and never show a desire to expatriate himself, yet he could be rejected by the United States on the basis of a fiction that by his voluntary act he proved he had exercised his right to expatriate.

The same difficulty appears in the committee's comments to the provision authorizing the expatriation of a citizen who voluntarily entered a foreign army:

> This provision is based upon the theory that an American who, after reaching the age of majority . . . voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred his allegiance to it.[36]

35 *Hearings* at 289.
36 *Id.* at 290.

There would seem to be considerable room for debate on the question whether an American citizen who voluntarily enters a foreign army has transferred any of his allegiance to the foreign country and away from the United States. For example, many Americans joined the armies of the Allies during both world wars prior to the entry of the United States; many others fought in the Spanish Civil War. In most cases, it may be assumed that those who fought did not intend to transfer their allegiance away from the United States. Even those who fought and gave allegiance to the foreign country for which they fought did not necessarily relinquish their allegiance to the United States as a matter of subjective intent. During both world wars American soldiers were permitted to fight in allied armies, and this was not regarded as connoting abandonment of allegiance to the United States. Moreover, "allegiance" is hardly the concrete notion to which such an important privilege as citizenship ought to be bound. Commenting on the provision for the expatriation of citizens who voted in the elections of foreign states while abroad, the committee, in blatant disregard of its own announced policies, observed:

> Taking an active part in the political affairs of a foreign state by voting in a political election therein is believed to involve a political attachment and pratical allegiance thereto which is inconsistent with continued allegiance to the United States, whether or not the person in question has or acquires the nationality of the foreign state. *In any event* it is not believed that an American national should be *permitted* to participate in the political affairs of a foreign state and at the same time retain his American nationality. The two facts would seem to be inconsistent with each other.[37]

There was no elucidation of the assertion that voting in a foreign election was inconsistent with American citizenship. Nor was there a discussion of whether expatriation was the only proper or possible sanction — if one was needed — for such action. Instead, the committee chose to fly in the face of its policy goals of avoiding rules which would be punitive or would interfere with freedom of action.[38]

Extensive debates on the draft code were heard before the House Subcommittee on Immigration and Naturalization.[39] Mr. Richard W. Flournoy, assistant to the Legal Advisor of the Department of State,

37 *Id.* at 291 (emphasis added).
38 *See* note 27 and text *supra.*
39 *See generally Hearings.*

was the chief proponent of the bill to enact the draft code, but his testimony offered little in the way of further explanation of the reasons for the specific provisions. With reference to the provision dealing with service in foreign armies he said:

> This is new law. . . . In very recent years Americans have entered the armies of foreign states. For instance, in the Spanish war and in the present war a good many are going into the armies of foreign states, *and it does not seem reasonable* that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States. . . .[40]

Mr. Flournoy noted that Congress could pass laws allowing Americans to enter the armed services of nations with which the United States was allied without depriving them of their citizenship and that, for reasons of policy, the Department of State would support such laws.[41] However, throughout his testimony there was no indication that the department was concerned with the subjective motivations or actual allegiance of the citizen involved in the performance of these "voluntary" acts of expatriation. Indeed, there was hardly mention of the fiction of "voluntariness." At one point in the hearings, Mr. Flournoy maintained that the defense of "duress" should not be accepted from those serving in foreign armies. In contrast, the Department of Labor, which controlled the Immigration and Naturalization Service, felt that one who was taken into the army of a foreign country against his will should not lose his citizenship.[42] The statute as passed applied in this respect only to those who voluntarily entered the foreign army.

The draft code, with some modification, was enacted as the Nationality Act of 1940.[43] That Act, substantially intact, was reenacted as part of the McCarran-Walter Immigration and Nationality Act of 1952.[44] There were few changes, and the provisions on the books today, which include several minor additions,[45] are basically the same

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40 *Hearings* at 131 (emphasis added).
41 *Id.*
42 *Id.* at 201-202.
43 Nationality Act of 1940, 54 Stat. 1169 (1940).
44 66 Stat. 267 (1952).
45 In 1954, expatriation was made a sanction for anyone who violated the Smith Act. *See* Note, *The Expatriation Act of 1954,* 64 YALE L.J. 1164 (1955).

as those contained in the Nationality Act of 1940.[46] None of the congressional reports dealing with the 1952 act or later amendments examine or explain the reenacted provisions of the 1940 act.[47]

The Immigration and Nationality Act of 1952 was enacted while the United States was engaged in the Korean conflict and the Communist scare was enveloping the country.[48] These historical factors contributed to the demand for harsh laws on citizenship, in much the same way the historical framework in 1865, 1868, 1907, and 1940 contributed to the legislation of the previous expatriation acts. Perhaps a more detached Congress might have produced a more logical piece of legislation. In any event, the 1952 reenactment came under attack on many levels. Some critics took issue with specific provisions, most notably the ones prescribing expatriation for citizens who voted in foreign elections or served in foreign armies. It was argued that such actions simply did not necessarily signify that the citizen intended

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46 The provisions for loss of citizenship are contained in 8 U.S.C. § 1481 (1964). The following are deemed evidence of "voluntariness":

1) Obtaining naturalization in a foreign state.
2) Taking an oath or making an affirmation or declaration of allegiance to a foreign state or a political sub-division thereof.
3) Enlisting in the military service of a foreign state unless authorized by the Secretary of Defense or Secretary of State.
4) (a) Serving in office under the government of a foreign state while accepting nationality of that state;
   (b) Serving in such office where an oath or affirmation is required.
5) Voting abroad in a foreign political election (now unconstitutional).
6) Formal renunciation abroad before a consul of the United States.
7) Formal renunciation during wartime in the United States on a form supplied by the Attorney General and with his approval.
8) Desertion if convicted by a court martial and dishonorably discharged (now unconstitutional).
9) Committing treason; attempting by force to overthrow the government or violating the Smith Act.
10) Leaving the country during wartime or emergency to avoid conscription (now unconstitutional).

