THE NEGATIVE INCOME TAX: ACCOUNTING PROBLEMS AND A PROPOSED SOLUTION

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Introduction

The negative income tax is a device for making cash payments to the poor, a substitute for traditional welfare programs[1] as a means of eliminating poverty. Its basic features have been fully described elsewhere[2] and will not be reviewed here. For present purposes it is sufficient to point out the two vital features of a negative income tax which most sharply distinguish it from traditional welfare schemes. While it is true that both of these features have recently been incorporated to some extent into the structure of traditional welfare programs, the modification of existing programs has not accomplished completely the objectives sought by proponents of negative income taxation.

One of these two vital features of the negative income tax is the retention of incentive to work.[3] This is accomplished by "taxing"

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An earlier version of this article appeared as a discussion paper that was published by the Institute for Research on Poverty at the University of Wisconsin, which provided the authors with financial support from funds made available by the Office of Economic Opportunity, pursuant to the provisions of the Economic Opportunity Act of 1964. The conclusions are the sole responsibility of the authors.

The authors are substantially indebted to various people who have worked on the Institute's Negative Income Tax experiments, but most particularly to Professor Lee Bawden, who shared in originating and developing the carryover concept and who contributed many valuable comments on an earlier draft of this article.

1 By "traditional welfare programs" we mean programs such as AFDC and general assistance that are designed purely to relieve poverty, not social insurance programs like OASDHI.

2 *See, e.g.*, Klein, *Some Basic Problems of Negative Income Taxation*, 1966 WIS. L. REV. 776; Tobin, Pechman, and Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967); Comment, *A Model Negative Income Tax Statute*, 78 YALE L.J. 269 (1968) [hereinafter cited as *Model Statute*].

3 For economic analysis of the incentive effect, see Boskin, *The Negative Income*

income at a rate less than 100 percent. Under traditional welfare programs, if a recipient earns $100, his benefits are reduced by $100. He has no economic motivation to work since the tax on earnings is 100 percent. Under a negative income tax, however, benefits are reduced by much less than $100 — say $50, assuming the commonly proposed 50 percent tax rate.

The second feature that is important for this article is the use of objective criteria for determining eligibility and level of payments. Under traditional programs, the statute and regulations spell out only the most general standards for the level of benefits. Much is left to the discretion of administrators — caseworkers and supervisors. A negative income tax, on the other hand, is modeled on the positive income tax. It would provide more detailed criteria for setting benefits, thus sharply limiting such discretion and perhaps eliminating its more odious manifestations altogether.[4] The first feature is the one that is generally emphasized in public discussions as the most important distinguishing characteristic of the negative income tax. As will be seen, however, it is the second that is probably the more important for the purposes of this article.

To implement a negative income tax, particularly to assure the minimization of administrative discretion, it is necessary to develop sets of detailed rules covering such issues as what items are included in and excluded from net income (the definition of "income"), whose income reduces whose benefits (the definition of "family unit"), and how often payments are to be made and with reference to what period (the "accounting rules"). These issues, and particularly those relating to the accounting rules, may seem, on the surface, to be mere mechanical details that can be disposed of after more fundamental issues are resolved. Upon further reflection, however, it becomes apparent that choices made as to details may contribute significantly to the success or failure of the program. Decisions concerning accounting rules will reflect not only judgments about such considerations as practicality and effects on incentives, but also more fundamental policy choices that distinguish a pure negative income tax from more traditional welfare programs.

Tax and the Supply of Work Effort, 20 NAT'L TAX J. 353 (1967). *See also* Klein, *supra* note 2, at 777-81.

4 Eligibility is discussed at greater length in Klein, *supra* note 2, at 792-96.

The question of how often people must report their income, for example, has an important bearing on administrative feasibility as well as on acceptability of the program to its beneficiaries. The frequency-of-reporting problem is in turn related to the even more significant issue of the proper period for determination of level of benefits. Should benefits be based on the income of the past month, an average of the past twelve months, expectations about the next month or twelve months, some combination of these and other possibilities, or what? In answering this kind of question we must take account of administrative feasibility, responsiveness to need, incentives to work, and other effects. A naive solution could seriously undercut the most fundamental goals of the negative income tax approach to the relief of poverty. In this article we hope to provide some insight into the basic issues presented by problems of reporting and accounting, as well as some understanding of the major alternatives. We will also describe, first in general terms and then in detail, an accounting system that was developed for use in currently operating negative income tax experiments involving payments to about 1,000 families in New Jersey, Iowa, and North Carolina.[5] That accounting system embodies an innovation which we call the carryover concept. It permits the system to be highly responsive to need without sacrificing fairness, equity, and other goals. The carryover concept adds to the complexity of the already complicated accounting system. But rarely are simple formulas adequate to cope with complex social problems and, therefore, it should not be surprising that complicated rules are needed to implement a negative income tax. We believe that our accounting proposal does a very good job of promoting the welfare reform goals embodied in the negative income tax. And the experience thus far in the experiments seems to indicate that, despite its apparent complexity, it is a workable system.

Before proceeding to our discussion, one final introductory comment seems worthy of mention. Our proposal was developed in

5 The original experiment, in New Jersey, focuses on urban families. It is operated by Mathematica, Inc.; the University of Wisconsin Institute for Research on Poverty has certain supervisory and research responsibilities. The more recently inaugurated experiments in Iowa and North Carolina focus on rural families. They are under the sole aegis of the Institute. Both experiments are funded by the Office of Economic Opportunity.

connection with the negative income tax experiments. It could, however, quite readily be employed in a more traditional welfare program. Thus, we suggest that it would constitute a useful modification of President Nixon's Family Assistance Plan,[6] which in its present form adopts some, but by no means all, of the features of a pure negative income tax.

I. Accounting Alternatives in Negative Income Tax Administration

A. *Prospective v. Retrospective Reporting and Benefits Disbursement*

One of the most important and fundamental accounting issues is whether benefit levels should be determined prospectively or retrospectively. In other words, should we try to gear benefits to estimated future needs or should we base those benefits on past data? This question can be approached at a relatively abstract level by referring to concepts of the nature and function of the payments. Thus, if welfare payments are seen as charitable benefits designed just to permit people to meet their dire needs, then a prospective approach may seem natural. This is the approach of traditional welfare programs. On the other hand, one might think in terms of a "right" to a certain minimum level of income; payments then would discharge a liability for past deficiencies and a retrospective approach would seem appropriate. A retrospective approach is also more consistent with the notion that the negative and positive taxes should be similar.[7] Even using a retrospective viewpoint, however, one could develop a scheme of estimated future deficiencies akin to the quarterly estimated payments of

6 H.R. 16311, 91st Cong., 2d Sess. as revised and resubmitted to the Senate Committee on Finance by the Administration (June 1970). Section 442(c) (1) of this bill provides:

> A family's eligibility for and its amount of family assistance benefits shall be determined for each quarter of a calendar year. Such determination shall be made on the basis of the Secretary's estimate of the family's income for such quarter, and such estimate shall in turn be based on income for a preceding period unless he has reason to believe that modifications in income have or are likely to occur on the basis of changes in conditions or circumstances.

7 It is interesting to note that the Nixon Administration's Family Assistance Plan unaccountably seems to leave the prospective-retrospective issue open.

positive tax. Thus, an analysis at this level of abstraction may not take us very far.

At a more concrete level, a prospective approach may seem more efficient and humane since it can gear payments more precisely to current need than can a retrospective system. But a concern with a close matching of current needs and benefits may rest largely on the rather paternalistic (and in that sense not only inhumane but also, perhaps, in the long run, inefficient) notion that poor people are incapable of even relatively short-run planning and budgeting and that the government should protect them from their own folly. Needless to say, this attitude is inconsistent with the thinking of most negative income tax proponents.

There is, however, a more practical objection to the prospective approach. If the estimate is in error, and the error is in favor of the claimant, there will be an overpayment. Presumably this overpayment would have to be recouped. But the process of recoupment would be administratively burdensome and could result in considerable hardship to claimants. Under a retrospective approach this problem can be avoided. Moreover, under a prospective approach there would have to be some penalties for mistaken estimates resulting in overpayments; otherwise conscious abuse would be invited. But penalties high enough to deter such abuse would be unduly harsh if applied to an innocent mistake. Since the question whether a mistake was innocent or conscious would turn on the claimant's mental state, it is difficult to imagine that fair, objective criteria could be developed to distinguish the two kinds of overpayment. And a procedure that sought to achieve fairness by reliance on case-by-case judgments of low-level government employees with wide discretion is precisely the kind of discretion in traditional welfare administration[8] that the negative income tax is designed to avoid. Thus, on balance, the retrospective approach seems preferable.

Under this approach, the problem of emergency, short-run needs remains, but these needs are somewhat unpredictable so that even a prospective system would not eliminate that problem completely. Furthermore, the negative income tax would intentionally not be

8 See note 2 *supra*. Yet this seems to be just what is contemplated under the Family Assistance Plan *supra* note 6.

designed to meet many such needs. For example, deductions would not be allowed for home repairs, on the assumption that recipients should budget to meet them. Thus, payments would in no event respond to need for such repairs, and a separate program of loans and grants will be required to meet the needs of those who, for one reason or another, find their benefits inadequate to meet certain needs.[9]

B. *Timing and Responsiveness*

Another major accounting issue is the length of the time period on the basis of which benefits are calculated. Assuming a retrospective approach, should benefits be based on the income of the past month, the past quarter, the past year, or what? The same question arises under a prospective approach (the question then being the period over which income is predicted), but the issue is somewhat more critical when the approach is retrospective. Under a prospective approach, there must be a periodic reconciliation of reality with estimates; overpayments and underpayments are inevitable. Consequently, not much is lost by basing payments initially on the prediction of income for a short period (like a month) followed by a periodic reconciliation based on a longer period (like a year). With a retrospective approach, on the other hand, it becomes possible to eliminate the problem of overpayments and underpayments (except those due to reporting errors or fraud). This is a very substantial advantage — indeed, the critical advantage — of the retrospective system. But this advantage is lost if there must be an annual reconciliation of payments initially computed on the basis of the facts of only the preceding month. As we shall see, just such a reconciliation might be deemed necessary in the case of a recipient with a fluctuating income.

The advantage of using a relatively short period (like the preceding month or two weeks) for measuring income is that the level of benefits can be very closely related to current need; the system may be said to be very *responsive*. When income is lost, full benefits become available very quickly; when income rises, benefits are

9 While discussion of the nature of such supplementary arrangements is outside the scope of this article, recent demonstrations by welfare mothers and other groups demanding allowances for special needs under existing welfare programs reflect the emotional as well as the practical importance of this related matter.

reduced or eliminated just as quickly. At the same time, however, a simple, short accounting period favors a person whose income fluctuates widely from month to month (either because of seasonal or sporadic employment or because of bunching). Such a person is much better off with a short rather than a long accounting period and, thus, better off than a person with the same annual income earned in a steady occupation. For example, the seasonally employed farm laborer whose income on an annual basis would be high enough to eliminate all entitlement to benefits would receive benefits for the months in which he is not working. This creates a serious problem of equity between seasonal and steady workers with the same annual incomes. Given a fixed appropriation for the entire program, more needy persons would be deprived of benefits in favor of less needy persons.

The problem of fluctuating income may not be of great magnitude in the existing welfare system, but would become much more serious as coverage is broadened. Both the pure negative income tax and the President's Family Assistance Plan contemplate an end to categorical welfare programs. They would include many more families headed by males engaged in farming, construction work, fishing, and other such activities — in other words, many more of the working poor. Moreover, under traditional welfare programs the bias in favor of recipients with fluctuating incomes produced by a short accounting period is blunted to some extent by very stringent asset tests. Under an asset test, no payments are made to persons with any significant amount of consumable assets. Thus, if part of the seasonal income is saved, benefits will later be denied because of the availability of those savings. Although an asset test tends to eliminate the bias in favor of fluctuating incomes, it creates an even more disturbing bias in favor of spendthrifts as opposed to those who prudently budget their earnings. For this reason, a stringent asset test is one of the harsh features of traditional welfare programs that many negative income tax proposals seek to eliminate. Finally, in traditional welfare programs any potential bias in favor of persons with fluctuating income may in fact be eliminated by various kinds of ad hoc, individualized actions, and informal controls administered by caseworkers. But, again, this kind of personalized administrative process is a feature

of traditional welfare that the negative income tax seeks, for very good reasons,[10] to avoid.

One way to avoid the bias in favor of fluctuating income is, as suggested earlier, to make a year-end adjustment. Under this approach, payments would be made throughout the year on the basis of the income of, say, the preceding month. Then, at the end of the year, benefits would be calculated on a yearly basis. For families with fluctuating incomes the calculation on an annual basis would often reveal that an overpayment occurred. But one of our prime objectives is to eliminate the recovery of such overpayments so as to minimize personal hardship and administrative burden. We shall describe later an accounting system which retains virtually all the responsiveness of the short-period approach without sacrificing either objectivity or uniformity, without having to rely on an asset test, without leaving any bias in favor of fluctuating incomes, and without requiring year-end adjustments.

The short-period approach of the traditional welfare accounting system may be contrasted with the annual period used for federal positive income taxation. If a negative tax system borrowed the positive tax model (without quarterly estimates or withholding), income would be reported once a year. The level of payment to be made (either in lump sum or, more likely, in 12 or 24 installments) would be based on that return. This approach has the obvious advantage of minimizing the bookkeeping burden both on the individual and on the administering agency. It eliminates the problems arising from seasonal fluctuations in income (though not of fluctuation from year to year, if that is seen as a problem). It works perfectly well for a family that never has any income or one with a steady income from year to year. It can fail miserably, however, when income drops substantially, because in such cases there could be a delay of as long as a year before any of the family's new need is met. Conceivably, the prospect of a future payment would make it possible for the family to borrow enough to live on; perhaps the government itself could provide credit in such cases. But private credit could be very expensive and difficult to get. A government credit program would, after all, be just one more needs-tested

10 See note 2 *supra*.

program of a sort, and why have two programs if one will do? In the absence of a good system of private or public credit there would have to be some fairly substantial welfare program to meet interim needs. To maintain such a program would be to retain a significant part of the system that the negative income tax is designed to replace. Similarly, if income rose sharply, unneeded payments would continue for as long as a year. Thus, a simple one-year accounting period of the sort suggested does not seem to be an attractive alternative.

The unresponsiveness of the one-year period could be alleviated by borrowing another feature of the positive tax system — namely, the quarterly estimate. But, as we have indicated, that kind of prospective system creates serious problems of its own: recovery of overpayments, policing of estimates, and sanctions for erroneous estimates.

An approach that combines some of the virtues of both the twelve-month and the one-month period is the twelve-month moving average. Under this approach, income would be reported once a month.[11] Payments each month would be based on the average income of the preceding twelve months. Each month, as a new report is added, the earliest one would be dropped from the average. This approach would eliminate the problem of seasonal income fluctuation. In the absence of reporting error or fraud there would be no overpayments or underpayments as there would be with estimates of future income or with short-period payments and year-end adjustments. Such a system is more responsive than a simple twelve-month period, but is much less responsive than a one-month period. For example, suppose that a family's income was at the breakeven point (that is, the point at which income is just high enough so that no more payments are made) for a year or more and then dropped to zero and stayed there permanently. Its payment in the month after the drop would be one-twelfth of the full allowance, in the next month one-sixth, and so on, until the full allowance level was finally reached twelve months after the

11 Actually, it might well be more convenient for most of the working poor to report every four weeks, instead of monthly, since typically they will be paid weekly or biweekly. If a four-week reporting period is adopted, then thirteen periods rather than twelve would be averaged but the principles are the same.

drop initially occurred. Suppose, on the other hand, that income had been zero for a year and earnings suddenly and permanently increased to the breakeven level. The process would be reversed and payments (which were at the maximum level) would gradually be reduced and would finally end a year later.

Thus, the twelve-month moving average is not very responsive; it fails to make adequate payments when there is need and continues to make payments when need has disappeared. If the negative income tax is viewed simply as a program to relieve poverty, then this unresponsiveness is a serious weakness of the twelve-month moving average accounting system. However, another important goal of negative income taxation is to preserve incentives to work, and a reasonable amount of unresponsiveness may actually promote this goal. For example, for the man who is fully employed, the prospect of a delay between the loss of earnings and the receipt of full benefits might operate as an inducement to stay with a job that he would otherwise abandon. And, for the man who has been unemployed, the fact that his benefits will decline slowly as income rises means in effect that he will keep most of his paycheck for a while, which might make the prospect of working more attractive than it would otherwise be.[12] Thus, some degree of unresponsiveness may be a good compromise between the dual objectives of meeting needs and of maintaining incentives. The twelve-month moving average may seem excessively unresponsive to need, but a compromise between the two objectives can be achieved by using less than twelve months but more than one. For example, in the New Jersey and rural experiments the basic accounting plan uses a three-month moving average. The use of a three-month period reintroduces the problem of the fluctuating income, but that problem can be solved by use of the carryover concept.

II. The Carryover Concept

As has been suggested, the objective of the carryover device is to permit the accounting system to be highly responsive without

12 Of couse, we do not know to what extent, if any, this phenomenon would occur. That is why a twelve-month moving average accounting system is one of the experimental variables in the urban experiment.

creating a bias in favor of persons receiving income unevenly during the year. Because the idea is something of an innovation and may therefore not be readily grasped, we will devote the remainder of this section to describing it in general terms. For purposes of illustration, assume monthly reporting of income and monthly recomputation of benefits.[13] The idea, simply stated, is that income in excess of the breakeven point in any month creates a carryover account; subsequently, whenever current income falls below the breakeven point, payments are based not on current income alone but on current income plus income from the carryover account. The carryover account is reduced by the amount taken from it to bring the income of any subsequent period up to the breakeven point. The unused portion, if any, remains available for future use, but a carryover has a life of only eleven months after the month in which it arises and then expires.[14]

A metaphorical explanation may aid understanding: Imagine that any income above the breakeven point is put into a savings account. There is a separate savings account for each month in which income exceeds the breakeven point. Any time income falls below the breakeven point enough money is taken from the savings account or accounts to bring income up to the breakeven point. If current income plus all available income from the savings accounts is insufficient to reach the breakeven point, there is a "deficit," and payments will be made according to the size of the deficit.[15] After money has been in a savings account for eleven months, it becomes immune from seizure for current use.

The carryover device would also be applied in reverse to reporting periods in which deductions exceed gross income. For example, a farm might have a loss in a particular month or the family might

13 The device also works with other reporting and recomputation periods; it becomes unnecessary, however, with an annual, or a twelve-month moving average system. An annual system, by hypothesis, will even out seasonal fluctuation. The carryover concept could be employed in connection with an annual system if there were concern with annual fluctuations.

14 If the carryover were used to even out annual fluctuations then, like the net operating loss or charitable contribution carryovers under the positive income tax, it should have a life of several years.

15 Occasionally, money from several savings accounts will be available. Then a choice must be made concerning which account to dip into first—a choice which has important consequences for the total amount of benefits payable over the long-term. For further consideration of this problem, see text at notes 32-33 *infra*.

sustain medical expenses in excess of their income. Where deductions exceeded current and carryover income, a negative entry would be made in the carryover account; the negative account would offset any future income for up to eleven months.

Consider the case of a family of four with a basic allowance (which is the amount paid when income is zero) of $3,000 per year, or $250 per month, and a tax rate (which is the rate at which payments are reduced as income rises) of 50 percent. Assume that income is reported once a month and that payments are based on the income of the previous month.[16] The breakeven point (the level of income at which payments are zero) will be $6,000 per year, or $500 per month. If the family's income is never below zero (by virtue of deductions in excess of gross income) or above the breakeven point of $500, then the carryover device is irrelevant and payments are the same as they would be under a simple one-month accounting system. Thus, if the family's income in any month were zero, its payment the next month would be the maximum of $250. If the family income reached the breakeven point of $500 in any month, then it would receive no payment in the next month.

Now assume that the income of the family is from seasonal work and consists of $1,000 a month earned in each of the months of June, July, and August; that no income is earned in any other month; and that this pattern repeats itself every year. The outcomes are summarized in Chart A, which illustrates that, at the end of June, $1,000 is reported, $500 is used to reach the breakeven point for June, and the remaining $500 goes into a carryover account. No payment would be made in July, because of the June income. At the end of July and at the end of August, again $500 would be used to reach the breakeven point, and $500 would go into the carryover account. In September, a zero current income would be reported but carryover income is available. Assuming that the oldest carryover is used first,[17] $500 is taken from the June carryover account; September is therefore treated as a month in

16 This relatively simple system is most appropriate for illustrative purposes. Of course, the carryover concept is quite appropriately employed in connection with more complex systems, like the three-month moving average. The additional intricacies introduced by a moving average are discussed in the text at note 31 *infra*.

17 See note 15 *supra* and Rule 10 *infra*.

which $500 is earned, so that no payment is made in the next month. The same thing happens at the end of October and November. By December, however, the carryover accounts have been exhausted, so December income is zero and a full payment of $250 is made in January. Full payments continue through June, for a total of $1,500. This is the same total amount that the family would have received in a twelve-month period if its income had been spread evenly over twelve months. Moreover, payments would be timed well in relation to presumed need.

In the kind of case illustrated, the accounting system with the carryover concept is as responsive to *increases* in income as is a simple one-month accounting system. When income has been above the breakeven point and then falls, however, there may be a potentially serious problem of unresponsiveness to need. Looking at the facts used for illustration in Chart A, payments do not resume until the fourth month after income drops to zero. If the family, knowing the pattern of its income and its negative tax payments, prudently saves its "excess" income in June, July, and August, then those savings will be available to meet living expenses during the dry months in which no payments will be forthcoming. In such cases the savings account metaphor is apt, there is a behavioral justification for the carryover device, and there is no hardship. But what if the family had been earning, say, $800 a month for many months, expected that level of income to be permanent, and consequently had failed to save? There will then be an interim need that will not be met by the carryover system. Hopefully, the number of such cases will be small, particularly in light of the fact that many steady workers will have income from unemployment compensation when they lose their jobs. But some sort of residual welfare program may be necessary to meet emergency needs.

To illustrate a slightly more complicated situation, assume that the family earns its income from farming, that its only receipts are from the sale of a crop in August for $7,000, and that it has expenses of $2,000 in June and $2,000 in October and no other deductions. Assume further that a strictly cash accounting method is used.[18] These outcomes are summarized by Chart B. In June

18 Non-cash deductions, such as depreciation, will be considered at Rule 6 *infra*.

CHART A

	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May
Current income	1000	1000	1000	0	0	0	0	0	0	0	0	0
Plus: Income carryover	—	—	—	500	500	500	—	—	—	—	—	—
Total income after application of carryover	1000	1000	1000	500	500	500	0	0	0	0	0	0
Breakeven point	500	500	500	500	500	500	—	—	—	—	—	—
New income carryover	500	500	500	0	0	0	0	0	0	0	0	0
Payment entitlement, to be paid in next month	0	0	0	0	0	0	250	250	250	250	250	250
Carryover income balance	500	1000	1500	1000	500	0	0	0	0	0	0	0

CHART B

(Negative figures in parentheses)

	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May
Current income less current deductions	(2000)	0	7000	0	(2000)	0	0	0	0	0	0	0
Plus or minus income carryover	0	0	(2000)	500	2500	500	500	500	0	0	0	0
Total income after applying carryovers	(2000)	0	5000	500	500	500	500	500	0	0	0	0
Breakeven point	—	—	500	500	500	500	500	500	—	—	—	—
New carryover	(2000)	—	4500	—	—	—	—	—	—	—	—	—
Payment entitlement, to be paid in next month	250	250	0	0	0	0	0	0	250	250	250	250
Carryover balances	(2000)	(2000)	4500	4000	1500	1000	500	0	0	0	0	0

(the first column on the chart), since there is no current or carryover income, the $2,000 expense cannot be used to offset any income and therefore will create a *negative* carryover. June and July are zero-income months, entitling the unit to the full payment of $250 in the following month. In August, the current income of $7,000 is reduced to $5,000 by application of the $2,000 negative carryover created in June. From this $5,000, $500 is used to bring income to the breakeven point in August and the remaining $4,500 becomes a *positive* carryover. In September, $500 of the carryover is used to bring income to the breakeven point. In October, accordingly, $4,000 initially remains in the carryover account: $2,500 is used — $2,000 to offset the $2,000 of expenses and $500 to reach the breakeven point. The remaining $1,500 in the carryover account is used, $500 per month, to reach the breakeven point in November, December, and January. In February, there is no current income and no positive carryover. It is a zero-income month and entitles the unit to a full payment. The same is true in March, April, and May. For the year, net income is $3,000 and total payments to the unit are $1,500 ($250 per month for 6 months) — which, of course, is the proper result on an annual basis.

These presentations may make the system appear to be too unwieldy. However, all the calculations would be made by computers. It is true that the monthly job of collecting information and feeding it into the computer is a big one in the aggregate, but that kind of processing job cannot be avoided without abandoning responsiveness. The point is that the carryover device does not add to the processing burden; it adds only to the computational burden, which is easily handled by computers.

III. A Proposed Solution: Rules And Comments

It seems useful at this point to set forth the actual rules that we developed initially for use in the rural experiment,[19] together with explanatory comments. The rules utilize both a three-period moving average and a carryover.

19 Slightly modified versions of these rules are being employed in both the rural and urban experiments. See note 5 *supra*.

Rule 1. ***Definitions***

(a) "Net income" means income less allowable deductions. Net income may be either positive or negative.

(b) "Average net income" means the arithmetical average of net income for three consecutive periods. The average is computed by algebraically adding the net incomes for the three periods and dividing the sum by three. Average net income can be either positive or negative.

(c) "Breakeven point" is the amount of average net income which would reduce payments to zero.

COMMENT: The definitions of income and the enumeration of allowable deductions are outside the scope of this paper. It is sufficient to note that under the typical negative income tax proposal, income is far more comprehensively defined than for positive income tax purposes. For example, gross income includes imputed rent on owner-occupied homes and a provision for annual consumption of 10 percent of the unit's usable capital. These innovations create accounting problems which are dealt with in Rule 6. Many of the personal deductions granted under the positive income tax are not allowed.

Among the allowable deductions is a provision for deducting twice[20] the amount of positive income taxes paid, whether by withholding, declaration of estimated tax, or otherwise. The essential purpose is to reimburse federal, state, and local income taxes.[21] This might be done more directly by simply providing that taxes paid should be added to the basic payment prior to deduction of 50 percent of net income. However, it proved to be more convenient in defining the breakeven point and in drafting carryover provisions to treat taxes as a deduction. A *double deduction* is required because allowing only a single deduction would have the effect (under a 50 percent negative tax rate) of reimbursing only half the taxes paid.[22] Any refunds of income taxes

20 If a negative tax rate other than 50 percent is used, the multiple for the income tax deduction should be the reciprocal of the negative tax rate.

21 The reason for reimbursing taxes is to preserve the overall 50 percent tax rate. If there is a 50 percent negative income tax rate plus a 14 percent positive income tax rate, the unit winds up with less than 50¢ of each dollar earned if taxes are not reimbursed. Therefore the incentive effect of the plan is altered from that intended.

22 One might rationally propose a system which reimbursed only half the income

must be included in income (after being doubled) in order to prevent excessive reimbursement.

The computations required by Rule 1 are simple. If net income for the three periods to be averaged is minus $300, minus $600, and positive $150, average net income would be a negative $250 (i.e., ⅓ of the algebraic sum of −300, −600, and +150).

The breakeven point is also easy to compute. If the "basic allowance" in a period is $250 and the tax rate is 50 percent, the breakeven point would be $500. The meaning of a 50 percent tax rate is that payments are reduced by one-half of income. Therefore, when income reached $500, the payment would be zero.[23] A breakeven point is needed as a measuring rod against income to determine whether a carryover has been created, as well as to measure the consumption of the carryover in subsequent periods.

As some commentators have noted,[24] it is possible to conceive

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taxes rather than the full amount. Such a system would be consistent with preserving incentives if the recipient bases his decisions to work on "take-home" pay rather than pre-tax pay.

For example, suppose that, in the first period, a family earns $50 and pays income tax of $8; the take-home pay is $42. In the second period, it earns $60 and pays income tax of $10; the take-home pay is $50. Under the plan explained herein, which reimburses all income taxes, a benefit of $233 would be paid after the first period and $230 after the second period. (This assumes a $250 basic allowance and a 50 percent negative income tax rate.) This means that, after the first period, the family retains a total of $275 — $233 benefit plus $42 take-home pay. After the second period, the family retains $280 — $230 benefit plus $50 take-home pay. Consequently, from $10 additional pre-tax income, $5 was retained. But of $8 additional take-home pay, $5 was retained. Thus the negative income tax rate is only 37.5 percent (i.e. $3 out of $8), rather than 50 percent if the family views take-home pay as the relevant standard on which to base decisions to work. Thus the plan we propose may be more generous than necessary if the goal is to achieve the incentive effect of a 50 percent tax rate.

If we reimbursed only half of income taxes paid, rather than the entire amount, the benefit after the first period would be $229 and after the second period would be $225. Thus, after the first period, the family would retain $271 — $229 benefit plus $42 take-home pay. After the second period, the family would retain $275 — $225 benefit plus $50 take-home pay. Thus, of an additional $8 in take-home pay, $4 was retained. But, of an additional $10 in pre-tax pay, only $4 was retained. Consequently, the negative income tax rate would be 60 percent (*i.e.*, $6 out of $10) if the family views pre-tax income as the relevant standard on which to base decisions to work. Such a plan would be less expensive than the one we propose, but it might be too strict to produce the incentive effect of a 50 percent rate.

23 Under the President's Family Assistance Plan, the family is entitled to a tax-free "set-aside" of $60 per month. This would increase the breakeven point to $560 under the assumptions used in the text.

24 Cohen, *Administrative Aspects of a Negative Income Tax*, 117 U. PA. L. REV. 678, 681-82 (1969); *Model Statute* 271.

of two breakeven points. The "first" breakeven point is the level of income at which the payment would be zero if there were no reimbursement of positive tax. The "second" breakeven point is the level of income at which the payment would be zero assuming that taxes are reimbursed. In the range of incomes between the two breakeven points, the negative tax payment will be less than the positive taxes paid out; the sole function of the negative tax program in that range would be to offset part of the unit's positive tax burden. In other words, if the plan fully reimburses income taxes, then, at the first breakeven point, the negative tax payments will be equal to the positive tax payment. At the second breakeven point, the negative tax payment would be zero.[25]

The negative income tax plans used in the experiments fully reimburse income taxes. Hence the first breakeven point is of no particular significance. The second breakeven point is the significant one and the one utilized in these rules as a measuring rod against income to determine whether a positive carryover has arisen. All further references to a breakeven point mean the second breakeven point.

The definition and computation of the breakeven point is greatly simplified by treating taxes paid as a double deduction (the "double deduction approach") rather than ignoring taxes in the calculation of net income and then adding them on to the payment ("the reimbursement approach"). The complexity is created by the fact that the amount of positive tax may vary sharply for the same amount of income as defined for negative tax purposes. Whether the unit files its positive tax return separately, jointly, or as head of household; whether it claims the minimum standard deduction or itemizes deductions; how many personal exemptions it claims (which is based on the number of depen-

25 A negative income tax might provide for the reimbursement of positive taxes only up to the first breakeven point. However, assuming that some positive income tax was in fact being paid at the first breakeven point, the result would be a sharp discontinuity in the unit's position vis-a-vis the government. Suppose that, at the first breakeven point, the unit was paying $300 of income tax per annum; the unit would therefore receive $300 in benefits. If taxes were reimbursed only up to the first breakeven point and if the unit earned one additional dollar, it would receive no benefit and would be paying out more than $300 in taxes. This "notch" in payments seems highly undesirable since it provides a disincentive to earn that extra dollar.

dents and whether anyone is over 65 or blind) — all these factors and others cause differences between units of positive tax payments on the same amount of net income (as defined for negative tax purposes). Consequently, it is not possible to state in advance what the breakeven point will be if it is based on pre-tax income, as it is under the reimbursement approach. Nor will it be obvious from the amount of pre-tax income whether the unit is over the breakeven point, thus creating a positive carryover, or whether the unit is under the breakeven point, thus being entitled to payment.

The definition of the breakeven point under the double deduction approach is simple. It is the basic allowance times the reciprocal of the negative tax rate.[26] For example, assuming a basic allowance of $250 and a negative tax rate of 50 percent, the breakeven point is $500. It will be immediately clear whether net income is above or below the breakeven point.

As suggested above, the definition of breakeven point under the reimbursement approach is, in contrast, most awkward. It is that amount of pre-tax income which will generate positive taxes such that the taxes, plus the basic allowance, equal one-half of income. And it will be impossible to prepare in advance a schedule of breakeven points since they will vary for each unit.

Perhaps an example will clarify the foregoing. Assume a basic allowance of $250 and a 50 percent negative tax rate. Assume net income (before taxes) is $520 and taxes are $30. Under either approach, the unit is entitled to a payment of $20. Under the double deductions approach net income is $460 [pre-tax income ($520) less twice the amount of taxes paid ($60)]. It is immediately apparent that net income is below the breakeven point of $500. Under the reimbursement approach, it is not immediately obvious from the net income level of $520 (without some further arithmetic) that the unit is below the breakeven point. In fact it cannot be ascertained from these figures alone just what the breakeven point would be, except that, for this unit, it is above $520.

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26 Plus the amount of a "set-aside" if that device is used. See note 23 *supra*.

Rule 2.

The accounting period (sometimes referred to as "the period") is one month.

COMMENT: As previously noted,[27] it probably makes more sense to utilize a reporting period based on weeks, rather than months, since this is much more likely to conform to the pay period of employees. However, it may help to avoid confusion in this article if monthly integers are used. This corresponds to the examples used earlier in this article; also, there are exactly 12 months in the year.

Rule 3.

Net income of the preceding period will be reported every month. Payments will be made bimonthly.

Rule 4.

Payments will be based on average net income for the preceding three periods. Carryovers will be added to or subtracted from average net income as provided in Rule 9.

Rule 5.

Income and deductions will be reported under the same method of accounting used for positive income tax purposes. If no positive income tax return has been filed, the cash receipts and disbursements method shall be used. Net income from a trade or business (other than as an employee) may (but need not) be computed and reported once a year when the federal income tax return reporting such net income is filed (or would be filed if taxes were payable). Net income from a trade or business, if reported once a year, must be reported at the same time every year. Such net income shall be divided into twelve equal parts, one of which will be assigned to the period in which the calculation is made, and one of which will be assigned to each of the next eleven periods.

COMMENT: Most units will be composed of persons who have always used the cash method of accounting; however, there may be

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27 See note 11 *supra*.

some small tradesmen who use the accrual method for positive income tax purposes. It seems desirable to permit such persons to use the same method for negative tax purposes, particularly since they may well be reporting annually under this rule. In a unit with a member using accrual accounting, there may also be a wage earner who is on the cash method; the simplest approach is to let everyone in the unit report on the same basis used for positive tax purposes.

The reason for permitting the reporting of income from a trade or business (other than as an employee) once a year is to simplify bookkeeping. Small tradesmen probably do not close their books any more frequently than required for positive income tax purposes. The disadvantage of the annual accounting approach, however, is that it is quite unresponsive to need. Income in January 1970 may not be reported until April 15, 1971. Thus it will be reflected in the payment level for the first time 15 months after receipt. Nevertheless, the rule seems a necessary compromise with practicality.

Rule 6.

Income or deductions resulting from:

(a) the computation of imputed rent from an owner-occupied dwelling;[28]

(b) the computation of capital consumption income;[29] or

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28 In an effort to do equity, homeowners are charged in the negative income tax experiments with "rental" income from houses in which they dwell. Deductions are allowed for mortgage interest, property taxes, and a fixed amount for maintenance. Presumably, the estimate of fair rental value would not be made anew each month.

The problem of calculating the imputed net rental value of owner-occupied homes may be quite troublesome when a negative income tax is instituted on a large scale. Professor Tobin asserts that "most persons should be able to estimate the market value of their homes by correcting their property tax assessments for the generally known rate of underassessment in their locality." Tobin *et al.*, *supra* note 2, at 12. But former Internal Revenue Commissioner Sheldon S. Cohen comments that experience with positive taxpayers does not augur well for acceptable calculations of such a complicated sort by negative taxpayers. Also, given the notorious lack of uniformity in property tax assessments, Cohen predicts that Tobin's adjustment methodology would not produce very accurate results. Instead, he advances two alternative suggestions: simply ignoring imputed rent, or using an expert appraisal system, perhaps through an extension of the FHA's functions. Cohen, *supra* note 24, at 685-86.

29 A feature of most negative income tax proposals is a provision including in

(c) depreciation, depletion, or amortization of assets used in a trade or business or held for the production of income, and not otherwise accounted for under Rule 5,

shall be divided into 12 equal parts, one of which will be assigned to the period in respect of which the calculation is made and one of which will be assigned to each succeeding period until a recomputation is made. Such computations shall be made as of the beginning of the experiment and whenever a new unit is formed. Said computations shall be repeated not later than one year after the earlier computation on such date as the administrator shall determine (and on a corresponding date in succeeding years).

