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A STUDY IN CIVIL COMMITMENT: THE MASSACHUSETTS SEXUALLY DANGEROUS PERSONS ACT

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I. INTRODUCTION

> The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent. This is the task of legal science. The second is a need of a philosophy that will mediate between the conflicting claims of stability and progress, and supply a principle of growth.[1]

The confusion in and dissatisfaction with many areas of the law that led Mr. Justice Cardozo in 1924 to the above assessment describes well the statute and case law dealing with "sexually dangerous persons" in Massachusetts. It is difficult to identify the base point of the problem; perhaps there is none. Yet several contributing factors can be located. For example, many of the assumptions about the mind implicit in such law are held to be incorrect by most psychiatrists.[2] Moreover, the key Massachusetts statute[3] was inartfully

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1 B. Cardozo, THE GROWTH OF THE LAW 1 (1924).

2 One writer has characterized the encounter between law and psychiatry as

> "a discouraging history of usurpation and abdication: of an expert being summoned for a limited purpose, assuming his own indispensibility, and then persuading the law to ask critical questions in terms which make him more comfortable and his testimony more relevant. The upshot has been to make the psychiatrists' testimony more relevant to the questions posed, but to make the questions themselves less relevant to the purposes of the law."

A. Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, in THE PATH OF THE LAW FROM 1967 71 (A. E. Sutherland ed. 1968). [hereinafter cited as Dershowitz, *Psychiatry in the Legal Process*].

3 MASS. GEN. LAWS, ch. 123A, (Supp. 1969).

drawn and includes many ambiguities and contradictions. Four agencies,[4] quite often disagreeing in basic philosophy, must administer this law. In addition, it would seem, the courts themselves often have directed their decisions toward transitory exigencies without knowing how the precedent was functioning and what end ought to be attained.[5]

In the following pages the development of the statute is traced from its beginning as an emergency provision, through the unsuccessful attempts at patch work improvement, and finally, to the total revision in 1958. Against such a backdrop the Massachusetts cases and the sections of the statute that deal with commitment, treatment and release are fitted together. As part of this examination the inner workings of the statute are exposed for discussion and analysis. The operation of the Treatment Center for Sexually Dangerous Persons[6] created by this statute (and the administrative focal point of the entire program) is described including a brief view of its physical plant and patient population. Finally, a tentative evaluation of the effectiveness of this ten year social experiment, together with several alternatives to the current statute, will be presented.

What follows, then, could be characterized as a case study. But it may also provide a foundation upon which a revision of the Massachusetts law could be constructed.

II. Historical Background

> Whereas, The deferred operation of this act would tend to defeat its purpose, which in part is to make immediately effective the provisions therein contained relative to sexual psychopaths, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.[7]

With this preamble a new statute, Chapter 123A of the General Laws, was enacted and Massachusetts had its first civil sexual psychopath law. The focus was upon any person, with or without a

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4 The courts, the Department of Correction, the Department of Mental Health, and the Parole Board.

5 For a discussion concerning the necessity of these two elements in making judicial choices see Cardozo, *supra*, note 1, at 61.

6 That is, the Treatment Center at Bridgewater which was founded in 1959 and is currently in operation.

7 Acts of 1947, ch. 684, [1947] Mass. Acts and Resolves.

criminal record,[8] who was found to be a "psychopathic personality."[9] Provision was made for a Probate Court hearing with representation by counsel[10] and compulsory process. Psychiatric examinations were required; and, like the present statute, an indefinite commitment could be imposed.[11]

Almost the entire Act was borrowed verbatim from the 1939 Minnesota Sexual Psychopath Law.[12] However, the definition of psychopathic personality came from a paraphrased interpretation of the original Minnesota definition which appeared in the landmark case of *Minn. ex rel. Pearson v. Probate Court*.[13] Perhaps due to wide dissatisfaction with the awkward and cumbersome provisions of the statute,[14] only one person was committed under Chapter 123A during the first six years of its existence.[15]

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8 There was no requirement of a prior conviction for jurisdiction. Acts of 1947, ch. 683, § 2, [1947] Mass. Acts and Resolves.

9 This type of person was defined as follows:

> Those persons who by an habitual course of misconduct in sexual matters have evidenced an utter lack of power to control their sexual impulses and who, as a result are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desires.

Acts of 1947, ch. 683, § 1, [1947] Mass. Acts and Resolves.
For a critical analysis of this provision see Curran, *Commitment of the Sex Offender in Massachusetts*, 37 MASS. LAW Q. 58 (1953).

10 "The person complained of may be represented by counsel, and if the court determines that he is financially unable to obtain counsel, the court may appoint counsel for him." Acts of 1947, ch. 683, § 2, [1947] Mass. Acts and Resolves.

11 Other provisions of the Act are discussed in Tenney, *Sex, Sanity and Stupidity*, 42 B.U. L. REV. 10 (1962); Note, *Out of Tune with the Times; The Massachusetts Sexually Dangerous Person Statute*, 45 B.U. L. REV. 10 (1965).

12 Minn. Sess. Laws 1939, ch. 369, § 1.

13 309 U.S. 270, 274 (1940). Mr. Chief Justice Hughes, speaking for a unanimous court, resolved the following constitutional challenges in favor of the state: first, that the definition was too vague; second, that the statute denied appellant the equal protection of the laws; and third, that it denied him due process.

In disposing of the equal protection argument, the Court stated in part that the question was not whether a group can be selected from a larger class, but whether there was any rational basis for the group that was selected.

> Whether the legislature could have gone further is not the question. . . . As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.

Id. at 274-275.

On the due process issue, the court took a quite cautious view. It was recognized that even though fair on its face, such a statute might be "open to serious abuses in administration and courts may be imposed upon if the substantial rights of the persons charged are not adequately safeguarded at every stage of the proceedings." *Id.* at 276-277.

14 Curran, *supra* note 9, at 63.

15 *Id.*

The first complete revision took place in 1954 when a new Chapter 123A entitled "Care, Treatment and Rehabilitation of Sexual Offenders and Victims of Such Offenders" was enacted.[16] The "sexual psychopath" then became the "sex offender".[17] In addition a treatment center was to be established wholly within the Department of Mental Health, jurisdiction had to be based upon a conviction,[18] and hearings were to be held in the Superior Court. The term of commitment was limited to that prescribed by the criminal law for the defendant's original offense. Those committed were given the right to a discharge hearing once every twelve months,[19] and provisions for voluntary commitment[20] and treatment of victims were included.[21]

This Act was not to become operative until the Commissioner of Mental Health certified that the treatment center provided for in section 2 was adequately staffed to carry out the purposes of the statute.[22] The Department of Mental Health, in the autumn of 1954, cautiously began to operate under the Act using the facilities of Concord Reformatory, a medium security prison.[23] But no vigorous enforcement of the Chapter was effected at that time.

A milestone in the history of this statute and the Treatment Center occurred in 1957 with the release from prison of Raymond Ohlsen. Ten years before, Ohlsen had been sentenced for assault with intent to kill, after stabbing a young boy who had resisted his sexual advances. It is difficult to reconstruct accurately the events surrounding Ohlsen's discharge, but it appears that his potential dangerousness was appreciated by the responsible public officials. While in custody he had had some psychotherapy, and, in the course of treatment Ohlsen predicted that he might lose control and commit a similar offense. It further appears that the parole authorities had no way to restrain

16 Acts of 1954, ch. 686, [1954] Mass. Acts and Resolves.

17 Section 1 of the Act defined this type of individual as:

> Any person who by a course of misconduct in sexual matters has evidenced a general lack of power to control his sexual impulses, and who, as a result, is likely to attack or otherwise inflict injury, degradation, pain or other evil on the objects of his uncontrolled or uncontrollable desires.

18 Either for a sexual offense under § 4 or any crime under § 5.

19 Acts of 1954, ch. 686, § 8, [1954] Mass. Acts and Resolves.

20 *Id.* § 9.

21 *Id.* § 10.

22 *Id.* § 2.

23 COMMONWEALTH OF MASSACHUSETTS, *Special Report of the Department of Mental Health Relative to the Advisability of Making Psychiatric Service Available to the District Courts*, House No. 2725, at 11 (1957).

or incarcerate him. The language of Chapter 123,[24] however, probably would have permitted the commitment of Ohlsen to a mental hospital. The appropriate section of that statute declares in part that persons with character disorders who are likely to conduct themselves in a manner which clearly violates ". . . the conventions or morals of the community . . ." may be involuntarily committed.[25]

In any event Ohlsen was released and in less than two months was arrested for the sadistic murder of two boys. It is a curious fact that he has never been brought to trial for these crimes. He has resided at the State Hospital at Bridgewater[26] since that time, after having been found to be mentally ill and incompetent to stand trial. Ohlsen has never, therefore, been inside the house which he, more than any other person, was responsible for having built.[27]

In response to the rising public indignation and the criticisms advanced, the Sex Offender law was amended in September 1957. The new emergency sections provided clearly for the establishment of a treatment center at a Correctional Institution, for indeterminate commitments, and for the mandatory transfer of prisoners found to be "sex offenders" into the treatment center.[28]

Still unsatisfied with Chapter 123A,[29] the General Court completely revised the law again in 1958.[30] At that time the "sex offender" be-

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24 MASS. GEN. LAWS ch. 123, (Supp. 1969).

25 MASS. GEN. LAWS ch. 123, § 1 (Supp. 1969). It has been the practice of Massachusetts mental hospitals not to seek involuntary commitment of persons other than those who are diagnosed as being psychotic. This policy is still adhered to. A moment's reflection will illustrate the implications of reversing such a procedure. Virtually any defendant would qualify for mental hospital commitment, especially all those released from prison who had not been risked on parole because of the likelihood of criminal behavior and who had been required to serve their maximum sentences.

In this context, it should be noted that only a small minority (estimates average around ten per cent) of Treatment Center patients are clinically psychotic.

26 The State Hospital is one of four established institutions which comprise the Massachusetts Correctional Institution at Bridgewater. The other three are the Prison Department for Chronic Alcoholics and Drug Addicts, the Defective Delinquent Center, and the Treatment Center for Sexually Dangerous Persons. The Youth Service Board maintains a maximum security unit for delinquent juveniles adjacent to the Correctional Institution, but it is wholly separate in function and administration.

27 For a newspaper account of the Ohlsen affair *see* the Boston *Daily Globe*, July 30, 1957, p. 1.

28 Acts of 1957, ch. 772, [1957] Mass. Acts and Resolves.

29 *See* Fox, *Sexually Dangerous Persons*, 6 ANN. SURVEY MASS. LAW 95 (1959).

30 Acts of 1958, ch. 646, [1958] Mass. Acts and Resolves.

came a "sexually dangerous person".[31] In addition certain important procedural changes were effected. Separate hearings on the issue of sexual dangerousness were provided for both persons in prison and those committed directly from criminal court; and the rights to compulsory process, notice and an expanded right to counsel were included.[32]

The statute as enacted in 1958 has remained basically the same, although there have been three noteworthy changes. In *Commonwealth v. Page*,[33] the Supreme Judicial Court found the Treatment Center at Concord[34] to be penal in nature, and therefore Page's civil commitment was held a violation of due process.[35] In response to this decision, section 2 was amended to empower the creation of a semi-autonomous Treatment Center by the Department of Mental Health within a Correctional Institution. Less than three weeks after the court's decision, the Treatment Center at Bridgewater was established under the authority of this section.[36] The adequacy of this arrangement was challenged in *Commonwealth v. Hogan*[37] and found in effect to satisfy substantially the remedial requirements of the statute.[38]

In 1960, an amendment to the first paragraph of section 9[39] may have moved many of those committed under section 6[40] one step further away from rehabilitation. A proviso was added preventing those committed while under sentence from being paroled from the Treatment Center until they would have been eligible for parole under their original sentence. Such procedure could result in at least

31 The "sexually dangerous person" was defined as "any person whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive behavior and either violence, or aggression by an adult against a victim under the age of sixteen years, and who as a result is likely to attack or otherwise inflict injury on the objects of his uncontrolled or uncontrollable desires." To date this has remained section one of chapter 123A.

32 These and other aspects of the statute will be discussed at length in part III, *infra*.

33 339 Mass. 313, 159 N.E.2d 82 (1959).

34 See text accompanying note 21, *supra*.

35 ". . . [W]e hold that a confinement in a prison which is undifferentiated from the incarceration of convicted criminals is not remedial so as to escape constitutional requirements of due process." Commonwealth v. Page, *supra* note 33, at 317-318.

36 The first patients were moved in five months later. Sarafian, *Treatment of the Criminally Dangerous Sex Offender*, 27 FED. PROB. 53, 54 (Mar. 1963).

37 341 Mass. 372, 170 N.E.2d 327 (1960).

38 See Tenney, *supra* note 10, at 19-20 for a critical comment on this decision.

39 Acts of 1960, ch. 347, [1960] Mass. Acts and Resolves. Section 9 of chapter 123A as it now stands is reproduced at note 119, *infra*.

40 See text accompanying note 89, *infra*, for a discussion of § 6 commitments.

two disadvantages. First, men who know they will not be eligible for parole will have less reason to participate in therapy. And second, the limited resources of the Treatment Center would be wasted upon those considered ready for release prior to parole eligibility but forced to remain.

Several administrative and textural changes were made in 1966.[41] Among the latter was a clarification of the court's power to grant conditional release after a finding that the patient is no longer a sexually dangerous person. The last sentence of section 9 — providing for the continued jurisdiction of the court until final discharge — was also added in 1966.

III. The Method of Chapter 123A

A. The Definition

Section 1 of the Act defines a "sexually dangerous person" as follows:

> Any person whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive behavior and either violence, or agression by an adult against a victim under the age of sixteen years, and who as a result is likely to attack or otherwise inflict injury on the objects of his uncontrolled or uncontrollable desires.[42]

This section has been the focus of much debate, controversy, confusion, and anxiety. Let one be quite clear about the fact that this section is the soul of the Act. The limits and purposes of the statute are set here. Therefore an understanding of its structure and spirit will be necessary for a meaningful discussion of the remaining sections.

The key to the implementation of this definition turns on the role of the psychiatrist. It has been suggested that the law imposes on the psychiatrist greater responsibilities than he would like to accept.[43] That such an imposition was no doubt the design of the drafters will become clearer as the commitment and release procedures are examined. Although the statute at many points demands the services of a psychiatrist, and much of the forthcoming discussion is limited

41 Acts of 1966, ch. 608, [1966] Mass. Acts and Resolves.
42 Mass. Gen. Laws ch. 123A, § 1, (Supp. 1969).
43 McGarry, *Who Shall Go Free*, 5 Psychiatric Opinion 19, 24 (1968).

to his role, the authors are of the opinion that, in most instances, experienced clinicians from other behavioral disciplines such as psychology would be equally qualified.

The statute imposes two basic roles on the psychiatrist. One follows from the premise that a rationale for commitment is treatment; the psychiatrist is thus commanded to treat whether he thinks the individual can be treated or not. The other and more frequent role for the psychiatrist in such proceedings is the providing of expert testimony, on the basis of which predictions of dangerous behavior are judicially arrived at.[44]

Several years ago Harry L. Kozol, M.D.[45] commented that the legislative step away from penology and toward psychiatry constituted a "realistic test of psychiatric participation in criminology."[46] He also thought that

> [T]he lawmakers wisely and realistically recognized that certain persons in the community are "dangerous" to others by reason of their behavior in relation to sex. Thus, they designated a category of individuals who have one thing in common in that their behavior is "sexually dangerous," and elected to have psychiatrists rather than penologists make the decision as to who is "dangerous".[47]

In *Commonwealth v. Peterson*,[48] one of the testifying psychiatrists was asked on cross-examination to define "sexually dangerous person." His answer was not precisely in accord with the statutory language. On appeal the Supreme Judicial Court held that while this discrepancy might have affected the opinion's weight, it did not put it out of the case. The court went on to clarify the relationship of judge to psychiatrist within the context of Chapter 123A: "The ultimate decision as to whether the defendant was a sexually dangerous person was for the judge to determine on all the evidence."[49]

By making this point the court was recognizing a fact noted at least two years before by Dr. Kozol, to wit ". . . that there is no such psychiatric disease as 'sexually dangerous' ".[50] On the other hand,

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44 *Id.* at 24; cf. Dershowitz, *Psychiatry in the Legal Process*, *supra* note 2, at 78.

45 Director of the Bridgewater Treatment Center for Sexually Dangerous Persons since 1960.

46 Kozol, *The Medico-Legal Problems of Sexually Dangerous Persons*, ACTA MEDECINEA LEGALIS ET SOCIALIS, No. 2, at 126 (April-June, 1963).

47 *Id.* at 127.

48 348 Mass. 702, 205 N.E.2d 719 (1965), cert. den. 384 U.S. 909.

49 *Id.* at 705.

50 Kozol, *supra* note 46, at 126.

the court has said that the statute calls for a prediction from the psychiatrist of what sort of behavior is "likely".[51] Yet even here the court was quite clear: "The *decision* as to what was 'likely' was for the judge."[52]

Notwithstanding the role of the psychiatrist when the proceeding reaches the courtroom, at prior[53] and successive[54] stages he must, at statutory command, make decisions based upon some conception of what a sexually dangerous person is and is not. It would seem that given a legal definition, all governmental agencies working with it ought to interpret it in the same manner. But do they?

Recently the Director of the Center, its senior consulting psychologist and its senior mental health co-ordinator[55] explained how they developed a working definition of "sexually dangerous person" for the Center.[56] First they ". . . looked to the language of the statute and the probable intent of the legislature in the light of the tragic circumstances that led to its enactment."[57] One of their guiding principles was to construe the term "sexually dangerous" narrowly. Thus, the primary group to come within their definition are ". . . persons who are likely to rape or otherwise to assault sexually a child or woman."[58] Also included are "those who have repeatedly indoctrinated prepubescent boys in homosexual activities."[59] Not considered as "sexually dangerous" by the Treatment Center's staff are consenting adults who indulge in homosexual practices or "nuisance of-

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51 Commonwealth v. Dagle, 345 Mass. 539, 543, 188 N.E.2d 450 (1963), cert. den. 375 U.S. 863 (1963).

52 *Id.* at 543.

53 See the discussion of the psychiatrists' part in pre-hearing examinations accompanying note 69, *infra.*

54 See the textural discussion of release procedures accompanying note 132, *infra.*

55 Harry L. Kozol, M.D., Murray I. Cohen, Ph.D., and Ralph F. Garofalo, M.A. respectively.

56 Kozol, Cohen, and Garofalo, *The Criminally Dangerous Sex Offender,* 275 N.E. J. OF MED. 79 (July 14, 1966) [hereinafter referred to as Kozol *et al., The Criminally Dangerous Sex Offender*].

57 *Id.* at 80.

58 *Id.* Apparently the issues of "repetitive or compulsive behavior" and "violence or aggression by an adult against a child" are relevant to but not determinative of the staff's ultimate finding.

59 *Id.* The Supreme Judicial Court and the Treatment Center seem to be in perfect concert as to this point. In *Commonwealth v. Dagle, supra* note 51, the court specified that "one kind of injury with which the statute is concerned is the establishing in boys at a formative age of unnatural habits and emotions which they may never be able to overcome." 345 Mass. at 543.

fenders," i.e. "voyeurs, exhibitionists, transvestites, fetishists and others with similar aberrant modes of behavior. . . ."[60]

In addition to this psychiatric interpretation, the court also has taken opportunities to construe the definition. Recently, in considering, and rejecting, petitioner's contention that section 1 was unconstitutionally vague, the court exercised its prerogative to interpret the section.[61] The argument that undue vagueness flowed from the word "misconduct" in the definition[62] was rejected on the grounds that further limitation was provided in succeeding clauses:

> The statutory definition requires [1] repetitive or compulsive behavior, [2] violence or aggression by an adult against a person under the age of sixteen and [3] a likelihood that injury will be afflicted (sic).[63]

If the court indeed read section 1 as requiring all three elements in every case it clearly conflicts with the Treatment Center's interpretation and with that of the Superior Courts. The Center's staff understand the statute to require only (1) misconduct in sexual matters indicating a general lack of power to control sexual impulses and (2) a likelihood that the person will attack or otherwise inflict injury on his victim.[64] Moreover, 57 of the 211 patients committed from the Center's inception to September 1, 1968 acted against victims over the age of sixteen.[65]

In order to accept the *Peterson* interpretation one would have to view the phrase "as evidenced by" in section 1 as meaning "including

60 Kozol *et. al., The Criminally Dangerous Sex Offender, supra* note 56, at 81. In another article Drs. Cohen and Kozol stated that in their view ". . . the law and the [Treatment] Center are concerned only with dangerous offenders, described as those who have used such violence that the life of the victim was in jeopardy or those whose primary object choices were children." Cohen and Kozol, *Evaluation for Parole at a Sex Offender Treatment Center*, 30 FEDERAL PROBATION, 50 51, (Sept. 1966).

61 Peterson, Petitioner, 1968 Mass. Adv. Sh. 517, 236 N.E.2d 82 (1968).

62 "The phrase 'misconduct in sexual matters' is so ambiguous that there is no room provided by which an individual could make a learned conclusion that particular activity was prohibited or would subject an individual to life confinement at Bridgewater. What may be considered 'misconduct' in one area may be considered normal conduct in other areas." Brief for Petitioner at 10, Peterson, Petitioner, *supra* note 61.

63 Peterson, Petitioner *supra* note 61 at 523. Attorney for the petitioner had argued that the clauses modifying "misconduct in sexual matters" did not protect the statute from the vagueness prohibition because they were phrased in terms intelligible only to ". . . a trained psychiatrist." Brief for Petitioner at 11-13.

64 Kozol et al., *The Criminally Dangerous Sex Offender, supra* note 56, at 80.

65 TREATMENT CENTER FOR SEXUALLY DANGEROUS PERSONS AT BRIDGEWATER, *Treatment Center Statistics as of September, 1968.* [cited hereinafter as *Treatment Center statistics as of* ———.]

only the following behavior." The more natural interpretation, it would seem, is to read it as meaning "including, but not limited to, the following behavior."

Furthermore, the comma following "violence" must be ignored to accept the *Peterson* view. Otherwise the section must be read to require (1) repetitive or compulsive behavior and (2) violence against any victim *or* aggression by an adult against a child. The latter interpretation, moreover, ought to prevail if the enumeration of crimes in sections 3 and 4[66] are to make sense. Surely the legislature would not have included both rape and rape of a female child under sixteen, for instance, if the statute were directed solely to pedophiles.

B. Commitment

There are two avenues of involuntary commitment under Chapter 123A. The first focuses upon the defendant after he has been found guilty of one of the sexual crimes enumerated in sections 4 and 5, but prior to sentencing. This will be referred to as commitment from court because the proceedings are initiated while the individual is still before the Bench.

The other method of involuntary commitment was created to meet the threat of another Ohlsen.[67] This provides for the commitment of men who are already serving sentences for *any* crime and are incarcerated in any one of a number of government facilities. This procedure, therefore, will be referred to as commitment from prison.

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66 Section 3 requires that a defendant who is charged in District Court with the following offenses and who appears to be guilty and a sexually dangerous person be bound over for trial in Superior Court:

> indecent assault or indecent assault and battery, indecent assault and battery on a child under the age of 14, open and gross lewdness and lascivious behavior, unnatural and lascivious acts with another person or with a child under the age of 16, lewd, wanton and lascivious behavior or indecent exposure, or an attempt to commit any such crime. . . .

MASS. GEN. LAWS ch. 123A, § 3 (Supp. 1969). The following are listed in § 4:

> indecent assault and battery on a child under the age of fourteen, rape, rape of a female child under sixteen, carnal knowledge and abuse of a female child under sixteen, assault with intent to commit rape, open and gross lewdness and lascivious behavior, incest, sodomy, buggery, unnatural and lascivious acts with another person or with a child under the age of sixteen, lewd, wanton and lascivious behavior or indecent exposure, or an attempt to commit any such crime. . . .

Id. § 4.

67 See text accompanying note 24, *supra*.

1. Commitment from Court

The statutory guidelines for this type of commitment are set by sections 4 and 5.[68] According to section 4, the defendant must first be found guilty of one of the sexual crimes enumerated therein. Then, prior to sentencing, upon its own motion or upon that of the district attorney, the court may commit the defendant to the Treatment Center for a 60-day examination and diagnosis period.

What transpires during this time has been set out in some detail by the Center's staff and applies also to the examination and diagnosis performed under the provisions for commitment from prison (section 6).[69] The diagnostic procedure is said to go ". . . far beyond the usual routine psychiatric assessment."[70] The staff attempts to gather and assess

> . . . every possible relevant fact. A dependable description of the assaultive act, in and of itself, may be sufficient to make the diagnosis. On the other hand [the staff] may require multiple clinical examinations, tests and other data. In every case a complete medical and neurologic examination is done. Projective psychologic and other tests are administered in most cases, but none are done routinely. In many cases a field investigation is made in which a female social worker interviews the victims themselves. . . . In many cases these investigations elicited information of profound clinical significance that had not been brought out by the police or in court.[71]

Before final diagnosis is made a minimum of three staff conferences are held on each case, and in difficult problems more are held. In fact the staff has conducted as many as seven conferences on one case.[72]

In addition to the staff's efforts, the statute requires that two psychiatrists supervise the 60-day examination and diagnosis procedure. Such a fiat must at present be honored more in the breach than in the observance because the total number of psychiatrists available

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68 MASS. GEN. LAWS ch. 123A, §§ 4, 5 (Supp. 1969).
69 Kozol *et al.*, *The Criminally Dangerous Sex Offender*, *supra* note 56.
70 *Id.* at 81.
71 *Id.*
72 *Id.* The amount of time required by a typical staff conference is at least one half hour each case. This is an impressive investment of time when one considered that 6 to 10 professionals attend each of these and that each conference represents many hours of preparation.

on a consultant basis[73] is quite limited, and the prospects for obtaining more are rather dim. The reasons for this are manifold. Elsewhere, in an article intended for the psychiatric profession, one of the authors set out the central issue: "The uncertainties of predicting human behavior are too great; our science is too short; our art is not long enough."[74] In addition, the long drive to and from the Treatment Center squanders precious time.[75] The fee paid by the state only recently began to approach adequacy.[76] Often hours are wasted in court waiting to be called; and taking the stand means being subjected to challenging, usually vigorous, and sometimes humiliating, cross-examination.

It is in this context that one should consider *Commonwealth v. Butler*.[77] In that case appellant asserted that the failure of both examining psychiatrists to have supervised the examination and diagnosis period voided the subsequent commitment. Justice Whittemore, speaking for the court, disagreed and outlined the statutory standard.

> Each of the two psychiatrists went to the center several times a week and laid out a 'program for the subject which they then recommend[ed] to . . . [the director of psychiatry at the center] or suggest[ed] at staff conferences.' 'They were free to supervise in terms of requesting that psychological tests be done.' One of the psychiatrists testified that he had considered the defendant's record and the opinions of the staff and had interviewed the defendant once. The other psychiatrist testified that he had interviewed the defendant on three occasions, had examined his record, and had considered the opinions of the staff.[78]

Even the testimony of one of the psychiatrists that " 'he did not supervise the examination and diagnosis period of sixty days . . .' " was not enough for a reversal.[79] One must confess, however, an un-

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73 The only full time staff psychiatrist at present is the Director, Dr. Kozol. The Center also draws upon four consultant psychiatrists.

74 McGarry, *supra* note 43, at 24.

75 From Boston it is about one hour each way.

76 Prior to January 1, 1969 a psychiatrist received $25 per 3 hour session at the Treatment Center. This was increased to $40 per 3 hour session at that time. The individual counties pay for their court appearances, usually at the rate of $100 per case.

77 346 Mass. 147, N.E.2d (1963). Although the appellant was committed under the provisions of § 6 (discussed at text accompanying note 89 *infra*.), the examination and diagnosis methods are precisely the same as those performed under §§ 4 and 5.

78 346 Mass. at 149. (Brackets in the original)

79 *Id.*

certainty as to the meaning of this statement. Apparently the court was perplexed also. Nevertheless, willing to conjecture, it was said that

> [i]f this means that in the particular case the [witness] did not lay out a program, it does not follow that the examination and diagnosis were not under his supervision to the full extent necessary to enable him to make the report which the statute contemplates.[80]

The staff completes its own extensive examination and diagnosis for each man sent for observation, and the court has interpreted the statute as requiring the psychiatrist to maintain only minimal contact with the patient. It follows that the recommendations which the psychiatrists file with the court are usually those of the Treatment Center's staff.

Section 5 provides that if this report "clearly indicates" that the defendant is a sexually dangerous person, the court must notify him that a hearing will be held to determine the issue. Provision is also made for appointment of counsel,[81] and compulsory process to compel the attendance of defendant's witnesses. Any evidence that tends to indicate that the defendant is a sexually dangerous person may be admitted.[82] This includes past criminal and psychiatric records, pro-

80 *Id.* at 149-150.

81 In fact the statute on its face does not require the appointment of counsel in every case. It merely says that "upon the motion of such person or upon its own motion, the court shall, if necessary to protect the rights of such person, appoint counsel for him. . . ." The validity of the qualifying clause is highly questionable in light of *In Re Gault*, 387 U.S. 1 (1967). This basic question is probably moot at this time since neither author is aware of any instance in which counsel has not been appointed at a significant stage in the proceedings where the defendant did not have one of his own. Nevertheless the court had opportunity in the *Peterson* case, *supra* note 61 to determine the issue but refused to do so. Peterson had sought a writ of habeas corpus in federal district court. The judge declined jurisdiction because of the petitioner's failure to exhaust state remedies. In his Memorandum and Orders remanding the case, the judge stated that two recent Supreme Court Decisions—*Specht v. Patterson*, 386 U.S. 605 (1967) and *In Re Gault* 387 U.S. 1 (1967)—cast serious doubt on whether or not due process requirements were met by Peterson's commitment. While the court dealt rather fully with *Specht*, it did not say one word (beyond the introduction) about *Gault*.

82 The scope of admissable evidence was discussed in *Commonwealth v. McGruder*, 348 Mass. 712, 205 N.E.2d 726 (1965), cert. den., 383 U.S. 972, reh. den. 384 U.S. 947. Both examining psychiatrists had based their opinions, at least in part, upon hearsay evidence.

> [One psychiatrist] testified on direct examination that the defendant was a sexually dangerous person within the definition of ch. 123A. When asked to give the basis for his opinion, he testified to a series of incidents in which the defendant was involved. It appeared that these incidents were based on a study of the records

bation reports, and any other report filed under chapter 123A.[83] Finally, the proceeding must be summarized in writing and the general public may, at the court's discretion, be excluded.

Upon a determination by the court of whether or not the defendant is a sexually dangerous person, section 5 provides the court with several alternatives. These are illustrated in Figure 1.

The last sentence in section 5[87] relates back to the dual system of authority which controls the Treatment Center's operations as established by section 2.[88]

2. Commitment from Prison

In addition to the procedure outlined above providing for commitment from court prior to sentencing, those already "under sentence in any jail, house of correction or prison, or in the custody of the youth service board"[89] can be involuntarily committed to the

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> at the Massachusetts Correctional Institution at Concord [a medium security prison] which were made available to the staff at the Treatment Center. . . . On cross-examination [he] testified that the only person interviewed by him was the defendant; that all other information was obtained from records, and that he "based his opinion upon information contained in these records."
>
> . . . [T]he other psychiatrist who had also examined the defendant at the Treatment Center, testified on direct examination that the defendant was a sexually dangerous person. He based his opinion on information (obtained from the records) that the defendant "had been convicted on two occasions of sexual crimes involving violence in connection with young girls."

348 Mass. at 713-714.

The court held such testimony to be within the evidenciary scope of § 5.

> The examining psychiatrists are to have access to a wide range of information in making their diagnoses. This would include court records, probation records, histories of prior offenses and of prior psychiatric examinations. § 4. It is also clear that the opinions of the examining psychiatrist based on such information [are] to be competent. § 5. These provisions are a very radical departure from the rules of evidence which ordinarily govern.

348 Mass. at 715. (Citations omitted.)

83 It would seem that this last authorization conflicts with the § 8 (voluntary admission) provision that "all information pertaining to this application shall be confidential, and may not be used in any criminal proceeding or proceeding under this chapter against such person."

87. Persons committed shall be subject to all laws, rules and regulations which govern inmates of the institution to which they have been committed, insofar as may be compatible with the treatment provided for by this chapter, and they shall be entitled to such rights and privileges of such inmates insofar as may be compatible with such treatment.

88 MASS. GEN. LAWS ch. 123A, § 2 (Supp. 1969). *See* text accompanying note 165, *infra*.

89 MASS. GEN. LAWS ch. 123A, § 6 (Supp. 1969).

Treatment Center. This is the so-called "section 6 commitment" or "commitment from prison."