If a person was a national of the foreign state when the act was performed or was there for ten years immediately before the act, there was a conclusive presumption of voluntariness in his actions. While the government has the burden to prove the act was committed, once it sustains that burden, the individual, in actions after September, 1961, has the burden of rebutting, by a preponderance of the evidence, the presumption that his act was performed involuntarily.

Subsequent sections deal with various exceptions and with special provisions for naturalized citizens (since declared unconstitutional by *Schneider*).

47 *See Senate Report No. 1137 on S. 2550; House Report No. 1365 accompanying H.R. 5678; Conference Report No. 2096 accompanying H.R. 5678,* 82d Cong., 2d Sess. (1952).

48 Note, 40 CORN. L. Q. 365, 367 (1952).

to renounce his citizenship.[49] Since nominally the expatriation laws were still based on the fiction of equating the performance of certain acts with the "voluntary" exercise of the right of expatriation, the critics maintained that Congress was drawing incorrect inferences. Permanently resident aliens and aliens living in the United States for more than a year are subject to military service in the armed forces of the United States.[50] It seemed anomalous that aliens could serve in the army of the United States yet remain aliens, while Congress could pass a law saying Americans could not do this in foreign countries without losing their citizenship.[51]

Another argument was that the language of the 1952 act did not take into account the citizen's true intent or loyalty to the United States.[52] It was argued that the McCarran-Walter Act failed to recognize that there were *two* basic acts which ought to be performed by a citizen who is expatriating himself: the giving up of American citizenship and the assumption of another allegiance.[53] Hence, a citizen who votes in an election in a foreign country, serves in its army, or performs duties for its government may be showing an intention to assume an allegiance to that country, but is not necessarily showing an intention to surrender his allegiance to the United States.[54] Moreover, the Supreme Court has explicitly recognized this. In reference to a person who held "dual citizenship," the Court said, in *Tomoya Kawakita v. United States*: "The mere fact that he asserts the right of one citizenship does not without more mean that he renounces the other."[55] In that case the Court gave full recognition to the concept of dual allegiance and belied the premise of "singleness of allegiance" used to justify some of the expatriation provisions.[56] The Court also discussed the argument that expatriation laws may result in the establishment of a class of "stateless" persons.[57]

49 21 U. CIN. L. REV. 59, 65 (1952).

50 *See* 50 U.S.C. § 454 (1964).

51 Note, U. So. CAL. L. REV. 196, 199 (1952).

52 Hurst, *Can Congress Take Away Citizenship*, 29 ROCKY MT. L. REV. 62, 66 (1956.)

53 Note, 40 CORN. L. Q. 365, 369 (1952).

54 It has been suggested that the proper test to apply to all expatriation laws is: "Are the acts enumerated by Congress of such a nature as to reasonably indicate an intention of expatriation and of self-divestment of nationality?" Note, 25 U. So. CAL. L. REV. 196, 198 (1952).

55 Tomoya Kawakita v. United States, 343 U.S. 717, at 724 (1952).

56 *See* note 30 and text *supra*.

57 Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV. 1510, 1530 (1960).

The recent line of Supreme Court cases referred to at the outset of this Note has rendered a good deal of the 1952 act unconstitutional. *Trop*[58] held that it was unconstitutional to expatriate a citizen solely because he deserted the military in time of war. *Mendoza-Martinez*[59] struck down the provision expatriating a citizen solely because he left the country in a time of emergency to avoid conscription. *Schneider*[60] held it unconstitutional to treat naturalized citizens differently from native-born citizens with respect to expatriation, thereby invalidating all the sections specifically addressed to naturalized citizens.[61] Most recently, *Afroyim*[62] held it impermissible to expatriate a citizen solely because he voted abroad in a foreign election. The Court there reasoned that the Fourteenth Amendment — "All persons born or naturalized in the United States . . . are citizens of the United States . . ."[63] — protects every citizen against legislative destruction of his citizenship. In sweeping terms, the Court added: "[W]e reject the idea . . . that . . . Congress has any power, express or implied, to take away an American's citizenship without his assent."[64]

As a result of these Supreme Court cases, the expatriation laws should be rewritten to comply with the Constitution, and to present a rational, consistent policy. While it has been pointed out that the courts have become increasingly liberal in favor of the citizen on expatriation matters,[65] a much more satisfactory and comprehensive result could be achieved if Congress definitively answered the often-asked question: what is the law of the land on expatriation?[66] The underpinning of a rational policy on expatriation should be that every American citizen can expatriate himself if he so chooses. This would be consistent with the implicit philosophy of our withdrawal from the

58 356 U.S. 86 (1958).
59 372 U.S. 144 (1963).
60 377 U.S. 163 (1964).
61 *Schneider* also held that residency abroad by naturalized citizens was an unconstitutional criterion for expatriation. From 1945 until 1961, some 87,282 citizens were expatriated. Of that number, half were expatriated for residing abroad or voting in political elections, both of which are no longer valid criteria for loss of citizenship. *See* Klubock, *Expatriation: Its Origin and Meaning*, 38 NOTRE DAME LAW. 1, 49 (appendix) (1962).
62 387 U.S. 253 (1967).
63 U.S. CONST. amend. XIV, § 1.
64 387 U.S. at 257.
65 *See* Note, *"Voluntary": A Concept in Expatriation Law*, 54 COLUM. L. REV. 932 (1954).
66 Kurland, *The Supreme Court, 1963 Term, Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 175 (1964).