COMMENT: The items described in Rules 5 and 6 share a common trait — although they are enjoyed or suffered constantly, our accounting provisions cause them to be reported in an annual lump. These items — namely net income from annual reporting of a trade or business, imputed rent, capital consumption income, and depreciation deductions — might be accounted for in two different ways. They might simply be treated as the income or deduction of the period in which the calculation happens to be made. This might create a carryover which would be consumed sometime during succeeding periods. The alternative — which we have employed — is to prorate the amounts into the calculation period plus succeeding periods. This seems a more accurate reflection of reality since the items are being enjoyed or suffered continuously, not in a lump. It would seem unrealistic, for example, to create a positive carryover from capital consumption income which might reduce payments to zero in the calculation period and in, say, three subsequent periods and which would be ignored after the carryover runs out.

Rule 7.

A "positive carryover" is computed by subtracting the breakeven point from average net income (after any negative carryover is first subtracted from average net income).

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income a certain percentage of the unit's wealth, after certain items (such as assets actively employed in a trade or business) are excluded from the computation. *E.g., Model Statute* § 13(b)(4), at 324; see note 31 *infra*. As in the case of imputed rent, the calculations involved would not be made anew each month.

COMMENT: The computation of a positive carryover may be illustrated as follows: Suppose average net income is $800 and there is a $100 negative carryover. If the breakeven point is $500, a positive carryover of $200 is created[30] and no payments would be made to the unit. Note that there could never be both a positive and a negative carryover carried into a single period, since the two would have offset each other in a prior period.

Rule 8.

A "negative carryover" is created if average net income (after any positive carryover is first added to average net income) is a negative figure.

Rule 9.

A positive carryover is carried forward to the next succeeding period and added to average net income. If the sum again exceeds the breakeven point, the portion of the carryover not used to bring average net income up to the breakeven point shall be carried forward in the same manner to the next succeeding periods. A negative carryover is carried forward to the next succeeding period and subtracted from average net income. If the difference again is negative, the portion of the carryover not used to bring average net income down to zero shall be carried forward in the same manner to the next succeeding periods. No positive or negative carryover may be carried forward for more than 11 periods following the period in which it first arose. A carryover is deemed to arise in the most recent period of the three periods averaged under Rule 4.

COMMENT: We have already pointed out how a positive carryover can be likened to a savings account. Whenever income falls below the breakeven point, the unit is deemed to draw from the savings account enough money to bring income up to the breakeven point. In the case of a negative carryover, the unit hypothetically incurred debts when the carryover arose. It must allocate current income to pay the debts. Therefore, it is entitled to a payment notwithstanding its current income.

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30 Note that the carryover is applied after, not before, the averaging process is completed. This is explained in the comment to Rule 9, *infra*.

We have provided that a carryover expires after one year (*i.e.*, after the period in which it arose plus the succeeding 11 months). The carryover thus equalizes the positions of those with seasonal employment and those with steady jobs producing the same annual income. A longer expiration period, say 3 years, would equalize the positions of those whose incomes fluctuate from year to year (such as farmers) and those with a steady income year after year.

Thus a longer expiration period would improve the plan's performance in treating equally persons with the same long-term income. However, there are substantial drawbacks to lengthening the expiration period. One is, of course, the bookkeeping problem of maintaining carryover accounts over a long period of time — as well as explaining to recipients why they are receiving no benefits. Another problem with a very long carryover period is that the assumption underlying the positive carryover concept — *i.e.*, that the family will conserve funds from the high income period — tends to become unrealistic. Imagine, for example, a family with a steady income above the breakeven point whose income drops permanently to zero. Such a family is not likely to have set aside substantial sums for the lean period and may well become needy fairly soon. Even in the case of the person receiving a large nonrecurring payment, such as a recovery for a disabling injury, it appears unrealistic to assume that the family can budget the amount received to meet day-to-day needs far in the future. Thus, as the carryover period lengthens, it becomes more difficult to maintain that total income during that entire period is the most accurate indication of need at the terminus of that period. Similarly, the assumptions underlying the negative carryover becomes dubious as the lifetime of the carryover lengthens. Debts resulting from the loss period will eventually be paid off, compromised, or discharged in bankruptcy. Thus, all things considered, we felt that one year was a reasonable compromise.

Of course, in some cases, income over the breakeven point will be turned into assets which survive the expiration of the carryover. This windfall could in part be offset by a capital consumption provision present in many negative income tax plans, which annually treats as income a certain fraction, such as one-tenth, of

total capital (after certain exemptions, primarily for homes, business assets, and personal items, all within specified dollar limits).[31]

Several technical points about Rule 9 might be noted. We provide that the carryover is added to or subtracted from average net income — not added or subtracted from the sum of the net incomes of the three periods before dividing by three. The latter approach would clearly be wrong. The positive carryover was computed by subtracting the breakeven point from an averaged figure (not from the sum of the figures before dividing by three); if the carryover were added to the sum of the net incomes of the three periods before dividing by three, the effect would be to dilute by two-thirds the effect of the carryover in reducing benefit payments. The same is true of a negative carryover, which arises because *average* net income was negative.

Finally, the rules provide that a carryover will "arise" in the most recent of the three periods averaged. For example, assume that net income in five consecutive periods is $400, $400, $1300, $700, and $100. Average net income in period 3 would be $700 (⅓ of $400 + 400 + 1300). If the breakeven point were $500, a $200 positive carryover would be created and would be viewed as arising in the third of the three periods averaged. Average net income in period 4 would be $800 (⅓ of $400 + 1300 + 700) and a $300 carryover would arise from period 4. Average net income in period 5 would be $700 (⅓ of $1300 + 700 + 100) and a $200 carryover would arise in period 5. These carryovers would expire (if not used up in intervening periods) after the 14th, 15th, and 16th periods respectively.

Rule 10.

If a carryover is available from more than one preceding period, it shall be taken from the earliest available period.

COMMENT: There are at least three defensible procedures for determining the order in which carryovers are utilized. One approach — which is used in Rule 10 — might be called FIFO

31 *E.g.*, Model Statute § 13, at 323-24 ("[A] person's capital utilization income for a supplement period of a full year shall be 30 percent of the fair market value of his net available capital . . . ").

(meaning first-in, first-out — after one of the inventory costing procedures used for positive tax purposes). The notion is that the first carryovers created are the first ones used. From the recipient's point of view, this is the least favorable approach to positive carryovers. It is in his interest to have a positive carryover expire rather than be utilized, but the FIFO approach would, by using the oldest carryovers first, minimize the chances of expiration. By the same token, of course, FIFO represents the most favorable approach to negative carryovers from the recipient's viewpoint.

A second rational approach would be LIFO (last-in, first-out), in which the last carryover created would be the first one used. It maximizes the possibility of the expiration of a carryover. The FIFO and LIFO approaches can be illustrated in this example: Suppose positive carryovers of $500 and $750 arise in periods 1 and 2 respectively and assume a $500 breakeven point, a 50 percent rate and a $250 basic allowance. Then assume that income is at the breakeven point until the 11th, 12th, and 13th periods, when income is zero. If FIFO is used, the entire carryover from period 1 will be utilized in period 11; $500 of the carryover from period 2 will be utilized in period 12, and $250 in period 13. Thus there will be payments of zero after periods 11 and 12 and $125 after period 13. On the other hand, if LIFO were used, the payments after periods 11 and 12 would still be zero, but the payment after period 13 would be $250 — the basic allowance. This is because the period 2 carryover is used first — $500 in period 11 and $250 in period 12. The period 1 carryover is used to the extent of $250 in period 12, but the remaining $250 of the period 1 carryover then expires and no carryover is available for period 13.

Still a third approach to this problem might be called the "ratable drawdown." This approach would use a pro rata part of all available carryovers in the periods to which they can be carried. For example, assume again the example employed in the preceding paragraph in which carryovers of $500 from period 1 and $750 from period 2 are available. The $500 of carryover utilized in both periods 11 and 12 would be drawn 2/5 from the $500 carryover from period 1 ($200 in both periods) and 3/5[32] from the

32 In other words, $1250 of carryover is available; 2/5 of it ($500) arises from period 1 and 3/5 of it ($750) arises from period 2.

carryforward from period 2 ($300 in both periods). Following period 12, the remaining carryforward from period 1 ($100) would expire and only the remaining carryover from period 2 ($150) would be available for use in period 13. Therefore, after period 13 the unit would be entitled to a payment of $175.

It is difficult to make a rational choice from among the three methods. We rejected the ratable drawdown approach, even though it seemed the fairest compromise, because it is complicated and difficult to explain to the recipients. Since a computer would be making the calculations, however, it would be feasible to use the ratable drawdown approach in spite of its difficulty. As between FIFO and LIFO, we selected FIFO as being more consistent with the assumptions underlying the carryover approach. Carryovers last one year, and then expire; the premise is that a unit can reasonably be expected to conserve for one year the assets generated by a high-income period.[33] By using the oldest carryover first, FIFO maximizes the chances that a positive carryover will be used during its one-year life expectancy when it is hypothetically available to be drawn on. LIFO, on the other hand, maximizes the chances that a positive carryforward will expire, even though it would have been used up if an additional positive carryover had not arisen in a later period. Such an expiration would be a windfall which FIFO would tend to prevent. By the same token, of course, FIFO maximizes the chances that a negative carryover will be used, rather than expire, which again seems consistent with equity.

Rule 11.

For purposes of computing average net income under Rule 4, the income and deductions of the preceding three periods will be the income and deductions of persons who were members of the unit in the preceding period. Payments will be based upon family composition of the preceding period.

COMMENT: Among the most difficult choices involved in drafting a negative income tax plan are those encountered in defining the

33 In the case of a negative carryover, the premise is that debts incurred as a result of the loss period are still being paid off.

family unit. Once these decisions have been made, the accounting provisions must be integrated with the family rules. Rules 11 and 12 are designed for this purpose. Rule 11 provides that, in the event a unit increases in size (for example, by a marriage) or splits up (for example, by the departure of a son), the income and deductions of the three periods averaged will be the income and deductions of the persons who were members of the unit in the preceding period. In other words, a change in the family unit would immediately be reflected in the calculation of benefits. Thus, suppose that in each of periods 1, 2, and 3 the family's income was $300, of which $100 was attributable to the earnings of a son. In period 4 the son leaves and the family's income drops to $200. The average income for the family for periods 2, 3, and 4 would be only $200 since the son's departure in period 4 requires readjustment of the unit's income in the 3 periods averaged. The son, if he qualifies for benefits, would report income for each of the three preceding periods of $100.

Rule 12.

Upon initial enrollment, or whenever a new unit increases or decreases in size, carryovers arising from earlier periods will be computed by examining income and deductions for the preceding 11 periods, as though these rules had applied to such periods. In the event that a carryover arising in the preceding 11 periods cannot readily be allocated to the appropriate individual, it shall be allocated to the filer in the unit which reported the carryover.

COMMENT: At the beginning of the experiment, it is necessary to trace the financial history of each family unit for the preceding year to find out whether there is a carryover which must be taken into account in computing benefits. The same analysis is required if a unit increases in size or splits up, since a carryover must be allocated to the appropriate individual who may be joining or leaving the group. The administrative effort required to reconstruct and analyze earlier periods is a serious drawback of the carryover method. We feel these administrative costs are tolerable when compared to the benefits of the carryover system described in this article.

We further provide that, if a carryover cannot be conveniently allocated to the appropriate individual, *i.e.*, the person primarily responsible for the activities which generated the carryover, it will be allocated to the head of the unit reporting the carryover. The theory for this approach is that he is likely to have had control over the family's finances. Normally, however, it should be easy to decide who is responsible for the carryover since it would typically be attributable to the services of a single person or to property or a business owned by a particular person. For this purpose, personal services income and deductions would be attributed to the individual who renders the service without regard to community property laws.

Another defensible approach to the problem of allocation of carryovers would be to prorate them between the two units. For example, suppose that, in a family of a husband, wife, son, and daughter, the father's work as a farm laborer generated a positive carryover. Assume further that the son leaves home. One might divide the carryover 1/4 to the son and 3/4 to the remainder of the family. The argument in favor of this approach would be that the negative income tax treats the family as a unit. This assumes that income and benefits are shared. Thus, a carryover — which is attributable to income or deductions of an earlier period — should also be shared between family members without regard to who was responsible for it. This approach would be administratively simpler in one respect — because it obviates the need to decide who was responsible for the carryover — but more complex in another respect since it multiplies the number of individuals who bear carryovers with them when they change units.

We rejected the proration approach because we think it makes more sense to allocate the carryover to the person responsible for it. The assumption of sharing, which is useful when the unit is together, makes much less sense when it splits up. In the example in the previous paragraph, it seems more reasonable to assume that the "nest egg" represented by the carryover is in the control of the father who earned it. If the son qualifies as a new unit, it would be unjust to reduce his payments by reason of a carryover which represents resources to which he has no access. Moreover, the carryover is necessary to properly reflect the income of the

unit headed by the father, who probably will continue to earn seasonally. If the son takes a job with a steady income, a positive carryover is not appropriate in calculating his benefit level.

Obviously, it will not be feasible to decide in each case whether it would be more appropriate to utilize the responsibility model (*i.e.*, Rule 12) or the proration model (explained in the previous paragraphs). Our choice represents simply a guess that the responsibility model will be realistic more often than the sharing model.

Conclusion

The basic accounting features proposed here, *i.e.*, retrospective reporting and disbursements, the three-month moving average, and the carryover, seem well-suited to an efficient and equitable system of negative income tax administration. They should provide a sound framework, as preliminary experimental results have indicated. At the same time further refinements will no doubt be necessary.

To be successful, the system must contain sophisticated arrangements to respond to rapid changes in family composition and income and to account for such considerations as imputed rent and capital consumption income, yet its essentials must be fathomable by recipients, or at least their informational inputs must be relatively uncomplicated. In addition, accounting and disbursing periods should reflect the nature of human activities. As noted *supra*, the appropriate accounting period may need to be adjusted from one month to four weeks. Perhaps also the suggested schedule of monthly payments is unrealistic in view of prevailing consumption patterns. These and other problems, however, can be resolved in time. The importance of the present accounting proposal is that it holds promise as a workable administrative foundation for an operational national negative income tax program.

PROSECUTORS IN THE JUVENILE COURT: A STATUTORY PROPOSAL

SANFORD J. FOX*

Introduction

The figure of a public prosecutor has appeared from time to time in the course of the reform of juvenile justice in America. For example, New York's District Attorney was one of the leaders of the movement to institute a separate correctional system for children, supplying a detailed and sympathetic analysis of the plight of that city's juvenile offenders to a reform society which soon established the New York House of Refuge.[1] Similarly, near the close of the 19th century, when Illinois adopted its pioneer Juvenile Court Act, one of the most enthusiastic supporters of the new law was the Assistant State's Attorney for Cook County, who announced to a meeting of fellow prosecutors that the legislation heralded "the dawn of a new era."[2] Unlike earlier times, however, the significance of prosecutors in the juvenile court today is not a matter of their involvement in a reform movement. Rather, it is that the contemporary trend to guarantee children a wide range of constitutional rights in the juvenile court has necessitated a

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In September, 1969 Chief Justice Thomas H. Roberts of the Supreme Court of Rhode Island appointed a committee of judges, chaired by the Presiding Justice of the Superior Court, Hon. John E. Mullen, to investigate and report on the matter of prosecution personnel in the Rhode Island Family Court. At the request of Judge Mullen and the committee, the author drafted a report and statute expressing their views of what ought to be done. This paper is a reworking of that report, and although it owes much to the fruitful discussions had with Judge Mullen and his colleagues, there are a sufficient number of differences between the two documents so that only the author can be taxed with responsibility for what is proposed here.

1 REPORT OF A COMMITTEE APPOINTED BY THE SOCIETY FOR THE PREVENTION OF PAUPERISM IN THE SAID CITY ON THE SUBJECT OF ERECTING A HOUSE OF REFUGE FOR VAGRANT AND DEPRAVED YOUNG PEOPLE (1823) in DOCUMENTS RELATIVE TO THE HOUSE OF REFUGE 13-14 (N. Hart ed. 1832); B. PEIRCE, A HALF CENTURY WITH JUVENILE DELINQUENTS 79-80 (Patterson Smith Reprint 1969).

2 REPORT OF THE COMMITTEE ON JUVENILE COURTS OF THE CHICAGO BAR ASSOCIATION 6 (1899).

close examination of the role of the attorney who appears in juvenile court to present the state's case against children.

The problems arising from the arrival of the prosecutor in juvenile court are new. Indeed, until fairly recently, the nature of the judicial proceedings involving delinquent children hardly raised the question of whether there was need for the sort of presentation that characterizes the prosecution of an adult accused of crime. Traditional juvenile justice was administered with little concern for the proof of delinquency. The focus of the courts was almost exclusively on the rehabilitative needs of the child. The juvenile courts were comparable to a criminal trial devoted to the sentencing issue, with the guilty verdict simply assumed.[3] The need for a public prosecutor in such proceedings was virtually non-existent.

It was not only the limited nature of the substantive issues that made it inappropriate for prosecutors to appear in juvenile courts. Delinquency proceedings were also infused with a spirit of child welfare and an explicit denial of any punitive aims, so that the system was at pains to avoid the adversary atmosphere that would be created by formalizing the presentation of specific charges. The severity, deprivation, and punishment that did exist in the world officially created for delinquent children was simply not admitted.[4]

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3 *See* Tappan *Treatment Without Trial*, 24 SOCIAL FORCES 306-11 (1946); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909); THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 3 (1967).

The point is illustrated by the following description of the judicial process whereby boys were committed to the Chicago Reform School (1855-72):

> [W]hen a boy was arrested for an offense, he was first examined by the Police Magistrates, then remanded to the Superior Court, there to be examined immediately by one of the Judges as to whether he was a suitable subject or not. If on the examination of him and his parents (for the law required the parents or guardian) it was considered best for the welfare of the boy that he should come to the Institution, an order or mittimus was made out to that effect, charging him with no crime, recording no criminal proceedings against him, blotting out all previous charges, and consigning him as it were to a Boarding School, regardless of the enormity of the offense for which he was arrested.

FIFTEENTH ANNUAL REPORT OF THE BOARD OF GUARDIANS OF THE CHICAGO REFORM SCHOOL TO THE COMMON COUNCIL 24 (1871).

It is often mistakenly stated that the judicial emphasis on treatment rather than adjudication was a creature of the juvenile court movement at the turn of the twentieth century. The continuities of juvenile justice from its beginnings in the early 1800's, are traced in Fox, *The Reform of Juvenile Justice: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

4 *E.g.*, FIFTEENTH ANNUAL REPORT OF THE MANAGERS OF THE SOCIETY FOR THE

At issue today is the question of how much, if any, of the child welfare spirit is to survive in the juvenile courts. The optimism reiterated by Justice Fortas in *Gault*,[5] that application of the due process standard in juvenile courts need not lead to the requirements of a criminal trial is yet to be borne out. On the contrary, it appears that there has been a steady progression toward a replication of an adult criminal trial.[6] The only significant difference still outstanding is the absence of a jury in juvenile courts, an issue soon to be settled by the Supreme Court.[7] The introduction of detailed rules of criminal procedure has inevitably had a significant impact on the ability of juvenile courts to discharge their traditional rehabilitative function;[8] more significantly, the likely result of present trends is a strictly adversary process that loses sight of these traditional concerns of juvenile courts.

I. The Advent of the Adversary Trial in Juvenile Court

Most important in bringing about the adversary trial is the *Gault* rule that children must be supplied with legal counsel.[9] Defense attorneys themselves do not bring about the change; they must have rules to force observance of, and contentions to be contentious about. These they have.[10] Very often, of course, the rights children have are waived, either by themselves or by their lawyers.[11]

Reformation of Juvenile Delinquents in the City of New York 5-6, 45-47 (1840); *Ex parte* Crouse, 4 Whart. 9 (Pa. 1838).

5 *In re* Gault, 387 U.S. 1 (1967).

6 *See, e.g., In re* Winship, 397 U.S. 358 (1970) (Delinquency must be proved beyond a reasonable doubt); *In re* Carl T., 1 Cal. App. 3d 344, 81 Cal. Rptr. 655 (1969) (Witness identification testimony must conform to requirements constitutionally mandated in criminal trials); Piland v. Juvenile Court, 85 Nev. 489, 457 P.2d 523 (1969) (Juvenile entitled to a speedy trial); *In re* Lang, 60 Misc. 2d 155, 301 N.Y.S.2d 136 (Fam. Ct. 1969) (Finding of delinquency cannot rest on uncorroborated accomplice testimony).

7 *In re* Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), *cert. granted*, 397 U.S. 1036 (1970); *In re* McKeiver, 265 A.2d 350 (Pa. 1970), *prob. juris. noted, sub nom.* McKeiver v. Pennsylvania, 399 U.S. 925 (1970).

8 It can hardly be denied that such rules as the privilege against self-incrimination make it difficult to obtain information on which a treatment plan might be based. *See* 387 U.S. at 75-78 (Harlan, J., dissenting); *see* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 Sup. Ct. Rev. 167, 171.

9 387 U.S. at 34-42.

10 *See* cases cited *supra* note 6; Fox, The Law of Juvenile Courts in a Nutshell (in press).

11 See Handler, *The Juvenile Court and the Adversary System*, 1965 Wis. L. Rev.

But even where waiver occurs, the atmosphere derived from a formal hearing gives tone and color to the environment in which the waivers take place.

The child's lawyer can be an advocate provided he has a forum and laws. But he can be an advocate in adversary proceedings only if he has someone on the other side to be his adversary. Defense counsel in a case where the state is unrepresented may be able to frustrate the rehabilitative aims of the juvenile court by insisting that the full panoply of rights be accorded, such as the right to suppress illegally seized evidence.[12] This process, in itself, may have some child-welfare value in that it may demonstrate to the child that a member of the establishment can help rather than hurt. But the presence of defense counsel leads inevitably to the appearance of prosecutors whose aim is to hurt — to bring about the involuntary interference in a child's life that a finding of delinquency entails. Five years ago Judge Polier observed in New York that as a result of having defense lawyers in the Family Court, "there are invoked the legal procedures to which defendants in the criminal courts are entitled, the preparation of witnesses, cross-examination of the petitioners and complaining witnesses, and the preparation of briefs on questions of law."[13] This sharply differs from the legal talent generally available to the other side:

> In contrast, where a citizen files a petition alleging that an offense has been committed against him or his child, there is no one to interview the petitioner or complaining witnesses prior to the trial, no one to conduct the direct examination other than the judge, no one to cross-examine the respondent and his witnesses other than the judge, and no one to prepare a brief on questions of law. . . .
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> Thus, the present law results in a paradoxical situation. The criminal courts are increasingly required to secure counsel for defendants so that their rights will be protected in actions brought by prosecuting officers representing the People. The Family Court, on the other hand, provides counsel for defen-

7, 32-34, urging that the rights accorded children in the juvenile court be mandatory, and not subject to waiver.

12 *In re* Marsh, 40 Ill. 2d 53, 237 N.E.2d 529 (1968); *In re* L.B., 99 N.J. Super. 589, 240 A.2d 709 (Union County Juv. & Dom. Rel. Ct. 1968).

13 *In re* Lang, 44 Misc. 2d 900, 905, 255 N.Y.S.2d 987, 992-93 (Fam. Ct. 1965).

> dants and no personnel or machinery to assure the adequate presentation of cases against minors even when they are charged with acts which would constitute a felony if committed by an adult.[14]

It is clear that this kind of imbalance has created strong pressures in favor of strengthening the representation of the state. A recent survey of the fifty-three American jurisdictions[15] indicated that in thirty-six of the forty-six jurisdictions responding to the questionnaire, there is now an attorney who appears on behalf of the state in some cases.[16] Even without knowing the precise frequency of these appearances, one senses that the state of affairs reported by the Ohio Legislative Service Commission describes a very common experience:

> Prior to recent decisions of the U.S. Supreme Court respecting the rights of juveniles . . . proceedings in juvenile court were not regarded as adversary in nature. While the juvenile judge might require the county prosecutor to present the state's case in very serious matters, the usual practice was to designate an aide or employee of the court to fulfill this function. Some judges would allow neither a prosecuting attorney nor defense counsel in the court room. Since juveniles now have the right to counsel who cannot be excluded from the court room, and the fundamental procedural requirements and rules of evidence applicable to criminal actions generally must now be observed in juvenile matters, the present tendency is to rely more heavily on the county prosecutor, to insure proper presentation of the state's case.[17]

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14 *Id.*

15 The survey was conducted in the Fall, 1969 via a mail questionnaire by Angelo A. Mosca, Jr., Director of the Rhode Island Legislative Council. I am grateful to Judge Mullen for making the results of the survey available to me. It included the fifty states plus the District of Columbia, Puerto Rico, and the Virgin Islands.

16 In New York, as well, attorneys appear for the state when a police officer is the complainant, or when a serious school offense is alleged. *See In re* Lang, *supra* note 13.

17 Letter from Thomas R. Swisher, Staff Attorney, Ohio Legislative Commission, October 3, 1969 to Angelo A. Mosca, Jr. The prosecutor is not invariably described in the same role. In Arkansas, for example, he appears to have the same conflict of interest that characterized the early phases of juvenile courts themselves. "[W]hen appearing before the juvenile court, the prosecuting attorney does not act as a prosecutor but rather he appears in such cases both as a defender of the child and on behalf of the state and the community also." Letter from Kern L. Treat, Assistant Director, Arkansas Legislative Council, October 3, 1969 to Angelo A. Mosca, Jr.

II. The Impact of the Adversary Proceedings

One of the major positions of the advocates of abolition of traditional juvenile court informality and non-adversary proceedings has been that the informality is actually a detriment to effective rehabilitation. They have urged that any attempt to convince the child that his juvenile court experience can be beneficial is perceived as dishonesty and hypocrisy. Such a posture, it is argued, only tends to confirm in the minds of youngsters who need confidence in the adult world, that still more distrust is called for.[18] The validity of this assessment of children's perceptions is questionable, but even if it is accepted, that does not, of course, prove or imply that adversary proceedings are of positive value to treatment programs. It may well be the case that whether the court runs an adversary or a non-adversary enterprise, the result will be to alienate delinquent youth from efforts to gain their trust and to change their behavior. It is, therefore, necessary to understand in what respects the replication of criminal procedures results in the severance of normal ties between delinquents and the community. The public prosecutor is the embodiment of the severance operation. He is the official whose duty it is to insure that the accused youth is placed in the status of an outcast. Hence, a redefinition of his role may serve to minimize the undesirable side-effects of compliance with due process.

Jerome G. Miller has recently recalled the analysis of the juvenile court made by the sociologist George Herbert Mead, more than half a century ago.[19] Mead contrasted the informality of the juvenile courts of his day with the rigid formalisms of criminal trials, but not in terms of the substantive or procedural rules. He was rather concerned with the social function of these two proceedings, and the underlying emotional attitude of the community that each expressed. Articulating a view first made popular by Durkheim,[20] and presently a favorite theme of American sociolo-

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18 *See* Handler, *supra* note 11, at 20-21; Halleck, *The Impact of Professional Dishonesty on Behavior of Disturbed Adolescents*, Social Work, April 1963, p. 55. *See also* Paulsen, *supra* note 8, notes at 186.

19 Miller, *The Dilemma of the Post-Gault Juvenile Court*, 3 Fam. L.Q. 229 (1969), reflecting on Mead, *The Psychology of Punitive Justice*, 23 Am. J. Soc. 577 (1918).

20 E. Durkheim, The Rules of Sociological Method 67-69 (8th ed. 1964).

gists,[21] Mead noted that both the criminal and the delinquent were social assets for the community, in that each was a means whereby group cohesiveness was promoted and differences within the community temporarily laid aside. The drama of apprehending, trying, and punishing the criminal achieved this by reaffirming the norms and values of the law-abiding which the criminal had rejected. The juvenile court process, on the other hand, Mead saw as a unifying effort by the community to control deviant behavior, but, importantly, through trying to understand its causes. For the criminal and society, the experience was one of mutual aggression and hostility whereas these emotions were notably absent in dealing with delinquents. Of central importance was Mead's view that reliance on the criminal process destroys the attempt at comprehension and treatment:

> It is quite impossible psychologically to hate the sin and love the sinner. We are very much given to cheating ourselves in this regard. We assume that we can detect, pursue, indict, prosecute, and punish the criminal and still retain toward him the attitude of reinstating him in the community as soon as he indicates a change in social attitude himself, that we can at the same time overwhelm the offender, and comprehend the situation out of which the offense grows. But the two attitudes, that of control of crime by the hostile procedure of the law and that of control through comprehension of social and psychological conditions, cannot be combined. To understand is to forgive and the social procedure seems to deny the very responsibility which the law affirms, and on the other hand, the pursuit by criminal justice inevitably awakens the hostile attitude in the offender and renders the attitude of mutual comprehension practically impossible.[22]

A strong case can be made that Mead's assessment of the juvenile court was entirely wrong; that the frank acknowledgement of the punitive aspects of juvenile court treatment, officially recognized in *Gault*,[23] conclusively demonstrates that the same feeling of hostility and rejection that characterize society's view of the adult criminal also characterizes its perceptions of the delinquent child.

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21 *See, e.g.*, K. ERIKSON, WAYWARD PURITANS, A STUDY IN THE SOCIOLOGY OF DEVIANCE 5-23 (1966).

22 Miller, *supra* note 19, at 231.

23 387 U.S. at 27.

Recent reevaluations of the history that gave rise to the juvenile court at the turn of the century support this interpretation by suggesting that the Illinois 1899 Juvenile Court Act was hardly a matter of child welfare progress at all.[24] According to this view the current flood of adversary procedures into the juvenile court merely represents an institutionalization into the judicial process of the social hostility toward delinquents that has clearly been the major component of reform school life and which was always lurking below the dogma of child welfare in the court proceedings that lead to reform school commitments and other authoritarian interventions in children's lives. It is, in other words, all part of a whole, delinquents and criminals, institutions and courts.[25] Deviants, young and old, are condemned to a punitive ostracism in the interest of many social goals, including group solidarity. Certainly, contemporary society's perception of the youth culture as a hotbed of drugs and rebellion, suggests that latent community hostility toward deviant youngsters is, if anything, more deeply felt now than in the past.

It may be that Mead's "error" conclusively demonstrates the futility of trying to extract young people from the class of deviants whom society must scorn and place in the role of outcasts.[26] The fact that virtually every known society, even those described in fictional utopias,[27] contains deviants, is some evidence of the presence of inexorable laws demanding the creation of criminals and delinquents. But no one knows this to be true, and if there are inexorable elements in human affairs, surely there must be counted among them the urge to ameliorate the lot of one's deprived fellows. It is appropriate, therefore, to propose that efforts be made to defuse the hostility, in spite of the setback represented by the advent of adversary procedures. The proposals in the remainder of this article are founded on the premise that Mead was nonetheless correct in his assumption that, in the juvenile court, delinquent children could fulfill their role in unifying society without inevitably incurring its wrath.

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24 *See* Fox, *supra* note 3, at 1221-30.

25 *See* A. PLATT, THE CHILD SAVERS (1969), *passim*.

26 *See* K. ERIKSON, *supra* note 21, at 6-7.

27 *See* V. Fox, Deviance in Utopia, 1969 (unpublished Ph.D. thesis, Boston Univ.).

III. Restructuring Juvenile Justice

There are several ways of restructuring the juvenile court process to this end. There might be, for example, a more widespread processing of delinquency cases as mental illness or neglect proceedings.[28] Exploration should also be made of expanding the process of negotiating with the delinquent and his family, in an informal atmosphere that borrows heavily from the techniques of labor relations.[29] As an abstract proposition, it is also possible to attack directly the adversary nature of the proceedings by redefining the role of defense counsel so as to have him assume responsibilities as an agent of the court as well as the champion for his client.[30] There are, however, constitutional limitations on this approach,[31] and it unnecessarily sacrifices the potential gain in the child's trust of the adult world that providing a single-minded defense counsel may achieve. If the thrust and counterthrust of an adversary process are to be minimized, there are distinct advantages to dulling the rapier on the prosecution side.

The primary purpose of the draft statute accompanying this paper is to provide for the inevitable and imminent arrival of attorneys to represent the state in juvenile courts. It establishes an Office of Community Advocates and assigns to them the responsibility of invoking and directing the legal machinery for controlling juvenile delinquents. These lawyers are enjoined, however, to a posture of cooperation rather than antagonism. Perhaps the most important means for accomplishing this is the provision, based on the assumption that there is a Public Defender office in the state, which requires that there be a system of rotation between defense and prosecution work so as to minimize the development of a nar-

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28 Fox, *Responsibility in the Juvenile Court*, 11 Wm. & Mary L. Rev. 659, 682-84 (1970).

29 The use of consent decrees would facilitate this. *See* United States Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts 35-36 (1969); The President's Commission on Law Enforcement and Administration of Justice, *supra* note 3, at 21-22.

30 *See* Isaacs, *The Role of the Lawyer in Representing Minors in the New Family Court*, 12 Buff. L. Rev. 501, 507, 516 (1963).

31 *Accord*, "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*." Anders v. California, 386 U.S. 738, 744 (1967).

row prosecution outlook, and to infuse the Community Advocates with a feel for the legitimate concerns of the children charged with delinquency. Broad disclosure provisions contribute to the same aim of substituting cooperation for hostility. The act also proposes to transfer the intake process of the juvenile court from the court itself to the office of the Community Advocate so as to insure that the decision to proceed with formal court action is based on a thoroughly investigated report concerning the social and psychological needs of the child complained of. In short, the act attempts to recast the role of the prosecutor in juvenile court proceedings so that he does not become the driving wedge that separates the child from the community and thus defeats the welfare and rehabilitative functions of juvenile court process.

AN ACT TO ESTABLISH AN OFFICE OF COMMUNITY ADVOCATES

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Section 1. *Title*

This act shall be known and may be cited as the "[State] Community Advocates Act."

Section 2. *Purposes*

This act shall be interpreted so as to promote the following purposes:

(a) to serve the special ends of the juvenile court law as set forth in [citation to the purposes section of the juvenile court law];

(b) to insure a uniformity of policy in the legal representation of the community in cases in which a child is alleged to be delinquent or wayward [or unruly, or stubborn, or in need of supervision, etc.];

(c) to effectuate cooperation between the legal representatives of the community and counsel for children complained of in the juvenile court.

COMMENT: Since the earliest juvenile court acts, it has been a standard legislative practice to include a statement of purposes in statutes dealing with juvenile courts. The statements usually emphasize the major importance of the welfare and healthy growth of children, as well as protection of public safety. This section incorporates the state's general juvenile court goals, and adds that it is the intent of the legislature that there be a state-wide uniformity in the manner in which children are prosecuted. Subsection (c) provides, however, that a central aim of this uniformity is cooperation.

It is especially vital that this latter aim be emphasized in the enactment of this statute. The sections that follow establish a group of public servants who might easily be mistaken for traditional prosecutors whose overriding concern is the vindication of the penal law by conviction and punishment of violators. Were this to become their central orientation in carrying out the duties assigned them by this law, the special welfare goals of juvenile court actions would be lost. The state would, in effect, have abandoned its efforts to maintain a judicial process reflective of the special status of children. Much is at stake, because this act completes the "lawyerization" of the juvenile court that has thus far proceeded to the point of affording defense counsel for anyone who wants it and of including sporadic representation of the state. There will now be lawyers on both sides whose full time commitments will be to the juvenile court. The risks of a wholly adversary proceeding, including the histrionics and contentiousness that frequently characterize adult criminal trials, are obvious. There is, accordingly, a need to assert at the outset that while a basic goal of the legislation is to provide for community representation, it is also a central policy to minimize the loss of emphasis on child welfare.

The title of the act reflects an effort to select a name for the new group of lawyers that would not be burdened with connotations of criminality and hostile prosecutions.

Section 3. *Establishment*

There is hereby established an Office of Community Advocates. It shall be comprised of one Chief Advocate and such Assistant Advocates and staff, including investigators and persons trained in social work, as shall hereinafter be authorized. The Chief and Assistant Advocates shall devote full time to these positions. On or before January 31 in the year 1971, the Governor, with the advice and consent of the Senate, shall appoint the Chief Advocate who shall hold office for the ten years next commencing on the first day of February next following his appointment. The Assistant Advocates and authorized staff shall be appointed by the Chief Advocate. As hereinafter used in this act, the term "Community Advocate" means either the Chief Advocate or an Assistant Advocate.

COMMENT: This section seeks to provide dignity and security for the position of Chief Community Advocate by making it a ten year gubernatorial appointment. The number of assistants would have to be determined by the caseload of the state's juvenile courts. The staff of the office should include full time investigators as well as clerical and secretarial positions. Social workers are required to perform the intake function which is made the responsibility of this office by Section 6. The requirement that the lawyers devote full time to the juvenile court reflects the present trend in that direction, and will necessitate a sufficiently large appropriation for salaries to attract high quality persons.