The process begins when the prisoner "appears" to the head of the institution[90] where he is incarcerated or to the district attorney for the district in which he was originally sentenced to be a sexually dangerous person. All the procedural requirements called for by section 6 need not be completed while the individual remains a prisoner under sentence. If the proceedings are properly *commenced* while he is a prisoner, "the fact that he [is] not a prisoner when he [is] finally found to be sexually dangerous does not invalidate the commitment."[91]

It is not required that the prisoner be serving a sentence for an offense of a sexual nature. It is not necessary that he have a record of conviction for sexual offenses, nor must there be evidence of any sexual misbehavior while in prison. No such stipulations can be

90 The breadth of this concept is exemplified by *Commonwealth v. Fitzgerald*, 350 Mass. 98, 213 N.E.2d 398 (1966). In that case the defendant had been "confined at the State farm under a sentence for drunkenness" when the proceedings were begun.

91 LaMorre v. Superintendent of Bridgewater State Hospital, 347 Mass. 534, 537, 199 N.E.2d 204, (1964). The court thought that to hold otherwise would tend to encourage hasty examinations and diagnoses. Then, too, it was said that such an interpretation furthered the purposes of the statute ". . . which are to ascertain who are sexually dangerous persons for the protection of society, and to cure and rehabilitate them as soon as possible." *Id.* at 538. During the pendency of § 6 proceedings, the defendant may be retained in custody even if he has completed his sentence. Commonwealth v. Fitzgerald, *supra* note 90, at 100. (Proceedings begun on October 30, 1961; sentence ended November 19, 1961; held until committed on March 8, 1962.)

84 MASS. GEN. LAWS ch. 123A, § 5 (Supp. 1969). The authors are aware of only two cases in which either of these (probation) has been exercised.

85 *Supra* note 51.

86 *Id.* at 542. The same conclusion had been reached by the attorney general four years prior to *Dagle*. At that time the Commissioner of Correction had asked the attorney general for an opinion on the following question:

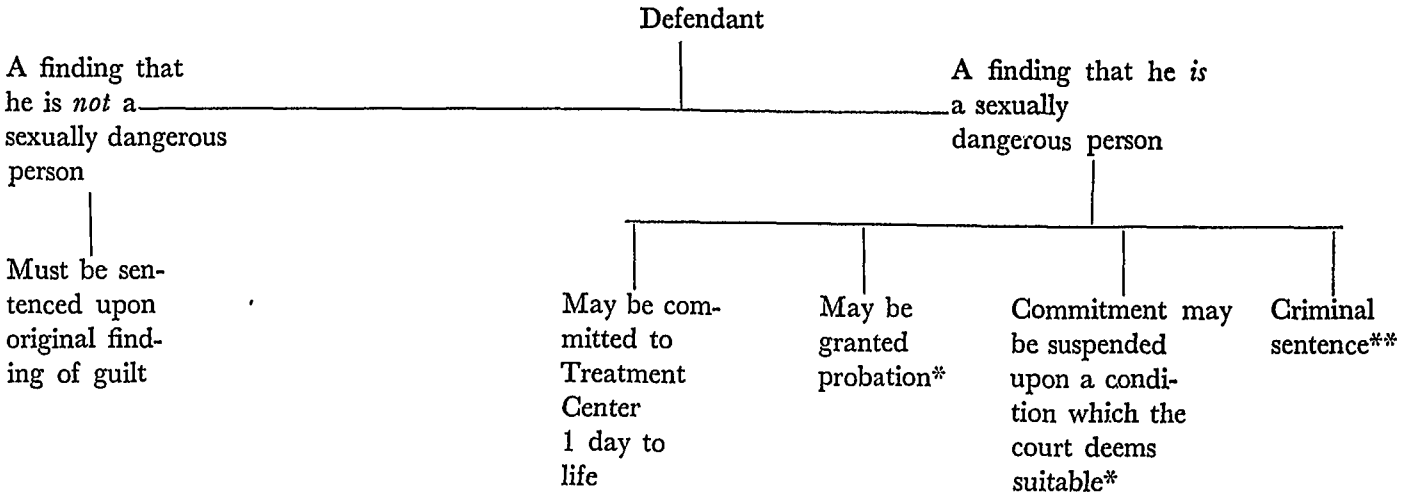
> Should the notice to the Commissioner of Correction of the court's *finding* that the person referred to is a 'sexually dangerous person' be regarded as an 'order' from the court which requires the Commissioner to *transfer* the person to a Treatment Center or branch for the purpose of treatment and rehabilitation?

Answering in the negative, the attorney general went on to state that

> "[s]ince said G.L. c. 123A, § 5, says the court 'may in lieu of the sentence required by law for the original offense, commit such person . . .', such commitment is discretionary with the court. Therefore, it had the authority to sentence him as a criminal rather than commit him."

Mass. Atty. Gen. Op. 12 PUBLIC DOCUMENTS 107 (April 21, 1959). On its face the statute is ambiguous, yet a strong argument can be made for this position in terms of preserving all possible options for the Superior Court judge.

FIGURE 1: JUDICIAL ALTERNATIVES UNDER SECTION 5



*These two alternatives are open only ". . . if the department of mental health recommends such person as a suitable object for such out-patient treatment."[84]

**The question of whether or not the Superior Court may sentence the defendant upon the original finding of guilt after it has been found that he is a sexually dangerous person seems to have been resolved by the Supreme Judicial Court.

In *Commonwealth v. Dagle*,[85] the court commented during a discussion of a challenge to section 6 that

> the defendant had no constitutional right not to be punished for sexual offenses or to be put immediately under treatment upon conviction therefor. The statute (§5) permits but does not require a commitment if the convicted person is found sexually dangerous.[86]

found in section 6 and the court has expressly refused to accept them as being implied.[92]

This aspect of the statute has recently been challenged in two important cases. In the first, *Peterson, Petitioner*,[93] it was contended that in the light of *Baxstrom v. Harold*,[94] section 6 had deprived the defendant of equal protection of the law. The argument was that since there is no provision " 'whereby individuals who may be admittedly "sexually dangerous" but who are not currently under sentence are [not] subject to the statute,' " it cannot be allowed to reach those who are under sentence.[95]

The court, however, held that section 6 of chapter 123A was "part of a comprehensive scheme dealing with sexually dangerous persons whose conduct has brought them under the observation of the Commonwealth."[96] Thus the equal protection clause, which disapproves only irrational and arbitrary classifications,[97] could not be invoked in this instance.[98]

This issue was again met in *Commonwealth v. Major*.[99] There it was argued that for classification purposes those in custody as prisoners are part of the general public and cannot reasonably be dealt with separately. The court, paralleling its result in *Peterson*, elaborated upon its "observation of the Commonwealth" concept.

> Prisoners are necessarily under recurrent and close observation by wardens, guards, and rehabilitation personnel. There is thus opportunity to discover sexually deviate[100] behavior or tendencies. The likelihood that in the course of

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92 Commonwealth v. Peterson, *supra* note 48. It was argued that this was necessary to accord the defendant due process of law. The court in disagreeing outlined the elaborate procedure set forth in § 6 and concluded that a commitment under that section ". . . cannot be the result of hasty or arbitrary action, and that the rights of a prisoner are carefully protected." *Id.* at 704.

93 *Supra* note 61.

94 383 U.S. 107 (1966).

95 Peterson, Petitioner, *supra* note 61, at 522.

96 *Id.* at 523.

97 McGowan v. Maryland, 366 U.S. 420, 426 (1960) (cited by the court).

98 The court also stated that given *Minn. ex rel. Pearson v. Probate Court*, *supra* note 13, "the classification of persons 'sexually dangerous' was not arbitrary." Mass. Adv. Sh. (1968) at 522.

99 Mass. Adv. Sh. (1968) 1173.

100 Twice in the opinion the concept of "sexual deviation" seems to be used synonymously with "sexual dangerousness." Such interpretation has never before appeared in the Massachusetts cases pertaining to ch. 123A. This may be a precursor of the court's willingness to expand the net of ch. 123A so as to include such behavior as acts of homosexuality between consenting adults.

> incarceration an afflicted prisoner will disclose such traits is substantial.[101]

Therefore, the court held that the Legislature cannot be required to extend chapter 123A "to members of the general public who have neither committed sex-related offenses nor been subjected to the intense custodial scrutiny given to prisoners."[102] Mental patients in State hospitals, it was said, are adequately covered by Massachusetts General Law chapter 123.[103]

As for the fact that section 6 gives similar authority to the district attorney, the court explained in a footnote that such provision

> . . . implies either that he has had the circumstances of a particular prisoner referred to him for evaluation by the custodial officer, or that he has learned of such circumstances from the official records of earlier observations by others who have had custody of the prisoner in connection with past offenses.[104]

Needless to say, carried to its logical extreme such a line of reasoning could support the bestowing of such authority upon a clerk of courts. But the point here is not who *might* have been given power but rather who was *in fact*. On its face, then, the court's rationale seems to make a great deal of sense.

On the other hand, within the context of the statute's operation, one may see the inclusion of the district attorney as another device for adding to the population at the Treatment Center. This occurs when, for example, the original sentencing judge decides (under sections 4 and 5) either that the defendant is not a sexually dangerous person, or that if he is, all interests will be served better if he goes to prison. The result is that the district attorney need only wait until the defendant enters a Correctional Institution, shop for a more symphathetic forum and seek a section 6 commitment. The issue to be decided, therefore, is whether or not it is wise to permit a district attorney to substitute his judgment for that of a Superior Court judge, and to subject the individual to the trauma of another accusation, examina-

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101 Mass. Adv. Sh. (1968) at 1173-1174. The court did not deal with the issue of what would happen if the Commonwealth observed, saw nothing, and pursued commitment anyway.

102 *Id.* at 1175.

103 With respect to Mass. Gen. Laws ch. 123, the court cites §§ 2, 5, 68, 88A, 89 and 118A as exemplifying the restraints and safeguards provided for the mentally ill.

104 Mass. Adv. sh. (1968) at 1174.

tion, hearing and disposition.[105] The Supreme Judicial Court has decided that such multiple hearings do not involve any aspect of double jeopardy, primarily because the proceedings are not held to be penal.[106]

The next required step in the section 6 commitment process is for a psychiatrist to examine the prisoner and file a written report of his findings. If the report indicates that he may be a sexually dangerous person, it must be transmitted together with a motion for a sixty day examination and diagnosis commitment to the clerk of courts for the county wherein the person was sentenced. If the court grants the motion,[107] the prisoner must be committed for examination and diagnosis under the supervision of two psychiatrists.[108]

If the psychiatrists' reports indicate[109] that the person is not a sexually dangerous person, he must be reconveyed to the Correctional Institution under the terms of his original sentence. If, on the other hand, the report clearly indicates that he is a sexually dangerous person, a petition for commitment must be filed. A hearing is then held in accordance with the provisions of section 5.[110]

Upon a negative determination of the issue, the judge has no discretion. If found not to be a sexually dangerous person, the prisoner must be reconveyed to the institution where he was serving his sentence. If, however, he is found to be a sexually dangerous person, the court must dispose of the matter in accordance with one of the following alternatives: (1) commitment to a treatment center for an indeterminate period; (2) commitment to a mental institution; (3) placement on outpatient treatment; (4) disposition consistent

105 One way to mitigate this problem would be to make it mandatory for the original sentencing judge to preside at the § 6 commitment hearing.

106 Commonwealth v. Dagle, *supra* note 51. The court left open the question of what effect a prior finding that the prisoner was not a sexually dangerous person would have upon a subsequent adjudication, absent "some new basis for a different conclusion."

The authors are of the opinion that while new acting out should not be required (especially in the case of pedophiles), some new clinical data ought to be necessary.

107 The authors are not aware of any case in which such motion has been denied.

108 MASS. GEN. LAWS ch. 123A, §§ 6 and 4 (Supp. 1969). The discussion accompanying note 71, *supra*, applies here as well.

109 According to the statute this report must only "indicate" that the person is not an S.D.P.; if a petition for commitment is to be filed, on the other hand, the report must "clearly indicate" that the person is sexually dangerous.

110 See text accompanying note 81 and following, *supra*. The court has interpreted this reference in § 6 as requiring the rights of counsel and compulsory process contained in § 5. Peterson, Petitioner, *supra* note 61, at 520.

The statute abounds in open-ended cross-references, most of which have not been judicially interpreted. Thus the system depends in great measure upon interpretation made by the administrators of the program

with the purpose of treatment and rehabilitation.[111] If the person is committed to the Treatment Center, his criminal sentence will run concurrently with his commitment.[112]

The intricate and complicated procedure called for by section 6 is presented diagramatically in Figure 2.

3. Voluntary Commitment

Along with the two modes discussed above, there is another method of entrance as a patient into the Treatment Center, voluntary commitment.[113] The procedure is simple — one merely fills in an admission form provided by the Treatment Center.[114] The statute provides: "all information pertaining to this application shall be confidential, and may not be used in any criminal proceedings or proceeding under this chapter against such a person."[115] To date, seventeen persons have made use of this procedure, although at present there are no voluntary patients in residence at the Treatment Center.[116]

The philosophy of the Treatment Center is such that the voluntary patients are treated in the same manner as the court-committed ones. The former, however, are permitted to terminate their stay in the Center three days after presenting notice to the Director.[117]

C. Release

All persons involuntarily committed to the Center must be released, if at all,[118] according to the provisions of section 9.[119] Basically two

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111 A nice question remains as to whether or not the court has the power to commit such a person to a prison if this course were recommended by the Department of Mental Health and found by the judge to be necessary for treatment and rehabilitation.

112 Mass. Atty. Gen. Op., 12 PUBLIC DOCUMENTS 118, 119 (May 14, 1959).

113 MASS. GEN. LAWS ch. 123A, § 8 (Supp. 1969).

114 It is in letter form addressed to the director of the Treatment Center requesting admission, stating one's promise to abide by the rules of the institution, and agreeing to the 3-day waiting period before being released.

115 MASS. GEN. LAWS ch. 123A, § 8. On its face, the penultimate sentence of § 5, paragraph 2 which states that "[a]ny psychiatric report filed under this chapter shall be admissible in evidence in [a commitment hearing under this section]" seems to conflict with the quoted portion of § 8.

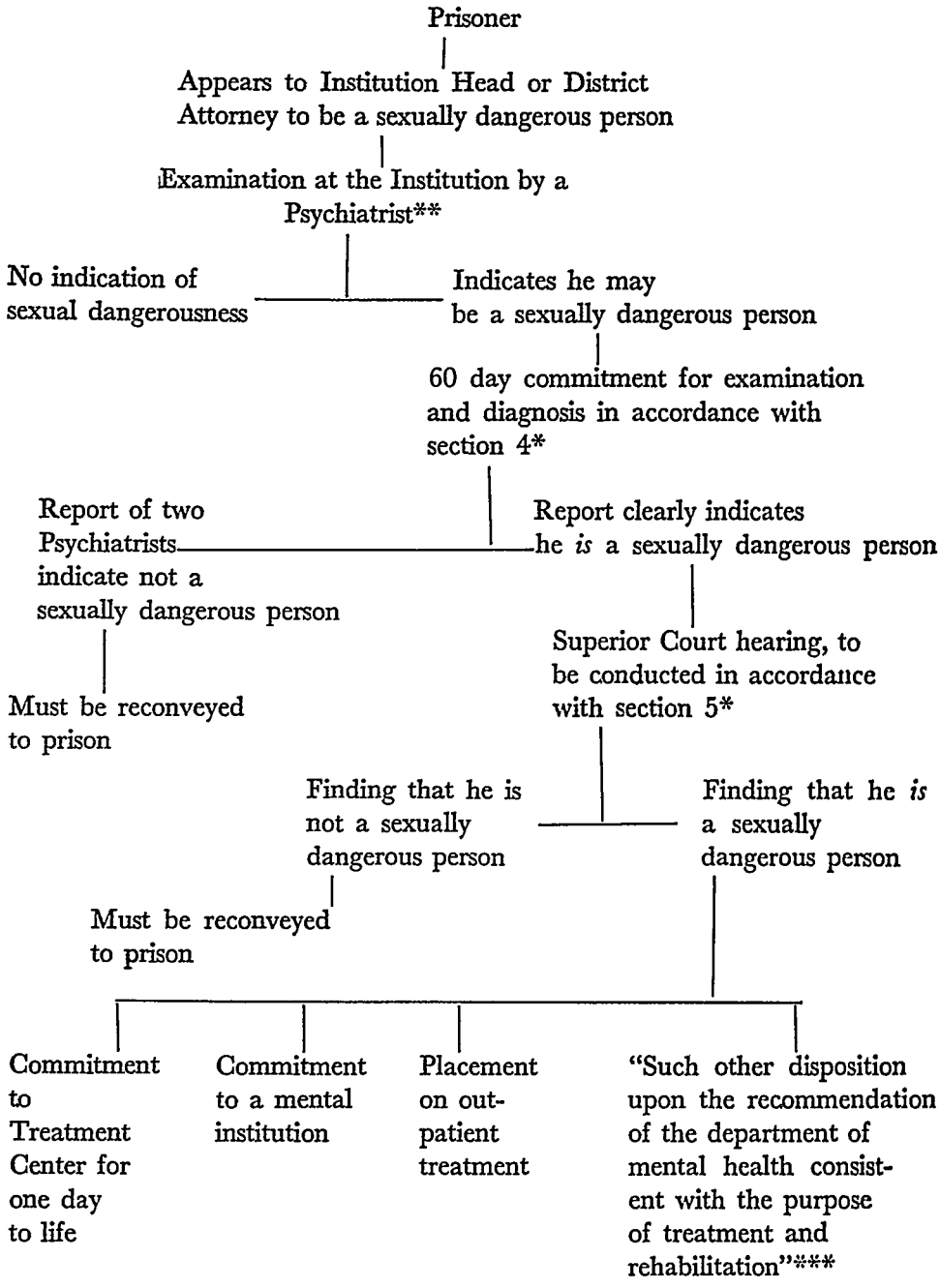
116 *Treatment Center Statistics as of Feb. 21, 1969, supra* note *65.*

117 It should be noted that the statute itself is silent on the matter of releasing voluntary patients.

118 It will be remembered that all involuntary commitments are for a period of one day to life.

119 MASS. GEN. LAWS ch. 123A, § 9 (Supp. 1969).

FIGURE 2: STATUTORY PROCEDURE UNDER SECTION 6



agencies of release partake of this process: the Parole Board and the Superior Court.

1. The Parole Board

The first paragraph of section 9 deals exclusively with the Parole Board. It provides for mandatory consideration by the Board at least once during the first year following commitment and once every three year period thereafter. The only condition precedent is that the person be "otherwise eligible for parole."[120] This provision, added in 1960, differentiates between commitments under section 5[121] and section 6 commitments.[122] Thus a person thought to be a good candidate for outpatient treatment or return to the community by the Center's staff could not be released by the Board until he became eligible for parole under the criminal law.[123]

It seems reasonable that such an obstacle would both inhibit rapid rehabilitation and waste the scarce resources of the Center. It is also an arguable denial of equal protection according to *Baxstrom v. Harold*.[124] In that case Johnnie K. Baxstrom was civilly committed at the expiration of his penal sentence without a jury review which was available to all other persons civilly committed in New York.[125] Citing *Walters v. St. Louis*,[126] and *Goesaert v. Cleary*,[127] Baxstrom's

120 *Id.*

121 Those coming directly from court after a guilty finding for one of the crimes enumerated in § 4. Such persons are committed "in lieu of the sentence required by law for the original offense."

122 Those coming from "any jail, house of correction or prison, or . . . the youth service board."

123 The question remains as to what effect, if any, the Superior Court's releasing power is limited by this proviso. In terms, it could be argued, the provision applies only to parole and not to conditional release. This in itself should be sufficient to limit its applicability. If this were not the case, moreover, the unqualified right to a yearly judicial hearing provided in the second paragraph would be in conflict.

124 383 U.S. 107 (1966).

125 The statute under which this was accomplished was N.Y. CORRECTION LAW § 384 (McKinney 1968).

126 347 U.S. 231, 237, (1954).

127 335 U.S. 464, 466, (1948).

*It is not at all clear which parts of these sections apply to section 6 proceedings and which do not.

**There is no requirement that 3 different psychiatrists examine the individual. In *Commonwealth v. Dagle, supra,* note 51, the court said:

> [t]he statute plainly does not expressly require that three different physicians have a part nor that a physician be disqualified because of his preliminary examination. There is no implication of such a requirement in the statutory purpose.

345 Mass. at 541.

***MASS. GEN. LAWS ch. 123A, § 6 (Supp. 1969).

counsel argued that the authorizing statute violated the equal protection clause of the Fourteenth Amendment in that it arbitrarily singled out one group of mentally ill persons and denied them the jury trial to which all other civilly committed patients were entitled.[128] Chief Justice Warren agreed, holding that since the State made jury review generally available on the issue of sanity, it could not arbitrarily withhold it from some.[129]

It can be seen that the section 9 situation is somewhat analogous. On the other hand, it should be pointed out that individuals committed under section 6 are persons of dual status: prisoners under sentence *and* civilly committed patients. This rather bizarre condition exists because it has been held that a section 6 commitment does not vacate the criminal sentence the prisoner was serving.[130] At any rate, it could be maintained that these two types of patients do not stand on the same ground before the Bench and thus to treat them differently is the State's prerogative.

Returning to section 9, one notes that the Parole Board is empowered to grant parole "upon such terms and conditions as it shall prescribe."[131] As for the "granting", the Board until recently almost always followed the judgment of the Treatment Center staff. Since August, 1965, however, of the 21 patients recommended for parole only six were released.[132]

When parole is granted the Board usually imposes the condition of outpatient care and treatment. At present six of the twelve patients being seen in the Treatment Center's After-Care Clinics[133] are on parole. The sexually dangerous person label does not come off once parole begins. In fact, since the commitment was indeterminate, the parole period could extend for life. Of course, the Board is at liberty to prescribe no conditions at all as parole terms.[134]

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128 Briefs and Appearances of Counsel, 15 L. ed.2d 1074.

129 *Supra* note 124, at 111.

130 The attorney general so concluded on the grounds that § 6 "does not provide that a commitment order is to be served in lieu of the original sentence," as does § 5. It was further held that "a commitment order [under § 6] would not toll the running of a sentence since his commitment is involuntary on his part." Mass. Atty. Gen. Op., 12 PUBLIC DOCUMENTS 118, 119 (May 14, 1959). (Brackets supplied.)

131 MASS. GEN. LAW: ch. 123A, § 9 (Supp. 1969).

132 *Treatment Center Statistics as of Feb. 21, 1969, supra* note 65.

133 One is located in dowtown Boston and the other at the Treatment Center in Bridgewater.

134 Any terms ". . . may be revised, altered, amended or revoked by the parole board at any time. . . ." MASS. GEN. LAWS ch. 123A, § 9 (Supp. 1969).

2. Superior Court

The second paragraph of Section 9 begins "[n]otwithstanding any provisions of this section . . ." and continues to set the functions and powers of the Superior Court in the releasing process. Every twelve months the patient is entitled to have a hearing upon the filing of a written petition. Many procedural and substantive requirements for the hearing are set out in this section. The issue is then confused by the following broad cross-reference: "The hearing shall be conducted in the same manner as is provided for in sections five and six."[135] In addition to the conflicts with its parent section, this broad command is further confused by the fact that section 6 provdes "[t]he hearing shall be conducted in the manner described in section five."[136] Furthermore, the section 5 hearing requirements do not contemplate an alternative release procedure. Thus the section refers back to mandatory reports filed under section 4 which, if required under section 9, would make the procedure completely unworkable.[137]

There are, however, at least three additional benefits to the patients provided by this subsection. First, the court can remove the sexually dangerous person label completely and terminate the commitment. Second, there is no provision in this part which differentiates between section 6 and section 5 patients.[138] Third, the petitioner is probably entitled to all the rights provided for in the second paragraph of section 5 (i.e. right to counsel and compulsory process for his witnesses).[139]

Finally, the inmates have enjoyed a benefit that may not have been contemplated when section 9 was drawn. Recently the Parole Board has been rejecting the advice of the Treatment Center staff and per-

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135 *Id.*

136 *Id.*, § 6, para. 4.

137 An example of this dilemma can be seen in the § 4 requirement that two psychiatrists examine prospective committees and file their reports with the court. While the 2nd paragraph of § 9 does not mention § 4, it does state that "the hearing shall be conducted in the same manner as is provided for in sections five and six." These latter sections then incorporate § 4 by reference. The question that arises here is whether the Department of Mental Health, itself facing a critical shortage of psychiatrists, is to be required by § 9 to provide two psychiatric examinations (and two psychiatrists who are willing to enter the courtroom) for each man every year.

It might be countered that even though this is a potential difficulty, it probably would never arise. In fact, it did come up when last year 75 patients filed for judicial release under § 9.

138 See *supra* note 123.

139 Peterson, Petitioner, *supra* note 61.

mitting no paroles.[140] The Courts, on the other hand, have tended to accept the staff's opinions. Therefore, where the staff has recommended release and the Parole Board refused parole, the Courts have quite often ruled in favor of "conditional release".[141] But the courts do not always accept the judgment of the Treatment Center staff or the psychiatrists. In one recent case a man was conditionally released against the advice of the staff and the psychiatrists. On another occasion where the staff had recommended conditional release, the Court issued an order for absolute discharge.

It cannot be too strongly emphasized that absolute releases should be ordered only in the rarest of circumstances. Two reasons support such a position. First, no one knows for sure how the man will respond to the freedom, the challenges, and the threats of open society. Second, under the terms of an absolute release the man cannot be returned to the Treatment Center if he begins to exhibit signs of "dangerousness".[142] While section 9 makes this a matter of judicial discretion, it would seem reasonable for the court in almost all in-

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140 The last parole granted was in March, 1968. Recent conservatism of the Board may be attributed to an accusation of murder lodged against one of the parolees from the Center.

141 § 9 provides:

> . . . Upon a finding by the court that such person is no longer a sexually dangerous person, it shall order such person to be discharged, or conditionally released from the center. He shall be released subject to such conditions, if any, as the court may impose, including any treatment or reporting to any clinic or outpatient department for physical or mental examination, and he shall be subject to being placed under the jurisidiction of a probation officer, or such other agency or authority as is deemed necessary. Any person released conditionally shall be subject to the jurisdiction of said court until discharged and such terms and conditions of release may be revised, altered, amended, revoked by the court at any time, and such discharge shall not result until after due notice to the treatment center and the district attorney in the county where the commitment first originated from and the district attorney in the county where the person resides, or will reside, at the time of the hearing and discharge.

MASS. GEN. LAWS ch. 123A, § 9 (Supp. 1969).

Of the last 6 inmates who were recommended to the Parole Board by the staff for release and turned down, 1 was granted conditional release by the Superior Court, 2 are awaiting judicial hearings, and the other 3 have not yet filed § 9 petitions.

142 One patient who was granted an absolute release from status as a "sexually dangerous person" by the court later telephoned a Correctional officer at the Treatment Center and indicated extreme mental deterioration. Having no legal authority to re-commit him, the Treatment Center could not have taken him into custody. Shortly thereafter he allegedly killed a young child.

stances to try a man on conditional release for a period before ordering absolute discharge.

IV. The Treatment Center and How It Functions

On October 13, 1967, Governor John A. Volpe presented to the General Court a report on the Massachusetts Correctional Institution at Bridgewater which had been prepared by a special advisory committee.[143] The study and report had been prompted by a series of sensational events [144] at the Bridgewater State Hospital.[145] The title of the report, reproduced as Appendix A to House No. 5271, was "The Management of the Mentally Disordered Offender and Potential Offender: A Long Range Plan for Massachusetts."[146]

The advisory committee did not limit its study to the State Hospital, but also reviewed the programs in the Defective Delinquent Center and the Treatment Center. Their report reflected growing concern about the more recent history of the Treatment Center and its activities. It was noted, for example, that in the three years since June 30, 1964 the population of the Center had increased by more than 50%.[147]

Since the date of the report the picture has not greatly changed. While commitments have slowed down,[148] releases have been difficult,

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143 The chairman of the committee was Anthony P. DeFalco, Commissioner of Administration. The other members were Milton Greenblatt, M.D., Commissioner of Mental Health; James Dykens, M.D., First Assistant Commissioner of Mental Health; John Gavin, Commissioner of Correction; William Chasen, M.D., Massachusetts Medical Association; William J. Curran, Professor of Legal Medicine, Harvard Medical School; Franklin Flaschner, Special Assistant Attorney General; Paul Tamburello, President, Massachusetts Bar Association. A. Louis McGarry, M.D., served as the Committee's advisor.

144 These included the escape of Albert DeSalvo, the alleged "Boston Strangler," and the hemmorhagic death of a newly admitted patient to the State Hospital. The release of the controversial film, "Titicut Follies," shortly after the report was issued further heightened public interest in the Bridgewater institution.

145 It will be recalled that the State Hospital is one of the four institutions which comprise the Massachusetts Correctional Institution at Bridgewater. The other three are the Prison Department for Chronic Alcoholics and Drug Addicts, the Defective Delinquent Center, and the Treatment Center for Sexually Dangerous Persons. The Youth Service Board maintains a maximum security unit for delinquent juveniles adjacent to the Correctional Institution, but it is wholly separate in function and administration.

146 Part III of this document dealt exclusively with the problems of the Treatment Center.

147 From 90 to 142. Commitments numbered 68 and discharges 25 during that same three year period.

148 There were only two from September, 1968 to February, 1969.

especially in the form of paroles. Of twenty-one men who were recommended for parole by the Treatment Center staff since August 1965, only six paroles were granted. The last of these was on March 13, 1968.[149] With the slowing, indeed the stopping of paroles during 1968, 75 men have petitioned for court hearings under the provisions of section 9.[150] Under this procedure more releases are now taking place.[151]

The physical plant of the Treatment Center[152] is austere and dates from the 19th century; the walls are thick stone, giving the external effect of a prison. A military-like cleanliness is maintained and indeed the grey uniforms of the patients and the khaki and green uniforms of the correctional officers sustain the military impression.

Within the limitations of the small cells, however, a high degree of individuality is permitted in the personal effects and decoration of the single occupancy rooms. About one-third of the men have their own television sets and almost everyone has his own radio. There are no toilets in the cells, a covered pot must suffice.

There are two outdoor yards, one is concrete and the other an enlarged grass area. There is a large recreation hall and three soundproof rooms. Television sets, one devoted to general subjects and one to sports, are provided in two of these soundproof rooms. The third room is devoted to recorded music. In addition there is a well stocked library. As for security, except when the men are locked in their rooms at approximately 10:30 p.m. each night, they are always in the presence of uniformed Correctional officers.[153] Lights out is controlled by each individual, the only requirement being his appearance at work on time the next morning. Security in general is representative of medium security[154] in the institutions of the Department of Correction elsewhere in the State.[155]

149 See note 141 *supra.*

150 This is the total number of § 9 petitions filed during 1968. As of February 24, 1969, seven more had been filed.

151 Since September, 1968, six men, all of whom were recommended by the Treatment Center staff, have been released by the courts. Five of these received conditional releases and one was absolute. Also see note 141, *supra.*

152 MASS. GEN. LAWS ch. 123A, § 2 (Supp. 1969) requires that the Treatment Center be established "at a correctional institution approved by the commissioner of correction."

153 These are employed by and responsible to the Department of Correction. *Id.*

154 There have been two instances of escapes from the Center. In the first case the two men were returned within 2 hours. In the second, two men were out for 3 days. There have been no escapes since the Treatment Center moved to its present quarters in 1963.

155 For an earlier view of the Treatment Center before its move to present quarters see Tenney, *supra* note 11, at 20-21.

Treatment modalities utilized at the Treatment Center may be categorized as providing both individual and group psychotherapy,[156] work, the development of vocational skills, and academic and recreation programs.[157] An attempt is made to provide an environment which is non-punitive although secure and which seeks to promote constructive social relations between the individual patient, the correctional officers and the professional staff.[158]

All of the men who are physically able are expected to put in a day's work during regular working hours and all do so. They are paid at standard rates for state Correctional Institutions.[159] During the working day, a shoe manufacturing and repair program occupies about thirty men, twenty men are involved in specialized maintenance functions, up to fifty in maintaining the cleanliness and physical upkeep of the institution, ten work in the kitchen, and ten in what is described as sanitation.[160] Ten men are engaged in a special IBM program which has been funded by a Federal grant and which provides training in the operation of equipment which turns out pay rolls. It is after the regular working day that about 30% of the population devote themselves to avocational pursuits. These are mostly remunerative. The goods produced are offered to the public for sale, and the proceeds accrue to the individual craftsman or artist. They include

156 About 102 patients are engaged in group psychotherapy and about 72 in individual psychotherapy. Approximately 24 are assigned to both group and individual treatment.

157 Two other modalities that should be noted are castration and estrogen therapy. Stürup (recipient of the Isaac Ray Award of the American Psychiatric Association, 1966), indicates that Denmark has had "satisfying results" with ". . . a law which enables a Danish citizen to apply for castration when he is suffering severely from his sexual drives or is in danger of committing sexual crimes." Stürup, TREATING THE "UNTREATABLE," (1968). Castration has been a repugnant procedure not used in this country since its abuse in the 1920's. *See*, Lindman and McIntyre, THE MENTALLY DISABLED AND THE LAW 183 (1961).