British Empire in 1776. Once that principle is accepted, it follows that there should be ways by which the United States can determine when a citizen has decided to expatriate himself. There is a general interest which every country has in identifying its citizens, to enable it to fulfill governmental obligations toward them and to ascertain those persons on whom to call for the performance of certain duties. Congress could properly enumerate the various ways in which a citizen could inform the Government that he had decided to expatriate himself. One obvious way would be for the citizen to appear before a designated official and declare or sign a formal, properly witnessed statement, saying, "I hereby expatriate myself from the United States of America and renounce any and all allegiance to it."[67] But Congress need not stop at that point; it would be legitimate to list additional ways in which a citizen could inform his government that he has expatriated himself.[68]

One way of preparing such a list would be to incorporate all the non-criminal actions listed in the 1952 act and *presume* that citizens who performed such actions did so in part to inform the Government that they had voluntarily expatriated themselves. This *presumption* could be overcome by production of proper evidence that the citizen involved still affirmed allegiance to the United States. The taking of an oath of allegiance to the United States would be sufficient evidence. If the citizen were given specific notice by the government official concerned that the Government had learned that the citizen had performed one of the enumerated actions and presumed that he had expatriated himself, and the citizen did nothing to deny or rebut that presumption or offer evidence that he still affirmed allegiance to the United States, within, say, five years of receipt of notice, it would be justifiable to conclude that the citizen had assented to the presumption of expatriation.

A second way of approaching the problem would be to apply different sanctions to citizens who performed the enumerated acts. Pres-

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67 It has been argued that formal renunciation should be the only grounds for expatriation. *See* Boudin, *Involuntary Loss of American Nationality*, 73 HARV. L. REV.. 1510 (1960).

68 Many other nations impose loss of citizenship on the performance by citizens of certain acts. *See* U.N. Doc. A/CH.4/66 (1953). Among the acts are: acquisition of another nationality, receiving a title from another country, activities against the public interest, acts for the profit of another state, failure to return to homeland on call, being unfaithful abroad, advocating subversive ideas, not cooperating in the common interest, and tending to destroy the republican form of government.

sently, a citizen can be expatriated if he obtains naturalization in a foreign state, works for its government, enters its army, or takes an oath of allegiance to it; commits treason or conspires to overthrow the Government; or formally renounces his connection with the United States. The citizen's only defense is to show he performed the acts involuntarily; and if he became a national of a foreign state or was there for ten years preceding the performance of the acts, there is an irrebuttable presumption of voluntariness. One could argue that unless the citizen literally forswears allegiance to the United States at the same time he commits these acts, there is no sound reason to expatriate him. In addition, the broad language of *Afroyim* may, in fact, forbid expatriation in any case other than formal renunciation. However, Congress could use the Act of 1865 as a model[69] and declare that a citizen may lose *certain rights* of citizenship if he performs certain enumerated acts.[70] While this approach would reintroduce the nice question of the difference between citizenship and the *rights* of citizenship, it would at least be an official expression of displeasure at such actions and might serve as a deterrent. Thus a person who enters the army of a foreign state, especially during wartime, cannot expect that the United States will be able to protect him. Such a person should lose the right of diplomatic protection normally extended to Americans who go abroad. Similarly, the United States should not have to extend the right of diplomatic protection to citizens who choose to reside abroad and become nationals of another state — the foreign state should be able to afford him adequate protection. His citizenship should not be revoked, however, for he may still be loyal to the United States, and the Constitution may still protect his right to remain an American citizen. Thus the Congress may try to deter such conduct, provide appropriate sanctions, yet respect the constitutional rights of all citizens.

A review of the legislative history of expatriation laws reveals that they have been based on inconsistent premises and often unsupported inferences. The recent line of Supreme Court cases, of which *Afroyim v. Rusk*[71] is the latest and most sweeping, suggests that expatriation

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69 *See* notes 8-10 and text *supra.*

70 *See* Klubock, *Expatriation: Its Origin and Meaning,* 38 NOTRE DAME LAW. 1, 45 (1962).

71 387 U.S. 253 (1967).

may be allowed only where the citizen formally renounces. In any event, the laws ought to be rewritten to reflect logical and constitutional demands.

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LEGISLATIVE DEVELOPMENTS

TEACHER DISMISSAL LEGISLATION: THE NEVADA APPROACH

INTRODUCTION

The teacher-dismissal statute[1] that went into effect in Nevada on September 1, 1968, is, by currently accepted standards, one of the most progressive. This Comment will attempt to set forth the scheme of the Nevada act, to articulate the goals of teacher-dismissal legislation in Nevada and elsewhere, and to suggest that the currently accepted standards for evaluating such legislation should be re-examined in the light of contemporary needs.

