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HIGHWAY RELOCATION PLANNING AND EARLY JUDICIAL REVIEW

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Introduction

A recurring problem in the administration of federal grant-in-aid programs is that the specific conditions generally attached to grants are not always enforced against the recipient states. The purpose of this article is to analyze one of these programs, the federal highway relocation program, and to examine how private parties with a bona fide interest in the enforcement of its conditions may act so as to require states to comply with them. Most important for the success of such private enforcement is the ability to obtain judicial review at an early point in the administrative decision-making process.

The relocation provisions of the Federal-Aid Highway Act of 1968[1] require that in order to receive federal funds, the states must give assurances to the Federal Highway Administration[2] that an adequate program is being carried out to relocate people displaced by a federal-aid highway project. The federal government provides matching funds[3] to meet much of the relocation expenses, but unless the states begin planning for relocation well in advance of the actual construction of the highway, the program will not be effective. For this reason, the FHWA, under its rulemaking authority, requires that the planning of the re-

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1 23 U.S.C. §§ 501-511 (Supp. IV 1968) (hereinafter the "Act").

2 The actual highway projects are carried out by the Bureau of Public Roads, which is part of the Federal Highway Administration (hereinafter "FHWA"), which is part of the Department of Transportation. For purposes of this article, reference will be made only to the FHWA.

3 Currently, the highway law calls for 50-50 federal-state matching and 90-10 federal-state matching for Interstate System mileage, 23 U.S.C. § 120(c) (1966). *See* R. Netherton, *Intergovernmental Relations Under the Federal-Aid Highway Program*, in 1 URBAN LAW ANNUAL 15, 27 (1968).

location program must be done step-by-step along with the planning of the highway project itself.[4] Thus, before any project is given preliminary approval, a state is required to have investigated the availability of housing and the number of individuals that would be displaced, to have provided a full opportunity for interested individuals to present data and views on the specific relocation problems involved, and to have taken into account the information thus obtained in their planning of the overall project.

Individual states, however, may not always carry out these steps as required, but may attempt to gain initial approval for their proposed projects by submitting false or obsolete data concerning relocation to the FHWA. Since early investigation of relocation problems is vital to successful relocation and to an optimal choice of highway routing, laxity by the states in the early stages may well cause unnecessary suffering among the people eventually displaced. There is evidence that such laxity exists, and there is a danger that present administrative and judicial procedures and remedies are inadequate. While empirically it may be difficult to substantiate the fact that states are currently or will possibly engage in future noncompliance, there are three indications that states will ignore the very real problems of people who are to be displaced.

First of all, while only two cases have been filed under this legislation,[5] barely a year has passed since enactment. In both cases, the complaints alleged that the state agencies involved had not given the relocation problems proper investigation or adequate treatment at the public hearings. Typical is the case of *Triangle Improvement Council v. Ritchie*,[6] in which a group of

4 The FHWA issues "Policy Procedure Memorandums," "Instructional Memorandums," and "Circular Memorandums" to carry out the highway program. These memorandums are not usually published but are available from the FHWA upon request. The Comptroller General has ruled that these types of memorandums have the force of law. 43 COMP. GEN. 31, 34 (Dec. B-149682, July 9, 1963). *See* Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969), and the many precedents cited by the Supreme Court in that case, for the rule that an agency's failure to comply with a memorandum's requirements is a violation of law.

5 Triangle Improvement Council v. Ritchie, Civil No. 68-183 CH (S.D.W. Va. filed July 2, 1969); Hanley v. Volpe, Civil No. 69-C-302h (E.D. Wis.), 28 U.S.C. §§ 501-511 was enacted on August 23, 1968.

6 Civil No. 68-183 CH (S.D.W. Va. filed July 2, 1969).

poor blacks living in Charleston, West Virginia, were being displaced by an interstate highway development. The complainants alleged that the state had acted without giving consideration to the economic and social consequences of the route of the interstate highway and without procedural compliance with federal statutes and regulations relating to public hearings.[7]

Secondly, further evidence of likely and frequent noncompliance is provided by analogy with the myriad difficulties suffered by persons displaced by urban renewal projects. The dismal record of state and federal government agencies is documented in law review articles[8] and a long line cases.[9] Typical of the general lack of concern by state agencies is the case of *Western Addition Community Organization v. Weaver*,[10] wherein a group of poor blacks contended that the state's local agency had completely ignored the statutory rights of displacees under the Federal Housing Act.[11] The federal district court agreed, holding that there had been "no compliance by the local agency with the contractual provisions required. . . ."[12] If the state agencies whose sole function is that of social redevelopment can be so lax with the rights of the displacees, it is obvious that those agencies concerned primarily with highway construction are apt to be at least as equally unconcerned.

Thirdly, highways tend to be constructed through the poorest residential neighborhoods of any urban area, where residents have the least political power in the community. Those involved with the problem on the state level are usually state highway department engineers with practically no training or experience

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7 The complaint went on to state that the public hearing was inadequate in that it failed to inform the affected residents of the existence, nature, purposes, scope, and potential effects of the hearing. Further, the format of the hearing was alleged to have discouraged citizen participation in that its scope was too great, its discussion too technical in nature, and its length oppressive and inhibiting.

8 For a thorough discussion of these problems in the urban renewal area, see Note, *Family Relocation in Urban Renewal*, 82 HARV. L. REV. 864 (1969); Note, *The Interest of Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STAN. L. REV. 801 (1969).

9 *See, e.g.*, Western Addition Community Org. v. Weaver, 294 F. Supp. 433 (N.D. Cal. 1968); Powelton Civil Homeowners Ass'n v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968).

10 294 F. Supp. 433 (1968).

11 42 U.S.C. §§ 1450-65 (1969).

12 294 F. Supp. 433, 440 (1968).

in understanding and dealing with the complex social and economic problems of the displaced person. As a noted relocation authority has said:

> Federal highways are frequently planned for economic reasons to be built through the poor areas of our major cities. The displacees involved invariably have little or no political or economic power to make their grievances known. It is often the case that state highway officials are far more interested in laying concrete than dealing with the problems of the few hundred poverty stricken families in the area.[13]

The provision of adequate relocation assistance to those persons displaced by the building of our nation's highways has long been a serious problem. Highway development displaces thousands of people and business concerns each year. A Congressional study on this matter found that approximately 168,000 individuals, families, businesses, farms and non-profit organizations have been or will be displaced during the three year period commencing July 1, 1967.[14]

The initial approach to highway relocation assistance taken by most legislatures was that displacees were "unfortunates to whom nothing is owed, but to whom something might be given."[15] The federal highway program did not provide for relocation assistance until passage of the Federal-Aid Highway Act of 1962.[16] The 1962 Act required states to furnish satisfactory assurance that relocation advisory assistance would be provided to those displaced and authorized limited federal reimbursement to states for any payments made by them to those dislocated by federal-aid highway projects. However, these provisions were not mandatory.[17]

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13 Letter from Anthony Kline, Staff Attorney, National Housing Law Project, Berkeley, Calif., December 10, 1969.

14 HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 1ST SESS., HIGHWAY RELOCATION ASSISTANCE STUDY 50-51 (Comm. Print 1967) [hereinafter cited as RELOCATION STUDY]. In 1964, the House Committee issued a list of federal agencies responsible for displacement of persons, in order of impact. The Bureau of Public Roads ranked second in importance, exceeded only by the Urban Renewal Administration (now the Renewal Assistance Administration). STAFF OF HOUSE COMM. ON PUBLIC WORKS, STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS, 88TH CONG., 2D SESS. 272 (Comm. Print 1964).

15 Note, *The Interest of Rootedness*, *supra* note 8, at 803-4.

16 23 U.S.C. § 133 (1966).

17 Federal participation, limited to $200 for a residential move and to $3,000 for

The inadequacies of the relocation program under the 1962 Act have become apparent. In 1966, approximately 26,000 people were displaced in states which had not chosen to make relocation payments.[18] As of March 31, 1968, only 37 states, the District of Columbia, and Puerto Rico were authorizing payment of any relocation costs.[19] On the average, since 1967, the highway program has displaced approximately 56,000 parties per year and over 77 percent of this displacement has taken place in urban areas.[20] The lack of an adequate program of assistance for displaced persons and businesses has resulted in vehement opposition to certain highway programs and has forced their cancellation in some instances.[21]

Concern over possible delay in highway development and the substantial inequities created by previous highway construction methods caused the Senate Committee on Public Works, beginning in 1967, to conduct a series of hearings on urban highway problems.[22] Throughout these hearings, testimony disclosed that one of the fundamental causes of failure of the states and the FHWA in obtaining local approval of proposed interstate highway route locations in, through, and around metropolitan areas stems from the fact that those displaced are not provided with adequate relocation assistance and just compensation for property taken.[23] Evidence shows that those persons least able to afford dislocation are frequently the ones who are forced to move by highway programs.

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a business relocation, was permitted only if the state law allowed relocation payments and only if the state elected to make such a payment. 23 U.S.C. § 133(c)(d) (1966).

18 RELOCATION STUDY, *supra* note 14, at 50-51.

19 S. REP. No. 1340, 90th Cong., 2d Sess., in 1968 U.S. CODE CONG. AND ADM. NEWS 3482, 3487.

20 RELOCATION STUDY, *supra* note 14, at 50-51. As of March 31, 1969, there were an estimated 750 miles of Interstate System highways alone (authorized but not planned) to be constructed in urban areas. Interviews with Tom Hartnett, Right-of-Way Acquistion Division of the Bureau of Public Roads, Aug. 10, 1969.

21 *See*-Christian Science Monitor, June 20, 1968, § 2, at 9; 113 CONG. REC. H5838 (daily ed. July 1, 1968) (remarks of Mr. Cramer).

22 Hearings began on November 14, 1967 and were concluded on May 28, 1968. In order to cover all facets of the impact of highway construction on major urban centers, those testifying represented a broad spectrum of views within the urban community, including federal, state and local government officials; representatives of the engineering, highway, urban planning, and architectural professions; sociologists and other academicians, among others. S. REP. No. 1340, *supra* note 19, at 3486.

23 S. REP. No. 1340, *supra* note 19, at 3488.

Urban interstate highways often go through slum areas of substandard housing, where most residents do not have the financial or social means necessary to adequately re-establish themselves.[24] Often the relocatees are nonwhite and face the additional handicap of racial discrimination in the private housing market. Highway construction also destroys low cost urban housing, which is simply not available elsewhere.

A definite need was thus shown to exist for procedures which provide for comparable replacement housing and property at the time such displacement occurs. In response to this problem, Congress passed the Federal-Aid Highway Act of 1968.[25]

I. The Federal Highway Relocation Assistance Program and its Implementation in the Highway Planning Process

A. *The Act*

The avowed purpose behind the enactment of the relocation program is to give potential relocatees prompt and equitable assistance so that they do not suffer disproportionate harm as the result of a public program. Fundamental also is the goal of removing the cause of highway construction delays and stoppages stemming from a late discovery of the inadequacy of state relocation planning.[26] To accomplish this goal, the Act requires that satisfactory assurances be given by the state that fair and reasonable relocation payments will be afforded, that a relocation assistance program will be established, and that there will be comparable dwellings for the displacees.[27] The assurances must be given before

24 For a thorough discussion of an analogous problem, see Note, *Family Relocation in Urban Renewal, supra* note 8; *see also* The Housing of Relocated Families in Urban Renewal: The Record and the Controversy (J. Wilson ed. 1966).

25 23 U.S.C. §§ 501-511 (Supp. IV 1968).

26 *See* 23 U.S.C. § 501 (Supp. IV 1968); *see also* S. Rep. No. 1340, *supra* note 19, at 3491.

27 The program requires that there be available "[i]n areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, decent, safe, and sanitary dwellings, as defined by the Secretary, equal in number to the number of and available to such displaced families and individuals and reasonably accessible to their places of employment." 23 U.S.C. § 502(3) (Supp. IV 1968).

authorization of any phase of a project causing displacement[28] and constitute a condition precedent for receipt of federal aid.

The new and comprehensive relocation assistance program not only provides for larger financial payments to the displacees and for associated relocation services, but it allows for a greater federal financial participation in the relocation program.[29]

The program consists of direct payments to the displacees and various relocation services for displacees. The payments are similar to those given in other federal relocation programs,[30] *i.e.*, relocatees receive reasonable moving expenses and various incidental expenses associated with the change of residence.[31] There is also a provision for replacement payments in situations where the replacement housing or rental payments are more expensive than the domiciles vacated.[32] In addition to the payments, the state is required to supply services to the displacee and the affected members of the public.[33] It must insure that a local relocation office is established which provides various housing data and public information. The state must also establish machinery which enables

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28 Pursuant to 23 U.S.C. § 502, the FHWA has established procedures that the state must follow in carrying out this requirement. FHWA Instructional Memorandum 80-1-68, Sept. 5, 1968 [hereinafter cited as IM].

29 It should be noted that the RELOCATION STUDY, *supra* note 14, recommended that (1) the amount of the payments to those displaced be raised; (2) relocation advisory assistance be increased; (3) availability of relocation housing be assured; and (4) procedures be established for the early notice of property acquisitions and timely relocation payments.

30 *See, e.g.*, Public Housing Act, 42 U.S.C. §§ 1415(7)(b)(iii), (8) (1969); and Housing and Urban Development Act, 42 U.S.C. §§ 3071-74 (1969).

31 A person displaced by a federal-aid highway project may elect to receive actual reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property. In lieu of actual expenses, any person displaced from (1) a dwelling may receive a moving expense allowance not to exceed $200 and a dislocation allowance of $100, or (2) from a business or farm operation may receive an amount equal to the average annual net earnings of the business or farm operation, or $5,000, whichever is the lesser. 23 U.S.C. § 505 (Supp. IV 1968). In addition, the state is to reimburse a dislocatee for reasonable expenses for property conveyancing, mortgage prepayment penalties, and the pro rata portion of real property taxes for the period after the taking. 23 U.S.C. § 507 (Supp. IV 1968).

32 In the instance of a dwelling owner, an additional payment of up to $5,000 may be made to enable such a dislocatee to obtain a comparable dwelling elsewhere. In the instance of lessees, an additional payment of up to $1,500 may be authorized to enable such a person to lease, rent, or make the down payment on a dwelling of adequate standards. 23 U.S.C. § 506 (Supp. IV 1968).

33 23 U.S.C. § 508 (Supp. IV 1968).

displacees to apply for assistance payments and appeal decisions made by the state agency.

B. *Compliance*

The process of implementing these provisions is complicated for several reasons. Constraints written into the Act have delayed its prompt effectiveness. Congress included two provisions which allow the states adequate time to enact state law and to establish the necessary relocation machinery. These provisions also give the states a financial incentive to implement such enabling laws as soon as possible. Although the Act became operative on August 23, 1968, section 37 of the Act provides that prior to July 1, 1970, the program is applicable only to the "extent that such State is able under its laws to comply with such sections."[34] After that date, the relocation program is mandatory for all states wishing to receive federal highway funds. Until July 1, 1970, the federal share of the first $25,000 of relocation payments made to any displaced person is to be one hundred per cent.[35] As of October 1, 1969, forty states and the District of Columbia have authority to make all payments prescribed by the Act. Twenty-five of these states have actually made payments.[36] This delay for the convenience of the states must have had a detrimental effect upon thousands of displacees throughout the country.

C. *Administrative Procedure*

The federal-aid highway program, like other grant-in-aid programs, makes the state primarily responsible for carrying out the project with supervision from the FHWA.[37] This process involves the close interaction of the two government highway agencies and results in the continuous federal funding of our national highways

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34 Section 37 of P.L. 90-495, set out as a note under 23 U.S.C. § 502 (Supp. IV 1968).

35 23 U.S.C. § 504 (Supp. IV 1968). It was hoped that the bulk of relocation would be completed by that date, with the federal government paying the bill.

36 Letter from S. Reid Alsop of the FHWA, Oct. 23, 1969. The states which are making payments beyond expenses are: Massachusetts, New Hampshire, Maryland, Pennsylvania, West Virginia, Indiana, Iowa, Missouri, Texas, California, and Oregon. BUREAU OF PUBLIC ROADS, QUARTERLY RELOCATION REPORT (PR-1228 July 15, 1969).

37 Reiter, *The Impact of the Federal Highway Program on Urban Areas*, 1 URBAN LAWYER 76 (1969).

in all cases where the state is in compliance with the requirements of the Federal-Aid Highway Act. Of greatest legal interest to those people who will be displaced by the highway development is the state's compliance with the hearing provisions of the Act, the state's proper use of relocation planning in the entire highway planning process, and the careful review of the state's actions in these areas by the FHWA.

First there are the requirements for public hearing in the highway planning decision-making process. Section 128 of the Federal-Aid Highway Act states that public hearings must be held by the state.[38] Pursuant to the amendments to that section in 1968 the FHWA recently established a new two-step hearing process which outlines the steps necessary for compliance with the section. The new procedure calls for both a "corridor public hearing"[39] and a "design public hearing."[40] Each is concerned with a different aspect of the overall planning process. The corridor hearing is held before the state is committed to a specific alternative in regard to the location of the highway. At this forum, the opportunity is presented for the public to voice its opinion as to the need for the location of a proposed highway. The design hearing is held at a later date (after the corridor has been chosen and approved by the FHWA) to discuss the placement of interchanges, viaducts, grades and the like within the already approved route location.[41]

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38 23 U.S.C. § 128 (1968).

39 The FHWA Policy and Procedure Memorandum [hereinafter cited as "PPM"] reads as follows: "A 'corridor public hearing' is a public hearing that: (1) is held before the route location is approved and before the State highway department is committed to a specific proposal; (2) is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for, and the location of, a Federal-aid highway; and (3) provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative highway locations and the social, economic, and environmental effects of those alternative locations." 34 Fed. Reg. 727, 728 (Jan. 17, 1969).

40 PPM, *id.*, reads as follows: "A 'highway design public hearing' is a public hearing that: (1) is held after the route location has been approved, but before the State highway department is committed to a specific design proposal; (2) is held to assure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a Federal-aid highway; and (3) provides a public forum that affords a full opportunity for presenting views on major highway design features, including the social, economic, environmental, and other effects of alternative designs."

41 PPM, *id.* at 730. At each of the two hearings, a complete stenographic transcript must be made.

These hearings must consider the social effect of the highway, which means that the problems of relocation must also be reviewed. The 1968 amendments to section 128 provide for three new factors which the state highway department must consider in evaluating highways passing near or through municipalities. They are (1) the social effect of a project, (2) the impact which it has on the environment, and (3) its consistency with the goals and objectives of urban planning promulgated by the community.[42] Section 128 requires the state highway department to certify to the FHWA that it has had public hearings and has considered the above factors.[43] The legislative history of the Act reveals a congressional desire that these additional factors become a central part of the decision-making process and that there be greater involvement in that process by other state and local governmental officials, agencies, and private groups.[44]

These specific hearing requirements are part of the more general planning process which the state highway department must conduct, integral to which is the gathering and consideration of relocation data. It should be noted that funding for this entire planning involves a process of frequent approval and reapproval of the state's actions by the federal government. This is due to the fact that in the large majority of cases matching funds are paid on a current reimbursement basis.[45] Under this arrangement, once the project agreement is signed, if the state is in compliance, it will be reimbursed immediately upon submission of all receipts to the FHWA. Of course, if at any time a state does not comply with the Act's relocation provisions, the FHWA is required to withhold further matching highway funds from the noncomplying state.

At the preliminary planning and engineering stage, when a state

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42 23 U.S.C. § 128 (1968).

43 *Id.*

44 The report of the Senate Committee on Public Works stated: "[i]t is important that those who participate in the hearings believe that the views they express will be considered and weighed in decisions relating to highway location and design. These hearings are intended to produce more than a public presentation by the highway department of its plans and decisions," S. REP. No. 1340, *supra* note 19, at 3492. The Implementing Memorandum of the FHWA requires that a state highway department be open to all viewpoints, while the flexibility to respond to these views still exists. PPM, 34 Fed. Reg. 727,728 (Jan. 17, 1969).

45 23 U.S.C. § 120 states that: "the Secretary may, in his discretion, from time to time as the work progresses, make payments to a state."

highway department begins to consider the development of a traffic corridor in a particular area, it solicits the views of the state, federal and public advisory groups. The state then selects a series of alternative routes which it investigates thoroughly. At this point a relocation program must be developed. The Instructional Memorandum of the FHWA[46] requires that a state must make preliminary investigations which provide very specific relocation information for each of the proposed routes. The state must furnish information as to the approximate number of displacees, the probable availability of decent and financially reasonable housing for those displaced, and the bases upon which the two findings were made.[47]

The state then holds the corridor hearing at which views on the social effects[48] of the alternative locations are presented and discussed. Relocation data and possible plans must be discussed thoroughly at the corridor hearing. The state next selects one route and submits the corridor plan to the FHWA for approval.[49]

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46 IM, 80-1-68, § 7(a), reads as follows:

> *Development of Relocation Program Plan.* The planning for the relocation program shall be accomplished in states:
>
> (a) Conceptual State. A project will be considered to be in this stage until such time as the final location is approved. At this stage the tenant is not to be disturbed in any way. The cost incurred in connection with securing this information is chargeable to preliminary engineering. Prior to the completion of this stage and prior to the public hearing, the State shall make preliminary investigations which will furnish the following information for each of the various alternative locations given final consideration:
>
> (1) Approximate number of individuals, families, businesses, farms, and non-profit organizations that would be displaced.
>
> (2) The probable availability of decent, safe, and sanitary replacement housing within the financial means of those displaced.
>
> (3) The basis upon which the above findings were made and a statement relative thereto by the State to the Bureau of Public Roads.

47 *Id.*

48 The social, economic, and environmental effects include, among others, residential and neighborhood character and location, replacement housing, and displacement of families and businesses. PPM, 34 Fed. Reg. 727, 728-29 (Jan. 17, 1969).

49 The following requirements apply to the processing of requests for highway location approval:

> *Location Approval.* The division engineer may approve a route location and authorize design engineering only after the following requirements are met:

Upon corridor approval, the state then proceeds with the development of engineering plans and conducts the design hearing. After all decisions as to the highway plan have been made, the state submits a final project plan to the FHWA for approval.

Before final project approval may be granted by the FHWA and before right-of-way acquisition or construction begins[50] (the time when people and property are most likely to be displaced), the state must give assurances of compliance with the relocation provisions of the Act.[51] The FHWA checks on the authenticity of the state relocation assurances through inspections by the right-of-way sections of the federal district offices. The inspections are conducted on a spot check basis at various times throughout a project, as well as on a more thorough basis at the time of the acquisition of right-of-way for any particular project.[52] Final project approval

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(a) The State highway department has requested route location approval.
(b) Corridor public hearings required by this PPM have been held, or the opportunity for hearings has been afforded.
(c) The State highway department has submitted public hearing transcripts and certificates required by section 128, title 23, United States Code.
(d) The requirements of this PPM and of other applicable laws and regulations.

PPM, *id.* at 730.

50 Eight to ten years often elapse between the corridor hearing and the start of actual construction. S. REP. No. 1340, *supra* note 19, at 3491.

51 The following requirements apply to the processing of requests for highway design approval:

Design Approval. The division engineer may approve the highway design and authorize right-of-way acquisition, approve plans, specifications, and estimates, or authorize construction, only after the following requirements have been met:
(a) The route location has been approved.
(b) The State highway department has requested highway design approval.
(c) Highway design public hearings required by this PPM have been held, or the opportunity for hearings has been afforded.
(d) The State highway department has submitted the public hearing transcripts and certification required by section 128, title 23, United States Code.
(e) The requirements of this PPM and of other applicable laws and regulations.

PPM, 34 Fed. Reg. 727, 730 (Jan. 17, 1969).

52 For evidence that another federal agency, the Renewal Assistance Administrations, conducted inadequate inspection which failed to reveal local agency noncompliance, see Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions of Federal Grants to Local Agencies,* 117 U. PA. L. REV. 183, 194-5 (1968). It is not unreasonable to assure that similar inspection failures could occur on the part of the FHWA.

is given by the Federal Highway Administrator, after clearing the decision with his immediate superior, the Secretary of Transportation.

The FHWA also has a procedure of informal review of the entire process of approvals.[53] In situations where the parties request the review, the Administrator will reconsider the action taken and notify the parties of his decision on the matter. This review procedure seems to presuppose that once the decision on the appeal in favor of the state has been made, the decision to proceed with the project will be final for the state and federal agencies. There are some instances where such appeals have resulted in the change of an entire highway location or design.[54]

The fact that these procedures alone are not adequate to provide protection for the rights of the displacees is evident from the situations which have arisen and from the background of those individuals having the responsibility for that review. As mentioned above, the two cases filed under the Act both have alleged improper approval upon the part of the FHWA.[55] Likewise, in the analogous case of urban renewal, there are frequent and often substantiated assertions of inadequate review on the part of the federal agency.[56] The most telling factor which indicates the inadequacy of the review is the makeup of the FHWA itself. The review is carried on by the very people who made the initial decision, and this entire process takes place within an agency whose top priority is the construction of highways. There is no autonomous board of review which can, in a disinterested manner, examine the actual compliance of the states.

53 PPM, 34 Fed. Reg. 727 (Jan. 17, 1969). In October 1968 appellate procedures were proposed which were designed to formalize the present informal appeal procedures and to ensure that appeals would be filed in a timely fashion so as to facilitate their disposition. A number of adverse comments were received concerning the proposed formal appellate procedure. Because of the merit of certain of these objections, the FHWA withdrew the proposal for further review, letting stand the present practice of entertaining informal appeals. The proposal is important, however, in that it reflects FHWA thinking on what it feels at present to constitute the finality of the administrative decisions, *i.e.*, that once the opportunity for an appeal has lapsed or once an appeal is disposed of, this action is final for purposes of the Administrative Procedure Act.

54 Note the recent disapproval of the New Orleans Riverfront Expressway; *see also* San Antonio Conservation Society v. Texas Hwy. Dep't, Civil No. 67-72-A (W.D. Tex.).

55 *See* Triangle and Hanley cases, *supra* note 5.

56 Western Addition Community Org. v. Weaver, 294 F. Supp. 433, 439, 440 (N.D. Cal. 1968).

The above analysis of the FHWA's mechanics of reviewing state actions illustrates two points which are of central importance. First, the review process gives an indication of when the agency considers its decisions final; secondly, it points out the inadequacy of that review process in fully protecting the interests of affected residents.

A potential or actual displacee has important interests at stake. In the absence of relief forthcoming from the FHWA, the resident, before he is irreparably harmed, should be allowed at an early point to turn to the courts to provide a necessary impartial forum for review of state actions. The certainty of early review would not only rectify noncompliance perpetuated by the states, but it would also instill in the state and federal highway agencies a greater adherence to the objectives of the Act's relocation provisions. Such early review would seem to be in conformity with the congressionally declared policy not only to protect the interests of the displacees but also to eliminate urban highway work stoppages late in the life of the project resulting from legal challenges after final project approval.

II. The Possibility of Early Judicial Review as a Means of Private Enforcement of the Relocation Provisions of the 1968 Act

In the situation upon which this article focuses, a state may not have made an adequate investigation of the relocation problems as required[57] and may have thus prepared erroneous relocation data for each alternative route presented at the corridor hearing. Both factors might mislead public sentiment at the hearing and result in the state submitting false and inaccurate data to the FHWA.

When this occurs, the site residents in the selected route are threatened, especially if they live in a low-income area of a city with a short supply of low-income housing. These threatened private parties can play a central part in the enforcement of the conditions of the Act against the states which do not comply with

57 *See* IM, *supra* note 28.

the relocation provisions. The most effective form of action would be for concerned renters, businessmen, and homeowners to form "action groups" for the purpose of representing the community. Such groups would have significant political power, could exert influence through the media and their elected representatives, and might better bear the costs of administrative appeals and court actions.[58] The question arises as to which steps they should take after a state corridor selection is approved and an appeal to the FHWA for review brings no relief.

An examination of the possible legal action which might be instigated by these people reveals that the legal issues and problems vary significantly with the timing and substance of each problem.[59] It would seem most logical to bring an action in the federal courts for declaratory relief and an injunction against the FHWA to withhold funds from the project until such time as the state complies with the language and purpose of the Act and the procedures thereunder.

The residents' basic issue on the merits would be to establish that the state had made no adequate relocation investigation and had submitted erroneous data to the FHWA. The group would have to make a very substantial case in order to overcome the "presumption of regularity of public officials with duties imposed upon them by statute."[60] The success of the contention would depend upon the factual setting of the individual case. The plaintiffs' basic legal problems in bringing their case would be to establish that the issue is judicially reviewable, that they have standing under the applicable statutory provision for judicial review, that they have exhausted their administrative remedies, and, most importantly, that the case is ripe[61] for review at this time.

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58 *See* Bonfield, *Representation for the Poor in Federal Rule Making*, 67 MICH. L. REV. 511 (1969) for discussion of the mobilization of the poor; see also Note, *Family Relocation in Urban Renewal*, 82 HARV. L. REV. 864, 898-906 (1969), for an analysis of group action in the urban renewal relocation process.

59 *See, e.g.*, Powelton Civil Homeowners Ass'n v. Department of Housing and Urban Development, 284 F. Supp. 809 (E.D. Pa. 1968); Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968), noted in 82 HARV. L. REV. 691 (1969); Road Review League v. Boyd, 270 F. Supp. 650 (S.D.N.Y. 1967).

60 Nashville I-40 Steering Committee v. Ellington, 387 F.2d 179, 184 (6th Cir. 1967), citing Hull v. Continental Illinois Bank, 177 F.2d 217 (7th Cir. 1949).

61 As will be shown, the crucial issue is that of ripeness. Assuming any relevant state relocation statute would be similar to the Act, it matters not whether the cause

A. *Standing and General Reviewability*

The first question is whether the agency determination is judicially reviewable. Under section 704 of the Administrative Procedure Act,[62] "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[63] The Federal-Aid Highway Act of 1968 makes no explicit provision for judicial review of state determinations of relocation feasibility. However, the absence of such a provision is not necessarily determinative.

While some courts have found statutory silence an indication that no review was intended, the general presumption favors review.[64] At the very least, the APA codified the presumption of judicial reviewability,[65] "[e]xcept to the extent, that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. . . ."[66] Neither of these exceptions appears applicable here. Nothing in the Act or its legislative history indicates an intention by Congress that the relocation decisions required by regulations issued pursuant to the Act[67] should be precluded from judicial review. The mere failure to provide specially for review in the statute is no evidence of an intent to withhold review. On the other hand, the "committed to agency discretion" doctrine is a somewhat more nebulous one.[68] The courts have held in the past that the Federal Highway Administrator's decisions are not committed to agency discretion and are reviewable by the courts. In *Road Review League v. Boyd*,[69] the court held that the decisions of the Administrator on highway routing were subject to judicial review under the APA. The court noted the specific reference to review in the Department

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of action, highway officer or court involved is state or federal; the case still turns essentially on the ripeness question.

62 5 U.S.C. §§ 701-706 (Supp. II, 1966).

63 5 U.S.C. § 704 (Supp. II, 1966).

64 *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). See also L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 336-63 (1965).

65 JAFFE, *supra* note 64, at 372-76; H.R. REP. No. 1980, 79th Cong., 2d Sess. 41, 1946, U.S. CODE CONG. SERV. 1946, D-1195.

66 5 U.S.C. § 701 (Supp. II, 1966).

67 23 U.S.C. § 128 (1968).

68 *See generally* Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

69 270 F. Supp. 650 (S.D.N.Y. 1967).

C. *Ripeness for Review*

The most crucial problem for the residents is to show that the case is "ripe" for review at the time of the first corridor hearing and approval. The traditional rules of administrative law provide that there can be no "final" agency action until final project approval, and until that time a suit is not ripe for judicial review.[82] However, there are factors present in the affected residents' situation which, in conjunction with recent developments in the law, might allow for a different approach to be taken by the courts.

To begin with, there is substantial opinion that review is possible even where there are technically further administrative procedures on matters in question. For example, Professor Jaffe writes:

> An administrative action may be ripe for review despite the fact that the full impact of the action on the plaintiff may be delayed or the fact that the disputed legal issue could receive further consideration at a later stage of the same or a related proceeding.[83]

The question of ripeness, to use Mr. Justice Frankfurter's classic formulation, requires two evaluations: the fitness of the issues for judicial decision and the hardship to the parties of withholding that decision.[84] The requirements of fitness are that the challenge be a "legal" one and that the agency action in question be "final."

The first requirement, that the challenge be of a legal char-

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82 The general rule, dating from such noted cases as Macauley v. Waterman Steamship Co., 327 U.S. 540 (1946), is that a plaintiff cannot use the medium of a lawsuit to oust an administrator from his primary jurisdiction and substituting court determination in the first instance. DAVIS ADMINISTRATIVE LAW TREATISE § 21 (1958).

Basically, the idea is that "there can be no judicial intervention until administrative action has reached its complete development," Shank v. Federal Power Commission, 236 F.2d 830, 834 (5th Cir. 1956), *cert. denied*, 352 U.S. 970 (1957). *See also* Sperry and Hutchinson Company v. Federal Trade Commission, 256 F. Supp. 136, (S.D.N.Y. 1966), where the court said that there is a "background of legislative and judicial reluctance to permit premature interference with 'nonfinal' administrative determinations," *Id.* at 142.