Section 4. *Requests for Petitions*

Whenever any person, including a law enforcement officer, desires to have filed in the juvenile court a petition under [citation to section of the juvenile court law authorizing petitions] alleging that a child is delinquent or wayward, he shall so advise the Community Advocate assigned under Section 5 to receive such requests from the place where the delinquency or waywardness is alleged to have occured. Except as provided in Section 6, no person other than a Community Advocate may sign and file such a petition.

COMMENT: The Community Advocate has the central responsibility for initially receiving community complaints that a particular child is delinquent or wayward. Many delinquencies will

continue to be brought to the attention of the police before the advocate learns of them, and many will go no further than the police. This act does not affect the discretion of law enforcement officers to refuse to process complaints beyond an informal warning to a child, or to overlook minor instances of misconduct that might, technically, bring a child within the jurisdiction of the juvenile court. Where a private citizen is the victim of an offense, however, he may, in effect, appeal a police decision not to proceed by taking his allegations to the Community Advocate. It is expected that in most instances the close relationship between police and the advocate will result in the latter backing the police decision. Section 6 provides, in such situations, and in any others in which the advocate refuses to file a petition, that a formal appeal may be taken to the juvenile court.

This section provides that complaints be lodged where the acts occurred in order to facilitate the location of witnesses or other initial investigations. Venue provisions of the juvenile court act may, however, require that the petition be filed where the child lives.

A major advantage of having the Community Advocate responsible for bringing formal petitions to the juvenile court is that his legal skill will minimize the times when petitions have to be dismissed because they have been defectively drafted. His training will also enable him to detect complaints that fall short of allegations which would bring a child within the jurisdiction of the court. In such cases there could be either be further investigation to determine if additional facts would establish the jurisdiction, or the case could be dropped. For these reasons, a lawyer is needed in the intake phases of the juvenile court process.

Section 5. *Assignment of Community Advocates*

All requests for petitions of delinquency or waywardness which are within the geographic jurisdiction of the juvenile court of [the city or county in which the largest number of these cases arise] shall be received by the Chief Advocate. The Chief Advocate, in consultation with the Chief Judge of the juvenile court [or other official responsible for administrative aspects of the juvenile courts], shall assign Assistant Advocates to receive said requests from such locations within

the state as appear to him to be necessary to carry out the purposes of this act.

COMMENT: Administrative responsibilities are assigned to the Chief Advocate, including placing his assistants in such places as the volume of business requires. He should be located at the busiest court in order to provide him the maximum experience in carrying out the terms of this act, which he can then pass on to the assistants in formal or informal training sessions. The consultations with the official who deals with court administration will provide an opportunity for the Chief Advocate to learn of other perceptions of how this novel enterprise is progressing. This will be especially valuable if the official is a judge of the juvenile court.

Section 6. *Action on Requests for Petitions*

(a) Upon receipt of a request for a petition alleging that a child is delinquent or wayward, the Community Advocate shall cause an investigation to be made of the social and psychological circumstances of the alleged offense and offender. Within 30 days of the receipt of such a request, he shall:

(1) draft and sign a petition concerning such child, and file it in the appropriate juvenile court; or

(2) following consultation with the person making the request, give notice to such person of his decision not to file a petition in the juvenile court, together with a statement of the reasons therefor and notice of his right to appeal said decision in person or through counsel. In such a case, the person making the request may, within 10 days following receipt of such notice, appeal the Advocate's refusal to the juvenile court to which the petition would have been submitted. The question presented by such an appeal is whether there was a reasonable basis for the refusal. If the Community Advocate's decision is reversed, the petition shall be submitted and the case shall proceed as if it had originally been submitted by the Community Advocate.

(b) In deciding whether or not to submit a petition, the Community Advocate shall be guided by whether there appears to be legally sufficient evidence upon which a finding of delinquency or waywardness could rest; and, if there is, whether there is the likelihood, without resort to juvenile court action, of adequate parental discipline or treatment. In the absence of such sufficient evidence,

the Community Advocate shall not recommend or encourage parental discipline or treatment.

(c) The Community Advocate, at any time prior to a hearing on a petition he has filed, may seek permission of the court to withdraw the petition by submitting in writing the reasons for seeking such withdrawal.

(d) When a request for a petition is submitted to the Community Advocate by a law enforcement officer who has received notice of the events underlying the request from a private citizen, the consultation provided for in subsection (a)(2) of this section may be with both the officer and the citizen, or either of them. The notice of refusal to submit a petition shall, however, be given to both. The appeal may be taken by either the officer or the citizen, or both.

COMMENT: Intake inquiries in the office of the Community Advocate are provided for in this section. Since the decision whether to file a petition should turn on extra-legal as well as strictly legal considerations, it is best to remove intake from its traditional place as part of the court apparatus. The alternative, locating the Community Advocate within the court structure so that the total decision could be made there, is not desirable since it would handicap the independence of the Community Advocate. Under the provisions of section 6(b) the results of the investigation are available to counsel for the child.

The decision to provide an avenue of appeal for those who are denied a petition by which to present their complaints against a child is based on the need to insure that the court system remains the primary community resource for the settlement of serious grievances. An administrative decision, by the police or the Community Advocate, not to press for court action, always contains the potential for causing people to resort to self-help. The formality of a court decision, even if it upholds the view that no petition is called for, provides the sort of opportunity to be heard that can quiet passions. The scope of review is a narrow one, however, so that there would be little tendency for the intake responsibility to be shifted to the court.

Subsection (b) sets forth, in general terms, the criteria that are to guide the advocate's decision. It provides the basis for him to obtain the agreement of the child and his family that steps will be taken to prevent the recurrence of further delinquencies. This

can only be done, however, when there is a strong enough case against the child so that a finding of delinquency or waywardness could legally be made by the court. In the absence of this sort of restriction, there would be the risk that restrictions would be negotiated with the child or his family under the threat of court action, even if the likely result of the action would be a dismissal of the petition. Such unauthorized treatment programs have long been inveighed against.

During any intake investigation or discussion concerning the child that takes place under the authority of this section, the advocate and his staff would be required to observe all of the constitutional restrictions on the law enforcement process, such as those relating to obtaining statements or seizing evidence.

Section 7. *Filing Petitions*

(a) After the filing of a petition by the Community Advocate, the juvenile court shall notify, in writing, the child and his parents, guardian, or person in whose legal or physical custody the child then is, of such filing. The notice shall include a copy of the petition, and a clear and simple statement to the effect that if the child is indigent, as defined in Section 10, a Public Defender will forthwith represent the child. The notice shall further include the name, address, telephone number, and office hours of the Public Defender.

(b) Either before or after filing a petition, the Community Advocate may request medical, psychological and other expert assistance from the [state agency, such as a Department of Mental Health]. Counsel for the child shall be informed of the substance of any written reports resulting from such assistance, or made as part of the investigation conducted under section 6(a). Subject to the requirements of subsection (c), copies thereof shall be provided upon request.

(c) Upon request by counsel for the child, the Community Advocate shall furnish him with the names and addresses of persons whom he knows to have relevant information, provided, however, that when there is a reasonable basis to fear that such persons will be subject to intimidation if their identities are disclosed, such information may be withheld. In such a case, and upon motion by counsel for the child, the court shall redetermine whether grounds for withholding the information exist.

(d) The Community Advocate shall furnish counsel for the child with a description of such physical evidence as is relevant and in his possession, or the location of which he knows. Upon request, counsel for the child shall be permitted a reasonable inspection of such evidence.

COMMENT: Most of the cooperation with counsel for children that is required of the Community Advocate by this act is provided for in this section. In some cases it may be that the intake inquiry would call for the kind of specialized help that can be provided by a mental health agency. Similarly, after the petition has been filed it may appear that medical or psychological factors are involved that were undetected earlier. Since all of this bears on the remedial action that might need to be taken, the information is opened to the child's lawyer, in the expectation that he will either find weaknesses in it which the Community Advocate ought to know of, or will accept it and join in any effort to bring treatment to the child; in either case, his knowledgeable participation is an asset to the ultimate goal of dealing effectively with the problems that may underlie delinquent conduct.

Counsel for the child should be free, nonetheless, to obtain his own expert assistance and evaluations. Where there is privately retained counsel, this would generally be available on a private basis as well. Provision should be made in the legislation and appropriation pertaining to the Public Defender's office for providing this kind of help so that indigent children are not disadvantaged.

Subsection (d) sets conditions on the availability of the names of witnesses. Although the instances are few in which the problem of intimidation will be important, it is necessary to insure that when they do appear, protection can be provided. Provision is made for resort to a judicial decision on the matter when the Community Advocate and the child's counsel cannot agree on whether the latter is entitled to the identities of witnesses.

The central purpose of this entire section, including subsection (a) which seeks to encourage an early meeting between the child and the Public Defender, is to encourage an atmosphere of cooperation between the community and the child in trouble. It is in

everyone's interest that the problems presented by children who have demonstrated themselves to be disturbing elements of one sort or another in the community, be resolved with the least antagonism and emotional alienation. The Community Advocate is authorized to refuse to file petitions in order to serve the end of preserving as much harmony as possible between the child and the state. Where petitions must be filed, this end is not abandoned, but is sought primarily through having the advocate disclose the information on which he acts and the disposition he pursues (see section 8(b)). Although the child's attorney constitutionally must be free to represent him with a single-minded zeal that takes account of the desire to remain free of any official restrictions, this posture need not necessarily result in a total criminalization of the juvenile court process so long as the community's agent is restrained from taking a similar adversary posture.

Section 8. *Court Appearances*

(a) Unless otherwise directed by the Chief Advocate, each Community Advocate shall, when there is a hearing on a petition submitted by him, represent the community and seek to prove its allegations. The Chief Advocate shall assign an Advocate to represent the community in hearings on all other petitions.

(b) If there is a finding of delinquency or waywardness, the Community Advocate shall, unless excused by the court, make a recommendation as to disposition which shall take due account of his personal knowledge of the case. The objective of the recommendation shall be to secure not the most severe disposition in each case, but rather a disposition entailing the minimum restriction on the child best calculated to insure that delinquency or waywardness will not continue. To this end, he shall consult with the probation service and, if requested by counsel for the child, shall disclose the disposition recommendation he proposes to make to the court and the reasons therefore.

COMMENT: Normally, each advocate who files a petition would be trial counsel in that case. Where he has refused to file one, and has been overruled in this by the court (see section 6(a)(2)), it may be wise to have the case tried by an advocate who has not already

decided that it should not be tried. Authority to assign an advocate in such circumstances is contained in subsection (a). Some advocates may develop an expertise in particular types of cases, such as those involving drug abuse. This is another reason for granting to the Chief Advocate discretion to assign trial counsel.

Subsection (b) requires that the Community Advocate become actively involved in the disposition phase of the proceedings. The disclosure requirements are consistent with the central policy of making the proceedings as minimally adversary as possible. Criteria are provided for reaching a decision as to the disposition to be recommended. The need to seek a cessation of the child's unlawful conduct is conditioned by the requirement that the least restrictive means to that end be proposed to the court.

Section 9. *Rotation to Public Defender Office*

(a) Upon the completion of one year of service as an Assistant Advocate, a person may be assigned by the Chief Advocate to duty as an attorney in the Office of the Public Defender; provided that such an assignment is with the permission of the Chief Public Defender [or other official responsible for supervising defense services]. Such an assignment shall be for no less than six months and no more than one year.

(b) While assigned to the Public Defender Office, the Assistant Advocate shall not appear or otherwise become involved in the defense of any case in which he was connected during his term as an Assistant Community Advocate. Upon his return to duty with the Office of Community Advocates, he shall similarly not become engaged in any aspect of a case in which he participated in any way while he was assigned to the Office of the Public Defender; and the attorney-client privilege shall be strictly observed.

COMMENT: The hazard of Community Advocates becoming unduly prosecution-oriented is one that needs to be guarded against, for the attitude of the persons who undertake the duties set forth in this act is as important in preserving a welfare outlook in juvenile court proceedings as are any of the rules that might be enacted. Providing a tour of duty with the Public Defender is a way of meeting this problem. The assignments must be with the

consent of the Public Defender, but need not have the assent of the Assistant Advocate himself. The individual who becomes most enamored with presenting charges against children is the one who might most need exposure to the other side of things. The period in which the assignment will be effective is flexible, but is within limits that recognize that a minimum period is needed to absorb adequately the nature of the work; while a maximum insures that the expertise that is developed returns to the Community Advocate's Office.

The rotation of attorneys, as provided for in this section, presents a potential conflict of interest in cases where both offices are involved. To insure against the conflict arising, strict prohibitions are placed on any sort of participation on both sides.

Section 10. *Determination of Indigence*

(a) A child is indigent for purposes of this act if, taking account of the financial resources of his parents or guardian and the availability of these resources to contribute to the costs of his defense, he is unable, without undue financial hardship, to provide for full payment of legal counsel and all other expenses necessary for his representation.

(b) In any case in which the parents or guardian of a child so determined to be indigent are able, but unwilling, to provide for such full payment and expenses, they shall be liable to the state for the reasonable value of the legal and other expenses expended on behalf of the child.

COMMENT: This section confronts a problem of great difficulty, for in a real sense, every child is indigent, except those few who have become beneficiaries of some financial settlement at an early age. Yet, it is an unfair burden for the taxpayers as a whole to provide for the legal expenses of children whose parents can well afford to bear these expenses. It would be easy enough to define indigence in terms of the resources of the parents or guardian, but in the infrequent situation where these adults are unwilling to meet the financial demands of their child's plight, the state cannot leave the child without counsel. The standard of indigence is cast, there-

fore, in terms of a general rule looking toward the ability of the parents or guardian, but permitting indigence to be found when financially able adults refuse to make their resources available. In such cases, subsection (b) creates a liability on their part to reimburse the state.

A MODEL ACT FOR THE REGULATION OF LONG-TERM HEALTH CARE FACILITIES

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Introduction

Over the past decade nursing homes have been the most rapidly expanding sector of the institutional health industry. Nursing homes[1] which accounted for approximately 350,000 institutional

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This model statute is the outgrowth of a report on the regulation of nursing homes in Massachusetts prepared by Yale Legislative Services. See, Yale Legislative Services Report to Mass. Public Health Dep't Concerning the Licensing of Long-Term Care Facilities (May 1970) (copies available from Yale Legislative Services, Yale Law School). The report was produced by the authors and Yale graduate students Nancy J. Gellman, Frederick H. Hyde III, Brian D. Sullivan, and Lawrence L. Tancredi.

The authors also wish to thank Professors Robert B. Stevens, Thomas I. Emerson, and Ellen A. Peters of the Yale law faculty, Doctors Alfred L. Frechette, David R. Kinloch, and Ann H. Pettigrew of the Dep't of Public Health of Massachusetts and Frank C. Frantz, nursing home specialist at HEW, for their valuable aid to the project.

1 There is no one accepted definition of "nursing home." Most nationwide surveys of nursing homes and nursing home beds, however, are on the basis of the Public Health Service's operational definition:

> A facility or unit, however named, which is designated, staffed, and equipped for the accommodation of individuals not requiring hospital care but needing nursing care and related medical services prescribed by or performed under the direction of persons licensed to provide such care or services in accordance with the laws of the State in which the facility is located.

PUBLIC HEALTH SERVICE, NURSING HOME STANDARDS GUIDE 1 (1961). The origin and early development of nursing homes has been attributed to many factors, including "the increased lifespan and the resultant large aged population, changes in family structure and living patterns in which older relatives are shelved, the increasing prevalence of chronic diseases, the disrepute into which the public almshouse had fallen, and the emergence of a new philosophy in the Social Security Act of 1935 and

beds in 1961 had grown to about 765,000 in 1969.[2] Of the 2.4 billion dollars spent for nursing home care last year, 74.5 percent represented payments from public tax revenues.[3] Federal support for nursing homes is extensive, including three programs of payment for care[4] and two programs in aid of construction.[5] States participating in the federally sponsored medical assistance program support nursing homes at least to the extent of making a contribution, ranging from 17 to 50 percent, toward the reimbursement of skilled nursing homes providing services to medical assistance recipients.[6]

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its amendments." E. Eagle, *Nursing Homes and Related Facilities: A Review of the Literature,* 83 PUB. HEALTH REP. 673 (1968) [hereinafter cited as Eagle]; *see also* Baney & Solon, *Ownership and Size of Nursing Homes,* 70 PUB. HEALTH REP. 437-44 (1955). For a history of the development of nursing homes in one state with national overtones, *see* W. THOMAS, NURSING HOMES AND PUBLIC POLICY: DRIFT AND DECISION IN NEW YORK STATE (1969) [hereinafter cited as THOMAS]. The new philosophy of the Social Security Act of 1935 was the favoring of noninstitutional relief. For a discussion of this development and its consequences, see *id.* at 32-77.

2 43 HOSPITALS 17:165 (1969). For an informed analysis of growth trends during the nineteen sixties, see Levey & Lubow, *Survey of Long-Term Care and Extended Care Facilities,* NURS. HOMES, May 1968, at 27-30.

3 116 CONG. REC. H7620 (daily ed. Aug. 3, 1970) (speech of Rep. David Pryor).

4 The Social Security Administration provides for the reimbursement of nursing homes certified as extended care facilities for services to social security beneficiaries. Social Security Act §§ 1812, 1861(h)-(2), 42 U.S.C. §§ 1395d, 1395x(h)-(2) (Supp. IV 1969); 20 C.F.R. §§ 405.1101-405.1137 (1970) (conditions of participation for extended care facilities). The Social and Rehabilitation Service administers a medical assistance program under which the federal government pays no less than 50 percent and no more than 83 percent of the cost of skilled nursing home care and other health services provided recipients of public assistance and, at a state's option, also medical indigents. Social Security Act §§ 1902(a)(10), (28), 1903, 1905, 42 U.S.C. §§ 1396a(a)(10), (28), 1396b, 1396d (Supp. IV, 1969); 34 Fed. Reg. 9784 (1969), 45 C.F.R. § 249.10 (1970) (amount and scope of medical assistance); 35 Fed. Reg. 6792 (1970), 45 C.F.R. § 249.33 (1970) (standards for payment for skilled nursing home care). In addition to the medical assistance program, the Social and Rehabilitation Service administers an "intermediate care facilities program" under which the federal government shares the cost of reimbursement by states to nursing homes for care of recipients of public assistance who do not require skilled nursing home services. Social Security Act § 1121, 42 U.S.C. § 1320a (Supp. V, 1970); 35 Fed. Reg. 8990 (1970), 45 C.F.R. § 234.130 (1970) (assistance in the form of institutional services in institutional care facilities).

5 The Public Health Service administers the so-called Hill-Burton program under which the federal government contributes toward the cost of construction of nonprofit hospitals, long-term care facilities, and other health institutions. 42 U.S.C.A. §§ 291-2910 (Supp. 1970), 42 C.F.R. §§ 53.1 to 53.134 (1970) (administration of Hill-Burton grant program). The Federal Housing Administration administers a mortgage insurance program which, unlike the Hill-Burton program, is open to profit as well as non-profit facilities. National Housing Act § 232, 12 U.S.C. § 1715w (Supp. V, 1970); 24 C.F.R. § 200.22 (1970).

6 See Social Security Act § 1905(b), 42 U.S.C. § 1396d(b) (Supp. IV, 1969).

In this article the authors propose comprehensive state regulatory legislation as a replacement for existing licensing acts which govern nursing homes. The proposal is best understood in terms of both the history of present licensing programs and the criticism which they have generated.

Most state licensing statutes date from the early 1950's.[7] Enactment was in response to the Social Security Amendments of 1950 which required that every state have a program for the licensing of nursing homes as a condition of participation in the old age assistance program.[8] At present, every state licenses both nursing homes and hospitals.[9] Many states, in addition, license other categories of facilities[10] which, for the most part, resemble nursing homes more than hospitals in that their purpose is to provide long-term, chronic care rather than short-term, acute care. These facilities fall into two principal categories: (a) chronic disease hospitals which generally provide a more intense level of long-term care than nursing homes, and (b) personal care facilities, also called "rest homes" or "sheltered care homes," which provide a lesser degree of care.[11] Because of variations from jurisdiction to jurisdiction, however, the licensure category of a facility is only

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7 Eagle at 676.

8 For a treatment of changes made in the Social Security Act in 1950 and their background, see THOMAS at 94-99.

9 As in the case of nursing homes, the federal government provided impetus for state licensing of hospitals. *See* Public Health Service Act § 623(a)(7), ch. 958, § 2, 60 Stat. 1041, 1044 (minimum standards for the maintenance and operation of hospitals required as part of state Hill-Burton plan), *as amended*, 42 U.S.C. § 291d(a)(7) (1964).

10 Massachusetts, for example, provides for the licensing of "rest homes," "infirmaries maintained in towns," and "charitable homes for the aged" in addition to nursing homes. MASS. ANN. LAWS ch. 111, § 71 (Supp. 1970). [Throughout this article in footnotes the authors have drawn from their experience with the licensing program for health institutions in Massachusetts to illustrate propositions made in the commentary. Unless indicated otherwise, the authors believe examples drawn from their Massachusetts experience to be valid in other jurisdictions as well.]

11 For examples of statutes providing for the licensing of personal care facilities in addition to nursing homes, see CONN. GEN. STAT. ANN. § 19-32 (1958) (called "rest homes" and "homes for the aged"); ILL. ANN. STAT. ch. 111½, § 35.16 (Smith-Hurd Supp. 1970) (called "sheltered care homes"); MASS. ANN. LAWS ch. 111, § 71 (Supp. 1970) (called "rest homes"); N.J. STAT. ANN. tit. 30, § 11-8 (Supp. 1969) (called "boarding homes for sheltered care"); N.C. GEN. STAT. § 130-9(e) (1964) (called "homes for the aged and infirm"); PA. STAT. ANN. tit. 62, § 1001 (1968) (called "personal care homes for adults").

one indication, often inaccurate, of the type and amount of service available at the facility.[12]

Criticism of state licensing programs has been vocal and persistent. After a study of state legislation, a group of experts in the health care field concluded in 1966 that "the consensus of informed opinion appears to be that very few jurisdictions approach the possession of a complete nursing home statute, adequately administered."[13] The staff of the Senate Finance Committee reported this year that authorities overseeing health facilities are disregarding the letter as well as the spirit of federal statutes and regulations establishing minimum standards for nursing care institutions.[14] In the House, Rep. David Pryor of Arkansas has charged that "[t]he system of inspection and enforcement of regulations in our nursing homes is inadequate, inefficient, and grossly ineffective."[15]

In offering a model law for the licensing of long-term care facilities, the authors recognize that an adequate statutory basis for state regulation is only one requirement for effective enforcement of health care standards. Other factors critical to the success of the regulatory scheme include the adequacy of rates which the state sets for the maintenance of publicly-aided patients, the extent of financial support which the legislature accords the agency responsible for policing standards, and the degree of competence and dedication which the agency brings to its duties. Without an adequate statutory basis, however, even the most energetic and well-funded agency will encounter severe difficulties in enforcing health care standards.

The model statute presented here differs in three principal respects from current nursing home licensing laws and from previous efforts to develop model nursing home standards.[16]

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12 *See* Eagle at 676-679.

13 COUNCIL OF STATE GOVERNMENTS, 25 SUGGESTED STATE LEGISLATION 15 (1966). *See also Hearings Before the Subcomm. on Long-Term Care of the Senate Special Comm. on Aging*, 89th Cong., 1st Sess., pts. 107, *passim* (1965) (also entitled CONDITIONS AND PROBLEMS IN THE NATION'S NURSING HOMES).

14 *See* STAFF OF THE SENATE FINANCE COMM., 90TH CONG., 1ST SESS., MEDICARE AND MEDICAID: PROBLEMS, ISSUES, AND ALTERNATIVES, *in* 2 MEDICARE & MEDICAID GUIDE ¶ 26,070, at 9169-9179 (Feb. 13, 1970).

15 116 CONG. REC. H7621 (daily ed. Aug. 3, 1970) (speech of Rep. David Pryor).

16 Model nursing home standards generally available include: Model Nursing

(1) The act covers all long-term care or "chronic" facilities and not merely nursing homes. In applying the generic term, "long-term care facility,"[17] the act merges non-functional distinctions developed over the past forty years and enables the state regulatory authority to create distinctions based on function. In the authors' view, a major defect in existing statutes is the extent to which they reflect historic developments in the health industry rather than embodying a functional analysis of medical systems. The act thus purposely departs from current licensing terminology.

(2) The act defines several degrees of care. The standards set forth for various levels of care differentiate facilities functionally on the basis of the degree of care provided. The application of the concept of differing degrees of care is designed to promote efficient utilization of manpower and equipment in facilities and to promote appropriate care and treatment of patients. The draftsmen believe that no regulatory system providing for only a single level of care can assure adequate care for all patients. The past performance of nursing care facilities has shown that a requirement for only one level of care is too simplistic a regulatory approach for meeting patients' differing health needs.[18]

(3) The act provides a comprehensive scheme of regulation. In addition to the licensing power on which most current statutes

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Home Licensing Act, in 25 COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, at 15-31 (1966) [hereinafter cited as Model Nursing Home Licensing Act]; JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, STANDARDS FOR ACCREDITATION OF EXTENDED CARE FACILITIES, NURSING CARE FACILITIES, AND RESIDENT CARE FACILITIES (1968) [hereinafter cited as JCAH Accreditation Standards]; PUBLIC HEALTH SERVICE, NURSING HOME STANDARDS GUIDE (1961).

17 Long-term care facility is one of the classes of health institutions for which aid is available under the Hill-Burton program. 42 U.S.C.A. § 291a(a)(1) (Supp. 1970). As defined by the federal government for the purpose of making construction grants, "long-term care facility" covers chronic disease hospitals and nursing homes but does not extend to personal care facilities as does this act. 42 U.S.C.A. § 291o(h) (Supp. 1970); *see also* 42 C.F.R. § 53.1(f) (1970).

18 In Massachusetts, the state health department is empowered to classify nursing homes, MASS. ANN. LAWS ch. 111, § 72 (Supp. 1970), but no system of classification currently exists, although one is planned. Reliance on one level of care has led to "quantitative deficiency for personal care or limited nursing care facilities, and qualitative deficiency in those facilities providing intensive rehabilitation or convalescent care." Address by David R. Kinloch, Director of Medical Care, Department of Public Health of Massachusetts, at Annual Meeting of Nursing Home Administrators, December 9, 1969.

place exclusive reliance,[19] this suggested act empowers the state regulatory authority to make plans for the orderly development and distribution of health facilities. Also, it confers upon the agency a hierarchy of sanctions, ranging from monetary assessments to license revocation, to permit the agency flexibility in enforcing standards. In areas such as licensing where regulatory agencies have had long experience, the act establishes detailed procedures and standards. In areas such as patient care review, where agencies have had little experience, the act establishes only a framework which can be filled in as the agencies gain experience.

Jurisdictions considering enactment of a statute based on this model act should design additional sections to deal with the problems of severability, effective date, and the handling of the transition period as this statute replaces previous provisions regulating long-term health care facilities.

A MODEL ACT FOR THE REGULATION OF LONG-TERM HEALTH CARE FACILITIES

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19 *See, e.g.*, CONN. GEN. STAT. ANN. §§ 19-32 to 19-42 (1969); ME. REV. STAT. ANN. tit. 22, §§ 1811-1821 (Supp. 1970); MO. ANN. STAT. §§ 198.011-198.170 (1962); N.C. GEN. STAT. § 130-9(e)(1), (3) (1964); PA. STAT. ANN. tit. 62, §§ 1001-1059 (1968). *See also* Model Nursing Home Licensing Act §§ 3, 6, 8; PUBLIC HEALTH SERVICE, NURSING HOME STANDARDS GUIDE ch. 3, at 5-11 (1961).

Section 1. *Declaration of Policy*

(a) It is the policy of _____:

(1) to promote the efficient utilization of resources in order to ensure appropriate care and treatment of individuals who require medical and medically related services in an institutional setting but whose condition is not so acute as to require care in a hospital;

(2) to safeguard the rights, interests, and well-being of patients in long-term care facilities;

(3) to promote the development of long-term care facilities throughout the state as needed; and

(4) to ensure the efficient administration and effective enforcement of this act and regulations established hereunder.

(b) This act shall be known and may be cited as the Long-Term Care Facilities Act.

COMMENT: This section underscores the four principal themes of the act, which are: (i) Efficient utilization of resources and appropriate care of patients. To realize this goal, the act provides in sections 10 to 12 for the classification of facilities and patients on the basis of degrees of care needed or provided. (ii) Protection of patients. Sections 13 to 18 establish a variety of mechanisms designed to benefit patients through the imposition of specific duties on

licensees and administrators and through the dissemination of relevant information about long-term care facilities. (iii) Development of facilities on basis of need. Section 4 authorizes the department to determine the need for beds used for patients requiring long-term care, and other sections require that the department utilize need as a criterion in reviewing applications for construction permits and requests for increases in quota or changes in classification. (iv) Efficient administration and effective enforcement. Sections 6 to 8 provide procedures and specific standards for the issuance of construction permits and licenses for facilities and sections 19 to 27 establish a range of enforcement devices, from administrative assessments to license revocation.

Section 2. *Definitions*

(a) For the purpose of this act the following definitions shall apply unless the context or subject matter requires a different interpretation:

(1) "Adult day care center" means any premises announced, advertised, or maintained for the purpose of providing protective and personal services for not more than eighteen hours a day to three or more adults who, because of physical or mental infirmity, require such services, but who do not require medical and medically related services provided by a hospital or long-term care facility.

(2) "Clinic" has the same meaning as "clinic" under [supply proper reference].

(3) "Construction permit" means a permit, issued to a particular person and not transferable, which authorizes the construction or modification of a long-term care facility at particular premises or the conversion of particular premises into a long-term care facility.

(4) "Department" means the Department of _____ of the state of _____.

(5) "Dietitian" has the same meaning as "dietitian" under [supply proper reference].

(6) "Distinct part" means a wing or floor of a building or a contiguous or adjacent building.

(7) "Hospital" has the same meaning as "hospital" under [supply proper reference].

(8) "Identifiable unit" or "unit" means an entire section of a long-term care facility, including a wing, floor, or ward, and where approved by the department, contiguous or adjacent rooms.

(9) "License" means a permit, issued to a particular person and not transferable, which authorizes the operation of a long-term care facility at a particular premises. "License" shall include a conditional license and an application with the force and effect of a license pursuant to section 6(d).

(10) "Licensed practical nurse" has the same meaning as "licensed practical nurse" under [supply proper reference].

(11) "Long-term care facility" or "facility" means any institution, the purpose of which is to provide convalescent, rehabilitative, nursing, or resident care to three or more individuals, admitted for overnight stay or longer, who require such care.

(12) "Nutritionist" has the same meaning as "nutritionist" under [supply proper reference].

(13) "Patient" means an individual under care in a long-term care facility.

(14) "Person" means an individual and every form of organization, whether incorporated or unincorporated, including any partnership, corporation, trust, association, or political subdivision of the state.

(15) "Physician" has the same meaning as "physician" under [supply proper reference].

(16) "Registered nurse" has the same meaning as "registered nurse" under [supply proper reference].

(17) "Self-care unit" means a suite or set of rooms in a building, with necessary appurtenances, suitable to be occupied as a dwelling unit by one or more individuals who do not require medical or medically related services as provided in a hospital or long-term care facility.

(18) "Sponsor" means the person or persons, agency or agencies, legally responsible for the welfare and support of a patient.

(b) The department may define in regulations any term used herein which is not expressly defined.

COMMENT: As the breadth of the definition of "long-term care facility" in subsection 2(a)(11) makes clear, the act is meant to cover the usual three categories of chronic medical institutions: personal care facilities, nursing care facilities, and chronic disease hospitals.

Under the definitions for "construction permit" and for "license," the department must limit all permits and licenses issued to

particular premises. Both construction permits and licenses are nontransferable.[20]

Subsection 2(a)(8) introduces the concept of an "identifiable unit." This is done so that various provisions of the act may be applied only to appropriate portions of facilities which propose to provide more than one degree of care pursuant to section 11. The definition of "distinct part" in subsection 2(a)(6), however, will apply only in the case of licensees who wish to operate a long-term care facility in conjunction with a hospital or a clinic pursuant to section 9.[21] Since most states will want to use existing definitions for "hospital" and for "clinic," the draftsmen have defined these terms by reference to the enacting jurisdiction's licensing acts. Definitions are included, however, for "adult day care center" and for "self-care unit" for states which wish to follow the draftsmen's recommendations for the development of medical complexes.[22]

Subsection (a)[23] provides for incorporation by reference to the enacting jurisdiction's definitions for "physician," "registered nurse," "licensed practical nurse," "dietitian," and "nutritionist."

Section 3. *General Powers of Department*

(a) In accordance with the provisions of this act, the department shall as public convenience, interest, or necessity may require—

(1) determine the need in the state for various degrees of long-term care, for long-term beds, and for long-term care facilities, and in accordance with such determination, develop a plan for the distribution of long-term beds and long-term care facilities in the state;

(2) establish requirements, in addition to any prescribed hereunder, for the distribution, construction, and operation of long-term care facilities;

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20 For similar provisions restricting a facility license to a particular person and for particular premises, see ALASKA STAT. § 18.20.040 (1970); ILL. ANN. STAT. ch. 111½, § 36.25 (Smith-Hurd 1966); WASH. REV. CODE ANN. § 18.51.050 (1961).

21 For a similar provision, *cf.* Social Security Act § 1861, 42 U.S.C. § 1395x(j) (Supp. IV, 1969) (distinct part of institution may be certified as extended care facility).

22 Pennsylvania provides for the licensing of adult day care centers among other health facilities. PA. STAT. ANN. tit. 62, §§ 1001-1002 (1968).

23 For similar definitions, see NEW YORK, N.Y., HOSP. CODE & REGS. §§ 2.01(g), (h) (1963) [hereinafter cited as N.Y.C. HOSP. CODE].

(3) issue construction permits and licenses, subject to revocation for cause, to persons who meet the applicable requirements of this act;

(4) have authority to inspect any long-term care facility and any records maintained therein at any time provided that a license has been issued or an application has been filed for such facility; whenever the department wishes to inspect other premises and access is not permitted it shall apply to the _____ court for a warrant authorizing inspection, and such court shall issue an appropriate warrant if it finds reasonable ground for inspection;

(5) establish and implement procedures, including informal conferences, investigations, and hearings, to enforce compliance with the provisions of this act and with regulations issued hereunder, and have authority to subpoena witnesses and documents, to administer oaths and affirmations, and to examine witnesses under oath for the conduct of any such investigation or hearing;

(6) establish and implement procedures, including periodic evaluation and classification of patients by medical review teams, for the supervision of patient admissions, transfers, and discharges;

(7) consult with applicants, licensees, administrators, and other interested persons for the purpose of facilitating improvements in the extent, quality, and appropriateness of care available;

(8) conduct studies on long-term care and long-term care facilities, make informational material on long-term care and long-term care facilities available to the public, and conduct seminars, workshops, and other educational programs concerning long-term care and long-term care facilities;

(9) make such rules, regulations, and orders as may be necessary to carry out the provisions of this act; and

(10) delegate authority to its employees and agents to perform all functions of the department except the making of final decisions in adjudications.

(b) No employee or agent of the department shall inspect the premises of any building other than a facility specified under subsection (a)(4), except where the owner has granted permission therefor or where the department has obtained a warrant therefor.

COMMENT: This section confers upon the department the powers it needs to perform the regulatory duties prescribed in the act, including primary functions such as the issuance of construction

permits and licenses and also supplementary functions such as investigations and research studies.

Subsection (a)(4) authorizes inspections of long-term care facilities at any time without the requirement of a court-issued warrant.[24] The department derives its jurisdiction for inspections from the submission of an application for licensing of particular premises. These inspections are distinguishable on at least two grounds from administrative searches which have been held to violate the fourth amendment of the Constitution.[25] First, an inspection is not unreasonable even if it is a "search" within the meaning of the fourth amendment, both because the context is a licensed industry subject to a comprehensive scheme of regulation[26] and because the purpose is to protect the rights and interests of patients who are the only persons actually present in the regulated premises.[27] Second, every applicant and licensee is on notice that,

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24 For similar provisions authorizing the inspection of facilities, *see generally* ARIZ. REV. STAT. ANN. § 36-442.02 (Supp. 1969) (as deemed necessary); COLO. REV. STAT. ANN. § 66-4-4 (1964) (free access at any time), *accord*, KAN. STAT. ANN. § 39-935 (1964); CONN. GEN. STAT. ANN. ch. 333, § 19-38 (1969) (at any time); VT. STAT. ANN. tit. 18, § 2007 (1968) (at all times without notice).

25 Camara v. Municipal Court, 387 U.S. 523 (1967) (warrantless search under municipal housing code held in violation of fourth amendment); See v. City of Seattle, 387 U.S. 541 (1967) (warrantless search under municipal fire code held in violation of fourth amendment).