Estrogenic feminizing hormones have also been used in attempting to diminish sexual drive. Stürup indicates that estrogen has a place in his treatment program. "Some inmates feel so troubled by their sexual urges at times that they become aggressive and provoke conflicts, and a short period of estrogen treatment may be a great help in such cases." *Id.* at 101. In the United States these substances have been widely used in men in the amelioration of cancer of the prostate gland and to a limited extent coronary artery disease. The authors are not aware of their use in the treatment of the "sexually dangerous" in this country.

158 It should be noted that the Correction officers integrate their efforts with those of the treatment staff. In fact, their chief, Assistant Deputy Superintendent Hutchings, regularly attends staff conferences and adds a quite useful dimension to the decision making process.

159 35¢ to 50¢ a day.

160 This term is used to describe the clean-up detail who must visit the rooms each morning.

leatherwork, ceramics, art, furniture refinishing, tailoring, and radio, T.V., and watch repair.

The full time professional staff consists of one psychiatrist, one physician, five psychologists, and three social workers. In addition, there are four consultant psychiatrists and four consultant psychologists. Recently, there have been indications of substantial future increases in the number of full time professionals.[162]

The composition of the current patient population provides another insight into the operation of the Center. Three mutually exclusive groups comprise the entire census: committed patients (146), observation patients (19), voluntary patients (0).[163] Of the 146 committed patients, about two-thirds had been sentenced to prison and later committed under section 6 to the Center. About seventy of these men would have completed their original maximum sentences and been returned to the community but for chapter 123A. The remaining one-third (about forty-three men) were committed directly from the Superior Court under sections 4 and 5 after being convicted of serious sex offenses.[164]

The administrative structure of the Center is set by section 2.[165] There the primary responsibility for the operation of the Center is divided between the Department of Mental Health and the Depart-

161 This is the Director, Harry L. Kozol, M.D.

162 Five new full time positions have recently been approved.

163 The last voluntary patient was released on November 26, 1968.

164 The total number of voluntary patients treated since the Center's inception is 17. This compares with 213 committed patients and 725 observation patients. The total number of patients screened at other institutions for possible 60-day observation under § 6 to date is 1665. Of the 213 patients who have been committed since the Treatment Center's inception the following is a categorization of inmates according to age and sex of victims (all offenders were male):

Victims under 11 years of age		
	Total	90
	Homosexual	25
	Heterosexual	59
	Both	6
Victims between 12 and 16 years		
	Total	64
	Homosexual	23
	Heterosexual	35
	Both	6
Victims over age 16		
	Total	57
	Homosexual	1
	Heterosexual	55
	Both	1

165 See note 88 *supra*.

ment of Correction. The former is charged with establishing and maintaining the Center and with providing for the care, treatment and rehabilitation of the patients. In practice, the Division of Legal Medicine of the Department of Mental Health is directly responsible for supplying the necessary professionals required by section 2. The Department of Correction supplies the edifice, establishes security and sees to the housekeeping aspects of the Center. For the most part, the Correctional officers who work at the Center have been integrated into the treatment programs and function well in cooperation with the professional staff. This is true in spite of the awkward organization called for by section 2.[166]

As has been noted above, the release of patients to the community is governed alternatively by either the Parole Board or the Superior Court. The burden is on the patient himself to seek a judicial hearing on release; Parole Board review, however, occurs by operation of section 9.[167]

Despite its geographical isolation the Treatment Center has been able to develop active relationships with the community. Students from Phillips Brooks House of Harvard University and from Wheelock College have enriched the educational program. Also, there are active Christian Fellowship and Alcoholics Anonymous groups. Clubs organized to pursue such special interests as bridge and stamp collecting also exist.

In regard to treatment, one of the senior clinicians[168] recently stated that, in his view, about one-third of the patients are responsive to dynamic, insight oriented individual and group psychotherapy. A second third (not mutually exclusive) are thought to be responsive to vocational[169] and educational programs. Another third are prob-

166 The statute assumes that administrators are able to determine where "treatment" ends and "security" begins.

167 Although the patients of the Treatment Center have been referred to as patients, they can be seen as quasi-civil (or quasi-criminal) patients in that their commitments are civil, but they may be released by the Criminal Parole Board. The confusion over whether they are patients or prisoners is best illustrated by the fact that if any of these men should escape to another state he would not be covered by either the inter-state compact governing the return of the mentally ill [MASS. GEN. LAWS ch. 123 App., Art. IX (a) (1965)] or that governing the return of criminal parolees and escaped prisoners. [MASS. GEN. LAWS ch. 127, § 151A, (1937)].

168 Thoughts expressed by Mr. Ralph Garofalo in a telephone conversation with Dr. McGarry on February 14, 1969.

169 One man progressed from an untrained person to a master watch maker with several thousand dollars worth of equipment paid for by his work.

ably unresponsive to any of the above mentioned modalities of treatment.[170]

Perhaps representative of the last group was Frank Newton. His case,[171] which is both interesting and instructive, ought to be at least outlined at this point, since it illustrates one basic fallacy of the current statute: by virtue of being a sexually dangerous person the law commands that the individual shall perforce be treated. The reality of the situation is that significant numbers of these men are simply not treatable by current modalities of treatment. This is particularly true if one interprets treatment narrowly to mean psychotherapy as the Newton decision appears to do.[172] Moreover, recent research[173] on group and individual psychotherapy with inmates of the Massachusetts Correctional Institution at Walpole (a maximum security prison) indicates that certain types of inmates do worse with psychotherapy in terms of recidivism than if they are not treated at all.

In this context, then, one should return to the Newton case. Newton reportedly had an I.Q. of about 60. While at the Treatment Center he refused to attend the weekly group therapy sessions to which he was assigned, though he did work approximately five hours a day in the shoe-shop.

In the fall of 1968, Newton filed a writ of habeas corpus alleging, inter alia, that he was receiving only custodial care and thus his commitment was in violation of his constitutional rights.[174] In agreeing with Newton's contentions the court stated that

> . . . there is not sufficient professional personnel at the Treatment Center to give each and every patient the *psychiatric or psychotherapeutic* treatment which could be considered in any way adequate for each patient's needs.[175]

170 At present this would mean that this last third is probably untreatable. Presumably with unlimited funds and staff and the best facilities some among this group could be reached. But no one has claimed that they are all amenable to treatment.

It should be noted that this kind of patient becomes a larger and larger percentage of the patient population of an institution such as the Treatment Center as time goes on. Under the present statute such an accumulation appears to be inevitable.

171 Newton v. Commonwealth, Middlesex Superior Court, Docket No. 295531 (Dec. 23, 1968).

172 *Id.* at para. 3.

173 Carney and Bottome, *An Evaluation of the Effectiveness of Psychotherapy with Inmates in a Maximum Security Correctional Institution,* Paper presented at Bass River (Mass.) Conference on the Administration of Criminal Justice and Community Mental Health, October 4, 1968.

174 Newton v. Commonwealth, *supra* note 171.

175 *Id.* at para. 3. (Emphasis added.)

Here the assumption appears to be that psychotherapy equals treatment. As seen above, there is great need to challenge such a position.

V. Effectiveness of Chapter 123A

Proper statistical evaluation of the effectiveness of programs such as are in operation at the Treatment Center is a highly sophisticated matter involving a good deal of time and expense, and requiring adequate base rate recidivism expectancy of sufficiently large and well classified study groups and comparable control groups.[176] Little such data exist for sex offenders. The statistics for sexual crimes, moreover, are unreliable.[177] One study,[178] for instance, sought to compare the amount of reported crime to the amount of actual victimization by measuring the Uniform Crime Reports[179] against a nationwide survey completed by the University of Chicago's National Opinion Research Center.[180] For the year 1965 the Uniform Crime Reports rate per 100,000 population for forcible rape was 11.6.[181] The National Opinion Research Center's survey revealed a rate for its sample population

176 Indicative of the research in progress has been reported by Murray I. Cohen, Ph.D., a research consultant at the Treatment Center, to one of the authors. This project involves a followup study of a 300-man sample selected from approximately 800 men observed at the Treatment Center and *not* found to be sexually dangerous. 170 of the sample population (300) have since reached the community. Of these, 17 or 10 per cent have been arrested for sexual misconduct. Another 7 per cent have been arrested on other criminal charges. Such recidivism rates are quite low but are consistent with the generally low rates for serious sexual offenders.

A sub-group of 27 out of the 300 were men who had been evaluated by the Treatment Center as sexually dangerous but not so found by the courts. 11 of these have reached the community and only one has been arrested for a subsequent offense. (Telephone report from Dr. Cohen to Dr. McGarry, February 21, 1969.)

In the authors' view, these data are inconclusive. A much larger number of men identified as sexually dangerous by the Center (whether or not the court agreed) must be followed-up before conclusive findings as to the predictive accuracy and efficacy of treatment can be reached.

177 Hayman *et al., Sexual Assault on Women and Children in the District of Columbia,* 83 Pub. Health Rep. 1021 (1968). Gagnon, *Female Child Victims of Sex Offenses,* 13 Soc. Prob. 176 (1965).

178 The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and its Impact — an Assessment 17 (1967) [hereinafter cited as Task Force Report].

179 National statistics regarding the number of certain offenses (including forcible rape) known to local police officials and collected by the F.B.I.

180 The surveyors went to 10,000 households, asking whether the person questioned, or any member of his or her household, had been a victim of crime during the past year, whether the crime had been reported, and, if not the reasons for not reporting. Task Force Report, *supra* note 178 at 17.

181 *Id.* at 17, Table 4.

of 42.5, or more than 3 1/2 times the reported rate, for about the same time period.[182] Given society's general disregard for the welfare of the victim — best characterized perhaps by the trial by ordeal to which they are subjected — it can readily be understood why many raped women and parents of sexually abused children do not choose to make public their experience.[183]

Evaluation in the instant case is further hampered by the small size of the sample, the relatively short period of the Center's operation, and the absence of well-defined, comparable control groups in other states[184] and within Massachusetts.[185] Classification by offense alone is not adequate. Additional and complex variables such as age, social status, psychiatric diagnosis and so on are required.

Cohen and Kozol[186] report that, from 1961 to 1966, of thirty-five men released from the Treatment Center, only five violated parole by the commission of another sexual misdeed. They assert that their patients

> represent a sample of only the repetitive, dangerous sexual offender. As such, the national parole violation or recidivism rate of 17 per cent for sexual offenders is not applicable. The base rate of recidivism for our patients is surely much higher.[187]

It is unquestionable that the incarceration of these men has spared society many sexual crimes; and it is highly probable that institutionalization beyond the maximum statutory sentence, permitted under chapter 123A, has further protected society. Perhaps the most unassailable research design for establishing the success of such a program would be to randomly process a large number of adjudged sexually dangerous persons through the standard correctional system and compare their subsequent success or failure with those released from the Treatment

182 The survey period was 1965 - 1966. Ennis, *Criminal Victimization in the United States: A Report of a National Survey* in FIELD SURVEYS II, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT, 1967, (cited in TASK FORCE REPORT, *supra* note 178, at 17, Table 4.)

183 Section 10 makes the facilities of the Department of Mental Health available to the victims of sexual attack. The authors are not aware of any case in which this section has been utilized. *Cf.* TASK FORCE REPORT, *supra* note 178, at 18, Table 5.

184 No other state has a classification that corresponds closely enough to the Massachusetts S.D.P. *See,* Lindman and McIntyre, *supra* note 157, at 298.

185 One possibility for obtaining controls would be that group of persons held by the Center's staff to be sexually dangerous but found by the Superior Court not to be.

186 Cohen and Kozol, *supra,* note 60.

187 *Id.* at 55.

Center.[188] The American criminal justice system has not looked kindly on building such an experimental design in the legal process,[189] although other countries have.[190] Current procedure in chapter 123A might actually permit such a design since the court can choose to sentence or even place on probation a person who is found to be a sexually dangerous person.[191] It is unlikely, however, that the bench would or could abdicate its sentencing authority to the dictates of a research design.[192]

VI. Alternatives to Chapter 123A as Currently in Force

It is well to summarize several of the dilemmas which confront those who would alter the present sex offender law. Maximum sentences currently provided by the criminal statutes would not prevent another Ohlsen tragedy. Thus society has depended upon a type of civil commitment, though it has been made clear by the Supreme Judicial Court that such further confinement can only be justified on the basis of adequate treatment.[193] This must be placed alongside the fact that the behavioral sciences have never claimed that all sexually dangerous

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188 *Cf.* note 185 *supra.*

189 *See, e.g.,* Canons of Judicial Ethics, Canons 19 (Judicial Opinions), 24 (Inconsistent Obligations), 34 (A Summary of Judicial Obligation). (As seen in A.B.A., Opinions of the Committee on Professional Ethics and Grievances 45 (1957)).

190 Stürup, *supra* note 157, at 3-5.

191 *See,* note 176 *supra.*

192 Such a judicial policy would almost certainly be an abuse of discretion and might also violate constitutional requirements.

193 Commonwealth v. Page, 339 Mass. 313, 159 N.E.2d 82 (1959); Nason v. Superintendent of Bridgewater, Mass. Adv. Sh. (1968) 207; Rouse v. Cameron, 373 F.2d 451 (1966); Millard v. Cameron, 373 F.2d 468 (D.C. Cir 1966). None of these courts has gone so far as to define what adequate treatment is, only what it is not.

In Denmark the attitude is security first, then treatment:

> "The goal of the institution [Herstedvester] is to safeguard society against the dangers to law and order (retssikkerheden) the persons detained in the institution would present if they were on their own, and inside these limits submit them to a treatment adapted to their psychological peculiarities in order that they become suited to return to free life. During the detention, which is not a punishment but a security measure, the treatment ought to have in view the individualities of the detainees."

A Royal Decree of 1940, Stürup, *supra* note 157, at 251-252.

persons are remediable.[194] The passage of years alone, perhaps, for some men (like Newton) will effect a change in their impulsivity and sexual danger. It is inevitable that a warehousing phenomenon will develop for men who either do not invest in therapy themselves or for whom extant modalities of treatment are not effective.

A second problem is that if such programs for the sexually dangerous are justified, it makes no sense to exclude the repetitively aggressive dangerous offender without sexual overtones.

> The dynamics for thus singling out the *sexually* antisocial may be clear but the logic is not. There are very dangerous men, convicted of very serious nonsexual crimes of violence, who leave our prisons every week in this country; they have not been risked on parole and they have served their maximum sentences.[195]

There is nothing intrinsically more responsive to treatment in the sexually aberrant than in the aggressively aberrant.[196]

Several major systems exist as possible alternatives to the present system in Massachusetts. These are set forth briefly below, with arguments for and against them. Since essentially they are matters of social policy, no final judgments will be indicated here.

One major alternative would be a return to criminal sentencing procedures in the management of the sexually dangerous but with several possible modifications.[197] Serious sexual crimes could have their maximum enforceable sentences legislatively extended.[198] A variant would be the extension beyond the statutory maximum by virtue of the atrociousness of a single criminal sexual act or the repetitive con-

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194 Stürup reports that only 10 per cent of those he treated ". . . are institutionalized because of criminal activities ten years after they first arrived in detention." *Supra* note 157, at ix. Nor does Stürup claim to have found the panacea for the inmates of his institution: "I never say that I cure psychopaths; I do claim, however, that during their stay in Herstedvester they have been helped to become nicer psychopaths." *Id.* at 2.

195 McGarry, *supra* note 43 at 27.

196 At Herstedvester the core of the 150-200 inmates is composed of "chronic criminals", those who have been sentenced at least three times within a short period with no limitation as to sexual crimes or sexual dangerousness. *Supra* note 157, at viii.

197 Model Sentencing Act, Art. III, §§ 5 and 6. Model Penal Code Sentencing Provisions Art. 6, §§ 6.01, 6.07, 6.11, Art. 7, § 7.03. *See* text of these provisions in Appendices A and B.

198 The Massachusetts Criminal Law Revision Commission (under the chairmanship of Professor Livingston Hall) is currently preparing a recodification of Massachusetts' criminal code.

viction of serious sexual crimes.[199] There could be an added requirement here of an affirmative finding of sexual danger by means of the diagnostic procedures currently followed under chapter 123A.[200] After such a commitment the individual could be placed within a specialized institution such as the Treatment Center; but, if he proved unresponsive to treatment, he could be transferred to another of the institutions of the Department of Correction and be exposed to alternative rehabilitative programs. Provision for early parole would tend to encourage a serious investment on the part of the inmate in the treatment process of such a program.[201]

An advantage of such a system is that only the better motivated persons would be treated. Also, the staff of the Center could restrict admissions and thus maintain a reasonable balance between themselves and the inmate population. A disadvantage to such a system, insofar as it is evaluated in terms of the breadth of the net it casts rather than the civil libertarian safeguards it provides, would be the absence of provisions for persons found to be sexually dangerous after sentencing where the crime was not of a sexual nature.[202] Although such a person could still receive treatment, he would not be subject to the extended maximum sentence of those adjudicated "sexually dangerous" at the time of conviction.[203] A further disadvantage would be the difficult problem of the disposition of the men already committed under the current section 6.

199 *See,* Model Sentencing Act, § 5(a) and (b); Model Penal Code, § 7.03(1) and (3), in Appendices A and B.

200 In Denmark the sentencing court may request the opinions of four psychiatrists, one of whom is a public officer. The other three are members of "an independent medical body headed by the professor of forensic medicine of the University of Copenhagen and is known as the Medico-Legal Council. Stürup, *supra* note 157, at 4.

201 One of the central themes of Stürup's work is that the patient must be an active participant in his treatment.

> Our treatment program is based on collaboration between all who have any potential for being active in the work, with the realization that the main burden falls upon the inmate himself, since it is his future which is at stake.

Id. at 4.

202 *Cf.* MASS. GEN. LAWS ch. 123A, § 6 (Supp. 1969). The system described here would not permit the raising of the sexual danger issue for crimes other than serious sexual crimes. The credibility of the evidence which has been presented in the "civil" commitments under the present chapter 123A has been of concern to more than one observer, particularly in the case of men committed *after* sentencing for a non sexual crime. *See, supra* note 82.

203 Under the Model Sentencing Act the maximum term is set at 30 years. (Art. III, § 5). But the Model Penal Code distinguishes among first, second, and third degree felonies (§ 7.03) and then permits extensions varying from 3 years to life imprisonment (§ 6.07).

A second major alternative would be civil commitment to a Department of Mental Health facility, rather than one of the institutions in the Department of Correction, in lieu of or during the pendency of a criminal sentence. The latter type of commitment is currently possible for psychotic prisoners.[204] An advantage to such a system would be the ease of entry into and exit from the treating facility.[205] There would be no doubt that the primary goal of the person's commitment would be treatment.[206] Also, there would be the administrative advantage of intra-departmental transfers to and from all of Mental Health's facilities according to the needs of the individual patient. However, such a system appears to have a number of disadvantages. Among these is the absence of a tradition of or expertise in effective security in the Department of Mental Health.[207] Commitment of psychotic prisoners to Mental Health facilities in Massachusetts have in fact been very few and almost all have been women. A second disadvantage is that the civil commitment model could impose the same problem of adequacy of treatment for the untreatable. The absence of a statutory limit to the length of commitment might well be another disadvantage.[208] It is conceivable that such a program could work on the basis of a suspended sentence, with consent by the convicted person and acceptance by the Mental Health facility.[209]

A third major alternative would be the repeal in toto of chapter 123A. To take such a position presumably one would have to conclude that the ten year "unique social experiment"[210] at the Bridgewater

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204 MASS. GEN. LAWS ch. 123, §§ 103 and 104 (Supp. 1969).

205 The authors are not entirely certain that ease of entry and exit would improve the situation. The civil process that is now in operation has not always functioned satisfactorily in that exit is often quite difficult. Perhaps one reason for this is the taint of criminality that touches all who enter such programs.

206 *See* note 193 *supra*.

207 To understand this objection one must realize that psychiatric education and practice militate vigorously against acceptance of a prison-like situation.

208 The American Bar Association has articulated the reservation as follows:

> The experience under these sex offender statutes should be carefully considered in the drafting of provisions for a special term. It is easy to get caught up in the desire to protect society by the long-term incarceration of dangerous offenders . . . and at the same time to lose sight of the inhumanity that can result from the lack of care, and of funds, in the process of implementation.

A.B.A.,PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES 106 (1967).

209 *See* MASS. GEN. LAWS ch. 111A, § 6, for an example of a similar system in operation for drug addicts; Curran, *Massachusetts Drug Addiction Act*, 1 HARV. J. ON LEGIS. 89 (1964).

210 Kozol et. al., *The Criminally Dangerous Sex Offender*, *supra* note 56, at 84.

Treatment Center had failed to demonstrate that its value outweighed its costs or justified the indefinite incarceration of growing numbers of men.

Such a conclusion would call for the pursuit of one of three courses. The first would be the continuation of a vestigial program at the Center with no new admissions. The second would force the mental hospital commitment of these men. As observed above this would be a major departure from long standing tradition and practice in Massachusetts. The third course would involve the discharge into the community of all those not serving criminal sentences.[211]

The Correctional and Mental Health staffs of the Treatment Center have devoted themselves to their work and produced commendable research and, at least at first glance, good results. If they are to continue their work they should be given a statute which is workable and realistic and does not impose the untreatable on them nor unnecessarily hamper the full and constructive exercise of their expertise.

Moreover, if society wishes to impose life sentences upon certain types of offenders, it should do so in accordance with the highest possible democratic requirements. It should not be possible to deprive a man of any constitutional right provided those accused under the criminal law and incarcerate him for an indefinite period in a "hospital" so that he can be "treated." "The jailer in a white coat and with a doctorate remains a jailor — but with larger powers over his fellows."[212]

211 About 122 of the 146 committed patients would fall into this group. Included are 76 who were committed under § 6 but have completed their original maximum sentences and about 46 who were committed under §§ 4 and 5 in lieu of criminal sentence.

212 Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 637 (1966).

APPENDIX A: MODEL SENTENCING ACT

ARTICLE III. SENTENCES FOR FELONIES

§ 5. Dangerous Offenders

Except for the crime of murder in the first degree, the court may sentence a defendant convicted of a felony to a term of commitment of thirty years, or to a lesser term, if it finds that because of the dangerousness of the defendant, such period of confined correctional treatment or custody is required for the protection of the public, and if it further finds, as provided in section 6, that one or more of the following grounds exist:

(a) The defendant is being sentenced for a felony in which he inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant crime as a single criminal episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity. (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons.

The findings required in this section shall be incorporated in the record.

§ 6. Procedure and Findings

The defendant shall not be sentenced under subdivision (a) or (b) of section 5 unless he is remanded by the judge before sentence to [diagnostic facility] for study and report as to whether he is suffering from a severe personality disorder indicating a propensity toward criminal activity; and the judge, after considering the presentence investigation, the report of the diagnostic facility, and the evidence in the case or on the hearing on the sentence, finds that the defendant comes within the purview of subdivision (a) or (b) of section 5. The defendant shall be remanded to a diagnostic facility whenever, in the opinion of the court, there is reason to believe he falls within the category of subdivision (a) or (b) of section 5. Such remand shall not exceed ninety days, subject to additional extensions not exceeding ninety days on order of the court.

The defendant shall not be sentenced under subdivision (c) of section 5 unless the judge finds, on the basis of the presentence in-

vestigation or the evidence in the case or on the hearing on the sentence, that the defendant comes within the purview of the subdivision. In support of such findings it may be shown that the defendant has had in his own name or under his control substantial income or resources not explained to the satisfaction of the court as derived from lawful activities or interests.

APPENDIX B: MODEL PENAL CODE, SENTENCING PROVISIONS

ARTICLE 6. AUTHORIZED DISPOSITION OF OFFENDERS

Section 6.01. Degrees of Felonies.

(1) Felonies defined by this Code are classified, for the purpose of sentence, into three degrees, as follows:

(a) felonies of the first degree;
(b) felonies of the second degree;
(c) felonies of the third degree.

A felony is of the first or second degree when it is so designated by the Code. A crime declared to be a felony, without specification of degree, is of the third degree.

(2) Notwithstanding any other provision of law, a felony defined by any statute of this State other than this Code shall constitute for the purpose of sentence a felony of the third degree.

* * * * *

Section 607. Sentence of Imprisonment for Felony; Extended Terms.

In the cases designated in Section 7.03, a person who has been convicted of a felony may be sentenced to an extended term of imprisonment, as follows:

(1) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than five years nor more than ten years, and the maximum of which shall be life imprisonment;

(2) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than five years, and the maximum of which shall be fixed by the Court at not less than ten nor more than twenty years;

(3) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be fixed by the Court at not less than five nor more than ten years.

* * * * *

Section 6.11. Place of Imprisonment.

(1) When a person is sentenced to imprisonment for an indefinite term with a maximum in excess of one year, the Court shall commit him to the custody of the Department of Correction [or other single department or agency] for the term of his sentence and until released in accordance with law.

(2) When a person is sentenced to imprisonment for a definite term, the Court shall designate the institution or agency to which he is committed for the term of his sentence and until released in accordance with law.

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ARTICLE 7.

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Section 7.03. Criteria for Sentence of Extended Term of Imprisonment; Felonies.

The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if it finds one or more of the grounds specified in this Section. The finding of the Court shall be incorporated in the record.

(1) The defendant is a persistent offender whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and has previously been convicted of two felonies or of one felony and two misdemeanors, committed at different times when he was over [insert Juvenile Court age] years of age.

(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity.

(3) The defendant is a dangerous, mentally abnormal person whose commitment for an extended term is necessary for protection of the public.

The Court shall not make such a finding unless the defendant has been subjected to a psychiatric examination resulting in the conclusions that his mental condition is gravely abnormal; that his criminal conduct has been characterized by a pattern of repetitive or compulsive behavior or by persistent aggressive behavior with heedless indifference to consequences; and that such condition makes him a serious danger to others.

(4) The defendant is a multiple offender whose criminality was so extensive that a sentence of imprisonment for an extended term is warranted.

The Court shall not make such a finding unless:

(a) the defendant is being sentenced for two or more felonies, or is already under sentence of imprisonment for felony, and the sentences of imprisonment involved will run concurrently under Section 7.06; or

(b) the defendant admits in open court the commission of one or more other felonies and asks that they be taken into account when he is sentenced; and

(c) the longest sentences of imprisonment authorized for each of the defendant's crimes, including admitted crimes taken into account, if made to run consecutively would exceed in length the minimum and maximum of the extended term imposed.

JOURNALISTS UNDER THE AXE: PROTECTION OF CONFIDENTIAL SOURCES OF INFORMATION

TALBOT D'ALEMBERTE*†

I. INTRODUCTION

The editor of a large metropolitan newspaper took a stand against civil disobedience in a recent address to the bar association in his community. During the question and answer period he was asked about the journalist's claim of privilege against disclosure of confidential news sources. Acknowledging that since state law recognized no such privilege, a court order could require such disclosure, the editor declared that he would rather be imprisoned than disclose a confidential source.[1]

Just as the nation was forced to reevaluate the moral basis of the segregation laws once the technique of civil disobedience focused attention upon them, it may be time to consider the rationale of the law which evokes a widespread spirit of civil disobedience among journalists.

Assume a newspaper which has received information that the town's mayor had recently increased his bank account in a clandestine manner publishes a series of articles reporting this "fact" to the local community, with information secured from a bank employee who was understandably sensitive to the effect of disclosure on his job, and who received a pledge from the reporter that his identity would remain secret. Upon publication, the editor of the newspaper is called before the local grand jury with predictable results. Under questioning the reporter refuses to reveal the identity of the bank employee and the jury asks the presiding judge to issue a contempt citation. At this point, the reporter then refuses to divulge the name to the judge, asserting that his ethical standards as a reporter prevent this disclosure. He goes to prison for a term.

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†The author wishes to acknowledge the assistance of Thomas Spencer, member of the class of 1969 in the University of Miami Law School, and editor of the U. Miami Law Review.

1 Address by Mr. Don Shoemaker, Editor of the *Miami Herald* to the Young Lawyers Section of the Dade County Bar Association, Sept. 12, 1966.

Some time later, the mayor sues the paper for libel and on deposition the reporter again refuses to disclose his source. The judge in this civil case now strikes the defense of the newspaper and sends the case to the jury on the question of damages.

In weighing the social interests involved in this example, it is evident that the news media may have exposed corruption in government, using as a basis for its exposure information secured from what is today alternatively referred to as a "confidential source," "highly-placed informant," or "reliable source." The reporter with considerable effort developed a story of corruption in government which otherwise would have remained hidden. The reporter would assert that the right he was protecting was not a narrow professional privilege, but, ultimately, the public's "right to know" what sources of information would not reveal if they did not have the assurance of confidentiality. Conversely, the grand jury was asserting the public's right to full information in its criminal investigation.

It has traditionally been the position of the law that "the public has a right to every man's evidence."[2] Obviously, a contrary rule would render orderly legal procedure both frustrating and futile. The interest of society favors procuring from each person relevant facts in order to resolve the issue being litigated or investigated.[3] The person who is aggrieved by a news article has a right to file a libel suit and to have all the evidence presented in that suit. The public official has a right to develop facts which might tend to show malice on the part of the newspaper so that he can avoid the public official defense.

Various resolutions for these competing policy considerations have been offered. While the news media has analogized its position to that of attorney and client and has asserted a similar "privilege," the courts have consistently refused to grant it.[4] Yet some form of privi-

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2 In re Investigation of World Arrangements with Relation to the Production, 13 F.R.D. 280, 281 (D.D.C. 1952). *See also* United States v. Bryan, 339 U.S. 323, 331 (1950).

3 8 J. H. WIGMORE, EVIDENCE § 2192 (3d ed. 1940); Blackmer v. United States, 284 U.S. 421, 438 (1932) (dictum).

4 W. R. ARTHUR & R. L. CROSSMAN, THE LAW OF NEWSPAPERS 257 (2d ed. 1940):

> The old and prideful newspaper tradition that a reporter will not reveal the source of information when given in confidence has no standing, in general, under the law. Newspaper codes of ethics which declare the protection of confidences to be a high principle to be faithfully advanced by all engaged in the newspaper profession not only are not binding in a court of law but have been held to amount substantially to promises not to obey the law.

lege has been recognized by fourteen state legislatures.[5]

In law, a privilege is an immunity or exemption conferred by special grant to a certain class or individual in derogation of a common right.[6] Four elements are commonly asserted as essential for recognition of a legitimate privilege:

1. The communication must originate in an express or implied confidence;
2. Confidentiality must be essential to the maintenance of the relation between informant and informed;
3. The relation must be supported by public opinion;
4. The prospective injury to the relation from the forced disclosure must outweigh the consequent benefit to the public in ascertainment of the truth.[7]

It is the purpose of this article to consider the proper weight to be given to the public interests involved — the interests of society in the revelation of facts and in the maintenance of confidential news sources. The history and development of the journalist's privileged source of information will be traced from its early sources to the present and a statutory survey and analysis will be presented culminating with two proposed model statutes.

II. Early Common Law Development

Long before the American Revolution, witnesses were obligated to appear and testify in England. By the Act of Elizabeth,[8] service of process requiring the person served to testify concerning any cause pending in the court could be had out of any court of record. Although it is not clear when grand juries first resorted to compulsory

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5 For other articles dealing with this problem see: Desmond, *The Newsman's Privilege Bill*, 13 Albany L. Rev. 1 (1949); Gallup, *Further Consideration of a Privilege for Newsmen*, 14 Albany L. Rev. 16 (1950); Garter, *The Journalist, his Informant, and Testimonial Privilege*, 35 N.Y.U. L. Rev. 1111 (1960); Semeta, *Journalist's Testimonial Privilege*, 9 Cleve.-Mar. L. Rev. 311 (1960); Comment, *Confidentiality of News Sources Under the First Amendment*, 11 Stan. L. Rev. 541 (1959); Note and Comment, *Privileged Communications—News Media—A "Shield Statute" for Oregon?* 46 Ore. L. Rev. 99 (1966); Note, *The Journalist and his Confidential Source: Should a Testimonial Privilege Be Allowed?* 35 Neb. L. Rev. 562 (1956); Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 Va. L. Rev. 61 (1950); 8 Buffalo L. Rev. 294 (1959); 61 Mich. L. Rev. 184 (1962); 32 Temp. L.Q. 432 (1959).

6 Webster's New World Dictionary 1160 (1955).

7 J. H. Wigmore, 8 Evidence § 2286 (3d ed. 1940).

8 5 Eliz., c. 9 § 12 (1562).

process for witnesses; as early as 1612 Lord Bacon declared that "all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discovery."[9] Therefore, each citizen owed the unfailing duty to reveal all his knowledge, including its sources.

Two exceptions to this rule were urged. In some trials in the 17th century, the obligation of honor among gentlemen was argued successfully as a sufficient ground for silence.[10] This doctrine, known as "Point of Honour," was formally abandoned in the Dutchess of Kingston's case involving a trial by the House of Lords for bigamy.[11] Invoking his honor, a witness who was a long-time friend of the accused refused to disclose whether the Duchess had ever admitted to the first marriage. The judges, after much heated discussion, stated: "It is the judgment of this House that you are bound by law to answer all such questions as shall be put to you."