83 Jaffe, *Ripeness and Reviewable Orders in Administrative Law*, 61 MICH. L. REV. 1273, 1303 (1963).

84 Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 156 (1951).

decided a few years ago, and the general trend of the law as shown by several recent and important cases seems to show that the law now allows such displacees standing.[74]

The rationale of those urban renewal cases which do not grant standing is that the wording of the relocation sections of the Housing Act of 1949 merely stated that decent, safe, and sanitary dwellings should be made available to displacees. Thus the court in the case of *Green Street Association v. Daley*[75] stated that "[c]ongress did not intend this relocation section of the Housing Act to give a right of action to those not a party to the contract between the Redevelopment Agency and the United States." This rationale has been subjected to vigorous criticism by legal scholars and other court decisions.

The majority view and what seems to be the currently held view on standing for urban renewal cases is that the specific mention of the interests of the displacees in the Act is sufficient to create a right of action for them. In the case of *Norwalk CORE v. Norwalk Redevelopment Agency*,[76] a local group sought review of the relocation actions taken by the Secretary of the Department of Housing and Urban Development. The district court dismissed the complaint on the ground that the plaintiffs lacked standing and the Court of Appeals for the Second Circuit reversed. The appellate court stated that since the relocation section was enacted to protect displacees' interests in adequate relocation housing, "it can hardly be thought that displaced families such as plaintiffs, do not have the required personal stake in the outcome of litigation where a violation of the section is claimed. If anybody can raise these claims, it is these plain-

74 Groups of private citizens have now been given standing to sue in numerous instances where a statute is designed to protect particular individuals or the interests of the public. Television viewers in Office of Communication of the United Church of Christ v. Federal Communications Commission, 359 F.2d 944 (D.C. Cir. 1966), and conservationists in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir. 1965), have been found to represent interests intended to be protected by legislation and, thus, to have standing to raise the issue of compliance with the particular legislation involved. The residents here would certainly seem to have as substantial an interest as such groups, and thus, would probably be deemed to have standing.

Likewise, standing recently has been given to *actual* displaces (as opposed to potential ones, as here) under both the Federal Housing Act, in *Powelton* and *Norwalk CORE*, and the Federal-Aid Highway Act in *Road Review*, and *Triangle*.

75 373 F.2d 1 (7th Cir. 1967), *cert. denied*, 387 U.S. 932 (1967).

76 395 F.2d 920 (2d Cir. 1968).

under the case law on the subject. The contention that judicial review would impinge on administrative discretion can be refuted by pointing out that the residents' action is no more than a request that the court guarantee governmental conformance to its own hearing rules under section 128. The court would thus simply be acting to secure procedural compliance with the agency's rules, and not substituting its own discretion on policy matters for that of the agency.

The idea of finality also does not necessarily require that final project approval be given. As Justice Frankfurter expressed it in the case of *Joint Anti-Fascist Refugee Committee v. McGrath*, "[f]inality is not a principle inflexibly applied."[89] In the peculiar setting of the administrative process, finality often has no clear meaning and the courts have to evaluate what is "final" in terms of the specific process involved.[90] Here, in the context of the FHWA's two-step hearing process, the first approval and appeal decision is "final," first of all because the highway's location is thus chosen and secondly, because the state may proceed with the expenditure of public funds which will be matched by the federal government. In many instances, the state is immediately reimbursed at that time. As will be seen from the analysis of the possible harm flowing from a witholding of review, there is no other adequate judicial remedy available to the residents at a later time. The decision as to location will have been made. That decision is final in terms of this step of the administrative process. Only the details of design remain to be worked out.

Although there are no cases directly in point, the argument for a flexible and pramatic approach to finality can be buttressed by several lower court and Supreme Court decisions. For example, in *Deering Milliken, Inc. v. Johnston*,[91] the plaintiff sought to enjoin the National Labor Relations Board from further delay in deciding an unfair labor practice charge pending against it. The district court granted the injunction and the Court of Appeals for the Fourth Circuit affirmed. The appellate court dismissed the contention that there must be a statutory command in the act in

89 341 U.S. at 156.
90 Jaffe, *supra* note 83, at 1303-4.
91 295 F.2d 856 (4th Cir. 1961).

the statute was to create a right of relocation services and payments in those individuals who will be displaced by the highway project. Further, the case law all seems to point toward the granting of standing to individuals who are in situations similar to the displacees. It is these people who will be most directly affected by any decisions based on misinformation, and it is these people who are best situated to vigorously challenge an action contrary to the Act. That the residents should have standing to seek judicial review seems fairly certain.

B. *Exhaustion of Administrative Remedies*

Another likely defense against the contemplated suit would be that the residents have not exhausted their administrative remedies and thus should be precluded from bringing a suit at that early time. The basis for such an argument would be that the affected residents have not yet attended the design hearing nor appealed the eventual design approval. The residents could, however, refute such a contention by pointing out that they have attended the corridor hearing and have filed an appeal to that corridor approval with the Administrator. The residents thus have a strong argument that they had exhausted all possible administrative remedies for that part of the administrative process which is directly concerned with the infringement of their rights.

This is true because after the first or corridor hearing, the route location is selected from several alternatives, presumably on the basis of accurate relocation data. The second or design hearing deals only with the design details of the already-selected route. By this point, great sums of money will have been spent on engineering studies and valuable time will have passed. If the relocation study is inadequate from the outset, the chances of remedying any deficiencies will have diminished significantly at the time of the final project approval. Indeed, it is the first step of the administrative process, *i.e.*, the choice of highway corridor location and the factors which influenced it, in which the residents are interested. It is during this step that relocation adequacy for the various alternatives is determined. The defense of "no exhaustion" should not bar the residents from entry to court.

Gardner,[97] the Food and Drug Administration issued a regulation requiring certain labeling. In order to comply the drug companies would have had to expend a great deal of money on packaging, and if they did not comply they would have risked severe penalties. Abbott brought suit before the FDA sought enforcement and the Supreme Court held that the regulation was of sufficient finality to be subject to judicial review because of the great threat of harm to the party.

The reimbursement of funds and the first corridor approval by the FHWA, and the review and approval of that action by the Administrator, are not regulations such as were dealt with in *Abbott* and *Frozen Food*. However, the situation is analogous because it is a decision on policy which has not been carried to completion but which does have an immediate and harmful effect on the parties aggrieved. What these cases point out is that the courts will often use an expanded sense of the term "final" where later judicial remedies appear inadequate to protect the asserted right. The actual risk of harm to the parties may be the controlling factor in a finding of ripeness.

IV. The Risk of Harm From Withholding Early Review: The Potential Harm

In one discussion of the *Abbott* case, it was suggested that fundamental to the decision "is the equitable notion that it is unfair to require a person to incur the risk of severe penalty if he is to test administrative action. Requiring such risk-taking may deter persons from seeking review in situations where such review is socially desirable."[98]

A risk of harm to the site residents to be relocated is certainly present here. They have substantial grounds for attacking any claims by the government that no irreparable harm would ensue or that their rights could be vindicated at the time of the final project approval.

First of all, there is the harm to the relocation program itself. If no viable relocation plan is created by the time the actual displace-

97 387 U.S. 136 (1967).
98 Note, *The Supreme Court, 1966 Term*, 81 Harv. L. Rev. 69, 231 (1967).

acter, is not difficult to meet. Here, the residents could characterize (1) the approval of the corridor plan or even the continual reimbursement of funds for the preliminary engineering, and (2) the Administrator's review of those approvals, as beyond the agency's power under sections 128, 502 and 508 of Title 23.[85] The Supreme Court has given this "purely legal" requirement a broad definition. For instance, in the recent case of *Toilet Goods Association v. Gardner*,[86] a Food and Drug Administration regulation was challenged by a drug manufacturer. The Court stated that the case presented a "purely legal question: whether the regulation is totally beyond the agency's power under the statute."[87] The Court, however, went on to decide the case based on a careful analysis of the factual situation of the case. It would appear then that other courts would likewise go into the factual situation in the residents' case.

Finality, on the other hand, is a much more difficult problem. The FHWA might argue that the particular administrative decision is not final and that any judicial review at the time of the corridor hearing or approval stages would be premature; thus, any court intervention then would constitute an infringement on administrative discretion in the middle of the administrative decision-making process. The argument might be that since the state might choose a different route or even decide to not complete the project, the suing residents might not even be displaced at all. Furthermore, they would have a "remedy" after final project approval and could bring forward any relocation planning deficiencies at that time. Specifically, the FHWA could point to that section of APA which allows for the review of an "intermediate decision" when the review of the final agency action is undertaken.[88] Under this section of the APA, the FHWA might attempt to characterize its actions as intermediate and thus be subject to review only at a later time.

The residents could present a strong argument that the actions of the FHWA are final within the meaning of the APA and

85 23 U.S.C. §§ 128, 502, 508 (1968).
86 387 U.S. 158 (1966).
87 *Id.* at 163.
88 5 U.S.C. § 704 (Supp. II, 1966).

of Transportation Act[70] and further noted that, in the absence of an explicit statutory prohibition of judicial review, such review should be allowed.

Section 702 of the APA states that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[71] Judicial review under the APA requires not only that there be an applicable provision but also that the parties have standing to enforce that provision. Here the residents' standing must rest on a statutory right to have their interest in the preparation of an adequate relocation plan protected. The relevant statute in this instance is the Federal-Aid Highway Act of 1968, plus the regulations issued thereunder.

The argument that site residents have standing to sue under section 702 of the APA is a strong one, since they are the parties most directly affected by agency action (here, FHWA approval of a state's inadequate relocation plan or procedures). The test of the affected residents' standing to sue under the Act is whether Congress has passed a statutory prescription for their protection and whether the statute has been violated. As indicated earlier, the purpose of the Act was to protect the interests of threatened site residents, and a recent federal district court decision[72] so held in sustaining potential displacees' standing to sue under the Act. However, the standing question remains open in the sense that no higher court has yet passed on the issue and because standing was denied in analogous urban renewal cases.

In the area of urban renewal, there has been a great deal of controversy over the question of whether persons who are displaced due to the development of an urban renewal project have a sufficient private interest to have standing to sue. There has been some authority, particularly from the Seventh Circuit, that such displacees do not have standing.[73] These cases, however, were

70 49 U.S.C. §§ 1651-59 (Supp. IV 1968).

71 5 U.S.C. § 702 (Supp. II 1966).

72 Triangle Improvement Council v. Ritchie, *supra* note 5.

73 *See, e.g.*, Green Street Ass'n v. Daley, 373 F.2d 1 (7th Cir. 1967), *cert. denied*, 387 U.S. 932 (1967); Johnson v. Redevelopment Agency, 317 F.2d 872 (9th Cir. 1963), *cert. denied*, 375 U.S. 915 (1963); Harrison-Halsted Community Group, Inc. v. Housing and Home Fin. Agency, 310 F.2d 99 (7th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963).

question and stated that "the courts have always been able to fashion remedies to prohibit agency action in violation of a statutory requirement, if a failure of enforcement would occasion a defeat of the apparent congressional purpose."[92] The court went on to refute the agency's claim that the party must wait for the agency decision in order to have "final" agency action within the meaning of the APA. The court pointed out that both Senate and House included in their reports on the APA a statement that the "final action included any *effective* action for which there is no other adequate remedy in court" (emphasis added).[93] The court held that the committee's statement should control the construction of the term "final" in the APA.[94] The agency action here is certainly "effective," for the state could otherwise proceed with its highway planning without the requisite relocation investigation or planning.

In addition, there are several Supreme Court decisions which deal with the review of administrative regulations before they are enforced against any party. In the case of *Frozen Food Express v. United States*,[95] the majority granted judicial review of an Interstate Commerce Commission order which was challenged before its enforcement. Reversing a district court's decision that the matter was not sufficiently ripe, the Court pointed out that the order had an "immediate and practical impact"[96] upon the party in that it risked not only a civil penalty but also the revocation of their certificates to do business. As will be elaborated below, the affected residents here face the same immediate and practical impact.

Similarly, in the recent key case of *Abbott Laboratories v.*

92 *Id.* at 865.

93 ADMINISTRATIVE PROCEDURE ACT LEGISLATIVE HISTORY, S. DOC. No. 248, 79th Cong., 2d Sess. 213, 277 (1946).

94 5 U.S.C. § 704 (Supp. II, 1966); likewise in Sinclair Oil Corp. v. Smith, 293 F. Supp. 1111, 1115 (S.D.N.Y. 1968), the court, while finding no irreparable harm present and denying early review in the case at hand, clearly stated that "a court of equity will intervene at an intermediate stage where there is a patent violation of constitutional or statutory authority by the agency, as well as lack of an alternative avenue of relief to the injured party." *See also* Textile and Apparel Group, American Importers Association v. Federal Trade Commission, 410 F.2d 1052 (D.C. Cir. 1969).

95 351 U.S. 40, (1956).

96 *Id.* at 45.

tiffs."[77] This general approach has been followed in cases appearing after *Norwalk*; and the general theme, as exemplified by *Powelton Civic Home Owners Association v. Department of Housing and Urban Development*,[78] is that "neither economic injury nor a specific individual legal right are necessary adjuncts to standing. A plaintiff need only demonstrate that he is in appropriate person to question the agency's failure to protect a value specifically recognized by federal law as in the public interest."[79]

The individuals who are to be displaced by federal highway development seem to be in the same position as individuals who are displaced due to urban renewal, and it is logical to assume that they would be granted the same standing that urban renewal displacees have been given. If anything, the wording of the Federal-Aid Highway Act creates a clearer right in those who are displaced.

This argument is further buttressed by the fact that private groups have been given standing to sue under other sections of the Act which create even more nebulous rights in the parties. In *Road Review League, Town of Bedford v. Boyd*,[80] the court held that a statutory instruction in the Act to preserve parklands and historic sites created standing in towns, local civic organizations, and conservation groups which are aggrieved due to alleged violations of these sections.

In the highway relocation cases, the courts would certainly appear to be as well equipped to handle those problems as they are to handle questions of conservation. There are many well defined standards as to the adequacy of the relocation plans. Standards have been set for state relocation planning and hearings under the memorandums issued by the FHWA. The sources of relocation data obtained by the states are required to be identified by the state. Courts could also receive independent evidence from such sources as the census of housing, local housing surveys, and testimony of local housing market experts.[81]

In summary, it seems apparent that the wording and intent of

77 *Id.* at 932.
78 284 F. Supp. 809 (E.D. Pa. 1968).
79 *Id.* at 821.
80 270 F. Supp. 650 (S.D.N.Y. 1967).
81 Note, *Judicial Review of Displacee Relocation in Urban Renewal*, 77 YALE L. J. 966, 976 (1968); Tondro, *supra* note 52, at 202 (1968).

ment takes place, it is probable that any plan developed under court order will be inadequate and inferior to a plan that has evolved along with the entire highway development. The process of planning and the notification and movement of people and businesses takes a considerable amount of time. In situations where there is a housing shortage, it often takes years to absorb displacees into the housing market, and in some instances state governments have had to build their own housing in order to assure the displacees of homes.[99] This type of long range activity necessary for any adequate relocation program is simply not possible under court order with pressure for prompt action. Such pressure is always present because delay increases the cost to the public.

Furthermore, the route and design plans will already have been made, and it is doubtful that a court would require that a state begin completely anew in its highway planning in order to qualify for federal funds. Thus, the ultimate selection of the routing of the highway will have been accomplished on the basis of inaccurate relocation information and the decision may very well be incorrect when such relocation factors are taken into consideration.

Secondly, the equities will be very much against the dislocatees if they wait until the time of final approval. If the residents were to prevail at the time of final project approval, such a victory would have negative effects on the public at large. Such an injunction at that time will cause a costly delay, result in the obsolescence of engineering plans, and deprive the public of a needed transportation route for a considerable amount of time.[100] At that time there will have already been a large expenditure of public funds.[101] It is just this costly, damage-producing type of delay which the 1968 Act was passed to remedy. The case law clearly points out that the courts will take into account the relatively small cost and

99 For a description of the California experiment in such housing, see 114 CONG. REC. 8038 (daily ed. July 1, 1968) (remarks of Sen. Murphy).

100 The harm to the government at that late date is very great indeed. The Secretary's approval of a highway project creates a contractual obligation on the part of the United States to pay its proportionate share of the cost of the project. 23 U.S.C. § 106(a) (1966). This provision is enforceable in a suit in the Court of Claims by the state involved for money damages under the Tucker Act, 28 U.S.C. § 1491 (Supp. IV 1968); *see* Commonwealth v. Conner, 248 F. Supp. 656 (D. Mass. 1966).

101 For an example of the possible harm involved, see Philadelphia Evening Bulletin, Mar. 5, 1968, at 14, col. 1.

harm to the displacees as compared to the large economic harm to the public caused by such a delay. Typical of this equity problem is the aforementioned case of *Road Review League, Town of Bedford v. Boyd.*[102] There, a group of civic and conservation leaders sought an injunction to require the FHWA to withdraw its approval of an interstate highway routing selection. The court dismissed the request on a number of grounds, but basic to the holding was the fact that the state had already expended a great deal of money on engineering and various early expenses, and a change of routing locations as requested by the plaintiffs would be of great economic harm to the state. The court pointed out that the state had spent over $1,000,000 on engineering the route and that

> [t]o enjoin defendants at this stage . . . would create a chaotic situation . . . some loss, as for example, engineering expenses, would obviously be irretrievable. In all likelihood, the ultimate loss would amount to much more. Substantial delay, perhaps amounting to over two years, would be encountered before a new route could be surveyed and engineered.[103]

Similarly, in the recent case of *Triangle Improvement Council v. Ritchie*[104] a residents' group sought review of a highway relocation program. The court dismissed the complaint on the grounds that the Act did not apply to highway projects such as the one there which had been approved prior to the time of the Act. The court, however, went on to find that there were relatively few displacees still in the project area and that there had been large outlays by the state. The court stated that:

> [i]n considering injunctive relief this court should of necessity, weigh its possible beneficial effect upon this group of Triangle residents against its potential disruptive effect upon the program of the state and federal authorities charged with the responsibility of building east-west and north-south interstate highway corridors.[105]

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102 270 F. Supp. 650 (S.D.N.Y. 1967).

103 *Id.* at 664.

104 Civil No. 68-183 CH (S.D.W. Va. filed July 2, 1969).

105 *Id.* at 17.

From the reasoning in both *Triangle* and *Road Review,* it is apparent that the interests of the residents will never be on an equal footing with those of the state or federal government at the time of final approval.[106] The equitable considerations would assure the rejection of any attempt to force the states to repeat the entire highway planning process in order to include relocation investigation and information.[107] There also may be less likelihood at this stage that judicial review will even be sought. For if a group does not act at an early point in the process, its most motivated and articulate members may be the first to move to a new neighborhood, and the people left in the community at the time of final approval of the acquisition of the right-of-way may be willing to accept unchallenged almost any treatment by the state.[108]

V. Conclusion

The residents of an area through which a federal-aid highway may be built have been given certain specific rights under the procedures promulgated by the FHWA to enforce the relocation and hearing provisions of the Act. These rights will only be viable through the time of the first or corridor hearing and approval. Consequently, a court should grant review at that time. This should be done despite the fact that there may be further administrative procedures before actual construction is begun. The clear and persuasive threat of harm from withholding judicial review at that point makes it essential that the courts find that in the context of this particular administrative process the agency action is final and that case is ripe for review. As in most areas of the law, unless a legal right is accompanied by an adequate remedy it will be of no worth. The only method of securing the rights discussed here is to allow judicial review at the time of the initial proceedings.

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106 The residents will also face this equity argument in the state courts. For instance, see Housing and Redevelopment Authority v. Minneapolis Metropolitan Co., 259 Minn. 1, 13, 104 N.W.2d 864, 873 (1960) where the court stated that since the "Federal Housing Administration [had] already advanced to the Minneapolis Authority loans and grants in excess of ten million dollars, [it is assumed] that the standards of compliance established under Federal procedures have been met."

107 *See also* Johnson v. Redevelopment Agency, 317 F.2d 872, 875 (9th Cir. 1963) where the court based its decision on the fact that "the agency has expended thus far over $2,000,000 in carrying out the project."

108. *See, Local Renewal Agencies,* 11 N.Y. Forum 51, 74 (1965).

NOTE

REGULATION OF COMPUTER COMMUNICATION

Introduction

Over the past decade, increasing utilization of computers by industry and government has created competitive forces in the telecommunications market. This market has been consistently monopolized by the American Telephone and Telegraph Company through the Bell System.[1] For various reasons of social and economic[2] policy relating to the establishment of a nationwide telephone system, the Federal Communications Commission allowed the Bell monopoly to be established. It is an open question, however, to what extent arguments that justify Bell's monopoly on telephone services apply to non-telephone telecommunications services,[3] such as nation-wide network television distribution or

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1 The Bell System includes AT&T, twenty-four Bell operating companies, Western Electric, and Bell Telephone Laboratories. The Bell operating companies, most of which are wholly owned by AT&T, offer communications services in a single state or region. Western Electric supplies virtually all the equipment used in the Bell System. AT&T owns 99.8 percent of Western Electric stock. Bell Labs provides engineering services to the System and is owned jointly by AT&T and Western Electric. AT&T operates the inter-state communications service through its Long Lines Department. Rates for this service are determined by AT&T and the Common Carrier Bureau of the F.C.C. while rates charged by the Bell System for communications services within a state are determined by the appropriate Bell operating company and state regulatory agency.

2 The economic justification for a monopolistic telephone industry is related to the concept of a "natural monopoly." A natural monopoly market exists if the entire demand can be satisfied at lowest cost by one firm. Competition is therefore thought to be undesirable in such a market. To ensure satisfactory performance for the single firm, direct controls over profits, rates, service, and market entry are often thought to be necessary. This set of controls is known as common carrier regulation when applied to transportation and telecommunications. Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. R. 548 (1969).

3 There may be an inevitable confusion in terms especially if the reader has read other articles on the subject. For the purpose of this Note, telephone communications will refer to the use of the telephone system for oral communications between people *i.e.*, telephone communications in the traditional sense. A person may, of course, use his telephone handset to communicate with a computer by coupling it to a teletype through a device known as a "modem" and the telephone system will not know the difference. For the purpose of this Note, however, such communications will not be referred to as "telephone" but as "data communication" or some other appropriate term. "Telecommunications" is a generic term usually referring to all forms of

high-speed data transmission between computers. But with one exception,[4] the F.C.C. has allowed Bell to be the exclusive provider of these non-telephone services regardless of the ability of a competitive market to supply them. As long as the demand for such non-telephone services constituted a small percentage of the total telecommunications market, most potential competitors were discouraged from challenging Bell and the F.C.C. in an attempt to enter the market. Recently, however, the demand for non-telephone services is experiencing such rapid growth that in many areas the existing regulated carrier, in most cases the Bell operating company, is unable to meet the demand. The particular service that is in greatest demand is the communication component of teleprocessing services,[5] in other words, data communication. To meet this demand, as well as the growing demand for other non-telephone communication services, many firms are seeking entry into the telecommunications market. This demand and the desire for new entry present problems of regulation for the F.C.C.[6] Four of these problems are: (1) to what extent should the established regu-

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communication by wire or radio. As used in this Note, however, the term will not apply to broadcast telecommunications such as commercial radio and television.

4 Until recently, the only telecommunications service that has escaped F.C.C. regulation as a common carrier service is community antenna television (CATV) or cable T.V. Reasons for allowing the exception are given in Frontier Broadcasting Co. v. Collier, 24 F.C.C. 251 (1958).

5 A teleprocessing service involves communications between computers and computer peripheral equipment such as a teletype or an IBM card reader. An example is computer time-sharing where the customer uses the computational power of a computer located, perhaps, in another city or state. Another example is a stock market information service where the customer brokerage house uses data compiled by and stored in a computer located again in another city or state. In both examples, a major component of the teleprocessing service is the communications between the customer and the computer. It is this communication, data communication, that is presently in such great demand and constitutes the most rapidly growing segment of the telecommunications market.

6 To investigate these regulatory problems the F.C.C. instituted the Computer Inquiry. Regulatory and Policy Problems presented by the Interdependence of Computers and Communications Services and Facilities 31 FED. REG. 14752 (1966) [hereinafter cited as Computer Inquiry]. As a result of this Notice of Inquiry, the Commission received over 60 responses from the computer and communication industries. 17 F.C.C.2d 587 (1969). The Stanford Research Institute was hired to evaluate these responses and offer recommendations on Commission action. Stanford Research Institute Report Nos. 7379B-1, 2, 3, 4, 5, 6, and 7 (1969) [hereinafter cited as SRI Report]. Also, in 1968 President Johnson commissioned a Task Force to study telecommunications regulatory policy. Final Report, President's Task Force on Communications Policy (1968) [hereinafter cited as Task Force Report].

lated common carriers be allowed to provide teleprocessing services; (2) what restrictions should a regulated common carrier be allowed to enforce regarding the use of its communications lines; (3) how should rates charged for non-telephone services be determined when the service is provided by a regulated common carrier; and (4) how should entry into the telecommunications market be controlled.

This Note will discuss these four regulatory problems in light of recent F.C.C. decisions. The manner in which the F.C.C. ultimately resolves these issues will determine to a great extent whether a second, non-Bell, telecommunications industry will be allowed to come into existence to meet the growing demand for non-telephone services or whether the user of telecommunication services will continue to have to go to the Bell System for all his telecommunications needs.

I. Teleprocessing by Common Carriers

The major objection to a common carrier such as Bell providing a complete teleprocessing service,[7] such as computer timesharing, rather than just the communications component is that the carrier will give preferential treatment to its own teleprocessing customers rather than serve all customers equally. This objection as far as Bell is concerned may be moot, since AT&T has disclaimed any intention of offering the data processing aspect of the service. There are several explanations for this attitude on the part of the world's largest corporation. AT&T may be justifiably concerned with its image of corporate giantism both in its dealings with the general public and in its rate proceedings with the F.C.C. and local public utilities commissions. Secondly, the terms of a 1956 Western Electric consent decree[8] forbid the Bell companies from providing non-carrier services, of which data processing is arguably an example. Finally, the only certain factor in the tele-

7 A complete teleprocessing service includes the data processing component as well as communications to and from a computer. The regulated carriers generally provide communications while the data processing component is provided in an unregulated and extremely competitive market.

8 United States v. Western Electric Co., and American Telephone and Telegraph Co., CCH 1956 Trade Cas. ¶ 68,246 (S.D.N.Y.).

processing market is the increased demand for communications services. Since communications services still account for a significant percentage of the teleprocessing service dollar, the more successful carriers could be expected to be content with an assured share of the growing market without having to predict what data processing services will prove most profitable in the future. This situation should continue at least until the market begins to stabilize and the demand for data processing becomes better defined, at which point AT&T may change its attitude.[9]

Another factor that may change AT&T's view is its inability to maintain monopoly control of telecommunications. Besides the changing satellite technology that is tending to make obsolete the Bell-owned terrestrial communication network,[10] new rate policies can be expected that will no longer force the realization of economies of scale and will thus allow competing carrier operations in large market areas.[11] Another factor is the lessening of AT&T's ability to control the use of its lines, both as to what may be attached as well as to how users may utilize a line.[12] If any or all of

9 SRI Report No. 7379B-1, at 31-32.

10 Bell's large and continual capital investment in terrestrial communications lines has led to a failure to realize the potential of a domestic satellite communication system. Such a system could efficiently meet the growing telecommunications demands of the television and teleprocessing industries; yet proposals for a domestic satellite system have so far been opposed by the carriers who must protect investments made at a time when economies of scale were necessary to the efficient provision of communications services. The change brought about by communications satellite technology has, in fact, so altered the concepts of communications design that many of the justifications for allowing the carriers to realize such economies of scale through a protected monopoly may no longer be valid. The retention of old justifications of natural monopoly seem at this point to impede the efficient development of communications in many areas such as national television distribution and data communications.

Proposals for a domestic satellite system devoted to a specific purpose were presented to the F.C.C. by the Ford Foundation and General Electric, among others. Ford's proposal was for a satellite to provide television distribution for the major networks. The profits from this activity would be used to support a fourth national network for educational T.V. The General Electric proposal was for a satellite dedicated to data communications between business firms or within elements of a widespread organization.

Opposition to these proposals comes also from the Communications Satellite Corporation (COMSAT) which is interested in preserving its protected monopoly in the provision of non-domestic space communications and extending it, if possible, to the domestic scene. LaFond & Riezenman, *What's Delaying U.S. Satellite Communications?*, ELECTRONIC DESIGN, September 27, 1969, at 36-42.

11 See text accompanying note 69, *infra*.

12 See text accompanying note 32, *infra*.

these factors becomes significant enough to cut into AT&T's share of the growing teleprocessing market, it can be expected that the Bell System will seek ways in which to provide the other components of a teleprocessing service.

The expectation that AT&T may eventually enter the teleprocessing market with data processing services is supported by the present actions of less successful communications carriers. General Telephone & Electronics,[13] for example, recently formed a data processing subsidiary, GT&E Services Corporation.[14] Entry into contracts for communications in areas where General Telephone is the local carrier can be expected to meet opposition from competitors of GT&E Services who fear price and service discrimination.[15]

Western Union[16] provides the best example of common carrier discrimination in the provision of complete teleprocessing services.

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13 General Telephone and Electronics is a highly diversified communications and manufacturing enterprise whose operations include 30 domestic telephone operating companies and two international subsidiaries. G.T.&E.'s domestic telephone companies constitute the largest independent telephone system, comprising about 40 percent of the non-Bell market. Two manufacturing subsidiaries, Automatic Electric and Lenkurt Electric, produce communications equipment for the General System, other independent telephone companies, and the military market. Mathison & Walker, Public Policy Issues Arising from the Interdependence of Computers and Communications, (submitted to the Sloan School of Management, Massachusetts Institute of Technology, June 1968).

14 Dunn, *The FCC Computer Inquiry,* October 1969, at 71, 77.

15 The expectation is supported by industry reaction to other carriers' plans to offer data processing services in conjunction with their regulated carrier services. DATAMATION, March 1969, at 113.

16 Western Union as a common carrier is second in importance to AT&T. Western Union's most important service is still its public telegram service which enjoys a monopoly. Because of the reduction of rates for public telephone service provided by telephone carriers and increasing telegram costs, Western Union's telegram market is declining.

Besides the monopoly telegram market, Wester Union also offers a variety of private line services for which it competes directly with the Bell System. Primary among these is the Telex which competes with Bell's TWX service. To eliminate the adverse (to Western Union) effects of the Telex-TWX competition, it has been proposed and negotiations are now underway to turn the TWX service over to Western Union. Western Union also competes directly with Bell in the provision of its bulk rate private line service, TELPAK. Western Union also offers several Government communications services such as AUTODIN, GSA Record System, a nuclear detonation alarm system, and a national crime information center.

Finally, Western Union has recently begun to offer teleprocessing services which compete with similar services offered by non-carriers. Task Force Report, *supra* note 6, ch. 6, at 42-50; SRI Report 7379B-2, *supra* note 6, at 143-144.

Western Union as a common carrier occupies a rather unique position since it does not own the bulk of the communications facilities which it makes available through its tariff offerings.[17] Yet as a result of being a regulated common carrier with a protected monopoly over various communications services, W.U. enjoys certain privileges that are not available to non-carrier data processing firms. In particular, W.U. obtains from the Bell System communications facilities at rates lower than available generally. Also, W.U. can make efficient use of these facilities by attaching its own terminal equipment, interconnecting the Bell facilities with its own networks, and allowing its customers to share the Bell leased lines. Non-carriers have not been able to utilize the Bell facilities in this manner because of restrictive tariffs on foreign attachments, network interconnection, and line sharing.[18] As a result of its privileged position as a regulated carrier, W.U. has been able to claim that its data processing services, most important of which is SICOM,[19] will be offered at reduced rates which reflect certain

17 Western Union owns a transcontinental microwave system but leases most other facilities from the Bell System. SRI Report No. 7379B-2, *supra* note 6, at 143.

18 Sharing of communications lines is essential for the efficient operation of a teleprocessing service. This is because Bell leases its private lines on a dedicated basis for a full 24 hours a day and that significant savings can be realized by the purchase of several channels combined in a bulk package. (Bell leases such private line bulk packages under its TELPAK tariffs). No single user of a teleprocessing service either uses the leased line 24 hours a day or utilizes the full capability of the line while he is on it. Therefore, the company that offers the service attempts to time share as much of the communication facilities as possible among its customers in a particular area. For example, a company may have its data processing computer center in Boston and several customers in New York City. Instead of each customer having to pay for a single communication line to Boston, the company will lease a bulk package private line from Bell. New York customers will then time share the line and thus realize substantial savings. Both Western Union and competing non-carrier teleprocessors can share lines in this way. The restrictions prevent use of the lines by other than the teleprocessor's customers. Non-carriers would like to have ways in which to use the lines continuously since their customers generally are on only during the working hours. Western Union, on the other hand, can share its lines with non-teleprocessing customers. For example, it can make night-time use of its lines available to its public message telegraph service. This is one of Western Union's monopoly services, and thus Western Union can use its monopoly market to help defray the costs of its competitive data processing services.