26 The Court in See v. City of Seattle, while reversing appellant's conviction for refusing to permit a warrantless search for fire code violations in his commercial warehouse, stated that it did not "question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product." *Id.* at 546. The most recent case to reach the Supreme Court involving a warrantless search is Colonnade Catering Corp. v. United States, 90 S. Ct. 774 (1970). Because the Court held that the Internal Revenue Service had no statutory authority to make a forcible search without a warrant, there was no need to rule whether the instant search of appellant's liquor storeroom was reasonable. *Id.* at 777. The Court noted, however, that "Congress has broad authority to fashion standards of reasonableness for searches and seizures." *Id.* Three justices (Burger, Black, and Stewart), in dissent, disagreed with the Court's statutory construction and concluded that the warrantless search, although forcible, was not illegal under federal liquor laws or under the fourth amendment. *Id.* at 779 (Black, J., dissenting).

27 To the extent that a portion of a facility is the private dwelling of an employee or owner, the occupant is protected under the fourth amendment against any warrantless search of areas occupied by him as a residence. Section 3(a)(4) itself makes no distinction between the right to inspect that part of the premises maintained as a facility and the right to inspect any other part, such as the apartment of an employee. In such instances, limitations on the right of inspection will depend upon the particular circumstances.

upon filing an application, he has entered a licensed and regulated industry in which the protections governing private dwellings are not applicable.[28]

Subsection (a)(5) authorizes the department to conduct informal conferences, hearings, and investigations as may be necessary to enforce the provisions of the act[29] and to inquire fully into circumstances which arouse its concern or suspicions.[30]

Subsection (a)(6) gives the department specific authorization to do all that is necessary to evaluate and classify patients under section 12. The power to classify patients on the basis of an evaluation is one of the principal innovations of the act. Because this power will for some persons represent an infringement upon the traditional concepts of the physician-patient relationship, the language of this subsection specifically authorizes the department to use medical review teams to evaluate patients. Thus there is no question whether this procedure is within the scope of power granted the department.

Subsection (a)(7), in giving the department the authority to consult with applicants, licensees, administrators, and facility staff,[31] sets forth what is presently the primary role of health agencies in many jurisdictions.[32] Under this act, however, emphasis is placed upon the orderly and efficient development of health resources and upon the enforcement of statutory and regulatory requirements.

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28 For a consideration of this proposition, see Colonnade Catering Corp. v. United States, 410 F.2d 197, 203 (2d Cir. 1969). To ensure that applicants have actual and not merely constructive notice of § 3(a)(4), every application should include a conspicuous statement of the department's right of inspection.

29 *Compare* § 3(a)(5) *with* Model Nursing Home Licensing Act §§ 8(e), (f), (g).

30 Investigatory powers are particularly important because evidence of compliance with regulatory requirements is often within the sole possession of the licensee and its employees. Personnel time records, for example, may be falsified. *See* Laurel Lodge of Medford Nursing Home, Mass. Dep't Pub. Health, April 4, 1970, in which it was found that the time records of two different nursing homes showed that on various occasions the same person worked in the different facilities at the same time.

31 *Compare* section 3(a)(7) *with* Model Nursing Home Licensing Act § 8(e) (1966). *See also* FLA. STAT. ANN. § 400.14 (1960); TENN. CODE ANN. § 53-1315 (1966).

32 Each of the authors has heard inspection personnel in various states comment that license revocation is an unacceptable enforcement device because the movement of patients which it requires both affects adversely the health of patients and aggravates a chronic shortage of long-term beds. Agencies which have accepted these arguments against exercising the authority conferred on them by statute have consigned themselves in effect to the role of consultants to the health industry.

In line with the statutory premise that adequate information is an inexpensive and relatively effective means of protecting the public and encouraging quality care,[33] subsection (a)(8) empowers the department to disseminate information which will educate and protect the public,[34] such as a directory of facilities, ratings of facilities, and a description of the degrees of care. Under present conditions public information, other than that passed by word of mouth, is limited largely to the advertising material of the facilities and trade associations.

Subsection (a)(9) gives the department general powers necessary to implement provisions of the act.[35] By specifically empowering the department to delegate authority to its employees, the subsection eliminates distinctions between the department and its employees. In the case of final decisions, however, the subsection is limited by section 24(f) which provides that final decisions in adjudications can be made only by persons who form the department. However, the making of recommended decisions can be delegated to employees.

Section 4. *Determination and Certification of Need*

(a) The department shall annually determine the need in such service areas as the department has divided the state for long-term beds in each degree of care, and on the basis of such determination, establish and publish a plan for the distribution among service areas of long-term beds in each degree of care. The department shall determine need on the basis of such factors as existing and projected utilization patterns and shall delineate service areas on the basis of such factors as population distribution, natural geographic boundaries, and trade and transportation patterns.

(b) As public convenience, interest, or necessity requires, the de-

33 For a discussion of the limitations on dissemination of information as a protective device, see this commentary at section 15, *infra*.

34 The agency charged with the supervision of long-term care facilities is obviously in a unique position to disseminate information about long-term care facilities on a comparative basis, but the draftsmen's experience is that this information generally either is not prepared on a comparative basis or is treated as confidential and withheld from the public. Several states have made the withholding of information on particular facilities a statutory policy. *See* CONN. GEN. STAT. ANN. § 19-39 (1958); IOWA CODE ANN. § 135B12 (Supp. 1970); KAN. STAT. ANN. § 39-934 (1964); MISS. CODE ANN. § 6964-10 (1952); TEX. REV. CIV. STAT. ANN. art. 4442c, § 13 (1966); WASH. REV. CODE ANN. § 18.51.120 (1961).

35 *Compare* § 3(a)(9) *with* Model Nursing Home Licensing Act § 8(a).

partment shall certify the need in a service area for long-term beds of a particular degree of care. The department shall make such certification on the basis of its plan for the distribution of long-term beds, with adjustments taken for construction permits and licenses issued and changes in classification and bed quota made since publication of the plan.

COMMENT: This section, in directing the department to determine and certify need, supports a major theme of the act: development of facilities on the basis of need. The two federal programs promoting the construction of long-term care facilities both require a finding of need as a prerequisite to federal aid,[36] and under both programs state agencies have had the responsibility of determining need.[37] Under prevailing state legislation, however, these agencies generally have no power to bring their determinations of need to bear upon state licensing programs. In contrast, this act authorizes the department to consider need as a factor in reviewing construction plans and requests for increases in quota or changes in classification.[38] At a particular time the rate of reimbursement under various federal and state programs may be more attractive for one degree of care than for other degrees of care. Thus, private interests have had the natural tendency during any given period to favor that degree in their building plans, sometimes to the total or near total exclusion of other degrees.[39] For this reason, the drafts-

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36 See 42 U.S.C.A. § 291d(a)(4) (Supp. 1970) (Hill-Burton grant program); 12 U.S.C. § 1715w (Supp. V, 1970) (FHA mortgage insurance program).

37 42 U.S.C.A. § 291d(a)(4) (Supp. 1970); 12 U.S.C. § 1715w(d)(4) (Supp. V, 1970).

38 California departs from the national pattern in making need a factor in the review both of construction plans and of requests for increases in quota or for changes in classification. CAL. HEALTH & SAFETY CODE §§ 437.7-438.5, 1402.1 (West Supp. 1969).

39 From January 1, 1967 to date, the Massachusetts Department of Public Health has approved plans for the construction of 120 long-term beds designed for patients requiring resident care. During the same period, the Department approved plans for approximately 13,000 skilled nursing care beds. Interview with Arthur R. Iacovelli, Assistant Director of Bureau of Planning & Construction, Division of Medical Care, Department of Public Health of Massachusetts, in Boston, Oct. 15, 1970. During the year 1969, rest homes in Massachusetts were reimbursed for public-support patients at rates ranging from $4.75 to $8.00 per day, and nursing homes were reimbursed at rates ranging from $7.00 to $20.00 per day. Homes providing skilled nursing services generally received higher rates than homes providing only supportive nursing services. Interview with Joseph Neal, Staff Assistant to the Rate-Setting Commission of Massachusetts, in Boston, Oct. 15, 1970. The greater financial support available in Massachusetts for skilled nursing care than for resident care

men have imposed the requirement that bed need be stated in terms of the degrees of care. For ease of administration, the draftsmen have prescribed the same criteria for determining need and for delineating service areas as presently prevail under the Hill-Burton construction and modernization grant program which state agencies administer in cooperation with the Public Health Service.[40]

Section 5. *Construction Permit Required; License Required*

(a) No person shall undertake the construction or modification of a long-term care facility or the conversion of any premises into a long-term care facility, unless he holds a valid construction permit authorizing such construction, modification, or conversion.

(b) No person shall announce, advertise, or maintain a long-term care facility, unless he holds a valid license authorizing the operation of the facility.

COMMENT: This section prohibits the construction of a facility without a construction permit and the operation of a facility without a license. In requiring a construction permit before any new construction or conversion is undertaken, the section subjects potential licensees to the supervision of the department at an early stage.[41] Most states presently restrict the right of construction by requiring approval of plans and specifications for the building of facilities. However, a person constructing a facility is not formally subject to state power until he applies for a license to maintain the facility.[42] In the view of the draftsmen, it is necessary to withdraw the right to construct a facility entirely if there is to be meaningful

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has produced a shortage of resident care beds statewide and a surplus of skilled nursing care beds in some areas of the state. Address by David R. Kinloch, Director of Medical Care, Department of Public Health of Massachusetts, at Annual Meeting of Nursing Home Administrators, Dec. 9, 1969.

40 *Compare* § 4 *with* 42 C.F.R. §§ 53.1, 53.11 (1970).

41 Supervision during construction is required to prevent deviation from approved plans and thereby to avoid pressure upon the regulatory agency to license a facility which does not conform in all respects to construction requirements. For example, if it is found that the configuration of patient rooms in a completed facility leaves less than the required minimum distance between beds, there will be great pressure upon the agency to license the facility despite noncompliance, allowing the operator to forego structural alterations or removal of beds, either of which might be prohibitively expensive.

42 *See, e.g.*, MASS. ANN. LAWS ch. 111, §§ 71-72 (Supp. 1970).

supervision of construction and assurance that facilities built satisfy an existing need.[43] Moreover, to insure that the development and operation of long-term care facilities follows one plan, the same agency which regulates the operation of facilities should be entrusted with this power.

Extension or alteration of facilities, if not properly carried out, can have a detrimental effect on the care provided, and if not related to the state's plan for the distribution of facilities can produce unneeded beds; a construction permit is therefore required for modification of existing facilities as well as for construction of new facilities. By the terms of section 27(a), violation of the requirement of a construction permit or a license is punishable as a criminal offense.

Section 6. *Applications*

(a) Any person seeking a construction permit or a license shall file an application therefor with the department on a form prescribed by the department. Each application and any exhibits thereto shall provide the following information:

(1) the name and address of the applicant;

(2) the name, address, and principal occupation (A) of each person who, as a stockholder or otherwise, has a proprietary interest of ten percent or more in the applicant, (B) of each officer and director of a corporate applicant, and (C) of each trustee and beneficiary of an applicant which is a trust; and (D) where a corporation has a proprietary interest of fifty percent or more in an applicant, the name, address, and principal occupation of each officer and director of such corporation;

(3) the name and address of owner of the premises of the facil-

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43 In Massachusetts, the failure on occasion to require persons constructing facilities to restrict capacity to the maximum number of beds allowed per nurses' station has led to later violations of quota limits and sometimes successful legal efforts by licensees for quota increases raising the number of beds per nurses' station above that allowed. *See* Ashmere Manor Nursing Home, Mass. Dep't Pub. Health (tentative decision), Sept. 16, 1970 (facility with excess capacity operating over quota granted provisional license with quota increase placing facility over usual limit of beds per nurses' station). *But see* Dell Manor Nursing Home, Inc., Mass. Dep't Pub. Health, Feb. 25, 1970 (facility with excess capacity found to have operated over quota prior to hearing but license not revoked in view of subsequent compliance with quota fixed in license). After the decision of the department was rendered, however, respondent licensee was granted an increase in quota placing the facility over the usual number of beds allowed per nurses' station.

ity or proposed facility, if he is a different person from the applicant; and in such case, the name and address (A) of each person who, as a stockholder or otherwise, has a proprietary interest of ten percent or more in such owner, (B) of each officer and director of such owner if he is a corporation, and (C) of each trustee and beneficiary of such owner if he is a trust; and (D) where a corporation has a proprietary interest of fifty percent or more in such owner, the name and address of each officer and director of such corporation;

(4) where the applicant is the lessee or the assignee of the facility or the premises of the proposed facility, a signed copy of the lease and any assignment thereof;

(5) the name and address of the facility or the premises of the proposed facility;

(6) the proposed bed quota of the facility and the proposed bed quota of each unit thereof;

(7) in the case of an application for a construction permit, (A) plans and specifications for the proposed construction, modification, or conversion; and (B) the date upon which construction, modification, or conversion is expected to be completed;

(8) in the case of an application for a license, (A) an organizational plan for the facility indicating the number of persons to be employed, the position and duties of all employees, and the qualifications of all professional employees; (B) the name and address of the individual who is to serve as administrator; and (C) such evidence of compliance with applicable laws and regulations governing zoning, buildings, safety, fire prevention, and sanitation as the department may require; and

(9) such additional information as the department may require.

(b) Every application filed with the department shall be accompanied by the appropriate fee. The fee for filing an application for a construction permit shall be _____ dollars, and the fee for filing an application for a license shall be _____ dollars.

(c) Every person seeking an original license shall file an application for a license not less than thirty days and not more than sixty days prior to the date proposed for commencement of operation, and every licensee seeking a renewal license shall file an application for such renewal not less than thirty days and not more than ninety days prior to the scheduled expiration of his current license.

(d) Where any person has made timely and proper application for an original license to maintain a facility which is currently li-

censed to another person, such application shall, upon commencement of operation by the applicant, have the full force and effect of a license, provided that the department has not denied such application and has had at least thirty days to review it.

(e) Every applicant, permittee, and licensee shall report in writing to the department any change in name, address, management, or ownership which affects the accuracy of information on file with the department pursuant to this section.

COMMENT: Subsections (a)(1) to (a)(4) require an applicant for a construction permit or license to provide detailed information concerning both himself and the owner of the premises involved.[44] This information is vital if the department is to discover the true parties and their interests.[45] Historically, the applicant for either a construction permit or a license would have been the putative owner of the premises and its expected permanent licensee. This is no longer true. The increased use of trusts, leases, assignments, corporate subsidiaries, separate management companies, and other forms of ownership and control has vastly complicated the task of health regulatory agencies in identifying controlling parties and their interests.[46] In many cases, the applicant may be merely the

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44 *Compare* §§ 6(a)(1)-(4) *with* Model Nursing Home Licensing Act §§ 5(a)(1), (5). *See also* 20 C.F.R. 405.1121(a)(1) (1970) ("full disclosure of ownership required for certification as extended care facility); 34 Fed. Reg. 9784 (1969), 45 C.F.R. § 249.10-(a)(1)(i) (1970) (disclosure of ownership and corporate management required for nursing home as condition for receiving payments for skilled nursing home services); N.J. STAT. ANN. § 30:11-1.2 (Supp. 1969) (disclosure of corporate ownership required for facility license); JCAH Accreditation Standards ch. 1, at 1 (1968) (disclosure of ownership and corporate management required for accreditation).

45 The true test of the responsibility of the applicant is his control of the activity for which he seeks a license. The information required with the application should assist the department in determining the degree of control exercised by the applicant or in alerting the department to the need of exercising its authority to investigate under § 3(a)(5). The lack of such information has led in Massachusetts to the licensing of persons who apparently have had no substantial control. For example, in Ashmere Manor Nursing Home, Mass. Dep't Pub. Health (tentative decision), Sept. 16, 1970, the hearing officer found that the prior licensee of the facility was neither its owner nor lessee.

46 Even where all the parties are known, information respecting their relationship to each other may be needed to determine who is in control. For example, in Fall River Manor Nursing Home, Mass. Dep't Pub. Health, Dec. 16, 1969, it was apparent at the appeal hearing that, because the licensee was a subsidiary of a corporation which provided some of the management services for the licensed facility, there was a continuing confusion concerning the person or persons who had the effective control of the operation of the facility. *See* Transcript of appeal hearing, Dec. 16, 1969, pages 39-40 (on file at Mass. Dep't Pub. Health).

designee of other interests who have not themselves qualified for department approval, or his interest in the proposed project or the operating facility may be so insubstantial that the various legal sanctions for noncompliance would not deter him.

To protect prospective licensees and current licensees who wish to sell their businesses against unreasonable delay, subsection (d) provides that a transferee's application for an original license and shall have the force and effect of a license if the department has not acted thereon after thirty days of review. Within the period allowed for review, the department can deny an application under section 19, but thereafter it may proceed only under sections 20, 21, or 22, all of which apply to licensees.

The information which an application provides is essential not only to the determination of whether a permit or a license should be issued, but also to control of the subsequent day-to-day operations of the facility if the applicant is awarded the authorization which he requested. Subsection (e) accordingly imposes on permittees and licensees as well as applicants the duty to report changes in name, address, management, and ownership which affect the accuracy of an application.[47] Sections 22(a), 22(b), 23(a)(2), and 27(a) provide sanctions for a willful failure to report such a change.

Section 7. *Issuance of Construction Permits*

(a) Within ninety days of receipt of an application for construction permit made in accordance with section 6, but not less than sixty days from such receipt, the department shall issue the applicant a construction permit, if it finds that all requirements of subsection (b) of this section are met.

(b) The requirements for a construction permit shall be:

(1) that the applicant, or the permittee if a construction permit has been issued, be the owner of the premises for which he seeks a construction permit, or have such interest therein as the department finds necessary for the construction of a facility and operation thereafter for a period of not less than two years;

(2) that (A) every individual applicant, or permittee if a construction permit has been issued, be responsible and suitable to con-

47 For similar provisions, *cf.* N.J. STAT. ANN. § 30:11-1.5 (Supp. 1969), Model Nursing Home Licensing Act § 5(d) (1966).

struct and maintain a long-term care facility by virtue of financial capacity, good moral character, appropriate business and professional experience, a record of compliance with lawful department orders (if any), and lack of revocation of a construction permit or license during the previous five years, and that (B) every partner, trustee, officer, director, and controlling person of an applicant which is not an individual be a person responsible and suitable to operate or to direct or participate in the operation of a facility by virtue of good moral character, appropriate business or professional experience, a record of compliance with lawful department orders (if any), and lack of revocation of a construction permit or license during the previous five years;

(3) that the plans and specifications submitted pursuant to section 6 demonstrate that the resulting structure will be in conformity with such requirements for construction as the department shall establish by regulation; and

(4) that where construction, modification, or conversion will increase patient capacity by five or more patients, a certified need exists for long-term beds of the degree or degrees of care proposed in the service area in which the proposed facility will be located.

(c) Whenever issuance of a construction permit would completely satisfy the certified need for a service area, the department shall not issue a construction permit to a particular applicant until it has considered every timely and proper application which requests a permit for a location within such area and which was filed within sixty days of receipt by the department of the first such application. In such case, if more than one applicant satisfies requirements (1) to (3) of subsection (a), the department shall, in accordance with such regulations as it shall adopt, select among such applicants on the basis of the relative merits of their credentials and proposals.

(d) Where any person has filed an application for mortgage insurance with the Federal Housing Administration pursuant to the National Housing Act, the department may, at the request of such federal agency, certify in writing to the agency that there is a need for the proposed facility, unless (1) there is no need for long-term care beds of the degree or degrees of care proposed in the service area in which the facility would be located, or (2) the person is not responsible or is unsuitable to construct and maintain a long-term care facility because of noncompliance with lawful department orders or because of revocation of a construction permit or license during the previous five years.

(e) A construction permit shall, for the term thereof, constitute a commitment by the department to the permittee, subject to revocation for cause, that he shall be permitted to satisfy a particular certified need. Certification made to the Federal Housing Administration pursuant to subsection (c) of this section shall not constitute a commitment by the department to permit the applicant concerned to satisfy a particular need unless he is issued a construction permit.

(f) The term of a construction permit shall be as the department imposes by order but shall not be for more than three years or for less than one year. Notwithstanding the stated term, a construction permit shall expire one year from the date of issuance if there has been no construction within such period. Expiration of a construction permit shall be without prejudice to the right of the permittee to file an application pursuant to section 6.

(g) The department shall specify on every construction permit issued the term thereof, the name and address of the permittee, the name and address of the proposed facility or of the facility to be extended or altered, the certified need to be satisfied, and any other restriction which it may require.

COMMENT: This section establishes procedures for the issuance of construction permits. Its provisions and the provisions of the next section (which establishes licensing requirements) serve the important function of controlling entry into the long-term care field. The premise of the draftsmen is that the character, capacity, and control of the facility premises of the operator will relate directly to the record of the facility in complying with statutory and regulatory requirements and to the quality of care provided at the facility.[48] Consistent with this view, the draftsmen have included

48 Massachusetts has considered a person's past record in the operation of health care facilities to determine whether he is likely to comply with all requirements in the operation of a facility. For example, the Department of Public Health on May 4, 1970, denied a request that it issue the Federal Housing Administration (FHA) a certificate of need for a project to construct a nursing home which would have replaced an existing facility. The ground for the denial was that the person involved was a substantial shareholder and officer of corporations holding the licenses of two substandard nursing homes, one of which was the facility to be replaced by the proposed new construction. Both existing facilities were later closed by department order. *See* Vineyard Haven Nursing Home, Inc., Mass. Dep't Pub. Health, June 9, 1970; Billerica Mt. Pleasant Nursing Home, Inc. v. Frechette, Eq. Docket No. 91412 (Mass. Suffolk Super. Ct., 1970); *see also* Carney v. Frechette, Eq. Docket No. 91673 (Mass. Suffolk Super. Ct., 1970). In another case, the Commissioner of Public Health recently disapproved a proposed corporation, the purpose of which was to become the licensee of an existing nursing home, on a finding that the person named as

in the section provisions which establish entry requirements for persons seeking permission to build and operate long-term care facilities. The section, in addition, is designed to limit construction to facilities which will satisfy a demonstrated need and which will comply with construction requirements and thus be suitable for the delivery of long-term care when completed.[49]

Subsections (b)(1) and (b)(2) prescribe entry requirements for persons seeking approval to construct facilities, and through section 22(a) conditions which permittees must meet in order to retain their permits. Subsection (b)(1) requires ownership, or sufficient rights of ownership to construct a facility, because a person who does not own the property on which he proposes to construct a facility may be unable to comply with all statutory and regulatory requirements governing physical arrangements. Since the degree of control necessary for the proper construction and operation of a facility will depend on the nature and the scope of the undertaking, the act gives the department discretion to determine what rights of ownership are necessary in a particular case.

While subsection (b)(1) pertains to the authority of the applicant over the facility, subsection (b)(2) is directed principally toward the character and capacity of the applicant himself.[50] The para-

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president and treasurer could not be deemed a suitable person from his record in nursing home administration. The decision of the Commissioner states in part: "The fact that since May 1, 1969, [the principal incorporator] has been the administrator of another nursing home which has been seriously and chronically below minimum required standards in almost all respects of its operation, including patient care, indicates that he is an unsuitable person to form a corporation with the authority to be a licensee of an institution requiring a license from this Department." Bri-Mar Nursing Home, Inc., Mass. Dep't Pub. Health, June 30, 1970 (decided under MASS. GEN. LAWS ANN. ch. 155, § 2B (1970), which requires that the state health department conduct an investigation, hold a hearing, and grant approval before the secretary of state may allow the incorporation of any applicant for incorporation whose charter includes the power of be a licensee of a health facility).

49 For a requirement similar to § 7(b)(3) (approval of plans and specifications), see ALASKA STAT. § 18.20.080(b) (1970); ARK. STAT. ANN. § 82-347 (Supp. 1969); KAN. STAT. ANN. § 39-933 (1964); N.H. REV. STAT. ANN. § 151.6 (1955). For a requirement similar to § 7(b)(4) (finding of need), see N.Y. PUB. HEALTH LAW § 2801-a(3) (McKinney Supp. 1970) (need as a factor considered in approval of certificate of incorporation or of application for establishment of nursing home).

50 A writer for a leading business newsweekly concluded after a study of nursing home chains that "top management in the nursing home business, taken as a whole, is a motley group. . . . Second-echelon expertise . . . apparently is as scarce as the Rh-negative factor." Elliott, *No Tired Blood: Nursing Home Operators Are Long on Enthusiasm, Short of Experience*, BARRON'S, Feb. 24, 1969, at 26.

graph contains two parts, one devoted to the applicant and the other to principals of an applicant which is not a natural person.[51] Any test of suitability, to be effective, must take into account the trend in the health industry toward corporate ownership of facilities.[52] In order to provide prospective permittees and licensees with guidance as to department policy on ownership and suitability, the department should issue guidelines or regulations covering subsections (b)(1) and (b)(2) and the corresponding subsections of section 8.[53]

The purpose of subsections (b)(4) and (c) is to relate the granting of construction permits to certification of need under section 4. Under subsection (b)(4), the department cannot approve an application for a construction permit where the proposed construction would increase patient capacity by more than four patients[54] unless the state plan for the distribution of long-term beds and facilities indicates a need for beds, in the number and of the degree proposed, in the service area of the state in which the facility or construction site is located. In a case of limited need for beds, subsection (c) requires the department to choose among competing applicants on the basis of the relative merits of their credentials

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51 "Controlling person" is included as a principal of a corporate applicant. The concept of control is a familiar feature of various federal regulatory schemes. *See, e.g.*, 2 L. Loss, SECURITIES REGULATION 764-83 (1961). As used herein, controlling person means any stockholder of a corporation with the power to exercise a controlling influence over the management or policies of the corporation. In a large, publicly held corporation, a person with ten percent or less of the stock of the corporation may be a controlling person; in a small, closed corporation, a larger percentage holding will generally be necessary to place a person in a position of control.

52 *Cf.* Elliott, *Unhealthy Growth? The Nursing Home Business Is Expanding at a Feverish Pace*, BARRON'S, Feb. 10, 1969, at 3-16.

53 In applying the standards of § 7(b)(2)(B) to principals of corporations, for example, the department may wish to distinguish between active and inactive principals. For the officer of a corporation who is charged with supervising the operation of a facility, the department could properly insist upon appropriate business or professional experience; however, for a director not involved in day-to-day operations, the department should probably not insist on any special business or professional competence.

54 The provision of § 7(b)(4) which allows additions increasing patient capacity by less than five without a finding of need is a de minimis exception to the fourth requirement for a construction permit. If the state follows federal recommendations and fixes the maximum number of patients per room at four, *see* 35 Fed. Reg. 8990 (1970), 45 C.F.R. § 249.10(a)(1)(i) (1970), the exception will allow the addition of one room of maximum size or several smaller rooms.

rather than on any arbitrary basis such as precedence in filing.[55] Every selection must be in accordance with regulations adopted by the department to implement the subsection, and will be subject to administrative and judicial review under sections 19 and 25.

In recognition of the role which the Federal Housing Administration (FHA) plays in insuring mortgages of nursing homes,[56] subsection (d) authorizes the department to certify the need for projects to the FHA upon request. Since a person seeking FHA mortgage insurance will require a permit from the department in order to construct a facility, the subsection directs the department (in the interest of not misleading either the FHA or the applicant for mortgage insurance) to refuse certification for any project which it could not approve under subsection (b) because of the applicant's bad standing with the department. By the terms of subsection (e), certification to the FHA is not a commitment, permanent or conditional, to allow the applicant to satisfy a particular need. Notwithstanding subsection (d), every applicant for a construction permit must satisfy all requirements of subsections (b) and (c).

Subsection (f) establishes the term for a construction permit,[57]

55 Choice on a merit basis not only accords with the purpose of the act to promote the rational development of facilities, but also is intended to preclude the possibility of agency misfeasance in the choice among applicants.

56 The Federal Housing Administration (FHA) insures mortgages, including advances made during construction, on nursing homes either of the proprietary or the non-profit type pursuant to the National Housing Act § 232, 12 U.S.C. § 1715w (Supp. V, 1970). *See* 24 C.F.R. § 200.22 (1970). The FHA cannot insure a mortgage unless it has received from the state agency administering the Hill-Burton program a certification that (i) there is a need for the nursing home in question and (ii) there is in force in the state reasonable minimum standards of licensure and methods of operation for nursing homes. National Housing Act § 232(d)(4), 12 U.S.C. § 1715w (d)(4) (Supp. V, 1970); *see also* Public Health Service Act § 604(a)(1), 42 U.S.C. § 291d(a)(1) (1964). The form forwarded to state agencies for the purpose of obtaining certification is entitled, Certificate of Need for Nursing Homes and Assurance of Enforcement of State Standards. FHA Form No. 2576 (revised April 1966).

57 Unless a term is fixed, an applicant may be willing to keep his project alive indefinitely while he attempts to arrange financing. In the meantime, the need assigned remains unmet and the plans may become obsolete and require changes and administrative review to comply with current requirements. *See* Schaffer v. Frechette, Civil No. 309835 (Mass. Middlesex Super. Ct., filed 1970), in which judicial review is pending respecting the cancellation of a construction project by the state health department because the applicant had failed to meet the agency's deadline for the start of construction after almost four years had elapsed from the approval of the project.

and allows the department discretion to refuse a second permit to a permittee who does not complete a project within the term of his initial permit or to declare a permit void where the permittee has not initiated construction within the first year of the term of his permit.

Section 8. *Issuance of Licenses*

(a) Upon receipt and review of an application for a license pursuant to section 6, the department shall issue a license if it finds that all requirements of subsection (b) of this section are met. In the case of an application for a renewal license, if all requirements of subsection (b) are not met, the department may in its discretion issue a conditional license, provided that care given in the facility is adequate to patient needs and the facility has demonstrated improvement and evidences potential for compliance within the term of said license. In no case, however, shall the department issue any person more than two consecutive conditional licenses for the same facility.

(b) The requirements for a license shall be:

(1) that the applicant or the licensee if a previous license has been issued, be the owner of the facility or have at least such interest in the premises as the department finds necessary for the operation of a long-term care facility;

(2) (A) that an individual applicant or licensee if a previous license has been issued, be a person responsible and suitable to maintain a long-term care facility by virtue of financial capacity, good moral character, appropriate business or professional experience, a record of compliance with lawful department orders (if any), and a lack of revocation of a construction permit or license during the previous five years, and (B) that every partner, trustee, officer, director and controlling person of an applicant which is not an individual be a person responsible and suitable to operate or to direct or participate in the operation of a facility by virtue of good moral character, appropriate business or professional experience, a record of compliance with lawful department orders (if any), and lack of revocation of a construction permit or license during the previous five years;

(3) that the facility be under the supervision of an administrator, who is of good moral character, responsible and qualified by training and experience, who assures that services required under this subsection are so organized and administered as to be available to patients as needed;

(4) that the facility (A) assure that the total health care program of each patient is under the supervision of a physician who sees the patient as needed but at least quarterly and (B) arrange to have a physician available to furnish necessary medical care in the event of an emergency when the patient's physician cannot be reached;

(5) that the facility provided, in the event of a minor acute illness of a temporary nature, for bedside care (A) under the direction of a physician, and (B) by or under the supervision of a registered nurse or licensed practical nurse;

(6) that the facility maintain a dietary service, (A) under which at least three meals a day constituting a nutritionally adequate diet are prepared and served under sanitary conditions and competent supervision and are served by means of tray service to nonambulatory patients, and (B) under which menus and special diets for patients are planned by, or in regular consultation with, a dietitian or a nutritionist;

(7) that the facility provide protective and personal services of the type and in the amount needed by each patient, including (A) assistance as needed with the routine activities of daily living and (B) access at all times to a responsible staff member on duty in the facility, to whom patients can report injuries, symptoms of illness, or emergencies, and who is immediately responsible for assuring that appropriate action is taken promptly;

(8) that the facility assure that all patients have available on a regular basis social services planned by or in regular consultation with a social worker;

(9) that the facility provide that all patients have available on a regular basis recreational activities which are appropriate to individual needs;

(10) that the facility have safe and appropriate policies and procedures for the storage and administration of drugs and biologicals;

(11) that the facility maintain for each patient a comprehensive health record which is accurate, current, and available in the facility;

(12) that the facility (A) provide each patient with safe, sanitary, and reasonably private living accommodations, and (B) have sitting rooms, bath and toilet rooms, and utility closets, suitable designed, located, and equipped and in such ratio to beds or units as the department shall establish by regulation;

(13) that the facility provide for periodic evaluation of each patient's physical and mental condition and his responsiveness to the care provided in the facility, and thereafter for appropriate action, including discharge or transfer, if the evaluation indicates that the patient's health needs would be better met through alternative non-institutional or institutional arrangements;

(14) that the facility be in compliance with all applicable laws governing safety and sanitation;

(15) that the facility have a written disaster plan, approved by the department, which shall be followed in the event of fire, explosion, or other disaster; and

(16) that the facility be in substantial compliance with such other requirements for a license as the department may establish by regulation under this paragraph.

(c) An applicant may use any name for the facility which he proposes to operate, provided that such name—

(1) is sufficiently distinctive to distinguish the facility from other facilities in the state;

(2) does not tend in any way to mislead the public as to the degree or degrees of care to be provided; and

(3) does not contain (A) the word "hospital" unless the facility will provide only intensive nursing care (degree I), (B) the words "convalescent," "rehabilitative," or "rehabilitation" unless the facility will primarily provide intensive nursing care (degree I) or skilled nursing care (degree II), or (C) the word "nursing" if the facility will primarily provide resident care (degree IV).

Upon issuance of a license, a facility shall be known by the name appearing on its license. Such name shall appear conspicuously in all listings made, in all advertisements placed, and on all stationery and forms used by the licensee in connection with the operation of the facility. The name of the facility shall not be changed without the consent of the department.

(d) The term of a full license shall be two years, and the term of each conditional license shall be as the department determines but shall not exceed six months. Notwithstanding its term, the license authorizing operation of a facility shall expire upon voluntary closure of the facility, and notwithstanding its term, the license shall continue in force pending department action if a timely and proper application for a renewal license has been filed pursuant to section 6(c).

(e) The department shall specify on every license issued the term thereof, the name and address of the licensee, the name and address of

the facility, the classification of the facility, the bed quota of the facility and each identifiable unit thereof, and any other restriction which it may require. In the case of a conditional license, the license shall bear the legend, "conditional license," and shall list thereon or on an exhibit thereto all deficiencies which prevent issuance of a full license.

(f) Every licensee shall be entitled to file a written request for an increase in its bed quota with the department at any time. The department shall give timely consideration to every such request and shall thereupon notify the requesting licensee of its action and the grounds therefor. The department may reject summarily any request made during the first six months of the term of a license or made within six months of the effective date of a reduction in quota under section 21. In no case shall the department grant a request unless there is a certified need for long-term beds of the degree or degrees of care involved in the service area in which the affected facility is located.

COMMENT: The primary function of this section is to prescribe standards and to establish procedures for the issuance of licenses. Wherever an applicant for an original license fails to meet fully any statutory requirement of subsections (1) to (15) or substantially to meet any administrative requirement established under subsection (16), the department must deny his application under section 19. Once a person is licensed, if the department proposes to revoke his license for violation of any provision of subsection (b), the proper section under which to proceed is section 22.

Since every facility which qualifies for licensure is entitled under section 11 to classification at least as a resident care (degree IV) facility, the requirements for a license are not only the minimum standards which any facility must meet to retain its license but also the standards for a resident care facility. In drafting subsection (b), the authors have drawn largely from the federal recommended standards for resident care.[58] The authors have supplemented these federal recommended standards with requirements for pharmaceutical policies and practices[59] and for a written disaster plan.[60]

58 *See* 35 Fed. Reg. 8990 (1970), 45 C.F.R. § 234.130(d)(4) (1970). As originally adopted, the regulation established minimum standards for services in intermediate care facilities, 34 Fed. Reg. 9782 (1969), but as amended this year, the regulation makes compliance optional for the time being, 35 Fed. Reg. 8990 (1970).

59 For similar provisions, *see generally* 20 C.F.R. § 405.1127 (1970); 35 Fed. Reg. 6792 (1970), 45 C.F.R. § 249.33(b)(6) (1970); Model Nursing Home Licensing Act § 10(e); JCAH Accreditation Standards ch. 7, at 19-20, ch. 17, at 36 (1968).

60 *See* 20 C.F.R. § 405.1136 (1970); 35 Fed. Reg. 6792 (1970), 45 C.F.R. § 249.33(b)(9) (1970).

In addition, the draftsmen have imposed requirements for ownership which follow those imposed for issuance of a construction permit.[61] The inclusion reflects the judgement of the draftsmen that the character, capacity, and control of the operation as a whole of the licensee are the most important factors to be considered in reviewing an application for a license.

The requirements for a conditional license are purposefully indefinite.[62] The intention is to allow wide discretion to the department in those instances in which a licensee seeking a renewal does not qualify for full licensure. Since deciding whether to issue a conditional license involves an estimation of the licensee's potential for correcting deficiencies, the question is one particularly appropriate for the exercise of discretion. As a safeguard against abuse, a proviso prohibits the department from issuing any person more than two consecutive conditional licenses for a particular facility.