Nearly all states limit by statute the discretionary power of school administrators to dismiss teachers. The usual political technique of such lawmaking is to balance the interests of school administrators in discretion and flexibility against the interests of the teachers in security and fairness.[2] A great deal of the literature in the field, for example, seems to evaluate teacher-dismissal legislation mostly in terms of whether it protects the teachers as much as possible. But, while the interests of the teachers (and the administrators) are legitimate and important, they should not be the only ones on the scales. The criteria by which bad teachers are distinguished from good teachers, and the methods by which these criteria are applied, should contribute to the capacity of the school system to serve its ultimate beneficiaries — the pupils and the community. To focus on teacher-protection is a bit like evaluating the law of trusts in terms of how well it treats trustees, instead of in terms of how well it protects beneficiaries.

Historically, teacher dismissal laws emanate from the same political reform impulse that produced the Hatch Act and state civil service reform. They were intended to protect teachers from dismissal when political leadership changed hands, in order to limit the degree to which political patronage rather than merit could determine who would teach.[3] While the "merit system" ideal of progressivism retains

1 NEV. REV. STAT. §§ 391.311-391.3196.

2 L. CHAMBERLAIN, L. KINDRED, J. MICKELSON, THE TEACHER AND SCHOOL ORGANIZATION 210-212 (4th ed. 1966).

3 Comment, *Academic Tenure: The Search for Standards*, 39 So. CAL. L. REV. 593 (1966).

vitality, it has probably been supplemented as a motive for teacher-dismissal legislation by the feeling that academic freedom ought to be, to some degree, protected in elementary and secondary schools as well as in higher education.[4] Of course, much legislative action in this area may be best explained as the successes of potent teachers' organizations' lobbyists.[5] All these policy goals — insulation from politics, academic freedom, and job security — combine to produce the usual emphasis on teacher protection.

I. Grounds For Dismissal

A. The Problem of Vagueness

Nevada's new act provides sixteen grounds for dismissal,[6] most of which are typical:

(a) Inefficiency;
(b) Immorality;
(c) Unprofessional conduct;
(d) Insubordination;
(e) Neglect of duty;
(f) Physical or mental incapacity;
(g) Justifiable decrease in the number of positions due to decreased enrollment or district reorganization;
(h) Conviction of a felony or of a crime involving moral turpitude;
(i) Inadequate performance;
(j) Evident unfitness for service;
(k) Failure to comply with such reasonable requirements as a board may prescribe;
(l) Failure to show normal improvement and evidence of professional training and growth;
(m) Advocating overthrow of the Goverment of the United States or of the State of Nevada by force, violence or other unlawful means, or the advocating or teaching of communism with the

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4 *Developments in the Law — Academic Freedom*, 81 Harv. L. Rev. 1045, 1065 (1968). This comment is, to some extent, a critical reply to the approach of *Developments — Academic Freedom*, for over-emphasizing protection of teachers and under-emphasizing benefit to children and society, and for over-emphasizing the role that constitutional law should play in teacher dismissal.

5 The new legislation in Nevada was proposed by the Nevada State Education Association. James F. Butler, *An Approach to Professional Practices Legislation*, Nat. Educ. Ass'n. J., Feb. 1967, p. 43.

6 Nev. Rev. Stat. § 391.312.

intent to indoctrinate pupils to subscribe to communistic philosophy;
(n) Any cause which constitutes grounds for the revocation of a teacher's state certificate;
(o) Wilful neglect or failure to carry out the requirements of the title;
(p) Dishonesty.

Incorporated by reference as grounds for dismissal are breach of teaching contract;[7] failure to keep and report attendance accurately;[8] failure to follow the prescribed curriculum and use the authorized textbooks;[9] failure to maintain adequate discipline;[10] failure to attend certain teachers' conferences;[11] and failure to conform to school administrators' regulations.[12]

These substantive grounds for dismissal in the Nevada statute invite criticism for vagueness. Some of them, such as "immorality" and "insubordination," have been interpreted by courts in many states; the existence of this common-law background may mitigate the dangers of this apparent vagueness. But other grounds for dismissal, such as "inadequate performance" and "failure to show normal improvement and evidence of professional training and growth," cannot be so easily elucidated.

Now that public school teachers' jobs are no longer necessarily treated as privileges outside the scope of the due process clause,[13] some of Nevada's stated grounds for teacher dismissal may be unconstitutional if applied to teachers whose formerly-proscribed activities now have constitutional protection. The looseness of the statutory criteria may enable review panels and school boards to resolve substantially similar cases in dissimilar ways for improper reasons, unless these panels and boards are closely scrutinized by reviewing courts.[14]

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7 *Id.*, § 391.350 makes this unprofessional conduct (ground [c]) and adequate cause for revocation of a teacher's certification (ground [n]).

8 *Id.*, § 391.240 makes this a violation of ground (o). Teachers' attendance records help determine allocation of money to different schools.

9 *Id.*, § 391.260 (a violation of ground [o]).

10 *Id.*, § 391.270 (a violation of ground [o]).

11 *Id.*, § 391.280 (a violation of ground [o]).

12 *Id.*, § 391.260 (a violation of ground [o]).

13 The "demise of the privilege doctrine" as applied to teachers is reviewed in *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1078 (1968). It seems to be in a coma, but not quite dead.

14 *E.g.*, Racial discrimination in teacher dismissal is facilitated by vague statutory criteria. Note, *Discrimination in the Hiring and Assignment of Teachers in Public School Systems*, 64 MICH. L. REV. 692, 702 (1966).