19 SICOM is a computer information-communication service for members of the New York Stock Exchange, and other exchanges in the United States, and their correspondents. It was initially designed primarily as a communication service to facilitate the movement of buy and sell orders from brokerage houses throughout the United States to the floor of the exchanges, but it is also capable of performing certain non-communications functions such as error checks, record and report usage, and

economies of scale. Competitors of Western Union's data processing service,[20] as well as the Justice Department, complain that such reduced rates reflect only discrimination in pricing and use of facilities controlled by the regulated carriers.[21] Although the data processing industry would probably like to see the regulated carriers prevented from offering any data processing services, it seems that most objections to the smaller carriers operating such services center around discriminatory pricing and use tariffs. The Justice Department would therefore like to see these tariffs eliminated before any additional data processing services are allowed to be offered by the regulated carriers.[22]

In allowing Western Union to offer data processing services without simultaneously removing existing tariff restrictions on non-carrier use of leased lines, the F.C.C. has demonstrated a bias in favor of allowing established carriers to be the primary suppliers of teleprocessing services. It has also extended its scope of regulation to an industry that no reasonable application of regulatory

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message storage and retrieval. Western Union hopes that the SICOM service "will be augmented, in a phased program, by offerings of data processing services utilizing the data base generated by the initial service." In describing the various advantages to the securities industry in the use of SICOM, Western Union states: "The economies realized by the shared use of transmission and computer facilities will be reflected in the rates for this service." Hamill & Brody, *SICOM: Securities Industry Communication System*, WESTERN UNION TECHNICAL REVIEW, April 1967, at 98-103.

20 The SICOM Service faces its strongest competition from Bunker-Ramo's Telequote III System and TOPS (Telecenter Omni Processing System). TOPS, like SICOM, is a data processing service which facilitates the processing of buy and sell orders from brokers and their branch offices. Orders generated in a local office are sent by teleprinter equipment and telegraph lines (leased from Western Union) to a nearby data concentrator called the Brokerage Control Unit. The Brokerage Control Unit stores and forwards messages over a leased line to a Bunker-Ramo data processing center in New York City. This center performs error checks, editing, and verification against current stock price and relays the information to the appropriate teleprinter on the exchange floor. Confirmations are also transmitted by TOPS back to the originating broker. The entire process takes less than 2½ seconds.

Telequote III is a quotation service utilizing the data generated by TOPS, *i.e.*, stock prices on the major exchanges. Telequote presents this stock information in a variety of formats depending on the user's requirements. The Telequote service represents the type of service that Western Union hopes to be able eventually to augment SICOM to perform. Response of the Bunker-Ramo Corporation, F.C.C. Computer Inquiry, Docket No. 16979, March 1968, at F-1, F-2, G-1.

21 Response of the United States Department of Justice, F.C.C. Computer Inquiry, Docket No. 16979, March 5, 1968, at 73; SRI Report *supra* note 6, No. 7379B-5, at 221.

22 Response of Department of Justice, *supra* note 21, at 52-57, 111; SRI Report No. 7379B-5, *supra* note 6, at 221.

policy would say requires it.[23] This position, however, may reflect a rather sympathetic attitude on the part of the Commission to the financial plight of W.U. If this is so, the principles of the SICOM case should probably not be applied to Bell or GT&E. Also, if this is so, instead of applying a different set of rules to W.U., the Commission should consider the alternative of not regulating W.U. at all, allowing and requiring it to compete on the open market with other unregulated companies for the services it sells.[24]

II. The Foreign Attachment and Interconnection Tariffs[25]

The Bell System has long been allowed to develop under the theory that the regulated common carriers would be allowed to provide all the services incident to the provision of a total communication common carrier service. For many years and for most users this meant simply that when one purchased telephone communications from the Bell System, he received the telephone along with the communication network. But for an increasing number of users, the purchase of the network lines is all that is needed because of a desire to attach either someone else's terminal equipment or to interconnect one's own communication system with the carrier's. These two desires are the basis of what are known as the foreign attachment problem and the interconnection problem.

The foreign attachment problem and the interconnection prob-

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23 *See* Response of Department of Justice, *supra* note 21, at 64-71.

24 The proposed sale of Bell's TWX service to Western Union would, if completed, greatly complicate the question of Western Union competing actively with non-carriers. The sale would give to Western Union a monopoly in an important aspect of future teleprocessing industry growth. There is reason to believe that Western Union will exploit such a position in every way possible by expanding and integrating its data processing services with its growth in the teleprinter communication market. Datamation, *supra* note 15.

25 A tariff is in effect a license for a regulated carrier to conduct business in a certain way. Tariffs are most commonly thought of as authorizing rates for services, and when such rate tariffs are approved they serve, among other things, to protect the offeror from claims of price fixing, discrimination, and other unfair business practices that might under other circumstances be the subject of antitrust action. Substantial and different questions are raised, however, when tariffs are used to legitimize carrier action that is not related to rate fixing or service approval but, under a claim of protecting the operation of the system, has the effect of extending monopoly power into potentially competitive markets.

lem arose from the existence of the same restrictive tariff, and to some extent they reflect the same philosophy on the part of the carriers and of the commission that approved the tariff and allowed its continued existence. However, the philosophy has recently been under attack and the tariff itself presumably eliminated by the *Carterfone* decision.[26]

The tariff prohibition, equally applicable to both foreign attachments and interconnections, originally read as follows:

"No equipment, apparatus, circuit or device not furnished by the Telephone Company shall be attached to or connected with the facilities furnished by the Telephone Company, whether physically, by induction or otherwise . . . ."[27]

The philosophy that supported this prohibition for so long in the F.C.C. as well as the carrier industry, according to Commissioner Cox, "was that the company was offering a complete end-to-end service of communication, including all necessary facilities, that the facilities were suitable for the service for which they were offered, and that the company would be responsible for the proper functioning of the service. From a negative standpoint, the carriers contended that the introduction into the system of any foreign element would deprive the responsible company of control over end-to-end service and lead to divided responsibility for such service, with resultant confusion and poor service."[28]

A major break in this philosophy occurred in the *Hush-A-Phone* case.[29] The Hush-A-Phone device is a cup-like device which snaps on to a telephone handset to acoustically block interfering outside noise and allows the speaker to confine his conversation to the voice piece. It thus allows a certain amount of privacy of telephone communication as well as immunity from outside noise. The court ruled that, as applied to the Hush-A-Phone device, the tariff was "an unwarranted interference with the telephone sub-

26 Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968) [hereinafter cited as Carterfone].

27 *Id.* at 421.

28 Address by Commissioner Cox, Wall Street Communications Association, New York City, Feb. 9, 1968. Also reproduced in Response of Business Equipment Manufacturers Association (BEMA), F.C.C. Computer Inquiry, Docket No. 16979, at 121-23.

29 Hush-A-Phone Corp. v. U.S., 238 F.2d 266 (D.C. Cir. 1965).

scriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."[30]

As a result of *Hush-A-Phone*, the tariff restriction was relaxed, at least as far as barring attachments to the telephone or other terminals that did not involve alteration of the terminal equipment or direct electrical connection to the communications line. Interconnection to other lines or terminal equipment was still prohibited, however.[31]

In *Carterfone*,[32] the Commission relied heavily on the essential statement of *Hush-A-Phone*, a foreign attachment case, to further strike down tariffs against interconnections. The Commission said:

> The principle of Hush-A-Phone is directly applicable here, there being no material distinction between a foreign attachment such as the Hush-A-Phone and an interconnection device such as the Carterfone, so far as the present problem is concerned . . . . The vice of the present tariff, here as in Hush-A-Phone, is that it prohibits the use of harmless as well as harmful devices.[33]

As a result of *Carterfone*, AT&T filed for approval of revised foreign attachment tariffs which also govern the extent of interconnections. These new tariffs[34] were allowed to go into effect by the Commission, effective January 7, 1969, without the Commission passing upon the lawfulness of the tariffs or even scheduling hearings to determine such lawfulness in light of *Carterfone*.[35] Rather, a series of informal, semi-private, discussions have been scheduled to determine what standards should be set to govern the interconnection of foreign devices and non-Bell networks to the Bell system.[36] In the meantime, the revised tariffs are

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30 *Id.* at 269.

31 BEMA Response, *supra* note 28, at 122-23.

32 13 F.C.C.2d 420 (1968). The Carterfone device allows for interconnection of the public telephone system with private mobile radio systems such as are used to dispatch taxi cab fleets. The telephone handset is placed on a cradle in the Carterfone device. A voice control circuit permits automatic operation of the radio transmitter and receiver by the telephone caller. No direct electrical connection to the telephone system is involved with the Carterfone device. *Carterfone*, Initial Decision of Hearing Examiner, 13 F.C.C.2d 430, 432.

33 13 F.C.C.2d at 423-24.

34 The new tariffs are described in AT&T, 15 F.C.C.2d 605, 606-09 (1969).

35 15 F.C.C.2d at 611.

36 The National Academy of Sciences (NAS) has been asked by the F.C.C. to

allowed to remain in existence over the objections of virtually every party to the proceeding save AT&T and the Common Carrier Bureau.[37]

The revised tariffs themselves pose at least three questions in light of *Carterfone*. First, a ban still exists on control of the network signalling device — in general terms, the dialing device. Bell insists that only it can control this part of the telephone system, and that to allow a proliferation of independently produced signalling devices would at least tend to detract from the overall efficiency of the system and could result in fraudulent use since the network switching signals are also used to generate billing information. The data processing industry would like to see the ban on signalling devices dropped since it would allow, in a competitive, non-Western Electric market, the manufacture of signalling devices that could be integrated with data terminals to provide automatic message routing at greater speed and lower cost.[38] Whether *Carterfone* applies to the network signalling device or not is unclear, but the Justice Department would have the F.C.C. investigate this question in formal hearings.[39] As noted above, however, the Commission has chosen to use semi-private informal meetings to determine this question.

The second question concerns the general ambiguous wording of the new tariffs. Because of Bell's requirement that it provide the network signalling devices as well as the inclusion in the tariffs of technical standards which arbitrarily exclude certain interconnecting devices, the full extent of the liberalizing effects of the tariff revisions are not apparent, especially when Bell continues to oppose network interconnections on non-technical grounds.[40]

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conduct these discussions. The NAS panel will consist of representatives of the common carrier industry, communications users, independent manufacturers, and Government and "non-profit" organizations. The studies to be undertaken will include not only technical issues relating to foreign attachment and interconnection but to social and economic issues as well. The discussions will probably take over 6 months and be followed by an F.C.C. formal proceeding before the issues are resolved. DATAMATION, Sept. 1969, at 146, 151.

37 Dissenting statement of Commissioner Johnson, 15 F.C.C.2d at 616.

38 DATAMATION, *supra* note 36, at 146.

39 15 F.C.C.2d at 615. Many users agree with the Justice Department that the informal discussions will be inadequate. DATAMATION, *supra* note 15, at 105, 107.

40 These objections concern the economic impact of allowing private network interconnections as well as creating competition for Western Electric's terminal equipment. See note 67 *infra*.

The third objection to the tariff revisions, raised by Commissioner Johnson in his dissent, is that the tariff has been allowed to go into effect over the objections of many parties without AT&T having to meet those objections or the Commission passing on the lawfulness of the tariff. This is especially distasteful in light of the principle, reiterated in *Carterfone,* that one could make use of the phone lines in ways that were not publicly detrimental. It was thought, in eliminating those tariffs which restricted harmless as well as harmful devices from attachment to the phone lines, that the burden would be on the telephone company to prove in any future foreign attachment tariffs that such tariffs would not arbitrarily exclude harmless devices. By allowing the revised tariffs to go into effect without passing on their merits, the Commission has put the burden back upon the user, where it was before *Carterfone,* to prove that his device does not harm the system and therefore should not be excluded.[41]

III. Ratemaking Policy Problems

One consequence of the growing dependence of computer use upon communications is that new questions have been raised regarding the rate structure and practices of communications common carriers.[42] These questions bear directly upon an already existing F.C.C. inquiry into telephone ratemaking policy, begun over four years ago.[43] The question thought to be of fundamental importance by the Commission concerns unlawful price discrimination and possible cross-subsidization of services. A finding of

41 An additional question is raised as to the effect in an antitrust suit challenging a tariffed practice of a declaration that the tariff is unlawful. This question is raised by *Carterfone,* which began as an antitrust case [Carter v. American Telephone and Telegraph Co., 365 F.2d 486 (5th Cir. 1966)], and is unresolved. Such questions are made more complicated when the Commission allows tariffs to go into effect without ruling on their lawfulness, for in subsequent litigation a court, which would normally presume the lawfulness of the tariff, is completely lost. Finally, the assessment of damages in such cases is much more difficult than when the Commission allows rate tariffs to go into effect pending rate hearings without ruling on their lawfulness, a common practice. For these reasons, the importance of placing a great burden on the carriers to justify their restrictive tariffs should be emphasized. See Response of Department of Justice, *supra* note 21, at 20-21.

42 Computer Inquiry, Report and Further Notice of Inquiry, 17 F.C.C.2d 587 590 (1969).

43 AT&T, Docket No. 16258, 2 F.C.C.2d 871 (1965); 2 F.C.C.2d 142 (1965).

cross-subsidization depends upon the principle applied to determine costs.

There are basically two principles that can be applied to determine the cost of a new service offering: fully distributed cost (f.d.c.) or long run incremental cost (l.r.i.c.). Under f.d.c., the rates for a service would reflect a certain amount of the cost of the whole system, distributed in some way among all the services offered by the system. Under l.r.i.c., however, the rates would only reflect the added cost of providing the service.[44]

The pricing environment under consideration can be described as follows. The message toll telephone service (m.t.t.) generates about 80 percent of the Bell System's interstate revenues. M.t.t. is regular long distance telephone service used by most consumers. Bell has a monopoly on this service. About 20 percent of Bell's interstate operations involve the provision of service to specialized customers, *e.g.*, private line, TELPAK, program transmission and TWX (teletype exchange). Bell faces at least potential if not actual competition in the provision of these services.[45] Bell also, either as a result of pressure or for reasons not directly related to competition, provides extensive communication services at reduced rates to important customers such as the Department of Defense or NASA.[46]

An analogy may help to describe the market in which Bell operates and the F.C.C. attempts to regulate. A bridge charges both cars and trucks 10 cents of which 5 cents represents long run incremental costs for any user and 5 cents represents fixed costs of capital fully distributed among all users. A ferry offers river-crossing services to cars only and profitably charges 7 cents. Enough cars are drawn to the ferry service that the bridge cannot recover fixed costs by charging all users 10 cents.

There are two ratemaking methods the bridge could institute to recover its losses to the ferry competition. It could raise rates for

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44 AT&T, 18 F.C.C.2d 761, 766 (1969).

45 In TWX and TELPAK it directly competes with Western Union. Note 16 *supra*. It faces indirect competition in the provision of other private line services from large users who may decide to operate their own communications facilities. It may in the future face direct competition from a growing non-regulated common carrier system. See note 72 *infra*.

46 Dissenting statement of Commissioner Johnson, 18 F.C.C.2d 761, 770.

both cars and trucks or it could raise rates for trucks only and lower rates for cars to meet the ferry competition. It would presumably only lower rates to l.r.i.c. since below that point it would be more profitable to give the car business to the ferry.[47]

The F.C.C. in regulating rates for its bridge, AT&T, in the presence of competition in the non-m.t.t. market, is faced with the following problems. If AT&T is forced to price according to f.d.c., it will have to raise rates for all services to recover fixed costs. It would continue to lose cars to competitors in the ferry business, represented by private microwave companies,[48] until all costs are being borne by the captive truck market, the m.t.t. user. Bell would rather have rates determined according to l.r.i.c. since it could in most cases lower rates below a competitor who did not possess a monopoly market in which to recover fixed costs common to monopoly and non-monopoly services. The F.C.C. is reluctant to allow ratemaking according to l.r.i.c. although there are strong arguments to support it.[49] The Commission is afraid of the effects on the m.t.t. user that l.r.i.c. may produce, and so has in the past required ratemaking according to f.d.c.[50] and has chosen to protect Bell's investment from competition by limitations on market entry by the car ferries, private microwave companies. The Commission is also afraid that even were it to adopt the proposition the ratemaking according to l.r.i.c. is appropriate for some services, it does not possess the necessary accounting methods to guard against cross-subsidization and predatory pricing.[51]

Even if acceptable procedures could be instituted to measure the effect of different ratemaking policies on the telecommunications market, additional problems of social policy exist. The Commission

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47 It may, of course, decide to operate below cost for awhile in an effort to drive the ferry out of business and then recover its losses in its regained monopoly market. Such practices are, of course, subject to antitrust law.

48 Private microwave companies could provide the equivalent of Bell's private line services between major market areas, thus attracting large users of communications services. One such company is Microwave Communications, Inc. *See* note 72 *infra*.

49 If there is a market for a service at its marginal costs and the economy can provide it, as a result of having invested in a bridge, then it would be economically wasteful to force the rates to remain artificially high in an attempt to lower the rates for a service whose users are not attracted by lower rates.

50 AT&T, 18 F.C.C.2d 761, 762-63 (1969).

51 *Id.* at 763.

has recognized[52] that it may be desirable to subsidize a service by setting rates that do not cover even l.r.i.c. A subsidized service would hopefully be the result of some clearly defined goal of social policy.[53] No policies or policy-making procedures exist. If they did, the Commission, possessing the necessary implements of economic policy as a result of its investigation into general rate-making procedures,[54] might decide to subsidize m.t.t. with Bell's earnings in the growing non-m.t.t. market.[55] But the Commission today cannot determine if such a subsidy would be economically feasible or even socially desirable.

The current ratemaking dilemma is illustrated by the TELPAK Rate Proceeding.[56] The TELPAK service offering is geared to the large user of data communications, such as the airlines. By combining several lines or channels into a bulk package through TELPAK, the large user can obtain significantly cheaper communications than the single channel user. These low rates present two problems for the F.C.C.: (1) whether TELPAK is being subsidized by m.t.t.; (2) whether the low rates, which discriminate in favor of the large user,[57] are justified by the cost savings of bulk

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52 *Id.* at 767.

53 Within the m.t.t. market, subsidy already exists for apparently social policy reasons. For example, Bell and the F.C.C. set rates for long distance calls between points in the U.S. independent of the willingness of consumers to pay for the service or the cost to Bell of supplying the service. In this way, low-cost high-demand links, such as Boston-New York or Chicago-St. Louis, tend to subsidize high-cost low-demand links. For whatever reason, such subsidizing within m.t.t. has been accepted pricing policy in the Commission even though such pricing policy has never been approved for other regulated industries, such as transportation common carriers. Also, no one has ever asked the people who are being subsidized whether they wished such subsidization of their communications as opposed to their farms, mines, or whatever. It should be noted also that such a policy can only be enacted by a carrier who enjoys monopoly control, and the acceptance of such a policy by the regulating agency justifies the existence and perpetuation of the monopoly and the agency. See Posner, *supra* note 2, at 607-09.

54 Note 43 *supra.*

55 For other ways in which telephone rate-making can and is used to enact social policy see AT&T, 18 F.C.C.2d 761, 775 n.1; Microwave Communications, Inc., 18 F.C.C.2d 953, 977.

56 F.C.C. Docket No. 18128.

57 The discrimination here relates to sharing of the TELPAK lines. In order to take advantage of TELPAK rates, the small user would have to band together with others who had similar communication needs. Presently, such sharing of private lines offered under TELPAK is prohibited by the tariff offering. The question of TELPAK sharing is being investigated under Docket No. 17457. See note 18 *supra.*

offerings or represent predatory pricing aimed at potential and actual competition.

The resolution of these problems has been delayed by the Commission until a final disposition of the issues involved in establishing ratemaking principles under the general rate investigation.[58] AT&T, however, has recently announced rate increases for TELPAK.[59] It has also proposed reductions in m.t.t.[60] which would presumably offset the increased TELPAK revenues. Large users of the TELPAK service oppose trading m.t.t. off against TELPAK and are attempting to convince the Commission to delay approval.[61]

The increased TELPAK rates along with reduced m.t.t. rates would seem to correspond in principle to the Commission's preference for f.d.c. principles and its concern for the m.t.t. user. Eventual approval is therefore likely. The increased rates for TELPAK will also have a positive effect on the growth of the private microwave companies, the car ferries of telecommunications.

IV. The Competing Carrier Problem

If AT&T brings the rates charged for non-m.t.t. services into line with fully distributed costs, potential suppliers of these services will find it profitable to enter the communications market. The competing carrier story begins with a 1959 decision which allowed private microwave competition.[62] However, most attempts to develop private microwave communications systems for specialized customer needs in limited markets have been opposed by AT&T and the F.C.C. when these systems are to be built and maintained by someone other than the users. The most compelling argument consistently used by AT&T to oppose the establishment of competing carrier systems in limited high demand markets is "cream skimming." The traditional conception of a common carrier is that all customers will be served at fair rates. This leads

58 Note 43 *supra.*
59 Telecommunications Reports, Oct. 6, 1969 at 1-7.
60 Telecommunications Reports, Dec. 8, 1969 at 1-4.
61 Telecommunications Reports, Nov. 24, 1969 at 8-11.
62 Allocation of Microwave Frequencies Above 890 Mc., 27 F.C.C. 359 (1959).

to rather broad rate categories that tend to result inevitably in some customers subsidizing others. The existing communications common carriers have been encouraged if not required by the F.C.C., for whatever reason, but apparently for primarily social considerations, to base their rates on nationwide averaging of costs. Therefore, high profit areas subsidize low profit or below cost areas in the common carrier's system. When a competitor moves into a high profit area and is not required to provide services at uniform rates in low profit areas, he can theoretically beat the common carrier's rates. For this reason, true common carriers object to this type of cream skimming competition and point out that if they lose high profit areas to cream skimmers they will have to raise rates for the low profit portions of their markets with resulting loss of service in some areas.

Another objection to allowing competition with established common carriers is the potential loss of network interconnection. This results in loss of the great benefit that the present interconnected Bell System now possesses of being able to communicate with all users regardless of who is supplying the local communications services. This objection can be dealt with more easily than cream skimming and should not serve as a bar to market entry by competitors of Bell. The F.C.C. could, for example, eliminate tariff restrictions on interconnection and set up technical standards of performance and of signalling and message format that would make competing systems compatible with Bell and each other. The establishment of such technical standards seems feasible since such standards are already in existence for the interconnection of regulated non-Bell carriers, such as GT&E and foreign carriers. There is a possible danger in this alternative in that established standards of performance and signalling format may be so restrictive and constraining that only the established communications carrier will be able to meet those standards, and the services offered will therefore be virtually the same as offered presently. In other words, the establishment of standards in such a case could be more the result of concern with preserving the "integrity"[63] of the present Bell system than with allowing services to arise in response to market demands.

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63 Preserving system integrity has been the primary justification for tariff restrictions on interconnections. System integrity refers to both what signals go over the

These two objections, cream skimming and loss of interconnection, were raised and for the first time shunted aside by the F.C.C. in the *Microwave Communication, Inc.* (MCI) case.[64] MCI filed applications for the establishment of a microwave communications service between Chicago and St. Louis. The proposed service was intended to meet the public need for interoffice or interplant data communications. This service would compete most directly with private line services now offered by the carriers, but unlike the private line user, the MCI user would have to build his own connection between plant or office and MCI's facilities or else make arrangements for interconnection through the carriers. Although MCI does not expect any insurmountable obstacles in reaching interconnection agreements, they had yet to reach such agreements at the time of the initial decision of the hearing examiner, and the carriers had expressed serious reservations about the likelihood of voluntary interconnection agreements.[65] Because of the large demand for, and relatively low cost of providing the services offered by MCI, and the fact that rates charged by the carriers reflect averaging over other less profitable routes, MCI proposes to offer their service at approximately half the carrier's rates.[66]

Thus the traditional objections of the carriers that such services are detrimental because of cream skimming and loss of interconnection did apply to this case. The Commission, in granting MCI's application, appeared for the first time, however, to limit the scope of these objections.[67] The Commission ruled that the cream skimming argument was not applicable here since a demand for the new service already exists, which the carriers cannot meet, and will not be generated merely because of reduced rates,[68]

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system as well as who has management responsibility for the system. Task Force Report, *supra* note 6, ch. 6, at 23-26.

64 AT&T, 18 F.C.C.2d 953 (1969).

65 AT&T, Initial Decision of Hearing Examiner, 18 F.C.C.2d 979, 981 (1969). *See also* 18 F.C.C.2d 953, 965.

66 *Id.* at 984. *But see* 18 F.C.C.2d at 958.

67 The Commission also for the first time seemed to reduce the importance of meeting the high technical standards traditionally applied to common carrier service offerings. Such high technical standards were recognized by the Commission Hearing Examiner as, for the most part, "self-created" and serving more fully the perpetuation of carrier monopoly than the advancement of any clearly definable public policy goal, at least in the provision of private, special purpose, services. *Id.* at 1004.

68 18 F.C.C.2d at 960.

which the carriers cannot match because of their cost averaging pricing policies. Furthermore, the Commission indicated that if it found substantial cream skimming that tended to jeopardize existing cost averaging pricing policies, the pricing policy might be sacrificed.[69] Thus the Commission generally weakened the importance of the cream-skimming argument.

On the question of lack of interconnection to carrier facilities, the Commission was explicit in its opinion that such an objection not only offers no reason for denying applications for carrier service but may be countered by a Commission order of interconnection.[70]

Since MCI was a close decision (4-3), any generalization as to future Commission actions is difficult.[71] It does seem, however, that the viability of special service offerings by new entrants will in the future be tested in the market place rather than before the Commission and AT&T.

V. Conclusion

The emergence of an alternative[72] to the Bell controlled market depends most immediately upon F.C.C. disposition of the ques-

69 *Id.* at 961.

70 *Id.* at 965. Apparently such an order would come, if opposed by the carriers, as a result of further hearings under section 201(a) of the Communications Act of 1934, as amended. 47 U.S.C. § 201(a) (1964).

71 It might be noted, however, that two of the three dissenting Commissioners, including Chairman Hyde, have been replaced by Chairman Dean Burch and Robert Wells. Questions raised at their confirmation hearings gave no indication of their views on common carrier regulation but rather centered on such topics as television policy, Black participation in television, spectrum allocation by the military, and communications satellites. Telecommuications Reports, Oct. 20, 1969, at 11-13.

72 As a result of MCI's success in gaining approval of its St. Louis-Chicago service, and in anticipation of further approvals, a system management company, Microwave Communications of America, has been organized to coordinate the development of other MCI family companies. So far the family includes the original MCI company; Interdata Communications, Inc., serving New York-Philadelphia-Baltimore-Washington; MCI North Central States serving Minneapolis-St. Paul-Milwaukee-Chicago; MCI Pacific Coast running from Seattle to San Diego; MCI New York West running from New York City to Chicago; and MCI New England serving New England states. Although all of these companies have filed applications with the F.C.C., none have been approved. Approval of this system of companies may not come as easily as might appear from a reading of the original MCI case. The cream skimming argument was not completely rejected. Rather it simply was held inapplicable to the facts. Cream skimming may prove to be a compelling argument for the Commission when applied to a larger system.

tions presented in this Note. If the existing carriers, especially Bell, are allowed to expand into the teleprocessing industry, if their rates are allowed to reflect subsidy from monopoly markets, and if their interconnection and attachment policies are allowed to continue to be unrealistically restrictive, then no important competitive market can exist. With no additional market there will also be less need for telecommunications policy reform that would threaten the autonomy and regulatory power of the F.C.C. Although cases such as *Carterfone* and *MCI* seem encouraging, much remains to be done before an environment conducive to the growth of a competitive market is established. Given the closeness of the decisions in these cases, the stalling procedures of the Commission on these matters, the opposition of Bell, and the symbiotic relationship that seems to have developed between Bell and the F.C.C.,[73] it seems doubtful that the Commission will, on its own initiative, allow a non-Bell industry to develop.

On the other hand, the power to enact policy decisions that will determine the development of the telecommunications industry may in the future be removed from the F.C.C. and given to an Executive Branch agency. The establishment of an Executive Branch Telecommunications Agency is one of the major recommendations of the President's Task Force on Communications Policy.[74] The major justification for the establishment of such an agency comes not only from the problems presented above relating to teleprocessing but also from problems presented in

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73 This relationship is not peculiar to the communications industry but is a characteristic of every regulated industry. Although the regulatory agencies are supposed to be representatives of the public interest in regulating an industry, the agencies have not found a way to effectively communicate with the consuming public. Neither have they found a way to communicate with Congress or the Executive, and, in fact, such communication, when it occurs, is the source of considerable political pressure from interest groups. Finally, an agency's technical expertise is the major guarantor of its effectiveness and independence from political pressures. Yet such expertise is difficult to obtain by means of political appointment, and is often derived by the agency from the industry it seeks to regulate.

Thus the agencies develop their constituency which is the industry they seek to regulate. The agency becomes the protector of the industry from ruinous price competition and entry of new firms, and the industry becomes the agency's reason for existence and for continued expansion of political and economic power. L. KOHLMEIER, THE REGULATORS 8-9 (1969).

74 Task Force Report, *supra* note 6, ch. 6, at 9-10.

other areas of communications policy.[75] To some extent these problems overlap, and their independent solutions by separate agencies and departments presents additional problems of policy formation and coordination.

The problem of policy formation is most acute. There have been no clear expressions of communications policy in the thirty-five years since the Commission was formed.[76] The policy that has evolved is a reconciliation of past decisions to changing technological and economic environments. These decisions are arrived at through adversary proceedings between powerful interest groups. For the most part, these proceedings are sufficient for the resolution of limited questions where all affected parties are present and adequately represented. If unrepresented interests are affected, the Commission must determine what policy Congress or the Executive would enact were they presented with the problem. For this purpose, in its proceedings, the Commission refers to Congressional Committee Hearings on related matters or briefs submitted by Executive Departments. These sources too often conflict on the most important matters and thus the Commission is left to its own best judgment. This judgment has, with one exception,[77] been undisturbed by the courts.

The Commission is formulator, executor, and adjudicator of its own policy. As long as the issues it was presented with were sufficiently narrow, there were no serious abuses of power. The issues the Commission must consider now include monopoly power in a competitive market. The decision the Commission arrives at on these issues will determine the development of this market and

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75 The major areas are: (1) control of domestic satellite communications; (2) frequency management — an ostensibly civilian-controlled resource allocation task, originally under the Department of Commerce, that has been taken over by the Department of Defense through fiscal control of the Interdepartmental Radio Advisory Committee during the early '50s and management and fiscal control of the National Communications System in the early '60s; (3) television broadcasting policy; (4) international telecommunications policy.

76 One possible exception was the Communications Satellite Act of 1962 that established the Communications Satellite Corporation (COMSAT) as a quasi-public-owned utility to develop and operate the U.S. portion of an international satellite telecommunications system. 47 U.S.C. §§ 701-744 (1964). This Act has actually produced more problems of policy enactment for the F.C.C. than it has solved since it does not deal with the question of domestic satellite development but specifically avoids it.

77 Hush-A-Phone Corp. v. U.S., 238 F.2d 266 (D.C. Cir. 1965).

the services it can provide. There is no reason to believe that these decisions will have any less affect than the decisions made on television two decades ago.

This is too much discretionary power to be assigned to an independent regulatory agency free of effective control by other branches of government. The original intent was that the independent regulatory agencies would possess the necessary expertise to determine policy affecting the regulated industry and yet be insulated from political pressures. In the formation of policy, however, it is of questionable value that policies do not reflect pressures from the body politic. In fact, of course, the decisions of the F.C.C. reflect considerable political pressure from individual Congressmen, Senators, Executive Departments, and industry lobbies. The problem lies in the manner in which this pressure is brought to bear upon Commission decisions. An Executive Branch Telecommunications Agency could provide the organizational framework in which policies can be developed in response to a broader political base than is available to the F.C.C. in its proceedings.

Besides aiding the policy-making function, an Executive Branch Agency is needed to coordinate government participation in telecommunications development. The Commission is often presented with inconsistent positions by Departments of the Federal Government. For example, the Justice Department because of the antitrust implications would like to see the rate discrimination in TELPAK eliminated. The Department of Defense, as a major user, opposes TELPAK rate increases and exacerbates the problem of monopoly power by major contract awards to Bell System companies because of Bell's position as the sole source of nationwide telecommunications services. An Executive Branch Agency could more effectively resolve these conflicts and present a consistent and unified Executive Branch position on matters pending before the Commission.

With the policy making and coordinating functions removed to the Executive Branch, the scope of the issues presented to the Commission can again be narrowed and more clearly defined. This will encourage the development of Commission expertise in the technical areas necessary for the efficient exercise of its rule making and adjudicatory powers.

As long as a need exists for telephone services that can only be supplied by a nationwide monopoly, the common carrier regulatory function of the F.C.C. will be required. But utmost care is needed to confine this monopoly and regulatory power to the narrowest area necessary to supply this need.