One year later, in *Hill's* trial,[12] the doctrine was further repudiated when the court said:

> [I]f this point of honour was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honour.[13]

More pertinent to the journalist's argument is the second doctrine which was spawned in England by the case of *Hennesy v. Wright.*[14] In that libel case the Court of Appeal refused to order the defendant to answer certain interrogatories involving the disclosure of the identity of his informants. The court held unanimously that the identity was "irrelevant" to the central issue being litigated. In several later libel cases,[15] *Hennesy* was relied on to declare the particular information

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9 Countess of Shrewsbury's Case, 12 Coke 94 (1613). *See also* Bulstrud v. Letchmere, Freem. Ch. 5 (1676); Lord Grey's Trial, 9 How. St. Tr. 127 (1682).

10 J. H. WIGMORE, 8 EVIDENCE § 2286 at 537, n. 13 (3d ed. 1940).

11 20 How. St. Tr. 586 (1776), Notable British Trials Series 256 (Melville ed. 1927).

12 Hill's Trial, 20 How. St. Tr. 1318 (1777).

13 *Id.* at 1362. Although traces of the doctrine have appeared at times in early American jurisprudence, it has never been applied to establish a journalist's privilege. Morris v. Vanderen, 1 Dall. 64 (Pa. 1782); Mills v. Griswold, 1 Root 383 (Conn. 1779). *See also* Calkins v. Lee, 2 Root 363 (Conn. 1796).

14 [1888] 24 Q.B.D. 445 (C.A.).

15 Gibbon v. Evans, [1889] 23 Q.B.D. 384; Elliott v. Garrett, [1902] 1 K.B. 870 (C.A.).

sought irrelevant. The basis of the rule, however, was shifted from "relevance" to "privilege" in *Plymouth Mutual Cooperative & Industrial Society v. Traders' Publishing Association.*[16] That case was a libel action against the publishers of a trade journal and the defense advanced was fair comment which invoked the issue of malice. The Court of Appeal upheld the defendants' refusal to answer an interrogatory as to the identity of their informants. *Hennesy v. Wright* was no longer regarded as simply a finding of irrelevance, but as having

> laid down a rule from which we are not at liberty to depart, namely, that the court ought not in such a case as this to compel discovery of the names of persons from whom the information on which the defendants acted in publishing the alleged libel was derived, in the absence of special circumstances. . . .[17]

It has been suggested that the reason for the rule is twofold: the public interest in the newspaper disclosure of matters of public concern which might otherwise be impeded and the principle of a free press. Although the rule is absolute as to a newspaper proprietor or publisher, it is discretionary when applied to a reporter.[18]

III. Contemporary Development

A. Other Common Law Jurisdictions

The general rule of law in England, established upon an obvious misinterpretation of *Hennesy v. Wright*, still exists today. Owing to the special status of libel actions in English social life, a publisher is privileged from disclosing the identity of his informant. Absent "special circumstances" reporters are not compelled to disclose their sources in private litigation against newspapers.[19] It is important to point out that this rule apparently does not apply to criminal or administrative proceedings.

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16 [1906] 1 K.B. 403 (C.A.).

17 The case was followed by Adam v. Fisher, [1914] 110 T.R. 537, 540; Lyle-Samuel v. Odhams, Ltd. [1920] 1 K.B. 135 (C.A.).

18 Lawson & Harrison v. Odhams Press, Ltd., [1949] 1 K.B. 129, 134-36 (C.A.).

19 Georgius v. Vice Chancellor of Oxford University Press [1949] 1 K.B. 729; Lawsen & Harrison v. Odhams Press, Ltd. [1949] 1 K.B. 129. *See also* Attorney-General v. Clough, Q.B.D. [1963] 1 All B.R. 420; Attorney-General v. Mulholland, C.A. [1963] 1 All B.R. 767.

In Australia, the rule is similar to that in the United States today. In *McGuinness v. Attorney-General*,[20] the High Court of Australia stated:

> Next it was submitted that the source of the appellant's information upon which the newspaper articles were based was privileged and that he could not be compelled to disclose it. No such privilege exists according to law. Apart from statutory provisions, the press, in Courts of Law, has no greater and no less privilege than every subject of the King.[21]

In Canada, the court in *Wisner v. MacLean-Hunter Publishing Co.*[22] held that in a libel action, examination of defendant upon discovery as to the sources of information could be required as a matter of discretion.

B. United States

1. Early Development

The first American case to raise the issue of a journalist's privilege was one involving James W. Simonton, a Washington correspondent for the New York *Daily Times* (now the New York *Times*). Simonton was cited for contempt of the United States House of Representatives when he refused to disclose his confidential sources.[23] He had been called to testify before a House committee after the *Times* published charges that bribes were being taken by House members for votes on certain land grant measures. The committee reached the conclusion that the substance of the charges was essentially true without resort to the reporter's source, and the House recommended expulsion of four members.[24] Nevertheless, Simonton was convicted of contempt of Congress and placed in custody for the remainder of the session.[25]

In 1887 the Supreme Court of Georgia in *Pledger v. State*[26] held that a newspaper publisher was a competent witness and could not

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20 63 Commw. L.R. 37 (Austl. 1940).
21 *Id.* at 91.
22 [1954] 1 D.C.R. 501 (C.A.).
23 CONG. GLOBE, 34th Cong. 3d Sess. 274-75, 411-412 (1957).
24 H.R. REP. No. 243, 34th Cong., 3d Sess. 169-79 (1857).
25 CONG. GLOBE, 34th Cong., 3d Sess. 411-412, 426 (1857). *See also* other cases collected in S. MISC. DOC. No. 268, 53d Cong. 2d Sess. (1894); EDITOR & PUBLISHER 10 (Aug. 11, 1934).
26 77 Ga. 242, 3 S.E. 320 (1887).

refuse to reveal the identity of the author of a libelous article. If he did not reveal the author's name, the court said, he

> was to be considered the author himself, and was liable to indictment and punishment as such, and might, moreover, be punished for contempt of court, as any other witness refusing to testify.[27]

In 1894, while the United States Senate was considering the Wilson-Gorman Tariff Bill, charges were made in various newspapers that the "sugar trust" interests had bribed certain unnamed Senators to vote for favorable amendments to the bill. On May 17, 1894, a committee was appointed by the Senate to investigate the charges. Two reporters, Elisha Edwards, a reporter for the Philadelphia *Press* and John S. Shriver, a correspondent of the New York *Mail and Express,* refused to tell the committee the source of their information charging Senators with corrupt practices. The witnesses were certified to the District Attorney of the District of Columbia for their refusal to testify. The Supreme Court of the District of Columbia struck their demurrer to a grand jury indictment and demanded that the reporters disclose the information.[28] Commenting on the case, Judge Cole declared:

> Let it once be established that the editor or correspondent cannot be called upon in any proceeding to disclose the information upon which the publication in his journals are based, and the great barrier against libelous publication is at once stricken down, and the greatest possible temptation created to use the public press as a means of disseminating scandal, thereby tending to lessen, if not destroy, its power and usefulness.[29]

California was the next jurisdiction to repudiate a court-created privilege. In 1897, the court in *People v. Durrant*[30] and *Ex Parte Lawrence*[31] refused to allow reporters to assert a privilege. *Ex Parte Lawrence* involved an investigation by the state senate regarding a charge that some of its members had accepted bribes. Both the editor and publisher of the newspaper which had published the charge refused to reveal the source of their information. The appellate court affirmed the citation of contempt of the Senate. In *Durrant*, the pros-

27 *Id.* at 248.
28 Chapman v. United States, 5 App. D.C. 122, 123-125 (1895).
29 SEN. MISC. DOC. 279 at 856; *See* Note, 36 VA. L. REV. 61 (1950).
30 116 Cal. 179, 48 P. 75 (1897).
31 116 Cal. 298, 48 P. 124 (1897).

ecution in a murder case asked the defendant if she had not told a newspaper reporter of a certain event. Defendant's counsel objected on the grounds that such a statement was privileged. The court summarily rejected the argument, stating "the claim scarcely merits comment."

The court in the 1901 Ohio decision of *Clinton v. Commercial Tribune Co.*,[32] without contributing any analysis of the problem, simply held that a communication made to a newspaper reporter and afterwards published, is not privileged. Moreover, the court noted that in any action for libel a question as to who furnished the information is both material and competent.

Twelve years later the Supreme Court of New Jersey in *In Re Grunow*[33] asserted its reason for refusing a reporter a privilege:

> Such an immunity, as claimed by the defendant, would be far-reaching in its effect and detrimental to the due administration of law. To admit of any such privilege would be to shield the real transgressor and permit him to go unwhipped of justice.[34]

Finally, in the Colorado case of *Joslyn v. People*[35] the editor of a newspaper which had attacked the integrity of a number of the grand jurors refused to testify as to whether or not he had written the articles. The court upheld a contempt citation, stating: "[H]e may not refuse to testify because he considers the matter inquired about as his 'private, confidential, and personal business.' "[36]

2. Judicial Repudiation of the Privilege

As the early decisions evidenced an absence of careful analysis, recent cases demonstrate legal ingenuity in the arguments advanced for the establishment of a court-created privilege. Six main arguments have been attempted: (1) code of ethics; (2) forfeiture of estate; (3) employer's regulations; (4) freedom of the press; (5) self-incrimination; and (6) relevance.

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32 11 Ohio Dec. 603 (1901).
33 84 N.J.L. 235, 85 A. 1011 (1913).
34 *Id.* at 236.
35 67 Colo. 297, 184 P. 375 (1919).
36 *Id.* at 303.

a. Code of Ethics Theory

The Canons of the fourth estate obligate a journalist not to reveal who gave him information.[37] Indeed, it has been held libelous to publish a statement to the effect that a reporter has violated a confidence.[38] In 1934 the American Newspaper Guild adopted the following canon:

> That newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigatory bodies, and that the newspaperman's duty to keep confidences shall include those he shared with one employer after he has changed his employment.[39]

Reporters faced with a demand to disclose have frequently refused on the basis that it would be unethical, but the courts which have considered this contention have unanimously given priority to legal considerations over ethical rules. For example, the earliest case of this nature was *In Re Wayne*.[40] There the editor refused to disclose the source of a report regarding government corruption made public by his newspaper before it was officially reported by the court. The court stated:

> The position of the witness is untenable. Though there is a canon of journalistic ethics forbidding the disclosure of a newspaper's source of information, — a canon worthy of respect and undoubtedly well-founded, it is subject to qualification, — it must yield when in conflict with the interests involved of justice — the private interests involved must yield to the interests of the public.[41]

37 EDITOR & PUBLISHER 9 (Sept. 1, 1934); BIRD & MERWIAL, THE NEWSPAPER AND SOCIETY 567 (1942); Note, 11 STAN. L. REV., *supra* note 5. Desmond, *The Newsman's Privilege Bill*, 13 ALBANY L. REV. 1 at 3 (1949).

38 Tryon v. The Evening News Association, 39 Mich. Rep. 636, 640 (1878):

> The necessity of frequently meeting members of the great body of reporters, and of having more or less to say to them, would require gentlemen to be very closely on their guard, and to treat them with scanty civility unless they were understood to be generally worthy of being trusted: When a man is found wanting in this he must expect to lose his reputation and standing with the press as well as in society, and imputation of such misconduct cannot be regarded as containing no cause of complaint. *Id.* at 641.

39 G. SELDES, FREEDOM OF THE PRESS 371 (1935), (Code of Ethics adopted by American Newspaper Guild 5); Note, *Privilege of Newspapermen to withhold sources of information from the court*, 45 YALE L.J. 357 (1935).

40 4 Hawaii Dist. Ct. 475 (1914). *See also* In re Grunow, 84 N.J.L. 235, 85 A. 1011 (1913).

41 *Id.* at 476.

The same argument was urged before the Florida Supreme Court where it was rejected in *Clein v. State*.[42] The language of *In Re Wayne* was quoted with approval by the Florida court.

b. Forfeiture of Estate Theory

In 1911 a reporter for the Augusta *Herald* refused to tell the Board of Police Commissioners of Augusta what member of the police department had given him information about a certain murder. The reporter was fined and imprisoned for contempt. Before the Supreme Court of Georgia he argued that to answer the question would "cause him the forfeiture of an estate, to wit, it would cause him to lose his means of earning a livelihood." The court summarily rejected the argument.[43]

A similar argument was advanced in *Wayne*[44] since the reporter could lose his position for a breach of professional ethics. Information for articles is frequently secured from informants. To reveal the informant in a particular instance would be to deter future informants, thus foregoing one source of a newspaper's raw material. However, the court in *Plunkett v. Hamilton*[45] did not accept this argument.

> A promise not to testify when so required is substantially a promise not to obey the law. Such promises cannot be recognized, save in subordination to the requirements of the law. Neither can the wishes, or even the commands of employers be allowed to outweigh the commands of the law. . . . To sustain such a doctrine would render courts impotent and the effort to administer justice oftentimes a mockery.[46]

In 1933 the Dauphin, Pennsylvania, County Court reached an opposite result. At that time Pennsylvania had no privilege statute for newsmen. Frank Toughill, a reporter for the Philadelphia *Record* declined in civil proceedings to reveal the source of a news story. He argued that he would be dismissed from his job should he comply with the court's order and the court permitted him to remain silent.[47] It must be noted that these proceedings were civil in nature and that

42 52 So.2d 117 (Fla. 1950).
43 Plunkett v. Hamilton, 136 Ga. 72, 81, 70 S.E. 781, 785 (1911).
44 *Supra*, note 40.
45 136 Ga. 72, 70 S.E. 781 (1911).
46 *Id.* at 84.
47 (Unreported) EDITOR & PUBLISHER 16 (Dec. 9, 1933). Pennsylvania subsequently adopted a privilege for newsmen on July 25, 1937. Pub. L. 2123 No. 433, § 1. Now 28 Penn. Stat. Ann. § 330, as amended Pub. L. 1669, § 1 (1959).

the next witness, an attorney, gave the desired information although only after being threatened with contempt.

c. Employer's Regulations

Related to the "forfeiture of estate" argument is the argument that the rules of the employer forbid the disclosure of the name of the informant. The latter argument necessarily precedes the former. The courts predictably have rejected this contention also. In *People ex rel. Phelps v. Fancher*,[48] a newspaper editor called as a witness before a grand jury refused to disclose the name of the author of an article on the ground that to do so would be to violate a regulation of the newspaper. The court stated:

> As the law now is, and has for ages existed no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it.[49]

d. Freedom of the Press

Probably the best articulated if not well-received argument is that the privilege against revealing confidential information is impliedly included in the freedom of the press as guaranteed by the First Amendment. The first case to assert this argument was *Garland v. Torre*.[50] Judy Garland brought an action against CBS for breach of contract and for allegedly false and defamatory statements about her which were supposedly made, according to the newspaper columnist Marie Torre, by a "network executive." In discovery proceedings the columnist refused to reveal the identity of the "network executive." The Federal District Court for the Southern District of New York entered an order holding the columnist in criminal contempt and was upheld on appeal by the Second Circuit Court of Appeals.

The columnist asserted that to compel newspaper reporters to disclose confidential sources of news would encroach upon the freedom of the press because it would impose an important practical restraint on the flow of information from news sources to news media and would thus diminish *pro tanto* the flow of news to the public. The court agreed that a restraint would indeed be imposed on freedom of the press but pointed out that no liberties are absolute. The court felt that the duty to testify is just as important as freedom of the

48 2 Hun 226 (N.Y. 1874).
49 *Id.* at 230.
50 259 F.2d 545 (2d Cir. 1958), *cert. den.* 358 U.S. 910 (1958).

press and that that duty will no doubt impinge upon the freedom. Judge Potter Stewart, Circuit Justice for the Second Circuit, speaking for the majority, remarked:

> [F]reedom of the press, precious and vital though it is to a free society, is not an absolute. What must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom.
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> * * *
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> If . . . freedom of the press is here involved we do not hesitate to conclude that it too must give place under the constitution to a paramount public interest in the fair administration of justice.[51]

In 1961, a similar argument was raised by *In Re Goodfader's Appeal*.[52] Plaintiff had instituted an action against the Honolulu Civil Service Commission seeking reinstatement as personnel director. The defendants took the deposition of a newspaper reporter who had been alerted to an attempt to fire the plaintiff. The reporter refused to reveal the source of his information. On an interlocutory appeal from an order compelling the reporter to reveal his source, he contended that the order was an abridgement of the First Amendment. The Supreme Court of Hawaii affirmed the lower court's order.

In its opinion, the court recognized that one of the primary purposes of the freedom of the press clause of the First Amendment is to preserve the right of the American people to full information concerning officials in order to guard against maladministration in government. However, the court concluded that none of the First Amendment freedoms and privileges are absolute. The determination of whether an asserted right under the amendment will prevail depends upon the particular circumstances involved and the balancing of the rights asserted. The court stated:

> We readily perceive the disadvantages to a news reporter where his desire to remain silent under a pledge of confidentiality is not accommodated, but we are unable to find, in any of the many decisions touching on the first amendment that we have been referred to and have considered, any basis for concluding that the denial of a claim under the news-

51 259 F.2d at 548-49. *See* 72 HARV. L. REV. 768 (1959). *See also* unreported case, Murphy v. Colorado, *cert. denied*, 365 U.S. 843 (1961).

52 45 Hawaii 317, 367 P.2d 472 (1961).

> man's code constitutes an impairment of constitutional rights.[53]

The most recent case to present this constitutional issue was the Oregon case of *State v. Buchanan*.[54] Annette Buchanan, a writer for a student newspaper, had promised seven persons who claimed to be marijuana users that if they permitted her to interview them for publication she would under no circumstances reveal their identity. Using fictitious names she reported the results of the interviews. The grand jury investigated the problem and Miss Buchanan refused to reveal the identity of the persons involved. On appeal of a contempt fine, she sought reversal on the ground that the constitutionally protected freedom of the press necessarily included the freedom to gather news. Since certain news stories cannot be obtained unless the reporter can promise anonymity to a confidential informant, she urged that a judicial order requiring disclosure abridges a protected freedom.

The court took a unique tack in refuting the reporter's argument. It reasoned that while the government at times extends to selected representatives of the news media privileges[55] (such as access to war zones and seats on presidential aircraft) not accorded to the general public, these privileges are not necessarily rights conferred by the Constitution solely upon those who can qualify as members of the press:

> Indeed, it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal privileges and equal protection concepts also found in the Constitution. Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing.[56]

Moreover, the court noted that to accord the privilege asserted by the reporter would be destructive of the very freedom sought to be preserved. The court stated that the history of our country revealed that the First Amendment requires the government to desist from regulation, licensing or approval of the credentials of those claiming

53 *Id.* at 327.

54 436 P.2d 729 (Ore. 1967). *See* Note and Comment, 46 ORE. L. REV., *supra* note 5.

55 The court said that those claiming to be news gatherers have no constitutional right to information which is not accessible to the public generally. *See* Matter of United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954); Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); Bromfield v. State, 108 So.2d 33 (Fla. 1958).

56 436 P.2d at 731.

to be authors and publishers.[57] If the government has the power to allow a privilege to a special class of "news gatherers" it has the power to limit that class. However, the court did refuse to hold that the Constitution forbids the legislative enactment of reasonable privileges to withhold evidence.

Generally, writers have agreed with the analysis of the *Buchanan* court.[58] But only a few cases have touched upon the First Amendment's protection of news gathering, as distinct from publication itself. These cases have uniformly upheld restrictions on photography within the vicinity of courtrooms and on the right of newspapermen to attend trials.[59] Courts have apparently regarded news gathering in general as protected by the First Amendment, but have sustained these particular restraints as reasonable measures for the protection of weightier public interests.[60]

e. Self-incrimination

In *Burdick v. United States*,[61] the city editor of the New York *Times* was called before a federal grand jury to reveal his sources for an article written on customs frauds. He refused to answer on the ground that a response would tend to incriminate him. President Wilson offered him a full pardon which he refused. The Federal District Court held him in contempt.[62] Speaking for the majority, Judge Learned Hand said:

57 The court took special note of the licensing acts, which prevailed in England during most of the period from Charles I to William and said:

> And forasmuch as great inconvenience may arise by the liberty of printing within our said territory under your government you are to provide by all necessary orders that no person keep any printing press for printing, nor that any book, pamphlet or other matter whasoever be printed without your especial leave and license first obtained. C. Duniway, *The Development of Freedom of the Press in Massachusetts* 65 (1906).

58 State v. Buchanan, 436 P.2d 729 at 731 (Ore. 1967). *See, e.g.*, 8 JOURNAL PUB. L. 596 (1959), concluding that there is no constitutionally protected right to gather news. *But see* W. O. DOUGLAS, THE RIGHT OF THE PEOPLE 81 (1958); M. R. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE 192-93 (1957) stating that the "First Amendment provides for freedom to acquire the news as well as to distribute the news."

59 Tribune Review Publishing Co. v. Thomas, 254 F.2d 883 (3d Cir. 1958); State v. Clifford, 162 Ohio St. 370, 123 N.E.2d 8 (1954); United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

60 *See also* Associated Press v. Kuos, Inc., 80 F.2d 575 (9th Cir. 1935), *rev'd on juris. grounds*, 299 U.S. 269 (1936); Brannan v. State, 29 So.2d 916 (Miss. 1947); Lyles v. State, 330 P. 2d 734 (Okla. Crim. App. 1958). All these cases support the view that news gathering is constitutionally protected.

61 236 U.S. 79 (1915).

62 211 F.492 (S.D.N.Y. 1914).

> If he obstinately refuses to accept it (the pardon), it would be preposterous to let him keep on suppressing the truth on the theory that it might injure him. Legal institutions are built on human needs and are not merely arenas for the exercise of scholastic ingenuity.[63]

However, the Supreme Court of the United States held that he did not have to accept the pardon and sustained his original defense.[64]

The only other case where this defense has been raised was *Joslyn v. People*.[65] In that case the defendant's attorney urged that to answer the question as to the source of his information might tend to incriminate him. Rather than rely on the Fifth Amendment, Joslyn elected to refuse to answer on the ground that the matter was "private, confidential, and personal business." Neither of the arguments was accepted by the court.

f. Relevancy

The final method by which reporters have sought to escape revealing confidential sources of information is the assertion that the information is irrelevant or immaterial to the proceedings. In *Rosenberg v. Carroll*,[66] for example, Rosenberg sought to obtain from a newspaper reporter the source of information printed in his column to the effect that the court had the right to alter the death sentence imposed on Mrs. Rosenberg for treason. The columnist asserted that Mrs. Rosenberg's fate was in her own hands since she could save herself by cooperating with the authorities. The court held the information in the column was merely a restatement of the Federal Rules of Criminal Procedure. Therefore, neither the information nor its source was relevant to the main proceeding and the reporter was not compelled to answer.

In *Brewster v. Boston Herald-Traveler Corp.*,[67] the Federal District Court for the District of Massachusetts held that even though the identity of a writer of a memorandum which prompted an editorial might not be admissible in a libel action, it was nevertheless relevant since it would have some bearing on the case and might lead to some admissible evidence on the issue of malice. Thus the court in *Brewster*

63 *Id.* at 494.
64 Burdick v. United States, 236 U.S. 79 (1915).
65 67 Colo. 297, 184 P. 375 (1919).
66 99 F.Supp. 629 (S.D.N.Y. 1951).
67 20 F.R.D. 416 (D. Mass. 1957).

held that the information to be secured need not go to the heart of the plaintiff's case, but must merely have some bearing on it.

A seemingly contrary view was suggested by the court in *Garland v. Torre*.[68] In that case the court implied that the First Amendment might properly apply to protect news sources where an attempt is made to compel a wholesale disclosure on matters of doubtful relevance and materiality. The court apparently felt that a similar situation was presented by *NAACP v. Alabama ex rel Patterson*[69] where the Supreme Court of the United States upheld the right of an organization not to disclose a membership list which it felt lacked a substantial bearing upon the issues in the case. In the *NAACP* case the court reasoned that the state had not shown a "controlling justification for disclosure sufficient to outweigh a possible deterrent effect on the freedom of assembly."[70] The *Torre* court considered the analogy to have merit.

However, the court in *In Re Goodfader's Appeal*[71] rejected the analysis of the *Torre* court and felt that the inquiry need not go to the "heart of plaintiff's case" in order to be of such importance as to compel disclosure of the source:

> There, of course, can be no assurance that if plaintiff is permitted to pursue her inquiry she will obtain from deponent's answers the identity of anyone who can substantiate the basic point of her alleged case. But that is not the criterion to be applied. [T]he inquiry desired to be made by plaintiff in this case could be considered likely enough to lead to the discovery of sufficiently important admissible evidence . . . .[72]

3. Congressional Acceptance of News Media Confidential Source

As previously mentioned,[73] early in American history the United States Congress became unsympathetic to the news media's asserted privilege. More recently, however, Congress has demonstrated a reluctance to punish reporters claiming the confidential privilege. This might be accounted for by the increased recognition by elected officials

68 259 F.2d 545 (2d Cir. 1958), *cert. den.* 358 U.S. 910 (1958).
69 357 U.S. 449 (1958).
70 *Id.* at 466.
71 367 P.2d 472 (Hawaii 1961).
72 *Id.* at 484.
73 *See* notes 22, 23, and 24, *supra*, and accompanying text.

of the powerful influence of the media and may be a pragmatic decision to maintain cordial relations with the press.

During World War II the Akron *Beacon-Journal* reported that union seamen had refused to unload vital cargo on Guadalcanal on Sunday because of union rules. Reprints of the article appeared in various papers throughout the country. City Editor Charles C. Miller of the *Beacon-Journal* was called before a subcommittee of the House Committee on Naval Affairs. He was unwilling to furnish the names of Marine veterans who had supplied the information for the story.[74] Remarkably, the committee said:

> It would have been helpful had the paper seen fit to submit to us these names, which we assured the publisher would be kept in confidence so as to minimize the possibility of military recrimination. We are aware, however, of the customary practice of newspapers in not revealing the sources of such stories.[75]

Two years later, in May of 1945, the House Veterans Committee sought to compel one Albert Deutsch of *PM*, a New York magazine, to divulge the names of certain Veterans Administration officials who had given him information for stories criticizing medical programs.[76] Deutsch told the committee that professional ethics made it impossible for him to answer. He refused to disclose the sources and the committee cited him for contempt. Criticizing the committee, Representative O'Toole of New York stated that "To compel a member of the newspaper profession to expose the source of his information would, in many instances, revolt against the public good."[77] Perhaps influenced by the great public interest aroused by this case,[78] the committee reversed itself by a vote of 13 to 2.[79]

III. Statutory Resolution of the Problem

Whether the arguments raised in various courts in defense of the jounalist's privilege were based on ethics, forfeiture of estate, or

74 *Hearing before House Subcommittee of Committee on Naval Affairs*, 78th Cong., 1st Sess., No. 30, at 197 (1943). *See also* Steigleman, *Newspaper Confidence Laws*, Journalism Q. 236 (Sept. 1942).

75 Steigleman, *supra*, note 61 at 236.

76 *Hearing before House Committee on W. W. Veteran's Legislation*, 79th Cong. 1st Sess., pt. 1, at 165, 171, 173, 179, 182, 183, 342 (1945).

77 91 Cong. Rec. 4847, 4849, A 2554 (1945).

78 N. Y. Times, May 17, 1945, at 8, col. 4,; May 23, 1945, at 17, col. 6; May 24, 1945, at 20, col. 2.

79 N. Y. Times, May 30, 1945, at 17, col. 1.

freedom of the press, the courts have consistently refused to place a greater value on this interest than on the public interest in obtaining "every man's evidence." Thus, the courts left it for the legislatures to provide any exception that might be made for the news media. Fourteen state legislatures over the past seventy-two years have done so,[80] although a number of legislatures have defeated proposals creating the journalist's privilege.[81]

Legislative acceptance of the importance of the privilege for newsmen has grown despite authoritative opposition. The earliest statute enacted in Maryland in 1896 drew the biting criticism from one commentator that: "The following enactment, as detestable in substance as it is in form, will probably remain unique."[82] It has not.

Those who have attacked the statutes have generally asserted one or more of four arguments:[83] (1) the statute hinders the search for truth; (2) even without legislative sanction reporters have generally refused to reveal their sources of information; (3) those persons who now have a statutory privilege (accountants, attorneys, priests, psychologists, doctors) are more carefully screened by society than are news media personnel;[84] and (4) the necessary terms cannot be so constructed in statutory form so as to be effectively used.

With regard to the first argument, those who favor the enactment of this type of legislation have generally contended that even though

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80 ALA. CODE, Tit. 7, § 370 (1958); ARIZ. REV. STAT. ANN. § 12-2237 (Supp. 1966); ARK. STAT. ANN. §43-917 (1964); CAL. EVIDENCE CODE § 1070 (1966); IND. ANN. STAT. § 2-1733 (Conn. Supp. 1966); KY. REV. STAT. § 421.100 (1963); LA. REV. STAT. §§ 45:1451 to 45:1454 (Supp. 1965); MD. CODE ANN. art. 35, § 2 (1965); MICH. STAT. ANN. § 28.945(1), C.L. Mich. 1948 § 769.58 [P.A. 1951, No. 276] (1954); MONT. REV. CODE § 93-601-1, 93-601-2 (1964); N.J. STAT. ANN. § 92A:84 A-21, 2A: 84A-29 (Supp. 1966); N.M. STAT. ANN. § 20-1-12.1 (1953, Supp. 1967); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Supp. 1966); PA. STAT. ANN. Tit., § 330 (Supp. 1965).

81 *See* Note, 36 VA. L. REV., *supra* note 5. *See also* R. W. JONES, THE LAW OF JOURNALISM 375 (1940) for a list of states which have attemped to pass statutes.

82 J. H. WIGMORE, EVIDENCE § 2286 n.7 (2d ed. 1923).

83 *See* Note and Comment, 46 ORE. L. REV., *supra* note 5.

84 The implication is that accountants, attorneys, priests, psychologists and doctors can be better trusted to exercise their "shield" for the public good than can newsmen. See the statement of the American Bar Association Committee on the Development of the Law of Evidence in 1937-38:

> The demand for these privileges seems to have been due, in part to a pride in their organization, and a desire to give it some mark of professional status, and in part to the invocation of a false analogy to the long-established privileges for certain professional communications.

The report concluded: "The correct teaching would be rather to cut down the scope of the existing privileges, instead of creating new ones."

the privilege hinders the "search for truth," the greater public interest is in protecting the source in order to invite the type of information that can only be secured confidentially. Indeed, the other privileges allowed by court decision or statute also hinder the collection of evidence, but their existence reveals society's interest in other, more dominant, values.

Secondly, the fact that newsmen rarely reveal sources even in the face of imprisonment further points up that the mechanisms used now are ineffective. While the statute would certainly not produce confidential sources more effectively than at the present, by the same reasoning it would not be detrimental. A statute granting such a privilege would be a declaration of public approval of confidential sources.

Thirdly, the privilege to be secured for newsmen is unique and different from that recognized in other professions. In all other privileges, it is the "communication" which is privileged. In the case of the newsman, it is the "source" of that communication that is meant to be kept confidential. Moreover, it is not because the other professions have greater screening procedures that the privilege is recognized. (Indeed, with ministers and priests who have a privilege in many states, there is almost no screening by government nor could there be such control without serious constitutional questions being raised.) Rather, it is because of two factors: confidentiality is essential to the maintenance of the relationship between informant and informed, and the prospective injury to that relationship from the forced disclosure outweighs the consequent benefit to the public in ascertainment of the truth. It is submitted that these factors apply equally to the situation of the news media.

The argument that the terms are difficult to incorporate into statutory form is put forward by the American Civil Liberties Union.[85] However, this is directed more toward the inexperience of the legislatures in dealing with the problem which results in poor draftsmanship than with any inherent weakness in the concept.

The remainder of the article is designed to present the various legislative approaches to the privileged news source and the inevitable problems.

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85 N. Y. Times, March 18, 1959, at 75, col. 3.

A. General Characteristics

The statutes enacted in the various states[86] generally protect the confidential sources of persons connected with, engaged on, or employed by specified news media. All of the fourteen states which have enacted this type of legislation confer a privilege for the confidential sources of newspapers, yet only three have attempted to define the term "newspaper." Of the three, Indiana has the most comprehensive and restrictive definition, while most of the other states merely define it as being disseminated "at regular intervals and having a paid general circulation." Three states apply the privilege also to other periodicals, seven to press associations, six to radio stations, and ten to television stations.

Generally, the persons covered by the privilege may assert it at any judicial, legislative, or administrative proceeding. In twelve of the fourteen states having the privilege it is absolute. At no time and under no circumstances can the newsman be compelled to reveal his source of information. Conversely, two states allow the person to assert the privilege unless disclosure "would be in the public interest." Only Louisiana, however, has attempted to establish mechanics for revoking the privilege. Finally, six states require the information to have been published before the person may assert the privilege.

The chart which appears below compares the pertinent provisions of the statutes of the various states which have enacted confidiential news source legislation:

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86 A number of proposed federal statutes have been introduced in Congress. *See* S. RES. 965, 86th Cong. 1st Sess. (1959):

> "(2) A person engaged or employed in the work of gathering, compiling, editing, publishing, disseminating, broadcasting or televising news shall not be required in any court of the U.S. to disclose the source of information procured by him for such publication, broadcasting, or televising unless such disclosure is necessary in the interest of national security."