On the other hand, there is a risk that the very vagueness and multiplicity of the grounds for dismissal may incline a court to apply a weaker standard of review, on the theory that the legislature must have intended to leave to the experts such "matters of judgment, often difficult and delicate."[15]

B. Specific Grounds

1. Insubordination.

"Insubordination" generally means willful disobedience of reasonable orders by proper authorities.[16] The Nevada statute includes as grounds for dismissal insubordination[17] and several kinds of conduct amounting to particular varieties of insubordination.[18] The traditional justifications for this ground for dismissal are that insubordinate teachers hamper efficient administration[19] and set a bad example for children of disrespect and disobedience.[20] Dismissals have been upheld where a teacher criticized his superiors,[21] taught from a proscribed book[22] (or as in the famous Scopes case, taught a proscribed theory), or refused to answer a superintendent's inquiries as to whether he was a member of a communist organization.[23]

The view might be taken that breaches of prescribed curriculum constitute failure of a teacher to do what he is paid for, and that free speech considerations do not require that teachers be permitted to say whatever they wish on "company time" as well as their own; the

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15 Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir. 1956). The dismal history of the FCC is often attributed to the vagueness of the statutory criterion, and the vagueness and multiplicity of its own criteria, by which it is to judge license applicants.

16 McIntosh v. Abbot, 231 Mass. 180, 120 N.E. 383 (1918); Garvin v. Chambers, 195 Cal. 212, 231 P. 696, 701 (1924).

17 NEV. REV. STAT. § 391.312(d).

18 "Failure to comply with such reasonable requirements as a board may prescribe," NEV. REV. STAT. § 391.312(k), "Willful neglect or failure to observe and carry out the requirements of this Title, *id.*, § 391.312(o), and some of the provisions incorporated by reference in "Any cause which constitutes grounds for the revocation of a teacher's state certificate," *id.*, § 391.312(m).

19 Punke, *Insubordination in Teacher Dismissal*, 45 MICH. ST. B. J. 51 (Aug. 1966).

20 Johnson v. Taft School Dist., 19 Cal. App.2d 405, 65 P. 2d 912 (1937).

21 Harrison v. Bd. of Educ., 134 N.J. Law 502, 48 A.2d 579 (1946).

22 Parker v. Bd. of Educ., 348 F.2d 464, *cert. denied*, 382 U.S. 1030 (1966).

23 Beilan v. Bd. of Educ., 357 U.S. 399 (1958), upholds a Pennsylvania incompetency dismissal for this behavior on the theory that the teacher was insubordinate.

maverick teacher could be likened to a radio announcer who insisted on reading weather reports when he was supposed to read news dispatches. But insubordination dismissals for non-classroom speech, especially public criticism of superiors, seem to be prohibited by the First Amendment.[24]

Courts have a duty to mitigate the unfairness lurking in so vague a term as insubordination, and can do so by confining the term carefully within its own conceptual boundaries. Insubordination can be defined as the willful disobedience of a reasonable order emanating from a proper authority. Many problems arising in dismissals for insubordination can be resolved in favor of the teacher without reliance on the Constitution, simply by emphasizing the proper criteria in this standard definition of the term. It is this writer's thesis that this method is to be preferred, in order to avoid the rigidity of constitutional adjudication in this delicate area.

Thus, the ingredient of willfulness would seem to be lacking when a teacher fails, because of the great administrative burdens on him, to perform some of the countless paperwork tasks required of him.[25] Similarly, disobedience of a school board's order forbidding the organization of a labor union could be held not to constitute insubordination, on the ground that the school board is not the proper authority to issue such an order. It is difficult to infer from the legislative delegation of educational policy-making power to school boards an authority over areas in which educators lack expertise. The school board would be the proper authority, on the other hand, for determination of minimum curriculum standards.

2. Incompetence.

The new Nevada statute provides several grounds for dismissal of teachers whose performance demonstrates substandard ability or effort,[26] all falling under the general rubric of incompetence. The

24 Pickering v. Bd. of Educ., — U.S. —, 88 S. Ct. 1731 (1968), 20 L.Ed.2d 811, holds that the First Amendment bars dismissal of a teacher for public criticism of a superior, absent proof of false statements knowingly or recklessly made.

25 Nevada recognized that mere unintentional error or excusable neglect in compiling attendance records does not justify revocation of a teacher's certificate under NEV. REV. STAT. § 391.340. Atty. Gen. Op. 258 (June 9, 1938).

26 NEV. REV. STAT. § 391.312 (a) Inefficiency; (f) physical or mental incapacity; (i) Inadequate performance; (j) Evident unfitness for service; (l) Failure to show normal improvement and evidence of professional training and growth; failure to maintain adequate discipline, NEV. REV. STAT. § 391.270, incorporated by reference by (n); any cause which constitutes grounds for the revocation of a teacher's state certificate. *See also Id.*, § 391.330.

"physical or mental incapacity" ground provides a means for dismissing pregnant and sick teachers without ruining their records by a more general designation, such as "incompetent." The "failure to show normal improvement and evidence of professional growth" ground represents a strikingly vague attempt to counter one administrative objection to teacher protection statutes: that once given tenure, many teachers cease developing their abilities and exercising them fully.[27] While "failure to maintain adequate discipline" seems understandable, the remaining grounds, "inefficiency," "inadequate performance," and "evident unfitness for service," have no obvious meaning.

Other states have split in their readings of similar criteria. Some apply the relatively clear and performance-centered definition of incompetence, *i.e.*, that a teacher must know his subject and show ability to arouse and hold his pupils' interest and to maintain discipline.[28] Others use a broad concept of unfitness, embracing insubordination,[29] immorality,[30] and inadequate patriotic zeal.[31] The cases have not discussed the process of choice between the narrow and broad constructions, but the legal rationale for the former could be that a broad reading would render nugatory the more specific statutory provisions as to immorality, insubordination, and so forth.