Subsection (c) is designed to protect the public by insuring that the name of a facility does not misrepresent the degree or degrees of care which the facility offers.[63] Because certain words might be misleading, the subsection restricts the use of these words.[64] Once a license has been issued, the licensee must use the name of a facility appearing on such license in all listings and advertisements and on all stationery.[65] Sanctions for violation of this provision are found in sections 22(b), 23(a)(2), and 27(a).

Subsection (d) establishes the term for a full license and a conditional license. Because the regulatory agency may be unable to act on a licensee's application for a renewal prior to the scheduled

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61 *Compare* §§ 8(b)(1), (2) *with* §§ 7(b)(1), (2) *supra.*

62 For a similar provision committing issuance of a conditional license to the standard-setting authority, *see* MASS. GEN. LAWS ANN. ch. 111, § 71 (Supp. 1970).

63 For similar provisions, *see* CAL. HEALTH & SAFETY CODE § 1401.5 (West Supp. 1969) (use of term "hospital" restricted); Model Nursing Home Licensing Act § 9 (use of terms "hospital," "sanitarium," "rehabilitation center" restricted).

64 The word "hospital," for example, has become associated in the public mind with intensive medical and nursing care. For this reason, use of the term is reserved for facilities providing only intensive nursing (degree I) care. Because the words "convalescent," "rehabilitative," and "rehabilitation" have come to imply the availability of restorative therapy, these words are restricted to use by facilities providing primarily intensive nursing (degree I) or skilled nursing (degree II) care. Since "nursing" implies that nursing services are regularly available, facilities providing primarily resident (degree IV) care are not allowed to use the term.

65 *See* Model Nursing Home Licensing Act § 9 (nursing home shall use name on license for its premises).

expiration of his previous license, the subsection provides that the license shall continue in force beyond its term pending department action if the licensee has filed timely and proper application for renewal.[66]

Subsection (f) allows a licensee to request an increase in its bed quota at any time. The department may summarily reject any request made within the first six months of the term of a license or within six months of a reduction in quota.[67] Any increase in quota is dependent upon a finding of need. Rejection or denial of a request for an increase in quota could be appealed to the courts under section 25.[68] The analog of this subsection for classification is subsection 11(e).

Section 9. *Joint Operations*

(a) No person shall operate a long-term care facility jointly with a hospital, clinic, adult day care center, or self-care units, unless the department has consented thereto and has issued all necessary licenses. As a prerequisite to joint operation of a facility and a hospital, clinic, or adult day care center, the department shall require that there be a distinct part for each component institution, and as a prerequisite to joint operation of a facility and self care units, the department shall require that the facility occupy a building either contiguous or adjacent to such units.

(b) The department shall grant its consent only if it finds that all applicable prerequisites and such requirements for joint operation as it has established by regulation are met. Such requirements shall, as a minimum, specify the extent to which services may be shared between or among component institutions and buildings.

(c) Whenever the department finds that requirements adopted under subsection (b) of this section are inadequate to assure that patients in a facility receive all services required under this act, it shall

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66 The draftsmen have based this provision on MASS. ANN. LAWS ch. 30A, § 13 (1966). In any case, it is doubtful that an agency could compel a licensee to cease operation by merely allowing his license to expire without acting on his application for renewal. *Cf.* K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE § 3.01, at 5046 (1958) [hereinafter cited as DAVIS].

67 Provision for summary rejections is made to save the agency administering the act from possible harrassing requests from a licensee.

68 *Compare* § 8(f) *with* CAL. HEALTH & SAFETY CODE §§ 437.7-483.5, 1402.1 (West Supp. 1969) (request for increase in bed capacity must be approved by local health planning agency, which is to consider need as a factor).

establish such additional requirements as it deems appropriate and as are reasonable.

COMMENT: Medical complexes including several different types of institutions and providing a broad range of services, if properly developed, hold forth the promise of a reduction of administrative costs, integrated services and continuity of care, and convenience to medical consumers and practitioners alike.[69] Some combinations are particularly promising. Examples are: (i) the operation of intensive nursing care (degree I) and skilled nursing care (degree II) facilities in conjunction with a hospital, a clinic, or both for the purpose of providing coordinated restorative services; and (ii) the operation of supportive nursing care (degree III) and resident care (degree IV) facilities in conjunction with clinics, adult day care centers, and self-care units for the purpose of serving a community of senior citizens.[70] Because at present there is little regulatory experience in this area, the section purposely allows the department a large measure of flexibility. The prerequisite for joint operation that each component institution form a distinct part[71] and be in a structure separated from any self-care units reflects the draftsmen's view that minimal separation is necessary for the purpose of assessing compliance with requirements governing component health institutions.

Section 10. *Degrees of Care*

The department shall establish by regulation degrees of care which correspond to the needs of long-term patients for medical and medically related services in an institutional setting. There shall be at least the following degrees of care: degree I: intensive nursing care; degree II: skilled nursing care; degree III: supportive nursing care; and degree IV: resident care, as defined in section 11.

COMMENT: Sections 10 through 12 establish a mechanism for differentiating among long-term care facilities on the basis of

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69 The draftsmen have found only one state which makes any provision in statute for the joint operation of health care institutions. See CAL. HEALTH & SAFETY CODE § 437.8(d) (West Supp. 1969).

70 For suggested definitions, see § 2(a)(1) (adult day care center) and § 2(a)(17) (self-care unit) of this act, *supra*.

71 For definition of "distinct part," see § 2(a)(6) of this act, *supra*.

services rendered and among long-term patients on the basis of their need for services. The sections build upon the current trend in both state and federal legislation toward recognizing distinct "levels" or "degrees" of care.[72] Such classification has three principal goals: to improve the appropriateness of care given patients; to assure efficient use of health manpower, equipment, and facilities; and to make possible a system of reimbursement for publicly supported patients which relates directly to patient need for care.[73] If classification is to be effective, it must necessarily involve both facilities and patients, for the essence of the concept is the matching of resources and needs.

Three of the four degrees of care established correspond to existing federal nursing home programs. Skilled nursing care is designed to approximate skilled nursing home services under Title XIX of the Social Security Act and extended care under Title XVIII of the Social Security Act.[74] Supportive nursing care and resident care are intended to be equivalent to the two levels of care allowable under the intermediate care facilities program established pursuant to Title XI of the Social Security Act.[75] In-

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72 The intention of Congress in creating separate programs for nursing homes was apparently to establish three levels of care varying in intensity and corresponding to the requirements of different classes of patients. *Cf.* S. REP. No. 744, 90th Cong., 1st Sess. (1967).

Of the states Michigan provides for the classification of both facilities and patients on the basis of levels of care. See Sherman, *Categories of Care*, NURS. HOMES, Dec. 1967, at 22-24; Ziel, *Medical Review and Nursing Evaluation of State Patients in Nursing Care Facilities and Homes for the Aged*, 1970 MICH. MED. 229-30. *See also* ILL. ANN. STAT. ch. 111½, § 35.26 (Smith-Hurd Supp. 1970) (classification of facilities by degrees of care). Connecticut classifies nursing homes under a point system which is intended to promote quality care but is not meant to reflect degrees of care. See Foote, *Progress in Nursing Home Care*, 202 J. AMER. MED. ASS'N 148-50 (1967).

73 For a discussion of the theory and goals of classification, *see* Frechette and Levey, *Current Concepts, Massachusetts Nursing Homes Today*, 272 N. ENG. J. MED. at 1011 (1965); Sherman, *Categories of Care*, NURS. HOMES, Dec. 1967, at 22-24.

74 *Cf. Social Security Act* §§ 1861, 1902(a)(28), 42 U.S.C. §§ 139-5-s(h), 1396a(a)(28) (Supp. V, 1970); 20 C.F.R. §§ 405.1101-405.1137 (1970); 35 Fed. Reg. 6792(11) (1970), 45 C.F.R. §§ 249.33(a)(1), (b) (1970).

75 *Cf.* Social Security Act § 1121(c), 42 U.S.C. § 1320a(e) (Supp. V, 1970). Regulations issued by the Social & Rehabilitation Service permit "two or more distinct levels of care" under the intermediate care facilities program, provided that at least one of the levels provided requires the "[i]mmediate supervision of the facility's health services by a registered professional nurse or a licensed practical nurse employed full-time in the facility and on duty during the day shift." *See* 35 Fed. Reg. 8990 (1970), 45 C.F.R. § 234.130(d)(4)(vii)(a) (1970).

tensive nursing care is not the equivalent of any existing federal nursing home program, although it is closest in practice and similar in concept to the program for extended care facilities.[76] The level is meant to correspond to the care usually given in chronic disease hospitals and in the best extended care facilities.

Section 11. *Classification of Facilities; Special Designations*

(a) The department shall, on the basis of an inspection, classify each long-term care facility according to the degree or degrees of care which it finds the facility qualified to provide. No facility shall be found qualified to provide multiple degrees of care unless it maintains at least one identifiable unit per degree of care. Where the department finds a facility qualifed to provide more than one degree of care, it shall establish a bed quota for each unit. For the purpose of this section and section 12, the department shall by regulation establish a maximum and a minimum number of beds allowable per unit.

(b) In determining whether a facility is qualified to provide a particular degree of care, the department shall apply the following requirements and such additional requirements as it has established under subsection (c):

(1) For intensive nursing care (degree I), the facility —

(A) employs a full-time medical director who supervises the administration of medical, nursing, and restorative care and the planning of special diets;

(B) maintains an organized nursing service which consists of a director of nursing seven days a week during the day shift, a supervisor of nurses at all times, a charge nurse at all times, and sufficient other nursing and ancillary staff;

(C) provides for the planning and preparation of menus and diets by or under the supervision of a dietitian or nutritionist;

(D) maintains or provides on the premises an organized restorative therapy service;

(E) has nurses' stations and utility rooms suitably designed, located, and equipped and in such ratio to beds or units as the department shall establish by regulation; and

(F) maintains a transfer agreement with one or more hospitals.

(2) For skilled nursing care (degree II), the facility —

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76 For a discussion of the purpose of extended care, see 20 C.F.R. §§ 405.1101 (d)(1), (2) (1970).

(A) employs a medical director who supervises the administration of medical, nursing, and restorative care and the planning of special diets;

(B) maintains an organized nursing service which consists of a director of nursing seven days a week during the day shift, a supervisor of nurses full-time if the bed quota for skilled nursing care is more than [maximum number of beds to be allowed in identifiable unit], a charge nurse at all times, and sufficient other nursing and ancillary staff;

(C) provides for the planning and preparation of menus and diets by or under the supervision of a dietitian or nutritionist;

(D) provides or assures the availability of restorative therapy services on the basis of patient need for such services;

(E) has nurses' stations and utility rooms suitably designed, located, and equipped and in such ratio to beds or units as the department shall establish by regulation; and

(F) maintains a transfer agreement with one or more hospitals.

(3) For supportive nursing care (degree III), the facility —

(A) maintains an organized nursing service which consists of a head nurse seven days a week during the day shift and sufficient other nursing and ancillary staff; and

(B) has nurses' stations and utility rooms suitably designed, located, and equipped to meet patient needs and in such ratio to beds or units as the department shall establish by regulation.

(4) Every director of nursing and every supervisor of nurses shall be a registered nurse; every head nurse shall be a registered nurse where the bed quota for supportive nursing care is more than [maximum number of beds to be allowed in identifiable unit]; every charge nurse and other member of the nursing staff shall be a registered nurse or a licensed practical nurse; and every member of the ancillary staff, including nurses' aides, orderlies, attendants, and ward clerks, shall be a responsible individual and shall have such qualifications as the department shall establish by regulation;

(c) The department shall by regulation establish requirements, in addition to the requirements of subsection (b), for determining whether a facility is qualified to provide a particular degree of care. Such regulations shall include criteria for the application of requirements to multiple unit facilities and shall cover at least the following: physician services, nursing services, dietary services, social services, recreational activities, pharmaceutical services, patient care review, and

administration, including written policies and admissions, transfers, and discharges.

(d) Every licensee shall be entitled to file a written request for a change in classification with the department at any time. The department shall give timely consideration to every such request and shall thereupon notify the requesting licensee of its action and the grounds therefor. The department may reject summarily any request made during the first six months of the term of a license or made within six months of the effective date of a reclassification under section 21. In no case shall the department grant a request unless there is a certified need for long-term beds of the degree or degrees of care proposed in the service area in which the affected facility is located.

COMMENT: Section 11 provides for the classification of facilities in accordance with the degrees of care established under section 10. By the terms of subsection (a), the department may classify a facility to provide one or more degrees of care. For ease of administration of standards, the subsection requires at least one identifiable unit per degree of care.[77] In addition, the department is directed to fix the maximum and minum number of beds in any unit. This is necessary in the draftsmen's view if the requirements in subsections (b) and (c) are to have a uniform effect on facilities.

The purpose of subsection (b) is to establish the basic features distinguishing the degrees of care as they are applied to facilities. Because the intention of the act is that every licensed facility will be eligible to provide at least resident care, there are no requirements for classification as a resident care facility aside from the requirements for licensure in section 8(b). In contrast, there are specific requirements for facilities which propose to offer any of the three levels of nursing care. All three degrees of nursing care have as common elements the requirement of an organized nursing service and the requirement of nurses' stations and utility rooms to support nursing activities.

As applied to facilities, the feature of intensive nursing and skilled nursing care which distinguishes these degrees from supportive nursing care is the inclusion of medical direction and restorative therapy services. Since patients in supportive nursing units and facilities will primarily be ambulatory patients requir-

77 For definition of "identifiable unit," *see* § 2(a)(8), *supra*.

ing maintenance level care, subsection (b) provides for minimal nursing supervision but not for such expensive and unnecessary services as restorative therapy.[78] Patients under degrees I and II will require higher intensity nursing care, restorative therapy services, and sometimes special diets; therefore, the conditions which facilities must meet in order to qualify have been designed to satisfy these patients requirements.[79] In addition, because of the importance of the rehabilitation function, facilities providing the two higher degrees of care must be under medical direction[80] and have arrangements with one or more hospitals which assure continuity of patient care in the case of a transfer.[81] Intensive nursing care is a higher intensity level than skilled nursing care. Hence, subsection (b), in addition to requiring additional professional nursing personnel, provides for full-time medical direction and for an in-house rehabilitation service. Since this degree is in essence an extension of hospital nursing and rehabilitative care, the department may wish, as a matter of policy, to encourage or to require the building of facilities with degree I capabilities as distinct parts of hospitals.

Subsection (b)(4) establishes the professional qualifications of nursing personnel enumerated under the preceding paragraphs of the subsection. The requirements accord with those contained in regulations under the Social Security Act.[82]

Subsection (d) allows a licensee to request a change in classification at any time and is similar to subsection 8(f).

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78 *Compare* § 11(b)(3)(A) *with* 35 Fed. Reg. 8990 (1970), 45 C.F.R. § 234.130(b)(4)(vii)(a) (1970).

79 For nursing care, *compare* §§ 11(b)(1)(B), (2)(B) *with* 20 C.F.R. § 405.1124(a)-(e) (1970) *and* 35 Fed. Reg. 6792 (1970), 45 C.F.R. § 249.33(b)(1)-(3) (1970); for restorative therapy services, *compare* §§ 11(b)(1)(D), (2)(D) *with* 20 C.F.R. § 405.1126(c) (1970); for dietary services, *compare* §§ 11(b)(1)(C), (2)(C) *with* 20 C.F.R. §§ 405.1125 (a), (e), (f) (1970) *and* 35 Fed. Reg. 6792 (1970), 45 C.F.R. § 249.33(b)(4) (1970). *See generally*, Model Nursing Home Licensing Act §§ 10(b), (d), (g); JCAH Accreditation Standards chs. 3, 8, 10, 13 (1968).

80 *Compare* §§ 11(b)(1)(A), (2)(A) *with* 20 C.F.R. § 405.1123 (1970) *and* 35 Fed. Reg. 6792 (1970), 45 C.F.R. § 249.33(b) (7) (1970). *See also* JCAH Accreditation Standards ch. 2, at 9-10 (1968); Anderson, *A Practical Plan for Medical Direction of Nursing Homes*, HOSPITALS, July 16, 1967, 66-72.

81 *Compare* §§ 11(b)(1)(F), (2)(F) *with* 20 C.F.R. § 405.1133 (1970) and 35 Fed. Reg. 6792 (1970), 45 C.F.R. §§ 249.33(b)(8), (c) (1970). *See also* JCAH Accreditation Standards ch. 5 (1968).

82 *See* 20 C.F.R. §§ 405.1124(a)-(d) (1970); 35 Fed. Reg. 6792 (1970), 45 C.F.R. §§ 249.33(b)(1)(i), (ii) (1970).

Section 12: *Classification of Patients; Special Categories*

(a) The department shall provide for the classification of each patient seeking admission to a long-term care facility, and for the periodic classification of each patient in a facility, according to the degree of care which such patient requires. Classification shall be made on the basis of a medical evaluation of the need for care and shall be subject to review by a medical review team. The department shall by regulation establish criteria which shall govern the classification of patients and requirements which shall govern the composition and duties of medical review teams.

(b) The department shall develop and implement procedures which assure, as far as practicable, that placement of patients is appropriate to the needs of patients for medical and medically related services. In no case shall a licensee accept a patient for admission to a facility, unless such patient has been classified in accordance with this section and regulations hereunder, and in no case shall a licensee accept a patient found to require a particular degree of care for admission to a facility or unit thereof which provides a different degree of care, unless such other degree of care is adequate to meet the patient's needs and such placement does not have the effect of depriving another patient in the facility of appropriate care.

COMMENT: Section 12 serves the function for patients which section 11 serves for facilities: classification in accordance with the degrees of care established under section 10. By the terms of subsection (a), the department will share responsibility for patient classification with private practitioners and medical review teams.[83] For its part, the department will establish the criteria to be applied in classifying patients and will prescribe the composition and duties of medical review teams. Under the scheme proposed, physicians will have the primary responsibility both for classifying patients prior to admission and for periodically reviewing classifications assigned upon admission.[84] Each medical review team, as

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83 The draftsmen have based § 12(a) on the proposal of the Social and Rehabilitation Service for a regulation governing periodic medical review and medical inspections in skilled nursing homes and mental hospital. *See* 45 C.F.R. § 250.23 (proposed regulation) (2 MEDICARE & MEDICAID GUIDE ¶ 26,101 (May 16, 1970)).

84 If the proposed regulations of the Social and Rehabilitation Service for medical reviews in skilled nursing homes is adopted without modification, states will have to require that physicians classify all patients eligible for medical assistance. *See* 45 C.F.R. § 250.23 (proposed regulation) (2 MEDICARE & MEDICAID GUIDE

the name implies, is meant to be a group, under the direction of a physician, consisting of practioners in a variety of medical and allied professions. Because of its inter-disciplinary nature, the team should be expected to provide a comprehensive review which may indicate that continued placement of a patient in a facility or unit is unnecessary or inappropriate and that alternative placement is desirable or necessary. In addition to monitoring placements, the medical review team can serve the related function, insofar as placement is appropriate, of making recommendations as to patient care plans. As the section stands, it would be possible to have teams composed of private practitioners or of government employees or both.

The draftsmen have purposefully omitted detail from the subsection (a) for the reason that patient care review is an area in which few states have experience and hence an area which is appropriate for experimentation. Once a state has had several years' experience with patient care review, it can recommend amendment of the section to include a detailed scheme for patient classification if it finds that regulations are inadequate to accomplish its purposes. As a guide to establishing a patient care review mechanism, states will want to consider carefully existing patterns of review required for participation in the federal extended care facilities and skilled nursing home programs.[85] Several states have initiated programs for the classification of patients which can provide models for fixing classification criteria.[86]

Subsection (b) directs the department to establish procedures which will assure appropriate placement of patients. As an initial measure, the subsection takes two steps in this direction: (i) a licensee is prohibited from admitting a patient who has not been evaluated and classified; (ii) once a patient has been classified, a

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¶ 26,106 (May 16, 1970)). Regardless of the final form of the regulation, however, under this act a state need not require that a physician himself perform the classification of patients not eligible for medical assistance as long as classification is on the basis of medical records and under the direction of the physician.

85 *See* 20 C.F.R. § 405.1137 (1970); 34 Fed. Reg. 3745 (1970), 45 C.F.R. § 250.20 (1970).

86 *See, e.g.*, Statement of Tennessee Medicaid Policy Review Committee and Tennessee Department of Public Health, *in* 2 MEDICARE & MEDICAID GUIDE ¶26,101 (May 19, 1970); Ziel, *Medical Review and Nursing Evaluation of State Patients in Nursing Care Facilities and Homes for the Aged*, 1970 MICH. MED. 229-30.

licensee may not accept the patient for admission, unless the admitting facility or unit provides the same or a higher degree of care as required by the patient and the effect of the placement will not be to deprive another patient already in the facility of appropriate care.[87] Because of problems associated with the transfer of long-term patients, strict prohibitions such as those recommended to cover admissions may not be justified in cases of patients whose conditions change while under care in a facility. In establishing procedures to implement the subsection, the department may wish to be more insistent upon transfer where movement will be from one unit of a facility to another than where movement will be between facilities. It may also be helpful to establish circumstances where transfer is necessary and where transfer is merely desirable. If the department chooses not to require transfer where desirable but not necessary, the facility involved will in some cases decide upon transfer, provided that medical care reimbursement is related directly to patient classification.

Section 13. *Reporting of Epidemic Disease, Accidents, and Significant Changes in Patient Condition*

(a) Every administrator of a long-term care facility shall, at the first evidence of epidemic disease occurring at the facility under his supervision, report such occurrence immediately to the department, and he shall, within three days thereafter, file a written statement of such report with the department.

(b) Every administrator of a long-term care facility shall promptly record any accident or untoward incident affecting the health or safety of a patient in the facility under his supervision in the comprehensive health record of such patient, and he shall, within seven days of such accident or incident, file a written report thereon with the department.

(c) Every administrator of a long-term care facility shall notify the sponsor of a patient, and the next of kin of such patient (whenever he is a different person from the sponsor), within twenty-four hours, or as soon as practicable thereafter, of any accident or untoward incident affecting the health or safety of a patient, any signifi-

87 For example, under this act a facility would not be allowed to make room for a private patient requiring intensive nursing (degree I) care by shifting a publicly-aided patient requiring the same degree of care into a skilled nursing (degree II) bed.

cant change in the physical or mental condition of a patient, or of the death of a patient in the facility under his supervision.

COMMENT: Section 13 is the first of six sections designed to safeguard the rights and interests of patients and their relatives. The section requires the reporting of epidemic disease and accidents to the department and the reporting of accidents and significant changes in patient condition to the appropriate sponsor or relative.[88] Since "epidemic disease," "accident," and "untoward incident" have particular meanings in the medical context, the department should define these terms under authority of section 2(b).[89]

The two main policies of the subsection (c) are first, that the relative should be notified in times of crisis as a matter of courtesy, and second, that the legal interests of a patient should be protected if he has suffered an actionable injury.

Under all three subsections, the administrator of the facility is the person legally charged with the responsibility of notification. In view of the recent recognition of the long-term facility administrator as a professional,[90] the draftsmen consider it proper to vest

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88 For a similar requirement for the reporting of accidents, *see* N.Y.C. HOSP. CODE § 5.06 (1963), *supra* note 30. A pattern of accidents in a facility may indicate existence of an unsafe condition. Whenever a particular patient is involved in a series of accidents, the pattern may indicate deteriorating physical condition, lack of sufficient supervision, or both.

89 While salmonella may cause only temporary discomfort to healthy persons, it poses a serious threat to patients weakened by disease or by infirmities associated with advanced age. An outbreak of salmonella at a Baltimore nursing home in August resulted in the deaths of 25 patients in a patient population of 144. According to the Maryland State Secretary for Health and Mental Hygiene, failure by the facility to report the first evidence of disease was a violation of state requirements and prevented public health authorities from taking immediate action to arrest the spread of the disease. Washington Post, August 20, 1970, at B1, col. 7, at B4, col. 4.

90 States participating in the medical assistance program are required to have a program "for the licensing of administrators of nursing homes." Social Security Act §§ 1902(a)(29), 1908, 42 U.S.C. §§ 1396a(a)(29), 1396g (Supp. V, 1970). If the administrator of a facility is imbued with a sense of professional ethics, his views and interests relative to a facility may differ markedly from those of the owner or persons with a proprietary interest in the facility. During an appeal hearing concerning a Massachusetts nursing home the administrator of the facility, when called as a witness on behalf of the licensee, gave the following opinion of the facility:

> Well, I'm not too happy with the home. I never have been. I've always thought it was ill kept. We did try to make it better by keeping the odor down with lysol, and things like that, but you see, the urine odor was already in the floor. . . . We do have pride. The home is on Highland Avenue and we would like it to look like the

legal responsibility in the member of the facility staff who has in fact generally fulfilled this function during most of the past decade. It should be noted that a willful failure to report epidemic disease, an accident, a death, or a significant change in patient condition can be prosecuted under section 27(a). If the administrator is the licensee, a willful failure to report would also be cause for license revocation.

Section 14. *Confidentiality of Records*

(a) Information contained in comprehensive health records maintained pursuant to subsection 8(b)(11) and property records maintained pursuant to subsection 17(c), shall be kept confidential. Such records shall be accessible for examination and copying only to authorized persons.

(b) The following persons shall be deemed "authorized" under this section to examine and copy from the comprehensive health record and the property record of a patient: (1) any person or agency designated by the department; (2) the sponsor of the patient; (3) the administrator of the facility; and (4) with respect only to the comprehensive health record, the patient's physician, any other attending physician, the director of nursing or head nurse of the facility, any supervisor of nurses or charge nurse of the facility, and such other individuals as the department may approve.

(c) Information received by the department through inspection of any comprehensive health record or any property record shall not be disclosed to any but authorized persons, except when disclosed in a manner which does not identify the patient, or when disclosed pursuant to an order of a court or in an adjudication held hereunder, or when disclosed with the consent of the affected patient, if he is competent, or of his sponsor, if he is not.

(d) Notwithstanding any of the foregoing provisions, the department shall make available to the public, or provide the public with access to, any notice of hearing, any decision of the department, and any order of the department which pertains to a long-term care facility.

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other houses around there. I have really been ashamed of saying that I worked there at times and I would like to see it kept better.

Fall River Manor Nursing Home, Mass. Dep't Pub. Health, Dec. 9, 1969, transcript of appeal hearing, Sept. 16, 1969, at 35 (on file at Mass. Dep't Pub. Health).

COMMENT: The purpose of this section is twofold. First it protects the patient by providing for the confidentiality of his records.[91] Second, it provides guidelines for the department as to the permissible form and content of the disclosures which may be necessary in the performance of its duties.

Subsection (c) provides that, except under the limited circumstances of subsection (d), the department may disclose confidential information received through the inspection of a patient's records under the four enumerated conditions only.[92]

Subsection (d) provides that the department shall make available to the public notices of hearings, decisions, and orders of the department pertaining to any long-term care facility, even if such documents contain information which otherwise would be treated as confidential. In many hearings, especially where adequacy of care is at issue, reports concerning particular patients may form a part of the evidence presented. Every reasonable effort should be made to limit disclosure of patient information, but where limitation is not feasible, the interest of the public in effective enforcement and the right of the public to know the circumstances requiring the imposition of sanctions against a facility must be overriding concerns.

Section 15. *Posting of License and Certain Other Materials*

(a) Every licensee of a long-term care facility shall maintain in an area of the facility accessible to patients, employees, and visitors a board suitable for posting notices and other written materials. He shall post conspicuously thereon such notices and materials as the department may require, including but not limited to, the following:

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91 Statutes governing confidentiality of records vary widely in the content and the conditions of permissible disclosure. States typically provide that information received by the licensing agency through inspections or reports shall not be disclosed publicly in a manner which identifies facilities or individuals, except in a proceeding involving questions of licensure. CONN. GEN. STAT. ANN. ch. 333 § 19-39 (1969); *accord*, IOWA CODE ANN. § 135B.12 (Supp. 1970), VT. STAT. ANN. tit. 18, § 2009 (1968), WASH. REV. CODE ANN. § 18.51.120 (1961). *See also* N.Y.C. HOSP. CODE § 5.04 (1963) (disclosure of patients' health records only to authorized persons or with consent; no requirement of confidentiality with respect to information about facilities).

92 One purpose of allowing disclosure in a manner which does not identify particular patients is to allow the agency administering the act to make available, in statistical form, information gathered through research studies.

(1) a current license, or if the facility is operating under an application with the force of a license, a copy of such application;

(2) a description, provided by the facility, of the accommodations, services, and degree or degrees of care provided by the facility and of the daily or weekly rate thereof and any items not included in such rate for which a patient may be separately charged;

(3) a list, provided by the facility, of the name, address, and principal occupation of each person who, as a stockholder or otherwise, has a proprietary interest of ten percent or more in the licensee, of each officer and director of a licensee which is a corporation, and of each trustee and beneficiary of a licensee which is a trust;

(4) a list, compiled by the administrator of the facility, of the names of all physicians, registered nurses, licensed practical nurses, and any other licensed personnel employed or retained by the facility;

(5) a description, provided by the department, of complaint procedures established under subsection 16(a);

(6) a list, provided by the department, of such materials as are available under subsection (b) for inspection and copying; and

(7) for such period as the department shall fix, a copy of any notice of hearing, order, or decision of the department pertaining to the facility.

(b) Every licensee of a long-term care facility shall maintain in the facility for examination and copying by patients, employees, visitors, and other interested persons at least one copy of this act, at least one copy of all rules and regulations issued hereunder, and at least one copy of such other materials as the department may require. The administrator of each facility shall be responsible for making such materials available to any person upon request.

COMMENT: The purpose of this section is to protect patients and the public by requiring minimal disclosure of information which is relevant to patients, relatives and friends of patients, employees, and other interested members of the general public.[93] Any licensee or administrator who willfully fails to carry out duties imposed

93 For similar provisions requiring facilities to post their current authorization to operate, see ALASKA STAT. § 18.20.040 (1969); ARK. STAT. ANN. § 82-346 (Supp. 1969); ARIZ. REV. STAT. ANN. § 36-442 (Supp. 1969); ILL. ANN. STAT. ch. 111½, § 35.25 (Smith-Hurd 1966); WASH. REV. CODE ANN. § 18.51.050 (1961). For a similar provision requiring posting of rates and description of services see ARK. STAT. ANN. § 82-355 (Supp. 1969).

under the section can be disciplined pursuant to section 23 or prosecuted criminally under subsection 27(a). A willful failure by a licensee is, in addition, cause under subsection 22(b) for the revocation of his license.

The premise of the draftsmen is that availability of information, particularly in the area of health care where a layman might hesitate to trust his own judgment, is an inexpensive and relatively effective means of protecting the rights of patients and their relatives and of encouraging facilities to comply voluntarily with standards. Although some purchasers of medical care will not benefit from the availability of information either because they will not take advantage of the information available or because they are not concerned about the quality of care provided, that segment of medical consumers capable of making an informed choice among facilities will be aided by the greater availability of information. Since many facilities plan upon a certain percentage of private patients to produce a suitable profit margin,[94] a change in the medical buying patterns of persons in this group could have a significant impact upon the facilities of an area.

Section 16. *Investigation of Complaints*

(a) The department shall establish and implement procedures for the making and transmission of complaints to the department by patients and other persons relative to the operation of long-term care facilities. The department shall prepare, and make available to any person upon request, a description of such procedures.

(b) As justice requires, the department shall investigate every complaint which it has received, except to the extent that the act or practice complained of does not constitute a violation of this act or any regulation hereunder. Upon receipt and review of a complaint, the department shall act thereon, either investigating or refusing to investigate such complaint. In the case of a refusal to investigate, the department shall promptly notify the complainant, if he is known, of its refusal and the reasons therefor; and in every other case, the de-

94 Of twenty-nine nursing home chains reporting on sources of patients revenues, eleven accounted for 50 percent or more of their revenue as coming from private patients and fourteen accounted for from 25 to 49 percent of their revenue coming from private patients. See Elliot, *Wards of the State? Healthy Growth in Nursing Homes Call for Intensive Care,* BARRON'S, Mar. 17, 1969, at 20.

partment shall, following investigation, notify the complainant of its investigation and any proposed action.

(c) Whenever it shall appear upon investigation that any person licensed to practice medicine, nursing, or nursing home administration has violated any provision of the law, the department shall forward such evidence as it has to the appropriate licensing board.

COMMENT: This section provides for the development by the department of methods for processing and responding to complaints concerning the operation of facilities. Although information given by complainants can obviously be no more than a supplement to knowledge gained by the agency through on-site inspections and review of facility records, it is nonetheless important that complaints receive consideration and, whenever a substantial matter is alleged, are investigated.[95]

Subsection (a) leaves to the department the details of the complaint procedure. Such a procedure should as a minimum provide for the address to which complaints are to be directed and the means by which they are to be communicated. Since complainants are often patients or employees, they may legitimately insist upon anonymity in their communications as a protection against possible retaliation. Although the draftsmen have made the department responsible for establishing complaint procedures, they have specifically not made rigid compliance with all formal procedures a prerequisite to investigation of a complaint.

Under subsection (b), if the complainant is known the department is required to notify him of its action, including its reasons for any refusal to investigate or the results of any investigation which it makes. Since a refusal to investigate is final department action, it is reviewable under section 25.

Section 17. *Safeguarding of Patient Property*

(a) The admission of a patient to a long-term care facility and his presence therein shall not confer on the licensee of the facility or on

95 Investigation of complaints provides the regulatory agency with a means of demonstrating its effectiveness to the public and of obtaining information which an inspection would not produce. To the extent that the agency has a reputation for full and fair treatment of complaints, members of the public will be encouraged to take advantage of the complaint mechanism.

the administrator, employees, or other representatives of the facility authority to manage, use or dispose of any property of such patient. In no case shall any such person act as guardian or conservator for any patient or as trustee for the property of any patient.

(b) Every licensee of a long-term care facility shall provide for the safekeeping of personal effects, funds, and other property of its residents; provided that where necessary for the protection of valuables and in order to avoid unreasonable responsibility therefor, a licensee may require that such valuables be excluded or removed from the facility and kept at some other place not subject to control by the licensee.

(c) On or before July 31 of [year after effective year] and of every year thereafter, every licensee of a long-term care facility shall furnish every patient in such facility on June 30 of such year with a complete and verified statement of all effects, funds, and other property which the facility received during the year ended June 30 for personal use by the patient, for expenditure on his account, or for safekeeping in his behalf. In addition, every licensee of a facility shall, upon transfer or discharge of a patient, furnish such patient with a complete and verified statement of all effects, funds, and other property which the facility received during his stay, or during the period since the last annual statement to him, for personal use by the patient, for expenditure on his account, or for safekeeping in his behalf. Every annual statement and every statement upon transfer or discharge of a patient shall be furnished without special charge and shall detail amounts and objects received, the sources thereof, and any disposition, except that such statement need not cover objects of personal property of a retail value of less than five dollars. Every licensee furnishing a statement to a patient shall furnish a copy, without charge, to the sponsor of such patient, any agency contributing funds to his care or support, and, upon request, to the department, and it shall, for at least a year, retain a copy in its records maintained on the premises of the facility.

COMMENT: Section 17 provides safeguards for patients' property in long-term care facilities by placing responsibility for its safekeeping on licensees.[96] However, it should be borne in mind

96 In the draftsmen's view, licensees at present may be uncertain as to their obligation with respect to patient property and often act as though unaware of the fiduciary aspect of their relationship with patients. For example, the property of deceased patients has sometimes simply been added to the required equipment of a facility. The following testimony is illustrative:

that these provisions, affecting only facilities, do not protect the patients' property from their families or other persons made responsible for them. Protection under existing law of the patient's property from persons outside long-term care facilities would require much wider use of trusts, conservatorships and guardianships.

Subsection (a) prohibits licensees and persons under their control from managing or disposing of the property of patients and from serving as guardians or conservators for patients.[97] The opportunity for independent review of a licensee's obligations respecting patients and their property would be at least partially lost if licensees were permitted to act in a position of authority independent of that conferred by the act. Because individual licensees may wish to limit their liability for patient property, subsection (b) provides that a licensee may require a patient in his facility to keep valuable items of personal property at some other place than in the facility.[98]

Subsection (c) requires of licensees long-term care facilities to render an annual property statement to every patient, his sponsor, agencies contributing to his support and, upon request, the de-

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> Dr. Frechette (Commissioner): [Why] the discrepancy between 13 bedside lights yesterday, and yet you testified this morning there were only two. Did you buy 11 yesterday?
> Mrs. Dorsey (administrator): No, we had some up in the attic. They were personal lights from patients who had gone on. We put those in and we had some floor lights from other places that were not in use.
> Dr. Frechette: By personal lights, do you mean they were the personal property of patients who have died?
> Mrs. Dorsey: Yes.
> Dr. Frechette: And you have taken them and used them?
> Mrs. Dorsey: Well, of course, they had no families and they were up in the attic.
> Att'y Winsor (representing licensee): They were abandoned?
> Mrs. Dorsey: Yes.