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LEGISLATIVE DEVELOPMENTS

GARNISHMENT STATUTES AND DUE PROCESS: THE EFFECT OF *SNIADACH V. FAMILY FINANCE CORPORATION*

I. THE SUPREME COURT'S DECISION

Alleging non-payment of a promissory note, the Family Finance Corporation instituted garnishment proceedings against Christine Sniadach in a Wisconsin county court. A summons had been issued in an action on the note, but judgment had not been entered at the time of the commencement of the garnishment proceedings. Pursuant to state law, the garnishee-employer retained one-half of Mrs. Sniadach's wages which it had in its control and paid the other half to Mrs. Sniadach as a "subsistence allowance." Mrs. Sniadach then instituted a separate action against the Finance Corporation seeking dismissal of the garnishment proceedings and alleging violation of her rights under the constitutions of Wisconsin and the United States. Her action was dismissed by the Wisconsin county court. Both the state circuit court of appeals and the Supreme Court of Wisconsin affirmed the dismissal.[1] The Supreme Court of the United States granted certiorari. The Court held, per Mr. Justice Douglas, that the Wisconsin statute allowing garnishment of a defendant's wages without hearing or notice and before judgment had been entered against the defendant was violative of the fourteenth amendment of the United States Constitution as a deprivation of the defendant's property without due process.[2]

Sniadich is the latest in a series of cases in which the Court has dealt with challenges to various processes under state and federal law which deprive defendants of their property or use of their property before a hearing or final judgment against them. In these cases the Court seems to be saying that a government's summary procedures must adhere to the same "traditional no-

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1 Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

2 Sniadach v. Family Finance Corporation of Bay View, 89 S. Ct. 1820 (1969), [hereinafter cited as *Sniadach*].

tions of fair play and substantial justice implicit in due process"[3] that a state's procedures to obtain jurisdiction over absent defendants must meet. In determining what is fair, the Court applies a balancing test weighing the desirability of final adjudication before a defendant may be deprived of his property against those "extraordinary situations" requiring "special protection to a state or creditor interest."[4] Thus the Court has upheld proceedings in which both resident[5] and non-resident[6] defendants' property was attached prior to judgment on the merits in civil actions, in which a drug manufacturer's products with allegedly misleading labels were seized without a hearing,[7] in which a conservator was appointed to take over the operation of a savings and loan association before a finding of improper conduct on the part of the incumbent management,[8] and in which stockholders of an undercapitalized bank were assessed without hearing to pay off the bank's depositors.[9] On the other hand, the Court has struck down procedures where a corporate stockholder's property was levied upon to pay a judgment against the corporation before the stockholder had an opportunity to challenge the propriety of the execution[10] and where a property owner's land was condemned by a government agency without sufficient notice and adequate opportunity for the property owner to object.[11]

Although Mr. Justice Douglas first discusses the "right to be heard" to protect one's property, the main focus of his argument is directed at the special nature of the property right involved in this case. The unique characteristic of a person's wages and the excessive hardship which can result when his earnings are cut off lead to the conclusion that wage garnishment without a hearing is unconstitutional. Wage garnishment can drive a working man

3 Millikin v. Meyer, 311 U.S. 457 (1940).
4 *Sniadach*, 89 S. Ct. at 1821.
5 McInnes v. McKay, 127 Me. 110, 141 A. 699 (1928), *aff'd mem. sub. nom.* McKay v. McInnes, 279 U.S. 820 (1929).
6 Ownbey v. Morgan, 256 U.S. 94 (1921).
7 Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).
8 Fahey v. Mallone, 332 U.S. 245 (1947) (alternative holding of estoppel).
9 Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928).
10 Coe v. Armour Fertilizer Works, 237 U.S. 413 (1914).
11 Schroeder v. New York, 371 U.S. 208 (1962).

below the poverty level. Desperation often leads the debtor to make settlements with the creditor in which he obligates himself not only to pay the original price and high finance charges but also to bear "collection fees" incurred by the creditor in bringing the garnishment proceedings.[12]

Mr. Justice Douglas is surely correct when he says that wage garnishment imposes a tremendous burden on the debtor-employee. The hardship extends beyond the lost wages. Many employers who do not want to bother with the administrative detail involved with wage garnishments will summarily discharge an employee whose wages have been garnished.[13] Recent federal legislation will mitigate this harm. The Consumer Credit Protection Act, which becomes effective July 1, 1970, will prohibit employers from discharging employees because their wages have been garnished for any one indebtedness.[14] Wage-earners unable to exist without the benefit of their garnished wages may declare bankruptcy since a bankrupt's wages may not be garnished.[15]

The breadth of the Court's holding is not clear. If the unconstitutionality of prejudgment garnishment is a function of the hardship imposed upon the wage-earner who has lost part of his wages, a constitutional prejudgment garnishment statute might be drafted by exempting a substantial portion of an employee's wages from prejudgment garnishment. In the Wisconsin statute invoked against Mrs. Sniadach, 50 percent of the wages of an employee with dependents (up to $40 per week) is exempt from garnishment.[16] The Court notes that this is hardly enough for a family to live on, and as a result, a wage garnishment may drive a wage-

12 *Sniadach*, 89 S. Ct. at 1822.

13 Brunn, *Wage Garnishment in California: a Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965).

14 15 U.S.C.A. § 1674 (1970). Section 5.106 of the Uniform Consumer Credit Code would prohibit any discharge from employment due to garnishments (whether one or more) resulting from a consumer transaction. The Code has been enacted in Oklahoma and Utah. See note 75 *infra*.

15 Testimony before the House Committee on Currency and Banking established a correlation between harsh garnishment laws and high levels of personal bankruptcy. In states such as Pennsylvania and Texas which prohibit garnishment of wages, the number of non-business bankruptcies per 100,000 population are nine and five respectively, while in those states having relatively harsh garnishment laws, the incidents of personal bankruptcies range from two hundred to three hundred per 100,000 population. H. R. REP. No. 1040, 90th Cong., 1st Sess., pp. 20-21 (1967).

16 WIS. STAT. § 267.18(2)(a) (1967).

earning family to the wall.[17] It might therefore be maintained that the Wisconsin statute's major defect was its failure to provide for an adequate source of income to the employee whose wages had been garnished and that a statute which exempted a larger portion of the employee's wages from garnishment need not provide a hearing prior to garnishment to satisfy the requirements of due process. Federal law, effective July 1, 1970, will provide a mandatory wage exemption of 75 percent of the employee's weekly earnings and will further provide that no garnishment may issue against the employee's first $48 of earnings per week.[18] State laws may provide higher wage exemptions.[19]

Drawing the line between an adequate exemption and an inadequate exemption is not, however, a task readily susceptible to the judicial function, and it is unlikely that the Court would like to find itself in a situation where it says that a given percentage exemption to a garnishment statute is constitutionally acceptable while another staute with a slightly lower exemption violates due process. The new federal legislation requiring fairly high wage exemptions[20] may enable the Court to avoid this line-drawing problem. A case may come before the Court involving a garnishment without prior hearing in which 75 percent of the defendant's wages were exempt from garnishment in accordance with the new federal requirement. The Court might say that this larger exemption adequately spares the defendant from the burdens outlined by Mr. Justice Douglas so that due process does not require prior notice and hearing in such a situation. The Court will not have to face the question as to where between the new 75 percent wage exemption and the 50 percent exemption provided by the Wisconsin statute in *Sniadach* an exemption becomes great enough to allow garnishment without hearing, because under the new federal law, wage exemptions in all states will be at least 75 percent. Such a decision would render *Sniadach* meaningless in light of the new minimum wage exemption. The majority opinion, how-

17 *Sniadach*, 89 S. Ct. at 1822-23.

18 CONSUMER CREDIT PROTECTION ACT. tit. III, § 303(a), 15 U.S.C. § 1673(a) (1970). The dollar figure equals thirty times the hourly federal minimum wage in effect at the time the earnings are payable, presently $1.60/hour.

19 *Id.*, § 307, 15 U.S.C.A. § 1677 (1970).

20 *See* text at note 18 *supra*.

ever, gives no indication that the size of the exemption provided by the Wisconsin statute was a controlling factor. Rather it is the *procedure* by which a person is deprived of his wages without hearing which is unconstitutional, and therefore it seems unlikely that a statute allowing prejudgment garnishment without hearing will be saved merely because a substantial portion of the employee's wages are exempt from garnishment.

Garnishment is a device which has been employed to gain jurisdiction over persons in lieu of personal service. The continued viability of the use of wage garnishment to obtain jurisdiction over absent defendants is in doubt. After mentioning that summary procedures may meet the requirements of due process in extraordinary situations, the Court noted that Mrs. Sniadach was a domiciliary of Wisconsin and therefore the Wisconsin state courts had personal jurisdiction over her.[21] This raises a possible negative implication that wage garnishments directed at non-residents who might not otherwise be subject to the jurisdiction of the court are constitutional. However, the hardships of wage garnishment emphasized by Mr. Justice Douglas are suffered equally by defendants who live inside and outside the state, and a non-resident defendant may be additionally burdened if he is forced to defend a suit far away from his home. Therefore, if the rationale of the Court's decision is that there cannot be prejudgment garnishment of property if that garnishment will result in undue hardship for the defendant, there would be no distinction between garnishment against in-state and out-of-state wage-earners: both kinds of garnishment would be impermissible. Moreover, in some situations garnishment in a remote jurisdiction has been used to evade exemptions provided in the wage-earner's home state,[22] and such garnishments may be brought to harass the debtor by imposing on him needless expense. Nevertheless, a District of Columbia

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21 *Sniadach,* 89 S. Ct. at 1821.

22 *See, e.g.,* Anderson v. Canaday, 37 Okla. 171, 131 P. 697 (1913). The creditor had attached debtor's wages in Missouri although both creditor and debtor resided in Oklahoma and debtor's employer had an Oklahoma office, since Oklahoma had an exemption from attachment for wages and Missouri did not. The court held that the debtor could recover damages from the creditor and the creditor's attorney. It may be doubted, however, whether this damage remedy adequately deters such forum-shopping or sufficiently compensates the debtor.

court has interpreted *Sniadach* narrowly and has allowed prejudgment garnishment of wages held by a District of Columbia employer where the defendant was a resident of Virginia but worked in the District of Columbia,[23] despite the fact that the only immediate hearing available to the defendant permitted challenges to the grounds for attachment but did not permit challenges to the merits of the plaintiff's claim.[24]

There are no compelling policy reasons for distinguishing between garnishment of in-state and out-of-state wage-earners in order to protect the creditors' interest in bringing absent defendants within the jurisdiction of the court: a logical extension of *Sniadach* would strike down both types of garnishment. In situations where the plaintiff is seeking jurisdiction over a non-resident defendant by garnishing the defendant's employer in the plaintiff's home state, the case where such garnishment is the only method of obtaining jurisdiction over the defendant will be rare. The plaintiff in *City Finance* who was suing a defendant who resided in Virginia but whose employer was located in the District of Columbia did not have to garnish the defendant's wages to obtain jurisdiction over the defendant in the District of Columbia. The plaintiff could have served the defendant personally when he appeared in the District of Columbia at his job.

Failure to distinguish between garnishments against in-state and out-of-state defendants can be reconciled with the Court's previous decisions dealing with the use of state summary processes to attach defendant's tangible property. In the past the Court has declined to distinguish between the use of attachment against residents and non-residents and has upheld summary attachment in both situations.[25] Mr. Justice Douglas is evidently satisfied that attachment of a resident defendant's property satisfies his "extraordinary situation" standard because he cites *McKay v. McInnes* as a case involving acceptable summary process.[26] *McKay* is a memorandum

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23 City Finance Company of Mt. Ranier, Inc. v. Williams, 2 CCH CONSUMER CREDIT GUIDE ¶ 99,893 (D.C. Ct. Gen. Sessions June 18, 1969).

24 D.C. CODE, § 16-506, ¶ 1 (1966).

25 *Cf.* McKay v. McInnes, 279 U.S. 820 (1929), *with* Ownbey v. Morgan, 256 U.S. 94 (1921).

26 *Sniadach,* 89 S. Ct. at 1822.

opinion affirming a decision by the Supreme Court of Maine.[27] The Maine court struck down a challenge to a Maine statute allowing attachment of a resident defendant's real estate and corporate stock prior to hearing even though the defendant was a resident of the state and susceptible to personal service and even though there was no showing that such attachment was necessary to protect the plaintiff's subsequent judgment.[28] Mr. Justice Harlan indicates that he does not consider the question of summary attachment against residents to be settled by the per curiam disposal of *McKay*.[29]

Allowing attachment of a resident defendant's property while disallowing garnishment of his wages may be reconciled by examination of the burden which each procedure places on the defendant. Garnishment of wages cuts off the working man's primary source of support and deprives him of the means to provide himself and his family with basic necessities. On the other hand, statutes providing for attachment of personal property typically exempt that property whose deprivation, albeit temporary, would work an undue hardship on the defendant.[30] Thus in dealing with the attachment of tangible property in *McKay v. McInnes* and *Ownbey v. Morgan*,[31] the Court may simply be saying that the temporary loss of non-essential property is not a deprivation of property at all in the constitutional sense and therefore, the standards of due process not being applicable, there is no need to seek out factors constituting an "extraordinary situation."[32]

Occasions in which the plaintiff makes a prima facie showing that garnishment is necessary to protect a subsequent judgment obtained against the defendant might constitute "extraordinary

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27 279 U.S. 820 (1929).

28 127 Me. 110, 141 A. 699 (1928).

29 *Sniadach*, 89 S. Ct. at 1823-24, (Harlan, J. concurring).

30 *See, e.g.*, CALIF. CODE CIV. PROC. §§ 69 *et. seq.* (West 1954); OHIO REV. CODE §§ 2329.62 *et. seq.* (1954). Property typically exempted includes necessary household equipment, furniture, provisions and fuel, farming implements, tools of the debtor's trade, and motor vehicles.

31 279 U.S. 820 (1929); 256 U.S. 94 (1921).

32 This is one of the theories of the Supreme Court of Maine in McInnes v. McKay, 127 Me. 141 A. 699 (1928), *aff'd mem. sub. nom.* McKay v. McInnes, 279 U.S. 820 (1929).

situations" in which it is consistent with due process to garnish the defendant's wages before judgment on the merits. State attachment statutes often provide for an allegation by the plaintiff that the defendant is concealing, conveying, or moving property upon which the plaintiff would otherwise levy in execution of a later judgment.[33] However, due process would still seem to require that the defendant be given a "right to be heard"[34] either before the garnishment or shortly thereafter to rebut the plaintiff's allegations that garnishment is necessary to protect the plaintiff's judgment. Due process may also require that the plaintiff show that the defendant's wages are the only property which the defendant has available to satisfy a later judgment. The Court's emphasis on the hardships on the garnished employee suggests that wage garnishment prior to judgment must be resorted to only upon a showing that all other efforts to obtain jurisdiction and to protect a subsequent judgment have failed.

Assuming that a hearing is required before any garnishment, or that the plaintiff has been unable to establish circumstances which eliminate the need for prior hearing, the hearing which is required before garnishment is evidently a hearing on the merits of the creditor's claim.[35] Wisconsin common law provided some relief to an employee whose wages had been garnished by allowing him to challenge the garnishment in a collateral hearing.[36] At this hearing, however, only evidence tending to show that the garnishment action was brought in bad faith could be introduced. Such a hearing was not a proper forum for a determination of the creditor's claims on the merits; such a determination must await the trial of the original action brought by the creditor.[37] The Court now says that, absent special circumstances constituting an "extraordinary situation," a creditor must establish the validity or probable validity of his case on the merits against the defendant

33. *See, e.g.*, N. Y. CIV. PRAC. LAWS & RULES § 6201 (McKinney 1963); CALIF. CODE CIV. PROC. § 537 (West 1954).

34 *See* Schroeder v. New York, 371 U.S. 208 (1962).

35 The majority does not discuss the nature of the hearing required. Mr. Justice Harlan's concurring opinion suggests that the hearing must deal with the merits of the creditor's claim. *Sniadach*, 89 S. Ct. at 1823.

36 Family Finance Corp. v. Sniadach, 37 Wis. 2d 163, 154 N.W.2d 259 (1967).

37 *See* Orton v. Noonan, 27 Wis. 572 (1871); Chernin v. International Oil Co., 261 Wis. 308, 52 N.W.2d 785 (1952).

before the defendant's wages may be garnished consistently with due process.

II. Extent of Wage Garnishment Today

Since the Supreme Court first held that a debt receivable constituted property subject to attachment,[38] garnishment has become big business. Statutes allowing wage garnishment without advance hearing now exist in about twenty states.[39] A 1967 survey by a Washington State District Justice Court judge showed that out of 1000 cases before him, wage garnishments were filed in 311 cases. Of these 311 garnishments, 227 were prejudgment garnishments. The judge noted that after prejudgment garnishment, none of the cases sampled ever went to trial on the merits, thus leading to the conclusion that the garnishments were brought more for the purpose of deterring the defendant from presenting his defenses on the merits than for the purposes of obtaining jurisdiction or safeguarding subsequent judgments.[40] In a survey of the San Francisco sheriff's department, the chief deputy sheriff estimated that of 3700 writs of attachment filed within a two-month period in 1965, 75-80 percent were wage attachments.[41] The potential effects of *Sniadach* are thus widespread.

III. Effect of *Sniadach* on Garnishment Statutes

The Court's failure to delineate the exact boundaries of its decision make it difficult to tell the precise effect of *Sniadach* on existing wage garnishment statutes. The District of Columbia garnishment statute has been upheld as sufficiently narrow to be compatible with *Sniadach*,[42] but the attorney general of North Dakota has rendered an opinion that the North Dakota garnish-

38 Harris v. Balk, 198 U.S. 215 (1905).

39 Report of the National Advisory Committee on Civil Disorders 276 (Bantam ed. 1968).

40 Patterson, *Foreward: Wage Garnishment—an Extraordinary Remedy Run Amuck*, 43 Wash. L. Rev. 735 (1968).

41 Brunn, *Wage Garnishment in California: a Study and Recommendations*, 53 Calif. L. Rev. 1214 (1965).

42 *See* text at note 23 *supra*.

ment statute is void after *Sniadach*,[43] and a Washington state court quashed all writs of garnishment presently before it on the basis of *Sniadach*.[44] The following analysis of the statutes of some larger states uncovers some potential problems raised by this case.

A. *Illinois, Massachusetts, Michigan, Pennsylvania, and Texas*

Wage garnishment statutes in these states would not appear to be affected by *Sniadach* as these states do not permit prejudgment wage garnishment.[45]

B. *New York*

New York does not have a separate garnishment statute; wages are "attached" like other tangible property. New York permits an order of attachment to be granted at any time prior to judgment without notice.[46] However, the order of attachment may be granted only in a limited number of circumstances. These include situations where the defendant is not a resident of New York; where it is necessary to prevent the defendant from concealing, conveying, or moving his property to defraud the plaintiff; or where the action is based on contract and alleges fraud on the part of the defendant.[47] Thus garnishment of wages will not be available in all actions founded upon contract as it was under the Wisconsin statute invoked against Mrs. Sniadach;[48] New York law does not require, however, that attachment be the only feasible method of obtaining jurisdiction over a non-resident defendant, and the defendant's non-residence is grounds for attachment despite the fact that the defendant may make regular appearances within the state to pursue his employment.

While the defendant in New York may not raise his defenses on the merits until the trial of the main action, he may apply to have

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43 North Dakota attorney general's opinion, 2 CCH CONSUMER CREDIT GUIDE ¶ 99,887 (July 8, 1969).

44 State Credit Association, Inc. v. Lewis, 2 CCH CONSUMER CREDIT GUIDE ¶ 99,902-1 (Wash. Super. Ct. July 11, 1969).

45 ILL. REV. STAT. ch. 62, §§ 71, 74 (1961); MASS. GEN. LAWS ch. 246, § 32 (Eighth) (1960); MICH. STAT. ANN. § 600.4011(3) (1968); 42 PA. STAT. tit. 42, § 886 (1966); TEX. CONST. art. 16, § 28 (1955).

46 N. Y. CIV. PRAC. LAWS & RULES § 6211 (McKinney 1963).

47 *Id.*, § 6201.

48 WIS. STAT. § 267.01 (1967).

the attachment vacated or modified.[49] The defendant may have the attachment vacated upon a showing that the attachment is unnecessary for the security of a subsequent judgment. The burden of proof, however, will be on the defendant,[50] and it may be difficult for a debtor of limited economic means to meet this burden. Other grounds for vacation or modification would be that the attachment is oppressive or working a hardship on the defendant,[51] or that the complaint does not prima facie state a cause of action.[52]

Since attachment of wages in New York is available only when certain grounds for attachment are alleged, this summary procedure may meet the "extraordinary situations" test laid down by Mr. Justice Douglas.[53] The fact remains, however, that a defendant in a New York civil action may have his wages attached notwithstanding the fact that he makes regular appearances in the state or that the plaintiff has made no showing that he needs security for a subsequent judgment.[54] The availability to the defendant of a hearing in which he may challenge the sufficiency of the grounds of the attachment or show that the attachment is oppressive may give the defendant adequate protection so as to satisfy the requirements of due process, but this is clearly not the "hearing on the merits" referred to by Mr. Justice Harlan and may therefore be defective in this respect.[55] Another serious potential defect in the New York statute is the lack of requirement of notice to the defendant upon issuance of the order of attachment against his property. The New York statute does not therefore seem to meet the requirement for timely notice insuring the "right to be heard" implicit in due process.[56]

49 N. Y. Civ. Prac. Laws & Rules § 6223 (McKinney 1963).

50 George A. Fuller Company, Inc. v. Vitro Corporation of America, 274 N.Y.S.2d 600 (App. Div. 1st Dep't 1966).

51 Elliott v. Great Atlantic & Pacific Tea Co., 171 N.Y.S.2d 217 (City Ct. Bronx Co. 1957), *aff'd* 179 N.Y.S.2d 127 (Sup. Ct. 1st Dep't 1958). This case did not, however, involve an attachment of wages.

52 Stines v. Hertz Corp., 259 N.Y.S.2d 903 (App. Div. 2d Dep't), *aff'd* 16 N.Y.2d 605, 205 N.E.2d 105, 261 N.Y.S.2d 59 (1965).

53 *Sniadach*, 89 S. Ct. at 1821.

54 *See, e.g.*, N. Y. Civ. Prac. Laws & Rules § 6201(5) (McKinney 1963) which permits an order of attachment to be issued in actions based on contracts in which the defendant was allegedly guilty of fraud in the contracting.

55 *Sniadach*, 89 S. Ct. at 1823, (Harlan J. concurring).

56 *Cf.* Schroeder v. New York, 371 U.S. 208 (1962).

New York provides a substantial 90 percent wage exemption from attachment;[57] the discussion above would indicate, however, that the extent of the exemption is likely to be irrelevant in determining constitutionality.

C. *California*

California permits prejudgment attachment of wages in any action founded upon an unsecured contract for direct payment of money[58] or an action for unsecured rent.[59] Other provisions of the California law allow attachment prior to judgment in actions upon contracts or involving injury to property upon a showing that the defendant is a non-resident or that the defendant is concealing himself to avoid service of process.[60] Although generally a writ of attachment may be granted anytime after issuance of a summons,[61] an attachment of a defendant's wages may not take effect until eight days after the plaintiff has filed an affidavit attesting that the defendant has been served with the summons and has been given notice of the pending wage attachment.[62] One hundred percent of the defendant's wages are exempt from attachment except in actions for debts contracted by the defendant for common necessaries or for personal services from the plaintiff where a lower exemption is applicable.[63] The lower exemption for suits involving common necessaries recognizes the need to give more protection to those creditors who have sold the defendant items for his basic needs rather than luxury items and to encourage retailers to extend credit for these items to persons who otherwise might not be able to obtain these necessities. California law provides a 50 percent wage exemption in these actions based upon contracts for common necessaries or personal services,[64] but federal law will shortly raise that exemption to 75 percent.[65]

Creditors in California may easily avoid the 100 percent wage

57 N. Y. Civ. Prac. Laws & Rules §§ 6202, 5205 (McKinney 1963).
58 Calif Code Civ. Proc. § 537(1) (West 1954).
59 *Id.*, § 537(4).
60 *See generally* Calif. Code Civ. Proc. § 537 (West 1954).
61 Calif. Code Civ. Proc. § 537 (West 1954).
62 *Id.*, § 690.11 (West 1963).
63 *Id.*
64 *Id.*
65 *See* text at note 18 *supra.*

garnishment exemption by alleging in the affidavit for attachment that they are suing on a contract for common necessaries. A defendant who wishes to challenge this allegation must bring a time-consuming independent suit for a writ of exemption in which the defendant bears the burden of proof in showing that the contract sued upon was for something other than common necessaries. Such writs are rarely sought by California defendants.[66] Thus prejudgment attachment is a very real phenomenon in California despite the apparently liberal wage exemption.

The defendant in California may institute a proceeding to have the attachment discharged.[67] Discharges are granted only upon a showing of irregularity in the writ of attachment. The validity of the indebtedness sued upon cannot be determined in a motion for discharge,[68] nor can the debtor show that the plaintiff has exaggerated his claim and has only a slight chance of recovering a judgment.[69]

Although California provides an ample eight-day warning to a defendant whose wages are being attached,[70] the failure to provide a prompt hearing on the merits in which the defendant may challenge the writ of attachment may render the attachments prior to judgment unconstitutional.[71] California does not seem to provide adequately for the "right to be heard" required by due process, since the statute permits only challenges to the regularity of the attachment itself and does not allow the debtor an opportunity to raise defenses on the merits or to show that the amount attached far exceeds the true value of the debt sued upon.[72] California's attorney general has expressed the opinion that California's garnishment procedures are void in light of *Sniadach*.[73]

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66 Brunn, *Wage Garnishment in California: a Study and Recommendations*, 53 CALIF. L. REV. 1214 (1965).

67 CALIF. CODE CIV. PROC. § 556 (West 1954).

68 Corum v. Superior Court in and for Alameda County, 114 Cal. App. 741, 300 P. 837 (Dist. Ct. App. 1931).

69 Minor v. Minor, 175 Cal. App. 2d 277, 345 P.2d 954 (Dist. Ct. App. 1959).

70 *See* note 62 *supra*.

71 *See* text at notes 35-37 *supra*.

72 *See* notes 68 and 69 *supra*.

73 *Garnishment and Due Process: a Dilemma*, 2 CCH CONSUMER CREDIT GUIDE ¶ 99,904 (1969).

IV. Suggested Legislation

The uncertain breadth of the Court's holding coupled with the wide variety of garnishment procedures presently operative make it desirable that state legislatures re-examine the garnishment procedures in their states in light of *Sniadach*. The increased exemptions from wage garnishment to be required by federal law in the Consumer Credit Protection Act, effective July 1, 1970, may reduce the urgency of the problem,[74] but this law does not affect the various statutory schemes outlining the circumstances justifying garnishment or the procedures to be followed in garnishment. More comprehensive reform is likely to be necessary in states which do not limit prejudgment garnishment to special situations and provide a mechanism for a prompt, effective challenge to the garnishment by the defendant.

The Uniform Consumer Credit Code[75] provides the best solution to legislatures seeking to insure the constitutionality of their garnishment processes. The Code would prohibit all prejudgment garnishments in actions arising from consumer transactions.[76] Wage exemptions are provided for post-judgment garnishments,[77] and an employee is protected from discharge from his employment because his wages have been garnished.[78]

In states where the legislatures feel it is essential to preserve prejudgment garnishment, such garnishments should be limited to those situations in which garnishment is either essential to obtain jurisdiction over the defendant and/or those situations in which protection for a subsequent judgment is needed and no other feasible means of protection are available. Even in these special situations, no writ of garnishment should issue without some showing by the creditor that his claim is not frivolous.

A prompt hearing either before or immediately after the garnishment must be afforded to a debtor wishing to challenge the garnishment against his wages. At this hearing, the debtor should

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74 *See* text at note 18 *supra*.

75 Presently enacted by Oklahoma and Utah. Okla. Stats. tit. 14A arts. 1-9; Utah Code Ann. chs. 70B-1-101 to 70B-9-103.

76 Uniform Consumer Credit Code § 5.104 (1969).

77 *Id.*, § 5.105.

78 *Id.*, § 5.106.

be allowed to make a special appearance to rebut the creditor's showing of his need to garnish. If the garnishment was brought to obtain jurisdiction over an absent defendant, the defendant should be allowed to submit himself to the personal jurisdiction of the court and to remove the freeze on his wages. If the garnishment was brought to protect a subsequent judgment, the debtor should be allowed to show that such protection is not needed or that he has sufficient assets other than his wages which might be attached to provide the requisite protection. Regardless of the grounds in justification of the garnishment, the debtor should also be permitted to introduce evidence that the plaintiff's claim is frivolous. If the debtor can show that the creditor's claim is frivolous or that the creditor has no special need justifying garnishment prior to judgment, the writ of garnishment should be promptly quashed.

Due process may not require that a hearing be held in every garnishment proceeding as long as a hearing is available in every case where the debtor desires it. Thus a constitutional prejudgment garnishment statute might allow garnishment without hearing as long as several days' notice was given to the debtor prior to garnishment and during this notice period the debtor could demand a hearing permitting the challenges discussed above.

In any event, state legislatures desiring to continue prejudgment garnishment will have to draft their garnishment statutes narrowly and carefully. It cannot be gainsaid that the days in which creditors can garnish a debtor's wages in almost any circumstance without challenge have been ended by *Sniadach*.

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SNOB ZONING: DEVELOPMENTS IN MASSACHUSETTS AND NEW JERSEY

Introduction

The twin problems of lack of low cost housing and discrimination in housing have gained increased importance in recent years due to the acceleration of the Black Revolution. The decade of the 1960's saw three major housing acts on the federal level,[1] each of which introduced a new concept in the method of subsidization by which private developers might be enticed to build low and middle income housing — housing for families earning $10,000 or less a year. The large industrial states have passed housing programs of their own, often analogous to the federal programs.[2]

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1 Housing Act of 1961 (§ 221(d)(3) Below Market Interest Rate Program), 12 U.S.C. 1715l-d(3) (1964); Housing and Urban Development Act of 1965 (rent supplement program), 12 U.S.C. 1701s (Supp. 1968); Housing and Urban Development Act of 1968 (§ 235 interest subsidy program), 12 U.S.C. 1715z (Supp. 1968). In addition, the Department of Housing and Urban Development instituted the leased public housing and turnkey public housing programs in 1965 under the broad authorization to finance the "acquisition" as well as the "development" of public housing. 42 U.S.C. 1402(5), 1409, 1410(b) (1964).

2 The forerunner of these programs is the New York Mitchell-Lama program. N.Y. PRIVATE HOUSING FINANCE LAW §§ 10-37 (McKinney 1962). The mortgage loans programs of the Massachusetts Housing Finance Agency are modelled upon this law. MASS. ANN. LAWS ch. 121, §§ 26 NN, KKK-MMM (Supp. 1968). *See also* MICH. COMP. LAWS §§ 125. 1401-1445 (1967) (state housing development authority); N.J. STAT. ANN. §§ 55:14J-1 to 14J-40 (Supp. 1969) (housing finance agency) and §§ 17: 11A-1 to 11A-33 (Supp. 1969) (mortgage loan program); MO. STAT. ANN. § 215.050 (Vernon Supp. 1969) (state housing development fund); W. VA. CODE ANN. §§ 31-18-1 to 31-18-25 (Supp. 1969) (state housing development fund). The most inventive of the recent programs is the New York Urban Development Corporation, an umbrella public agency which would float bonds to finance land acquisition and development by itself and by private developers. N.Y. UNCONSOL. LAWS §§ 6251-6285 (McKinney Supp. 1969). In addition, thirteen states have enacted redevelopment corporation laws which give tax abatements to limited dividend developers of public land. District of Columbia, D.C. CODE §§ 5-701 to 5-719 (1966); Hawaii, HAWAII REV. LAWS §§ 143-22 to 143-38 (Supp. 1963); Illinois, ILL. ANN. STAT. ch. 67½, §§ 252-294 (Smith-Hurd 1961); Kentucky, KY. REV. STAT. §§ 99.010-99.310 (1962); Massachusetts, MASS. ANN. LAWS. ch. 121A, §§ 1-19, (1966); Michigan, MICH. COMP. LAWS §§ 5.3058(1) to 5.3058(22) (1967); Missouri, MO. STAT. ANN. §§ 353.010-353.180 (Vernon 1966); New Jersey, N.J. STAT. ANN. §§ 55:14D-1 to 55.14D-28 (1964); New York, N.Y. PRIVATE HOUSING FINANCE LAW §§ 200-221 (McKinney 1962); Ohio, OHIO REV. CODE ANN. §§ 1728.01-1728.13 (Page Supp. 1967); Oklahoma, OKLA. STAT. ANN. tit. 11, §§ 1601-1620 (Supp. 1969); Virginia, VA. CODE ANN. §§ 36-48 to 36-55 (1950); and Wisconsin, WIS. STAT. ANN. §§ 66.405-66.418 (Supp. 1969). See also laws

In addition, the federal and state governments have passed stiff discrimination laws[3] and the Supreme Court has given new life to the property rights of the black in its revival of the Civil Rights Act of 1866 in *Jones v. Mayer*.[4]

However, few houses have been built under any of these heralded programs[5] and only a token amount of low and lower middle income housing has been built in the suburbs that have burgeoned since the end of World War II around our largest cities.[6] Recent studies have placed a large part of the blame for this situation upon exclusionary zoning and building code regulations.[7] This Note will discuss the Massachusetts Snob Zoning

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with regard to the formation of limited dividend housing companies. CAL. HEALTH & SAFETY CODE §§ 34800-34948 (West 1964); DEL. CODE ANN. tit. 31, §§ 4131-4142 (1962); FLA. STAT. ANN. §§ 42401-42422 (1962); MINN. STAT. ANN. §§ 462.591 to 462.661 (1963); S.C. CODE ANN. §§ 36-1 to 36-61 (1962) and TEX. REV. CIV. STAT. ANN. art. 1524b-1528a (1962).