Sound policy as well as the canons of construction favor the narrower approach. Experts on teacher appraisal techniques say that they can achieve greater teacher compliance and more accurate evaluations when they focus on classroom performance of a teacher than when they include personality and out-of-school factors.[32] A narrow approach probably would catch almost all the cases of genuine incompetence that could be spotted with a wider approach, since

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27 This purpose is suggested in an article about the Nevada act, when it was still only a bill, by the Executive Secretary of the Nevada State Education Association: Butler, *An Approach to Professional Practices Legislation*, NAT. EDUC. ASS'N. J., February 1967, at pp. 43,44.

28 *E.g.*, Conley v. Bd. of Educ., 143 Conn. 488, 123 A.2d 747 (1956).

29 Tichenor v. School Bd., 144 So.2d 603 (La. App. 1962), relying on the equation of incompetence and insubordination with unfitness in Beilan v. Bd. of Educ., 357 U.S. 399 (1958).

30 Horosko v. Mt. Pleasant Twp. School Dist., 335 Pa. 369, 6 A.2d 866 (1939), where the dismissed teacher served beer and taught customers how to use the gambling machines in her husband's restaurant after school hours.

31 Dismissals for incompetence were upheld in State *ex. rel.* Schweitzer v. Turner, 155 Fla. 270, 19 So.2d 832 (1944) (conscientious objector) and McDowell v. Bd. of Educ., 104 Misc. 564, 172 N.Y.S. 590 (Sup. Ct. 1918) (failure to support World War I) because they could not inculcate patriotism by their examples.

32 G. REDFERN, HOW TO APPRAISE TEACHING PERFORMANCE, 17, *passim* (1963).

discipline in the classroom usually breaks down when a teacher is seriously deficient in any way.[33] A narrow focus, by creating a clearer standard, should produce greater teacher compliance (which can facilitate a tougher standard) and higher morale. Higher morale should reduce the attrition rate, facilitate the recruitment of good teachers, and reduce teacher opposition to the incompetence dismissals that do take place.

3. Personal Conduct.

Nevada's new law provides six grounds for teacher dismissal, all typical of many states, relating to a teacher's personal conduct, mostly out of school. Its anti-Communist provision[34] stands as good a chance as any of passing constitutional muster.[35] While its more specific provisions[36] seem unexceptionable, the broader grounds, "immorality,"[37] and "unprofessional conduct"[38] suffer from gross vagueness.

Presuming non-redundancy on the part of the draftsmen, "immorality" must mean more than commission of a felony or of a misdemeanor involving moral turpitude. Some courts, generally in cases upholding dismissals, have defined it as conduct which a large body of public opinion regards as immoral.[39] Other courts hold that "immorality" was intended by the legislature as a "catch-all clause," embracing not only immoral conduct, but any conduct tending to lower the esteem in which the teaching profession is held.[40] A number of courts require no conduct at all; the mere reputation for immorality is held to justify dismissals on that ground, on the theory

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33 Annot., 4 A.L.R.3d 1090, 1102 (1965), citing facts of many cases in support. Probably children are fairly good judges of which of their teachers know and can teach their subjects, and refuse to waste their time cooperating with those who cannot.

34 "Advocating overthrow of the Government of the United States or of the State of Nevada by force, violence or other unlawful means, or the advocating or teaching of communism with the intent to indoctrinate pupils to subscribe to the communist philosophy." NEV. REV. STAT. § 391.312(m).

35 It avoids the "membership in a subversive organization" approach nullified for vagueness and excessive breadth in Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

36 Subsections (h) "Conviction of a felony or of a crime involving moral turpitude," and (p) "dishonesty" (applied in other states to such teacher conduct as embezzling school funds), NEV. REV. STAT. § 391.312.

37 NEV. REV. STAT. § 391.312(b).

38 *Id.*, § 391.312(c).

39 *E.g.*, Horosko v. Mt. Pleasant Twp. School Dist., *supra* note 43.

40 Watts v. Seward School Bd., 421 P.2d 586, vacated and remanded, U.S. —, 88 S. Ct. 1753, 20 L.Ed.2d 842 (1968) (public criticism of superiors).

that a bad reputation in the community reduces a teacher's effectiveness in the classroom and her fitness as a moral exemplar.[41]

Where the same statute makes both "immorality" and "unprofessional conduct" grounds for dismissal, courts generally reason that the latter term must have been intended to embrace conduct not covered by the former.[42] Unprofessional conduct is generally defined as conduct which violates the rules or ethical code of a profession or is "unbecoming" a member of the profession,[43] and embraces such cases as advocacy in class of a particular candidate for public office.[44]

Children may be as impressionable and as strongly in need of protection from bad examples as the prevailing broad constructions of "immorality" and "unprofessional conduct" assume. But where the proscriptions are construed to apply to conduct protected by the First Amendment, they may be unconstitutional.[45] Teachers' legitimate interests in freedom are undermined by the broad constructionists' approval of the fact that

> one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations.[46]

The community interest in recruitment of good teachers militates against a construction which would induce many good teachers to shun employment in the local school system in favor of systems elsewhere or private schools, because of the restrictions on personal life by the local system.