H. R. 355, 86th Cong. 1st Sess. (1959) provided in part:

> "A witness who is employed by a newspaper, news source, newspaper syndicate, periodical, or radio or television station or network, or an author, reporter, correspondent, or commentator or in any other capacity directly involved in the gathering or presentation of news, shall not be required in any court of the United States to disclose the source of any information obtained in such capacity unless in the opinion of the court, such disclosure is necessary in the interests of national security."

All attempts to create a federal privilege have failed.

TABLE 1: CONFIDENTIAL NEWS SOURCE LEGISLATION BY STATE

STATE	YEAR ENACTED	PERSONS COVERED	MEDIA INCLUDED	ABSOLUTE	QUALIFIED	WHERE ASSERTED	WHAT COVERED	PUBLICATION REQUIRED
Alabama	1935	Engaged, employed, connected with newspaper, radio or television	Newspaper, radio, television	Yes		Anywhere	Source	Yes
Arizona	1937	Engaged in newspaper, radio or television reportorial work	Newspaper, radio, television	Yes		Anywhere	Source	Yes
Arkansas	1936	Editor, reporter, writer for any newspaper, or periodical or radio station or publisher of any newspaper or periodical or manager or owner of any radio station	Newspaper, periodical, radio	No	Must have written, published, or broadcast in good faith, without malice, and in the public interest		Source	
California	1965	Publisher, editor, or other person connected with or employed	Newspaper, press association, wire service, radio, television	Yes		Anywhere (*cannot be adjudged in contempt)	Source	Yes
Indiana	1941	Any person connected with; bonafide owner, editorial or reportorial employee who receives principal income from legitimate gathering, writing, editing, and in-	Weekly, semi-weekly, tri-weekly, daily newspaper which shall have been published	Yes		Anywhere	Source	No

STATE	YEAR ENACTED	PERSONS COVERED	MEDIA INCLUDED	ABSOLUTE	QUALIFIED	WHERE ASSERTED	WHAT COVERED	PUBLICATION REQUIRED
		terpretation of news. Any person connected with commercially licensed radio or television station as owner, official or as an editorial or reportorial employee who receives principal income from gathering, writing, editing, interpreting, announcing or broadcasting news	for 5 consecutive years and which has a paid circulation of 2% of the population in which it published; Press assoc., commercially licensed radio or television					
Kentucky	1936	Any person engaged, connected, employed	Newspaper, radio, television	Yes		Anywhere	Source	Yes
Maryland	1896	Any person engaged, connected, employed	Newspaper, journal, radio, television			Anywhere	Source	Yes
Louisiana	1964	Reporter (one regularly engaged in collecting, writing, editing news for publication)	Newspaper, periodical (issued at regular intervals and having paid general circulation)	No	Can be revoked in the public interest upon application	Anywhere	Source or identity of any informant	No

STATE	YEAR ENACTED	PERSONS COVERED	MEDIA INCLUDED	ABSOLUTE	QUALIFIED	WHERE ASSERTED	WHAT COVERED	PUBLICATION REQUIRED
			Press assoc. wire service radio, television, news reels					
Michigan	1949	Reporters	Newspaper or other periodical	Yes		Only criminal investigations	Source	No
Montana	1943	Person engaged, connected, or employed for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, broadcasting, televising news	Newspaper, press assoc. radio or television	Yes		Anywhere	Source	No
New Jersey	1933	Engaged, connected with, or employed by	Newspaper	Yes		Anywhere	Source, author means, agency or persons from or through whom any information was procured, supplied obtained, furnished or delivered	Yes
New Mexico	1967	Reporter (one regularly engaged in collecting, writing, or editing news)	Newspaper, periodical issued at	No	Disclosure required when essen-	Anywhere	Source	No

STATE	YEAR ENACTED	PERSONS COVERED	MEDIA INCLUDED	ABSOLUTE	QUALIFIED	WHERE ASSERTED	WHAT COVERED	PUBLICATION REQUIRED
			regular intervals and having a paid general circulation; press assoc., wire service, radio station, television station		tial to prevent injustice			
Ohio	1941	Person engaged in work of, connected with, employed by; in order to gather, procure, disseminate, publish, compile, edit news	Newspaper, press assoc.	Yes		Anywhere	Source	No
Pennsylvania	1937	Engaged in, connected with, employed by; in order to gather, procure, compile, edit, publish news	Newspaper of general circulation, press assoc., radio or television	Yes	Radio or television must keep transcription or recording of broadcast	Anywhere	Source	No

B. Application of the Statutes

1. Generally

The case of Hamilton Owens, an editor of the Baltimore *Evening Sun* was probably the earliest application of a privileged source statute. In that case a Maryland Circuit Court sustained the contention that under the Maryland statute of 1896, the reporter was privileged to refrain from disclosing to a grand jury the name of the author of a letter written to his newspaper.[87]

In *Ex Parte Sparrow*,[88] the Federal District Court for Alabama considered a motion by the plaintiff in a civil action for libel to compel a newspaperman to disclose sources of information. Construing Rule 26 of the Federal Rules of Civil Procedure[89] which provides that a deponent may not be examined regarding anything "privileged," the court held that under the Alabama statute, the sources were "privileged" within the meaning of the Federal rule. Moreover, the court rejected the argument that the statute was unconstitutional as repugnant to the Fourteenth Amendment.

2. Definition of News Media

The California statute was construed by a federal court in 1964,[90] in a libel action in which the sources of information of a writer for *Look* Magazine were sought to be uncovered. The court in applying California law[91] asserted that since the statute was in derogation of the common law, it must be strictly construed. Furthermore, the court noted that the California statute used the term "newspaper" instead of "periodical," and found some support for the exclusion of a magazine from the shield of the statute. The court reasoned that this omission was designed by the legislature to point up the essential difference between newspapers and magazines. Both newspapers and radio stations have the function of disseminating news. The speed of dissemination which is necessary and expected by the public precluded a minute verification of news material. On the other hand, magazines published on a weekly or monthly basis do not have the same sense

87 N. Y. Times, May 12, 1925, at 23, col. 3.
88 14 F.R.D. 351 (D. Ala. 1953).
89 28 U.S.C. 286ff.
90 Cepeda v. Cohane, 233 F.Supp. 465 (S.D.N.Y. 1964).
91 The California statute, rather than granting a blanket privilege, merely grants an exemption from contempt of court. *See* CALIFORNIA EVIDENCE CODE ANN. § 1070 (1966).

of immediacy to provide the news "while it is new," and can therefore check more carefully for errors. The court accordingly held that the deponent should be required to reveal his sources since he was a reporter for a magazine rather than a newspaper.

A similar construction of the Ohio statute was made in *Deltec, Inc. v. Dun & Bradstreet, Inc.*[92] The defendant published a bi-monthly report which was distributed to its subscribers throughout the United States. It contained condensed information concerning the financial status of individuals, firms and corporations. The defendant refused to reveal the source of his information. Holding that the defendant was excluded from the coverage of the statute, the court stated:

> We cannot, under these circumstances, stretch the meaning of 'newspaper or any press association' to include the defendant, and the very fact that the legislature chose these nouns indicates to us that it realized the ultimate and necessary effect of its language.[93]

3. Definition of Source

The Pennsylvania statute was construed recently by the court in *In Re Taylor*.[94] In November, 1962, an investigating grand jury in Philadelphia began to inquire into alleged criminal activity in the city government. The Philadelphia *Evening and Sunday Bulletin* published an article on the interrogation of John Fitzpatrick by the Philadelphia District Attorney. As a result, a subpoena was served on the general manager and city editor of the *Bulletin* requiring disclosure of all material relating to Fitzpatrick's information. Relying on the Pennsylvania privileged source statute, the newsmen refused to divulge the substance of the information. The court found them guilty of contempt. On appeal the court held that the phrase "source of information" as used in the statutes includes not only the identity of a person, but also the information itself — in this case memoranda and tape recordings. Furthermore, the court held the appellants had not waived the statutory privilege by disclosure of the informant's name or part of his information because waiver applies only to statements by an informant that are actually published or publicly disclosed.

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92 187 F.Supp. 788 (N.D. Ohio 1960).
93 *Id.* at 790.
94 412 Pa. 32, 193 A.2d 181 (1963).

The result obtained by the court has been criticized in a strong dissenting opinion and by academic commentators. The dissenting judge stated:

> This 'liberal' construction of the Act of 1937 results in a complete distortion of the legislative purpose of encouraging the flow of news; newsmen now have a license to prevent news from ever reaching the public — including that which would expose corruption in government — although the informant's identity is disclosed and he himself desires that the information be made public.[95]

A student commentator commented:

> The circumstances leading up to the adoption of the privilege suggest that the legislature was dealing only with "source" in the narrow sense. . . .
>
> [T]he statutory purpose, viewed in light of the narrow problem confronting the legislature, would seem to require privileging the substance of information only where such disclosure would inferentially reveal the informant's identity.[96]

A similar constructional problem was involved in *State v. Donovan*,[97] which applied the New Jersey statute. Relying on the statute, several editors refused to reveal who physically conveyed the information to them even though the source of the information had been disclosed. The appellate court ordered the editors to answer the questions posed, stating, "no reason, legitimate to the legislative intent, appears why the vehicle of transmission should not be revealed."[98] The New Jersey Legislature apparently disagreed with the public policy represented by this decision, because it amended the statute to include not only the source, but also the "author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished, or delivered."[99]

4. Waiver of Privilege

In 1950 the Supreme Court of New Jersey was faced with another construction problem. In *Brogan v. Passaic Daily News*,[100] an editor

95 In re Taylor, 412 Pa. 32, 40, 193 A.2d 181, 184 (1963).
96 77 HARV. L. REV. 556 (1963).
97 129 N.J.L. 478, 30 A.2d 421 (1943).
98 *Id.* at 487.
99 N.J. STAT. ANN. § 2A:84A-21 (Supp. 1966).
100 22 N.J. 139, 123 A.2d 473 (1956).

who wrote an allegedly libelous article testified that it was based on information from a "reliable source." He later revealed some of his sources. The court held that he had waived the privilege by testifying that he had received his information from a "reliable source" and by disclosing some of his sources:

> [A] newspaper ought not to be able to give and take what it chooses when its own acts bring into question a liability on its part to others. If permitted to do as the defendant has here, the newspaper could give whatever information was favorable to its position and then plead the privilege to prevent any disclosure of the detrimental facts.[101]

The New Jersey Superior Court in *Beechcroft v. Point Pleasant Publishing Co.*[102] held that in an action for libel the newspaper had waived its privilege and must disclose its source if it pleads fair comment and good faith and that its information came from a "reliable source."

In *In Re Howard*[103] a reporter was called as a witness in a labor dispute and testified that he had written a newspaper story about the dispute which included quotations from a union official. When he was asked if he had had a conversation with a specific official, the reporter invoked the privilege of the statute and refused to answer. The lower court held that the reporter had waived the privilege because the article contained the source of the information. On appeal, the California District Court of Appeal held that the news story had not necessarily disclosed the source of the information simply because parts of it were set out in quotes. This did not mean that the statement attributed to the union official had been made directly to the reporter.

C. Drafting Problems

In addition to the problems in the application of the statutes discussed above, a number of other problems must also be faced by state legislatures which contemplate enacting this type of legislation. Among these are: (1) the constitutionality of a classification based on the definition of the term "newspaper;" (2) the scope of employment; (3) the media to be covered; (4) the necessity for publication of the information the source of which is sought to be privileged;

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101 *Id.* at 152.
102 82 N.J. Super. 269, 197 A.2d 416 (1964).
103 136 Cal. App.2d 816, 289 P.2d 537 (1955).

(5) the definition of the term "source;" (6) the type of qualification necessary for an acceptable statute.

1. Minimum Circulation Requirements

Most of the state statutes involved make no attempt to define the term "newspaper." However, Indiana extends the coverage of the privilege to:

> Any person connected with a weekly, semi-weekly, tri-weekly, or daily newspaper that conforms to postal regulations, which shall have been published for five consecutive years in the same city or town and which has a paid circulation of two percent of the population of the county in which it is published.[104]

One commentator has asserted that the provisions requiring a minimum period of publication and a minimum circulation may be repugnant to the equal protection clause of both the Federal and State constitutions on the basis of arbitrary classification.[105]

The guaranty of the Fourteenth Amendment is that all persons similarly situated must be dealt with and treated on an equal basis. However, this guaranty does not mean that legislation must operate equally on all persons, since all persons may not be similarly situated. A state may classify persons, transactions, or objects according to their peculiar circumstances as long as the classification is reasonable and not arbitrary,[106] but the classification must be based on real and not feigned differences, the reasons for which are sound, viable, and related to the purpose thereof. As the United States Supreme Court stated in *McLaughlin v. Florida*:[107]

> [J]udicial inquiry does not end with showing equal protection among the members of the group classified. It must determine also whether the classification is reasonable in light of its purpose.[108]

The designation made by the Indiana Legislature appears to be unreasonable and arbitrary. Why exclude a four year old bi-weekly paper with a paid circulation of 1 3/4 percent of the population? In a county with over a million people certainly this percentage rep-

104 IND. ANN. STAT. § 2-1733 (Supp. 1964).
105 17 IND. L.J. 162 (1941).
106 Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Safeway Stores, Inc. v. Oklahoma Rental Grocers Assoc., 360 U.S. 334 (1959).
107 379 U.S. 184, 191 (1964).
108 *Id.* at 191.

resents a large public reached by the newspaper. Furthermore, the paper described may be engaged in the very type of news investigation that the statute was designed to foster. Is it any less of a watchdog for the public simply because it is less well established, or because it may in fact be unpopular? The legislative rationale does not seem reasonably related to the purpose of the statute. It is submitted that a more reasonable approach would be that taken by a number of states, to simply modify the term "newspaper" with the phrase "paid general circulation."

2. Scope of Employment

All the states having the privilege except Michigan and Pennsylvania declare that the privilege shall be afforded to those sources procured by the person designated within the period of his employment and within the scope of his employment.[109] The purpose of the statute, which is to encourage the type of information secured from secret informants, is not served when it is applied to communications received outside the scope of employment. It is submitted that the Michigan and Pennsylvania statutes are in that regard poorly drafted in the light of legislative purpose.

3. Media Covered

As previously noted, all the statutes cover newspapers. To a lesser degree press associations, other periodicals, television, and radio stations are included, but each of these forms of mass communication are involved daily in the type of investigation and publication which should be protected by the statutes. The television and radio stations are in instant contact with millions of Americans. If the confidential sources are worth protecting, the privilege should certainly be extended to all forms of mass madia.

4. Publication Requirement

A number of states do not require publication in order for the person covered to claim the privilege. Some may argue that this contradicts the intent of the legislature since the interest to be protected is that in the disseminated information and therefore the public interest is not involved until the information is actually published. It is submitted, however, that to require publication as a necessary condition precedent to the protection of the statute would fail to give

109 *See* note 67 *supra.*

enough protection to the source and without such protection, the potential sources will not feel free to make disclosures.

5. Definition of "Source"

In *In Re Taylor*,[110] the Pennsylvania Supreme Court held that the term "source" meant not only the identity of the actual person involved, but also "includes documents, inanimate objects, and all sources of information." Conversely, the New Jersey court in *State v. Donovan*[111] reached the opposite result by including in the scope of the privilege only the identity of the person and not the mechanics of the delivery of the information. This result seems clearly erroneous. If the encouragement is to be made, then all the information regarding the source should be confidential, including the "author, means, method of delivery, agency." Apparently, this cannot be assumed to be included in the term "source" and therefore must be clearly defined.

6. Qualified Privilege

In 1949 the New York Law Revision Commission reported out its recommendation for a privilege source statute:

> After weighing the conflicting interests involved, the Commission has unanimously concluded (1) that an unconditional privilege should not, in the public interest, be granted to newsmen to refuse to divulge the sources of information on which news stories are based; (2) that a privilege, with safeguards essential to the protection of the public interest, may safely be granted.[112]

Thus, the question is whether a person should be empowered to refuse to disclose the identity of an informant at all times and under all conditions and circumstances or whether the privilege should be qualified, and if so, how. Society has resolved this in favor of an absolute privilege in the case of the attorney-client relationship and other so-called "absolute privileges." It remains to be determined whether there are events, circumstances, and conditions which in the public interest must necessitate the revelation of a confidential source by a journalist.

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110 412 Pa. 32, 193 A.2d 181 (1963).
111 129 N.J.L. 478, 30 A.2d 421 (1943).
112 NEW YORK LAW REVISION COMMISSION REPORT, RECOMMENDATIONS, AND STUDIES, 25-28-29 (1949).

Some authors have drawn an analogy to the rights of an accused in a criminal proceeding. There the traditional privilege of a law enforcement officer to withhold the identity of an informer must give way when the defendant would not be afforded a fair trial as guaranteed under the due process clause of the constitution.[113]. This analogy may be sufficiently close to the news media privilege:

> The degree to which the journalist's refusal to disclose the sources hampers an investigation or legal proceeding should be a material consideration. If the refusal to disclose the sources causes nothing more than an inconvenience, the argument that the due administration of justice is impaired is not too overpowering. But, where the refusal effectively stifles the particular proceeding, the same argument would override any claim of public benefit which may support the privilege claim.[114]

A valid distinction, therefore, may exist as to the weight of the public interest depending upon the nature of the particular case involved. For example, the interest of the public may be greater in a criminal prosecution involving a major crime than for a minor crime, or in a civil libel suit.

Thus, the presiding judicial tribunal would most probably be the best forum upon which to rest the determination of whether the public interest is great enough to override the newsman's privilege.[115] Two considerations may be involved. First, the public interest would override the privilege when the revelation of the information itself violates public policy. In this class would fall state secrets or secret proceedings. Journalist contempt cases have arisen upon both these particular fact situations and the testimonial privilege was denied. In *In Re Nugent*,[116] the reporter revealed foreign treaties which were at the time under consideration by the Senate in executive session.

113 *See* 32 TEMPLE L.Q. 432 at 443 (1959).

114 Note, 35 NEB. L. REV., *supra* note 5, at 575.

115 *See* 8 BUFFALO L. REV., *supra* note 5, at 297:

> The social interests in a free press would vary depending upon the type of news reported and what it was intended to accomplish. Furthermore, it is submitted that valid distinctions exist as to the weight to be given the interests of society in the administration of justice depending upon the nature of the particular case involved; that is to say, the interests of society may be greater in a criminal prosecution involving a major crime than they would be for a minor offense, and social interest in a civil suit may be greater if damages could only be recovered from the informant and not from the reporter.

116 18 F.Cas. 471 (No. 10,375) (C.C.D.D. 1848).

In Re Wayne [117] involved the revelation of secret grand jury proceedings. Secondly, when the information is in fact false, this would override the newsman's privilege. However, the problem here is that many times it will be essential to know whether the disclosure of the newsman's confidential sources will be necessary to determine the truth of his published statements.

Other criteria to be considered may be: the nature of the proceeding, the merits of the claim or defense, the adequacy of the remedy otherwise available, the relevancy of the source, and the possibility of establishing by other means that which the source is offered as tending to prove.

No fine lines can be drawn for a perfect compromise and any conditional privilege statute must rest, finally, on competent judicial administration.[118] However, it is submitted that reasonable criteria can be included in a statute which would generally guide a court in the proper weight to be given to the various conflicting public interests.[119]

It seems clear to this writer that the best approach to this problem is the uniform adoption of a qualified, rather than an absolute privilege for the news media. A universal exemption robs the public of essential information when resort can only be made to the newsman's source. In these situations, which will undoubtedly be rare, the competing policy interests are weighted toward disclosure. On the other hand, in many other situations disclosure of the newsman's source is merely convenient. It is at this point that the public interest in protecting confiidential communications assumes a more dominant position. The benefit to be attained is the encouragement of informers who, through the influence of the news media, have served the American people well.

117 4 Hawaii Dist. Ct. 475 (1914).

118 *See* Semeta, *supra* note 3, at 322:

> "Judicial tribunals are the jealous guardians of our rights and freedoms; thus it should be left in their sound discretion to determine whether a nondisclosure of a 'source' would prevent access to facts necessary for the correct disposal of the case."

119 One author, while disagreeing with the need for confidence statutes nevertheless says:

> Conceding that situations may from time to time arise in which the public interest would be best subserved by permitting the newsman to remain silent, still legislation is not the proper method of achieving the desired result. It must be for the presiding official of each forum where a newsman may appear to reach the just result in a particular instance by a judicial exercise of the discretionary powers to treat a witness in contempt.

Note, 36 VA. L. REV., *supra* note 5, at 83.

HARVARD JOURNAL ON LEGISLATION

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AN ACT TO PROTECT CONFIDENTIAL SOURCES OF NEWS MEDIA

Providing that employees of news-gathering media cannot be compelled to disclose the source of news or information unless disclosure is essential to the public interest

SECTION 1: *Conditional Privilege to News Media*

No person engaged in the work of gathering, writing, publishing, or disseminating news for any newspaper, periodical, newsreel, press association, wire service or radio or television station, shall be compelled by any judicial, legislative, or administrative body to disclose the source of any information procured or obtained by him while so engaged, except as provided in Section 3.

SECTION 2: *Definitions*

For the purposes of this act, "source" is defined as the person or means from or through which the information was obtained. It shall not be construed to include the information itself unless the person or means from or through which the information was obtained could be inferred from its disclosure.

SECTION 3: *Procedure for Divestiture of Privilege*

In any case where a person claims the privilege conferred by this statute, the body, officer, person, or party seeking the information may apply to the (superior, county, or district) court for an order divesting the person of the privilege. Such application shall be made to the_____court in the (county or district) where the hearing, action, or proceeding in which the information is sought is pending. Where the privilege has been invoked in a proceeding before that court, the application shall be made to any other_____court. The order shall be granted only if the court, after hearing the parties, shall find either (a) that the information gained by such person concerned matters, or the details of any proceeding, required to be kept secret under the laws of this state or of the federal government, or (b) that all other available sources of information have been exhausted and disclosure is essential to the protection of the public interest. Any such order shall be appealable as provided by (appellate procedure statute).

COMMENT*

Whether a testimonial privilege similar to that granted to spouses, lawyers, and law enforcement officers ought to be allowed to journalists in protecting their confidential sources is an issue that generally receives attention as a result of a particular well-publicized incident.[1] Eleven states among the fourteen with privilege statutes grant an unconditional privilege to newsmen to refuse to divulge the sources of information on which news stories are based.[2] These statutes have been criticized for failing to provide adequate safeguards to protect the public interest in the due administration of justice and as contrary to the general duty of every citizen to testify. Thus, if a journalist can bring himself within the mechanical confines of the statute, he may refuse to disclose his source no matter how great a barrier he is raising in the path of legal proceedings.

On the other hand, the judicial view has been that, absent statute, there is no such privilege, and this rule has been broadly stated with apparently no room for exception even in those cases in which policy factors might weigh in favor of the journalist. In these latter jurisdictions, moreover, the cases illustrate that newsmen almost unswervingly adhere to their canon of ethics forbidding disclosure of confidential sources.[3] The reason is apparent: if informants feel that newsmen cannot be trusted to protect a confidence, then valuable sources of information will be closed to news-gathering media. In the main, the use of contempt proceedings has not proved successful in bringing forth disclosure of the source. The administration of certain proceedings has been inconvenienced or hampered in varying degrees, newsmen have been jailed for short periods, and the press has emotionally claimed another martyr, but the source remains protected.

The proposed bill is based upon a recognition that in appropriate circumstances the public benefits more from protecting the journalist-

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*For a more detailed review of judicial and legislative action in this area, see, in this issue, T. D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969).

1 *See, e.g.*, State v. Buchanan, 436 P.2d 729 (Ore. 1967); Garland v. Torre, 259 F.2d 545 (2nd Cir. 1958).

2 Louisiana alone of the fourteen states with privilege statutes provides an explicit procedure for disclosure when "in the public interest." LA. REV. STAT. §§ 45:1451 to 45:1454 (Supp. 1969). *See* T. D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. LEGIS. 307 (1969).

3 *See, e.g.*, Clein v. State, 52 So.2d 117 (Fla. 1950); Brewster v. Boston-Herald Traveler Corp., 20 F.R.D. 416 (D. Mass. 1957).

informant relationship than it is injured by the impediments such privileges may cause to the administration of justice. It rejects the approach taken in some existing statutes in so far as they are based solely on the witness' occupational pursuit; instead it looks toward broader grounds of public benefit and detriment which flow from acceptance or denial of the privilege. Such flexibility has been injected in other personal testimonial privileges. For example, the privilege of law enforcement officers not to reveal their confidential informants is limited and can be denied if the trial judge feels such revelation is necessary to protect the rights of the defendant.[4] Similarly, the attorney-client privilege attaches not to the relationship but only to certain communications.[5]

Supervision under the proposed bill is achieved by permitting the party against whom the privilege is invoked to seek a court order to compel disclosure, with such order reviewable in the appellate courts. This qualified privilege will free the courts from the necessity of punishing journalists in every case in which they refuse to disclose the source of information.

Section 1 of the proposed bill states as a general proposition that no person engaged in publishing or disseminating news shall be held in contempt for refusing to disclose the source of information received by him. In the earlier statutes the privilege was confined to newspaper employees, but more recent enactments or amendments have extended it to radio and television personnel, and this development has been recognized in the proposed bill. The considerations persuasive of the need for a privilege for newsmen are equally applicable to other organizations and individuals engaged in the dissemination of news.

Some statutes also have attempted to enumerate at considerable length the tribunals before which the privilege may be invoked. Where, as here, it is intended to apply to all judicial, legislative, and administrative bodies, committees, or agencies, the general language "by any judicial, legislative or administrative body" has been used.

Some of the existing statutes have added the requirement that the information be published. Since the objective sought is the protection of the confidential relationship, such a limitation could operate to defeat the purpose of the statute. For instance, the information actually transmitted may not itself be published, but it may have enabled the

4 Roviaro v. U.S., 353 U.S. 53 (1957); McCray v. Illinois, 386 U.S. 300 (1967).

5 *See, e.g.*, C. McCORMICK, EVIDENCE 186-96 (1954); N.L.R.B. v. Harvey, 349 F.2d 900 (4th Cir. 1965); In Re Colton, 201 F.Supp. 13 (S.D.N.Y. 1961).

journalist to uncover additional information which was disseminated. To require disclosure of the information under these circumstances would undercut the privilege. Conceivably a journalist could be required to establish the link between the published and unpublished information, but the publication requirement does not promote any legitimate objective not already served by the disclosure proceeding under Section 3.

Finally, no requirement that the information be transmitted in confidence has been stated. Such a requirement might in fact discourage the free flow of information by introducing an element of uncertainty into the protection afforded under the privilege. Moreover, the circumstances and factors are so variable that no meaningful distinctions can be made in determining what constitutes a confidential communication. If the information has not been given in confidence, presumably the journalist would have no occasion to invoke the privilege. However, the circumstances under which the information was procured or obtained would be relevant where an application for an order to deny the privilege has been made, as discussed below.

Section 2 simply clarifies an area which has troubled some courts.[6] The definition is designed to provide protection against any disclosure which reveals the channels of communication with the informant and thus risks disclosure of the informant himself, either directly or by inference. The information itself, on the other hand, is not privileged when it does not indicate the informant.

Section 3 of the proposed bill states the conditions under which the privilege may be denied to a journalist by court order, and the procedures by which such a court order may be obtained. As outlined above, the purpose of the proposed bill is to grant a qualified testimonial privilege in situations where the public interest benefits from the existence and protection of the confidential relationship. The bill states the general considerations to which the court will look in passing upon an application to deny the privilege.

First of all, the privilege will be denied in those cases in which state or federal secrets are published, or the details of secret proceedings, such as grand juries, are made known. It is clear that in these situations there is an absence of public benefit in the publication and that consequently the privilege is not justified.

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6 In Re Taylor, 187 F.Supp. 788 (N.D. Ohio 1960); State v. Donovan, 129 N.J.L. 478, 30 A.2d 421 (1943). *See* D'Alemberte, *supra* note 2.

Secondly, the privilege will be denied where "disclosure is essential to the protection of the public interest." Broadly stated, the public benefits from the free flow of information that would be unobtainable if the identification of the source were to be required in every case. This benefit to the public is greatest when disclosure of the situation itself initiates litigation or investigation, and corrective action can progress without resort to the journalist's source. On the other hand, if a journalist has revealed a situation requiring investigation or litigation, and then stops the investigative or legal process by his recalcitrance, and if no other practical sources of information are available, he has destroyed the public benefit arising from his use of a confidential source.

Whether the due administration of justice is hampered or obstructed is, of course, a question of degree which no statutory formula can attempt to define with exactness, and therefore the determination has been left to the courts. The court must be assured that the source of the information cannot be obtained by any other practical means, and that disclosure is more essential to the public interest than preservation of the confidential relationship would be. No attempt has been made to distinguish between situations in which the public welfare is concerned and those in which the interests of private individuals primarily are involved, although as a practical matter most of the cases that have arisen have been of the former type. Moreover, where a court order has been sought to compel disclosure, such a factor will necessarily enter into the court's evaluation of the public interest.

Under the procedure established in the proposed bill, application for an order to deny the privilege is to be made to the court in the county or district where the proceeding is taking place. This requirement represents a balance of convenience to all the parties involved. However, in order to insure a disinterested determination where the proceeding is before that same court, the application must be made to any other court.

MODEL WAGE EARNER RECEIVERSHIP STATUTE *

INTRODUCTION

In an economic system where credit plays a vital role, it is necessary to attempt a balance between economy's interest in an increase in the amount of credit extended and society's interest in the damage to the debtor who wants to buy now and pay later. The drafters think that such a balance must serve the policy goal that the benefit derived from the extension of credit exceeds the subsequent damage inflicted by collection It is apparent to the drafters that the social costs of creditor remedies — in job loss due to garnishment, bankruptcy discharge and its effects, family deprivation and strife — outweigh the economic benefits of the present credit system.

The drafters consider the creditor to be the chief culprit in consumer credit problems. Consequently, the statute directs its force against the creditors and their debt collecting techniques. The cost to the creditor of enforcing such a policy is much less than the cost to the debtor of the alternative. If this statutory policy against the present position of the creditor has its desired effect upon the standards of credit extension and if the debtor is educated in budget financing through the use of such a plan, the scales of the balance will begin to come even.

Though bankruptcy often seems an easy way out to the beleagured debtor since it results in the discharge of scheduled debts, its economic effects cannot be overlooked. Straight bankruptcy can be filed only once every six years; the debtor will have a bad credit rating; and, consequently, his ability to buy even needed commodities on credit will be curtailed. The social effects are even more detrimental. A debtor who has been given a discharge in bankruptcy has not been educated in managing his finances and usually continues to have financial problems. The end result is often a necessity for public and private welfare agency assistance for the bankrupt and his family. The creditors' recovery in bankruptcy proceedings is very small. This causes creditors to accept additional bad credit risks in order to make up the business losses, and the circle goes on.

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*Prepared by William A. Gregory and Michael F. O'Connell, members of the Classes of 1969 and 1970, respectively, in the Harvard Law School.

The benefits of a wage-earner receivership plan are numerous. First, the debtor is educated in budget financing and is more apt to assume a productive role in society. Second, the debtor is offered an opportunity to pay his obligations honorably while retaining his nonexempt property for domestic and business use. Third, the debtor may avoid the stigma of bankruptcy and its economic effects. Fourth, he is rescued from the collection remedies of his creditors, such as garnishment, which often result in job loss and domestic stress. And finally, the creditors recover more on their accounts receivable than they would in bankruptcy.

It will be necessary to educate prospective creditors that a debtor who has paid his obligations through a wage-earner plan is different from a debtor whose debts have been discharged through bankruptcy. Creditors should more readily extend credit to the former debtor because he has, in many instances, paid his debts fully. If the plan is used enough, this process of education should necessarily come about.

The limitation of five years may be too long, for a debtor may get depressed and give up his effort under the plan, feeling that he has become a perpetual wage slave. Experience will give the answer, and the States, of course, can experiment with different limits. Counterbalancing this hazard of frustration is the necessity for a time period of length sufficient to allow his debts to be paid off without undue burden to the debtor, yet also to give reasonable assurance of payment to the creditors included in the plan.

The statute is intended as a model uniform state wage-earner receivership statute. It is drafted with reference to Article 8 of the Uniform Consumer Credit Code in order to stimulate discussion and research in this area. The drafters have worked from a tentative statute submitted by the National Legal Aid and Defender Association. It is inspired by similar state legislation in Ohio and Wisconsin and by Chapter XIII of the Bankruptcy Act.