3 The Civil Rights Act of 1968, 42 U.S.C. 3601-3619 (Supp. 1968), prohibits discrimination in the sale of rental of housing, other than single family houses. *See also* Civil Rights Act of 1964, 42 U.S.C. 2000a (1964); Exec. Order No. 11063, 27 C.F.R. 11527 (1963); Exec. Order No. 11246, 30 C.F.R. 12319-12325 (1965), *as amended by* Exec. Order No. 11375, 32 C.F.R. 14303 (1967).

Most large states now have broad state anti-discrimination laws which specifically restrict discrimination in the sale or leasing of housing. *Cf. e.g.*, MASS. ANN. LAWS ch. 151B, § 4 (1966); N.J. STAT. ANN. §§ 10-5 to 10-9-1 (Supp. 1969); OHIO REV. CODE ANN. § 4112.02 (H-J) (Page Supp. 1967); PA. STAT. ANN. tit. 43, §§ 955-959.1 (Supp. 1969); N.Y. CIV. RTS. LAW 18-a to 18-e (McKinney Supp. 1969); ILL. ANN. STAT. ch. 38, § 70-51 (Smith-Hurd Supp. 1969); MICH. COMP. LAWS §§ 564-101 to 564.704 (Supp. 1969).

Racial zoning was held invalid in *Buchanan v. Warley*, 245 U.S. 60 (1917), though racial covenants were enforced until *Shelley v. Kraemer*, 334 U.S. 1 (1948). For a review of specific cases see Williams & Wacks, *Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited*, 1969 WISC. L. REV. 827, 840 n.38 (1969); Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 336 (1955).

4 392 U.S. 409 (1968).

5 As of December 31, 1968, insurance in force under the 221(d)(3) BMIR program included 126,791 units. Rent supplement projects under payment included 17,141 units with another 17,330 units under contract and 32,181 units under reservation for payments. DEPT. OF HOUSING AND URBAN DEVELOPMENT, FHA DIVISION OF RESEARCH AND STATISTICS, STATISTICS SECTION, March 14, 1969. Housing Authorities were managing 673,000 public housing units at the end of 1967. DOUGLAS COMMISSION, RESEARCH REP. NO. 10, F. KRISTOF, URBAN HOUSING NEEDS THROUGH THE 1980's: AN ANALYSIS AND PROJECTION 53 (1968).

6 See generally Schnore and Jones, *The Evolution of City-Suburban Types in the Course of a Decade*, 4 URBAN AFFAIRS Q. 421 (1969); R. WOOD, 1400 GOVERNMENTS (1961) for a general discussion of this process.

7 U.S. NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY: FINAL REPORT, I-50, 51 (1969) [henceforth DOUGLAS COMMISSION]; U.S. COM-

Act[8] and the proposed New Jersey Land Use Planning and Development Law[9] in the light of the scope of the problem presented by these studies and of past judicial and legislative responses to the situation.

I. The Problem

The Douglas Commission[10] and Kaiser Commission[11] reports left little doubt of their belief in the extent to which exclusionary zoning practices, such as minimum lot size requirements, minimum floor area requirements, and minimum frontage and setback requirements, have reduced the capacity of our large metropolitan areas to provide the projected needs in moderate cost housing for the next several decades. A study by Neil Gold and Paul Davidoff for the Kaiser Commission found that increased use of such zoning devices by suburban communities had reduced the dwelling unit capacity of the New York metropolitan area from a total of 2,543,900 households in 1960 to 2,050,000 households in 1968, while the projected need for housing by 1985 included 2,500,000 new households — an additional five to eight million people — and 700,000 households for those now ill-housed in cities such as New York and Newark.[12] In addition, the Regional Planning Association reported that the minimum lot size required for a single family home in the metropolitan

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MISSION ON URBAN HOUSING, A DECENT HOME 4-5 (1969) [henceforth KAISER COMMISSION]; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 479-482 (1968); Downs, *Moving Toward Realistic Housing Goals,* in K. GORDON AND D. BELL, AGENDA FOR THE NATION 161-169 (1968).

8 Mass. Acts of 1969, ch. 774, *amending* Mass. Ann. Laws ch. 40B by adding §§ 19-23.

9 N.J., S. 803 (introduced May 12, 1969).

10 DOUGLAS COMMISSION, *supra* note 7. Data on exclusionary zoning practices is found in a number of research reports completed for the Commission. RESEARCH REP. NO. 2, AMERICAN SOCIETY OF PLANNING OFFICIALS, PROBLEMS OF ZONING AND LAND-USE REGULATION, 80 pp. (1968); RESEARCH REP. No. 6, A. MANVEL, LOCAL LAND AND BUILDING REGULATIONS, 48 pp. (1968); RESEARCH REP. NO. 11, RAYMOND & MAY ASSOCIATES, ZONING CONTROVERSIES IN THE SUBURBS, 82 pp. (1968); RESEARCH REP. NO. 12, A. MANVEL, THREE LAND RESEARCH STUDIES, *Land Use in 106 Large Cities,* p. 19-60 (1968); RESEARCH REP. NO. 18, J. COKE & J. GARGAN, FRAGMENTATION IN LAND USE PLANNING AND CONTROL, 91 pp. (1969).

11 KAISER COMMISSION, *supra* note 7.

12 Gold and Davidoff, *The Supply and Availability of Land For Housing For Low and Moderate Income Families,* in KAISER COMMISSION, TECHNICAL STUDIES, vol. II, p. 287-409, at 343.

area had doubled in the period 1950 to 1960.[13] Only 200,000 multi-family units could be provided under present zoning regulations.[14] Similar patterns have been noted since the end of World War II in Massachusetts,[15] Connecticut,[16] New Jersey,[17] Missouri,[18] and Minnesota.[19]

Beyond the gross reduction in housing capacity, it is more difficult to sort out the effects of exclusionary zoning upon hous-

13 *Id.*, at 342-343. An earlier survey is Gibbons, *Minimum Lot Area Requirements— The National Picture* in COMMUNITIES RESEARCH PROJECT, ZONING FOR MINIMUM LOT AREA 18-38 (1959).

14 Gold and Davidoff, *supra* note 12, at 343.

15 A study of twenty one communities in the Boston Metropolitan Area in 1956 found that in the ten year period 1946-1956 the capacity for residential development in the area was reduced from 95,000 units to 58,000 units or by 39 percent. Acreage in the densest lot size category (8,000-10,000 square foot minimum) was reduced by 75 percent. URBAN LAND INSTITUTE, THE EFFECTS OF LARGE LOT SIZE ON RESIDENTIAL DEVELOPMENT, TECH. BULLETIN No. 32 (1958) at 7-11, 35-36 [henceforth ULI]; R.E. COUGHLIN, THE COMMUNITY COSTS RESULTING FROM GROWTH, (unpublished M.I.T. Masters' Thesis in City Planning 1955), 172 pp.; W.L.C. WHEATON AND M.J. SCHUSSHEIM, THE COST OF MUNICIPAL SERVICES IN RESIDENTIAL AREAS 1-7 (1955). The continuing trend in this direction was confirmed by a 1968 questionnaire sent out by the Massachusetts Legislative Research Bureau. MASS. REPORT OF THE LEGISLATIVE RESEARCH COUNCIL RELATIVE TO RESTRICTING THE ZONING POWER TO CITY AND COUNTY GOVERNMENTS, MASS. S. REP. NO. 1133 (1968) 89-119 [henceforth LEGISLATIVE RESEARCH COUNCIL].

16 In Connecticut in 1966 approximately 70 percent of the undeveloped land zoned for a minimum lot size had acreage requirements of more than one acre. Subdivisions built after World War II had usually placed five dwellings per acre. AMERICAN SOCIETY OF PLANNING OFFICIALS, NEW DIRECTORS IN CONNECTICUT PLANNING LEGISLATION 185-187 (1967) [henceforth ASPO]. Less than five percent of the land was zoned for one-third acre or less.

17 A 1964 study by the Department of Conservation and Economic Development found that over 75 percent of the total zoned land in the state was zoned for single family residences on lots greater than one-half acre in size and that 17 percent of the residentially zoned land had a minimum lot size of one acre or more. Only 10 percent of the total is zoned for high density lots of one-eighth acre or less. By 1980 the northern New Jersey area will have largely exhausted its supply of available land. N.J. DEPT. OF CONSERVATION AND ECONOMIC DEVELOPMENT, THE REGIONAL DEVELOPMENT OF NEW JERSEY, A REGIONAL APPROACH 53, 75, 83 (1964). At present, only four percent of the land of Paterson and nine percent of the land of Newark is undeveloped. DOUGLAS COMMISSION, *Land Use in 106 Large Cities* in RESEARCH REP. NO. 12, THREE LAND RESEARCH STUDIES 42-43, 46-47 (1968). A Regional Planning Association study found that 54.2 percent of the vacant land in the New Jersey portion of the New York metropolitan area was zoned for single family dwellings on lots of one acre or more. REGIONAL PLAN ASSOCIATION, SPREAD CITY 40 (1962). A 1966 state survey found that the number of communities with one acres zoning had risen from 60 in 1950 to nearly 300. William & Wacks, *supra* note 3, at 829.

18 See Gold and Davidoff, *supra* note 12, at 363-366 for data on the St. Louis metropolitan area.

19. *Id.*, at 360-363 for data on Minneapolis-St. Paul.

ing cost and upon the related costs of community services, transportation and maintenance expenses. There is no conclusive evidence of a relation between minimum lot size requirements and the cost of a house. Topography, pattern of development, and improvements required of the developer are more important factors than density.[20] Yet the restriction upon the number of houses that can be built in an area will distort the housing market for the entire metropolitan area. In attractive suburban areas large lot zoning has been found to increase the competition and cost of the available number of smaller lots.[21] The dispersal of development may waste valuable land resources, especially in view of the open space needs of a metropolitan area.

Proponents of such restrictions have stressed that they increase tax revenues while reducing costs of government services.[22] This argument holds only in rural areas where few community services are now provided. If such services are provided, larger lot size may increase the costs to the homeowner or renter because employment, community services and schools are farther away and the owner must bear the effect of these increased transportation costs.[23] The trade-off is between the increased cost for street and water improvements at densities of 3000 persons or less per square

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20 See WHEATON & SCHUSSHEIM, *supra* note 15, at 32, 57; ASPO, *supra* note 16, at 183-223. Site costs have represented 32 percent of the overall rise in housing costs in the 1960's. A major factor has been the rise in land improvement costs which now average $35 per linear foot lot width. Id. at 348-349, 375. In the period 1940-1960 land costs rose from 8-12 percent to 20 percent of the total cost of a house. ASPO, *supra* note 16, at 207. The importance of the increase in land improvement costs was emphasized in COUGHLIN, *supra* note 15 and LEGISLATIVE RESEARCH COUNCIL, *supra* note 15.

21 ASPO, *supra* note 16, at 214-215; LEGISLATIVE RESEARCH COUNCIL *supra* note 15, at 104. The former study found several instances where the price of a quarter-acre lot was higher than that of a one or two acre lot in the same town. The benefits of an alternate cluster development policy are discussed in Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959).

22 Cf. discussion in Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRAC. L. REV. 507, 514-17 (1963). [henceforth SYRACUSE].

23 See studies by W. ISARD and R. COUGHLIN, MUNICIPAL COSTS AND REVENUES 25-28 (1957); G. ESSER, ARE NEW RESIDENTIAL AREAS A TAX LIABILITY? 8 (INSTITUTE OF GOVERNMENT, UNIV. OF N.C. 1956) and ULI, *supra* note 15. These studies are premised on the assumption that basic water, sewer and educational services will be provided by the community and that education should be charged as a community service, not one directed against individual property through the property tax. The basic area is well covered in SYRACUSE, *supra* note 22.

mile and the necessity of providing sewers and schools at higher densities.[24] However, for municipalities with a population of from 25,000 to 100,000 and a basic capital plant for water, sewer and school services, a reduction of large lot size and concomitant restrictions is not likely to change the cost of services to the extent that any increase will not be offset by new tax revenue.[25] Such new revenue would arise from an increased assessment of the property due both to its division into a smaller number of units and to the often ignored interrelationship between residential density and revenue from commercial and industrial centers.[26] In addition, the municipality gains added revenue from an increase in intergovernmental transfer payments for education, health and welfare.

In any event, even if the removal of exclusionary zoning does increase living costs for the suburban residents, legislation against snob zoning is based on the assumption that the suburbs should endure this increased cost, because it represents their responsibility toward the problems of the inner city, the center of commerce and culture upon which they depend.[27] Moreover, such legislation will not place an onerous burden on any one suburb. The Massachusetts and New Jersey statutes, for example, are premised on a definition of a regional need, a need to be satisfied by all the municipalities in the area.

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24 WHEATON & SCHUSSHEIM, *supra* note 15, at 4.

25 Recent studies of the cost of municipal services have shown that the basic services of fire and police protection, primary and secondary education and refuse collection show no economies of scale once one reaches a population of 50,000 to 100,000. Major utilities show economics of scale up to 200,000 to 300,000 persons. See studies cited in Hirsch, *The Study of Urban Public Services* in H. PERLOFF AND L. WINGO, ISSUES IN URBAN ECONOMICS 477-526 (1968).

26 R. MACE, MUNICIPAL COST-REVENUE RESEARCH IN THE U.S. 7 (1961). The importance of the consideration of increased sales by local merchants and the large intergovernmental transfers from the state and federal governments for population serving functions, such as education and health, are neglected if the property tax is viewed as the sole revenue source of the municipality. See Margolis, *On Municipal Land Policy for Fiscal Gain*, 9 NAT. TAX J. 247 (1956); Wheaton, *Application of Cost-Revenue Studies to Fringe Areas*, 25 J. OF AMER. INST. OF PLANNERS 172 (1959); Comment, *The General Welfare, Welfare Economics, and Zoning Variances*, 38 U. SO. CAL. L. REV. 548 (1965). This argument has been used extensively against apartments. Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1081 (1963).

27 MACE, *supra* note 26, at 120; Margolis, *supra* note 26, at 250; R. BABCOCK, THE ZONING GAME (1966).

Before exploring the traditional judicial and legislative responses to the problem of snob zoning, it is important to add a caveat concerning the effect of the loosening of zoning restrictions upon the dispersal of the Black and Puerto Rican from the central city ghetto. Residential segregation is not caused primarily by economic segregation.[28] Even before the advent of black power, there were strong positive reasons why black people would choose to live together.[29] Thus the first response to the availability of housing in the suburbs is likely to come from the working class white family and those middle class blacks who are already well assimilated into the American system, and not from poor black families.

II. Traditional Judicial and Legislative Responses

Zoning is an exercise of the police power of the state.[30] The Standard Zoning Enabling Act provides a grant of power to local municipalities for the purpose of "promoting health, safety, morals or the general welfare of the community."[31] Specific purposes of such regulations generally include: (1) to lessen congestion and prevent overcrowding of land; (2) to facilitate the provision of public services; (3) to promote health standards such as the provision of adequate light and air; (4) to preserve the

28 A recent study of Cleveland found that whites and blacks paid the same amount both for rent and for homes. Taueber, *Effect of Income Redistribution on Racial Residential Segregation,* 4 Urban Affairs Q. 5 (1968). The classic studies of the subtle effects of discrimination on housing segregation are A.H. Pascal, The Economics of Housing Segregation (1967); W. Grigsby, Housing Markets and Public Policy (1963); L. Laurenti, Property Values and Race (1960); Report of the National Advisory Commission on Civil Disorders 467-82 (1968). Yet the discrepancy between blacks and whites is perhaps most visible with regard to housing. G. Sternlieb, The Tenement Landlord 6 (1966). Some commentators have even proposed that there is a constitutional right to decent housing. Note, *Decent Housing as a Constitutional Right, 42 U.S.C. § 1983: Poor People's Remedy for Deprivation,* 14 How. L.J. 338 (1968).

29 See particularly the recent development of interest in community development. Note, *Community Development Corporations: A New Approach to the Poverty Problem,* 82 Harv. L. Rev. 644 (1969); K. Miller, *Community Capitalism and the Community Self-Determination Act,* 6 Harv. J. Legis. 413 (1969); American Assembly, Black Economic Development (1969).

30. C. Rathkope, The Law of Zoning and Planning 2-25 (3d ed. 1962).

31 U.S. Dept. of Commerce, A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations § 1 (1926), reprinted in C. Rathkope, Law of Zoning and Planning 100-1 (3d ed. 1962).

character of the district; and (5) to encourage the most appropriate use of land.[32] State legislatures have been slow to provide more specific standards.[33] Hawaii and New York provide the only statewide powers for restricting local zoning.[34]

Given the broad scope of these powers courts have generally presumed zoning ordinances to be valid unless they were clearly arbitrary and could be shown to have no connection to the standards set out above.[35] Thus they have been reluctant to strike down restrictions such as large lot zoning requirements.

In the early years of zoning ordinances, it was presumed that such restrictions must show some relationship to the health of

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32 *Id.*, § 3.

33 Only New York and Colorado provide that local zoning regulations must be submitted to a regional or state authority before they take effect. In Colorado the role of the State Planning Department is merely advisory. In New York a disapproval by the regional or state authority may be overridden by a vote of a majority plus one of the members of the local governing body. N.Y. GEN. MUN. LAW art, 12-B, § 239m (McKinney 1962); COLO. REV. STAT. ANN. § 106-2-21 (1963).

Only New Jersey imposes a statutory restriction upon the types of improvements which localities may require developers to provide in subdivisions. The developer must include only those improvements for which a direct benefit assessment could be levied against an individual homeowner if the improvement was installed by a government agency. N.J. STAT. ANN. 40:55-1.21 (1965).

Only six states have adopted mandatory statewide building codes. California, CAL. HEALTH & SAFETY CODE §§ 18900-18917 (West 1964); Indiana, IND. ANN. STAT. §§ 20-416 to 20-434 (1964); New Mexico, N.M. STAT. ANN. §§ 67-35-1 to 67-35-63 (1953); Ohio, OHIO REV. CODE ANN. §§ 378.01-379.07 (Page 1954); North Carolina, N.C. GEN. STAT. §§ 143-136 to 143-143.01 (1963); Wisconsin, WIS. STAT. ANN. §§ 101.01-101.60 (1957). See generally Note, *Building Codes: Reducing Diversity and Facilitating the Amending Process*, 5 HARV. J. LEGIS. 587 (1968).

34 In Hawaii the State Land Use Commission must divide the land area of the state into urban, rural, agricultural and conservation districts. Counties may adopt zoning regulations for the first three types of districts as long as they meet state requirements and may petition the Land Use Commission for changes in the boundaries of districts. HAWAII REV. LAWS § 98H (Supp. 1963).

In New York the state Urban Development Corporation may override local zoning ordinances where there is a need for safe and sanitary housing accommodations for low income persons that private enterprise cannot provide. N.Y. UNCONSOL. LAWS § 6260 (McKinney Supp. 1969). See Amdursky, *Urban Crisis, Private Enterprise and State Constitutions: A Plan for Action*, 19 SYRAC. L. REV. 618 (1968); Note, *The State Urban Development Corporation of New York*, 1 URBAN LAWYER 129 (1969); For model acts see COUNCIL OF STATE GOVERNMENTS, 1970 SUGGESTED LEGISLATION 53-66, and *An Act to Establish A Corporation for Urban Development*, 5 HARV. J. LEGIS. 529 (1968).

Ontario also has a state board to review zoning decisions.

35 *Nectow v. City of Cambridge*, 277 U.S. 183, 187-188 (1928), citing *Nectow v. City of Cambridge*, 260 Mass. 441, 448 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, at 395 (1926). The *Nectow* opinion is the only Supreme Court case to strike down a zoning ordinance after the *Euclid* case.

the community.[36] However, in *Simon v. Needham*,[37] the Massachusetts Supreme Court upheld a one acre minimum lot requirement as advantageous to the character of the area, as well as to public health, recreation, fire prevention, traffic congestion and aesthetics. Since that time courts have concentrated, with few exceptions,[38] on the elastic concept of the welfare of the community, including its interest in the maintenance of property values.[39] In *Lionshead Lake, Inc. v. Wayne Township*,[40] the New

36 See *Oxford Const. Co. v. City of Orange*, 4 N.J. Misc. 515, 133 A. 477 (1926) (ten foot minimum side yard); *R.B. Const. Co. v. Jackson*, 152 Md. 671, 137 A. 278 (1927) (two and a half story height limit held valid to improve light and air); *Daniels v. City of Portland*, 124 Ore. 677, 265 P. 790 (1928) (windows of certain size held valid for health purposes) Wynn v. Margate City, 9 N.J. Misc. 1324, 157 A. 565 (1931) (sideyard regulations upheld as fire safety measure); Appeal of Blackstone, 38 Del. 230, 190 A. 597 (1937) (minimum area restriction had substantial relationship to public health).

37 311 Mass. 560, 42 N.E.2d 516 (1942).

38 Michigan is the major exception, striking down most challenged zoning restrictions. *Hitchman v. Oakland Township*, 329 Mich. 331, 45 N.W.2d. 306 (1951) (three acre minimum); *Senefsky v. Huntington Woods*, 307 Mich. 728, 12 N.W.2d 387 (1943) (1300 square foot minimum floor area); *Federation of Livonia Civic Assoc. v. Lewis*, 350 Mich. 210, 86 N.W.2d 161 (1957) (minimum one-half acre lot area); *Rittenour v. Dearborn Township*, 326 Mich. 242, 40 N.W.2d 137 (1949) (maximum dwelling size of eight feet in width on twenty-foot lot); *Frishkorn Construction Co. v. Lambert*, 315 Mich. 556, 24 N.W.2d 209 (1946) (minimum house size of 14,000 cubic feet); *Elizabeth Lake Estates v. Township of Waterford*, 317 Mich. 359, 26 N.W.2d 788 (1947) (minimum 700 square foot floor area and minimum house area). But cf. *Padover v. Township of Farmington*, 132 N.W.2d 687 (Mich. 1965) (upheld neighborhood unit plan providing for developments that could be served by a single school). Also see cases under notes 46 and 47 *infra*.

39 See particularly *Bilbar Const. Co. v. Easttown Bd. of Adjmt.*, 393 Pa. 62, 141 A.2d 851 (1958) (one acre minimum); *Flora Realty and Inv. Co. v. Ladue* 362 Mo. 1045, 246 S.W.2d 771 (Mo. 1952), *appeal dismissed*, 344 U.S. 802 (1952) (one acre minimum); *Zygmont v. Greenwich*, 152 Conn. 550, 210 A.2d 172 (1965) (four acre minimum); *Honeck v. County of Cook*, 12 Ill. 2d 257, 146 N.E.2d 54 (1957) (five acre minimum); *Dilliard v. Village of No. Hills*, 276 App. Div. 969, 94 N.Y.S.2d 715 (1950) (two acre minimum); *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967) (five acre minimum).

In particular, courts have upheld requirements that houses have a minimum square foot area of cubic footage because such restrictions are felt to be closely related to health. *Thompson v. City of Carrollton*, 211 S.W.2d 970 (Tex. Civ. App. 1948) (minimum floor area 900 square feet); *Dundee Realty Co. v. City of Omaha*, 144 Neb. 448, 13 N.W.2d 634 (1944) (sliding scale ordinance); *Flower Hill Bldg. Corp. v. Village of Flower Hill*, 100 N.Y.S.2d 903 (Sup. Ct. 1950) (1800 square feet restriction within statutory discretion of village); *Lionshead Lake supra* note 40; *122 Main St. Corp. v. Brockton*, 323 Mass. 646, 84 N.E.2d 13 (1949) (outside scope of state enabling act); *Brundage v. Township of Randolph*, 54 N.J. Super. 384, 148 A.2d 841 (1959) (ordinance can provide for different areas for conventional dwellings and summer cottages); *Contra, Medinger Appeal*, 377 Pa. 217, 104 A.2d 118 (1954).

Jersey Supreme Court upheld a minimum floor area restriction on residential dwellings in which the purpose of the ordinance seemed to be the preservation of appearance and property values, rather than the stated reasons of public health.[41]

There has been some escape from that trend in recent years where very large minimum lot sizes are proposed which bear no relation to the present size of lots in the community.[42] However, often the standards by which such regulations are judged are no clearer than the standard for obscenity.[43] In *Aronson v. Sharon*,[44] the Massachusetts court struck down a system of rural districts which increased minimum lot sizes from 40,000 square feet to

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See generally Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370, 381-82.

40 10 N.J. 165, 89 A.2d 693 (1952), *cert. denied*, 344 U.S. 919 (1953). An excellent discussion of the issues involved in zoning for minimum standards is found in a series of articles written in response to this case. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Nolan and Horack, *How Small a House?—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Williams, *Zoning and Housing Policies*, 10 J. HOUSING 94 (1953). A recent review of the case is found in Williams & Wacks, *supra* note 3.

41 The *Lionshead* decision has been followed in a series of New Jersey cases. *Fischer v. Bedminster Township*, 21 N.J. Super. 81, 90 A.2d 757, *aff'd.* 93 A.2d 378 (N.J. 1952) (a five acre lot minimum upheld); *Fanale v. Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749 (1958) (upheld ordinance that excluded new apartment construction); *Napierkowski v. Gloucester Tp.*, 29 N.J. 481, 150 A.2d 481 (1959) (upheld exemption of trailers from all but industrial districts); and the celebrated *Vickers v. Gloucester Township*, 37 N.J. 232, 181 A.2d 129 (1962), *appeal dismissed*, 371 U.S. 233 (1963) (upheld banning of trailer camps). See Note, *Protection of Property Values Held Sufficient Justification for Total Exclusion of Trailer Camps*, 17 RUTG. L. REV. 659 (1963). A fine discussion of these cases is found in F. FEKETE, SUBURBAN ZONING RESTRICTIONS AND THE STRATEGY OF GHETTO DISPERSAL 7-23 (unpublished 1969, on deposit in Harvard Law School Library).

42 *E.g.*, *Hamer v. Town of Ross*, 59 Cal. 2d 776, 382 P.2d 375 (1963) (one acre minimum); *LaSalle Nat. Bank v. Highland Park*, 27 Ill. 2d 350, 189 N.E.2d 302 (1963); *Aronson v. Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964) (100,000 square foot lot minimum); *Grant v. Washington Township*, 203 N.E.2d 859 (Ohio 1963) (80,000 foot minimum); But cf. *Zygmont v. Greenwich*, *supra* note 39. Lot size minima have been upheld where they conform to standards in neighboring areas. See *Flora Realty and Inv. Co. v. Ladue*, *supra* note 39; *Fischer v. Bedminster Township*, *supra* note 41; *State ex rel. Grant v. Kiefaber*, 114 Ohio App. 279, 181 N.E.2d 905 (1960) (80,000 foot minimum).

43 *Cf. Roth v. United States*, 354 U.S. 476, 489 (1957), where Justice Brennan states that the inquiry is whether for the average person, applying contemporary community standards, the dominant theme of the material as a whole appeals to prurient interest. Later cases added an affront to community standards of decency standard. *Jacobellis v. Ohio*, 378 U.S. 184, 192 (1964).

44 346 Mass. 598, 195 N.E.2d 341 (1964).

100,000 square feet on the ground that the recreation use envisaged for the land should have been provided through eminent domain. The court distinguished *Simon v. Needham* by noting that a law of diminishing returns set in for the public welfare somewhere between 10,000 square feet and 100,000 square feet.[45] However, it did look specifically at the size of lot upon which existing housing had been built.

The Pennsylvania court in *National Land & Investment Co. v. Kohn*[46] struck down a four acre minimum lot requirement by referring to the need to take into account regional considerations as well as those of the local community. However, this is one of the few instances in which Judge Hall's classic lecture on the spillover effects of local zoning decisions with regard to metropolitan development has been heeded.[47] Courts have been notoriously reluctant to find that a zoning ordinance is a fifth amendment taking of property without due compensation if there is any reasonable relationship to the general welfare of those now living in the community involved directly. The recent emergence of the equal protection clause as a guarantor against racial and economic discrimination does not yet provide the additional leverage to deal with the problem.[48]

This brief description of judicial reluctance and legislative resistance forms the background for the discussion of the recently enacted Massachusetts Snob Zoning Law and the proposed New Jersey Land Use Planning and Development Law.

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45 *Id.*, at 345.

46 419 Pa. 504, 215 A.2d 597 (1965). This case overturned a proposed four acre minimum lot size for the same community in which a one acre minimum had been upheld in the *Bilbar* case, *supra* note 39. See Note, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251 (1966) for a discussion of the case.

47 *Vickers v. Gloucester Township*, 37 N.J. 232, 252, 181 A.2d 129, 140 (1962), *appeal dismissed*, 371 U.S. 233 (1963) (dissenting opinion). Besides the *Kohn* case a two acre minimum was declared unconstitutional in *Bd. of Supervisors v. Carper*, 200 Va. 653, 107 S.E. 390 (1959). Also see *Hitchman, supra* note 38; *Marquette Nat'l Bank v. County of Cook*, 24 Ill. 2d 497, 182 N.E.2d 147 (1962).

48 *E.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969) discussing the possible effect of *Brown v. Bd. of Education*, 347 U.S. 483 (1954), *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) upon the problem of fiscal zoning.

III. Massachusetts Snob Zoning Law[49]

The purpose of the Massachusetts Snob Zoning Law is to avoid the complete review of local zoning ordinances by the state, while allowing private developers or public agencies to build some low income housing in the suburbs. The sponsors hoped that a statement by the legislature with regard to land use in the suburbs would spur the passage of plans to provide housing for low and moderate income families.[50] There is some indication that this result is occurring.[51]

A public agency, nonprofit corporation, or limited dividend developer may appeal to the Commonwealth to review and reverse a refusal to waive local zoning and other regulations by a local zoning board of appeals if it can be shown that the decision was not "reasonable and consistent with local needs."[52] It may also appeal restrictions placed upon building housing under an approved application where such restrictions make the construction of such housing "uneconomic."[53] If the five member Housing Appeals Committee placed in the Department of Community Affairs finds that the decision by the local board of appeals was consistent with local needs, that decision will stand regardless of whether the local restrictions make the proposed housing uneconomic.[54] If the Committee finds that the local decision was inconsistent with local needs it may direct the local board to issue a building permit.[55] The local board then has thirty days to comply with the decision of the Housing Appeals Committee. If it fails to act it is deemed to have acquiesced to the order which

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49 Mass Acts of 1969, ch. 774, *amending* Mass. Ann. Laws ch. 40B by adding §§ 19-23 [henceforth Snob Zoning Law].

50 Interview with State Representative Martin Linsky, co-sponsor and principal draftsman of the law, December 17, 1969.

51 *Id.* The Planning Board of the Town of Lexington has passed a plan to provide 900-1000 units of low and moderate income housing, its quota under the ten per cent guideline *infra*. Committees have been established in Wellesley, Lincoln, Concord, Needham, Weston and Westford. The latter two communities had turned down such proposals in the past.

52 *Id.*, §§ 22, 23.

53 *Id.*, § 23.

54 *Id.*

55 *Id.*

may be enforced by either the Housing Appeals Committee or the developer in the superior court.[56]

The developer must initiate the procedure by applying for a comprehensive permit to build housing to the local board of appeals.[57] He need not make separate applications to the planning board, building commissioner, health board, and selectmen or mayor as is often necessary under present law.[58] The local board must hold a hearing within 30 days of the receipt of an application for a comprehensive permit and render a decision within 40 days of the termination of the hearing,[59] as in normal zoning cases. The applicant then has 20 days to appeal to the state Housing Appeals Committee which must hold a hearing on the appeal within 20 days of the receipt of the applicants' statement.[60] Within 30 days after the end of the hearing the Committee must render a written decision. Any person aggrieved by the issuance of a permit may go to the Massachusetts Superior Court either at the point when the local board renders a decision or when the Committee gives a written decision.[61] Thus the length of time that will elapse between the submission of a proposal to the local board and the decision of the Housing Appeals Committee might well be four or five months, half of that time being spent in the appeals procedure. The developer will have to bear the additional costs of holding the land during this period.[62]

The key to the understanding of this procedure lies in the definitions of "consistent with local needs" and "uneconomic." There are two alternative definitions of the phrase *consistent with local needs* provided in the statute. Prima facie, local regulations will be considered consistent with local needs if (1) the city

56 *Id.*
57 *Id.*, § 21.
58 *Id.*
59 *Id.*
60 *Id.*, § 22.
61 *Id.*, § 21. MASS. ANN. LAWS ch. 40A, § 21 (1966).
62 Such costs generally include the interest and other financing costs associated with interim financing obtained by the developer and other costs for the overhead of his operation. However, the developer may only hold an option in which case the costs are much lower. Though this period seems long it is shorter than the average zoning board procedure.

has existing low or moderate income housing[63] in excess of ten per cent of the housing units reported in the last federal census or on sites comprising one and one-half per cent of the total land area, exclusive of that owned by public authorities;[64] or (2) that the application would result in the commencement of housing on sites comprising the greater of three-tenths of one per cent of the land area of the city or town or ten acres in that calendar year.[65]

The effect of the ten per cent guideline on the towns and cities of the state would be great. A study by the Metropolitan Area Planning Council[66] (MAPC) found that there are now only 36,488 units of subsidized low and middle income housing in the Boston metropolitan area but that the ten per cent housing unit guideline could require an additional 51,639 units. At an average of three or four persons per unit subsidized housing could be provided for an additional 150,000 to 200,000 persons. The bedroom communities of Newton, Arlington, Brockton, Lynn, Medford and Quincy would be especially affected.[67]

The effect of the alternative land area guidelines is more difficult to assess. The MAPC study of six selected communities — Brookline, Lexington, Malden, Needham, Newton and Peabody — found that only Malden exceeded the one and one-half per cent guideline, though it would have been required under the housing unit guidelines to increase its subsidized housing supply

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63 "Low and moderate income housing" includes any housing "subsidized by the state or federal government under any program to assist the construction of low or moderate income housing as defined in the applicable federal or state statute, whether built or operated by any public agency or any nonprofit or limited dividend organization." SNOB ZONING LAW, § 20. Federal programs applicable include public housing, rent supplement, the Section 202 Senior Citizens Housing program, Section 235 Home Ownership Assistance program, Section 236 interest subsidy program and the 221(h) program guaranteeing mortgages for housing in urban renewal areas. See below at note 83 for possible dispute about the turnkey and leased public housing programs.