Fall River Manor Nursing Home, Mass. Dep't Pub. Health, Dec. 16, 1969, transcript of appeal hearing, Sept. 16, 1969, at 35-36 (on file at Mass. Dep't Pub. Health).

97 *See* Model Nursing Home Licensing Act §§ 13(a), (b). California allows licensees of facilities to manage patient funds, but requires that every licensee managing a patient's funds post a bond. CAL. HEALTH & SAFETY CODE § 1423 (West Supp. 1969).

98 *See* Model Nursing Home Licensing Act § 13(c).

partment.[99] Statements should provide a means of detecting patterns of disappearance, unduly large disbursements for the services listed, or other irregularities in the handling of the property. For ease of administration, and in recognition that loss or interchange among patients of minor personal belongings is inevitable, the subsection limits reporting of items of personal property to items with a retail value in excess of five dollars.

Any person who willfully violates any provision of this section can be disciplined under section 23 and can be criminally prosecuted under subsection 27(a). In addition, by the terms of subsection 22(b), willful violation of any provision of the section is cause for license revocation.

Section 18. *Contracts Between Licensees and Patients*

(a) Commencing [one year from effective date of this act], no licensee shall provide care for any person for more than ten days in a long-term care facility unless there is in force a contract between the licensee and such person which covers the relative rights and duties of the parties. In the case of persons admitted to a facility on or after [same date as above], the licensee and the patient shall conclude a contract, as far as practicable, within three days of the day of admission. Each party to a contract made hereunder shall receive a duplicate original or a copy of such contract. Whenever a patient is not competent to enter into a contract, the sponsor of such patient may contract on his behalf for the purposes enumerated hereunder.

(b) Every contract covering the relative rights and duties of a licensee and a patient shall, after [effective date], be in writing and on a form which the department has approved. Every such contract shall contain express provision for (1) the duration of the contract, not to exceed six months; (2) the accommodations, services, and degree of care to be provided; (3) the daily or weekly rate therefor and any items not included therein for which a separate charge may be made; and (4) specification of any rights, duties, and obligations of the parties in addition to those imposed by law. The department may by regulation require that every such contract contain any provision which it finds necessary for the protection of patients or in the public

99 *See* MINN. STAT. ANN. § 376.58 (1968); N.Y.C. HOSP. CODE §§ 4.05(i), 5.05(c)(3)-(5) (1963); JCAH Accreditation Standards ch. 1, at 3 (1968) (accurate record accounting for patient property required); Model Nursing Home Licensing Act §§ 13(d), (e) (records, annual accounting required).

interest and prohibit any provision which it finds unfair to patients or contrary to the public interest. The department shall prepare and distribute a model contract which it finds acceptable.

(c) Every licensee of a long-term care facility shall maintain in such facility a file of contracts made hereunder, and it shall retain each contract in such file for at least one year after the transfer or discharge of the patient covered thereby.

COMMENT: Section 18 is intended to protect patients and their families by requiring that every admission be covered by a contract which specifies the rights and duties of the patient and of the licensee.[100] Some licensees have shown themselves to be resourceful both in increasing their income beyond that received for necessary care and in lessening their expenses by reducing the services rendered. In either instance the patient suffers, but in the absence of an agreement guaranteeing him specific services, it is difficult for the patient to assert his private rights. Methods used by licensees to increase income involve excessive charges for extra services, such as a high monthly fee for the right of the patient to operate his own television, or the production of additional income by activities which make use of staff or equipment supposedly reserved for the care of patients.[101] Sometimes reductions of services are combined with income enhancement, as when a reduced diet may lead to greater sales of food for a facility-operated coffee shop or vending machine.[102] Under subsection (a), the sponsor of a patient may contract in the patient's behalf if the patient is not competent to make a contract. Because of the novelty of the duty which the section imposes on licensees and because of the heavy initial volume of requests for approvals which the department is likely to experience, subsection (a) is not to take effect until one year after the effective date of the rest of the act.

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100 *See* Model Nursing Home Licensing Act § 11.

101 Income-producing activities which divert the use of a facility or its personnel from the treatment of inpatients have been known in Massachusetts to include the renting of space in facilities to physicians and paramedical personnel and the operation of x-ray equipment and kidney dialysis for outpatients. For a discussion of how facilities, if properly supervised, may be allowed to share some services with other institutions, see this commentary at § 9, *supra*.

102 Patient access to a coffee shop or a vending machine in a facility, under any circumstances, requires careful supervision if prescribed diets are to be maintained. In view of the difficulty in regulating such activities, the enacting jurisdiction may choose not to allow either coffee shops or vending machines in facilities.

Under subsection (b), the contract which the section requires is to be the exclusive contract between the parties and it must include specified provisions. The department's power to ensure that contracts cover required subjects and are otherwise fair is contained in provisions that contracts be on department-approved forms and that the department may, as necessary for the protection of patients, prohibit certain terms and require others.[103] Subsection (c) makes licensees responsible for maintaining a contract file which department representatives can periodically check for evidence of compliance with the section.

By the terms of sections 22, 23, and 25(a), any licensee who willfully violates this section can have his license revoked, be disciplined, and be prosecuted criminally. Any person aiding, abetting, or causing a violation would be subject to sanctions under sections 23 and 27(a).

Section 19. *Denial of Applications for Construction Permits; Original Licenses*

(a) The department shall deny every application for a construction permit which it cannot grant under section 7(a) and (b). Upon denial of an application for a construction permit, the department shall notify the affected applicant of its action, the reasons therefor, and the provisions of law relied upon.

(b) Subject to subsection 6(d), the department shall deny every application for an original license which it cannot grant under section 8(a) and (b). Upon denial of an application for an original license, the department shall notify the affected applicant of its action, the reasons therefor, and the provisions of law relied upon.

(c) Any applicant aggrieved by denial of an application for a construction permit or by denial of an application for an original license shall, upon timely written request, have the opportunity for a hearing at which he may contest the department's action as contrary to law or unwarranted by the facts or both. The department shall render a final decision on the basis of such hearing.

COMMENT: The section specifies procedures for denying applications for construction permits and for original licenses. It does not

103 The agency administering the act should give consideration to prohibiting life care contracts pursuant to this provision. New York City has taken this step. N.Y.C. HOSP. CODE § 4.12 (1963).

apply to applications for renewal licenses, which may be denied only pursuant to section 22. Under subsections (a) and (b) when an application is denied, the affected applicant must be notified of the denial, the reasons therefor, and the provisions of law relied upon. Subsection (c) grants to any applicant the opportunity for a hearing on the denial of his application. The department should establish in its regulations a reasonable period during which an aggrieved applicant may request a hearing under section 24.

Section 20. *Correction Orders; Assessments*

(a) Whenever the department finds upon inspection of a facility that the licensee is not in compliance with any applicable requirement of this act or of any regulation made hereunder, it may in its discretion issue a correction order to such licensee. If a correction order is not issued, the department shall either advise the licensee of all deficiencies found or take appropriate action under another section of the act. In every case, however, where a licensee has been advised of a deficiency and does not take prompt remedial action, the department shall issue a correction order or take other appropriate action under the act.

(b) Every correction order issued by the department shall state the deficiencies found and specify a date by which each deficiency shall be corrected; provided, however, that deficiencies shall be listed with reference to applicable provisions of law and the time provided for correction shall be reasonable and in no case less than twenty-one days.

(c) Any licensee ordered to correct deficiencies may, within five days of receipt of the correction order, file a written request that the department reconsider such order or any portion thereof. The department shall act upon any such request within seven days of its receipt. Unless modified or cancelled, the order shall stand as issued, provided that the department has taken timely action thereon

(d) Where a licensee is found upon inspection to be in violation of a correction order, the department shall assess him fifty dollars for each deficiency continuing beyond the date specified for correction; provided, however, that no licensee shall be assessed more than five thousand dollars in any one calendar year for deficiencies in any one facility. Each day that a violation exists beyond the date specified for correction shall constitute a separate deficiency. Any licensee aggrieved by a demand for payment of an assessment shall, upon timely

written request, have the opportunity for a hearing at which he may contest the department's demand as contrary to law or unwarranted by the facts or both. The department shall render a final decision on the basis of such hearing, but shall assess no licensee for a violation continuing during the pendency of the adjudication.

(e) The department shall, in a civil judicial proceeding, recover any unpaid assessment which has not been contested under this section, or which has been affirmed under this section and not appealed under section 25, or which has been affirmed on judicial review had pursuant to section 25.

COMMENT: This section, together with sections 21 and 22, forms the primary mechanism for enforcing compliance with the provisions of the act and regulations adopted under it. Statutes currently providing for the regulation of health facilities typically rely exclusively upon the threat of license revocation or suspension to compel compliance.[104] Revocation, however, is a draconian measure, difficult to enforce in court,[105] and unsuitable for any but flagrant or chronic violations. In an effective scheme of regulation, revocation is a last measure which is invoked only when lesser measures have failed to produce the desired end.

Subsection (a) empowers the department to issue a correction order for any deficiency found upon inspection of a facility. Upon initial discovery of a deficiency, the department may merely advise the licensee. This approach encourages informal resolution of the problem and allows inspectors to function as consultants whenever possible.

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104 *See, e.g.*, CONN. GEN. STAT. ANN. § 19-35 (Supp. 1969); FLA. STAT. ANN. § 400.101 (Supp. 1970); ILL. ANN. STAT. ch. 111½, § 35.22 (Smith-Hurd 1966); TEX. REV. CIV. STAT. ANN. art. 4442c, § 6 (1966); WASH. REV. CODE ANN. § 18.51.060 (1961).

105 In Massachusetts, judicial review of an administrative decision to revoke a license is usually accompanied by a court order restraining enforcement of the agency's decision pending outcome of the review. Typically, at least several months elapse before a hearing and, in one instance, review of the health department's decision denying an application for a renewal license has languished in court for more than three years. During this period, the facility has remained in operation protected by a restraining order. Sorrentino v. Frechette, Eq. Docket No. 27825 (Mass. Middlesex Super. Ct., 1970). During the twelve months ended September 30, 1970, ten petitions were filed in court seeking review under the state administrative procedure act, MASS. ANN. LAWS ch. 30A, § 14, of decisions of the Department of Public Health revoking licenses or issuing licenses with reduced quotas. Of eight facilities granted restraining orders pending judicial review, two subsequently closed voluntarily, two closed upon dissolution of their restraining orders after hearings, and four remain in operation or at their former quotas pending review.

The chief concern of draftsmen in subsection (b) is that correction orders take a reasonable form. The department is required to list each deficiency with reference to the applicable law and must allow reasonable time for correction. The licensee is given an opportunity under subsection (c) to ask for reconsideration of the whole or any part of any order. In order to discourage purely dilatory requests for reconsideration, the subsection allows the licensee only a short period in which to make his request, and it requires that the order stand as issued, unless modified or cancelled, provided that the department gives the licensee a timely answer. Since at this point the licensee is not aggrieved, there is no provision for opportunity for a hearing or for judicial review.

Under subsection (d), the department is required to assess a licensee fifty dollars for each deficiency which is found uncorrected after the date set for correction. Each day that a deficiency continues beyond the specified compliance date constitutes a separate offense, but no licensee may be assessed more than five thousand dollars in any one calendar year for any one facility.[106] Since a licensee may be aggrieved once payment of an assessment is demanded, a licensee shall then have the opportunity for a hearing. In implementing the provision, the department should establish in its regulations a reasonable period during which an aggrieved licensee may request a hearing.

Subsection (e) empowers the department to initiate a civil proceeding in order to recover an assessment which has not been paid. Because every correction order is subject to judicial review under section 25, there is no provision for review as part of the recovery proceeding.

The administrative assessments provided for in this section are distinguishable from fines, which a majority of jurisdictions hold

106 Massachusetts empowers its Department of Public Health to impose fines of up to fifty dollars for any violation of regulations established for the maintenance of nursing homes and rest homes. Under the provision, where a violation is not corrected after an order to comply, each day of violation constitutes a separate offense. There is no ceiling on the amount of fines which may accrue. MASS. ANN. LAWS ch. 111, § 73 (Supp. 1970). New Jersey provides that any person who fails to correct or to initiate correction of a violation of a regulation within seven days of notice is liable to a civil penalty of between ten and twenty-five dollars for each day the violation continues. As under the Massachusetts statute, there is no statutory maximum amount which may be collected. N.J. STAT. ANN. § 30:11-4(a) (Supp. 1969).

cannot be imposed by an administrative agency,[107] in two important respects. First, an assessment is a civil sanction whereas a fine is a criminal penalty.[108] No stigma of conviction or other consequence of criminal liability attaches to the collection of an assessment since the court proceeding under subsection (e) is civil. Second, since a legislature may lawfully vest the power to revoke or suspend a license in an administrative agency, delegation of a lesser power such as the making of assessments should be upheld,[109] provided that every licensee assessed is accorded administrative due process and the right to judicial review.[110]

Section 21. *Reclassification; Reduction in Quota*

(a) The department shall by order reclassify a facility, reduce the bed quota of the facility, or both where it finds upon inspection of the facility (1) that the licensee is not providing adequate care under the facility's existing classification or quota and (2) that reclassification, reduction in quota, or both would place the licensee in a position to render adequate care. Any notice to a licensee of reclassification, reduction in quota, or both shall include the terms of such order, the reasons therefor, and the date set for compliance.

(b) The department shall allow a licensee not less than fourteen days and not more than ninety days in which to comply with an order under this section. Where a quota reduction of more than twenty percent is ordered and a hearing is claimed under subsection (c), such period shall not commence until notice to the licensee of an adverse final decision; in all other cases, the period shall commence upon receipt of the order and shall not be stayed by the department.

(c) Any licensee aggrieved by an order issued pursuant to this section shall, upon timely written request, have the opportunity for a hearing at which he may contest such order as contrary to law or un-

107 For a short survey of the problems involved in the administrative imposition of penalties, see L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW CASES AND MATERIALS 159-62 (3d ed. 1968).

108 "The problem is therefore to distinguish between criminal penalties and civil or remedial penalties, for the administrative imposition of penalties is commonplace." 1 DAVIS, *supra* note 90, § 2.13, at 134. For a discussion of the distinction between judicial and administrative function, see Brown, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261 (1935).

109 *But see* Tite v. State Tax Commission, 89 Utah 404, 57 P.2d 734 (1936), Broadhead v. Monaghan, 238 Miss. 239, 117 So. 2d 881 (1960).

110 In other contexts, even limited review by the courts is sufficient to prevent an administrative determination from being held invalid as an unconstitutional delegation of judicial power. *See* Brown, *supra* note 139, at 272.

warranted by the facts or both. The department shall render a final decision on the basis of such hearing. This susbsection, however, shall not apply to any order included in a final decision rendered pursuant to subsection 22(e).

COMMENT: This section contemplates establishment of an enforcement device which will supplement revocation under section 22. Subsection (a) empowers the department by order to reclassify a facility, reduce its bed quota, or both where the licensee is not providing adequate care under the facility's existing classification or quota.[111] This grant of authority is intended both to add force to the department's power to issue warnings and correction orders and to reduce the need to resort to revocation proceedings. Subsection (a) conditions reclassification and reduction in quota upon a finding that such action would place the licensee in a position to render adequate care.

A licensee aggrieved by reclassification or by reduction in quota is provided with an opportunity, under subsection (c), for a hearing at which he may contest the department's action. As subsection (b) makes clear, however, except where the department orders a reduction in quota of more than twenty percent, the order is to take effect pending the outcome of any hearing which may be claimed. The department may wish in some instances to establish a timetable for compliance pursuant to its power under subsection (a) to set the terms of any order reclassifying a facility or reducing the quota of a facility.[112]

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111 Although the Massachusetts statute governing nursing homes and related facilities does not expressly authorize the state health department to reduce bed quotas, MASS. ANN. LAWS ch. 111, § 71 (Supp. 1970), the department has proceeded under the theory that the power to reduce a quota is inherent in the power to issue licenses subject to revocation for cause. *See* Malden Nursing Home, Mass. Dep't Pub. Health, Jan. 13, 1970 (quota reduced from 64 to 40 beds to meet floor area requirement effective on change of ownership of facility), *aff'd*, Carney d/b/a Malden Nursing Home v. Commonwealth, Eq. Docket No. 91178 (Mass. Suffolk Super. Ct., 1970); Old Colony Road Nursing Home, Inc., Mass. Dep't Pub. Health, May 18, 1970 (quota reduced restricting patient occupancy to first floor because of lack of utility room on second floor), *pending judicial review*, Old Colony Rd. Nursing Home, Inc., v. Frechette, Eq. Docket No. 91781 (Mass. Suffolk Superior Ct., 1970); Odd Fellows Home of Massachusetts, Mass. Dep't Pub. Health, June 23, 1970 (quota reduced from 85 to 71 beds to enable home to provide adequate care with existing staff).

112 For example, the agency administering the act may, if it chooses, set as terms of a quota reduction order that the licensee admit no additional patients, effective

In a case of doubt whether to seek revocation under section 22 or to proceed pursuant to this section, the agency should rely upon section 22. If, after hearing, it concludes that reclassification or reduction in quota is preferable it may include a reclassification or quota reduction order in its final decision.

It should be observed that the grounds for reclassification and for reduction in quota, unlike those for revocation, are not specifically related to the requirements for licensure and classification of subsections 8(b) and 11(b). The authors take the view that, since the purpose of classification is to tailor care to patient needs, the performance of a facility under a particular classification can best be judged by its success in meeting patient needs. Since the burden of proof will be upon the licensee in contesting an order under this section, the fact that the standard for reclassification and for quota reduction is stated in general terms should not impede the administration of sanctions.[113]

Section 22. *Revocation of Construction Permits; Suspension and Revocation of Licenses*

(a) The department may revoke any construction permit for (1) violation of any restriction upon such permit or any requirement prescribed or established under subsections 7(b)(1) to 7(b)(3); or (2) willful violation of or failure to observe subsection 6(e).

(b) The department may revoke any license (1) for violation of any restriction upon such license, any order issued under section 19 or section 21, or any requirement prescribed in or established under section 8(b); or (2) for willful violation of or failure to observe any provision of section 6(e), section 8(c), or sections 13 to 18.

(c) Whenever the department proposes to revoke a construction permit or a license, it shall notify the permittee or licensee concerned of its proposed action, of the deficiencies or violations alleged, and of the provisions of law relied upon. Such permittee or licensee shall, upon timely written request, have the opportunity for a hearing at which he may present evidence and argument rebutting the charges

immediately, and that he operate at the reduced quota given him by a set date. By curtailing or temporarily prohibiting admissions, the department may be able to accomplish quota reduction or reclassification with little or no transfer of patients.

113 If the agency finds after some experience with the act that it would be useful to elaborate the "adequate care" standard, it may define the term pursuant to § 2(b), *supra*.

against him. If after hearing, or waiver thereof, the department determines that revocation is warranted, it shall render a final decision revoking the construction permit or license. Where revocation of a license is proposed, if the department determines that revocation is unwarranted, it may include in its final decision an order for reclassification, reduction in quota, or both, provided that the conditions of section 21(a) are met.

(d) Notwithstanding subsection (c), the department may, upon due notice, suspend any license at any time upon a finding that the health or safety of patients is in imminent danger. Upon suspension of a license, the department shall promptly afford the licensee involved an opportunity for a hearing. If after a hearing, or waiver thereof, the department determines that revocation is warranted, it shall render a final decision declaring the license revoked.

(e) Where the department has rendered a final decision to revoke a license under subsection (c), the department may stay the effective date of revocation by not more than sixty days upon a showing that such delay is necessary to assure appropriate placement of patients.

COMMENT: Revocation of a license is intended to be the most severe disciplinary action. Generally, this sanction is appropriate for application only where a licensee has been given ample opportunity to correct deficiencies but has refused to or failed to do so. In addition to providing for revocation of licenses,[114] this section also provides for suspension of licenses and for revocation of construction permits.

Subsection (a) establishes grounds under which the department may revoke a construction permit and subsection (b) establishes grounds for revocation of a license. Under subsection (d), a license may be suspended only upon a finding of imminent danger to the health or safety of patients.

Since "licensee" means any person who holds a license or who is operating under an application with the force of a license under

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114 For a sample of state statutes providing for the revocation of facility licenses, see ALASKA STAT. § 18.20.050 (1969); CONN. GEN. STAT. ANN. ch. 333, § 19-35 (1969); FLA. STAT. ANN. § 400.101 (Supp. 1970); IDAHO CODE § 39-3303 (Supp. 1969); ILL. ANN. STAT. ch. 111½, § 35.22 (Smith-Hurd 1966); MASS. ANN. LAWS ch. 111, § 71 (Supp. 1970); MICH. COMP. LAWS ANN. § 331-656 (1967); MO. ANN. STAT. § 198-130 (1962); N.J. STAT. ANN. § 30:11-3 (Supp. 1969); R.I. GEN. LAWS ANN. § 40-15-6 (1969); TEX. REV. CIV. STAT. ANN. art. 4442c, § 6 (1966); WASH. REV. CODE ANN. § 18.51.060 (1961).

subsection 6(d), the department must follow the provisions of this section, against those in either category. Where an application for an original license is involved, section 19 is the proper section under which to proceed.

Subsection (c) prescribes the steps which the department must follow in order to revoke a license or a construction permit. To initiate a proceeding, the department notifies the affected licensee or permittee. Because revocation represents what is sometimes considered the denial of a property right, the subsection provides a procedural protection absent in sections 19, 20, and 21: the department must accord the affected person an opportunity for a hearing *prior* to taking any action. In addition, under section 24(d), the department must bear the burden of proof.

The value of subsections (a), (b), and (c) will depend primarily upon the performance of the regulatory agency. If the department is prepared to invoke the section as necessary, and it is competent in the conduct of any revocation proceedings, the section should provide a deterrent against violations of statutory and regulatory requirements. In an effective enforcement program, the readiness to use revocation when appropriate will in many instances produce compliance and eliminate any need for a proceeding.

The premise of subsection (d) is that an imminent danger to the health or safety of patients requires prompt action[115] even if the licensee has not had the opportunity for a hearing. In order to safeguard the licensee in a case where patient health or safety is clearly in present danger, the subsection provides that the licensee, upon suspension, shall promptly be afforded the opportunity for a hearing. If the licensee believes that the department has acted arbitrarily, or that it is imposing undue delay, he may seek equitable relief under section 25, and as appropriate, the court can shape a remedy to safeguard the licensee's rights.

Under subsection (e), the department is allowed to stay revoca-

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115 The power to suspend a license and empty a facility is no more than a vesting in the responsible agency of an implicit police power. In Massachusetts, facilities have been emptied of patients without hearings because of fire, flooding, loss of heat, lack of food, linen and other necessities, lack of personnel, and abandonment of the operation by the licensee. Interview with Martin J. Armstrong, Assistant Director of Bureau of Health Facilities, Division of Medical Care, Department of Public Health of Massachusetts, in Boston, Oct. 19, 1970.

tion of a license for a maximum of sixty days upon a showing by the licensee that a delay is necessary to assure appropriate placement of patients. Exercise of the department's discretion is intentionally restricted to this one situation. Stays should be granted only on condition that the licensee consent to the revocation and waive the right of judicial review.

Section 23. *Prohibited Acts and Practices; Disciplinary Action*

(a) No person shall engage in, or aid, abet, or cause, any prohibited act or practice. The following acts and practices shall be prohibited:

(1) any violation of any restriction upon a construction permit, any restriction upon a license, any order of the department, or section 5;

(2) any willful violation of section 6(e) or sections 13 to 18;

(3) failure to provide three or more patients with prescribed care or treatments for a period of a week, or willful failure to provide a patient with prescribed care or treatments;

(4) misrepresentation of accommodations, services, or degree of care available at a long-term care facility by false statement, by omission of material fact, or by scheme, trick, or device; and

(5) any violation of any requirement which the department has made subject to this section by regulation.

(b) Whenever it shall appear to the department that any person has engaged in, or has aided, abetted, or caused, any prohibited act or practice, the department may in its discretion institute a disciplinary proceeding hereunder. If the department proposes to discipline a person, it shall notify such person of the disciplinary action proposed, the charges made, and the time and place of the hearing at which such charges shall be heard. Any person so charged may present evidence and argument rebutting the charges against him at such hearing. As justice requires, the department shall consolidate for hearing and decision related cases arising under this section, section 22, or both sections.

(c) Upon a final decision, if the department finds that the person charged has engaged in, or has aided, abetted, or caused, a prohibited act or practice, it shall issue an order commanding him to divest himself of any proprietary interest in long-term care facilities in_____ to cease directing or participating in the construction or operation of facilities in _____or both. Such order shall take effect fourteen days from notification to the affected person and shall continue in

force for such period as the department shall fix but in no case for more than five years. The department may stay the effective date of an order for a period of not more than six months upon a showing that the affected person requires a delay for the purpose of complying with the order.

COMMENT: The purpose of this section is to single out acts and practices which constitute flagrant violations of the act and to provide for the imposition of sanctions against persons committing them. In accordance with this design, subsection (a) prohibits certain acts and practices, and subsections (b) and (c) provide for the disciplining of any person found to have engaged in, or to have aided, abetted, or caused, any prohibited act or practice.

Unlike the sanctions contained in sections 20, 21, and 22, disciplinary action is available against employees and representatives of facilities as well as against licensees. In the case of officers, directors, and supervisory employees of health facility chains, the section represents an extension of the licensing agency's traditional jurisdiction. The prevalence of chain operations in many states, and the apparent nationwide trend to consolidation is bringing into existence a large class of persons who have indirectly a major effect on the quality of care in long-term care facilities.[116] If the agency which licenses facilities is to be fully effective in supervising the operation of facilities, it must have at least some jurisdiction over the activities of chain ownership and management. This section will allow the department to exercise control over chains, chain managers, and chain owners to the extent that it may discipline such persons for flagrant violations of the act. The state might supplement this provision with a section requiring health facility holding companies to register and subjecting such companies to the rule-making power of the department.[117] Apart from affecting chain managers and owners, the section also subjects professional employees to the jurisdiction of the department in so far as they may commit any prohibited act or practice.

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116 *Cf.* Elliott, *Unhealthy Growth? The Nursing Home Business Is Expanding at a Feverish Pace*, BARRON'S, Feb. 10, 1969, at 3-16; *Nursing Homes: Caution Signals*, MAG. WALL STREET, June 21, 1969, at 19-21.

117 For an example of regulatory legislation directed at companies with a controlling interest in the operating companies of a particular industry, *see* Public Utility Holding Company Act, 15 U.S.C. §§ 79-79z-6 (1964). Section 2(a)(7) of the act, 15 U.S.C. § 79b(a)(7), provides a tested definition for "holding company."

Subsection (b) prescribes the steps which the department must follow in order to discipline a person who it believes has engaged in, or has aided, abetted, or caused, a prohibited act or practice. As under section 22, the department must bear the burden of proving the charges which it has made. Whenever the department is conducting a revocation proceeding in the same or a related matter, it may consolidate all proceedings both for hearing and for decision.[118]

Subsection (c) specifies the disciplinary action which the department may order if it finds, after hearing, that a person has engaged in, aided, abetted, or caused a prohibited act or practice. Three types of action are possible: the department may order that the person involved divest himself of any proprietary interest in facilities in the state, that he cease directing or participating in the construction or operation of facilities in the state, or both.[119]

In a case where disciplinary action is ordered, such order will normally take effect two weeks from notification to the affected person. The department may stay its order for a maximum of six months upon a showing by the affected person that a delay is necessary for the purpose of complying with the order. As under subsection 22(e) which allows the department to stay revocation of a license, the department's power is available only to a person who consents to the department's final decision.

Should any person duly disciplined under this section fail to observe the department's order, the department would be entitled, upon application, to an injunction issued pursuant to section 26. Since a person disobeying a department order is subject to section 27 which provides for criminal penalties, the department could recommend to the state attorney general that he institute a criminal proceeding.

Section 24. *Hearings; Decisions; Burden of Proof*

(a) This section shall apply, according to the provisions thereof, in every case of an adjudicatory proceeding provided for under this act.

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118 For a discussion of consolidation of administrative proceedings, *see generally* 1 DAVIS, § 8.12, at 572. Fundamental fairness may in some instances require consolidation of two or more proceedings, *id.*, at 573-76 (1958), 198-200 (Supp. 1965).

119 Professor Davis distinguishes four types of administrative proceedings: rule-making, adjudication, licensing, and investigation. 1 DAVIS, § 3.01, at 159-160.

(b) The department shall accord all parties notice of a scheduled hearing. Such notice shall include the time, place, and subject matter of the hearing and the legal authority and jurisdiction under which the hearing is to be held.

(c) One or more members of the department or one or more employees of the department shall preside at any such hearing. Any member or employee who has engaged in the performance of investigative or prosecutorial functions in the case or in a factually related case shall disqualify himself and not preside at the hearing or take part in the decision of the case.

(d) Subject to such rules as the department shall adopt, persons presiding at hearings may —

(1) issue subpoenas to a party on request and upon a showing of general relevance and reasonable scope of the evidence sought;

(2) administer oaths and affirmations, rule on offers of proof and receive relevant evidence, dispose of procedural requests and similar matters, hear the arguments of the parties, and otherwise regulate hearings consistent with the rules of the department; and

(3) render or recommend decisions in accordance with subsection (f).

(e) In any adjudication hereunder the burden of proof shall be on the department where it proposes to take a particular action and on the contesting party where the department has issued an order. Every party shall be entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to cross-examine witnesses who testify. Any evidence may be received, but the department shall exclude irrelevant, immaterial, or unduly repetitious evidence. An official record of every proceeding shall be kept.

(f) Following every hearing held pursuant to this section, the persons presiding shall render a final decision whenever such persons constitute a majority of the members of the department; otherwise, the person or persons presiding shall recommend a decision to the department. Whenever a decision is recommended, each party shall, upon a timely written request, have the right to file with the department his exceptions thereto or concurrence therein together with supporting reasons. The department shall render a final decision upon consideration of the recommended decision and any papers filed pursuant to this subsection. The final decision, and any recommended decision if reversed or modified, shall be a part of the official record. Every decision shall include a statement of findings and conclusions,

together with the reasons therefor, on all material issues of fact, law, or procedure.

COMMENT: This section applies to any adjudicatory proceeding which the agency conducts in the exercise of its enforcement powers and its powers to select among applicants seeking approval to construct facilities. States with administrative procedure acts may wish to delete many of the provisions of this section and to rely instead upon their procedure acts. Subsections (b) through (f) are derived principally from the provisions of the federal Administrative Procedure Act.[120]

Subsection (e) places the burden of proof upon the applicant or licensee in proceedings under sections 19, 20, and 21, and upon the department in proceedings under sections 22 and 23. The procedures set forth in sections 20 and 21 are distinguishable from those in sections 22 and 23 in that the former relate to proposed actions which are designed to compel correction of deficiencies, whereas the latter relate to closure of facilities and divestiture of proprietary interest in facilities. Both the differing purposes and the differing degrees of gravity of the acts authorized in these sections support the differences in the burden of proof. Placing the burden of proof on the applicant in proceedings under section 19 is justified on the grounds that it is reasonable to expect that persons who intend to make an initial entry into long-term care should clearly demonstrate that they are responsible and suitable persons, since these persons and not the department are in possession of such information.

As subsection (c) suggests, it will be advisable for the department to separate the prosecutorial and the adjudicatory functions of the department.[121] The department may delegate the hearing of

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120 *Compare* § 24(a) *with* 5 U.S.C. § 554(b) (Supp. V, 1970); § 24(b) *with* 5 U.S.C. §§ 554(d), 556(b) (Supp. V, 1970); § 24(c) *with* 5 U.S.C. § 556(c) (Supp. V, 1970); § 24(d) *with* 5 U.S.C. §§ 556(d), (e) (Supp. V, 1970); and § 24(e) *with* 5 U.S.C. § 557 (Supp. V, 1970).

121 It should be borne in mind that the person appointed to hold a hearing may by reason of continuances, re-hearings, or for other reasons retain his position for a considerable period of time. In the meantime, if investigatory or other duties bring him into contact with the licensee or the licensee's employees or agents, his position as an impartial judge may be compromised. For a discussion of separation of functions in adjudication, see 2 DAVIS §§ 13.01, 13.02, at 23-31 (Supp. 1963), and § 13.02, at 29-32 (Supp. 1965).

cases to subordinate officials. In such case, however, officials presiding must not have served in a prosecutorial capacity in the same or a related case.

Section 25. *Judicial Review*

(a) A person suffering a legal wrong because of department action, or adversely affected or aggrieved by a department decision, may obtain review thereof whenever such action or decision is final and no other adequate remedy in a court is available. A preliminary, procedural, or intermediate ruling, order, or decision shall not be directly reviewable but shall be subject to review upon review of a final action or decision of the department.

(b) Proceedings for judicial review shall be initiated by filing a petition for review in the _____court within fourteen days after notification of the final action or decision of the department. The petitioner shall simultaneously serve a copy of such petition personally or by registered mail upon the department. Upon receipt of a copy of a petition for review of a final decision, the department shall promptly file in court the official record of the proceeding in which such decision was rendered.

(c) Initiation of a proceeding under this section shall not, unless specifically ordered by the reviewing court, operate as a stay of the department's action or decision. The reviewing court may issue process to postpone the effective date of the department's action or decision but only to the extent necessary to prevent irreparable injury and on such conditions as may be required to protect the public interest and the health, safety and property of patients.

(d) The reviewing court shall —

(1) compel department action unlawfully withheld or unreasonably delayed, and

(2) hold unlawful and set aside, in whole or in part, any action or decision of the department found to be —

(A) in violation of constitutional provisions; or

(B) in excess of the statutory authority or jurisdiction of the department; or

(C) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; or

(D) without observance of procedure required by law; or

(E) unsupported by substantial evidence.

(e) The Supreme Court of_____ shall have jurisdiction to review any judgment made or any order or decree issued by the_____ court in a proceeding held pursuant to this section.

COMMENT: This section provides for judicial review of final actions and decisions of the department. The basis for the section is the judicial review section of the federal Administrative Procedure Act.[122] States with administrative procedure acts may wish to eliminate the section if it is merely duplicatory of existing provisions of law. Subsection (a) restricts review to final actions and decisions to prohibit review where the administrative process is incomplete and review would interfere with the orderly administration of the act.

Section 26. *Injunctive and Mandatory Relief*

The department may in its discretion bring an action in the _____court to enforce compliance with this act or any rule, regulation, or order hereunder, whenever it shall appear to the department that any person has engaged in, is engaging in, or is about to engage in an act or practice in violation of this act or any rule, regulation, or order hereunder, or whenever it shall appear to the department that any person has aided, abetted, or caused, is aiding, abetting, or causing, or is about to aid, abet, or cause such an act or practice. Upon application by the department, the_____ court shall have jurisdiction to grant without bond a permanent or temporary injunction, decree, or restraining order or writ of mandamus.

COMMENT: This section empowers the department to apply for an injunction or writ of mandamus to enforce compliance with statutory and regulatory requirements.[123] The section is intended pri-

122 *Compare* § 25(a) *with* 5 U.S.C. §§ 702, 704 (Supp. V, 1970); § 25(c) *with* 5 U.S.C. § 705 (Supp. V, 1970); and § 25(d) *with* 5 U.S.C. § 706 (Supp. V, 1970). *See also* MASS. ANN. LAWS ch. 30A, § 14 (1966) (judicial review of final decisions of administrative agencies).

123 *See* ALASKA STAT. § 18.20.120 (1969) (injunction available to restrain operation without a license), *accord,* ARK. STAT. ANN. § 82-352 (Supp. 1969), CONN. GEN. STAT. ANN. ch. 333, § 19-42 (1969); CAL. HEALTH & SAFETY CODE § 1418.5 (West Supp. 1969) (injunction available to restrain both operation without a license and any threat to the health and safety of patients); KY. REV. STAT. § 216.500 (1960) (injunction available against any violation of licensing act), *accord,* MO. ANN. STAT. § 198.160 (1962). The present section is modelled after Securities Act of 1933, § 9(a), 15 U.S.C. § 77t (1964).

marily as a supplement to sections 21, 22, and 23. A significant feature is that the department may seek relief, as necessary, against any person violating a requirement and against any person aiding, abetting, or causing a violation of the act.[124] Because the section applies to any person and not just licensees, the department may apply for enforcement orders against employees and other representatives of facilities as well as against licensees.

Section 27. *Criminal Penalties*

(a) Whoever engages in, aids, abets, or causes an act or practice prohibited under section 23, or whoever engages in, aids, abets, or causes the making of an untrue statement of a material fact or the omission of a material fact within the jurisdiction of the department, shall be punished for a first offense by a fine of not more than two thousand dollars and for any subsequent offense by a fine of not more than five thousand dollars or by imprisonment of not more than one year or both.

(b) Whoever offers or gives any commission or other fee, directly or indirectly, to any person with a proprietary interest in or employed by a facility in return for the purchase of drugs or biologicals for patients in the facility, or whoever offers or gives any commission or other fee, directly or indirectly, to any person in return for the referral or placement of patients, or whoever solicits or accepts any such commission or other fee, shall be punished for each offense by a fine of not more than five thousand dollars or by imprisonment of not more than one year or both.