A number of helpful works on the economic and social problems of the present credit system, their current solutions and their shortcomings and recommendations for the future may serve as a starting point for anyone with an interest in this area:

OHIO REV. CODE ANN. § 2329.70 (Supp. 1964);
Brown, *A Primer on Wage-Earner Plans Under Chapter XIII*, 17 BUS. LAW 682 (1962);

Brunn, *Wage Garnishment in California: A Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965);
Hess, *Wage-earner Plans in Oregon*, 47 ORE. L. REV. 146 (1967-68);
Note, *Wage-earner Bankruptcy: A Neglected Remedy?*, 34 FORDHAM L. REV. 528 (1966);
Note, *Relief for the Wage-earning Debtor: Chapter XIII, or Private Debt Adjustment?*, 55 NW. U.L. REV. 372 (1960);
Note, *Chapter XIII of the Bankruptcy Act: As Maine Goes, So* SHOULD *the Nation*, 5 SAN DIEGO L. REV. 329 (1968);
Note, *Wage-earner Plan — A Superior Alternative to Straight Bankruptcy*, 9 Utah L. Rev. 730 (1965);
Note, *Wisconsin's Personal Receivership Statute*, 1968 WIS. L. REV. 210;
Note, *Wage Garnishment as a Collection Device*, 1967 WIS. L. REV. 759.

ARTICLE 8 WAGE EARNER RECEIVERSHIP

TABLE OF CONTENTS

SECTION 8.101: *Title*

This Article shall be known and may be cited as Uniform Consumer Credit Code — Wage Earner Receivership.

SECTION 8.102: *Definitions*

(1) A prior creditor is any creditor who had extended credit prior to the filing of the petition with the court.

(2) A subsequent creditor is any creditor who extends credit subsequent to the filing of the petition with the court.

SECTION 8.103: *Filing of Petition*

(1) Any individual debtor whose income from all sources is not greater than the maximum wage earner income [as defined in Section 8.103(2) of the Article] and who is unable to pay his current debts as they mature but is able to make regular future payments on account sufficient to amortize said debts over a period of not more than five years, may file a petition for receivership under this Article with the clerk of (designation of court) in the county of his residence.

(2) The maximum wage earner income as used in Section 8.103(1) of this Article is hereby defined to mean the greater of the following:

(a) $12,000 per annum, or

(b) an amount which, considering the fluctuations in the general price level, is equivalent to $12,000 per annum in calendar year 1968.

(3) Changes in the price level shall be computed by the [Administrator] [here insert name of appropriate state official] using the Consumer Price Index of the Bureau of Labor Statistics of the United States Department of Labor. The foregoing computation shall be made annually, or more frequently at the discretion of the [Administrator] [here insert name of appropriate state official].

(4) The petition shall be under oath and shall set forth the following:

(a) that the debtor is unable to meet his current debts as they mature;

(b) the names and address(es) of his employer(s), the income received from each, the periods for which received and when payable;

(c) whether the petitioner is married, the name, age and relationship of each person depending upon him for support and the approximate amount required for the petitioner's and his dependents' support;

(d) a list of all his creditors, with the names and addresses of and the amount owing to each, the nature of the claim, whether the indebtedness is secured or unsecured, the nature of the security, if any, and whether any listed claim is disputed, together with the amount claimed by the creditor and the amount claimed by the debtor;

(e) a description of all actions, suits or proceedings which are, to the best of his knowledge, in effect against him.

(5) Upon filing the petition, the debtor shall pay to the clerk of the court the sum of $1.00 as a filing fee.

COMMENT: The availability of this plan is restricted by only two formal criteria. First, the debtor must be an individual as opposed to a corporation or a partnership. Second, the debtor's income must not exceed a certain amount. This amount should be set high enough so that most consumers with financial problems can qualify for relief under the plan. Section 8.103 provides for appropriate administrative machinery to change this cut-off point as the level of prices rises or falls so that legislative inaction over a long period of time will not make the income limitation unduly restrictive. The drafters have intentionally omitted any requirement that the debtor be a wage-earner or on a salary of some sort. The same social policy arguments which justify relief of this nature for a wage-earner apply equally well to a low or middle-income self-employed individual. Though in the case of the self-employed there may be a greater danger of harm to the interests of creditors than in the case of wage-earners, this remote danger is not sufficient to outweigh the benefits accruing from the extension of this statute to the self-employed.

SECTION 8.104: *Appointment of Trustee and Assignment*

(1) After the debtor has filed a petition for a wage earner receivership plan, the court shall select a trustee from a list of eligible persons of good reputation and acceptable qualifications maintained by the court. If the Legal Aid Society, or any local non-profit debt counseling corporation shall nominate representatives for inclusion on such list, the court shall include such representatives if satisfied that they are persons of good reputation.

(2) The debtor shall deliver to the trustee a written assignment of all of his future wages, salaries, and commissions.

(3) The trustee shall give bond to be approved by the court.

SECTION 8.105: *Resignation and Removal of Trustees Termination of Trusteeship*

(1) The trustee may resign at any time.

(2) The trustee may be removed by any creditor or the debtor at any time by application to the court and upon good cause satisfactory to the court being shown for such removal.

(3) Upon resignation or removal of the trustee or termination of the trusteeship for any other reason;

(a) if such event occurs during the pendency of the plan, the court shall appoint a successor trustee in accordance with the provisions of Section 8.104; and

(b) the trustee shall render full accounting to the court of the transactions under the plan during his service as trustee.

SECTION 8.106: *Compensation of Trustee*

The trustee shall be compensated in an amount not to exceed 5% of all payments made by or on behalf of the debtor to his creditors during the pendency of the proceedings. In addition, the trustee shall also be reimbursed in an amount equal to the cost of postage necessary for the mailing of payments and of the notices of meeting provided for in Section 8.113 hereof, and of any correspondence with creditors. Such amounts, as accrued, may be charged by the trustee to the debtor or deducted from distributions to be made by the trustee. Allocations of such amounts to particular distributions shall be within the discretion of the trustee.

COMMENT: The 5% figure for compensation is only meant as a suggestion. Each State will be free to adjust this figure in the light of its experience with the administration of the statute. Since the success of the statute will depend upon its inexpensive administration, this rate should be as low as possible and in accord with the policy that everyone can afford to use the plan.

Postage costs are expected to be the only expense incurred by the trustee. This is in line with the policy of low administrative cost. If, in practice, the plan requires additional expenses to be incurred by the trustee, the States will be free to reimburse him.

SECTION 8.107: *Effect of Filing*

(1) After the filing of the petition with the court under this

statute and until the dismissal of these proceedings, no prior creditor or subsequent creditor seeking the collection of any claim may levy or enforce any judgment, execution, attachment, garnishment or other legal or equitable process or proceeding against the property, real or presonal, including but not limited to wages, salaries or commissions of the debtor; nor may any assignment of wages be enforced against the debtor.

(2) Upon the filing of the petition, the court shall by order require that all such proceedings be so stayed and the debtor shall be entitled to have a copy of said order served upon any or all of his creditors and his employer(s).

(3) With respect to the claims to be amortized under this Article, the time between the filing of the petition with the court or the inclusion of the claim in these proceedings, whichever is later, and the dismissal of these proceedings shall not be counted as a part of the period of any statute of limitations.

COMMENT: (1) This section specifies the effects of the filing of the petition with the court. The immediate effect of subsection 1 will be to get creditors "off the debtor's back." Often it will prevent the debtor from losing his job since many businesses have a policy of dismissal upon a second wage garnishment. It makes clear to the creditors that the plan means business and is capable of setting strict standards upon their conduct in the future. The debtor will also be encouraged to join the plan since he knows he can get immediate asylum from the legal and equitable techniques of the creditor.

The drafters considered having such a stay only when the plan was approved by the court. But such a delay would only give the creditors a chance to increase their collection efforts against the debtor. It would also fail to forestall any wage garnishment action during the interim period and this could mean the loss of the debtor's job. By having the stay take effect immediately upon filing with the court, initiative and control is put firmly into the hands of the debtor. The debtor has immediate help whenever he decides he needs it. This should lead to frequent use of the plan by debtors and to realization by creditors that the debtor can put a clamp upon their collection efforts whenever he wishes. This hopefully will result in creditors' attempting to be reasonable in their extension of credit and in their demands upon the debtor.

There is always the problem that a debtor will use this section in bad faith in order to cut off creditors' pursuit. Such a purpose should be evident when creditors take notice and/or enter claims. This might well show too much debt to be amortized over five years or that the debtor is incurring debt irresponsibly and using the plan

as a shield. Even if the debtor fails to list all his creditors on the petition, the stay of legal and equitable remedies will give the creditors fair notice. They will be able to enter their claims and, in many cases, give the names of other creditors of the debtor.

(2) Subsection 2 makes formal the stay effected in subsection 1. It will be most important to give notice of such stay to the employer as quickly as possible in cases of wage garnishment or assignment to avoid any sanctions by the employer.

(3) This paragraph refers to cases coming under (1): statutes of limitation on judgments will not run during the period described. It also refers to any statute of limitation on bringing a claim to judgment. If a creditor is included in the plan, he may or may not bring his claim to judgment.

(4) *See* Section 8.110(4).

SECTION 8.108: *Filing of the accepted plan with the Secretary of State and its effect*

(1) After the plan submitted by the trustee is approved by the court, it shall be filed by [a stated officer of the court] with the Secretary of State within 21 days from the time of the original filing of the petition with the court. Such filing shall have the following effect:

(a) except as stated in 8.111(2), all subsequent creditors shall be excluded from the plan.

(b) all prior creditors who have not been included in the plan shall be excluded from the plan unless said creditor, the trustee or the debtor makes application to the court within ten days after the filing of the plan with the Secretary of State.

(2) All unsecured creditors excluded from the plan by force of (1)(a) and (b) of this section must wait until the dismissal of these proceedings before collecting upon their claims. Secured creditors' rights are determined by 8.110 and 8.111(3).

COMMENT: Subsection 1 incorporates requirement of filing with the Secretary of State. Any prior creditor who was not listed on the petition filed with the court — due to the debtor's oversight or insincerity — has the chance to take notice and file his claim with the court and be included in the plan without any inquiry like that in 8.111(2). Any creditor extending credit after the filing of the petition with the court is excluded from the plan, except when 8.111(2) has been complied with, if the plan is approved and filed with the Secretary of State.

The filing with the Secretary of State will be an automatic practice: i.e., once the plan is approved, it will as a matter of course be filed

with the Secretary of State. This filing, therefore, is not like the filing required for the perfection of security interests in Article 9 of the UCC. There will be no possibility that once a plan is approved it will not be filed within twenty-one days from the initial petition. The clerk of court or some other official of the court will be designated to perform the filing requirement.

At first the drafters considered accepting in the plan only those prior and subsequent creditors who had extended credit according to the criteria in 8.111(2). This would indeed be the most equitable approach. But the arguments of administrative expense and time consumption and the disruptive effect of leaving the plan prey to additional claims which would change the amount of payments, the scheduled termination date of the plan, or even make the plan unfeasible, led the drafters to a compromise in 8.108(1). The recommended compromise will, hopefully, combine equity with administrative speed and economy. It reduces the cost and time of administration by treating all prior creditors equally. It allows the debtor to obtain future credit by permitting certain subsequent creditors to participate in the plan. It incorporates the reasonable extension doctrine, but only in regard to subsequent creditors. It permits the amount of the debt to be amortized to remain fairly definite, with control over its fluctuation after the notice period has run. And, it gives all prior creditors a chance to join — those not listed in the petition have an opportunity to join by taking notice. Subsequent creditors are subject to the criteria of 8.111(2). One reason why all prior creditors may join whether or not they extended credit reasonably whereas subsequent creditors must meet certain tests is that prior creditors do not have the obvious indicium of the debtor's financial condition that the subsequent creditor has; namely, the fact that the debtor is participating in a wage-earner plan. The subsequent creditor is put on notice whereas the prior creditor is not; and the latter would often be required to partake in a costly investigation in order to ascertain the debtor's real financial position should the debtor misrepresent his position.

Any subsequent creditor who extends credit within the twenty-one day period is deemed to have notice of the debtor's participation in the plan. This will require such creditors to adhere to the criteria in 8.111(2). Since such creditors will often not know beforehand that an extension is within this period, it will necessitate everyday use of the criteria in a creditor's business.

If any State wishes to use the reasonable extension test for all creditors included in the plan, it is, of course, free to do so. The administrative costs of such a system will be able to be more ac-

curately estimated after experience with the recommended system which uses such a test in regard to subsequent creditors. One problem with the reasonable test for all creditors is that it is possible that few of the debtor's creditors meet the test; and, consequently, the plan will not really succeed in eliminating his debt since not many creditors will be included in the plan.

Subsection 2 states the result which would otherwise follow from the force of subsection 1 of this section and of 8.107(1).

SECTION 8.109: *Effect of approval of plan on prior unsecured creditors*

All prior unsecured creditors who have been scheduled in the plan from the initial filing of the petition with the court or whose application has been submitted to the court within ten days of filing with the Secretary of State as provided in 8.108(1)(b) must join the plan if it is approved.

COMMENT: Once the plan is approved, all prior unsecured creditors with notice must join. This section eliminates any question of majority rule among the creditors in approving the plan.

There is nothing in the article to prevent the debtor from attempting to pay off his obligation to any prior unsecured creditor not included in the plan according to the terms of the original contract. But if the debtor defaults on such contract, the creditor cannot enforce any remedy against the debtor.

A problem may arise if a prior unsecured creditor with notice would rather wait until the end of the plan instead of joining. The court may use its discretion as to whether it will force such a creditor to participate. The possibility of such an event is unlikely since the creditor will gain absolutely nothing; he may in fact lose money if the debtor declares bankruptcy during or after the plan.

SECTION 8.110: *Effect of approval of plan on prior secured creditors*

(1) All prior secured creditors who have been scheduled in the plan from the initial filing of the petition with the court or whose application has been submitted to the court within ten days of filing with the Secretary of State as provided in 8.108(1)(b) may either

(a) join the plan if approved and receive payments as determined by the plan, or

(b) reclaim or repossess the collateral sold on security.

(2) If a prior secured creditor has not been scheduled in the plan from the initial filing of the petition with the court and

whose application has not been submitted to the court within ten days of the filing with the Secretary of State as provided in 8.108(1)(b), he may reclaim or repossess the collateral sold on security if the debtor defaults upon the contract of sale unless the retention of such collateral by the debtor is essential to the continuance of his employment upon reasonable terms and conditions. In such case 8.110(5) shall apply.

(3) If a secured creditor under (1)(b) or (2) of this section or 8.111(3) reclaims or repossesses the collateral sold on security, that shall be the extent of his recovery.

(4) Notwithstanding 8.107, any action, judicial or non-judicial, by a secured creditor under 8.110(1)(b), 8.110(2), or 8.111(3) for the purpose of reclaiming or repossessing collateral sold on security shall be enforced.

(5) At any time either during the pendency of proceedings hereunder or pursuant to (1)(b) or (2) of this section or 8.111(3) and before a secured creditor shall have acquired actual possession of the collateral to which this subsection (5) applies, the debtor may petition the court, upon notice to the secured creditor, to stay any action, judicial or nonjudicial, by the secured creditor to reclaim or repossess such collateral as the debtor shall identify in his petition on the grounds that the retention of such collateral by the debtor is essential to the continuance of his employment upon reasonable terms and conditions. Upon the filing of a written notice by the secured creditor, within twenty days of the service upon him of a copy of said petition, the court shall order a hearing and, upon a determination for the debtor shall order such a stay which shall be effective during the pendency of these proceedings. Such stay shall automatically terminate if the debtor shall fail to pay to the creditor on any installment date, as provided in the plan, a payment in the minimum amount of the approximate depreciation in the fair market value of the relevant collateral for the period since the previous payment or the installments actually due under the relevant deferred payment contract, whichever is less. Such amount may be fixed by the court and may be varied from time to time upon petition to the court by the secured creditor, the trustee, or the debtor, with notice to all other parties.

COMMENT: (1) The drafters originally planned to treat secured and unsecured creditors exactly the same in respect to the effect upon them of the filing with the Secretary of State. The arguments in favor of such course were ease and economy of administration and symmetry — one rule for all parties. The advantageous position accorded

secured creditors in the UCC and the cautionary and deterrent effects of the debtor's signing a security agreement have, however, led the drafters to conclude that secured creditors must be treated differently. To make such creditors, not included in the plan, wait until the termination of the plan to collect would eliminate the purpose of a security interest. The collateral sold would have depreciated markedly in that period. The effect would be to make the secured creditor an unsecured creditor to the extent that the market value of the collateral has declined. Over five years, the market value of most articles bought by a wage-earner is only a small fraction of what it was when sold. The result reached in the statute, however, does not give unreasonable freedom to secured creditors. Their remedy, where different from unsecured creditors' remedies, is very limited: they can reclaim or repossess the collateral sold and such action is the extent of their recovery. No deficiency judgments against the debtor are permitted. The secured creditor is not an unsecured creditor for any deficiency; his claim has been eliminated. If a prior secured creditor joins the plan and thereby gives up his opportunity to repossess or reclaim for the time being, he shall receive payments under the plan which are as far as possible consonant with the payments under the original security contract or are equivalent with the approximate depreciation in the fair market value of the collateral between payments — whichever is less.

(2) If a prior secured creditor is excluded from the plan, he cannot repossess or reclaim the collateral sold unless and until the debtor defaults upon the contract of sale.

(3) Paragraph (3) makes clear the extent of the creditor's recovery by reclamation or repossession. It goes only to the collateral sold on security. If the collateral itself is insufficient to cover the obligation due, there is not further recourse open to the creditor.

This paragraph will have the result of compelling many secured creditors to join the plan so that they may receive the full amount owing to them. For example, if a secured creditor has sold the debtor a new car for $3000 and the debtor has driven it 100 mi. and paid only $100 down before filing a petition under the act, the secured creditor may reasonably believe that he will not receive the amount due him by repossession.

(4) Paragraph (4) affords any secured creditor choosing to reclaim or repossess the collateral sold legal or equitable enforcement of that choice. This paragraph is an exception to 8.107(1).

(5) Paragraph (5) allows for the possibility that by granting an exception to 8.107(1), the debtor may be vulnerable to loss of some nonexempt property necessary to the carrying on of his employment.

In such case it is only equitable that the secured creditor be paid according to the terms described in the statute since his choice of remedies has been overruled by the court.

A State may be sympathetic to an allowance of a stay in the case of collateral necessary to a reasonably comfortable domestic life — with the caution that such a rule would necessitate investigation by the court into areas where a court is inexperienced and hesitant to enter. But such inquiry may become necessary in order to protect a plan from termination through debtor dissatisfaction with the burdens imposed upon his family by a harsh plan. No debtor should be crushed by a plan; he should be willing to sacrifice, but within reasonable bounds.

(6) *See* Section 8.116, "Termination of the plan."

SECTION 8.111: *Subsequent creditors*

(1) All subsequent creditors who have obtained the trustee's approval prior to their extension of credit may be included in the plan upon application to the court by said creditor, the trustee, or the debtor.

(2) The court, upon such application, may include such creditor(s) in the plan if it determines that the extension of credit to the debtor was reasonable. The court's criteria in the process of determining the reasonableness of a creditor's extension of credit shall include, but not be limited to, the following:

(a) amount of credit extended,

(b) purpose for which the credit was extended,

(c) terms upon which the credit was extended,

(d) debtor's ability to meet this extra financial obligation in light of his financial position under the plan.

(3) If a subsequent secured creditor extends credit without the trustee's approval, such secured creditor may reclaim or repossess the collateral sold on security if the debtor defaults upon the contract of sale unless the retention of such collateral by the debtor is essential to the continuance of his employment upon reasonable terms and conditions. In such case 8.110(5) shall apply.

COMMENT: Exclusion of all subsequent creditors from the plan may at first blush seem feasible. But the debtor will often need credit during the pendency of the plan for essential commodities recognized to be within the reasonable expectation of most people, *see* section 8.119. Therefore it was necessary to provide the debtor with some leverage in the face of possible refusal to extend credit to him both because of his participation in the plan and the impossibility of any

subsequent creditor being included in the plan. This leverage is given by this section. The procedure of inclusion described in the statute has two purposes: the immediate purpose is to give the debtor an opportunity to get credit when he needs it; the long range purpose is to educate — by force or persuasion — creditors in the standards they should use in extension of credit to any debtor at any time.

(1) The reason the trustee's approval is required in order to qualify for paragraph (2) is that the creditor may want a quick estimate of his chances of being included in the plan. This the trustee should be able to do. It also teaches the debtor the value of immediate consideration of the effect of what he is doing when he accepts credit. The trustee's approval should normally be given prior to the extension of credit. This makes for discussion before the fact and use of the criteria before extension of credit.

In order to reduce administrative cost and time consumption, a state may wish only to have the trustee rule on the reasonableness of the creditor's extension of credit. The trustee is close to the situation and knows the debtor's financial position and needs; he can make an intelligent and relevant decision. This proposal takes on added force when it is recognized that in the great majority of cases the court will act upon the trustee's recommendation and take his analyses to be the correct ones.

(2) Paragraph (2) serves the policy in favor of raising standards for extension of credit. Subsequent creditors must, in order to be included in the plan, meet these criteria. The more often they are exposed to such a test, the easier it will be for them to extend that test into their normal credit business where a debtor is not participating in a plan and the creditor in not a "subsequent" creditor. The success of this section will be measured by the use of such criteria throughout the consumer credit business.

The fact that a creditor will not always know whether he is a subsequent creditor — due to the time lag between the debtor's filing with the court and the notice given by the filing with the Secretary of State — will increase the possibility of recourse to this section by creditors in their daily business.

(3) Paragraph (3) extends the advantage of a secured creditor very far. His extension of credit need not be reasonable in order for him to be able to have his remedy of repossession or reclamation. The arguments for difference in treatment of prior secured and prior unsecured creditors lose much of their force here. The added factor that through this paragraph secured creditors may never have to meet the criteria described in (2) and therefore may never have to change their standards of credit extension may cause the states to

eliminate this paragraph and treat subsequent secured and subsequent unsecured creditors alike.

SECTION 8.112: *Claims brought to judgment; priority in case of default*

(1) All creditors (secured and unsecured, prior and subsequent, those included and those excluded from the plan) may bring their claims against the debtor to judgment.

(2) If these proceedings are terminated by dismissal, default or otherwise,

(a) any claim reduced to judgment by a subsequent creditor excluded from the plan shall be deemed to have been reduced to judgment one day after these proceedings are terminated.

(b) any claim reduced to judgment by a prior creditor (whether included or excluded from the plan) or a subsequent creditor included in the plan within a reasonable time after termination of these proceedings shall be deemed to have been reduced to judgment as of the day these proceedings are terminated.

COMMENT: The purpose of this section is to protect the claims of those creditors participating in the plan from prejudice from an inability to collect because of the restrictions on attachment and garnishment which the Article imposes. The means selected is to permit any creditor to bring his claim to judgment at any time, but to protect the creditors who participate in the plan by making their judgments prior liens. The rationale behind this scheme is that creditors should be permitted to litigate their claims before the evidence becomes stale. The judgment does not cause any harm because it is virtually uncollectible while the plan is in effect, and will be subordinated to the judgments of creditors under the plan as long as the latter reduce their claims to judgment within a reasonable time after the plan ends.

Prior creditors who are not included in the plan are those who have merely failed to take notice under section 8.108. Their extension of credit presumably was reasonable when it was made. They are, therefore, given the same preferred status as creditors who are included in the plan.

SECTION 8.113: *Establishment of Plan*

(1) Upon his selection, the trustee shall forthwith meet with the debtor, review the petition and send notice to each creditor listed in the petition and to any other creditor of whose existence

as a creditor the trustee may learn within the notice period as prescribed in Section 8.108(1)(b). Said notice shall include a copy of Sections 8.106 to 8.112 inclusive of this Article, a schedule of the debtor's obligations, and notice that a meeting shall be held at a place selected by the trustee in the county of the debtor's residence and at a time not less than 5 nor more than 10 days thereafter for the purposes of considering an amortization plan and of determining the claims to be covered by the plan.

(2) The amount of a creditor's claim shall be the amount for which the debtor could have paid or prepaid the claim on a date ten days after the petition was filed either (a) pursuant to the terms of the obligation, (b) pursuant to the requirements of any applicable statute, or (c) in accordance with the customary practices of the creditor at such time, whichever is the lowest.

(3) All claims included in the plan shall bear interest during the pendency of the plan at the rate applicable to unpaid judgments in this state. If the plan so provides, such interest may be precomputed at the time the plan is established as if all payments were made on the scheduled installment dates and all payments actually made to creditors under the plan applied to the combined total of interest and principal without reference to the date such payments are actually made.

(4) The claim of any creditor under the plan shall not include such part of the obligation of the debtor to that creditor which, pursuant to the terms of the obligation and without reference in those terms to any provision accelerating any unpaid portion of the obligation because of debtor's default or otherwise, is payable more than 5 years from the date the petition is filed hereunder.

(5) Upon conclusion of the meeting the trustee shall either (a) report to the court that no equitable plan of amortization is feasible or needed in which case the court may forthwith dismiss the proceedings or (b) recommend to the court a plan of amortization calculated by weekly or monthly payments to discharge in full the claims of all known creditors within a period of not exceeding 5 years. The trustee shall attach to said plan the written consents and objections, if any, of the creditors present or represented at the meeting or who have otherwise submitted consents or objections to him, and an analysis, with his recommendations regarding the disposition of any claim in dispute.

(6) If satisfied that the plan is feasible and equitable, the court shall forthwith enter an order approving the plan and ordering the payment by the employer(s) of the debtor of such salary,

wages, commissions or any combination thereof of the debtor to the trustee as provided by the plan and determining, for the purposes of the plan, the amounts of the claims; otherwise, the court shall enter an order dismissing these proceedings. However, if in any written objection a creditor shall ask for a hearing respecting the plan the court shall set a date for a hearing as soon as practicable on notice to all parties. At such hearing the court shall enter an order either approving the plan, if satisfied that it is feasible and equitable or dismissing these proceedings or making and approving such modifications of the plan as the court deems just. If the plan is approved, the clerk of the court shall so notify the employer or employers of the petitioner and serve him with a copy of the order of the court.

COMMENT: The status of a claim originally due more than 5 years after the petition is a problem. On one hand, there is justice in permitting a creditor to accelerate that debt, if the obligation so permits, just like any other debt and include it in the plan. On the other hand, this could result in a debtor being obligated to pay more during the 5 year period than he might have to pay if no plan at all existed. In this draft the disadvantages of the latter were considered to be more persuasive.

SECTION 8.114: *Contents and Payments of Plan*

(1) The plan, giving due regard to the reasonable requirements of the debtor and his dependents, shall provide for periodic payments by or on behalf of the debtor to the trustee by virtue of the wage assignment and court order, or otherwise; and the debtor may make additional payments to the trustee. If the debtor is required by an order of a court of competent jurisdiction to pay money for the support and maintenance of dependents, then, upon the filing with the court of a certified copy of the order, the plan shall be modified to the extent required to comply with the order.

(2) In no case shall the plan provide for receipt by the debtor from the trustee or otherwise, of an amount less than the minimum amount of the income of the debtor that is exempt from garnishment under the laws of this state or federal law.

(3) Subject both to Section 8.110(5) on minimum amounts to be paid to certain secured creditors and to this section, the plan shall provide for the trustee to pay, to the extent of funds received by him, a pro rata share of the balance to each creditor on the basis of the amount of the claim of each creditor; provided, however, that claims of $10 or less may be paid in full.

(4) The plan shall provide that if the total amount available to be distributed is less than $100, the trustee may deposit such undistributed amount in a special trust account until the next distribution date that the total amount is $100 or more; but no sums received by the trustee shall remain undistributed for more than 90 days.

(5) Any money which is not called for by any creditor, or, if sent to a creditor, is returned undelivered and which remains in the possession of the trustee for more than 6 months after these proceedings are dismissed must be paid by the trustee to the other creditors in proportion to their unpaid obligations under the plan on the date these proceedings were dismissed, provided that no creditor is paid in excess of the full amount of his claim as of the date payment is made. If no such creditors exist, then the money shall be paid to the debtor.

(6) The court may, upon application of the debtor, the trustee or any creditor, upon notice to all other parties, at any time or times during the pendency of these proceedings, increase or reduce the amount of the installment payments provided by the plan, or extend or shorten the time for any such payments, or otherwise alter the provisions of the plan, where it shall be made to appear, after hearing, that the circumstances of the debtor so warrant or require.

SECTION 8.115: *Dispute of Claims During Pendency of Proceedings*

(1) The court, trustee, debtor or any creditor may dispute the claim of any creditor at any time during the pendency of these proceedings. Upon the filing with the court of a written notice of intention to dispute a claim or upon the determination of the court, on its own motion, to dispute a claim, the court shall cause notice of a hearing thereon to be served on all parties and hold a hearing thereon. At such hearing the court may establish the amount of the claim or make such other determination as shall be fair and equitable under the circumstances.

(2) Neither the determination of the amount of any claim for the purposes of the plan, nor the acceptance of payments thereunder, shall affect the right of any creditor to litigate his claim and obtain judgment thereon, or the right of the debtor to dispute it, and the amount of any judgments shall be substituted by the trustee for the amount theretofore being used as a basis for distribution.

COMMENT: There will be, almost as a matter of course, disputes concerning the amount of, the existence of and the validity of claims filed by creditors and listed by the debtor. This section describes the procedure to deal with such disputes. It was first considered by the drafters that the court hearing would be sufficient to iron out any differences. This had the value of quick determination without costly and time consuming litigation adding to the expense of the plan. But questions of review and jury trial prompted the addition of (2).

Perhaps a state may see fit to permit only a hearing in a case in which merely the amount of a claim is in dispute. And since the debtor or creditor, after the court hearing, will often forego litigation concerning these disputes, the result will often be the use of (1) only.

SECTION 8.116: *Termination of the Plan*

(1) If any payment provided by the plan to be made to the trustee by or on behalf of the debtor is in default or if the debtor has otherwise violated the provisions of this Article or of the plan, the trustee or any creditor may, and if any such default shall have continued for a period of more than 30 days the trustee shall, report the matter to the court The trustee shall submit a report and his recommendations to the court and the court may terminate the plan.

(2) If the addition of any prior creditor included in the plan by reason of the proviso in Section 8.108(1)(b) or of any subsequent creditor by reason of Section 8.111(1) and (2) shall make continuation of the plan unfeasible, the court may, upon petition of the debtor, the trustee or any creditor, with notice to all other parties, and upon a hearing, terminate these proceedings.

(3) If the debtor makes preferential payments to creditors participating in the plan during the pendency of the proceedings or appears for any reason to be abusing the privileges of this Article, the trustee shall promptly report the matter to the court and the court may terminate the plan. If the court finds that preferential payments have been made to those creditors participating in the plan, it shall order those creditors who had received a preferential payment to pay over the amount of the preferential payment to the trustee who shall apply it to reduce the debtor's indebtedness under the plan pro rata, among all creditors participating in the plan. A preferential payment is any payment to a creditor participating in the plan which is, at the time of the payment, in excess of what he is entitled to under the plan.

(4) In deciding whether or not to terminate a wage earner receivership plan, whenever such discretion is given, the court shall consider the following criteria:

(a) the feasibility of the plan; i.e., whether in light of the debtor's income and the size of the debt incurred it is reasonable for the debt to be paid off on an amortized basis within the time remaining in the plan;

(b) the knowledge which subsequent creditors had, or should have had, when they extended credit of the prior debts of the debtor;

(c) the knowledge which subsequent creditors had, or should have had, when they extended credit, of the insolvency of the debtor;

(d) the intent of the debtor to abuse the plan by unreasonably incurring debts which, if included in the plan, would make the plan unfeasible;

(e) prejudice to the interests of those creditors who have participated in the plan in not being able to collect their debts by those means proscribed by this Article during the pendency of the plan.

COMMENT: This entire Article is based on the principle of voluntary action by the debtor. The only sanction which the Article provides for default by the debtor is that the court may thereupon terminate the plan. However, the court need not do so. In many cases such a course of action would only harm the creditors who had participated in the plan up to the time of default. The relevant criteria in deciding to terminate the plan are those listed in Section 8.116(4).

Section 8.116(3) is designed to deal with the problem of preferential payments by giving the court discretion to terminate the plan if the debtor makes payments to some creditors in addition to what they are entitled to under the plan. In addition the court is given authority to require the preferential payments to be repaid by the preferred creditor to the trustee. This is necessary to deter creditors from pressuring the debtor to make "under-the-table" payments. It effectively does so by taking away any potential gain in such a practice.

Under Section 8.111 creditors may be added to the plan. The possibility exists that if this is done, the plan may become unfeasible. That eventuality would require that the plan be terminated. In deciding to do so, the court must consider the criteria in Section 8.116(4). It should be noted that under the criteria for adding creditors to the plan in Section 8.111(2) this result (i.e., adding creditors to the plan) would not occur if the court accurately foresaw the subsequent unfeasibility. This will not, however, always be the case.

The most obvious example is an unexpected decline in the debtor's income.

SECTION 8.117: *Duration of Proceedings*

(1) Receivership proceedings hereunder shall continue during the pendency of the plan or until all debts of the debtor are sooner paid or these proceedings are sooner terminated as provided in this Article.

(2) Upon termination of these proceedings, the court shall discharge the trustee and notify the debtor's employer(s) who had been subject to an assignment of wages hereunder that the debtor is no longer subject to such assignment. The trustee shall return to the debtor all assignments received by him hereunder marked "Cancelled."