64 SNOB ZONING LAW, § 20.

65 METROPOLITAN AREA PLANNING COUNCIL, MEMO, CHAPTER 774: AN INTERPRETATIVE ANALYSIS FOR CITIES AND TOWNS, Oct. 1969, 15 pp.

66 *Id.*, Attachment 3: Maximum Housing Guideline under Chapter 774 for Communities in the Council District, 11-14.

67 *Id.*, These communities could provide 10,055 of the additional 51,639 units in the area (Newton 2370, Arlington 1160, Brockton 1555, Lynn 2245, Medford 1132, and Quincy 1593). An additional 6170 units could be provided in Boston.

from 1390 units to 1814 units.[68] Since few Massachusetts communities besides the cities of Boston, Worcester, Springfield, Cambridge, Framingham, Malden, Somerville and the town of Brookline have built more than a small amount of subsidized housing to date, the alternative acreage guideline is not likely to be of great significance.[69] This study also indicated that the ten acre maximum for annual construction of such housing was unlikely to be appropriate in many cases.[70]

Even if a community does not meet the specific requirements of the prima facie ten per cent or alternative land area guidelines, its action may be held to be consistent with local needs if it is reasonable with regard to (1) the regional need for subsidized housing, (2) the health and safety of either the residents of the housing or the residents of the town, (3) preservation of open spaces, or (4) promotion of better site and building design.[71] The latter three requirements must be uniformly applied to all housing applications.[72] Thus the Housing Appeals Committee is given considerable discretion in determining when to override a local board of zoning appeals, using the same broad standards of health, safety and general welfare that have hamstrung courts in the area. The committee can make a de novo decision based upon the same facts and considerations as were applied by the local zoning body.

Yet the decisive criterion for review is likely to be that of regional need for subsidized housing. Projected estimates indicate that Massachusetts will need 200,000 more housing units by 1980.[73] The Housing Appeals Committee thus will probably refer back to the prima facie standard as the easiest means to developing an index of regional need to be applied to specific cases.

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68 *Id.*, at 15.

69 Boston, Cambridge, Framingham, Malden and Somerville account for 23,502 of the existing 36,488 subsidized units in the Boston metropolitan area (Boston 17,710, Cambridge 1849, Framingham 1074, Malden 1390, Somerville 1470). *Id.*, at 10-14.

70 The study of six communities *supra* note 68 found that only Brookline could use the ten acre guideline.

71 SNOB ZONING LAW, § 20.

72 *Id.*

73 This figure is an extrapolation from the 250,000 substandard units in the state at the time of the 1960 census using the data collected by DOUGLAS COMMISSION, RESEARCH REP. No. 10, *supra* note 5. In the period 1960-1966 the net change in housing units in Boston was only 355 units. It is estimated that 37,000 new units will be needed in the city by 1975.

A developer may threaten a specific town with the development of a large low income housing project if it does not grant him a zoning amendment for a large factory. Low income housing may be a leverage for bad planning.

However, the act is a first step toward the building of some low income housing in the suburbs, a step that was opposed vigorously by many state representatives from those areas.[90] It may have the indirect impact of speeding the formulation of plans by local communities. It will not affect the amount of money available for such housing at the state or federal level, an amount that has dwindled under the inflationary pressures exacerbated by the Vietnam War. Yet it may shift some of the heavy burden for social services, such as welfare and education, from the central city to the wealthier suburbs.

IV. New Jersey Land Use Planning and Development Law[91]

The proposed New Jersey Land Use Planning and Development Law provides the comprehensive planning requirements that the Massachusetts Snob Zoning Law lacks. It gives a framework within which local communities may promulgate zoning ordinances and subdivision regulations. Such ordinances must be based upon a land use plan,[92] adopted as a part of a master plan by the governing body of the municipality.[93] The land use plan

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90 Representatives from Newton and Concord were vigorous in their opposition. A tabulation of critical votes showed that less than one-half of the state representatives from the Boston metropolitan area voted for the bill. These included those from Ipswich, which does not have two acre zoning, Arlington, Framingham, Beverly, Cambridge and Wellesley. Most of these communities now have some low income housing.

It is interesting to note that fifty representatives voted differently than they had on the Racial Imbalance Law four years earlier. City representatives who had voted against the earlier law voted to try to move some of their problems to the suburbs. See J. Bolner, *The Politics of Racial Imbalance Legislation,* 5 Harv. L. Legis. 35 (1967).

91 N.J. S. 803 (introduced May 12, 1969) (hereinafter N.J.). This act would replace all previous planning and zoning legislation at the state level. It was drafted by the N.J. Department of Community Affairs.

92 *Id.,* § 7.1(a) (zoning ordinances). Subdivision plans must conform to the applicable provisions of the zoning ordinance. *Id.,* § 6.2(a)(6).

93 A master plan must also include a housing plan element, a circulation plan element, a utility service plan element, a community facilities plan element, a recreation plan element, a conservation plan element and an economic develop-

the amount to be received by the tenants in the form of rent supplement payments will not have been determined.[79]

The process by which a reasonable rate of return is determined for limited dividend developers is also a problem of no real practical importance, though it may create an act of financial juggling for the developer. At the moment, he figures his total costs for a project in asking for an FHA mortgage by including a six per cent profit, as well as financing costs, construction costs and operating costs. For each year his before-tax income equals rental income minus operating expenses and interest charges.[80] This figure is often below a six per cent return. However, the further tax deduction for depreciation payments often leverages this return to 15 per cent or more.[81] In sum, the definition of *uneconomic* adds nothing to the basic consideration of local and regional needs because everybody always meets the requirement. Its only function may be to make this fact clear to local municipalities. The FHA and other federal agencies would still provide a limitation on rate of return to developers, a limitation that will probably dampen their enthusiasm in the present tight money market.[82]

In addition to the obvious limiting factor of the small amount of money in present federal and state housing programs, there is a statutory ambiguity which has delayed the use of the law by

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see L. KEYES, THE BOSTON REHABILITATION PROGRAM: AN INDEPENDENT ANALYSIS (to be published in 1970 as a Harvard-MIT Joint Center for Urban Studies Monograph); URBAN PLANNING AID, INC., AN EVALUATION OF THE BOSTON REHABILITATION PROGRAM (1969). It is almost axiomatic that housing cannot be built that is profitable for a rent that low income tenants can afford.

79 At present only twenty per cent of the funds for rent supplements can be used within a below market interest rate project. Only five per cent of the total rent supplement appropriation may be used for that purpose. In addition, at the end of 1968 only three million dollars was being paid out annually for the program. Berger, Goldston & Rorthrauff, *supra* note 75, at 753.

80 Cf. *Id.*, at 756.

81 See K. COLTON & S. SHERER, THE SUPPLY OF LOW INCOME HOUSING: AN ANALYSIS OF PRESENT PROGRAM ALTERNATIVES (unpublished paper 1969); *Tax Incentives to Encourage Housing in Urban Poverty Areas, Hearings Before the Committee on Finance, U.S. Senate, on S. 2100* (Kennedy Bill), Sept. 14-16, 1967, esp. 85-101.

82 With the prime interest rate at 8½ percent investors are now seeking investments that yield an after tax return of 15-20 percent generally greater than that of low income housing projects. The restrictions placed on the taking of accelerated depreciation in other areas by the Tax Reform Act of 1969 may help to alleviate this situation. See note 76.

while preventing overcrowding;[103] and (4) to promote the conservation of open space, the development of new communities and the avoidance of urban sprawl.[104] In addition, the act may not be used so as to exclude any economic, racial, religious, or ethnic group from the enjoyment of residence or land ownership anywhere in the state.[105]

These specific purposes seem to prevent new zoning ordinances that exclude particular economic classes from housing, except in the special category of low density districts established to promote the orderly growth of present rural areas and the conservation of an adequate supply of open space land.[106] However, the act is not retroactive[107] and most of the land in the state is presently subject to restrictive zoning.[108] Only in the vast area of the Meadowlands and the growing areas of the northwest and southern parts of the state would the act likely be effective.[109] In addition, New Jersey courts have relied so heavily upon the standard of orderly development and the general welfare that they may uphold ordinances that conform to presently existing standards in neighboring areas.[110]

The establishment of a State Planning Commission to develop criteria for the review of zoning and planning ordinances may forestall this possibility.[111] The review procedure is optional. In deference to the local nature of the power. A municipality may request that the Division of State and Regional Planning in the Department of Community Affairs review proposed local master

103 *Id.*, § 1.2(b)(5).
104 *Id.*, § 1.2(b)(8-9).
105 *Id.*, § 1.2(c).
106 *Id.*, § 7.5. Such districts are temporary in nature for a period not to exceed five years. A land area so classified must contain a minimum of 100 contiguous acres. Any extension of the time period must be approved by the state Commissioner of Community Affairs.
107 *Id.*, § 7.1(e).
108 See statistics provided, *supra* note 17.
109 *Id.* A general discussion of recent trends of growth in the suburban New York area can be found in J. GOTTMAN, MEGOLOPOLIS (1961) and E. HOOVER and R. VERNON, ANATOMY OF A METROPOLIS (1959).
110 See discussion of *Lionshead* and *Vickers* cases *infra*. The New Jersey constitution creates a presumption in favor of local zoning ordinances. N.J. CONST. ART. IV, § 7, ¶ 11 (1947). A good general discussion of past New Jersey practice is found in Cunningham, *Zoning Law in Michigan and New Jersey: A Comparative Study*, 63 MICH. L. REV. 1171 (1965).
111 *Id.*, § 10.6.

such district planning commissions.[88] Though members of planning boards may already sit on the local boards under the present statute it would be more consistent to specify that the local board shall be the local planning board.

The regional planning commissions should be given some role in the review process. Given the sporadic nature of developer initiative, such commissions might have been used for review purposes in place of the statewide Housing Appeals Committee. They are better acquainted with the needs for housing in a particular state region than would be an unsalaried Committee composed of five members, including one member of a city or town board of selectmen and one member of a city council.[89] If political considerations necessitate more direct participation by local municipalities, the regional commission might be given at least one member on the Appeals Committee when an application for housing within its region is being reviewed. Then a strong case for regional or statewide coordinated planning would at least be considered.

The Massachusetts scheme provides for intervention into the planning process by a local developer on a rather haphazard basis. It is possible, within the guidelines, that one town may have two or more low income housing developments in one year while a neighbor may have none, depending upon the whims of developers and the amenities provided by the particular community. It is difficult for the Housing Appeals Committee to take such factors into account in determining the regional needs with regard to a particular proposal. There is no provision for the role of regional planning commissions to create order out of this possible chaos by creating a plan describing exact or even general needs and locations for particular facilities. In addition, a scheme dependent upon the initiative of developer may lead to abuses.

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88 *Id.*, § 4.

89 Mass. Acts of 1969, ch. 774, *amending* MASS. ANN. LAWS ch. 23B by adding § 5A. Three members, including one employee of the department, are appointed by the Commissioner of Community Affairs. The other two members to represent local interests are appointed by the Governor. The members serve terms of one year each.

Regional commissions were given the review power in an original draft of the bill. However, they did not feel that they had the knowledge or manpower to perform this function. Interview with Martin Linsky, *supra* note 50. One wonders why they should not be forced to assume such a function.

planning in the New Jersey statute illustrates the futility of attempting to plan anything within the existing fragmented governmental structure that is the federal union. The need for regional planning commissions has been trumpeted for the last 15 years with the establishment of little more than advisory commissions to draw up grandiose master plans with no chance of implementation.[117] As a result these commissions are not equipped to handle a problem when called upon to do so. Since natural regions often do not follow statewide boundaries, especially in New Jersey, coordination on the state level is not very helpful either.

True regional programs will require a renewed emphasis on the part of the federal government, which provides most of the money in these areas. Existing requirements for areawide planning have not been put to the test.[118] The challenge of the next decade will be to find the means of constructing such programs while keeping effective and efficient control of the program at the regional and local level.[119] For that purpose, the Massachusetts approach which ignores existing zoning ordinances is preferable to the prospective approach of New Jersey. Neither, of course, has much political support at the state level at the moment.

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116 *Id.*, § 9.1.

117 Charles Haar has called the making of a master plan a didactic exercise. Haar, *Regionalism and Realism in Land Use Planning*, 105 U. PA. L. REV. 515, 523 (1957). See Note, *Large Lot Zoning*, 78 YALE L.J. 1418, 1438-40 (1969) for a discussion of possible statewide standards which does not even go as far as the position of the Massachusetts law. Also see BABCOCK, *supra* note 27, at 159-73.

One of the few cases invalidating an ordinance because it was not in harmony with a regional master plan has borne little fruit. *Cresskill v. Dumont*, 28 N.J. Super. 26, 43, 100 A.2d 182, 191 (1953).

118 See the § 701 planning grant program, 40 U.S.C. 461 (1969), the § 204 areawide planning grant program and the § 205 supplemental grant program, 42 U.S.C. 3331-3339 (Supp. 1968).

119 The Kaiser Commission, *supra* note 7, at 143 advocated federal preemption of local zoning ordinances for federally subsidized housing. A requirement that regional need be considered in evaluating FHA applications might be helpful but the author is sceptical of the ability of H.U.D. to satisfactorily develop criteria for local areas. That function can only be performed by a regional commission cognizant of all of the local peculiarities that must be considered.

In Massachusetts the regional commissions admitted that they did not have the knowledge or the personnel to handle such a review procedure. Interview with Martin Linsky, *supra* note 50. Thus such a commission would fall prey to the same criticisms that now are directed at municipal boards of zoning appeals. Note, *Municipal Discretion in Zoning*, 82 HARV. L. REV. 668, 673-76 (1969). Yet such a function should provide the needed leverage to increase the performance and power of such commissions.

must include a statement of the standards of population and development density recommended for the municipality,[94] along with specific policy statements relating the plan to the master plans of adjacent municipalities and the county[95] as well as to the development plans of the state or relevant regional agencies.[96]

The master plan must conform to a specific set of purposes applicable to all land use regulations.[97] These purposes include (1) the promotion of the public health, safety, economy and the general welfare;[98] (2) the encouragement of the orderly development of the state and regions within the state; (3) the conservation of natural resources; and (4) the provision of standards for the elimination of wasteful, inefficient and socially costly practices.[99] The considerations of social cost and regional development have not generally been set up as zoning purposes in legislation following the Standard Zoning Enabling Act.[100]

The specific purposes for which land use planning and regulation are authorized go even further in the direction of recognizing regional need. Such ordinances may be enacted (1) to ensure that the development of individual municipalities does not conflict with the development and well-being of neighboring municipalities and the state as a whole;[101] (2) to promote maximum choice for all economic and social groups in the state among a variety of adequate housing types;[102] (3) to promote the establishment of population densities that provide adequate public services

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ment plan element. *Id.*, § 3.1(d)(3). It is important to note that the master plan would be adopted by the local governing body, not by the planning board.

94 *Id.*, § 3.1(d)(2).

95 *Id.*, § 3.1(d)(10).

96 *Id.*, § 3.1(d)(11). A similar proposal for state standards for municipal economic plans can be found in ADVISORY COMM. ON INTERGOV. RELATIONS, NEW PROPOSALS FOR 1969, ACIR STATE LEGISLATIVE PROGRAM, §§ 405-1 to 405-18.

97 *Id.*, § 3-1(e).

98 *Id.*, § 1.2(a). This litany contains the standard zoning purposes.

99 *Id.*

100 Yet see HAWAII REV. LAWS § 139-42 (1963) (to ensure the greatest benefit for the state as a whole); WASH. REV. CODE § 35.63.090 (1965) (to promote coordinated development of undeveloped areas and to encourage the most appropriate use of land); CALIF. GOV'T CODE § 65302(c) (West Supp. 1969) (the housing part of a master plan must make adequate provisions for the housing needs of all economic segments of the community).

101 N.J., § 1.2(b)(3).

102 *Id.*, § 1.2(b)(4).

Given their reluctance to take any initiative at all in the area, the courts are unlikely to overturn decisions by the Housing Appeals Committee, even if they are based solely on the criterion of regional need, without a more extensive review of the general welfare, health and safety requirements.

In order to overturn a local board decision to grant an application subject to conditions and restrictions, the developer must show the Housing Appeals Committee that the decision will make the construction of such housing *uneconomic* as well as inconsistent with local needs. *Uneconomic* means (1) with financial loss to a public agency or nonprofit organization and (2) without a reasonable rate of return to a limited dividend developer as the latter term is defined by the Federal Housing Administration and other federal government agencies subsidizing housing.[74]

The "with financial loss" standard should not be difficult to meet. Rarely do nonprofit sponsors break even on their projects. Such sponsors have great difficulties in raising the seed money necessary for the financing and materials costs of construction which are greater than the amount provided by Federal Housing Administration (FHA) through a subsidized mortgage.[75] Since a nonprofit sponsor cannot take advantage of the tax losses due to accelerated depreciation during the early years of the project,[76] it will be forced to make up any later deficiency between this cash outlay and operating revenue.[77] The possibility of loss is accentuated by the fact that actual operating revenue for low income housing is often difficult to predict before construction of the units because political forces in the community are likely to have some influence in setting rough boundaries for rent levels.[78] In addition,

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74 SNOB ZONING LAW, § 20.

75 See Berger, Goldston, and Rothrauff, *Slum Area Rehabilitation by Private Enterprise*, 69 COLUM. L. REV. 739, 754 (1969), citing P. NIEBANCK & J. POPE, RESIDENTIAL REHABILITATION: THE PITFALLS OF NON-PROFIT SPONSORSHIP (Institute for Environmental Studies, Univ. of Pa., 1968). Section 106 of the Housing Act of 1968 provided the modest sums of $7.5 million for fiscal year 1969 and $10.0 million for fiscal year 1970 as interest free seed money advances to nonprofit developers. 12 U.S.C. § 1701x (Supp. 1969).

76 The Tax Reform Act of 1969 retains the 200 percent accelerated depreciation feature for the construction of residential housing. See S. REP. No. 552, SENATE COMM. ON FINANCE, TAX REFORM ACT OF 1969, 91st Cong., 1st Sess. 211-15 (1969).

77 *Berger, Goldston & Rothrauff, supra* note 75, at 756 n.73.

78 For a discussion of this factor with regard to the Boston Rehabilitation project,

plans and ordinances to see if they conform to Planning Commission guidelines.[112] Such a review shall certify such plans and regulations based upon the standards of residential settlement, commercial land development, industrial land development, and patterns of agricultural activity for the orderly growth and development of the state, and that sufficient land be set aside so that the municipality will provide for an equitable municipal share of the regional housing needs created by those employed within the region.[113] The latter standard allows the establishment of a prima facie test, similar to that established under the Massachusetts Snob Zoning Act[114] but with increased flexibility to determine the particular needs of a given region of the state.

Another important element of the act is the broad definition of standing to challenge a proposed ordinance. Any person in the state who is affected by a zoning ordinance, whether he lives in the particular community or not, or any person who asserts that such an ordinance is prohibited under the purposes set out above may bring a court action or, if the ordinance has not yet been passed, may present evidence in a municipal agency hearing.[115] The advisory opinion by the Division of State and Regional Planning would probably be determinative in such a suit. However, the municipality must keep up with changing local and regional needs by reviewing its master plan and development regulations every five years.[116] Evidence that it had not done so would now be evidence to be admitted in an action against a proposed ordinance.

Despite its recognition of regional planning standards the New Jersey law is unlikely to have much effect upon the housing supply of the state because it does not affect the existing land use standards. For all of its problems of orderly development, the Massachusetts law will likely have greater immediate effect, even given the present anemic character of federal housing programs. Yet a state that is still in the process of urbanization would do well to adopt the more comprehensive New Jersey approach.

In a real sense the emphasis on regional need and statewide

112 *Id.*
113 *Id.*
114 See SNOB ZONING ACT, § 20 for housing quota definitions.
115 N.J., § 2.26.

public housing authorities under the Turnkey program in which completed housing is purchased by the authority from a private developer.[83] The definition of "low and moderate income housing" refers to the construction of housing whether *built or operated* by a public agency, nonprofit or limited profit organization.[84] However, the operating section of the Act refers only to the submission of applications to *build* housing.[85] The present session of the Legislature is likely to correct this deficiency but it underlines the need for superior draftsmanship.

Finally, there should be some consideration of the review procedure itself. The Act suffers from the ambiguity that it is a zoning provision placed in a statutory section dealing with regional planning.[86] Thus it is not clear whether a local zoning board of appeals has the power to grant a special exception to local zoning laws since the local zoning power is not specifically limited by a statewide exception for low income housing. A cautious local board might prefer to wait to be overturned by the Housing Appeals Committee before granting a permit, thus creating a delay in almost every case. There is no specific provision that the action of the local board be reasonable in regard to the standard of local needs established for the Housing Appeals Committee. A provision making the special exception clear would make the procedure potentially less cumbersome.

In addition, it seems strange to place the power at the local level in the hands of a zoning board rather than a planning board, especially if the criteria of regional need, open space, health and safety are to be considered. Massachusetts has already established regional planning commissions to investigate the needs of metropolitan areas and to draw up plans for meeting these needs.[87] Local planning boards already send members to

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83 At present, this problem has held up a proposed turnkey project in Pittsfield, Mass. Interview with State Representative Martin Linsky, *supra* note 50.

84 SNOB ZONING ACT, § 20.

85 *Id.*, § 21.

86 MASS. ANN. LAWS ch. 40A contains the provisions relating to the power of zoning while ch. 40B relates to regional planning. The Act was placed in ch. 40B because ch. 40A specifically exempts the city of Boston. MASS. ANN. LAWS ch. 40A, § 2 (1966).

87 MASS. ANN. LAWS ch. 40B, § 3-18 (1966).

V. Conclusion

While the effects of large lot zoning and similar devices are difficult to trace out in detail, there is no doubt that they have some restrictive effect upon the dispersal of low and middle income populations in a metropolitan area. The Massachusetts and New Jersey statutes represent two different efforts to facilitate this process. The New Jersey approach is the traditional planning approach of tying local master plans into a set of statewide criteria. Though the approach is sound, it is difficult to see how it can succeed because it operates only prospectively. The Massachusetts approach is likely to encourage more low income housing in the suburbs but it does not provide for an orderly process of development. However, given the present political realities, it may be the only possible short term solution.

A long term solution to the problems of housing in a metropolitan area will require the development of regional bodies with real powers that transgress state as well as municipal boundaries. Such a solution is unlikely to occur without strong enforcement of federal areawide planning requirements in awarding housing funds as well as the addition of more monies and fewer restrictions under the FHA guaranteed mortgage system. Perhaps the best solution at the state level would be an increase in the use of traditional public housing programs and the new leased housing and turnkey programs, combined with a land subsidy to the developer who finds the cost of acquiring land in a suburban area excessive despite the statewide emphasis on this problem.

Zoning regulations are only a small part of the web of restrictions that make it difficult to provide housing at a cost that low income families can afford. Yet the removal of zoning restrictions by the state would be evidence of a determination to begin to solve the entire problem.

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THE LIMITS OF MUNICIPAL INCOME TAXATION: THE RESPONSE IN OHIO

Introduction

The city income tax is no longer a novelty.[1] More than 170 municipalities, twenty of them large cities with a combined population of 18 million, impose an income tax.[2] While taxes on property remain the largest source of local tax revenue, accounting for about 70 percent of the total,[3] collections from municipal income taxes provide a significant proportion of the revenue in those cities where they are imposed. In 1966, for example, among cities having a population of over 300,000, the yield ranged from 20.5 percent in Pittsburgh to 70.7 percent in Columbus.[4]

The future growth of the city income tax seems assured as local governmental units are forced to reduce their heavy reliance on property taxation.[5] In part because of the popular opposition to still more increases in rates and assessed valuation on property,[6] the city income tax has gained increasing acceptance as a viable solution to the problems of local finance.[7] While providing a ready answer to the immediate concern of obtaining local revenue, however, municipal income taxation is subject to a number of criticisms which suggest that the fundamental goal of ensuring adequate revenue to local government must be met through some other means. Problems have been recognized with respect to the ad-

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1 For a bibliography on municipal income taxation see 28 ACAD. POL. SCI. PROC. 423, 585-88 (1965-68) [hereinafter cited as 28 ACAD.].

2 TAX FOUNDATION, INC., CITY INCOME TAXES 39 (Research Publication No. 12,-1967) [hereinafter cited as TAX FOUNDATION].

3 *Id.* at 40.

4 ADVISORY COMMISION ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL TAXES — SIGNIFICANT FEATURES 1968, at 45-46 (1968).

5 The property tax has been termed by the Advisory Committee on Intergovernmental Relations as the "sick giant of our domestic revenue system — a fiscal pathology that can be traced to individual and group property taxpayer overburden situations." *Id.* at 7.

6 *See, e.g.*, Boston Globe, Jan. 31, 1969 at 1, col. 1 (morning ed.) ("Used Tea Bags Newest Weapon in Tax Revolt" — Mass. State House flooded with tea bags as a reminder of an earlier expression of taxpayer dissatisfaction.).

7 *See* Bronder, *Michigan's First Local Income Tax*, 15 NAT'L TAX J. 423 (1962); Masotti & Kugelman, *The Municipal Income Tax as an Approach to the Urban Fiscal Crisis*, 45 JOURNAL OF URBAN LAW 113 (1967) [hereinafter cited as Masotti & Kugelman]; Walker, *Inevitability of City Income Taxes*, 34 TAX POLICY 3 (1967).

ministration and enforcement of the tax and despite its acclaimed virtue of fairness, the tax has been criticized as being, itself, inequitable.[8] In addition, there is serious concern that allowing the piecemeal imposition of the tax by individual local taxing units will only increase the existing disparities between the revenue needs of some areas and the revenue producing abilities of others — a problem which has particular relevance to the metropolitan central cities and their surrounding suburbs.[9]

One alternative to a system of separately imposed municipal income taxes has been offered in a bill recently introduced in the Ohio House of Representatives by State Representative Albert H. Sealy.[10] The Sealy Bill seeks to provide a comprehensive system of local income tax revenue by incorporating Ohio's existing municipal taxes into a state tax plan. At the same time the bill allows Ohio communities, subject to certain state controls, to continue to impose their own additional local income taxes. The advantages of the bill can be seen most clearly by examining the problems encountered in financing local government through individually imposed municipal income taxes. Before discussing these problems, however, a brief description of the typical city income tax ordinance is perhaps in order.

I. Basic Features of the City Income Tax

In 1967, 171 cities with a population of 10,000 or more levied a city income tax.[11] About 86 percent of these cities were located in Ohio (74) and Pennsylvania (73) with the remainder being distributed among Kentucky (12), Michigan (7), Missouri (2), Maryland (Baltimore), Alabama (Gadsen) and New York (New

8 *See* Hartman, *Municipal Income Taxation*, 31 Rocky Mt. L. Rev. 123 (1959) [hereinafter cited as Hartman]; Lynn, *Municipal Income Taxes Reappraised*, 8 Ohio Cities and Villages 77-78, 95, 96 (1960).

9 *See* [Nov. 21, 1968] Bipartisan Select Comm. On Tax Revision, Final Report to the Ohio House of Representatives, 107 Genl. Assy. (1967-68) [hereinafter cited as Bipartisan Select Comm.]; *cf.* Gulick, *The Plight of the Cities*, 28 Acad., *supra* note 1, at 423.

10 H.B. 446, the "Sealy Bill", was introduced in 108th General Assembly, Regular Session, 1969-70. As yet it has not been reported out of the House Ways and Means Committee.

11 Tax Foundation 11.

York City).[12] With a few significant exceptions, the features of the various tax ordinances are quite similar.[13] In most instances, the tax base consists of: (1) the earned income of residents, including rentals but excluding income derived from intangibles, (2) that portion of income earned by nonresidents which is attributable to the taxing district, and (3) that portion of the net profits of corporations, unincorporated business, and professions which is attributable to the taxing district. Usually the pay or allowance of active members of the armed forces and the income of religious, charitable, scientific, or educational institutions are not taxed.

With the exception of New York and Baltimore, which impose a graduated tax, the rate is uniform, varying according to the municipality between .25 and 2.0 percent. The majority of cities levy a tax of either .5 or 1.0 percent and, with a few exceptions, the rates for residents and nonresidents are the same. In most ordinances a credit is allowed to a resident whose income is being taxed by another municipality up to the amount of the local tax, and there is commonly a reciprocal provision that a certain percentage of the tax levied on a nonresident by the city in which he is employed, termed the "city of work," will be returned to the taxpayer's "city of residence."[14] While several municipalities allow a flat exemption of $600, the usual case is that no exemptions or deductions may be taken.

Almost all ordinances require the tax to be withheld on wages and salaries and provide penalties in the nature of $500 fine and six months imprisonment for non-compliance. Businesses and individuals whose tax is not being withheld are required to file a declaration of estimated income and to make quarterly payments, while those whose entire income is subject to withholding need file only once a year.

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12 *Id.*

13 The following summary is based on data in TAX FOUNDATION, *supra* note 2, at 14-23. The most notable exceptions to the common provisions are found in the New York and Baltimore ordinances. New York levies a graduated tax rate on residents, allows exemptions and deductions, and "taxes nonresidents on a basis entirely different from that applying to residents." *Id.* at 9. Baltimore "applies graduated rates to residents, a flat rate to corporations, and excludes nonresidents from the tax altogether." *Id.*

14 *See* TAX FOUNDATION 23.

II. Problems of Municipal Income Taxation[15]

A. *Equitable Objections*

The first of several criticisms of the tax on equitable grounds is that the uniform flat rate, characteristic of most ordinances, establishes a regressive tax which imposes the greatest proportionate burden on those whose income is the lowest.[16] Taxing the net profits of business at the same rate as personal income likewise works against the equitable principle of taxing according to ability to pay. Second, by excluding income derived from interest, dividends, and capital gains, the common ordinance again favors the rich since the income of the wealthy is derived from intangibles to a far greater extent than is the income of the poor.[17] Third, unlike the federal income tax, the typical ordinance does not provide for deductions and exemptions and therefore fails to recognize that gross income is not always an accurate measure of taxpaying abilities.[18] Fourth, the nonresident who must pay an income tax to the city in which he is employed has no opportunity to vote for the local government leaders who decide what his tax rate should be, or to vote on how the revenue should be spent.[19] In addition to being a modern day victim of taxation without representation, the nonresident is further ill-treated by being taxed at the same rate as residents. While the nonresident derives benefits from the city in which he works in the form of police and fire protection, utilities, public transportation, highway maintenance, and the like, the amount of benefit he derives from other areas of government action such as education, recreational facilities, and welfare is difficult to determine. What-

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15 The following discussion presents several of the most important problems affecting the tax's acceptability and administration. It does not purport to be an exhaustive treatment of all the possible difficulties associated with the tax and in particular does not consider problems created by restrictive state constitutional provisions. For a general treatment of this subject see Glander & Dewey, *Municipal Income Taxation: A Study of the Pre-emption Doctrine*, 9 Ohio St. L.J. 72, 88-89 (1948); Hartman, *supra* note 8, at 132-148.

16 *See, e.g.*, Tax Foundation 15.

17 *Id.* at 17 (Table, showing dividends, interest and net gain from sale of capital assets as a percent of salaries and wages).

18 *Id.* at 18-19.

19 Michaelian, *Comments on Administration of the Municipal Income Tax*, 28 Acad., *supra* note 1, at 478.

ever the benefit may be, however, it certainly does not equal that received by the resident.[20]

Finally, if the income of a resident is being taxed in his city of work and that city has no provision for reciprocal sharing, the city of residence must choose between taxing the resident's income a second time, or allowing him a credit equal to the amount he has already paid.[21] If a second tax is imposed, the result is unfair to the taxpayer, and if a credit is allowed, it is financially harmful to the city of residence.

B. *Administrative Efficiency and Revenue Yield*

The arguments given to justify the uniform rate, the exclusion of income derived from intangibles, the absence of exemptions and deductions, and the tax on nonresidents are grounded in considerations of administrative costs in relation to revenue yield.[22]

A graduated income tax, while treating individual taxpayers more equitably, would greatly increase costs of administration.[23] These costs involve such things as: more complex auditing procedures; more detailed forms and explanatory instructions, which in turn would prompt a larger number of questions from confused taxpayers;[24] and even greater problems of gaining compliance from nonresident employers who would be asked to withhold taxes of resident employees computed on the varying rates of individual brackets. In relation to the revenue produced, the extra expense created by the imposition of a graduated rate would be unacceptable to most cities of average size.

The inclusion of intangibles in the tax base would also result

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20 *Id.* at 479.

21 *See, e.g.*, Hartman, *supra* note 8, at 130.