COMMENT: Under subsection (a), any person who engages in any act or practice prohibited under section 23(a)[125] or who knowingly makes an untrue statement or conceals a material fact can be prosecuted criminally,[126] and if convicted, punished by a fine for a

124 Violations of provisions of the act are obviously not necessarily limited to the licensee. Other persons also, such as employees of the licensee, persons having a property interest in the premises or equipment of a facility, including banks, and providers of services to a facility or its patients may in the pursuit of their own interests act in violation of the act. The authority to seek relief directly against violators is a recognition of this fact. If the department considers the licensee to be responsible for such a violation it may, in addition to seeking relief under this section, take action against the licensee pursuant to §§ 20-23.

125 For a similar provision, see MASS. ANN. LAWS ch. 111, § 73 (Supp. 1970) (violation of any provision of licensing act constitutes punishable offense).

126 For a similar provision, see 18 U.S.C. § 1001 (1964) (federal false statement statute).

first offense. The punishment for a subsequent offense is a fine, imprisonment for not more than two years, or both. Aiding, abetting, and causing are punishable offenses of equal magnitude either in the case of a prohibited act or practice or in the case of a false statement or concealment. As under sections 23 and 26, the formulation is stated in terms which make sanctions available against offending employees and representatives as well as against offending licensees.

The purpose of restricting the availability of criminal sanctions to serious violations of the act is to preserve the force of the criminal law. By the terms of section 23, the department can discipline a person rather than recommend prosecution. In deciding how to handle a particular case, the department should consider the nature of the act in question and the likelihood of conviction if a criminal proceeding is undertaken. Even if the department believes that there is an opportunity to obtain a conviction, it may, as a matter of policy, prefer to devote its energies to pressing a disciplinary proceeding if it feels the public interest would be best served by prompt exclusion of the person involved from the long-term care field.[127]

A provision has been included to discourage the giving of false information and the withholding of material facts in matters within the jurisdiction of the department. As in the case of the federal false statement statute on which this provision is based, the statement may be either oral or written.[128] To maximize the effectiveness of the provision as a deterrent, the department should follow the federal practice of placing a notice of warning on applications and other department forms.[129]

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127 The primary consideration in the department's choice of available action in response to violations of the act should be whether the action taken will deter future violations. Where the department detects a pattern of activities prohibited under this section, it may conclude that the violator should be excluded from the long-term care field under § 23(c).

128 18 U.S.C. § 1001 (1964), *construed in* United States v. McCue, 301 F.2d 452, 456 (2d Cir. 1962). However, whereas materiality is an element of the offense in instances of concealment but not of falsehood under the federal statute, *cf.* United States v. Marchisio, 344 F.2d 653, 666 (2d Cir. 1965), it is an element of the offense in both instances under § 27(a).

129 The following warning is suggested: "ATTENTION: Intentional misstatements or omissions of facts constitute criminal violations of state law." For an example of a warning contained in a form of a federal agency, see SEC Form BD

Subsection (b) covers kickbacks and rebates which are not prohibited under section 23(a) and hence are not punishable under subsection (a).[130] The omission of kickbacks and rebates from section 23(a) and their inclusion here reflects the authors' view that an adjudicatory proceeding is not suited for a determination of whether kickbacks or rebates have been given or offered[131] and that, in any case, these practices should be punished criminally if proven.

(Application for Registration as Broker-Dealer or to Amend Such an Application under the Securities Exchange Act of 1934) (2 CCH FED. SEC. L. REP. ¶ 32,702 (Feb. 26, 1969)).

130 New York City prohibits rebating in its regulations governing nursing homes. N.Y.C. HOSP. CODE § 9.13 (1963). *See also* Model Nursing Home Licensing Act § 16.

131 To prove that kickbacks or rebates were given or offered would require extensive pre-hearing investigations not only because the offense was probably carried out in secret but also because at least some of the participants would necessarily be persons whose activities and records are not subject to regulation or inspection by the department.

NOTES

LEGISLATIVE HISTORY OF TITLE III OF THE VOTING RIGHTS ACT OF 1970

Introduction

On June 22, 1970, President Richard M. Nixon signed into law the Voting Rights act of 1970,[1] which renewed the Voting Rights Act of 1965.[2] One addition to the Voting Rights Act was Title III,[3] a provision which lowers the voting age to 18 for all federal,

1 Pub. L. No. 91-285, 84 Stat. 318.

2 42 U.S.C. §§ 1971, 1973 to 1973p (Supp. IV, 1969).

3 TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

DECLARATION AND FINDINGS

Sec. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

PROHIBITION

Sec. 302. Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

ENFORCEMENT

Sec. 303. (a) (1) In the exercise of the powers of the Congress under the necessary and proper clause of section 8, article I of the Constitution, and section 5 of the fourteenth amendment of the Constitution, the Attorney General is authorized and directed to institute in the name of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purposes of this title.

(2) The district courts of the United States shall have jurisdiction of proceedings

state and local elections. During Congress's consideration of Title III, President Nixon maintained that Congress could not lower the voting age by statute, and accordingly, that Title III was unconstitutional.[4] Even though he signed the measure into law, President Nixon did not alter his position; rather, he chose not to veto the entire Voting Rights Act simply because he objected to one of its titles.[5] Indeed, when he signed the law, President Nixon reiterated his belief that Title III was unconstitutional and urged his Attorney General to seek a judicial review of the law as soon as possible.[6] In consequence, the Supreme Court will consider the constitutionality of Title III before it becomes effective on January 1, 1971.[7]

This Note will examine the constitutional basis of Title III and after reviewing its legislative history, conclude that its enactment is consistent with Congress's constitutional power.

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instituted pursuant to this title, which shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

DEFINITION

Sec. 304. As used in this title the term "State" includes the District of Columbia.

EFFECTIVE DATE

Sec. 305. The provisions of title III shall take effect with respect to any primary or election held on or after January 1, 1971.

4 Letter from President Richard M. Nixon to House Minority Leader Gerald Ford, 116 CONG. REC. H3977-78 (daily ed. May 6, 1970).

5 It is interesting to note that when signing the bill, President Nixon had an audience consisting of only a single aide, rather than the legislators and others responsible for the bill's passage in Congress, as is customary.

6 N.Y. Times, June 23, 1970, at 31, col. 1.

7 On August 3, 1970, Oregon and Texas filed suits directly with the Supreme Court, challenging the constitutional validity of Title III. Oregon v. Mitchell (No. 43 Original, 1970 Term); Texas v. Mitchell (No. 44 Original, 1970 Term). The Justice Department then filed suits against Arizona and Idaho in the Supreme Court. United States v. Arizona (No. 46 Original, 1970 Term); United States v. Idaho (No. 47 Original, 1970 Term). These suits arose because of a telegram which Attorney General John Mitchell had sent to each of the states requesting a decision as to whether the respective states would abide by Title III. *See* N.Y. Times, July 15, 1970, at 18, col. 1. Another suit had been filed in the Federal District Court in Washington, D.C. in June, 1970. Christopher v. Mitchell, Civil No. 1862-70 (D.D.C. 1970).

I. The Impact of *Katzenbach v. Morgan*

An important impetus to Congress's decision to lower the voting age by statute was the Supreme Court's decision in *Katzenbach v. Morgan*.[8] In that case, the Court upheld section 4(e) of the Voting Rights Act of 1965 as a legitimate exercise of congressional power under section 5 of the fourteenth amendment.[9] In effect, section 4(e) prohibited the application of New York's voter literacy test to Puerto Ricans who had completed the sixth grade in an American-flag school where the language of instruction was not English. Although determination of voting qualifications is traditionally within the domain of the respective states,[10] the Court sanctioned congressional intrusion into this area to enforce the Equal Protection Clause. As Justice Brennan observed in the majority opinion, "The states have no power to grant or withhold the franchise on conditions that are forbidden by the Fourteenth Amendment or any other provision of the Constitution."[11]

The Court upheld section 4(e) on two separate and independent grounds, each of which was later referred to as the source of Congress's power to lower the voting age by statute.[12] First, the Court stated that Congress may well have decided that section 4(e) would ". . . be helpful in gaining non-discriminatory treatment in public services for the entire Puerto Rican community."[13] The Court recognized that any interest served by section 4(e) would have to be balanced against any state interest served by the literacy tests, but the Court declined to review Congress's resolution of these conflicting interests: "It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."[14]

Second, the Court observed that Congress could determine that

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8 384 U.S. 641 (1966).

9 U.S. Const. amend. XIV, § 5: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

10 *See* U.S. Const. art. I, § 2, art. II, § 1, amend. X, amend. XVII.

11 384 U.S. at 647.

12 *See, e.g.*, 116 Cong. Rec. S3057-60 (daily ed. March 5, 1970) ("Memorandum of Senator Edward M. Kennedy"); 116 Cong. Rec. S3062-63 (daily ed. March 5, 1970) (testimony of Professor A. Cox before Senate Subcommittee on Constitutional Rights).

13 384 U.S. at 652.

14 *Id.* at 653. *See* Strauder v. West Virginia, 100 U.S. 303 (1879).

application of New York's literacy test on its face constituted the type of invidious discrimination which violated the Equal Protection Clause.[15] It was not necessary that the state statute in question be one that the Court would find unconstitutional. Rather, it was sufficient that Congress itself determined the situation to be one requiring remedial legislation. In other words, the Court concluded that section 5 of the fourteenth amendment endows Congress with the power to adopt affirmative legislation expanding the substance of Equal Protection guarantees. In the words of the Court:

> A construction of § 5 that would require a judicial determination that the enforcement of the state law . . . violated the Amendment, as a condition sustaining the congressional enactment, would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.[16]

In addition, the Court concluded that any determination made by Congress in the exercise of its independent power to define the scope of fourteenth amendment guarantees would be sustained by the Court if it is able to "perceive a basis" on which Congress "might predicate" its judgment.[17]

In upholding section 4(e), the Court did not overrule judicial precedent regarding the respective states' use of literacy tests;[18] nor

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15 384 U.S. at 653-55.

16 *Id.* at 648-49.

17 *Id.* at 656.

18 Indeed, the Court specifically stated that it was not overruling Lassiter v. Northampton County Board of Elections, 360 U.S. 45 (1959). 384 U.S. at 649. That case concerned the constitutional validity of a literacy test which North Carolina required of all voters. The Court upheld the literacy test as serving a legitimate state interest. However, any reliance on *Lassiter* to challenge the constitutional validity of Title III may be misplaced for two reasons. First, the complainant in *Lassiter* did not allege that the literacy test was being used as a vehicle for discrimination, racial or otherwise; the complainant asserted that the literacy test was unconstitutional on its face. Second, *Lassiter* did not concern any related congressional legislation.

did the Court completely void New York's literacy test. However, the language of *Morgan* is extremely broad and reflects considerable judicial deference to congressional determinations under section 5 of the fourteenth amendment. Consequently, it has been argued[19] that *Morgan* provides a basis for congressional action to lower the voting age to 18.

While the *Morgan* opinion represents a novel form of judicial deference to congressional determinations, it follows from familiar principles of constitutional law. The Court has long viewed its function as preserving congressional statutes rather than as nullifying them.[20] Likewise, the Court has recognized the supremacy of the Congress over the judiciary in legislative fact-finding.[21] The legislature is better equipped to balance conflicting social, economic, and political interests than the judiciary. Thus, past decisions in other areas of constitutional litigation such as the Commerce Clause reflect the considerable deference the Court has accorded congressional determinations based upon testimony and evidence, notwithstanding their intrusion into areas previously regulated by the states.[22]

The authority of Congress to lower the voting age to 18 follows logically from the *Morgan* opinion. Nevertheless, a number of arguments have been advanced against such an extension of *Morgan*. First, it is argued that the sweeping language of *Morgan* concerning the scope of congressional power under section 5 was

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19 *See, e.g.*, Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

20 *E.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

21 United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

22 *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). The analogy to the Commerce Clause cases is valid because the grant of power to Congress to enforce the Commerce Clause expressed in the Necessary and Proper Clause, art. I, § 8, cl. 18, is similar to the grant of power to enforce the equal protection clause contained in § 5. In fact, the opinion in *Morgan* expressly holds that the classic definition of the reach of congressional power contained in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 is the measure of what constitutes appropriate legislation under § 5. Katzenbach v. Morgan, 384 U.S. 641, 650-51 (1965). Similarly, in initially upholding the constitutional validity of the Voting Rights Act of 1965, the Court relied heavily on this analogy to the constitutional litigation under the Commerce Clause. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

unnecessary to the result since the court could have held that the New York statute was violative of traditional judicial standards of equal protection.[23] Additionally, it is argued that the *Morgan* decision can only be understood in the context of a line of cases protecting the right of vote of ethnic, racial and economic groups that have been the victims of discrimination.[24] Therefore, it is contended that the court will be much more reluctant to sanction a congressional intrusion where the purportedly invidious classification is not based on the traditionally sensitive criteria of race, religion or wealth. Lastly, it is argued that as the ultimate implications of the language in the *Morgan* opinion become apparent, the court is likely to retrench and articulate more stringent standards for reviewing congressional determinations under section 5, especially if it appears that Congress is simply substituting its judgment for that of the respective states on matters which the Constitution clearly allocates to the states for decision.[25]

To determine whether Title III can be justified under *Morgan*, then, it is necessary to consider more generally the relationship between the Equal Protection Clause and the constitutional power of the states to determine voter qualifications.

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23 *See, e.g.*, Letter from Professor Charles A. Wright to President Richard M. Nixon, April 20, 1970, in 116 CONG. REC. H5648 (daily ed. June 17, 1970).

24 *See, e.g.*, Letter to the Editor from Professor Alexander Bickel, et al., N.Y. Times, April 5, 1970, § 4, at 13, col. 1.

25 For the possible implications of an independent congressional power to determine the scope of the Equal Protection Clause under section 5 *see*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81. In fact, in his dissent to *Morgan*, Justice Harlan suggested that the opinion might afford a basis for "Congress . . . to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments . . ." 384 U.S. at 667 (Harlan, J., dissenting). The majority opinion answers Justice Harlan by stating:

> § 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court": We emphasize that Congress's power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees. 384 U.S. at 651, n. 10.

Professor Wechsler suggests that ". . . a more stringent standard [of review] may evolve . . . as it becomes apparent how far *Morgan* in the total implications of the Court's opinion, would transcend the purpose of the Fourteenth Amendment, broad as one may grant its purpose was." Letter from Professor Wechsler to the President, April 23, 1970 in 116 CONG. REC. H5649 (daily ed. June 17, 1970).

II. The Equal Protection Clause and State Power To Determine Voter Qualifications

The Supreme Court has long recognized the right to vote as one of the fundamental rights of citizenship. Because of the importance of this right, the Court has not hesitated to invoke the Equal Protection Clause to nullify state actions which threaten it, even in the absence of related congressional legislation. In *Carrington v. Rash*,[26] for example, the Court ruled that a state could not deny the ballot to its residents merely because they were members of the armed forces. Similarly, in *Kramer v. Union School District*,[27] the Court decided that a state could not deny the franchise to citizens in a school district election merely because the citizen did not own property or did not have children attending those district schools. In this latter case, the Court emphasized the importance of the right to vote in the citizen's daily affairs:

> Statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.[28]

This emphasis by the Court on the right to vote in elections, whether federal, state or local, reflects the Court's perception of the modern-day interdependence of the levels of government. A citizen's vote even in a local election may well affect his representation in national affairs, as well as the attention which his local community receives from the federal government.

On the other hand, it is equally clear that the power to determine voter qualifications is, within broad limits, vested by the Constitution in the respective states. Article I, section 2 of the Constitution provides that the electors in each state for members of the House of Representatives shall have the same qualifications as the electors for the most numerous branch of the state legisla-

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26 380 U.S. 89 (1965).
27 395 U.S. 621 (1969).
28 *Id.* at 626.

ture.[29] The seventeenth amendment makes identical provisions with respect to electors for Senators.[30] Historically, these two provisions have been understood to grant to the states the power to determine voter qualifications. Thus, in the past, when Congress desired to impose restraints upon the discretion of the states to determine voter qualifications it did so by proposing a constitutional amendment rather than by statute.[31]

However, the power of the respective states to determine voter qualifications is not absolute; rather, it is qualified by other provisions of the Constitution. For example, it is quite clear that the power of the states to determine voter qualifications could not be used to justify the disenfranchisement of all redheads or agnostics. As *Carrington* and *Kramer* make clear, to do so would violate the Equal Protection Clause, and the fact that the action was taken by the state in connection with determining voter qualifications would not save it from constitutional infirmity. While the Constitution allows the states discretion to determine voter qualifications, that discretion is clearly circumscribed by the guarantees of the fourteenth amendment.

Those who argue that Title III is unconstitutional acknowledge that no state may constitutionally prescribe "a voting qualification so invidious or irrational as to be a denial of equal protection of the laws."[32] But they contend that, within a reasonable range, a minimum age requirements cannot be considered to be an invidious classification. For example, Professor Charles Allen Wright has stated:

> I do not think an argument [that the denial of the vote is invidious discrimination] can be convincingly made with regard to age. Age limit on voting necessarily must be arbitrary. There is no single specific day in the life of all citizens in which it can rationally be said that they are suddenly informed members of the electorage though they were not so one day before. It is a problem in drawing lines and I think the clear meaning . . . of the Constitution is that these lines are for the states to draw.[33]

29 U.S. CONST. art. I, § 2.
30 *Id.* amend. XVII.
31 *E.g.*, U.S. CONST. amend. XV, amend. XIX.
32 Letter to the Editor from Professor Bickel, et al., *supra* note 24.
33 Letter from Professor Charles A. Wright, *supra* note 23.

When analyzed, however, this argument simply reduces to an opinion that drawing the line at 21 is not an invidious classification. Yet the holding of *Morgan* is that section 5 of the fourteenth amendment grants Congress authority to determine for itself whether a state-created disability amounts to invidious discrimination. Thus, if Congress concludes that citizens 18 years of age are, by contemporary standards, so clearly entitled to vote that the denial of the vote is invidious discrimination, then the Court, under *Morgan*, would sustain that determination provided it is able "to perceive a basis" on which Congress "might predicate" its action. Moreover, the act would be sustained regardless of whether the Court would hold the 21-year-old age limit a violation of equal protection guarantees in the absence of congressional legislation.

A related argument against the constitutional validity of Title III is that the history of the fourteenth amendment's adoption does not sanction congressional legislation to lower the voting age.[34] In particular, it has been observed[35] that section 2 of the fourteenth amendment specifically recognizes the age of 21 as the proper voting age for citizens,[36] and consequently that Congress would not be remedying any unfair discrimination if it lowered the voting age. It would be mistaken, however, to regard this argument as being conclusive. The sanction in section 2 was directed at state restrictions upon the voting rights of citizens above the age of 21. As Professors Freund and Cox have observed, "The most that can be inferred [from the enactment of section 2] is that in 1866-68, Congress and the state legislatures were willing to accept 21 years as a reasonable measure of maturity and responsibility necessary to vote at that time."[37] Thus, if Congress concludes that under contemporary conditions, young people reach

34 Bickel, *The Voting Rights Cases*, 1966 SUP. CT. REV. 100.

35 Letter to the Editor from Professor Bickel, et al., *supra* note 24.

36 U.S. CONST. amend. XIV, § 2: ". . . but when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

37 Letter to the Editor from Professors Freund and Cox, N.Y. Times, April 12, 1970, at 23, col. 3.

the requisite maturity to vote at an earlier age, this conclusion would in no way be inconsistent with section 2. As Justice Douglas stated in *Harper v. Virginia Board of Elections*,[38] "In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change."[39]

Familiarity with the cases relied upon as a basis for the enactment of Title III enables one to appreciate the constitutional issues that faced Congress and are now facing the Supreme Court in its deliberations on the constitutionality of that statute. The Supreme Court may uphold Title III under the reasoning of *Morgan*, in which case it may well be that "the basis for the Congressional determination need not appear in the legislative record."[40] Yet, it is inevitable that the Court's decision will take into account the same considerations which persuaded Congress to adopt the amendment. Moreover, if the Court chooses to depart from *Morgan* and exercise a more rigorous standard of judicial review, the question of whether the legislative history of Title III demonstrates a rational basis for Congress's determination that the denial of the right to vote to 18, 19, and 20-year-olds is invidious discrimination will be crucial to the statute's constitutionality. Thus, this Note will now turn to an examination of the legislative history of Title III.

III. Legislative History of Title III

A. *Brief History of the Movement to Grant the Vote to Eighteen-Year-Old Citizens*

For decades, there have been various proposals to extend the franchise to citizens between the ages of 18 and 21. As long ago as 1942, Senator Arthur Vandenburg proposed in the United States Senate a constitutional amendment to lower the voting age to 18.[41] This proposal followed a similar one offered in the

38 383 U.S. 663 (1966).
39 *Id.* at 669.
40 Cox, *supra* note 19, at 104, 106.
41 88 Cong. Rec. 8316 (1942) (S.J. Res. 166).

House of Representatives by Representative Victor Wickersham on October 17, 1942.[42] In fact, the House Judiciary Committee conducted hearings on a similar resolution in 1943,[43] and the Senate considered and voted on a like amendment in 1954.[44]

The movement to grant the vote to 18-year-old citizens has continued until the present day. Senator Jennings Randolph of West Virginia, who had proposed a constitutional amendment to lower the voting age in 1942,[45] offered another in 1969.[46] Senator Randolph was not alone in endorsing a constitutional amendment to lower the voting age;[47] more than 71 Senators joined Senator Randolph as co-sponsors of his proposal to lower the voting age to 18.[48]

This desire to extend the vote to 18-year-olds, moreover, was not confined to Members of Congress. Various groups and individuals, including Presidents Dwight D. Eisenhower,[49] John F. Kennedy,[50] Lyndon B. Johnson,[51] and Richard M. Nixon[52] have expressed the opinion that the vote should be extended to citizens between the ages of 18 and 21. The strength of those supporting the 18-year-old vote was so considerable that the Senate Subcommittee on Constitutional Amendments[53] conducted exhaustive hearings on the matter in 1968[54] and again in 1970.[55] The hear-

42 *Id.* at 8312 (1942) (H.J. Res. 352).

43 *Hearings on H.J. Res. 8 Before the House Comm. on the Judiciary,* 77th Cong., 2d Sess. (1943).

44 100 CONG. REC. 5943, 6911, 6956 (1954) (The Senate voted against adopting a constitutional amendment to lower the voting age.)

45 89 CONG. REC. 73 (1942).

46 S.J. Res. 147; *see* 116 CONG. REC. S2940 (daily ed. March 4, 1970) (remarks of Senator Randolph).

47 *See* 115 CONG. REC. S2511 (daily ed. March 10, 1969) (remarks of Senator Richard Schweiker) and *Hearings on S.J. Res. 8, 14 and 78 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary,* 90th Cong., 2d Sess., at 79 (1968) (hereinafter cited as *1968 Hearings*).

48 *See* 116 CONG. REC. S3517 (daily ed. March 11, 1970).

49 PUBLIC PAPERS OF THE PRESIDENTS 1954, DWIGHT D. EISENHOWER, 22 (January 7, 1954).

50 *1968 Hearings* at 80.

51 PUBLIC PAPERS OF THE PRESIDENTS 1968, LYNDON B. JOHNSON at 669 (May 29, 1968) and at 751-53 (June 27, 1968).

52 *Hearings on S.J. Res. 147 and Others Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess., at 129, 130 (1970) (unpublished transcripts of hearings) (hereinafter cited as *1970 Hearings*).

53 Hereinafter the Bayh Committee.

54 *1968 Hearings.*

55 *1970 Hearings.*

ings focused solely on the merits of granting the vote to citizens between the ages of 18 and 21. The 1970 hearings also considered the question of whether the voting age could be lowered by statute.

In 1968, the Bayh Committee heard from 49 individuals representing all levels of government, including 21 Senators, two Congressmen, 12 Governors, and the Vice-President of the United States. With only a few exceptions, each of these spokesmen articulated the need to extend the vote to 18 to 21-year-old citizens.[56] In fact, many believed that the age of 21 had little relation to the time when society conferred the obligations of citizenship on individuals. Consequently, these spokesmen argued that it was an anachronism to refer to the age of 21 as the proper time to extend the franchise to citizens. Senator Mansfield, for instance, observed that

> the age of 21 is not simply the automatic chronological door to the sound judgment and wisdom that is needed to exercise

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56 *See, e.g., 1968 Hearings* at 88 (remarks of Dennis Brinkmeyer, Chairman, State Conference of Committees to Lower Indiana's Voting Age); *id.* at 71 (remarks of Roy Elson, Administrative Assistant to Senator Carl Hayden); *id.* at 40 (remarks of Senator Vance Hartke); *id.* at 73 (remarks of Representative Ken Hechler); *id.* at 11 (remarks of Senator Jacob Javits); *id.* at 83 (remarks of Donald Lass, Chairman, National and State Committee for the 18-Year-Old Vote); *id.* at 43 (remarks of Jack McDonald, Chairman, The Young Republican National Federation); *id.* at 77 (remarks of Paul McMillan); *id.* at 4 (remarks of Senator Mike Mansfield); *id.* at 99 (remarks of Sibyl Moses, National Association of Colored Women's Clubs, Inc.); *id.* at 19 (remarks of Spencer Oliver, President, Young Democratic Clubs of America); *id.* at 92 (remarks of John Owen, President, Philodemic Debating Society); *id.* at 35 (remarks of Senator James Pearson); *id.* at 61 (remarks of Senator Jennings Randolph); *id.* at 45 (remarks of Edward Schwartz, President, National Student Association); *id.* at 9 (remarks of Senator Joseph Tydings); *id.* at 67 (remarks of Senator Ralph Yarborough); *id.* at 24 (remarks of Senator Alan Bible); *id.* at 39 (remarks of Senator Howard Cannon); *id.* at 100 (remarks of Governor David Cargo); *id.* at 101 (remarks of Senator Joseph Clark); *id.* at 101 (remarks of Governor Kenneth Curtis); *id.* at 102 (remarks of Governor John Dempsey); *id.* at 102 (remarks of Senator Peter Dominick); *id.* at 103 (remarks of Governor Buford Ellington); *id.* at 104 (remarks of Governor William Guy); *id.* at 25 (remarks of Senator Clifford Hansen); *id.* at 24 (remarks of Senator Fred Harris); *id.* at 105 (remarks of Senator Mark Hatfield); *id.* at 105 (remarks of Governor Harold Hughes); *id.* at 106 (remarks of Governor Richard Hughes); *id.* at 106 (remarks of Vice President Hubert Humphrey); *id.* at 106 (remarks of Senator Daniel Inouye); *id.* at 107 (remarks of Senator Gale McGee); *id.* at 98 (remarks of Senator Frank Moss); *id.* at 107 (remarks of Richard M. Nixon); *id.* at 38 (remarks of Senator William Proxmire); *id.* at 108 (remarks of Governor Calvin Rampton); *id.* at 108 (remarks of Representative William St. Onge); *id.* at 110 (remarks of Senator Stuart Symington); *id.* at 111 (remarks of Governor Charles Terry); *id.* at 112 (remarks of Claude Ury).

> the franchise of the ballot, or for that matter, to assume any other responsibility. Indeed, it is the age of 18 that has long been regarded as the age when young people "try it on their own" and become responsible for themselves and for others.[57]

Judgments regarding the maturity of citizens between the ages of 18 and 21 were borne out by the statistics offered for the Committee's consideration. Mr. Oliver's statement was representative in this respect:

> As of September, 1966, there were 12 million Americans who were 18, 19 or 20 years of age. Of these, 47 percent were degree candidates enrolled in colleges across our Nation; 6 percent of this number were serving in the armed services. The majority, 60 percent, with some overlap in the colleges, were working full-time and 12 percent were unemployed according to the U.S. Department of Labor. Amazing as it may seem, less than 4 percent of these American citizens had the right to vote. . . .[58]

Those supporting a constitutional amendment to lower the voting age further observed that an 18-year-old can marry, make contracts, pay taxes, make wills, and be legally responsible for his conduct. For these spokesmen, then, it was evident that citizens between the ages of 18 and 21 possess the maturity to exercise the vote in an intelligent fashion. Senator William Proxmire, for example, asserted that

> . . . at no other time are the young so keenly interested and informed on political issues and political candidates. Educational psychologists have urged that the ability to grasp new ideas reaches its peak at the age of 18, and then it proceeds on a plateau. This, of course, does not mean that wisdom does not increase throughout life — it does. But the capacity to grasp new ideas and developments readily in this so rapidly changing world was never more essential. . . . Without the wisdom of age, government would be chaotic and without the vision of youth, government would be stagnant. Not as a gesture but as a right, I urge the passage of Senate Joint Resolution 8.[59]

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57 *1968 Hearings* at 4, 5.
58 *Id.* at 21.
59 *Id.* at 38, 39.

Similar testimony concerning the wisdom of lowering the voting age to 18 was presented in the 1970 hearings.[60] Again, those testifying repeatedly cited the responsibilities assumed by youth in order to underscore the need and right of 18-year-olds to exercise the vote. And again, support for the 18-year-old vote emerged from all points on the political spectrum.

President Nixon was among those urging that the 18-year-olds be granted the right to vote:

> I am for the 18-year-old vote. The reason I think they should vote is that I think they would add to the interest in American elections, they would add to the quality of the debate. The younger generation today is better educated, it knows more about politics, more about the world than many of the older people. That is why I want them to vote, not because they are old enough to fight but because they are smart enough to vote.[61]

President Nixon's enthusiasm for the 18-year-old vote was shared by others in his Administration. Deputy Attorney General Kleindienst noted, for instance, that

> America's 10 million young people between the ages of 18 and 21 are better equipped today than ever in the past to be entrusted with all of the responsibilities and privileges of citizenship. Their well-informed intelligence, enthusiastic interest, and desire to participate in public affairs at all levels exemplify the highest qualities of mature citizenship.[62]

Many of those testifying viewed the vote as a means of correcting discrimination which undermines the equal protection of the

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60 *1970 Hearings* at 8 (remarks of Senator Jennings Randolph); *id.* at 27 (remarks of Theodore Sorenson); *id.* at 38 (remarks of Dr. Walter Menninger); *id.* at 67 (remarks of Dr. S. I. Hayakawa); *id.* at 84 (remarks of Ian MacGowan, Chairman, Youth Franchise Coalition); *id.* at 118 (remarks of Deputy Attorney General Richard Kleindienst); *id.* at 170 (remarks of Ramsey Clark, former Attorney General); *id.* at 191 (remarks of Private Gerald Springer); *id.* at 198 (remarks of Representative Allard Lowenstein); *id.* at 223 (remarks of Carl Megel, Director of Legislation, American Federation of Teachers); *id.* at 235 (remarks of Senator Barry Goldwater); *id.* at 275 (remarks of James Brown, Jr., National Youth Director, NAACP); *id.* at 288 (remarks of Senator Edward Kennedy); *id.* at 334 (remarks of Assistant Attorney General William Rehnquist); *id.* at 429 (remarks of Lawrence Speiser, Director, Washington Office, ACLU).

61 *Id.* at 129, 130.

62 *Id.* at 119.

laws for the nation's youth.[63] Speaking to this point, Ramsey Clark, former Attorney General, posed a rhetorical question to the Bayh Committee: "Do we tax without representation? We subject 10 to 12 million young citizens between 17 and 21 years of age to taxation without representation."[64] Other testimony to the Committee called attention to the inequality existing by reason of the fact that citizens below the age of 21 can vote in four states while their peers in other states cannot. Mr. MacGowan observed, for example, "When the situation arises where an 18-year-old in Covington, Kentucky can influence national politics with the exercise of his vote, while an 18-year-old in Cincinnati, Ohio just a mile across the river is denied this right the inequity must surely be apparent."[65]

Because the Bayh Committee was concerned with the merits of a constitutional amendment to lower the voting age, it did not directly invite discussion of Congress's power to lower the voting age by statute. Nevertheless, at several points in the 1970 hearings, the Committee heard arguments that Congress did indeed have such power.[66] In particular, Senator Cook contested Dean Pollak's opinion that section 2 of the fourteenth amendment limited Congress's power under section 5 of that amendment.[67] In effect, Senator Cook endorsed the view of Archibald Cox, who testified before the Senate Subcommittee on Constitutional Rights.[68] In his remarks, Professor Cox had argued that Congress did have the power, under section 5 of the fourteenth amendment, to lower the voting age by statute: "Congress can define what it regards as an invidious discrimination and can adopt laws that it regards as necessary in its judgment to remove the discrimination."[69]

Professor Cox's testimony before that committee coincided with

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63 *See, e.g., id.* at 235 (remarks of Senator Goldwater); *id.* at 288 (remarks of Senator Kennedy); *id.* at 364, 365 (comments by Senator Marlow Cook).

64 *Id.* at 171.

65 *Id.* at 89.

66 *See, e.g., id.* at 235, 288.

67 *Id.* at 384-94.

68 *Hearings on S.818, S.2456, S.2507 and Title IV of S.2029 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess., at 330 (1970).

69 *Id.* at 335.

a new awareness within Congress regarding the scope of its powers under section 5 of the fourteenth amendment. Until the historic decision of the Court in *Morgan*, Members of Congress generally believed that the Congress could not extend the vote to 18-year-olds except by a constitutional amendment. Because *Morgan* upheld the constitutional validity of section 4(e) of the Voting Rights Act of 1965 and took a broad view of Congress's power under section 5 of the fourteenth amendment, it generated a belief among many congressmen that the 18 to 21-year-olds' right to vote could be granted by statute.

Exhaustive factual and legal research was conducted by numerous congressmen to lay the foundation for subsequent legislation. Shortly before the Voting Rights Act was to be considered by the Senate, Senator Kennedy circulated among his colleagues a memorandum which detailed the unfair discrimination practiced against 18 to 21-year-olds.[70] Senator Kennedy believed that this discrimination could be remedied by extending the franchise to 18-year-olds, and that Congress had the responsibility and power to effect this change by statute rather than by a constitutional amendment.

Senator Kennedy's memorandum was the essence of the testimony which he later gave before the Bayh Committee. Senator Mansfield referred to that testimony as ". . . an excellent factual basis upon which the Senate should proceed to give the franchise to our younger citizens" and as "ample foundation" for a legislative amendment to achieve that end.[71] Consequently, it would be useful to consider the significant points raised by Senator Kennedy in his memorandum and later his testimony before the Bayh Committee, since this memorandum is representative of the evidence before Congress when it enacted Title III of the Voting Rights Act of 1970.

B. *Memorandum of Senator Edward M. Kennedy*

First, Senator Kennedy stated that "the minimum voting age in the United States should be lowered to 18."[72] He observed that

70 Memorandum of Senator Kennedy on Lowering the Voting Age to 18, February 23, 1970 (hereinafter cited as Memorandum).

71 116 CONG. REC. S3392 (daily ed. March 10, 1970).

72 Memorandum at 1.

the higher educational achievement of today's youth, coupled with their heightened involvement in public issues and their increased service to the nation through agencies such as the Peace Corps and VISTA, justified the conclusion that 18 to 21-year-olds are more mature than previous generations and are ready to accept the responsibilities of the right to vote. Senator Kennedy commented that lowering the voting age would also ". . . encourage civic responsibility" and "promote greater social involvement and political participation for our youth."[73]

The need to grant the right to vote at the age of 18 was of particular importance because too often the youth's exclusion from the voting process discouraged their later participation in voting. In this regard, Senator Kennedy referred to the 1963 report of President John F. Kennedy's Commission on Registration and Voting Participation:

> by the time they have turned 21 . . . many young people are so far removed from the stimulation of the educational process that their interest in public affairs has waned. Some may be lost as voters for the rest of their lives.[74]

This tendency toward alienation from the electoral process is understandable, Senator Kennedy stated, in light of the fact that ". . . in many important respects and for many years, we have conferred far-reaching rights on our youth, comparable in substance and responsibility to the right to vote."[75] As examples, he cited the fact that the 18-year-old can marry, pay taxes, be drafted into the armed forces, own a gun, and be criminally responsible for his conduct. In addition, he observed that the present experiences with voting by persons under 21 in Georgia, Kentucky, Alaska and Hawaii "justifies its extension to the entire Nation."[76]

Second, Senator Kennedy's memorandum stated that "the Federal Government should act to reduce the voting age to 18 by statute, rather than by constitutional amendment."[77] Not only would national legislation insure uniformity throughout the

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73 *Id.* at 2.
74 *Id.*
75 *Id.*
76 *Id.* at 3.
77 *Id.* at 4.

country, but it also would avoid the inevitable delay involved in adopting an amendment to the Constitution. Also, Senator Kennedy argued, there are no compelling reasons for resorting to a constitutional amendment:

> . . . lowering the voting age does not work the sort of deep and fundamental structural change in our system of government that would require us to make the change by pursuing the arduous route of Constitutional amendment. Because of the urgency of the issue, and because of its gathering momentum, I believe that these are overriding considerations in favor of Federal action by statute to accomplish the goal.[78]

Third, Senator Kennedy stated that "Congress has the constitutional power to act by statute to lower the voting age."[79] The *Morgan* decision, coupled with the other decisions of the Supreme Court in interpreting the Equal Protection Clause, made it evident that Congress's power under section 5 of the fourteenth amendment was sufficient to lower the voting age by statute. In this respect, Senator Kennedy cited *Morgan* quite extensively.[80]

Senator Kennedy noted that the *Morgan* decision upheld section 4(e) on two separate and independent grounds. First, the Court recognized that section 4(e) could be a means by which the Puerto Rican community could obtain more favorable, nondiscriminatory treatment in the provision of public services. Second, Senator Kennedy stated, the Court upheld section 4(e) because ". . . Congress could reasonably have found that section 4(e) was well adapted to eliminate the unfairness against Spanish-speaking Americans caused by the mere existence of New York's literacy test as a voter qualification, even though legitimate state interests supported the tests."[81]

Either of these two grounds, Senator Kennedy then noted, would be sufficient to justify congressional legislation to lower the voting age to 18. To begin with, "Congress could reasonably find that the reduction of the voting age to 18 is necessary in order to eliminate a very real discrimination that exists against the Na-

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78 *Id.* at 4, 5.
79 *Id.* at 5.
80 *Id.* at 6; *see* Katzenbach v. Morgan, 384 U.S. 641, 652-53 (1966).
81 *Id.* at 7.

tion's youth in the public services they receive."[82] Given the increasing number of federal, state and local programs geared to the needs of youth, youth should be given the political power required to eliminate any inequities or discrimination arising in the provision of public services and governmental programs.