II. Procedure

Except in emergencies, a school administrator who admonishes a teacher for a reason which may lead to dismissal must advise the teacher of the danger and assist him in remedying the problem, allowing sufficient time for improvement before initiating dismissal proceedings.[47] A teacher against whom dismissal proceedings have been initiated is entitled to notice of the grounds and of his right to a

41 Freeman v. Inhabitants of Bourne, 170 Mass. 289, 49 N.E. 435 (1898) (indictment for adultery in another state, where the charges were later dropped). *Freeman* is the leading case for this view.

42 *E.g.*, Gover v. Stovall, 237 Ky. 172, 35 S.W.2d 24 (1931).

43 People v. Gorman, 346 Ill. 432, 444, 178 N.E. 880, 885 (1931).

44 Goldsmith v. Bd. of Educ., 66 Cal. App. 157, 225 P. 783 (1924).

45 *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1072 (1968).

46 Horosko v. Mt. Pleasant Twp. School Dist., 335 Pa. 369, 6 A.2d 866 (1939).

47 Nev. Rev. Stat. § 391.313.

hearing,[48] to counsel at a hearing,[49] and to reinstatement without loss of pay if, under the emergency procedure, he was dismissed before the procedure was concluded and the dismissal was wrongful.[50] A contested dismissal petition is judged initially by a five member panel chosen (subject to three challenges each by the teacher and by the petitioning administrator[51]) by the superintendent of public instruction from a forty-two member committee. This committee is appointed for staggered three year terms by the superintendent, from teachers and administrators with more than five years' experience, who are nominated by teachers; and a majority of them must be teachers without administrative positions.[52] The panel investigates, may require witnesses to testify under oath, and must hear the teacher and petitioning administrator.[53] If the teacher or administrator disagrees with the report of the panel, he may appeal to the board of trustees of the teacher's school district, which must consider all relevant evidence, including the panel's report; the board may require witnesses to testify, and must render a written decision.[54] The Act is not explicit on the scope of judicial review of board decisions, but the requirement of a written decision facilitates fairly broad scope of review, since a court can see how the board arrived at its decision.

This procedure for dismissals now established in Nevada law comports with presently accepted progressive opinion. Nevada now favors due process for teachers over discretion for administrators, probably on the theory that "inarticulable" managerial factors are less important than fairness.[55] The argument may be made that a cumbersome procedure which is scrupulous in its attention to fairness creates an undue administrative burden on non-lawyers who are not well-suited to implementing complex procedures. But this is met by the argument that dismissals of teachers are so rare that their cumbersome character will not impede the school system, and that laymen not trained in the niceties of due process are most needful of specific guidelines when confronted with the responsibility for other people's important in-

48 *Id.*, § 391.317.
49 *Id.*, § 391.3195 (d). But this applies only at an appellate hearing.
50 *Id.*, § 391.314 (3).
51 *Id.*, § 391.3191.
52 *Id.*, §§ 391.316, 391.319.
53 *Id.*, § 391.3192.
54 *Id.*, § 391.3195.
55 *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1082 (1968).

terests.[56] The local school boards of trustees, to whom either teachers or administrators can appeal if dissatisfied with the decisions of the faculty-administration panels, may tend to regard dismissal of a particular teacher as less important than good relations with and the good reputation of the administrator who seeks the dismissal,[57] but the boards are unlikely to reverse the review panels since this would create grave risks of alienating teachers all over the district. The review panels, selected from a mixed committee of administrators and experienced faculty, balance the conflicting interests of faculty and administrators.[58]

Conclusion

Some of the grounds for dismissal in the Nevada and other teacher dismissal statutes, and the very idea, perhaps, behind most teacher protection schemes, run counter to the interests of parents and their children in school. The very notion of insulating teachers from politics, the fundamental reason for teacher protection legislation, may, by reducing parental influence over their children's schools, reduce their trust in them; their mistrust cannot help but carry over to their children, so that learning is impeded.[59] The procedural schemes devised by the more progressive teacher dismissal laws, such as Nevada's, go far toward protecting teachers from dismissal where they have strong faculty support but have aroused personal enmity in an administrator. These schemes, however, do not provide for parental protection of teachers disliked by their colleagues and supervisors but strongly supported by their students and students' parents, or for dismissal of teachers obnoxious to parents but favored by other teachers and superiors. The current controversy about community control over schools may be viewed as an attack on the "merit system" by parents who strongly disagree with the ideas taught to and the teachers imposed on their children by schools to which their children are compelled to go. Black militants may feel that many schools serve the

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56 Comment, *Dismissals of Public School Employees in Texas—Suggestions for a More Effective Administrative Process*, 44 Texas L. Rev. 1309, 1328 (1966).

57 *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1088, (1968).

58 *Developments in the Law: Academic Freedom*, 81 Harv. L. Rev. 1045, 1089 (1968) recommends such a committee.

59 Featherstone, *Community Control of Our Schools*, New Republic, Jan. 13, 1968, p. 16.

white community in ways detrimental to black children and the black community.

"Academic freedom," therefore, insofar as it is meant to protect public elementary and secondary school teachers rather than students, may be a red herring. Public school teachers are hired, not to think creatively (they may, like anyone else, but it is not what they are paid for), but to disseminate a curriculum laid down by elected authorities or their appointees to children of the electorate.[60] Children are less mature and less able to purchase wisely, as it were, in the "free marketplace of ideas," than are adults.[61] Few teachers are particularly concerned with academic freedom in its civil libertarian aspect.[62]

While academic freedom concepts may be a badly chosen route to better schools, one reaches many of the same conclusions by following the road of pragmatic personnel policies. Vague standards in teacher dismissal statutes make it difficult to fire teachers without creating at least the appearance of unfairness, which can be expected to harm morale, thereby impairing recruitment and increasing attrition. Broad catch-all grounds for dismissal prevent teachers from living like adults outside of school, thereby probably reducing the supply of good teachers in the recruiting pool.