22 These arguments are strongest when applied to taxes imposed by cities having a relatively small population, as in general, "Municipal income taxes . . . are not well suited to suburban governments . . . ; they are difficult to administer, requiring a bureaucratic sophistication . . . that few suburbs possess." R. WOOD, SUBURBIA: ITS PEOPLE AND THEIR PROBLEMS 209 (1959).

23 *See, e.g.*, TAX FOUNDATION 15.

24 *See* Jolles, *Administration of the Municipal Income Tax*, 28 ACAD., *supra* note 1, at 475. The first substantial task of administration, says the Director of the New York City Income Tax, Mr. H. Jolles, is to educate the taxpayer. In the first year of New York's graduated tax, that task included issuing "thousands of written rulings" and answering "hundreds of thousands of telephone calls." *Id.*

in costs outweighing the revenue produced. Local income taxation is feasible for individual communities because much of the administrative work is done by employers who are required to withhold taxes on wages and salaries.[25] Since income on intangibles would not be withheld, however, the quarterly returns of all taxpayers deriving income from intangibles would have to be audited and processed by the individual municipality. If done conscientiously, the cost of administration for all but the largest cities would not warrant taxing a source which accounts for only about 3 percent[26] of federal adjusted gross income.

A more general argument is that because the rates of municipal income taxes are so low, the practical effect of the inequities produced is very slight.[27] Thus, the amount of time and money needed to verify a claimed $1,000 deduction from a $5,000 income, is not warranted by the $10.00 which the taxpayer will be saved. Similarly, because of the small amount of tax involved, eliminating the inequity of levying identical rates for both residents and nonresidents is not worth the additional administrative and compliance costs which would be incurred by municipalities and employers in, respectively, auditing and withholding taxes levied at two different rates.[28]

The above arguments, of course, assume that each municipality administers its own tax at rates which will continue to be low even in the face of rising expenditures. With expanding revenue needs and a continuing reluctance to increase taxes on property, however, a city might well raise income tax rates to the point where the inequity produced by its present ordinance could no

25 *See* Conlon, *Enforcement of the Municipal Income Tax*, 28 ACAD., *supra* note 1, at 481-482. "The requirement that the employer withhold the tax from wage and salary payments is indispensible to the enforcement of all local income taxes both as to residents and nonresidents. . . . From a cost standpoint, the fact that a substantial proportion of the tax — from about 70 percent to over 90 percent, depending on the tax base and local priority rules — is collected at relatively little expense keeps the overall costs within acceptable limits." *Id.*

26 TAX FOUNDATION 17.

27 *Id.* at 15.

28 In addition, taxing nonresidents at lower rates could cause a significant reduction in the total amount of revenue collected. "Very few cities maintain statistics on the breakdown between [resident and nonresident collections] but figures from Cincinnati give some idea of the relative proportions involved: in 1964 . . . 37 percent of the returns filed and 39 percent of the revenue came from nonresidents who were taxed at the same rate as residents." *Id.* at 20.

longer be ignored, and yet still be unable to justify the increased administrative costs of a graduated system.

One answer to this problem, it seems clear, is to take advantage of the economies of scale which can be realized by centralizing the administrative functions of several taxing cities.[29] A possible form that this centralization can take, the Sealy Bill, will be discussed later.

C. *Problems of Jurisdictions and the Lack of Uniformity*

The lack of uniformity among taxing municipalities and the absence of a controlling, policy making body, create several other problems besides the loss of economies of scale and the corresponding inability to employ a more equitable tax system.

First, a city having a large percentage of its population working elsewhere may be faced with unacceptable administrative costs unless it can get foreign employers to withhold for its residents.[30] Where the employer is already subject to witholding by the city in which he is located, compliance is usually forthcoming. Because the employer's withholding is voluntary, however, it may be terminated if a change in nonresident rates would require additional bookkeeping time and expense. One result of this situation is that the residential municipality is strongly encouraged, within certain limitations, to match its income tax rate with that of its more industrialized neighbors, regardless of how closely the rate corresponds to its own revenue needs.[31]

Second, where an employer is subject to paying and withholding a local tax, varying rates and provisions impose a heavy cost of compliance.[32] Except where prohibited by state preemption, most cities include the net profits of incorporated and unincorporated businesses in their income tax base.[33] Consequently, in many instances, a firm doing business in several municipalities

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29 S. SACKS & W. HELLMUTH, FINANCING GOVERNMENT IN A METROPOLITAN AREA 243 (1961).

30 See authority cited note 25 *supra.*

31 Similar tax rates are also imposed by the primarily residential municipality in order to derive as much revenue as possible through reciprocity agreements with its industrial neighbor.

32 *See* Fordham & Mallison, *Local Income Taxation*, 11 OHIO ST. L.J. 217, 271 (1950) [hereinafter cited as Fordham & Mallison].

33 TAX FOUNDATION 20.

will have to pay both corporate and withholding taxes to all of them. This means that the employer must: determine the amount of tax owed to each city on the basis of the relative proportion of his total profits that he earned in each;[34] withhold and distribute to the correct city the tax levied on each of his employees; and, finally, be careful not to withhold the wages of employees living in non-taxing cities. The bookkeeping costs involved in allocating the proper percentage of withheld taxes and taxes on profits to the correct city are high enough when each city is taxing at the same rate. Should the rates imposed by the several cities differ, or should there be variations in their definitions of "net income," the already high compliance costs would increase. Conceivably, they could become so great that the employer would find it cheaper to avoid the tax rather than pay it.[35]

One form of avoidance open to the business taxpayer is moving out of the taxing district, or in the case of new industry, choosing a non-taxing district initially.[36] While there is no data on the effect that municipal income taxation has on industrial location, a study of the problem has been made by the Advisory Commission on Intergovernmental Relations with respect to differentials in property tax levels.[37] The conclusion of the Commission was that significant local property tax variations within a metropolitan area can and do become swing factors in plant location decisions.[38] It is fair to infer that just as management prefers low property rates to high, other things being equal, it would prefer to locate in a city not levying an income tax. For some firms, particularly those hopeful that a tax on net profits

34 Various formulae are used, depending on the state and municipality, in determining the amount of net profits attributable to a taxing city by a nonresident or multi-branch business entity doing business within the city limits. For examples see TAX FOUNDATION, *supra* note 2, at 21; Fordham & Mallison, *supra* note 32, at 243.

35 "In view of the relatively complicated reporting procedures, one might suspect that smaller foreign corporations would yield to the temptation not to file at all. The Special Subcommittee on State Taxation of Interstate Commerce indicates that this apparently has indeed been the case, reporting that 'few of the taxpayers who are technically liable [for local corporate income taxes] file returns'." TAX FOUNDATION 22.

36 *Cf.* Masotti & Kugelman, *supra* note 7, at 123.

37 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL TAXATION AND INDUSTRIAL LOCATION (1967).

38 *Id.* at 70.

would be substituted for any further increase in taxes on inventory or property, the influence of the tax would be slight or even positive. For other firms, however, especially those employing a large work force, the burdens of withholding and paying a municipal income tax could be a significant factor. Whatever the actual impact the tax has on location decisions, however, the fact that a business would be able to locate in a nearby non-taxing city is a negative factor that a city must consider when deciding whether or not to impose an income tax. In the absence of a uniformly imposed tax on business and personal income, there is a certain degree of reluctance on the part of any city to be the first to end its reliance on the property tax.

Third, without an enforcible, controlling policy there may be unhealthy competition between the city of work and city of residence for the same tax dollar.[39] Most local ordinances contain a reciprocal agreement whereby city "A" agrees to return, for example, 25 percent of the tax paid by an individual working within its jurisdiction to his city of residence, "B", provided that City B will do likewise for city "A's" residents.[40] Where the rate levied by both cities is the same, this arrangement works fairly well.[41] When City A is levying a rate higher than City B, however, it may refuse to grant reciprocity to City B, reasoning that in terms of actual revenue the 25 percent of the tax collected which it relinquishes under a reciprocal agreement will not be equalled by the 25 percent relinquished by City B. Similarly, one city having a large amount of industry within its jurisdiction may refuse to grant reciprocity to a neighboring city with little or no industry.[42] Not only does such a refusal deny the typical bedroom community

39 *See* Lynn, *Municipal Income Taxes Reappraised*, 8 OHIO CITIES AND VILLAGES 77, 95-96 (1960); Sigafoos, *The Municipal Income Tax—A Janus in Disguise*, 6 NAT'L TAX J. 188 (1953).

40 The 25-75 percent split between city of work and city of residence is the percentage distribution provided for in the model ordinance drafted by the Ohio Municipal League and is common to local ordinances in the Cleveland metropolitan area. *See, e.g.*, Cleveland, Ohio, CODE TITLE 15 OF PART I, ch. 19 (1967). Letter from Harold M. Peele, Governmental Research Institute, Cleveland, Ohio, to author, February 3, 1970. The exact method of nonresident income tax allocation differs in other states, but the principle of reciprocal sharing remains the same.

41 Masotti & Kugelman, *supra* note 7, at 124.

42 For example, the Cleveland suburb of Brookpark grants no reciprocity, preferring to retain all of the tax revenue collected from hundreds of nonresidents employed at the large Ford Motor Co. stamping plant located within its borders.

of needed revenue, it also creates ill feeling which may affect cooperation between the two cities in such areas as road maintenance and police and fire protection.

Finally, the system of city-wide taxing units does not provide for a governing authority empowered to correct the misallocation of tax revenue created by the imbalance existing in many cities between taxpaying abilities and revenue requirements.[43] Provisions of reciprocity, in part, are a recognition of the need for sharing income of taxpayers who require certain governmental services both where they live and work. But the usual 75 percent allocation of revenue to the city of work, while allowing for simple administation, is an arbitrary weighting which will result in misallocation of revenue in given instances. The residential suburb of 25,000 people, for example, may find that its revenue from income taxation is much less than a neighboring suburb of 7,000 which has several industries, while its needs, in terms of education and services, are over three times as great.

The problem of finding a better way to allocate tax revenue between city of work and residence is made even more difficult by the preliminary question of who should be responsible for formulating and implementing the desired non-arbitrary system of allocation. It is unrealistic to assume that individual taxing communities by themselves will have either the money, the skill, or the inclination to provide the answer. Allocation of local revenue according to need is beyond the capacity of a municipally imposed and administered tax. A related question of whether the income tax should be reserved solely for use by municipal governments also points to the limitations of an individual city tax. School districts, library districts, and county governments are called on to provide a significant percentage of community services, are expected to offer relief to some of the hardest urban problems, and are clearly in need of a growth related source of revenue.[44] But in the absence of uniformity and some political body responsible for coordination, the problems created by still more autonomous taxing units imposing their own tax definitions,

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43 *See* BIPARTISAN SELECT COMM., *supra* note 9, at 8.

44 Gotherman, *Municipal Income Taxation*, 8 OHIO CITIES AND VILLAGES 121-122 (1960).

regulations, forms, and rates, might be enough to make taxation by these units politically unacceptable and administratively unmanageable.[45]

III. The Sealy Bill

Almost all of the aforementioned problems are related directly or indirectly to the separate administration by individual municipalities of small taxing districts. The high costs of separate administration prevent the solution of certain equitable problems. Inconsistencies in taxing rates between cities and the requirement of separate disbursement increase compliance costs for both business and individual taxpayers. And the competition between cities of residence and cities of work for the same tax dollar takes the place of a rational distribution of revenue according to need. Uniformity and coordination are clearly needed, but in conflict with the benefits derived from centralized administration and coordination of revenue levies are values of local autonomy and the belief that local problems can best be solved by local solutions.[46]

One attempt at resolving this conflict is the Sealy Bill.[47] The

45 *Cf.* Lynn, *Municipal Income Taxes Reappraised*, 8 Ohio Cities and Villages 77, 96 (1960).

46 Masotti & Kugelman, *supra* note 7, at 126.

47 Another solution is the formation of central collection districts, which centralize administrative tasks while allowing each participating municipality to choose its own tax rate, base, and regulations. Among others, the experience of the Cleveland Central Collection Agency has shown that individual cities can work together on a purely voluntary basis to lower administrative costs. In setting up the agency, the City of Cleveland mutually contracted with over 50 surrounding suburbs to contribute a proportionate share of the cost of running a tax-processing clearing house, and agreed to reciprocal sharing of taxes collected by cities of work with city residence on a 75-25 percent basis.

Central collection has been successful in reducing administrative costs and fostering a high degree of uniformity as a result. By the very nature of the voluntary coalition, however, certain other problems remain. *See* Cook, *Effects, Problems, and Solutions of Central Collection of Municipal Income Taxes*, 19 Case W. Res. L. Rev. 900 (1968). First, employers must still go through the expensive process of allocating business tax revenue among all the cities in which they derive income. Second, it is doubtful that the central collection contract suffices to give participating City A, for example, jurisdiction over an employer located in participating City B, such that City A can require the employer to withhold tax for its residents. In other words, withholding by the foreign employer remains voluntary. Third, while uniformity of rates and regulations is made more likely by participation in Central Collection, it is not assured, since a member city may adopt non-con-

bill is the work of the Bipartisan Select Committee on Tax Revision which was appointed in the spring of 1967 to consider the report of the Ohio Tax Study Commission and to draft appropriate tax reform legislation.[48] Shaped by numerous hearings held both at the State House and in 24 cities throughout Ohio,[49] the bill represents, in many respects, a workable compromise between the extremes of reserving complete control of local income taxation to the state and granting autonomous taxing authority to each municipality. Its major significance is that it incorporates municipal income taxation into a comprehensive revenue system designed to meet the needs of all Ohio's local taxing units. While not without its own difficulties, the bill resolves several of the problems previously discussed.

A. *Taxation of Business Income*

The bill levies a five percent tax on the net income "derived from sources within the state" of incorporated and unincorporated businesses[50] and at the same time bars municipalities from taxing business income.[51] By setting the rate on business income higher than the one percent rate on personal income, the bill answers the objection that imposition of a single rate undermines the principal of taxation according to ability to pay.

Another equitable problem is resolved by the elimination of

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forming provisions if it pays any additional expense of administration that might result. While this extra payment may defray the municipality's cost of administration, it does nothing to alleviate the cost of compliance for business taxpayers. Fourth, not all municipalities participate in Central Collection and consequently problems created by the lack of uniformity remain. Fifth, in the absence of a single coordinating body with authority to propose and implement changes, progress in perfecting the tax is likely to be slow. Sixth, and finally, each community, regardless of its needs, is still restricted in the amount of revenue it can raise by the tax sources, particularly business and industry, that are located within its boundaries.

48 BIPARTISAN SELECT COMM., *supra* note 9, at 11.

49 Telephone interview with State Representative Albert H. Sealy, Chairman of the Bipartisan Select Comm. on Tax Revision, Nov. 11, 1969.

50 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70), *enacting* OHIO REVISED CODE ANN. § 5733.30 (1953). While this proposed enactment encompasses the taxing of both unincorporated and incorporated businesses it should be noted that Ohio corporations will be formally taxed under Sec. 5733.05, paying a "franchise tax" measured by 5 percent of their net income.

51 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70), *enacting* OHIO REVISED CODE ANN. § 718.01 (1953).

cost differences found in most municipal income tax ordinances based on whether or not business is incorporated. In recognition, however, that their equalization will be unfair to some professional people and the owners of small businesses whose total business income is soley attributable to their own services, the bill provides that up to $15,000 of such income will be taxable at the individual rather than the business rate.[52] By removing from local governments the power to tax business income, multiple branch firms and firms doing business throughout the state no longer are compelled to make estimates of how much income they earn in individual municipalities, and then allocate to each local tax department the amount of tax due according to its particular rate and definition of "net profits." Under the bill, all businesses in Ohio pay to the state treasurer a uniform percentage of net income derived from sources within the state,[53] thus greatly reducing administrative costs for the government and compliance costs for business. An additional benefit of the state-imposed business tax is that individual local communities can receive business income tax revenue without fearing that the tax will cause industry to relocate elsewhere in Ohio.[54]

B. *Taxation of Individuals*

A Local Government Income Tax (LGIT) at one percent of adjusted gross income as determined for federal income tax purposes is levied on individuals, estates, and trusts.[55] No tax is imposed on income of $500 or under, and a $600 exemption is allowed for each taxpayer, plus an additional $600 if the taxpayer is married or is a widow with one or more minor children.[56] A

52 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70), *enacting* OHIO REVISED CODE ANN. § 5733.35 (1953).

53 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *amending* OHIO REVISED CODE ANN. § 5733.07 (1953).

54 The danger of losing industry to an other state as a result of the tax seems to be minimal. "Between distant states, tax differentials appear to exercise little plant location influence . . . As between neighboring states, there appears to be no clear relationship between industrial growth trends and tax differentials." ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL TAXATION AND INDUSTRIAL LOCATION 71 (1967).

55 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.02 (1953).

56 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.02(A)(1)(2) (1953).

credit is allowed against the LGIT for income taxes already being paid to municipal governments at the time that the bill is enacted, thus preventing double taxation on individuals living or working in taxing cities.[57] If this credit is not available, or if it is waived, a property owner may take instead a credit equal to the lesser of $25 or the tax paid on $1000 of assessed valuation; and if the taxpayer is sixty-five or older and earns less than $5,000 a year, he is allowed an additional credit of $25 or the lesser amount.[58]

An important part of the compromise between state control and local autonomy is the bill's provision which allows municipalities to levy "piggy-back" income taxes in addition to the LGIT.[59] Revenue from the piggy-back taxes is retained solely by the taxing municipality and does not reduce its formula-determined share of the LGIT.[60] The piggy-back taxes must be levied, however, in accordance with a number of controlling regulations.[61] All cities must levy a uniform rate, use the state-formulated definition of taxable income, and allow the exemptions provided for in the bill. No city may levy an additional income tax of greater than one-half of one percent without submitting the matter to a vote of the electorate, and in the case of a taxpayer living and working in cities which both impose piggy-back taxes, reciprocity of 25 percent is required to be given by the city of work to the city of residence. Finally, a ceiling of $75 per capita is imposed on the total amount of revenue which can be obtained under the tax, any amount in excess of the ceiling being placed in the state's general revenue fund.

Administration of the LGIT and the piggy-back taxes is performed on two levels. A single return for both taxes is filed by the taxpayer with his county treasurer, who retains the LGIT

57 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* § 5745.08 (1953). In this way the bill incorporates existing municipal income taxes, which remain in force subject to being in conformity with state definitions and provisions, into the new state administered system.

58 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.08 (1953).

59 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 718.01(G) (1953).

60 *See* section III, C, *infra*.

61 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 718.01(G) (1953).

payments, distributes the piggy-back tax revenue to the appropriate cities and forwards the returns to a regional office of the state tax commissioner.[62] This office then performs the major jobs of auditing, enforcement, and determining the relative share of revenue to be distributed to each taxing unit within the county.[63] Employers are required to withhold the LGIT from the gross salaries, wages, commissions, and other compensation to their employees and to pay the withheld tax to the treasurer of the county where the services are performed for which the compensation is paid.[64] Although an employer may have to distribute the withheld amounts if his employees work in different counties, the task is far less onerous than in the present situation where employers may be required to distribute revenue among several municipalities located in several counties.

The state-imposed LGIT and the provisions controlling the levying of additional piggy-back taxes answer a number of the equitable and administrative criticisms previously raised. First, by using the same definition of taxable income as is used for federal purposes, the bill expands the local tax base to include such other income as interest, dividends, and gains on sales of securities.[65] While increasing revenue, this provision removes the equitable objection that the failure of most municipal income taxes to tax intangibles allows the wealthy to escape paying taxes on much of their income. Second, even while retaining the flat rate, the bill adds a measure of progressivity to the tax by allowing the taxpayer to take up to two $600 exemptions.[66] For example, with a 1.00 percent flat rate and two $600 exemptions, a laborer earning $6,000 would pay a tax of $48 (one percent of $6,000 minus the $1,200 exemption) at an effective rate of 0.80 percent ($48 as a percentage of $6,000). The foreman earning $8,000 and filing a joint return would pay $68 at the increased rate of .85 percent. At $15,000 the tax of the product manager would be

62 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. §§ 5745.10, 5745.21-.22 (1953).

63 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.24 (1953).

64 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. §§ 5745.11-.12 (1953).

65 *See* note 55 *supra*.

66 *See* note 56 *supra*.

$138 at 0.95 percent, and that of the vice president, earning $30,000 would be $288 taxed at a rate of .96 percent. Although the degree of progression currently possible under the bill is relatively small, it could be substantially increased by allowing more or larger personal exemptions or by imposing progressive rates.

Third, and most important, the economies of scale which can be realized by the tax being imposed on a state-wide basis would greatly reduce the relative cost of administration.[67] Although the counties technically constitute the new tax districts, in reality they are little more than clearing houses which retain the payments and then forward the taxpayers' returns to regional offices of the state tax commissioner for the actual processing. Because of the size of the operation involved, the regional offices could make efficient use of computerized techniques, and because the LGIT is a state tax, access to the taxpayers' federal returns could be obtained.[68] This would make possible rapid and economical auditing of even the most detailed returns and suggests that, if desired, the full range of federal exemptions and deductions could be allowed to the taxpayer without substantially increasing administrative costs. While such detailed attention to equity is unnecessary at the present low rate of the tax, it may become important as the rate is increased both to meet expanding needs and to reduce the percentage of total revenue currently derived from taxes on property.

The additional piggy-back income tax serves among other things as a tangible guarantee that the state is not seeking to preempt a source of revenue which has become highly important to local government.[69] The strong attachment of Ohio cities and villages to the concept of home rule and their general distrust of any proposal which advocates the removal of power from the local to the state level[70] make the authority to levy a piggy-back

67 The inverse relationship between the size of the taxing unit and the cost of administering the tax was corroborated by John W. Cook in his study of Pennsylvania municipal income taxes. J. COOK, THE ADMINISTRATION OF THE EARNED INCOME TAX (1964).

68 *See* INT. REV. CODE of 1954, Sec. 6103(B).

69 Telephone interview with State Representative Albert H. Sealy, Chairman of the Bipartisan Select Committee on Tax Revision, Nov. 11, 1969.

70 *See, e.g.*, Schiele, *Municipal Income Taxation . . . Model Ordinance, Uniform Regulations and Sample Forms*, 8 OHIO CITIES AND VILLAGES 120, 127 (1960).

tax politically essential. This political importance of piggy-back authority serves to counter-balance some of the difficulties created by the provision and makes its inclusion in the bill understandable.

Allowing individually imposed taxes means that differing rates will continue to present problems to employers who must withhold wages for employees living in several different communities.[71] For some workers, employers will be required to withhold only the one percent LGIT, while for others they may be liable to withhold an additional tax as well. It is unclear whether in the more difficult situation an employer well be required to withhold piggy-back taxes levied at different rates on nonresident employees. As indicated earlier, there appears to be no present obligation on an employer to withhold for a foreign taxing city, with the consequence that the foreign taxing city is reluctant to levy a rate different from that levied by the city in which the employer is located.[72] The fear that increased compliance costs will lead the employer to refuse withholding is one factor that accounts for uniformity of rates among neighboring cities. But if, as is certainly arguable, the Sealy Bill's requirement of withholding for the LGIT is interpreted to also require withholding for the piggy-back taxes, this incentive for uniformity would disappear and compliance costs for employers necessarily would be increased.[73]

One criticism that cannot be made of the individually imposed piggy-back taxes is that they perpetuate the inefficiencies attendent to separate administration and enforcement. Under the terms of the bill, administration is taken completely out of the hands of the local communities and given to the county governments and the state tax commissioner. The taxpayer files only one return which lists the amount of tax he owes under the LGIT and any piggy-back tax he may be required to pay. Since the bill requires that all piggy-back taxes use the same definitions and

71 See section II, C, *supra.*

72 See section II, C, *supra.*

73 The bill does not distinguish between those taxes withheld for the LGIT and those withheld for additional piggyback levies, requiring only that: "Each employer having a place of business . . . in a tax district or districts shall deduct an amount of tax earned in such tax district or districts by persons employed principally therein by such employer." H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.11 (1953).

allow the same exemptions as the LGIT, the taxpayer need only figure his taxable income once, and then use the appropriate rate to determine how much is owed. Because the taxpayer files both returns simultaneously, compliance costs are virtually unaffected and the economies of scale gained by the imposition of the statewide, uniform LGIT are not lost.

Objections over the loss of revenue suffered by the predominantly residential city whose residents are taxed by their city of work are partially met by the bill's requirement that the city of work return 25 percent of the tax it collects from nonresidents. Of course, the division of tax money between city of work and residence remains an arbitrary one and does not necessarily bear any relation to the needs or tax-producing abilities of either city. To an extent the problem is minimized, as will be seen, by the bill's method of distributing the total revenue collected according to the mathematically computed needs of each city. Even with the knowledge that his city is receiving adequate revenue, however, the nonresident taxpayer may still complain that he has no voice in deciding how much he will pay and how his tax dollars should be spent.

C. *Allocation of Revenue*

The most important and unique feature of the bill is its method of revenue allocation. The bill distributes revenue to the state's local taxing units, including school and library districts, in principally one of two ways. A given unit will receive the greater of either a guaranteed minimum or an amount determined by formula which is intended to closely approximate its fiscal needs. The former calculation insures that no taxing unit will lose money under the operation of the proposed distribution formula, while the latter is designed to allocate tax revenue according to need rather than on the basis of where revenue is produced.[74]

The guaranteed minimum provides that each township, municipality, school district, and library district will receive at least an amount equal to the total of its tax loss and its index increase.[75] The "tax loss" is the theoretical reduction in revenue

74 BIPARTISAN SELECT COMM., *supra* note 9, at 9-10.

75 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(A)(3)(4), (B), (C), (D) (1953).

for the established base year, 1969, that the taxing unit would have suffered from the bill's prohibition on taxing business income, its requirement that exemptions be provided in municipal taxes, and its repeal of certain other taxes not previously discussed.[76] The "index increase" is a yearly percentage increase in the unit's base year tax loss which is designed to make the minimum guarantee responsive to increases in cost of government. The figure used is that of the yearly index increase of costs of materials and services paid by state and local governments as computed and published by the United States Department of Commerce, Office of Business Economics.[77]

Owing to the uncertain accuracy of the distribution formula in calculating actual as opposed to theoretical revenue needs, an ascertainable minimum of guaranteed revenue is necessary protection against errors in the formula which may be discovered only after the bill's implementation. Two problems, however, arise from the bill's present method of determining the minimum amount. On the one hand, while providing for increases in cost due to inflation, the bill's guarantee fails to compensate for increased revenue needs caused by increases in population. If for some reason the formula proves to be insufficiently accurate in a given year, a unit which has enjoyed rapid growth might find itself to be significantly short of funds. On the other hand, the bill allows certain other units to be the recipients of a windfall. Because the bill is designed to reallocate revenue to those districts which do not have sufficient tax sources within their borders, there are certain tax-rich districts which, over time, would be financially better off if they were not affected by the bill. For these districts, primarily municipalities, the tax loss-index increase acts as a cushion which will spread out the reduction in their revenue over several years until the amount of tax loss finally becomes equivalent to the distribution formula's mathematical determination of their tax needs. This temporary loophole may become permanent in the case of a tax-rich city which is collecting revenue

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76 The bill repeals the intangible personal property tax and the tangible personal property tax on inventory.

77 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(A)(4).

far out of proportion to its needs in the base year, and whose needs increase very slowly or not at all.

The second method of allocation — according to need — distributes revenue in two ways. Each taxing unit receives from the undivided income tax fund and the local government fund[78] an amount determined by formula which corresponds to its needs. In addition, each unit receives its proportionate share of the "growth" of the two funds.[79] This simply means that a unit will receive a percentage of the yearly increase in revenue enjoyed by the two funds which is equivalent to the percentage of the total it receives from the distribution formula. Therefore, not only is a unit theoretically assured of having enough revenue to meet expanding needs, it also will receive a share of any surplus that may result.

The specific workings of the second method of allocation vary according to whether the taxing unit involved is a local government, a library or school district, or some other taxing unit. The total revenue received by each township, municipality, and county, apart from its share of the "growth" in the LGIT and local government funds, is equal to the size of its population multipled by a per capita rate which is individually determined for each unit. This per capita rate represents the aggregate of three different per capita rates each determined by a mathematical formula using respectively one of the following factors: the size of the unit's population; the revenue producing ability of the unit's property tax base; and the "tax effort" of the unit as shown by the amount of allowable millage it levies on property within its jurisdiction.[80] Although the formula for each governmental unit is separate and distinct, all are based on the same three factors. In principle the method of determining the proper allocation

78 The undivided income tax fund consists of the revenues from the LGIT, while the (present) local government fund includes some sales tax and the tax on deposits in, and shares of, financial institutions. These two funds along with the major part of the proceeds from the franchise tax and supplementary income tax on business make up the proposed "local distribution fund" out of which is to be allocated each municipality's formula-determined share. BIPARTISAN SELECT COMM., *supra* note 9, at 8-9.

79 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(B) (1953).

80 H.B. 446, 108 Genl Assy, Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(D) (1953).

of tax to a county is the same as that used in distributing revenue to a city or township. A specific example may help to illustrate the operation of the formula and explain the method of revenue allocation.

According to the table of proposed allocations prepared by the Bipartisan Select Committee, in 1970 the City of Cleveland would receive revenue under the bill based on a per capita rate of $53.79.[81] This is the total of Cleveland's separately determined per capita rates based on population, $46.42; tax effort, $7.37; and property capacity, $0.00.[82] The total per capita rate when multiplied by the city's population of 825,000 would yield a gross allocation of revenue to the city of $44,390,000. This gross amount, however, is not necessarily the amount of money Cleveland would receive from the LGIT and local government funds. In fact, because the city levied a municipal income tax of 0.05 percent at the time the bill (theoretically) was enacted, its residents would be entitled to credit the amount of their city tax to the amount of tax owed under the LGIT.[83] As a result, the city would be allowed only so much of the gross allocation as would remain after the total of its municipal, non-business, income tax collections of $24,001,000 were deducted. After making the deduction, Cleveland's net allocation would then be $20,390,000.[84] Although this figure is theoretically the amount of revenue which is needed to meet the city's minimum requirements, it is subject to a ceiling which may reduce the amount which will be finally allocated. The bill stipulates that the total per capita amount of revenue for each municipality, township, or county shall not exceed 150 percent of its respective total tax loss and index increase.[85] Cleveland's tax loss and index increase for 1970 is estimated in the proposed allocation table to be $17,700,000 and its

81 BIPARTISAN SELECT COMM., *supra* note 9, at 24. Note this amount and the amounts which appear in the following illustration are estimates prepared for the Bipartisan Select Comm.

82 The level of Cleveland's property valuation exceeded the minimum needed to qualify for recognition in this area. Note, however, that the city was rewarded in the "tax effort" category for the large amount of mileage it levied on its taxable property.

83 See pp. 283-4 *supra*.

84 BIPARTISAN SELECT COMM., *supra* note 9, at 18.

85 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(D) (1953).

maximum receivable amount is thus 150 percent of $17,700,000 or $26,550,000. Because the net amount of allocable revenue is well below this ceiling, Cleveland is, in fact, entitled to receive the full amount of money called for by the formula.

While the 150 percent ceiling creates no problem for cities like Cleveland which have a high tax loss and index increase figure, the operation of the ceiling for other cities may result in a great disparity between the amount of revenue which is allocated by formula and the amount of revenue which the city can actually receive. According to the formula, for example, the City of Columbus should receive a net allocation of $12,915,000, but because its tax loss and index increase is only $3,900,000, it can receive no more than $5,850,000.[86] From this discrepancy of $7,065,000 it can be seen that while the amount of tax loss and index increase may provide a workable figure for establishing a minimum level of income, in many instances its use in computing a ceiling will unnecessarily bar cities from receiving needed revenue. Indeed, since a large component of tax loss necessarily comes from the bill's denial of revenue formerly received from taxing business income, the city with little or no industry, the one which the bill is designed to help the most, continues to be at a disadvantage. Without having any business tax to give up, the city is unable to substantially increase its tax loss so as to be eligible to receive the full amount of revenue allocated by the formula.

To be sure, the ceiling has the valid purpose of preventing windfalls and ensuring that large amounts of revenue will not be concentrated in a few areas to the detriment of others.[87] It seems, however, that this purpose could be accomplished in some other way than by raising an arbitrary cut off point which works to the disadvantage of a taxing unit which has not suffered a potentially large tax loss through the enactment of the bill, but whose existing level of revenue is inadequate to meet its present needs.

The bill seeks to provide income tax revenue to other taxing units in addition to counties, municipalities, and townships. Each school district is to receive the greater of its tax loss and index

86 BIPARTISAN SELECT COMM., *supra* note 9, at 18.

87 Telephone interview with State Representative Albert H Sealy, Chairman of the Bipartisan Select Comm. on Tax Revision, Dec. 4, 1969.

increase or its proportionate share of a newly created supplementary state aid fund.[88] As yet, the method of determining the proper allocation for each district has not been determined. Library districts will receive an amount equal to their tax loss and index increase plus 50 percent of their proportionate share of the increase in the LGIT and local government funds. The other 50 percent will go to the state library board which will distribute the revenue among the districts according to a plan which has yet to be submitted to the legislature.[89] The bill further provides that other taxing units such as park districts, community college districts, or conservancy districts will receive an amount equal to their tax loss and index increase.[90] At present, no method of distribution according to need has been devised for these units, it being considered enough at this point to ensure them a growth related source of revenue.