(3) If any claim covered by the plan is unpaid in whole or in part at the termination of the plan:

(a) all interest accrued during the pendency of these proceedings and unpaid shall be added to the principal amount of the debt, but such interest shall not bear additional interest thereafter.

COMMENT: The rationale of 8.117(3) is that a creditor deserves interest on the amount of his debt because he is compelled to forego any effective means of collection for a five-year period while the plan is in effect. Since in most jurisdictions a creditor who obtains a judgment is entitled to interest from the date of the judgment, the drafters feel it is equitable to give interest to the creditors under the plan since otherwise they might well have obtained judgments, or even more effectively attached the debtor's property and gotten full satisfaction of their claim. To deny the creditor effective use of both of these remedies (even though the creditor is free to sue under the plan, he is unlikely to do so because he might have a five-year wait to collect his judgment, and the only advantage in suing so early would be in having the interest run from an earlier date, while this remote advantage is counterbalanced by the fact that the debtor might pay his debt off in full under the plan, or the plan might terminate and the debtor declare bankruptcy, in both of which cases, the creditors costs of litigation would be for naught) without providing for the accrual of interest seems, therefore, a harsh result. Once the plan terminates, however, the amount of a creditor's debt is what it was originally plus any interest accrued under the plan. This Article states nothing as to whether any further interest accrues on such an amount. That question is left to be decided by looking to the common law or statutes of the jurisdiction in which this Article is enacted.

SECTION 8.118: *Hearings*

The court may issue subpoenas to compel the attendance of witnesses at hearings held under this Article. Any costs in connection with such hearings may be assessed against any of the parties in such manner as the court may deem just.

SECTION 8.119: *Deferred Obligations of Debtor During Pendency of Receivership Proceedings*

During the pendency of these receivership proceedings, the debtor shall not voluntarily incur obligations for the payment of money at any time in excess of an aggregate amount of $100 or incur any secured obligation without the prior approval of the trustee upon the trustee's determination that such obligations are for the reasonable living requirements of the debtor or his family or dependents and that payments of such obligations will not represent an undue hazard to the successful completion of the plan.

COMMENT: This section puts a positive responsibility upon the debtor to abide by the rules for his future credit needs. Here the onus is upon the debtor, whereas in 8.111(2) the onus was upon the creditor. The object of the section is the debtor's education in budget financing — getting the debtor used to considering the effects of his obtaining credit. This is done in the plan by getting the trustee's approval. Hopefully this will lead to the debtor's confidence in his own ability in determining his needs when he is not participating in a plan.

This section will also give the court valid cause to terminate the plan should the court think it wise. Discretion remains with the court even though there is a violation of this section.

SECTION 8.120: *Notices and Employment Changes*

(1) All notices provided for in this Article may be given by registered or certified mail with return receipt requested and if the return receipt is not received, the court may order the same served as process is served in said court, and the cost thereof shall be paid by the person giving notice.

(2) The period of notice for all court hearings for which notice is required shall be at least 5 days unless the court by rule or special order shall prescribe a different period of time.

(3) If the debtor changes his employer or acquires an additional employer(s), he shall notify the trustee and execute and deliver to the trustee a new assignment(s) of his wages if re-

quired and the trustee shall give written notice thereof to the new employer(s).

SECTION 8.121: *Payments by Employers*

(1) Payments by any employer to a trustee in pursuance of notice from the court or the filing of a petition hereunder or the receipt of an assignment of wages, salary or commissions by a trustee then on the approved list of trustees of the court shall be payment to the employee the same as if received by said employee personally, regardless of any defect or invalidity in said instruments or these proceedings, and regardless of any statute of this state relating to wage assignments, garnishments, exemptions, homestead laws or otherwise to the contrary.

(2) Any employer who pays any salary, wages or commission in violation of a notice received by him from the court shall be liable for any sums so paid.

REVISIONS:

SECTION 8.106: *add* 8.106(2).

The trustee may waive any compensation to which he is entitled under this Act.

SECTION 8.105(2): *amend to read*:

The trustee may be removed by an creditor or the debtor at any time by application to the court, or by the court on its own motion, upon good cause being shown to the court for such removal.

COMMENT: These revisions were suggested by interested groups after reviewing the draft.

NOTES

THE POOR AND THE POLITICAL PROCESS: EQUAL ACCESS TO LOBBYING

INTRODUCTION

Lobbying — broadly defined as "any intentional effort to influence legislation"[1] — is an essential part of effective democratic government in the United States.[2] It provides a unique type of political expression, through which pressure groups formulate policies and seek their implementation, provide public officials with much needed information, and, by making their individual concerns well known, help to define the public interest.[3] More generally, lobbying serves as a mechanism, supplementary to the constitutionally prescribed legislative process, for resolving the inevitable conflicts among the diverse interests of society.

As a means of resolving conflicts and balancing interests, however, the lobbying mechanism has several weaknesses. In the first place, it is open to flagrant abuse. The practices of lobbyists in the nineteenth and early twentieth centuries provoked periodic scandals. Bribery and blackmail, practices which are hardly conducive to a just appraisal of competing interests, were not uncommon lobbying techniques.[4] The calibre of lobbying activity has generally improved during this century; but abuse is still prevalent,[5] albeit in more sophisticated guises.

Secondly, even the most legitimate forms of lobbying are somewhat covert in their operation, so that the public rarely knows what kinds of bargaining lie behind any particular legislative decision. It is not generally known, for example, how witnesses before congressional committees are selected, or how influential their testimony is. As a result, the public can only apply an outcome-determinative test to the lobbying process, judging lobbying by the quality of the legislation it helps

1 HOUSE SELECT COMMITTEE ON LOBBYING ACTIVITIES, GENERAL INTERIM REPORT, H.R. REP. No. 3138, 81st Cong., 2nd Sess. 6 (1950): "In the final analysis, there are only two practical gauges of lobbying activity — intent and some substantial effort to influence legislation. The means employed are secondary. . . ."

2 *See, e.g.*, E. P. HERRING, GROUP REPRESENTATION BEFORE CONGRESS (1949); K. SCHRIFTGEISSER, THE LOBBYISTS (1951); J. DEAKIN, THE LOBBYISTS (1966).

3 H. A. Bone, *Political Parties and Pressure Groups* in UNOFFICIAL GOVERNMENT: PRESSURE GROUPS AND LOBBIES, ANNALS Sept. 1958, 73 at 83.

4 In 1935 Senator (now Justice) Hugo Black said of the lobby that "its size, its power, its capacity for evil; its greed, trickery, deception, and fraud condemn it to the death it deserves." H. Black, *Lobby Investigation*, 1 VITAL SPEECHES 762, 765 (1935).

5 *See generally* J. DEAKIN, *supra* note 2.

to produce, without being able to evaluate the process itself. In other words, the public has no way to discover whether the balancing function is being performed in the best possible way.[6]

Lobbying can be defended as a beneficial device for balancing conflicting interests within society only on the assumption that all relevant interests are fairly represented in the process. The inaccuracy of this assumption in the past has been well established. A method for correcting the balance is the subject of this Note.

The connivance between elected representatives and the lobbyists of powerful special interests, and the resulting exclusion of the public interest from the process of government, were recognized early in this century.[7] Since then there have been a number of exhaustive studies of lobbying, all of which, to one degree or another, have concluded that the interests of business and other well-financed and well-organized groups carry disproportionate weight in the legislature.[8]

> All too often the operations of large pressure groups prevent rather than encourage the balanced compromises that are the goal of the democratic system. All too frequently the legislative contests are uneven, and in too many instances the lobbyists serve to retard rather than advance the general welfare.[9]

The right to lobby is grounded in the First Amendment's guarantees of free speech and the right to petition for the redress of grievances. These rights are guaranteed to all citizens alike, but the disproportionate power of some private interests has such a distorting effect on the political process that many less powerful interests are excluded altogether. Representative Buchanan, chairman of the House Select Committee on Lobbying Activities, noted in 1950 that lobbying is a "sacred right" which some make more meaningful than others. The

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6 "By focusing on the processes of government in operation rather than on the substance of policies, the effect of political interest groups on the public interest can be more objectively evaluated. . . . The question is whether the process of formulating policy has been perverted by pressure group activity." R. W. Gable, *Interest Groups as Policy Shapers*, in UNOFFICIAL GOVERNMENT, *supra* note 3, at 93.

7 SCHRIFTGEISSER, *supra* note 2, at 29, discussing BENTLEY, THE PROCESS OF GOVERNMENT (1908).

8 HOUSE SELECT COMMITTEE ON LOBBYING ACTIVITIES, REPORT AND RECOMMENDATIONS ON THE FEDERAL LOBBYING ACT, H.R. REP. No. 3239, 81st Cong., 2nd Sess. (1951) [hereinafter BUCHANAN COMMITTEE REPORT]; FINAL REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE POLITICAL ACTIVITIES, LOBBYING AND CAMPAIGN CONTRIBUTIONS, S. REP. No. 395, 85th Cong., 1st Sess. (1957) [hereinafter SENATE LOBBYING REPORT]; *see also* D. C. BLAISDELL, ECONOMIC POWER AND POLITICAL PRESSURES (TNEC Monograph No. 26, 1941).

9 DEAKIN, *supra* note 2, at vii.

individual consumer and the billion dollar corporation have equal rights before the law, he remarked, "but are they equal before the lawmakers?"[10]

Despite its defects, there are few who would do away with lobbying, not only because of an unwillingness to infringe upon constitutional liberties, but also out of an affirmative conviction that a fair and open lobbying mechanism can be valuable to the democratic political process. Response to the perceived inequities of lobbying, therefore, has been limited to various schemes for its modification or regulation. As we shall see, direct statutory regulation of lobbying and indirect regulation through the taxing power have been the devices relied upon to accomplish these ends. Extensive changes in the existing schemes have often been recommended, and new, more exotic, schemes have been proposed.

But these efforts have been inadequate. Lobbying abuses are still pervasive. The poor and the unorganized consumer public, the ultimate victims of these abuses, are still without viable representation in the lobbying process. This Note considers why these efforts have been inadequate and urges a new effort on the part of Government, which can help not simply to remedy abuses, but to mold the lobbying process into an effective force for social justice in the United States.

I. Lobby Regulation and the Legislative Balance

A. Restructuring Congress

The most radical proposals for curing the ills of lobbying call for an outright restructuring of Congress. These proposals proceed from the fact that the American system of geographic representation is no longer as accurate a reflection of the varying interests within the country as it once was.[11] The economic development of the United States has created strong functional interests which transcend geographic boundaries and override regional concerns.[12] While it may be simplistic in these days of increased racial and cultural awareness to define group interests strictly in terms of economic condition, it is undeniable that geographic proximity is no longer an accurate guide to compatibility of views, if it ever was. Because the congressional

10 General Interim Report, *supra* note 1, at 65.

11 Note, *Improving the Legislative Process: Federal Regulation of Lobbying*, 56 Yale L.J. 304, 305 (1947).

12 Blaisdell, Economic Power and Political Pressures, *supra* note 8, at 196.

system of representation by districts does not account sufficiently for more specialized social and economic interests, lobbying had developed as a means by which these interests can be heard. Because of this, it has been suggested that the way to curb lobbying is to revise the Constitution to eliminate the geographical system of representation.[13] More practically, it has also been proposed that Congress establish advisory councils to represent economic interests as a supplement to geographic interests.[14]

But proposals for such functional representation have not been particularly well-received.[15] Not only does functional representation run counter to the American political tradition, but also the task of implementing such a system would be formidable. Parliaments of industry and advisory councils have actually been adopted in Europe, but results in these countries have not indicated that a formal joining of politics and economics is an effective solution to the problem of pressure groups.[16] And even if a system of functional representation could be implemented in this country, the same kind of imbalance which now characterizes lobbying would probably be reflected on the floor of Congress.

Another school of thought attributes the undue influence of special interest groups to the committee system in Congress.[17] According to this analysis, the mechanics of congressional leadership tend to consolidate power in a few key men, who in turn control the operation of certain influential committees and subcommittees. By winning over one strategically placed legislator, an interest group can achieve remarkable results in Congress as a whole. The Senate and House Agricultural Committees offer a case in point. The 1968 report *Hunger, USA*, issued by the "Citizens' Board of Inquiry," concluded that

> the composition of the Agricultural Committees of Congress — which pass upon major food assistance legislation — dictates that inevitably the needs of the poor and hungry will be subordinated to the interests of the large agricultural producers.[18]

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13 *See, e.g.*, MACDONALD, A NEW CONSTITUTION FOR A NEW AMERICA (1921).

14 *See, e.g.*, S. 6215, 71st Cong., 3d Sess. (1931) (sponsored by Senator LaFollette).

15 Note, *Improving the Legislative Process*, *supra* note 11, at 308 n.8.

16 *Id.*

17 Cohen, *Hearing on a Bill — Legislative Folklore?*, 37 MINN. L. REV. 34 (1952); Cohen & Robson, *The Lawyer and the Legislative Hearing Process*, 33 NEB. L. REV. 523 (1954).

18 CITIZENS' BOARD OF INQUIRY INTO HUNGER AND MALNUTRITION IN THE UNITED STATES, HUNGER, USA (1968), at 81.

To avoid this situation, it has been suggested that the committee system be either substantially modified or completely eliminated.[19] Rather than rely on committees to evaluate the merits of proposed legislation or to investigate the need for new legislation, Congress could, for example, establish a body of professional researchers to perform these functions. Comprehensive reports on each proposal would be submitted to all Senators and Representatives, who would debate the issues in full session in their respective Houses, and then vote on each particular proposal. In this way, much of the need for lobbyists as sources of information would be obviated; and the overweening influence of individual Congressmen, with its vast potential for corruption and abuse, would be reduced.

This proposal, while it merits serious consideration, has its weaknesses. The abolition of congressional committees runs counter to the jealous regard which most, if not all, Congressmen have for their powers and prerogatives. The likelihood of success for such a proposal is, thus, negligible. Furthermore, even a team of professional researchers could not be relied upon to elicit all the interests involved in a given issue. As in the present system, there would inevitably be groups whose interests were not perceived as relevant to the proposal being examined and who would, thus, still be excluded from the legislative process.

B. Registration and Disclosure

The most direct attempt to curtail the abuse of congressional lobbying has been the Federal Regulation of Lobbying Act of 1946.[20] The weaknesses of the Act have been exhaustively discussed,[21] and need little treatment here. It has been quite ineffective in bringing the inequities of federal lobbying under control.[22] Many organizations which engage in extensive campaigns to influence legislation have managed to avoid registering under the Act, and many of those who do register provide such incomplete information that it is hard to draw any conclusions about the scope of their activities or the impact they have. Since 1946 there have been several congressional studies of

19 Cohen, *supra* note 17.

20 Federal Regulation of Lobbying Act 60 Stat. 839 (1946), 2 U.S.C. §§ 261-270 (1964).

21 *See* Note, *Federal Lobbying Act of 1946*, 47 COLUM. L. REV. 98 (1947); Note, *Improving the Legislative Process*, *supra* note 11, B. Zeller, *The Federal Regulation of Lobbying* Act, 42 A.P.S. REV. 239 (1948); J. F. Kennedy, *Congressional Lobbies: A Chronic Problem Re-examined*, 45 GEO. L. REV. 535 (1957).

22 *See* DEAKIN, *supra* note 2; E. LANE, LOBBYING AND THE LAW (1964).

lobbying activity, and each has produced a spate of recommendations, none of which has yet been implemented.

The Buchanan Committee reported in 1950 that "to the extent that some groups are better endowed than others, there is a disparity in the pressure which these groups can exert on the policy making process."[23] The Committee did not feel, however, that the situation called for any major revisions in the Lobbying Act. Instead, they felt that the proper control of lobbying lay in strengthening the political parties and party discipline, since it was when the parties were weak that pressure groups had the most influence. The few changes in the Act which the Committee did propose were designed principally to disclose the identity and financial participation of those who supported lobbying activity. Such information, it was felt, would enable Congress and the people to evaluate group pressures.

In 1956, a Special Senate Committee to Investigate Political Activities, Lobbying and Campaign Contributions again looked into the activities of pressure groups in the legislative process. According to Senator John F. Kennedy, a member of the committee, the ultimate goal of these investigations, and Congressional lobbying legislation in general, was to "provide sound legislative action by Congress, aided in its deliberations by the arguments, positions and presentations of *all* segments of our population."[24] In 1957, the Final Report of the Committee recommended extensive changes in the 1946 Lobbying Act.[25] Among the major innovations of the proposed Legislative Activities Disclosure Act[26] was an enforcement mechanism and more definite criteria of applicability. The Act included a prohibition of attempts by private individuals and groups to influence Congress through the use of spurious telegram campaigns.[27]

The Senate Committee in 1957, like the Buchanan Committee in 1951, was convinced that full disclosure was an effective means of controlling abuses. It was their feeling that a major purpose of the 1946 Act was to begin a process of public education about "the role

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23 GENERAL INTERIM REPORT, *supra* note 1, at 64.

24 Kennedy, *supra* note 21, at 567 (emphasis added).

25 SENATE LOBBYING REPORT, *supra* note 8.

26 The Committee recommended changing the name of the 1946 Act to avoid reference to the word "lobbying" which, the Committee felt, had a sinister connotation in the minds of the public, "and therefore induces reluctance on the part of individuals and organizations to exercise their constitutional rights." *Id.* at 85.

27 *Id.* at 80.

and responsibilities in our political system of the pressure group."[28] The committee believed that "persistent prodding through official notices and civil actions will continue the process of education well begun under the existing law."[29] They appear to have reasoned that as the public became better informed about the kinds of activity in which pressure groups engaged, the existing pressure groups would be constrained to keep their activities within acceptable limits, and other members of the public would take a more active role in "aiding" Congress in its deliberations.

It may be reasonable to assume that the prospect of full disclosure will keep most lobbyists from engaging in unfair practices; it seems unduly sanguine, however, to make the further assumption that "all segments" of our very heterogeneous society, provoked by such disclosures, will begin to make their special interests known to Congress in any meaningful way. It is generally agreed that the impact of an interest group is more or less proportional to such factors as the availability of resources (including money and access to the media), the prestige of the group and of its individual members, the degree and appropriateness of the group's organization, and the degree of cohesion it can achieve in a given situation.[30] The consumer public in general and the poor in particular lack the prestige, organization, cohesion, and resources which they need to give their interests political viability, yet it is presumably these very groups from whom Senator Kennedy especially wished to receive "arguments, positions and presentations" as an aid to "sound legislative action."

The proposed Legislative Activities Disclosure Act of 1957 did not pass. A similar bill,[31] proposed in 1967, met the same fate. Despite this conspicuous lack of success, there remain strong advocates of lobby regulation reform in Congress, and perhaps some changes will ultimately be made. Even those who have not supported the proposed amendments have favored some kind of reform.[32] But statutory reg-

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28 *Id.* at 72.

29 *Id.*

30 D. B. TRUMAN, THE GOVERNMENTAL PROCESS 506-07 (1958); BLAISDELL, *supra* note 8, at 16.

31 H.R. 20594, S. 355, 90th Cong., 1st Sess. (1967).

32 The Republican minority of the Buchanan Committee bitterly opposed the majority report. Nevertheless, in their separate report, the Minority declared, "We are convinced that the present Regulation of Lobbying Act is vague, ambiguous, uncertain and seriously in need of amendment." HOUSE SELECT COMMITTEE ON LOBBYING ACTIVITIES, REPORT AND RECOMMENDATIONS ON FEDERAL LOBBYING ACT, MINORITY VIEWS, H.R. REP. No. 3239, pt. 2, at 11 (1951).

ulation can be effective only in protecting against abuse of the lobbying process by those already engaged in it. Regulation is not a creative process; it cannot call into being that which is not already there. Interest groups lacking the prerequisites for entrée into the political-legislative process will not be substantially aided by regulatory schemes aimed at preventing abuses.

C. Regulation by Taxation

Besides direct statutory regulation, the other major device used by Congress to control attempts to influence legislation has been the taxing power. By allowing or disallowing deductions for specified kinds of lobbying activity and by conditioning tax status on, among other things, the extent of legislative activity, Congress has been able to influence who lobbies, in what way, and how much. Section 501(c) of the Internal Revenue Code sets out a list of organizations exempted from the income tax. Subsection 501(c)(3) exempts organizations operated exclusively for religious, charitable, scientific, educational or other similar purposes, provided that "no substantial part" of the organization's activities consists of attempts to influence legislation or participation in political campaigns.[33] By section 170(c)(2), contributions to organizations which qualify for tax exemption under section 501(c)(3) are made tax deductible.[34]

It is possible for organizations which engage in lobbying activity to remain tax exempt,[35] but any group which relies heavily on private contributions for support is compelled to maintain its section 501(c)(3) status in order that donors may continue to deduct their contributions from gross income. Since most charitable institutions and organizations dedicated to public rather than private interests are in fact dependent on private contributions, the Internal Revenue Code is an

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33 INT. REV. CODE OF 1954, § 501(c)(3).

34 *Id.* § 170(c)(2). The deductibility of contributions to § 501(c)(3) organizations is not explicit. Since the language in § 170(c)(2) defining organizations contributions to which will be considered charitable (*i.e.*, deductible) is substantially the same as the language of § 501(c)(3) defining exempt organizations, however, it is reasonable to assume that contributions to § 501(c)(3) organizations will be deductible under § 170(c)(2).

35 Thus, an organization originally certified under § 501(c)(3) might decide to forgo this status in order to engage in political activity. To this end, it might seek certification under § 501(c)(4), which encompasses, *inter alia*, civic leagues not organized for profit but operated exclusively for the promotion of social welfare. The Sierra Club, discussed *infra*, text accompanying note 40, having lost its § 501(c)(3) status, remained tax exempt under § 501(c)(4).

effective control on the amount of activity by these groups devoted to influencing legislation.

On the other hand, Congress has also seen fit to provide incentives for lobbying by certain groups under specific circumstances. Section 162(e), a 1962 amendment to the Code, allows a deduction as an "ordinary and necessary" business expense for the cost of preparing and presenting testimony, statements, or communications before Congress or other legislative body on legislation of direct interest to the taxpayer.[36] Deductions are also allowed for various other expenditures made in connection with this kind of activity. In recommending enactment of section 162(e), the Senate Finance Committee stated,

> It is . . . desirable that taxpayers who have information bearing on the impact of present laws, or proposed legislation, on their trades or businesses not be discouraged in making this information available to the Members of Congress or legislators at other levels of Government.[37]

The majority report also argued that it was illogical to allow deductions for expenses incurred in connection with judicial and administrative proceedings, but not to allow a deduction for similar legislative appearances.[38]

The Finance Committee apparently did not perceive the even greater illogic in allowing a tax deduction to business groups for lobbying expenses while penalizing public interest groups for the same kind of activity. As Senators Gore and Douglas noted in their minority report,

> [T]he relationship of this provision [section 162 (e)] to the whole process by which our citizens seek to influence the enactment of legislation at all levels of government was not adequately considered.[39]

The inequities inherent in section 162(e) have been dramatically illustrated recently in a controversy involving the Sierra Club, a well-known conservation organization.[40] Until 1966, contributions to the Sierra Club qualified for deductions under section 170(c)(2), and the Club itself was tax-exempt under section 501(c)(3). In June of 1966, the Club placed advertisements in the *New York Times* and the

36 INT. REV. CODE OF 1954, § 162(e).
37 S. REP. No. 1881, 87th Cong., 2nd Sess. 22 (1962).
38 *Id.*
39 *Id.* at 414.
40 The facts related herein with regard to the Sierra Club controversy are drawn substantially from Borod, *Lobbying for the Public Interest—Federal Tax Policy and Administration*, 42 N.Y.U. L. REV. 1087 (1967).

Washington Post announcing its opposition to legislation which proposed constructions of power dams in the Grand Canyon, and urging the public to contribute to the fight against the project by writing their Congressman and supporting the Sierra Club.[41]

Not long after these ads appeared, the Internal Revenue Service revoked Sierra's section 501(c)(3) exemption and ruled that contributions to the Club would no longer be allowed as deductions.[42] As a result, the Club's revenues fell off an estimated $5000 per week. In the view of the IRS, the newspaper ads constituted an attempt to influence legislation and, as such, were a "substantial part" of the Club's activity. Thus, the Sierra Club was penalized for its efforts to oppose the Grand Canyon legislation. Meanwhile, due to section 162(e), the power companies on the other side of the controversy could deduct their own expenses in lobbying *for* the bill, as well as any dues paid to organizations which were used for similar purposes.[43]

The propriety of the IRS' action in the case of the Sierra Club is questionable on a number of grounds.[44] The case also brings out the inconsistencies and inequities in the way Congress currently uses the taxing power to regulate lobbying activity. By exempting charitable and educational institutions from taxation, and allowing tax deductions for the contributions they rely on for support, Congress indicated a desire to encourage the meritorious goals which these groups pursue. Prominent among their activities in recent years have been efforts to find a solution to such problems as racial discrimination, poverty, urban decay, and education. In recent years, Government has assumed an ever larger role in this attempt to construct a more just society, by stepping into areas of social policy formerly the exclusive domain of private social-service organizations. But the present tax laws make it difficult for charitable groups to make a rational adjustment to this fact of contemporary life.[45]

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41 New York Times, June 9, 1966, at 35, col. 1; Washington Post, June 9, 1966, at A9, col. 1.

42 The final determination by the IRS was made in December, 1966, approximately six months after the ads appeared, and after the IRS had informed Sierra that its tax status was being reviewed.

43 The power companies could only deduct their expenses for direct lobbying. Expenses for indirect lobbying, such as newspaper ads to cultivate public opinion, would not be deductible under § 162(e), unless they could be construed as trade ads.

44 *See* Borod, note 40 *supra*; Note, *The Sierra Club Controversy*, 55 CALIF. L. REV. 618 (1967).

45 Clark, *The Limitations on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 453 (1960).

It is deplorable that the tax laws constitute a barrier between the private charitable agencies and the legislative process, when collaboration and coordination would seem to be more fruitful for all concerned. Under the present system, any organization which, out of a purely selfless regard for the general welfare, attempts to improve the quality of federal legislation by sharing the fruits of its expertise and experience with the legislators and the public, risks losing the very tax status it relies on to insure sufficient income. Since the IRS is sporadic in its investigations, an institution runs the greatest risk when it is most highly visible, which is likely to be the time when it is struggling hardest to make its views known.[46]

> In the present day context, it is difficult to reconcile a law which purports to encourage private participation involving social problems with a restriction in the same law which cuts off the incentive as soon as private groups attempt too vigorously to make their views known to the one agency — the Government — whose actions far surpass in importance and scope those of all other agencies combined.[47]

In 1959, in *Cammarano v. United States*,[48] the Supreme Court upheld as a valid exercise of the Commissioner's rule-making power the Treasury regulations disallowing deductions as ordinary and necessary business expenses for expenditures made in attempts to influence legislation, even where the proposed legislation presented a direct threat to the taxpayer's business.[49] A principal ground relied on by the Court to justify the disallowance was the need to maintain a balance in the treatment of business and non-business taxpayers. The Court reasoned that business groups should be required to pay for lobbying activity "entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code."[50]

In a flood of legal comment following *Cammarano*, the Court's conception of a tax equilibrium was criticized. One commentator suggested that the need to preserve an equilibrium in political-legislative restrictions between the private and public sectors might best be

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46 Borod, *supra* note 40, at 1104.

47 *Id.* at 1117.

48 Cammarano v. United States, 358 U.S. 498 (1959).

49 In *Cammarano*, petitioners sought to deduct the expenses incurred while conducting an advertising campaign against a state initiative which, if passed, would have severely curtailed or eliminated petitioner's beer distributorship.

50 358 U.S. at 513.

served by giving a liberal interpretation to the restrictions imposed on political activity by section 501(c)(3) or by eliminating it altogether, rather than by restricting business group lobbying.[51] The response of Congress to *Cammarano* was to pass section 162(e), which benefited only business group lobbying and thereby vitiated any notion of a balance between public and private interests which *Cammarano* might have announced.

Since the passage of section 162(e), commentators have suggested a selective interpretation of the substantiality test of section 501(c)(3),[52] repeal of the lobbying restrictions in that section and in section 170(c)(3),[53] and a modification of lobbying restrictions on charitable institutions to conform to the treatment given to business groups.[54] These proposals all implicitly recognize the marked advantage now enjoyed by well-organized and well-financed private interests in the lobbying process, and seek to limit that advantage by enhancing the ability of less well-organized and less well-endowed organizations to compete. But like direct statutory regulation of lobbying, these proposals do little to bring into the political-legislative process those inchoate interests currently outside it. Eliminating the restrictions on political activity by non-profit groups does nothing for those people who remain unorganized and without financial support.

D. Toward Greater Participation

1. Public Lobby Organization

One proposal which does seek to encourage wider participation in the political process by groups currently excluded is Professor Cooper's plan for a public lobby organization.[55] This proposal would create a special new tax status for organizations wishing to engage in "public-interest" lobbying. Groups in this category would be eligible for some tax benefits, but would be subject to special protective standards. To prevent a public lobby from representing too narrow a point of view, and becoming a mere propaganda organ for aready strong economic interests, the lobby would be required to remain independent of any other organization, such as an industrial corporation, which had not passed a "public interest" test by being certified under section

51 Note, *Cammarano v. U.S. and a Bit Beyond*, 69 YALE L.J. 1017, 1042 (1960).
52 Borod, *supra* note 40, at 1116.
53 Cooper, *Taxation of Grassroots Lobbying*, 68 COLUM. L. REV. 801, 842-46 (1968); Clark, *supra* note 45, *passim*.
54 Note, *Problems and Procedures*, *supra* note 44, at 629-30.
55 Cooper, *supra* note 53, at 846-50.

501(c)(3). A public lobby could also be required to remain multi-purpose rather than concentrating on one issue. Tax benefits to any one taxpayer for contributions to public lobbies could be limited to small annual amounts to avoid the possibility of a lobby being dominated by one source of income. Benefits could also be limited to individual rather than corporate taxpayers. Further, benefits would be in the forms of a tax credit rather than a deduction, so the value of the benefit would not vary according to the tax bracket of the contributor.

The principal virtue of Cooper's proposal is that it provides at least some incentive for even the smallest taxpayer to involve himself in the political-legislative process. With a tax benefit in the form of a limited credit, the taxpayer would have a choice between sending his money to the government or sending it to a public lobby, whose purposes reflected his own concerns. Given such a choice, a significant number of people would probably opt for the tax credit, and in that way obtain at least a minimal stake in the exercise of government. Of course, there remains the problem that those with the fewest tax dollars are generally the same people whose interests are presently the most easily neglected. The tax group whose interests need the most support would be least able to take advantage of the benefits conferred by tax credits.

A more fundamental weakness of the public lobby proposal is that it fails to reach the poor non-taxpayer. Professor Cooper himself notes,

> We must resign ourselves to the fact that any use of the tax law to stimulate the public voice is going to discriminate against non-taxpayers.[56]

Cooper assumes that the consequences of this weakness are mitigated by the fact that, since the income tax reaches relatively low income levels, "it is reasonable to expect that the non-taxpayer groups would receive substantial benefits from the stimulated public voice."[57] But this assumption seems unjustified on a number of grounds.

First of all, it implies an identity of interest between the marginal taxpayer and the non-taxpayer. While there is undoubtedly some uniformity in the views of these two groups, particularly in the demand for improved public services, it is unlikely that those already supporting existing federal poverty programs, even with their few tax dollars,

56 *Id.* at 847, n. 221.
57 *Id.*

would consistently contribute to lobbies dedicated to expanding them.

Secondly, even where there is a compatibility of interest, the marginal taxpayer, as already noted,[58] is limited in his ability to take advantage of the benefits conferred by a tax credit because of his small tax bill.

Finally, Cooper's assumption is particularly unacceptable because it emphasizes substantive results and neglects the process by which the results are achieved. Results are important, but there is a point at which even the most spectacular results do not compensate for the exclusion of substantial numbers of people from the political process. During the 1960's there has been a tremendous increase in the amount of federal money devoted to social service programs, yet there is now more unrest and discontent than ever before. Much of this dissatisfaction can be attributed to a rising level of expectation. But it also indicates the the poor cannot simply be bought off. Whatever device is used to adjust the balance between public and private interests in the political-legislative process, it must be one which does more than produce programs for the benefit of the economically depressed. It must bring "all segments of our population" into the process itself.

2. Contingent-fee Lobbying

A second possibility for enabling people to have an impact on the legislative process, regardless of economic condition, would be to permit contingent-fee lobbying. Professional lobbyists could be paid out of the proceeds derived through their efforts. Although this kind of lobbying has traditionally been disapproved on the ground that it would encourage abusive and corrupt practices,[59] in 1957 the Senate Special Committee to Investigate Political Activities, Lobbying and Campaign Contributions reported that ". . . it appears to us more desirable to proscribe pernicious activities on the basis of what they are and not on the basis of when and how payment is made for them."[60] Senator John F. Kennedy analogized contingent-fee lobbying to the widespread use of contingent fees in the tort field and perceived no reason to distinguish between the two practices.[61] Both the Committee and Senator Kennedy perceived that to prohibit the practice

58 *See* text preceding note 56, *supra*.