All of the substantive and procedural provisions of a teacher dismissal statute should be judged according to whether they distinguish dismissable from non-dismissable teachers in such a way as best to serve the interests of schoolchildren and the community, since the children and the community are the intended beneficiaries of the schools. Since students' attendance in school is compulsory in most states almost to the end of high school, and this compulsion is justified by the theory that it is for their benefit, it is especially important that the administrative scheme of the schools be shaped to serve their clients.

*Andrew J. Kleinfeld**

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60 Many sources take the view that elementary and high school instructors are meant to be disseminators of knowledge, unlike college teachers, who are supposedly producers, e.g., Reutter, *Legal Aspects of Academic Freedom*, in CURRENT LEGAL CONCEPTS IN EDUCATION 253, 255 (L. Garber, ed. 1966).

61 *Id.* 256.

62 *Developments in the Law: Academic Freedom*, 81 HAR. L. REV. 1045, 1120, 1122 (1968).

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BOOK REVIEW

PRACTICE AND PROCEDURE OF PARLIAMENT, By *M. N. Kaul and S. L. Shakdher.* Delhi: Metropolitan Book Co., Private Ltd., 1968, pp. xliii, 1009, 14 appendices, table of cases, and index, £ 5 10s ($13.20).

Nearly a century and a quarter ago, Sir Thomas Erskine May's renowned TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT was first published in England. Since then it has gone through 16 editions and has been the *vade mecum* of parliamentarians throughout the British Empire. As former members of that empire obtained their independence and as their parliamentary institutions have developed, the need for special parliamentary guides mirroring the myriad details of their local practices, rules, and usages became apparent. James R. Odgers' AUSTRALIAN SENATE PRACTICE, which is now in its third edition, was one of the early excellent responses to that need. Now M. N. Kaul and S. L. Shakdher have provided a monumental work, with particular reference to Lok Sabha of India which may well become the Indian Erskine May's. The authors' qualifications for their task are clearly reflected in the excellence of this volume. Shri Kaul is the former Secretary of Lok Sabha and now a member of Rajya Sabha (Council of States), while Shri Shakdher is the present Secretary of Lok Sabha (House of the People). Both have long been students of comparative parliamentary practice and are dedicated to the strengthening of parliamentary government.

Although encyclopedic in scope, this volume is readable for both the ordinary citizen and the legislator. It does not neglect any major aspect of the practice and procedure of parliament, with the result that it provides an admirable education for the ordinary citizen, while furnishing the answers to the innumerable specific problems of the legislator. Sardar Hukam Singh, the third Speaker of Lok Sabha, who has presided over that body for nearly seven years, in a thoughtful foreword, attests to the excellence of the authors and their work. Their approach — historical, interpretive and comparative — is precisely what contributes so greatly to the value of the volume.

In forty-three chapters the authors deal with every aspect of parliamentary government, well documented with British as well as Indian authorities, with the former not necessarily limited to the distant past.

Two of the major concerns of parliaments throughout the world, the use of parliamentary committees and the obtaining of information from the government, are amply covered in this volume. Many parliamentary governments today are gradually receding from their old aversion to legislative committees, but no parliament has yet developed a system of standing committees comparable to that of the United States Congress, even though the subject is occupying the minds of parliamentarians everywhere. Shri Shakdher, himself, is preparing a detailed report for the Association of Secretaries General of Parliaments on the Improvement of Parliamentary Procedure Through the Use of Committees. At the present time, the powers of the committees of Lok Sabha are the same as those enjoyed by the committees of the British House of Commons at the commencement of the Indian Constitution. Both parliaments are giving consideration to the extension of committees and Shri Shakdher may prove instrumental in their extension in Lok Sabha.

With respect of the problem of acquiring information from the government, Lok Sabha like many other parliaments relies greatly upon question-procedure in the chamber, the scope of which has been widened by every new constitutional reform instituted in India. In addition, a Member may, with the previous permission of the Speaker, call to the attention of a Minister a matter of urgent public importance and request the Minister to make a statement thereon. Furthermore, the motion for adjournment on a matter of urgent public importance, while an exceptional thing, is sometimes used to influence the decision of the Government in an urgent matter where there is not time for a motion or resolution with proper notice. It requires, however, not only the consent of the Speaker but leave of the House, itself. Finally, parliamentary committees may take evidence of witnesses, including Ministers, on innumerable subjects, but where the disclosure of a document is likely to be prejudicial to the safety or interest of the State, the Government may decline to produce it.

Although those subjects are covered exhaustively they are only two of the many matters of interest to students of parliament arising from the complexities of modern legislative bodies that are discussed in detail. Every aspect of a Member's service is treated, such as election, disqualification, powers, privileges, conduct, immunities, and salaries and allowances. Of course, the arrangement and details of business and the rules of procedure are dealt with in detail, particularly as to

the legislative business of the House. The relationship between the Parliament and the Judiciary, the civil service, the press, and interparliamentary bodies is also discussed knowledgeably. The authors' practice, adopted early in their careers, of noting procedural changes almost daily, have enabled them to provide useful and interesting information on all those matters.

This volume will undoubtedly be the authoritative handbook of Indian parliamentarians and others interested in Lok Sabha for generations to come.

*Charles J. Zinn**

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