It should be noted that the drafters and sponsors of the Sealy Bill recognize that a great deal more work needs to be done in perfecting the method of revenue allocation.[91] Problems exist with the distribution provisions as they are presently drafted and more are likely to be discovered after the bill's enactment. But these difficulties, actual and potential, are certainly capable of solution and should not be allowed to overshadow the fact of the bill's largely successful attempt to place revenue distribution on the basis of need. Putting an end to the "city of work" versus "city of residence" rivalry, halting unwise land usage which results when residential communities seek an industrial tax base, and alleviating the chronic budget deficits suffered by cities whose tax needs outweigh their tax sources, demand a comprehensive plan of revenue distribution. The Sealy Bill, at the very least, is a major advancement in the development of such a plan.

*Craig Stewart**

88 H.B. 446 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(C) (1953).

89 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(G) (1953).

90 H.B. 446, 108 Genl. Assy., Reg. Sess., § 1 (1969-70) *enacting* OHIO REVISED CODE ANN. § 5745.20(H) (1953).

91 Telephone interview with State Representative Albert H. Sealy, Chairman of the Bipartisan Select Comm. on Tax Revision, Dec. 4, 1969.

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COMMENT

STATE ADULTERY LAW AND THE "GOOD MORAL CHARACTER" NATURALIZATION REQUIREMENT

Introduction

Since the first naturalization law was passed in 1790, a petitioner for citizenship has been required to prove his good moral character.[1] The current statute,[2] passed in 1952, reads: "No person . . . shall be naturalized unless [he] . . . (3) has been and still is a person of good moral character. . . ."[3] "Good moral character" traditionally has been an undefined term. The courts, which have always been the instrumentalities for naturalizing aliens, were assigned the difficult task of determining the content of good moral character.[4] Reflecting the spirit of regulating morality through law, grounds for denying a petition for lack of good moral character have generally included commission of a sex offense,[5] such as rape,[6] cohabitation,[7] incest,[8] lewdness and sodomy,[9] polygamy,[10] homo-

1 Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103.

2 Immigration and Nationality Act of June 27, 1952 (McCarren-Walter Act) 8 U.S.C. §§ 1101-1503 (1964).

3 8 U.S.C. § 1427(a) (1964).

4 Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949); In re Edgar, 253 F. Supp. 951, 953 (E. D. Mich. 1966); Petition of F—G— and E—E—G—, 137 F. Supp. 782, 785 (S.D.N.Y. 1956).

5 In some early cases, the fact that petitioner was an illegitimate child precluded a finding of "good moral character." Fields, *Conflicts in Naturalization Decisions,* 10 TEMP. L. Q. 272, 284 (1936). This is no longer the law. *Cf.* Matter of D—. 1 I. & N. Dec. 186 (1941). "Good moral character" is now a requirement for access to the Attorney General's discretionary relief in deportation cases. 8 U.S.C. § 1254. Deportation cases defining good moral character or "moral turpitude" are often cited in naturalization decisions. Convictions for crimes involving moral turpitude also prevent a finding of good moral character. 8 U.S.C. §§ 1101(f)(3), 1182(a)(9) (1964).

6 Ng Sui Wing v. United States, 46 F.2d 755 (7th Cir. 1931); Bendel v. Nagel, 17 F.2d 719 (9th Cir. 1927) (statutory rape).

7 Petition of Pecora, 96 F. Supp. 594 (S.D.N.Y. 1951).

8 Matter of Y—, 3 I. & N. Dec. 544 (1949).

9 Wyngaard v. Kennedy, 295 F.2d 184 (D.C. Cir. 1961), *cert. denied,* 368 U.S. 926 (1961); Babouris v. Esperdy, 269 F.2d 621 (2d Cir. 1959), *cert. denied,* 362 U.S. 913 (1960).

10 United States v. Zaltzman, 19 F. Supp. 305 (W.D.N.Y. 1937); Petition of Horowitz, 48 F.2d 652 (E.D.N.Y. 1931).

sexuality,[11] indecent assault,[12] abortion,[13] fornication,[14] and adultery.[15]

Until 1952, the courts had a great deal of latitude in how they viewed these offenses, and in many cases they disregarded an act which was a crime under the applicable state law.[16] In a series of celebrated cases in the 1940's, the Second Circuit, dealing with adultery and fornication, began to condone acts which were clearly offenses under the layman's view.[17] Congress reacted strongly. In the carnage wrought by the McCarren-Walter Immigration and Nationality Act of 1952 could be found: "No person shall be regarded as, or found to be, a person of good moral character who . . . is . . . (2) one who . . . has committed adultery."[18] The words of the statute seemed clear, but they have become a flimsy cover for a mass of conflicting cases, which are particularly disturbing because they affect so many people daily and attract so little attention. One running afoul of this section cannot, even with the best legal advice, say for certain where he stands. The statute does not define "adultery"; the courts, although interpreting a national law concerning citizenship, come to varying conclusions under very similar facts; the Supreme Court has never granted certiorari in the area; and few, least of all the interested petitioners and their attorneys, dare to ask Congress for legislative clarification for fear of results more restrictive than the present case law.

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11 Re Petition of Schmidt, 56 Misc. 2d 456, 289 N.Y.S.2d 89 (Sup. Ct. 1968). State courts have jurisdiction to hold naturalization proceedings.

12 Fitzgerald v. Landon, 238 F.2d 864 (1st Cir. 1956).

13 Matter of M—, 2 I. & N. Dec. 525 (1946).

14 Petition of R—, 56 F. Supp. 969, 971 (D. Mass. 1944) (dictum); *cf.* Flumerfelt v. United States, 230 F.2d 870 (9th Cir. 1956).

15 Petition of O—N—, 233 F. Supp. 504 (S.D.N.Y. 1964).

16 United States v. Francioso, 164 F.2d 163 (2d Cir. 1947) (incest); United States v. Rubia, 110 F.2d 92 (5th Cir. 1940) (adultery); Petition of Smith, 71 F. Supp. 968 (D.N.J. 1947) (bigamy); Petition of R—, 56 F. Supp. 969 (D. Mass. 1944) (fornication).

17 Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949) (fornication); Petitions of Rudder, 159 F.2d 695 (2d Cir. 1947) (adultery); In re Schlau, 136 F.2d 480 (2d Cir. 1943) (adultery); *but see* Johnson v. United States, 186 F.2d 588 (2d Cir. 1951) (adultery).

18 8 U.S.C. § 1101(f) (1964).

I. A State or Federal Standard?

In large part the difficulties arise from the policy of the Immigration and Naturalization Service, which makes recommendations to the courts on all naturalizations,[19] that the definition of "adultery" and all other sex crimes related to "good moral character" should be governed by the local law where the offense was committed.[20] The opposing view is that the naturalizing court should look to the prevailing moral attitude in the United States as a whole to determine whether the "average American" would consider that the petitioner has good moral character.[21] The Service represents their policy as the Congressional desire:

> The law of the state in which the sexual act was committed will determine whether such act constitutes adultery. The viewpoint is said to embrace well-established administrative practice based upon past judicial rulings, and it has been noted that there is nothing in the legislative history of the current statute to indicate that the Congress intended a departure from the reliance on state law.[22]

In *Matter of Pitzoff*,[23] the Board of Immigration Appeals[24] declared:

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19 8 U.S.C. § 1446(d) (1964).

20 Imm. and Nat. Service, Interpretations § 316.1(g)(2)(ii) (1969); *see also* In re Mogus, 73 F. Supp. 150 (W.D. Pa. 1047); In re Paoli, 49 F. Supp. 128 (N.D. Cal. 1943). In a recent case, In re C—C—J—P—, 299 F. Supp. 767 (N.D. Ill. 1969), the Service examiner pressed for a federal standard, not withstanding commission of adultery by petitioner as defined by state law, but this was rejected by the court.

21 Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949); United States v. Francioso, 164 F.2d 163 (2d Cir. 1947); U.S. *ex rel.* Zacharias v. Shaughnessy, 221 F.2d 578 (2d Cir. 1955); In re Petition of Russo, 259 F. Supp. 230 (S.D.N.Y. 1966); In re Edgar, 253 F. Supp. 951, 953 (E.D. Mich. 1966); In re Briedis, 238 F. Supp. 149 (N.D. Ill. 1965).

22 Imm. and Nat. Service, Interpretations § 316.1(g)(2)(ii) (1969); *see also* In re Mogus, 73 F. Supp. 150 (W.D. Pa. 1947); In re Paoli, 49 F. Supp. 128 (N.D. Cal. 1943).

23 10 Int. Dec. No. 1237 (1963).

24 A similar problem emerges in immigation cases. Once a special inquiry officer in the Immigation and Naturalization Service finds that an alien should be excluded or deported, the alien has the right to appeal to the Attorney General. 8 U.S.C. § 1254 (1964). In practice, this means an appeal to the Board of Immigation Appeals, a body established by the Attorney General's regulations to handle the cases for him. 1 Gordon and Rosenfield, Immigration Law and Procedure § 1.10b (1967). While the case is pending, the Attorney General has discretion to provide relief from deportation or exclusion to allow the alien to leave the country "voluntarily". *Id.* § 7.2a. The right to leave "voluntarily" is important because the alien can someday be readmitted to the United States once his disqualifying status has

> It is our belief that Congress' desire that there be uniformity related not to the method to be used in determining whether adultery has been committed, but related rather to the desire that *all* persons who had committed adultery should be banned from the prizes of the law. This provision is in consonance with the findings of the court in *Dickoff* [*Dickhoff v. Shaughnessy,* 142 F. Supp. 535 (S.D.N.Y. 1956)] that Congress wished to rely upon past interpretations as to good moral character and it takes cognizance of the fact that Congress has not criticized the long established administrative practice (based upon judicial rulings) in which a determination as to whether there has been the commission of adultery was made depends upon the law of the state in which the act occurred.[25]

There is a certain amount of sophistry in these statements. First, the local law view never was and never has been universally applied. In a 1943 case, one court bluntly stated that state law did not control because it was not obliged under *Erie v. Tompkins*[26] to follow the decisions of state courts because there was a federal statute at issue; the court tacitly assumed that the federal statute did not incorporate state law as its standard.[27] The Board of Immigration Appeals cited this case with approval in one of its own pre-1952 cases involving incest.[28] The Board found that, although the alien had violated Washington law, his marriage to his niece was not "basically contrary to the moral standards of the country."[29] There has been a resurgence of the national view

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disappeared, which would be far more difficult if he were deported. GORDON AND ROSENFIELD, *supra,* at § 2.33; *see* 8 U.S.C. § 1182(a)(16) and (17) (1964). In order for discretion to be applied, the alien must, among other things, prove his good moral character; other forms of relief require similar proof. 8 U.S.C. § 1254 (1964). Hence, he falls under the same system of definitions as would a petitioner for naturalization. In many instances, the alien will appeal to the federal courts from rulings by the Board denying the privilege of the discretionary review, as is his right. The right is either by habeas corpus, where the alien is in custody, or under the Administrative Procedure Act. 2 GORDON AND ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 8.2 (1967). Thus, the courts have dealt with the adultery definition under two distinctly different types of proceedings, but they have used the cases interchangeably. Dickhoff v. Shaughnessy, 142 F. Supp. 535, 538 (S.D.N.Y. 1956).

25 10 Int. Dec. No. 1237, pp. 37-38; *contra,* In re Petition of Russo, 259 F. Supp. 230, 234 (S.D.N.Y. 1966) (criticized *Pitzoff*).

26 304 U.S. 64 (1938).

27 Petition of Lieberman, 50 F. Supp. 121 (E.D.N.Y. 1943).

28 Matter of B—, 2 I. & N. Dec. 617 (1946).

29 *Id.* at 619. *Cf.* In re Mayall's Petition, 154 F. Supp. 556 (E.D. Pa. 1957); *contra,* Petition of Axelrod, 25 F. Supp. 415 (E.D.N.Y. 1938).

in recent years. For example, in *In re Mayall*,[30] petitioner and her correspondent in adultery remarried in Pennsylvania following her English divorce, contrary to the Pennsylvania law making such marriages adulterous. The federal court found that the Pennsylvania rule was followed by only a handful of states and could not be considered the federal rule.[31] As another court stated:

> We are convinced . . . that the better view is to develop a uniform federal standard when interpreting a statute relating to the federal right of citizenship. Indeed, we are of the opinion that Congress, acting under Article I, Section 8 of the Constitution, intended this result.[32]

Secondly, the agencies exaggerate the importance of the failure of Congress to criticize the state standard. The Senate introduced the adultery clause into the 1952 revision, expressing a desire for "a greater degree of uniformity . . . in the application of the 'good moral character' tests."[33] Principally, Congress was troubled by the judicial decisions which admitted obvious adulterers to citizenship; hence, for the first time, they tried to bar such persons through an absolute prohibition. But Congress never made it clear whether it really wanted a state law standard or not. Immediately after the statute was passed, the Service decided that it was being saddled with administering a state standard and complained.[34] There is nothing in the legislative history to indicate that Congress realized the kind of problem it was creating, and, aside from the policy of the Service, the few analyses of the history are split as to interpretation.[35]

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30 154 F. Supp. 556 (E.D. Pa. 1957).

31 *Id.* at 560-561.

32 In re Briedis, 238 F. Supp. 149, 151 (N.D. Ill. 1965); *accord*, U.S. *ex rel.* Zacharias v. Shaughnessy, 221 F.2d 578 (2d Cir. 1955); In re Petition of Russo, 259 F. Supp. 230 (S.D.N.Y. 1966); In re Edgar, 253 F. Supp. 951 (E.D. Mich. 1966); In re Mayall's Petition, 154 F. Supp. (E.D. Pa. 1957); Petitions of F—G— and E—E—G—, 137 F. Supp. 782, 785 (S.D.N.Y. 1956); Evans v. Murff, 135 F. Supp. 907, 911 (D. Md. 1955); *cf.* Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949) (fornication); United States v. Francioso, 164 F.2d 163 (2d Cir. 1947) (incest).

33 S. REP. No. 1515, 81st Cong., 2d Sess. 700-701 (1950); *see also* S. REP. No. 1137, 82d Cong., 2d Sess. 6 (1952).

34 *Hearings before President's Commission on Immigration and Naturalization, printed in House Judiciary Hearings*, 82d Cong., 2d Sess. 1409 (1952).

35 *Compare* Dickhoff v. Shaughnessy, 142 F. Supp. 535 (S.D.N.Y. 1956) (federal standard intended) *with* Note, 4 HOUST. L. REV. 558, 561-562 (1966) (state standard intended).

The Service appears to have gone out of its way to create a thorny problem where there was none.[36] Incorporation of administrative practice through Congressional silence is a deduction that can restrict the flexibility of the Congressional amendment process if such a method of statutory construction is mechanically employed. It is based on an unrealistic view of the resources of Congress.[37] All the broader considerations in this context recommend that the adultery clause be interpreted by what has come to be called the "federal common law".[38] The factors suggesting the adoption of a federal rule — equity between persons in different states; inconvenience in enforcing laws dependent on fifty interpretations;[39] interest of the petitioner in looking at one source of law only[40] — are strong. The power is exclusively in Congress,[41] and the constitutional history of the naturalization clause indicates a desire that undue state variances be avoided.[42] At first glance, state interests seem substantial if the federal standard is stricter than the state standard. For Congress to declare that no one shall become a citizen who drives his car faster than thirty miles per hour would constitute an extreme interference with states normally permitting driving speeds as high as seventy. Similarly, for Congress to bar from citizenship aliens who had not broken a state's adultery law might undermine state policy, which in turn suggests it may not have been within the Congressional purpose. The parallelism is not complete, however. If

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36 PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME? 246 (1953) [hereinafter cited as WHOM WE SHALL WELCOME?]; *see also* In re Petition of Russo, 259 F. Supp. 230, 234 (S.D.N.Y. 1966).

37 *Cf.* Francis v. South Pacific Co., 333 U.S. 445, 465-468 (1948) (Black, J., dissenting); Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting). Incorporation of administrative practice has been used to save a statute from unconstitutionality on grounds of excessive delegation. *See, e.g.*, Intermountain Rate Cases, 234 U.S. 476 (1914); Kent v. Dulles, 357 U.S. 116 (1958); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 71, 73 (student ed. 1965).

38 *See generally* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

39 WHOM WE SHALL WELCOME?, *supra* note 36.

40 Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1529-1531 (1969); *cf.* U.S. v. Turley, 352 U.S. 407, 411 (1957); NLRB v. Hearst Publications, 322 U.S. 111, 123 (1944); Jerome v. U.S., 318 U.S. 101, 104 (1943).

41 Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817).

42 THE FEDERALIST, Nos. 32 and 42; 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF *1787* 245, 247 (1937); 2 FARRAND 158.

a state does not punish adultery, that does not mean it encourages it. Furthermore, the concept of requiring "good moral character" necessarily implies that the average petitioner will be more restricted in his activities than the average native-born person until naturalization. The whole idea behind having the national government handle naturalization was to provide a minimum standard for citizenship.[43] Of course, if the federal adultery standard is more liberal than the local law, not even a superficial conflict arises since the state can still protect itself through enforcement of its criminal law.

The major disadvantage of the federal standard based on a national sense of "good moral character" is the obvious lack of written law to guide a court as to what offenses should preclude a finding of good moral character.[44] By relying on state law, the "local law" test advocated by the Immigration and Naturalization Service provides some certainty, but the results may vary from state to state since a given act may be illegal under the law of one state but not another. To those who view citizenship as a national concept, the Service's interpretation of the law appears to be an unfounded concession to regionalism.[45]

A review of the many different definitions of criminal adultery throughout the United States will highlight the variance problem. Four major formulations of adultery exist under state law: the "common law" view, the "canon law" view, and two hybrid views. Under the common law view, adultery takes place only when the woman is married, but both parties are deemed to be guilty.[46] Under the canon law view, adultery is the voluntary sexual intercourse of a married person with a person other than the offender's

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43 THE FEDERALIST, No. 42.

44 Repouille v. United States, 165 F.2d 152 (2d Cir. 1947) (L. Hand and Frank, JJ.).

45 The President's Commission on Immigration and Naturalization recommended abandoning the definitional system and returning to the pre-1952 method. WHOM WE SHALL WELCOME?, *supra* note 36.

46 Followed by six states: CONN. GEN. STAT. § 53-218 (1960); IND. ANN. STAT. § 10-4207 (1956); MARY. ANN. CODE, Art. 27, § 4 (1967); MINN. STAT. ANN. § 609.36 (1964); N. J. STAT. ANN. 2A:88-1 (1953); WYO. STAT. § 6-86 (1957). *See generally* Moore, *Diverse Definitions of Criminal Adultery*, 30 U. KAN. CITY L. REV. 219 (1962) [hereinafter cited as Moore]; Ohlson, *Adultery: A Review*, 17 B.U.L. REV. 328, 533 (1937). In Maryland, the only interpretive case is a deportation case, Evans v. Murff, 135 F. Supp. 907 (D. Md. 1955).

husband or wife; only the married person is guilty.[47] Under the majority hybrid rule, followed by twenty states, if either spouse has sexual intercourse with a third party, both transgressors are guilty of adultery.[48] Finally, eight jurisdictions make both transgressors guilty if the woman is married, but if the woman is single, only the man is guilty.[49] Six states have never passed a statute changing adultery from a common law tort to a statutory crime, so it is not a crime unless it constitutes a public nuisance by being open and notorious;[50] three of these states, however, have anti-cohabitation statutes.[51] Three states have statutes punishing adultery but define it neither by statute or case law.[52] Georgia has held that the parties cannot commit adultery unless both are married to someone else;[53] if one is unmarried, the crime is called "fornication and adultery," and indictments have been quashed where the wrong crime is charged. Eight states require a showing of cohabitation or at least more than a single adulterous act for conviction of adultery.[54] The possible conflicts created by applying a state standard are patent.

47 Followed by seven states: CAL. CIV. CODE ANN. § 93 and CAL. PEN. CODE ANN. § 269a (West 1954); COLO. REV. STAT. ANN. § 40-9-3 (1963); KAN. STAT. ANN. § 21-908 (1964); MONT. REV. CODES ANN. § 21-105 (1967); OHIO REV. CODE ANN. § 2905.08 (1954); PA. STAT. ANN. tit. 18, § 4505 (1963); CODE OF VA. § 18.1-187 (1960).

48 ALA. CODE, tit. 14, § 16 (1959); ARIZ. REV. STAT. ANN. § 13-221 (1956); DEL. CODE ANN. tit. 11, § 311 (1953); FLA. STAT. ANN. § 798.01 (1965); HAWAII REV. LAWS § 309-8 (1955); IDAHO CODE § 18-6601 (1948); ILL. ANN. STAT., 38 §11-7 (Smith-Hurd 1962); IOWA CODE ANN. § 702.1 (1950); ME. REV. STAT. ANN. ch. 17, § 101 (1965); MO. REV. STAT. § 563.150 (1953); NEB. REV. STAT. § 28-902 (1965); N.Y. PENAL LAW § 255.17 (McKinney 1967); OKLA. STAT. tit. 21, § 871 (1958); R.I. GEN. LAWS ANN. § 11-6-2 (1958); S.C. CODE § 16-407 (1962); S.D. CODE § 22-22-17 (1969); TEX PEN. CODE ANN. art. 499 and 501 (1952); VT. STAT. ANN. tit. 13, §§ 201 and 202 (1958); WASH. REV. CODE § 9.79.110 (1961); WIS. STAT. § 944.16 (1958).

49 ALASKA COMP. LAWS ANN. § 11.40.010 and § 11.40.030 (1962); D.C. CODE ANN. § 22-301 (1967); MASS. ANN. LAWS ch. 272, § 14 (1959); MICH. STAT. ANN. § 750.29 and § 750.30 (1968); N.H. REV. STAT. ANN. § 579.2 (1955); N.D. CENTURY CODE § 12-22-09 (1960); ORE. REV. STAT. § 167.0005 (1968); UTAH CODE ANN. § 76-53-3 (1953).

50 Arkansas, Louisiana, Nevada, New Mexico, North Carolina, and Tennessee. Moore, *supra* note 46, at 222.

51 ARK. STAT. § 41-805 (1964); N.M. STAT. ANN. 40A-10-2 (1964); N.C. GEN. STAT. § 14-184 (1953) (crime of "fornication and adultery"). Moore, *supra* note 46, at 222, refers to a cohabitation statute in Nevada, NEV. REV. STAT. § 201.200 (1955); this law does not appear in the 1968 code.

52 KY. REV. STAT. ANN. § 436.070 (1962); MISS. CODE ANN. § 1998 (1957); W. VA. CODE ANN. § 61-8-3 (1966).

53 Zachery v. State, 6 Ga. App. 104, 64 S.E. 281 (1909); GA. CODE ANN., § 26-5801 (1953).

54 Smith v. State, 39 Ala. 554 (1865); People v. King, 26 Cal. App. 94, 146 P. 51

II. Taming the State Standard

Even when courts have generally found that state law controls, some have been reluctant to apply it with the rigidity called for by the Service and the Board. For the most part, state adultery laws are outmoded and usually unenforced. Although it would be almost unfair to hold a petitioner responsible for obeying laws so generally disregarded, the judge may feel bound by the harsh congressional rule. Yet alternatives have been found. In the early case of *In re Hopp*,[55] petitioner operated a saloon on Sunday contrary to the state "Sunday closing law" but in conformity with a forty-year old tradition of Sabbath tippling by the public and unenforcement by the police. The court said:

> I cannot see that the applicant should be denied citizenship because he has fallen in with the general public sentiment of the community in which he lives. There is in the conduct and attitude of the applicant no moral turpitude, and nothing evincing a calloused conscience, and it would not, in my judgment, be a fair construction of the act of Congress to require the applicant to rise above his environment and show by his behavior that his moral character was above the level of the average citizen.[56]

Although no other court has so forthrightly stated why it was disregarding the state law, the spirit of this case survives in many of the recent adultery decisions. Naturalizing courts adopting the view that local law controls have developed a number of doctrines to alleviate the harshness of the letter of the state law. Adultery is now usually not considered a bar to the finding of good moral character when it is "technical adultery;"[57] in some cases, adultery

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(1914); People v. Bright, 77 Colo. 563, 238 P. 71 (1925); Braswell v. State, 88 Fla. 183, 101 So. 232 (1924); State v. Sekrit, 130 Mo. 401, 32 S.W. 977 (1895); State v. Brown, 47 Ohio St. 102, 105-106, 23 N.E. 747, 748-749 (1890) (dictum); S.C. Code § 16-407 (1962); Tex. Pen. Code Ann. arts. 499 and 501 (1952). South Carolina and Texas will also convict on the showing of "habitual carnal intercourse." Moore, *supra* note 46 at 222, finds such a requirement in Montana, also, but examination of the statute (there are no reported cases) does not indicate how he arrived at this conclusion.

55 179 F. 561 (E.D. Wis. 1910).

56 179 F. 561, 563.

57 That is, where the parties do not realize that their divorce or annulment has not terminated the marriage. Dickhoff v. Shaughnessy, 142 F. Supp. 535 (S.D.N.Y. 1956); *see also* Petition of Schlau, 41 F. Supp. 161 (S.D.N.Y. 1941), *rev'd on other grounds* 136 F.2d 480 (2d Cir. 1943).

will be excused where the court finds mitigating circumstances.[58] This trend constitutes a re-emergence of the judicial philosophy which prevailed before the 1952 statutory revision. Technical adultery cases have gone so consistently against the Service that it now proposes not to fight them;[59] nor will it contest cases where the participants later marry.[60] Thus, though *In re Hopp* has had mostly unfavorable mention,[61] by the judicious use of these doctrines, along with the use of a federal standard where the state standard is too harsh, the courts have avoided applying the laws which do not appear to represent the prevailing moral attitude of the community.

Other kinds of cases may arise where even courts that usually apply the state standard will be forced to consider how absolute that standard should be. What should the result be when the state law applied is unconstitutional? Although it appears unlikely at present that state adultery laws could be declared unconstitutional,[62] the recent criminal case of *Cotner v. Henry*[63] presents this hypothetical problem in the context of sodomy. Cotner was convicted of sodomy on complaint and testimony of his wife. On his petition for habeas corpus, the Seventh Circuit held that he had been denied due process by his defense lawyer's failure to raise the substantial constitutional question as to whether the Indiana sodomy law could be applied to a husband under *Griswold v. Connecticut*.[64] Assuming the application of the statute to Cotner in a criminal prosecution would be unconstitutional, could Cotner, if he later petitioned for citizenship, be barred as a sodomist on the basis of the evidence given at his trial? Should the naturalizing judge look to an unconstitutional state statute, which nonetheless stands as a clear indication of the moral attitude

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58 *Compare* In re Briedis, 238 F. Supp. 149 (N.D. Ill. 1965) *with* Petition for Naturalization of O—N—, 233 F. Supp. 504 (S.D.N.Y. 1964).

59 IMM. AND NAT. SERVICE, INTERPRETATIONS § 316.1(g)(2)(v) (1969); *see* In re C—C—J—P, 299 F. Supp. 767, 768 (N.D. Ill. 1969).

60 *Id.*

61 Turlej v. United States, 31 F.2d 696 (8th Cir. 1929); In re Bonner, 279 F. 789 (D. Mont. 1922); United States v. Gerstein, 284 Ill. 174, 119 N.E. 922, 1 A.L.R. 318 (1918); *contra,* Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949).

62 Griswold v. Connecticut, 381 U.S. 479, 499 (1965) (dictum).

63 394 F.2d 873 (7th Cir. 1968), *cert. denied* 393 U.S. 847 (1968).

64 381 U.S. 479 (1965).

of the community? The mere fact that the statute is unconstitutional in criminal proceedings is not conclusive since Congress could adopt the statute as part of the naturalization law.[65] Courts which have applied the state standard with some discretion will probably not hold that Congress meant to use a standard ordinarily unconstitutional as the "good moral character" standard, at least without explicit Congressional directive.

III. Divorce Law as a Source for the State Standard

Contrary to liberalizing judicial practice, the Service and the Board of Immigration Appeals have delved even further into state law in attempting to define adultery. The Service has declared that it will deem an act to be adultery if it falls within the state divorce-law definition for the locale where the act was committed;[66] the Board has applied divorce law in three cases.[67] As some jurisdictions have no criminal adultery statute, this policy has some logic, given the necessity for a definition; however, the Board used divorce-law standards in jurisdictions where criminal adultery was defined, a policy without rational support.

Wadman v. Immigration and Naturalization Service[68] rejects this policy. Wadman applied for discretionary relief from deportation, and the Board denied consideration, holding that Wadman had committed adultery as a matter of law and hence could not prove "good moral character." The Ninth Circuit reversed. The court stated that "federal law does not define adultery"[69] and went on to examine the California standard. The California Civil Code reads: "Adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."[70]

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65 Since Congress may prohibit anyone from entering the country, Nishimura Ekiu v. United States, 142 U.S. 651 (1892), or from citizenship, Takao Ozawa v. United States, 260 U.S. 178 (1922), on the basis of even such irrational factors as race or nationality, it would appear that it could use other criteria for selection which would be unconstitutional as applied to citizens.

66 Imm. and Nat. Service, Interpretations § 316.1(g)(2)(iv) (1969).

67 Matter of P—, 7 I. & N. Dec. 376 (1956); Matter of W—Y—S—, 6 I. & N. Dec. 801 (1955); Matter of M—, 6 I. & N. Dec. 660 (1955); *see also* United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925).

68 329 F.2d 812 (9th Cir. 1964); *see also* Petition of Smith, 71 F. Supp. 968 (D.N.J. 1947).

69 329 F.2d 812, 816.

70 Cal. Civil Code § 93 (West 1954).

Wadman fell within this definition, used in divorce, but the court went on to hold that California does not punish adultery criminally "unless the sexual intercourse is such as to constitute cohabitation. Cal. Penal Code Sec. 269a, 269b."[72] Since cohabitation was not shown, there was no bar to the finding of good moral character. It would appear, therefore, that at least in the Ninth Circuit, divorce law is not relevant.

Outside the Ninth Circuit, the Service and the Board are free to determine their own policy. But their curious desire to apply divorce law may lead to some outrageously inconsistent results. In some instances, the definition of adultery varies between use in divorce and criminal cases. For example, a Connecticut court said:

> The crime of adultery at common law can be committed only upon the person of a married woman, but as a ground for divorce under both the canonical law as administered by the ecclesiastical courts and under the general terms of the statutes, adultery includes sexual intercourse between the husband and a woman other than his wife, although such woman is unmarried.[73]

Although the Board has done so in the past, the government agencies ought not to look to divorce law where the state has a criminal statute, for *Wadman* should be persuasive even where it is not binding precedent. In Connecticut, for example, they should, and probably shall, continue to apply Connecticut's common-law view of criminal adultery. But would the agencies look to divorce law if Connecticut were to abolish criminal adultery as was suggested in New York?[74] If they do, it would become paradoxically more difficult for offending aliens to be naturalized although Connecticut had liberalized its laws. For the Board and

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71 CAL. CIVIL CODE § 92 (West 1954).

72 329 F.2d 812, 816.

73 Nelson v. Nelson, 22 Conn. Sup. 145, 147, 164 A.2d 234, 235 (1964) *citing* 17 AM. JUR. DIVORCE § 34; *accord,* Picket v. Picket, 27 Minn. 299 (1880). Louisiana, which has no criminal adultery does have divorce adultery. *See* De Maupassant v. Clayton, 214 La. 812, 38 So.2d 791 (1949). In Petition of McNab, 121 F. Supp. 938 (E.D. La. 1954), the court cited the statute and denied the petition on grounds of adultery. This decision is either inconsistent with the principle that the naturalization law does not find adultery where the state law would not find criminal adultery, In re Johnson, 292 F. Supp. 381, 384 (E.D.N.Y. 1968), or the opinion simply lacks reasoning. The court made no mention of a "federal standard."

74 N.Y. PENAL LAW § 255.17 (McKinney 1967).

the Service to continue to apply the old criminal adultery cases would be to ignore a change in community moral standards. Such a change in the criminal law of adultery reflects the inappropriateness of employing definitions from divorce law; the fact that the community thinks an act should dissolve a marriage may not mean it condemns the character of the person who commits the act.

IV. Conclusion

The time would appear ripe for a clarifying statement. Not only is the plethora of divergent approaches disconcerting, but the confusion may encourage forum-shopping within the system. Although the petitioner must reside in the United States five years before filing for naturalization,[75] his residence in the filing jurisdiction need only be six months,[76] and he may be tempted to seek out a court whose interpretation of the statute is most favorable to him. Despite the incoherency in the law, the Supreme Court has yet to speak on the issue, though it has had the opportunity. Any Congressional resolution may well go beyond proclaiming a power in the courts to develop a federal standard by itself specifying that standard. Pending such action, the courts appear to be developing a federal outlook and to be extricating themselves from the state standard despite some occasional backsliding.[77] The federal standard, when it emerges, may be more liberal than the 1952 draftsmen might have wanted, had they thought to delineate it. Yet, the result will fulfill their primary goal of providing more uniform treatment, which in itself will make the "good moral character" requirement more rational and humane.

*Michael T. Hertz**

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75 U.S.C. § 1427(a)(1) (1964).
76 *Id.*
77 *E.g.*, In re C—C—J—P—, 299 F. Supp. 767 (N.D. Ill. 1969).
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