59 *See, e.g.*, Marshall v. Baltimore & O. R.R., 57 U.S. (16 How.) 314 (1853) (contingent-fee lobbying contract held void as against public policy); Hazelton v. Sceckells, 202 U.S. 71 (1906); BUCHANAN COMMITTEE REPORT, *supra* note 8, at 30.

60 SENATE LOBBYING REPORT, *supra* note 8, at 79.

61 Kennedy, *supra* note 21, at 559-60.

would, in some cases, deprive the indigent of redress.[62] As a result, the proposed Legislative Activities Disclosure Act, endorsed by the Committee, did not include any prohibition on contingent-fee lobbying; nor did the proposed amendments to the Federal Regulation of Lobbying Act introduced in the ninetieth Congress.[63]

Unfortunately, the effectiveness of contingent-fee lobbying contracts as a means of giving the poor entrée to the political process would be limited, since the only people who could benefit from such an arrangement, aside from the lobbyists themselves, would be those who had specific claims against the Government, collectible only by special act of Congress. The poor, as a class, would still be excluded, and their interests still neglected.

In sum, it is apparent that the major thrust of the efforts so far to reform lobbying has been to perfect the lobbying mechanism by developing a more equitable balance among the conflicting interests already represented in the political-legislative process. Insufficient attention has been paid to the groups outside the political process which, because they lack the necessary organization, cohesion, and resources, find it impossible to enter. It is not a sufficient answer to say that there are individuals and groups of strong social consciousness who are prepared to lobby on behalf of the poor. In a democratic society, government is not simply a matter of ends; the means are equally important. The past year has seen the beginning of a movement to bring more "power to people," to democratize the political process down to its very roots. Lobbying, as an integral part of the political process, must also be made more democratic. All interest groups, including the poor and the consumer-public, must be given genuine opportunities to influence legislation through the lobbying process. It is the thesis of this Note that the obligation to provide such opportunities lies with Government, which can successfully fulfill its obligation only by providing direct support for lobbying activities.

II. Public Subvention of Lobbying

In *Slee v. Commissioner*, in referring to provisions of the 1921 Revenue Code allowing deductions for contributions to organizations operated exclusively for religious, charitable, scientific, literary or educational purposes, Judge Learned Hand declared that

62 Senate Lobbying Report, *supra* note 8, at 79; Kennedy, *supra* note 21, at 560.
63 H.R. 20594, S. 355, 90th Cong., 1st Sess. (1967).

> political agitation as such is outside the statute, however innocent the aim. . . . Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.[64]

Thirty years later, in *Cammarano v. United States*,[65] Justice Harlan invoked the wisdom of Hand and stated that the Treasury regulations contested in *Cammarano* were "a further expression of the same sharply defined policy."[66] Whether the policy against public subvention of activities to influence legislation is as "sharply defined" as the Court seemed to think is open to question,[67] but, if we assume *arguendo* that there is such a policy, it can be challenged on a number of grounds.

In 1967, in his message to Congress on campaign financing, President Johnson declared that:

> Public participation in the processes of government is the essence of democracy. No Government can long survive which does not fuse the public will to the institutions which serve it. The American system has endured for almost two centuries because the people have involved themselves in the work of their Government, with full faith in the meaning of the involvement. *But Government itself has the continuing obligation second to no other — to keep the machinery of public participation functioning smoothly and to improve it where necessary so that democracy remains a vital and vibrant institution.*[68]

President Johnson's words were written as a preamble to a proposal for the financing of presidential campaigns by permanent Congressional appropriation, but they also provide an eloquent statement of the need to bring all Americans into the political process, and of the duty of Government to take definite steps in that direction.

Since 1930, when Judge Hand first disapproved public subvention of attempts to influence legislation, the role of the federal government in providing for the public welfare has expanded dramatically. Such programs as Social Security, Old Age Assistance, and Workmen's Compensation, commonplace today, were regarded then with suspicion and distrust. The Government is now involved in a variety of activi-

64 42 F.2d 184, 185 (2nd Cir., 1930).
65 358 U.S. at 498.
66 *Id.* at 512.
67 Sharp, *Reflection on the Disallowance of Income Tax Deductions for Lobbying Expenditures*, 39 B.U. L. REV. 365, 378-79 (1959).
68 President's Message on Campaign Financing, 24 CONG. Q. ALMANAC 135A (1967) (emphasis added).

ties, involvement in which would have been unthinkable only a short while ago. A proposal for publicly supported lobbying thus seems far less heretical today than it would have in the days of Judge Hand. The notion of the government's paying to have itself lobbied seems even less implausible when one recalls that Neighborhood Legal Services throughout the country, funded by the Office of Economic Opportunity, are constantly bringing suit against local, state, and federal officials and frequently winning.

Another consideration which undercuts Judge Hand's policy against public subvention of "political agitation" is that the quality of lobbying has changed since 1930. The old fashioned type of lobbyist who sought to coerce or corrupt Congress in behalf of his private clients is not the problem he once was.[69] Rather than direct contact, lobbyists today rely heavily on the printed word as a means of pursuing legislative aims.[70] In fact, the increasing reliance on the mass media to mold public sentiment may be the most significant contemporary development in pressure group activity.[71] Although direct contact is still a useful technique, the emphasis is increasingly on grassroots campaigns designed to stimulate public opinion and thus to influence the legislators indirectly.[72] A natural concomitant of this development is an increased public awareness about current issues. As interest groups work to stimulate public opinion in favor of their viewpoint, they in effect educate the people about the problem involved. Of course the information the public receives is likely to be slanted, but too flagrant distortion runs the risk of exposure and discredit, and competing interests presumably provide or could provide the other side of the argument.

The educational aspect of grassroots lobbying, and the increasing use of this technique among pressure groups, provide another reason for public subvention of lobbying activity. The Senate Special Committee believed that a major purpose of the 1946 Lobbying Act was public education about "the role and responsibilities in our political system of the pressure group."[73] But the Act has not stimulated the broad-based participation in the political-legislative process which the Senate

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69 SCHRIFTGEISSER, *supra* note 2, at 229.

70 BUCHANAN COMMITTEE REPORT, *supra* note 8, at 3.

71 H. A. Turner, *How Pressure Groups Operate*, in UNOFFICIAL GOVERNMENT, *supra* note 3, at 63.

72 DEAKIN, *supra* note 2, at 184.

73 SENATE LOBBYING REPORT, *supra* note 8, at 72.

Committee hoped for,[74] and the need for such participation is even more acute than it was in 1957. Education of the public remains a prerequisite to any meaningful participation. For the Government to assume this educational function directly would be impossible; the issues are too numerous and too varied. Those people whose interests are most intimately affected by the issues concerned are potentially the most qualified to educate others about them. The Government can contribute to this kind of public education indirectly, by providing financial support for the right kind of lobbying activity.

It has been suggested that a program of federally-subsidized lobbying would result in increased pressures on policy making and would for this reason be undesirable.[75] A recent study of congressional lobbying reported that "Congressmen see interest groups as having a helpful and legitimate role in the legislative process," which is that "of providing information, opinion, and support."[76] If public subvention of lobbying activity increases pressure on policy-making by increasing the flow of information and opinion to the legislator and multiplying the interests in his constituency with which he must contend, then it is difficult to see such pressure as undesirable.

Finally, it should be noted that public support of activity to influence legislation is not really an innovation. Section 162(e) of the tax code, with its deduction for lobbying before Congressional committees, represents an indirect form of such federal subsidy. Similarly, the fact that section 501(c)(3) prohibits only "substantial" political activity by charitable institutions is an admission that Congress has not been absolutely opposed to the idea of using public funds to support lobbying by approved organizations.[77] Another precedent can be seen in the law reform projects handled by OEO-funded legal services. Federal money is used by these groups to "educate" the public and local legislators about the need for legislation which they have drafted.[78] The educational activity of these legal service operations bears a striking resemblance to the lobbying activity of interest groups.

Such precedents are an indication that Congress has perceived a need for keeping its members informed about the issues of concern

74 *See* text accompanying note 28 *supra.*

75 GENERAL INTERIM REPORT, *supra* note 1, at 66.

76 A. SCOTT AND M. HUNT, CONGRESS AND LOBBIES: IMAGE AND REALITY 58 (1965).

77 Sharp, *supra* note 67, at 379; Clark, *supra* note 45, at 453.

78 Conversations with A. Kovel and H. LeVine, Mass. Law Reform Institute, Boston, Mass., February 20, 1969.

to their constitutents. In 1966, Senator Abraham Ribicoff remarked in hearings before the Senate Subcommittee on Executive Reorganization, of which he was Chairman, that

> . . . we are passing laws and spending money to deal with all these problems [of poverty], but our information is poor. We don't even understand the problem. I do not see how we are ever going to straighten this out until we understand the problem.[79]

Thus, it would be in the interest of Congress and the American governmental process to institute a system of publicly-supported lobbying activity designed to elicit the kind of concerned and informed public opinion which Senator Ribicoff sees as essential.

II. The Voucher System: A Specific Suggestion

Once the principle of public support for lobbying has been accepted, how should it be implemented? The 1967 hearings before the Senate Finance Committee which followed the President's Message on Campaign Financing elicited discussion of the various considerations involved in developing a mechanism for publicly financing political activity.[80] The Committee heard extensive testimony on several different proposals for presidential election-campaign financing. President Johnson's proposal called for direct appropriations by Congress;[81] others suggested tax deductions[82] or tax credits[83] for campaign contributions. The use of such tax incentives found favor with a number of witnesses.[84]

A more promising approach, advanced by Senator Lee Metcalf, involves the use of vouchers.[85] Under this plan, Treasury vouchers would be distributed to taxpayers, who would send them to the political party of their choice. The party would then redeem each voucher at the Treasury for one dollar. Testimony before the Finance Committee

79 *Hearings before the Subcommittee on Executive Reorganization of the Senate Committee on Government Operations*, 89th Cong., 2nd Sess., pt. 5, at 1115 (1966).

80 *Hearings on Political Campaign Financing Proposals before the Senate Committee on Finance*, 90th Cong., 1st Sess. (1967) [hereinafter cited as *Finance Comm. Hearings*].

81 S. 1883, 90th Cong., 1st Sess. (1967); *see also* S. 1407 and S. 1827.

82 S. 1827, S. 1882, 90th Cong., 1st Sess. (1967).

83 S. 786, S. 1547, S. 1794, 90th Cong., 1st Sess. (1967).

84 *See, e.g., Finance Comm. Hearings, supra* note 80, at 242 (testimony of Sen. Robert F. Kennedy); at 283 (testimony of Russel D. Hemenway).

85 S. 1390, 90th Cong., 1st Sess. (1967).

brought out several advantages in this plan over the direct appropriation method. This plan, for example, makes the individual citizen responsible for sending his own voucher to the party of his choice, a feature which encourages individual choice and participation.[86] A system of direct appropriation would not offer the same encouragement. Senator Long, Chairman of the Finance Committee, observed that vouchers could be made available to all citizens twenty-one or over, thus further eliminating inequities based on wealth.[87] Another advantage, noted by Senator Joseph Tydings, is that it avoids the need to secure annual congressional appropriations and gives more power to the people.[88] Finally, Mr. George Agree of the Association for the Democratic Process, observed that the number of vouchers received by a party

> would depend on the vigor of the respective collection efforts, but this fact would enormously benefit the political process. Both parties would be encouraged to get down to the grass-roots, with an across-the-board stimulation of political interest and activity.[89]

If the basic features of the Metcalf voucher plan could be adapted to the lobbying process without sacrificing any of its advantages it would do a great deal to democratize further the political process. Providing a voucher to all voting-age citizens would afford to "all segments of our population" increased influence in the political-legislative process. A citizen, with a voucher in hand, would be induced to consider which of his alternatives could benefit him the most. Interest groups, anxious to attract vouchers, would have to compete for them in terms of substantive achievement. The need for vouchers would be an incentive for interest groups to educate the public about the issues with which each is concerned and to inform them about recent developments. Finally, the prospect of broad-based financial support might induce latent interest groups to organize into a more effective political instrument.

Financing the political activity of interest groups through the use of vouchers would of course present difficulties, both administrative and substantive. It is not the purpose of this Note to make a detailed proposal as to how all these difficulties could or should be solved. But solutions are available.

86 *Finance Comm. Hearings, supra* note 80, at 244.
87 *Id.* at 357.
88 *Id.* at 415.
89 *Id.* at 360-61.

The first difficulty lies in trying to decide which people are to get vouchers. One of the main virtues of the plan is that its benefits need not be restricted to taxpayers. But assuming vouchers are made available to all voting-age citizens, should they be restricted to registered voters?[90] To do so would give an incentive to lobby groups to encourage and assist in voter registration. On the other hand, there are still many areas where registration is extremely difficult, due to racial or economic discrimination. In these areas, limiting vouchers to registered voters would tend to cut off people most in need of them. Until such time as all citizens have an equal opportunity to register, it would seem preferable to make vouchers available to all citizens of voting age, registered or not.

A second difficulty with vouchers is the problem of distribution. Should each eligible recipient be mailed a voucher or should vouchers be made available at convient distribution centers? A system of direct mailing runs the risk of omitting eligible recipients. The use of distribution centers might encounter the same problem with discrimination that hampers voter registration efforts, although this danger could be minimized by using a federal agency, such as the post office. Perhaps a combination of the two methods would provide the most satisfactory assurance that all eligible citizens would receive vouchers.

The next difficulty is to determine what organizations should be eligible to collect vouchers and cash them. Clearly some standards would have to be established to avoid the possibility that dishonest or deceitful groups could obtain public funds for personal ends. The standards would have to be reasonably objective and easily applicable to insure that interest groups desiring to collect vouchers would not be denied permission because of political pressure or the private prejudices of the administrator. A list of standards, to be set by Congress, should include limitations on the uses to which public funds could be put. In this way Congress could insure that publicly supported lobbying activity was principally devoted to public education and not to private coercion. Another standard might require an administrative structure adequate to insure that a publicly supported lobby remains open and accountable to the people whose vouchers support it. For example, a lobby group might be required to have a

90 The proposal is to make vouchers available to voting-age citizens, rather than to citizens aged twenty-one or above, since the voting age could quite conceivably be changed in the near future, and it would be illogical to allow a citizen a ballot but to deny him a voucher.

formal mechanism for receiving and responding to the suggestions and grievances of its constituents.

If an interest group qualifies to receive vouchers, should there be any limit on the number of vouchers the group can cash? If vouchers are distributed to all citizens of voting age, the amount of federal money potentially available for lobby support would be considerably in excess of 100 million dollars.[91] It is conceivable that a handful of groups might attract a substantial percentage of that money, and then use it to bombard the public with educational material. It could be argued that if such a large number of people choose to support a particular lobby with their vouchers, it is no more than just to allow that lobby to spend it. On the other hand, if the primary purpose behind public subvention of lobbying activity is to correct an imbalance in the political-legislative process and to encourage expanded participation in that process through public education, then an absolute limitation on the amount of public money available to any one group would seem justifiable.[92]

Related to the problem of whether or not to limit the voucher funds available to a group is the question of how to handle private contributions. A person cannot be prevented from giving his own money to an interest group whose ideas he supports. But should an organization which receives such private donations also be eligible to collect vouchers and cash them at the Treasury? A proposal made by Senator Albert Gore in connection with political campaign financing would accord political parties an option for public or private financing.[93] Private support would be encouraged by allowing a tax deduction of one-half of a political contribution up to $100. Public support would be available for those parties willing to forgo private donations. This proposal might also serve the needs of lobby financing. An interest group would have the option of relying on its private supporters or refusing such contributions and accepting only vouchers.

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91 The 1964 voting-age population was 113,931,000, which was an increase of approximately 5,500,000 over the 1960 figure. Assuming a proportionate increase since 1964, the U.S. voting population is approaching 120,000,000. The potential "pot" from voucher contributions, therefore, is about 120 million dollars. THE WORLD ALMANAC (Luman H. Long, ed. 1969) at 601.

92 Such a consideration might also justify a limited number of direct federal grants to particularly needy groups, whose interests and ideas are not readily understood and which, as a result, are unable to attract sufficient vouchers. Such a grant might cover the "starting up" expenses of a group just beginning to organize.

93 S. 1827, 90th Cong., 1st Sess. (1967).

Another possibility would be to allow a lobby group to collect and redeem vouchers so long as the total of public and private contributions did not exceed a specified maximum. This plan, however, might meet some administrative difficulty in coping with the problem of a late private contribution which puts an organization's total funds over the stated maximum. Should the organization then be required to turn back Treasury vouchers equal to the amount by which total funds collected have exceeded the maximum? Such a requirement might induce lobby groups to conceal such late contributions. On the other hand, the absence of an effective ceiling would mean that even groups with relatively easy access to private resources could receive federal subsidies.

This administrative difficulty points to a more general weakness of the voucher plan, also noted by Senator Williams with respect to the Metcalf plan for campaign financing, namely that it is "wide open for abuse."[94] There is, for example, the possibility that vouchers would be counterfeited or that bona fide vouchers would be stolen. Organizations might attempt to buy vouchers for cash, at less than the one dollar redemption value. Proper security precautions would probably be enough to keep counterfeiting and theft to a minimum. Besides, the small cash value of single vouchers would make such activities comparatively unattractive, considering the risks involved. Similarly, any lobby organization which tried to secure vouchers by offering a cash premium would have to operate on such a large scale to make the venture worthwhile that it would be easily detected.

Probably the most common kind of abuse would be the misuse of legitimately acquired funds. An illustration might be the use of vouchers to finance a fraudulent telegram campaign to persuade some congressman that his constituency supported a particular piece of legislation. The best safeguard against this is the technique nominally utilized by the Federal Regulation of Lobbying Act, full disclosure. The Lobbying Act, of course, has been conspicuously unsuccessful in bringing lobbying abuses to light; nevertheless, the principle of using publicity or the threat of disclosure to keep lobbyists in line is sound.[95] By requiring an organization to submit a full report of its income and the ways in which the money was spent before it can be certified eligible to collect and cash Treasury vouchers in the following year,

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94 *Finance Comm. Hearings, supra* note 80, at 471.
95 Kennedy, *supra* note 21, at 537.

it would be possible to keep a check on the kind of abusive practices most likely to appear under the voucher plan.

IV. Conclusion

It has been the purpose of this Note to raise the issue of publicly-supported activity to influence legislation rather than to provide a blueprint for implementing such a policy. That there is an imbalance in the impact which private and public interest groups have upon the legislative process has long been recognized. But the techniques for coping with this situation, both those already tried and those which have been proposed, are almost invariably designed to develop a more equitable balance among the conflicting interests already represented within that process. The more fundamental problem of how to draw the currently excluded segments of society into the political process in a meaningful way, has generally been neglected. The problem has been especially neglected in the area of lobbying, which is today acknowledged as an integral part of democratic Government. The supreme obligation of Government to improve the machinery of public participation in the political process, requires that Government take bold, affirmative steps to afford all our citizens an opportunity to be heard in the legislatures of the land, not only through their votes, but also through their lobbies. Public subvention of lobbying activity, properly implemented and regulated, is a sound policy which could do much to expand the frontiers of social justice in the United States.

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BOOK REVIEW

COPYRIGHT IN HISTORICAL PERSPECTIVE, by *Lyman Ray Patterson.* Nashville: Vanderbilt University Press, 1968, pp. vii, 264, $8.50.

The Judiciary Committee Report, submitted to the House of Representatives during the Nineteenth Congress's attempt to enact a general revision of the copyright law, cited an urgent need for legislation that would take full account of the continuing technological revolution in communications and adequately reconcile the conflicting interests of the many groups and industries dependent upon the works of authors.[1] But authors, the report stated, continue to be the primary subject of legislative concern. Consequently the basic aim of the Bill was said to be very simple: "to insure that authors receive the encouragement they need to create and the remuneration they fairly deserve for their creations."[2]

The Ninety-first Congress will also attempt a wholesale revision of the copyright laws,[3] and doubtless its attempt will also be ballyhooed as an "author's bill." The Statute of Anne (the first English copyright statute) and the Copyright Act of 1790 (the first federal copyright statute) are said to have been acts to secure the rights of authors. It is appropriate that any present effort to pass legislation should have as its announced purpose that of securing to authors the exclusive right to their writings.

Of course if a copyright act *really* secured to authors exclusive rights in their writings there would begin a dramatic redistribution of wealth in the publishing and entertainment industries. Authors who could ignore promises to the contrary and cry "Stop!" when a book, play or motion picture was enjoying commercial success, or who could say "Bring it back" when a work was perceived as no longer worthy, would surely be able to reap for themselves whatever "monopoly profits" their works could earn, while holding publishers to a competitor's increment. But neither the Statute of Anne, nor the Act of 1790 (or its later revisions), gave authors exclusive rights to profit from their efforts and it is unlikely that any act which passes the 91st Congress will do much to alter the present reality, that it is the

1 COMMITTEE ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. Rep. No. 83, 90th Cong., 1st Sess. 1-3 (1967).

2 *Id.* at 3.

3 A Senate Bill for the general revision of the Copyright Law was introduced by Senator McClellan on January 22, 1969. S. 543, 91st Cong., 1st Sess.

profits of publishers, and not the economic well-being of authors, with few exceptions, that historically have been made secure by copyright statutes. The present authors' lobby, after all, is not even strong enough to secure civilized treatment for authors under the Internal Revenue Code of 1954, reform of which could indeed insure "that authors receive the encouragement they need to create and the remuneration they fairly deserve for their creations."

Interestingly enough, it is Professor Patterson's basic thesis in *Copyright In Historical Perspective* that the Statute of Anne was a publishers' statute and that the copyright it described was a publisher's right. His subsidiary thesis is that the House of Lords, in 1774, and the United States Supreme Court, in 1834, erred both in supposing that the primary purpose underlying the copyright statutes before them was to create authors' rights and, in consequently treating the statutory copyright as an author's right embracing the entire bundle of property interests in a published literary work.

Professor Patterson is concerned that these infirmities in the development of copyright doctrine be exposed so that contemporary judges and legislators can identify "unsound" prior constructions and decisions and pay them the deference they are due. He is actually little concerned with bettering directly the author's ecnomic lot; rather he is concerned that the concept of the author's personal right or creative right in his work be recognized, that the compatibility of statutory copyright be properly perceived, and that the concept of authors' personal or creative rights in their works be understood.

In aid of his point, that the Statute of Anne translated an existing publisher's copyright into a statutory copyright, Professor Patterson provides an interesting and detailed historical account of the development of the publishing trade in England prior to the passage of the Statute of Anne in 1709 (o.s.).

Professor Patterson writes of the formation of an approved guild of writers of text letter, illuminators, book binders and booksellers in London in 1403; the introduction of the printing press into England in 1476, and the formation of the Company of Stationers of London, under a Royal Charter, in 1557.

The Stationers' Company, aided by printing patents granted by James I, and by powers of censorship conferred by Star Chamber decree, regulated the publishing trade in England for 150 years without the benefit of a copyright statute. The settling of disputes within the trade was handled by a Court of Assistants. It was an essential

part of the administrative machinery of the Company, and, as a side effect, kept the affairs of the book trade, including the development of the Stationers' copyright, from the scrutiny of the common law courts.

The monopoly on printing in England was maintained through the Crown Charter and the Star Chamber decrees. Monopolies in individual books became lodged in individual members of the company by its customary procedures which included, in many cases, entering on the books of the Company a notice that rights in a particular publication were claimed by the registrant.

This recognition of monopoly rights in individual books by members of the Company *inter se* Professor Patterson, rightly, I think, calls the Stationers' Copyright. This Copyright, or something like it, was needed to insure that the trading activities of the membership were orderly, and not overly competitive.

Presumably there was some competition among members of the Company for manuscripts of new books. But once a member obtained a new manuscript by paying the author a lump sum, entered it on the books of the Company, and complied with government censorship regulations, he was assured of the exclusive right to have the book produced, or reproduced. Members of the Company respected this exclusive right in order to secure reciprocal respect for *their* copyrights, and since non-members of the Company could not lawfully produce a book, the combined efforts of the Company and the Crown were successful, at least for a time, in discouraging piracy by non-members.

Not surprisingly, the right to profit from the publication of a book was deemed by the Stationers to be perpetual. This meant that the ownership of a particular book was to remain forever in the hands of a member or members of the Company, occasionally subject to an outstanding agreement with a printer conferring "printer's rights," or to a charge for the benefit of the widow of the former owner or, in rare cases, to a superior printing patent granted by the Crown. It has been said, that by means of the Stationers' Copyright, the Company had contrived to gain control by the late 17th Century of all the literature of the Kingdom.[4]

Near the end of that century, a variety of pressures, including expressions of dissatisfaction from the less affluent members of the Com-

4 *Donaldson v. Beckett* (H.L. 1774), as reported in 17 HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 953, 995 (1813).

pany and the lapse of the Company's statutory power to seize "unauthorized" texts, caused the Company to seek legislation which, in 1709 (o.s.) became the first copyright statute.

The members of the Company holding copyrights wanted to regain their monopolies; printers and other "less chanced" members of the Company, and nonmembers in general, wanted the booksellers monopoly broken up. The Statute of Anne was a compromise between the two groups. Existing "copyrights" in old books, including books hundreds of years old, were continued for 21 years. New books were controlled by the new statute, which provided that the author or the purchaser of the copy could receive a copyright — an exclusive right to multiply copies — for fourteen years, with a second fourteen year monopoly available to the author, if he lived to apply for it.

Professor Patterson suggests that although authors were permitted to acquire copyrights by the statute, the notion of copyrights, held by the individual legislators who passed the act, assuming they thought about it, would have been modeled on the old Stationers' copyright with which they were familiar.

That copyright was hardly an author's copyright. It was a right to publish lodged by publishers in a publisher. In most cases, the author was paid a lump sum for the right to publish a manuscript, but it was recognized that a living author could always alter and revise a work, and publishers frequently contracted with the author for the rights to publish revisions, or to publish without fear of competing revisions for a period of time.

In the Stationers' pre-Statute of Anne system, the author in selling his manuscript did not sell the right to publish, for he had no such right; nor did he part with personal rights to rework the product of his creativity, for these rights were recognized to exist during his life, independently of the manuscript publishing rights. The author's rights to be paid for his manuscript and to revise his work were simply not related to the copyright in the Stationers' Company's system, and, postulates Professor Patterson, author's rights were hardly the concern of the legislators who passed the Statute of Anne.

But history threw a curve at the judges who were called upon to construe the statute, for they did not receive the question until long after the statute's passage. By the terms of the statute, the booksellers perpetual monopoly ceased to exist. But the booksellers nevertheless

launched a campaign to regain it under the banner of the author's common law copyright. The author had a perpetual common law copyright in his works, the booksellers claimed, a right which was independent of the statutory copyright and, of course, assignable to a publisher.

The House of Lords had no choice but to reject this perpetual common law copyright argument, if it was to implement the general legislative purposes underlying the Statute of Anne, that of curtailing publishers' monopolies. Publishers could not be permitted to regain, under the rubric of the author's common law copyright, that which the legislature had taken away, or at least limited, by the Statute of Anne. And so, the House of Lords, in *Donaldson v. Beckett*,[5] held that although there was an author's perpetual copyright at common law which survived publication, it did not survive the preemptory effect of the Statute of Anne. Under that statute, the sole copyright that survives publication is statutory, said the Lords.

The unfortunate effect of this decision was to direct authors solely to the statute for any personal right in their published works. In reality this had the effect of denying all authors' personal rights in published works, since the Statute of Anne (and subsequent copyright statutes in the United States) was modeled upon the Stationers' copyright, a *publishers'* copyright, that did not speak to authors' personal rights in their works.

Professor Patterson deeply laments that aspect of *Donaldson v. Beckett* and its American counterpart, *Wheaton v. Peters*,[6] which limits the author's interests in his published work to the right to print, publish, and sell, while disabling the common law from protecting the large area of the author's personal interest in his published work not connected with printing, publishing, and selling. And of course he convincingly demonstrates that the law did not have to develop in that way, and perhaps would not have developed in that way if the bench and bar had even a small portion of Professor Patterson's knowledge of history.

I am tremendously impressed with Professor Patterson's book as historical writing. Every copyright scholar will benefit from reading it and will enjoy reading it. I cannot see how anyone can quarrel

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5 Burr. 2408, 98 Eng. Rep. 257 (1774).
6 33 U.S. (8 Pet.) 591 (1834).

with his conclusion that the Statute of Anne and its later American counterparts could have been effectively implemented as anti-monopoly, trade regulation schemes without deciding that the statutory copyright constitutes the entire property interest in a published work.

The only disagreement I have with the book is that I cannot tell *what* personal or creative rights in published books Professor Patterson would have the common law protect. M. Sarraute, a distinguished Paris lawyer, has recently suggested that in France the author's rights in a published work in addition to copyright — his personal or creative rights — include a right to have others respect the integrity of his work, a right to have his authorship acknowledged and, in a very limited way, a right to withdraw or renounce a work.[7]

If these are the personal or creative rights which could co-exist with statutory copyright but which were shifted beyond the reach of authors by the House of Lords and the Supreme Court, then I think Professor Patterson is open to slight criticism; for, of the three personal rights mentioned by M. Sarraute, one is in the process of being recognized by American common law, the second could be recognized, if the need actually arises, and the third is incompatible with the anti-monopoly thrust of statutory copyright.

The first of M. Sarraute's authors' "rights" (and perhaps one of Professor Patterson's authors' rights?) is the right to have others respect the integrity of a published work, and not alter or destroy it. Tort and contract principles presently insure American authors and artists that their work will not be garbled or mutilated, and the ghost of *Donaldson v. Beckett* is not thought to haunt the undertaking.

The two opinions generated by Producer-Director George Stevens' efforts to enjoin NBC from cutting the movie "A Place In The Sun" and from interrupting it for commercials, clearly suggests limits beyond which television exhibitors may not go in fitting a film to their medium — limits suggested by the relation between a creative person's reputation and his published work.[8] The tort of mutilation is develop-

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7 Sarraute, *Current Theory on The Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. ———— (1968).

8 Stevens v. N.B.C., 148 U.S.P.Q. 755 (Cal. Super. Ct., L.A. Co. 1966); Stevens v. N.B.C., 150 U.S.P.Q. 572 (Cal. Super. Ct., L.A. Co 1966). *Cf.* Preminger v. Columbia Pictures Corp. 49 Misc. 2d 363, 267 N.Y.S. 2d 594 (Sup. Ct. 1966), *aff'd.* 25 App. Div. 2d 830, 269 N.Y.S. 2d 913, *aff'd.*, 18 N.Y. 2d 659, 273 N.Y.S. 2d 80.

ing in the United States[9] and protects, it would seem, the very interest that Professor Patterson assumes was rendered unprotectable by *Wheaton v Peters.*

American law has not yet developed a "paternity right," the second of M. Sarraute's rights, enabling authors to compel publishers to acknowledge their authorship. My guess is that there is little need for such a tort; surely publishers ordinarily acknowledge authorship,[10] and in any event, a reverse passing off theory is perhaps available to halt distribution of an artist's work under another's name.[11] Clearly under American law an author has a right distinct from copyright not to have a work presented as his own, when it is not of his creation.[12]

An author's right to withdraw or recall a published work, the third right mentioned by M. Sarraute, even if logistically feasible, is, it seems to me, placed beyond the competance of the common law by the anti-monopoly principle of statutory copyright. Works actually published (or even unpublished under the Revision Bill) proceed ineluctably to the public domain, subject, for a limited time, to the copyright monopoly. The public domain principle was at the core of the legislative purpose when each previous English and American copyright statute was passed, and is the key to the grant of economic rights to authors and their assignees. A common law right of recall, in short, unlike a common law duty not to mutilate when multiplying copies of a published work, is not consistent with statutory copyright. The right of recall is not one of those common law possibilities inadvertantly knocked out by *Donaldson v. Beckett, et. al.* Its preemption was advertant,[13] and Professor Patterson would perhaps agree.

In any event, Professor Patterson powerfully and persuasively develops the points that statutory copyright deals with the economic

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9 *See* Fairbanks v. Winik, 206 App. Div. 449, 201 N.Y.S. 487 (1923), Meliodon v. School Dist. of Philadelphia, 328 Pa. 457, 195 A. 905 (1908), and Gieseking v. Urania Records, Inc., 17 Misc. 2d 1034, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

10 *But cf.* Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947).

11 *Cf.* International News Service v. Associated Press, 248 U.S. 215 (1918).

12 Drummond v. Alternus, 60 F. 338 (E.D. Pa. 1894); Locke v. Benton & Bowles, Inc., 253 App. Div. 369, 2 N.Y.S. 2d 150 (1938).

13 *See* Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964); and Brulotte v. Thys Co., 379 U.S. 29 (1964).

aspect of copyright, and that common law courts have a power, as yet unused, to deal with the creative interests of authors as justice requires. I believe the common law courts have in fact already begun to deal with authors' creative rights, but I acknowledge that these efforts are tentative. Whether the courts' work has already begun, or is about to begin, *Copyright In Historical Perspective* will provide a sound doctrinal basis for future developments.

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