In addition, Senator Kennedy stated,

> Congress could reasonably find that the disenfranchisement of 18-21-year olds constitutes on its face the sort of unfair treatment that outweighs any legitimate state interest in maintaining a higher age limit, just as the Supreme Court in the *Morgan* case accepted the determination that the disenfranchisement of Puerto Ricans was an unfair classification that outweighed New York's interest in maintaining its English literacy test.[83]

In effect, Senator Kennedy supported the argument that section 5 of the fourteenth amendment allows the Congress to enforce the Equal Protection Clause even if a related state statute is not unconstitutional; otherwise, section 5 would merely duplicate the power of the Supreme Court to nullify an unconstitutional state statute.

In closing, Senator Kennedy commented that the primary issue involved here was *not* whether Congress could lower the voting age below 18, but whether 18-year-olds were entitled to vote.[84] Finally, he noted that support for congressional authority in this matter could be gained by the Nixon Administration's acknowledgment that Congress had the power under section 5 of the fourteenth amendment to eliminate residency requirements as well as literacy tests for all elections. In other words, the rationale to justify these changes by congressional legislation also could be applied to justify congressional legislation to lower the voting age.[85]

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82 *Id.*

83 *Id.*

84 One question which arises here is why Congress chose to lower the voting age to 18 instead of another age. From the subsequent congressional debates, it appears that the age of 18 is the most frequent age at which governments confer full obligations among citizens in the United States.

85 It should be pointed out that administration of literacy tests or residency requirements lends itself to a discrimination resulting from the discretion of administrators. Because it does not require any administrative interpretations, voting

C. *Congressional Debates on Title III of the Voting Rights Act of 1970*

Shortly after the circulation of Senator Kennedy's memorandum, a decision was made by the Democratic leadership in Congress to propose an amendment to the Voting Rights Act which would lower the voting age to 18 for all Federal, state and local elections. On March 4, 1970, Senator Mansfield, with the cosponsorship of eight other Senators, offered Amendment No. 545, adding Title III to the Voting Rights Act.[86]

The subsequent congressional debates which concerned Amendment No. 545 centered on three issues.[87] First, did denial of the vote to 18 to 21-year-olds amount to invidious discrimination and would conferring the right to vote on them, as a practical matter, remedy discrimination against that age group? Second, did Congress have sufficient power under the Constitution to extend the right to vote to 18-year-olds by statute? And, finally, would enactment of a statute to enlarge the franchise raise constitutional questions whose resolution by the courts might create uncertainty in the electoral process?

1. Granting Eighteen-Year-Olds the Right to Vote As a Means to Remedy Unfair Discrimination

Much of the discussion concerning Amendment No. 545 involved a description of the role of youth in the nation's political, social and economic structures. It is noteworthy that during these congressional debates, only three Senators and two Congressmen expressed explicit reservations about the merits of granting the

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age qualifications are not as susceptible to that type of discrimination. This does not, however, undermine a reasonable determination by Congress that a voting age qualification, even if administered fairly, results in a discrimination which violates the equal protection of the laws.

86 116 CONG. REC. S2938 (daily ed. March 4, 1970).

87 *See id.* at S2938-40, 2968, 3001-02 (daily ed. March 4, 1970); *id.* at S3057-65, 3088 (daily ed. March 5, 1970); *id.* at S3185-86, 3197 (daily ed. March 6, 1970); *id.* at S3214-20, 3261 (daily ed. March 9, 1970); *id.* at S3391-96, 3405, 3411-19 (daily ed. March 10, 1970); *id.* at S3474-3525, 3544-48, 3552-57 (daily ed. March 11, 1970); *id.* at S3572-78, 3581-86 (daily ed. March 12, 1970); *id.* at S3724-25 (daily ed. March 13, 1970); *id.* at H3977-84 (daily ed. May 6, 1970); *id.* at S7277-85 (daily ed. May 18, 1970); *id.* at H5639-79 (daily ed. June 17, 1970).

franchise to citizens between the ages of 18 and 21.[88] Indeed, several Members of Congress explicitly commented on the near unanimity of opinion in their respective chambers that 18 to 21-year-olds were entitled to the franchise. One day before the vote in the Senate, for example, Senator Mansfield observed that "... so far as I am aware, not a Member of this body, to my knowledge, has spoken during this floor debate against extending the voting franchise to those 18 and above."[89] Other Members made similar observations in both Houses, and with a few isolated exceptions, the accuracy of these statements was not challenged by Members of either House.[90]

The extent of this sentiment is reflected in an analysis of the final vote on Amendment No. 545 in the Senate on March 12, 1970.[91] Of the 17 Senators who voted against the amendment, 11 participated in the debates between March 4th and March 12th. Of those who participated, seven explicitly stated that 18-year-olds were entitled to the vote; it was primarily doubts concerning the constitutional validity of the legislation which caused these Members not to vote in favor of the amendment.[92]

The overwhelming congressional support for the 18-year-old vote does not necessarily imply that Congress was remedying any discrimination by extending the franchise. Senator Gordon Allott of Colorado, for instance, believed the sentiment was merely in-

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88 *Id.* at S3495-96 (daily ed. March 11, 1970) (remarks of Senator John Stennis); *id.* at S3555 (remarks of Senator Russell Long); *id.* at S3724-25 (daily ed. March 13, 1970) (remarks of Senator Spessard Holland); *id.* at H5641-42 (daily ed. June 17, 1970) (remarks of Representative Emanuel Celler); *id.* at H5670-71 (remarks of Representative John Rarick).

89 *Id.* at S3501 (daily ed. March 11, 1970).

90 *See, e.g., id.* at S3214 (daily ed. March 9, 1970) (remarks of Senator Cook); *id.* at S3478 (daily ed. March 11, 1970) (remarks of Senator Kennedy); *id.* at S3491 (remarks of Senator Randolph); *id.* at S3501 (remarks of Senator Hugh Scott); *id.* at S3509 (remarks of Senator Everett Jordan); *id.* at S3544 (remarks of Senator James Allen); *id.* at S3584 (daily ed. March 12, 1970) (remarks of Senator Mark Hatfield); *id.* at H5639 (daily ed. June 17, 1970) (remarks of Representative Spark Matsunaga); *id.* at H5655 (remarks of Representative Joe Skubitz).

91 *Id.* at S3585 (daily ed. March 12, 1970).

92 *Id.* at S3001 (daily ed. March 4, 1970) (remarks of Senator Sam Ervin); *id.* at S3503 (daily ed. March 11, 1970) (remarks of Senator Jack Miller); *id.* at S3509 (remarks of Senator Everett Jordan); *id.* at S3513-14 remarks of Senator Strom Thurmond); *id.* at S3493-94 (remarks of Senator Roman Hruska); *id.* at S3475 (remarks of Senator John Sparkman); *id.* at S3544 (remarks of Senator Allen).

dicative of a conviction within Congress that the electorate should be enlarged, regardless of whether there was any discrimination.[93] Senator Ervin likewise stated, "There is no invidious discrimination here, because people are treated exactly alike."[94]

The Nixon Administration shared the opinion of these Senators. William Rehnquist, an Administration spokesman who appeared before the Bayh Committee and whose testimony Senator Allott included in the *Record*, stated that the issue was not one of discrimination but one of whether there was sufficient national consensus to warrant the enlargement of the electorate.[95] Mr. Rehnquist questioned whether the Congress's decision to extend the right to vote to 18-year-olds would bear any relation to correcting discrimination prohibited by the Equal Protection Clause. This doubt was also raised by some Congressmen during the debate.[96] Thus, many of those who opposed Amendment No. 545 believed that it did not remedy any discrimination and that, therefore, it could not be justified under section 5 of the fourteenth amendment.

Those who voted for Title III, were aware that congressional legislation in this area must bear a reasonable relation to elimination of discrimination which violated the Equal Protection Clause. This awareness is reflected in the repeated statements of the Congressmen as well as the testimony which they cited. Throughout the debates on Title III, for example, a flood of statistics were introduced to demonstrate that the denial of the vote to 18 to 21-year-olds was, on its face, discrimination violative of the Equal Protection Clause.[97] The accuracy of these statistics was never questioned by opponents of Title III; moreover, rarely did the opponents of Title III introduce material to counterbalance those statistics in order to demonstrate that any conclusions drawn from

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93 *Id.* at S3412 (daily ed. March 10, 1970).

94 *Id.* at S3479 (daily ed. March 11, 1970).

95 *Id.* at S3417-19 (daily ed. March 10, 1970); *but see 1970 Hearings* at 364, 365.

96 *See, e.g.*, 116 CONG. REC. S3495 (daily ed. March 11, 1970) (remarks of Senator Hruska).

97 *See id.* at S3057-60, 3065 (daily ed. March 5, 1970); *id.* at S3214, 3216-18 (daily ed. March 9, 1970); *id.* at S3392-93, 3396 (daily ed. March 10, 1970); *id.* at S3478, 3492-93, 3499-500, 3509-10 (daily ed. March 11, 1970); *id.* at S3584 (daily ed. March 12, 1970); *id.* at H5661, 5668 (daily ed. June 17, 1970).

the statistics regarding discrimination against youth were unfounded.

In any event, the *Record* is replete with data which attest to the responsibilities assumed by youth, responsibilities which lend force to the argument that a denial of the vote to this age group is patently discriminatory. Senator Kennedy frequently referred to statistics in his arguments and in the material included in the *Record* for Congress's consideration.[98] Senator Cook added that almost 30% of the 3.5 million men in the armed forces were under 21, and that approximately 50% of those who died in Vietnam were under 21.[99] Referring to Senator Goldwater's testimony before the Bayh Committee, Senator Cook also noted that 81% of the nation's 18-year-olds have a high school diploma, and that 50% of the girls under 21 in the country are married.

Senator Randolph also introduced several items which pertained to the responsibilities assumed by youth, concluding that these responsibilities required Congress to grant the vote to 18-year-olds.[100] Among these items was a statement of Senator Randolph's proposal to lower the voting age by a constitutional amendment, a copy of a report outlining the age at which each of the states consider minors as adults for the purposes of criminal prosecution, and the "Brock Report on Campus Unrest." Senator Randolph and others drew particular attention to the fact that, with the exception of California, every state considered persons under 21 as adults for the purposes of criminal prosecution.

Because the debate in the House of Representatives was limited to one hour, individual Congressmen were precluded from employing extensive statistics to justify their support of the Title III amendment. Nevertheless, many Congressmen, such as Louis Stokes of Ohio,[101] and Bill Burlison of Missouri[102] did cite various studies to support their opinion that congressional legislation was needed to insure that 18-year-olds had equal access to the privileges of citizenship.

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98 *Id.* at S3057-60 (daily ed. March 5, 1970); *id.* at S3392-96 (daily ed. March 10, 1970); *id.* at S3478 (daily ed. March 11, 1970).
99 *Id.* at S3214 (daily ed. March 9, 1970).
100 *Id.* at S3517 (daily ed. March 11, 1970).
101 *Id.* at H5661 (daily ed. June 17, 1970).
102 *Id.* at H5668.

In the light of these statistics and related observations by members of both Houses of Congress, many Senators and Representatives explicitly stated that lowering the voting age would do much to remedy unfair discrimination against youth.[103] Senator Frank Moss of Utah, for instance, noted that a careful analysis of political conditions warranted the conclusion that persons between the age of 18 and 21 had, in fact, been subject to discrimination. He then asserted, "I believe that this discrimination against 18 to 21-year-olds is invidious and that Congress should so find."[104] Senators Cook and Kennedy frequently cited this discrimination during the debates, and, with the exceptions noted above, were not seriously challenged by their colleagues.[105] Senator Yarborough of Texas observed that ". . . we are demanding of young men and women from the age of 18 to 21 all the duties of citizenship, yet we deny them the most basic right — the right to vote."[106] Senator Mansfield similarly commented that "the youngsters of today are being discriminated against just as women were

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103 *See, e.g., id.* at S2939 (daily ed. March 4, 1970) (remarks of Senator Warren Magnuson); *id.* at S3088 (daily ed. March 5, 1970) (remarks of Senator Moss); *id.* at S3214 (daily ed. March 9, 1970) (remarks of Senator Cook); *id.* at S3478 (daily ed. March 11, 1970) (remarks of Senator Kennedy); *id.* at S3493 (remarks of Senator Harris); *id.* at S3496 (remarks of Senator Yarborough); *id.* at S3497 (remarks of Senator Hartke); *id.* at S3498 (remarks of Senator Tydings); *id.* at S3499 (remarks of Senator Howard Cannon); *id.* at S3499-500 (remarks of Senator Stephen Young); *id.* at S3500-01 (remarks of Senator Bible); *id.* at S3506 (remarks of Senator William Fulbright); *id.* at S3510 (remarks of Senator Birch Bayh); *id.* at S3577 (daily ed. March 12, 1970) (remarks of Senator Mansfield); *id.* at S3584 (daily ed. March 12, 1970) (remarks of Senator Walter Mondale); *id.* at S3583 (remarks of Senator Joseph Montoya); *id.* at H5640 (daily ed. June 17, 1970) (remarks of Representative Matsunaga); *id.* at H5643 (remarks of Representative William McCulloch); *id.* at H5644 (remarks of Representative John Anderson); *id.* at H5644 (remarks of Representative Abner Mikva); *id.* at H5645 (remarks of Representative Robert McClory); *id.* at H5645 (remarks of Representative Carl Albert); *id.* at H5654 (remarks of Representative Paul McCloskey, Jr.); *id.* at H5656 (remarks of Representative Richard Ottinger); *id.* at H5660 (remarks of Representative Don Edwards); *id.* at H5656, 5659 (remarks of Representative Bertram Podell); *id.* at H5657 (remarks of Representative Peter Rodino); *id.* at H5661 (remarks of Representative Louis Stokes); *id.* at H5664 (remarks of Representative Melvin Price); *id.* at H5667 (remarks of Representative John Tunney); *id.* at H5671-72 (remarks of Representative Howard Robison); *id.* at H5670 (remarks of Representative Charles Vanik); *id.* at H5675 (remarks of Speaker of the House John McCormack).

104 *Id.* at S3088 (daily ed. March 5, 1970).

105 *Id.* at S3214 (daily ed. March 9, 1970); *id.* at S3478 (daily ed. March 11, 1970); *id.* at S3576 (daily ed. March 12, 1970).

106 *Id.* at S3496 (daily ed. March 11, 1970).

until a few decades ago, just as the slaves were until a century ago."[107]

The conclusion of many Senators that persons between the ages of 18 and 21 had been subject to discrimination was equally supported by those in the House who spoke in favor of Title III. Congressmen such as Robert McClory of Illinois and Sherman Lloyd of Utah expressed the opinion that this legislation could well mitigate, if not eliminate, the discrimination which had been practiced against youth.[108]

Although many did not believe the draft age was determinative of the matter, Representative McCloskey, Jr. of California was particularly disturbed by the incongruity of asking a young man to risk his life for policies which he did not even have an indirect opportunity to influence. "If equal protection of the laws is to have any real meaning at this point in our history," Representative McCloskey observed, "it would seem reasonable to conclude that the obligation to fight and die in a war against people whom a man does not hate, in a cause in which he does not believe, justifies the protection of law that such man and the loved ones of his age be entitled to vote for or against such cause."[109] Representative Ottinger of New York similarly commented that "the important need for this move is the increasing alienation of our young people from the governmental decisions which affect their lives so profoundly."[110] Speaker of the House John McCormack felt compelled to step down from his chair and make an unusual speech on the floor of the House. In this speech, Speaker McCormack implored his colleagues to support Title III: "We are not conferring citizenship, because they are citizens once they are born. The question is the assumption of the fullness of citizenship, to wit, the vote."[111]

The congressional debates also reflect the fact that most Members of Congress believed that no compelling state interest was being served by a voting age of 21. In fact, Senator Allen proposed an amendment which would strike from Title III language which

107 *Id.* at S3577 (daily ed. March 12, 1970).
108 *Id.* at H5645, 5665 (daily ed. June 17, 1970).
109 *Id.* at H5654.
110 *Id.* at H5656.
111 *Id.* at H5675.

explicitly stated that no compelling state interest was served by having the voting age at 21.[112] In an exchange with Senator Philip Hart of Michigan, though, Senator Allen failed to adequately define the state interest he was seeking to protect.[113] His amendment to strike the relevant language from Title III was soundly defeated in the Senate by a vote of 64-20.[114]

In addition, many Members of Congress expressed the belief that youth's exclusion from the electorate had created among them considerable frustration. In this regard, the testimony of Dr. Margaret Mead before the Bayh Committee, included in the *Record* by Senator Birch Bayh of Indiana, is particularly apt: "Lack of political responsibility can put the sanest men and women into a rebellious and frustrated state where they no longer trust the political process on which our freedom is built."[115] Representative John Anderson of Illinois further added, "[Young people] are constantly enjoined to work within the system only to find that the system excludes them from any direct participation in the actual decision-making process."[116]

In the end, both Houses of Congress adopted Title III by overwhelming voting margins — the Senate by a vote of 64-17,[117] and the House by a vote of 272-132.[118] The evidence is substantial that when it adopted Title III, Congress believed that it was pursuing reasonable and appropriate means to remedy discrimination against citizens between the ages of 18 and 21, a discrimination that was inconsistent with the Equal Protection Clause.

2. Congressional Power to Lower the Voting Age by Statute

A second principal issue which concerned Congress during the debates on Title III was whether or not the Congress had authority under the Constitution to extend the franchise to 18-year-olds without a constitutional amendment. This issue was raised

112 *Id.* at S3552 (daily ed. March 11, 1970).
113 *Id.* at S3554.
114 *Id.* at S3557.
115 *Id.* at S3510 (daily ed. March 11, 1970).
116 *Id.* at H5643 (daily ed. June 17, 1970).
117 *Id.* at S3585 (daily ed. March 12, 1970).
118 *Id.* at H5679 (daily ed. June 17, 1970).

on the same day that Senator Mansfield proposed Amendment No. 545,[119] and the issue continued to occupy much of the debating time in the Senate as well as in the House. Indeed, because of their doubts as to the legislation's constitutional validity, some Senators and Congressmen felt compelled to vote against Title III's adoption even though they believed that citizens between the ages of 18 and 21 were entitled to vote.[120]

In debating this issue, four principal sources were referred to by Members of Congress: the Constitution itself; the relevant decisions by the Supreme Court; the views of legal scholars throughout the country; and the experience with the Voting Rights Act of 1965. A careful scrutiny of the debates leads to the conclusion that Members of Congress were fully aware of arguments contesting its constitutional authority to do so. The votes in the respective Houses of Congress therefore justify the conclusion that, having fully considered these issues, Congress believed that its authority under the Constitution was adequate to lower the voting age by statute.

The principal issue considered by Congress was whether section 5 of the fourteenth amendment was sufficient to limit the power of the states to determine voting qualifications. Senator Ervin, highly respected in matters of constitutional law, argued that legislation to lower the voting age was inconsistent with the power delegated to the Congress by the Constitution.[121] Concurring with Senator Ervin were several Senators as well as spokesmen for the Nixon Administration.[122]

To justify his position, Senator Ervin cited four provisions of the Constitution: article I, section 2;[123] Article II, section 1;[124]

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119 *Id.* at S2940 (daily ed. March 4, 1970).

120 *See* text accompanying note 94 *supra.*

121 116 CONG. REC. S2940, 3001-02 (daily ed. March 4, 1970); *id.* at S3477 (daily ed. March 11, 1970).

122 *See* note 4 and text accompanying note 94 *supra.*

123 U.S. CONST. art. I, § 2 ("[A]nd the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.")

124 U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress. . . .")

the tenth amendment to the Constitution;[125] and the seventeenth amendment to the Constitution.[126] One further provision which seemed to support Senator Ervin's position was section 2 of the fourteenth amendment. Although this latter section was not discussed on the Senate floor, it was raised by Senator Cook during the hearings conducted by the Bayh Committee in 1970.[127] It was also raised in an exchange of letters appearing in the *New York Times*,[128] and in the House debate concerning Title III.[129]

It was contended that the foregoing provisions of the Constitution accorded the states the right to determine voter qualifications, subject only to limitations not relevant to lowering the voting age. While the Constitution does not expressly state that the voting age must be 21, nor that Congress is without power to lower the voting age, opponents of Title III believed that a reasonable interpretation of the Constitution left little doubt that Congress could not lower the voting age by statute.

Senator Harry Byrd, Jr., of Virginia, for example, asserted that he opposed Title III because it represents ". . . a distortion of the constitutional process and is clearly wrong."[130] Senator Jack Miller of Iowa added that if Title III were constitutional, then there would be no limit to Congress's power — it could conceivably make a finding to support any legislation and perhaps undermine the federal system of government.[131] These same arguments were cited by Members of the House who opposed Title III,

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125. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

126 U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; . . . . The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.")

127 *See* text accompanying note 69 *supra*.

128 Note 38, *supra;* Letter to the Editor from Senator Kennedy, N.Y. Times, April 7, 1970, at 44, col. 1; Letter to the Editor from Professors Cox and Freund, *id.*, April 12, 1970, § 4, at 13, col. 2.

129 *See, e.g.*, 116 CONG. REC. H5645 (daily ed. June 17, 1970) (remarks of Representative George Andrews); *id.* at H5663-64 (remarks of Representative Richard Ichord); *id* at H5666 (remarks of Representative Richardson Preyer); *id.* at H5678 (remarks of Representative William Colmer).

130 *Id.* at S3411 (daily ed. March 10, 1970).

131 *Id.* at S3503 (daily ed. March 11, 1970).

and many even referred to the statements of Senator Ervin and others in the Senate debate.[132]

To buttress their arguments, opponents of Title III referred to several judicial decisions and to the opinions of constitutional lawyers throughout the country. Mr. Rehnquist specifically cited the dicta from *Lassiter v. Northampton County Board of Elections*,[133] that the matter of age was one voting qualification to be determined by the respective states.[134] Senator Ervin, moreover, did not believe that *Morgan* afforded sufficient support for Title III. Indeed, from his perspective, the Court in that case had abdicated its responsibility to interpret the Constitution and had therefore generated erroneous beliefs as to Congress's power under section 5 of the fourteenth amendment.[135]

Opponents of Title III also cited the statements of various lawyers who shared doubts as to the legislation's constitutional validity. Among the most prominent of these lawyers was Louis Pollak, then dean of the Yale Law School.[136] While Dean Pollak understood the legal arguments of those who supported this legislation, he believed that *Morgan* was not conclusive in the matter and that other provisions of the Constitution limited *Morgan*'s relevance to Title III. Dean Pollak's arguments were stated frequently in the debates, and they were endorsed by several other lawyers. Representative Clark MacGregor of Minnesota, in fact, inserted in the *Record* letters from fifteen legal scholars, addressed to the White House and expressing the opinion that Title III was unconstitutional.[137] In the end, the arguments of those who believed Title III to be unconstitutional were frequently made, and it is reasonable to conclude that Congress was fully informed of these legal opinions when it enacted Title III.

The proponents of Title III answered these arguments by acknowledging that the Constitution left to the respective states the power to determine voter qualifications; but argued that this

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132 *See, e.g., id.* at H5645 (daily ed. June 17, 1970) (remarks of Representative Andrews); *id.* at H5647 (remarks of Representative Leslie Arends).

133 360 U.S. 45 (1959).

134 *Id.* at 360 U.S. 50, 51.

135 116 CONG. REC. S3479 (daily ed. March 11, 1970).

136 *Id.* at S3494.

137 *Id.* at H5647-53 (daily ed. June 17, 1970).

discretion was bounded by the constraints imposed by the fourteenth amendment. Moreover, it was argued that section 5 of the fourteenth amendment empowers Congress to make its own determination of what constitutes discrimination in violation of the Equal Protection Clause and thereby to impose limits upon the discretion of the states in determining voter qualifications.[138]

The proponents cited numerous cases interpreting the Equal Protection Clause and Congress's power to adopt appropriate legislation to enforce that clause. Central among these cases was *Morgan,* whose language was repeatedly referred to in both the Senate and the House.[139] Proponents asserted that, according to

138 *See, e.g., id.* at S2939 (daily ed. March 4, 1970) (remarks of Senator Magnuson); *id.* at S3088 (daily ed. March 5, 1970) (remarks of Senator Moss); *id.* at S3215 (daily ed. March 9, 1970) (remarks of Senator Cook); *id.* at S3478 (daily ed. March 11, 1970) (remarks of Senator Kennedy); *id.* at S3493 (remarks of Senator Harris); *id.* at S3496 (remarks of Senator Yarborough); *id.* at S3496-97 (remarks of Senator McGee); *id.* at S3497 (remarks of Senator Hartke); *id.* at S3498 (remarks of Senator Tydings); *id.* at S3499 (remarks of Senator Cannon); *id.* at S3499-500 (remarks of Senator Young); *id.* at S3500-01 (remarks of Senator Bible); *id.* at S3506 (remarks of Senator Fulbright); *id.* at S3508-10 (remarks of Senator Bayh); *id.* at S3576-77 (daily ed. March 12, 1970) (remarks of Senator Mansfield); *id.* at S3583 (remarks of Senator Montoya); *id.* at S3584 remarks of Senator Mondale); *id.* at H5640 (daily ed. June 17, 1970) (remarks of Representative Matsunaga); *id.* at H5643 (remarks of Representative McCulloch); *id.* at H5643 (remarks of Representative Anderson); *id.* at H5644 (remarks of Representative Mikva); *id.* at H5645 (remarks of Representative McClory); *id.* (remarks of Representative Albert); *id.* at H5646 (remarks of Representative Thomas Railsback); *id.* at H5654 (remarks of Representative Edward Boland); *id.* (remarks of Representative McCloskey); *id.* (remarks of Representative Charles Bennett); *id.* at H5656 (remarks of Representative Dante Fascell); *id.* (remarks of Representative Richard Ottinger); *id.* at H5657 (remarks of Representative Podell); *id.* (remarks of Representative Rodino); *id.* at H5658 (remarks of Representative Jeffrey Cohelan); *id.* at H5660 (remarks of Representative Edwards); *id.* at H5661 (remarks of Representative Stokes); *id.* at H5664 (remarks of Representative Price); *id.* at H5667 (remarks of Representative Tunney); *id.* at H5668 (remarks of Representative Burlison); *id.* at H5670 (remarks of Representative Vanik); *id.* at H5671-72 (remarks of Representative Robison); *id.* at H5675 (remarks of Speaker McCormack).

139 *See, e.g., id.* at S3216 (daily ed. March 9, 1970) (testimony of Senator Goldwater before the Bayh Committee); *id.* at S3058-59 (daily ed. March 5, 1970) (Memorandum of Senator Kennedy); *id.* at S3215 (daily ed. March 9, 1970) (remarks of Senator Cook); *id.* at S3475 (daily ed. March 11, 1970) (remarks of Senator Cook); *id.* at S3478 (remarks of Senator Kennedy); *id.* at S3498 (remarks of Senator Tydings); *id.* at S3508 (remarks of Senator Bayh); *id.* at H5640 (daily ed. June 17, 1970) (remarks of Representative Matsunaga); *id.* at H5644 (remarks of Representative Anderson); *id.* (remarks of Representative Mikva); *id.* at H5645 (remarks of Representative McClory); *id.* at H5654 (remarks of Representative McCloskey, Jr.); *id.* (remarks of Representative Bennett); *id.* at H5656 (remarks of Representative Ottinger); *id.* at H5657 (remarks of Representative Rodino); *id.* at H5661 (remarks of Representative Stokes); *id.* at H5664 (remarks of Representative Price); *id.* at H5667 (remarks of Representative Tunney); *id.* at H5671-72 (remarks of Representative Robison); *id.* at H5674 (remarks of Speaker McCormack).

the *Morgan* opinion, any congressional legislation designed to remedy discrimination and insure the equal protection of the laws was consistent with section 5. This was, in fact, the very rationale employed to justify the enactment of section 4(e) of the Voting Rights Act of 1965.

In testimony before the Bayh Committee, Senator Goldwater stated that the fundamental rights of citizenship embraced the right to vote, and that Congress had the power to insure that individuals possessed these rights.[140] In support of this position, Senator Goldwater referred to various Supreme Court decisions which recognized the importance of the right to vote and the power of Congress to implement that right.[141] Senator Goldwater asserted that there is "no reasonable justification for denying the vote" to citizens between the ages of 18 and 21.[142]

The legal position of the proponents of Title III was further supported by the testimony of numerous constitutional lawyers.[143] Of these, the most prominent were Archibald Cox and Paul Freund, both professors at the Harvard Law School. In his testimony before the Senate Subcommittee on Constitutional Rights, Professor Cox expressed his opinion that Congress had ample power under section 5 of the fourteenth amendment to lower the voting age, and that any reasonable finding by Congress in this matter was a sufficient basis to uphold its constitutionality under the reasoning of *Morgan*.[144] Professor Cox's opinion was referred to frequently in both the Senate and House debates.[145]

Professor Cox's view was also supported by Professor Freund, whose 1968 address at Cornell College incorporated the theme

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140 *Id.* at S3216 (daily ed. March 9, 1970).

141 *See* cases cited at note 29, *supra*. *See also*, Strauder v. West Virginia, 100 U.S. 303 (1879).

142 116 CONG. REC. S3216 (daily ed. March 9, 1970).

143 *See, e.g., id.* at S7277-85 (daily ed. May 18, 1970) (letters from 18 lawyers addressed to Senator Kennedy).

144 *See* text accompanying note 70 *supra*; 116 CONG. REC. S3062-63 (daily ed. March 5, 1970); *id.* at S3481 (daily ed. March 11, 1970).

145 *See, e.g.*, 116 CONG. REC. S2939 (daily ed. March 4, 1970) (remarks of Senator Magnuson); *id.* at S3478 (daily ed. March 11, 1970) (remarks of Senator Kennedy); *id.* at S3215 (daily ed. March 9, 1970) (remarks of Senator Cook); *id.* at S3493 (daily ed. March 11, 1970) (remarks of Senator Harris); *id.* at S3506 (remarks of Senator Fulbright); *id.* at S3509 (remarks of Senator Bayh); *id.* at H5640 (daily ed. June 17, 1970) (remarks of Representative Matsunaga); *id.* at H5643 (remarks of Representative McCulloch); *id.* at H5645 (remarks of Representative Albert); *id.* at H5659 (remarks of Representative Podell); *id.* at H5675 (remarks of Speaker McCormack).

that congressional legislation to lower the voting age was both necessary and appropriate.[146] Indeed, when Title III's constitutional validity became the prime focus of the Senate debate, Senator Mansfield dispatched a telegram to Professor Freund, asking him to state explicitly his opinion on the matter. In response, Professor Freund outlined in greater detail the power of Congress to extend the franchise to 18-year-olds.[147] In particular, he referred to the Supreme Court's decision in *Harper v. Virginia Board of Elections*.[148] Professor Freund observed that in that case even the dissenting justices concurred that any legislation designed to remedy discrimination violative of the Equal Protection Clause was appropriate legislation under section 5.

Ultimately, a majority in both Houses found the legal arguments of the proponents persuasive. Senator William Fulbright's statement shortly before the Senate vote on Title III is illustrative:

> I have long favored lowering the voting age to 18. . . . I have, nevertheless, listened to the questions raised about whether it would be constitutionally correct for the Congress to enact a statute to this effect in view of the constitutionally based premise that voter qualifications shall be set by the several States. However, as this issue has been developing in the Senate, and especially with regard to the new amendment just offered, I have been most impressed with the arguments made by such eminent legal authorities as Professors Freund and Cox, not to mention those made by the distinguished majority leader and the assistant majority leader. The reasoning supporting the amendment has been most eloquently expressed in the Chamber today and I need not elaborate upon it at this time. I am persuaded by these arguments and, accordingly, I shall vote for this amendment (No. 545).[149]

3. Possible Uncertainty in the Electoral Process if Title III Were Adopted

The third concern of Congress was the uncertainty and confusion which Title III could introduce into the electoral process, particularly with respect to the presidential election in 1972.

146 *Id.* at S3060-62 (daily ed. March 5, 1970) (Freund, *The Student Generation and Social Regeneration Commencement Address*).

147 *Id.* at S3502-03 (daily ed. March 11, 1970).

148 383 U.S. 663 (1966).

149 116 CONG. REC. S3506 (daily ed. March 11, 1970).

Because questions were raised with regard to the legislation's constitutional validity, some Members of Congress argued that the outcome of any election could remain in abeyance until the courts resolved these constitutional issues.[150]

Because of these possible uncertainties, it was argued in both Houses that Congress should not be "impatient" with the constitutional amending process,[151] and that proponents of Title III should be careful lest they generate false expectations among the nation's youth in the event that Title III was declared unconstitutional by the Court.[152] Further opponents of Title III observed that adoption of the twenty-fourth amendment required less than two years. Words of caution were also issued by Administration spokesmen and by many of the scholars and lawyers who questioned the constitutional validity of Title III.[153]

Two arguments were employed to answer the contentions of those who feared the electoral uncertainties which might flow from Title III's enactment. First, as Senator Kennedy noted,[154] Section 303 of Title III provided that any challenge to the legislation's constitutional validity could be considered expeditiously by a three-judge district court with direct appeal to the Supreme Court. Proponents also argued that the legislation could include an expansion of the declaratory judgment similar to 10(b) of the Voting Rights Act of 1965, a device which was accepted by the Supreme Court in *South Carolina v. Katzenbach.*

Senator Kennedy reflected the attitude of the proponents when he labeled the possible uncertainty a "false issue."[155] This was particularly true, he stated, since in accordance with an amendment proposed by Senator Cook,[156] Title III would not become effective until January 1, 1971. As a result, the Court would have more time to consider the constitutional validity of Title III than it did to consider the Voting Rights Act of 1965, which also could

150 *See, e.g., id.* at S3480 (remarks of Senator Robert Griffin); *id.* at H5647 (daily ed. June 17, 1970) (remarks of Representative Richard Poff).

151 *See, e.g., id.* at S3493-94 (daily ed. March 11, 1970) (remarks of Senator Hruska).

152 *See, e.g., id.* at S3555 (remarks of Senator Long).

153 *See* text accompanying notes 97 and 140 *supra.*

154 116 CONG. REC. S3577 (daily ed. March 12, 1970).

155 *Id.* at S3480 (daily ed. March 11, 1970).

156 *Id.* at S3476.

have created uncertainty in the electoral process if the Court's consideration of that Act require too much time. The arguments of the proponents in this matter were evidently persuasive, because, by a vote of 72-15, the Senate rejected Senator Allen's amendment to change the effective date of Title III to January 1, 1973.[157]

With respect to the expectations of the young, the proponents of Title III forcefully argued that youth's frustration could only be exacerbated if Congress failed to act in this matter. Senator Mansfield, for example, stated that the Judiciary Committee was a "good burial ground" for constitutional amendments, and that any amendment to lower the voting age would require several years before it could become effective.[158] Congressmen such as Charles Bennett of Florida[159] and Edward Boland of Massachusetts[160] were among many who also cited the growing frustration among youth, and stated that this frustration could not be assuaged with promises of a constitutional amendment in the future.[161] These spokesmen were supported by representatives of youth groups[162] and by the Congressmen and Senators who voted for Title III.

Conclusion

Legislative history is rarely amenable to simple analyses and indisputable conclusions. Nevertheless, this review of the relevant congressional statements, debates, and hearings does demonstrate a rational basis for Congress's decision which qualifies it as an appropriate exercise of Congress's power under section 5 of the fourteenth amendment. An act which will broaden the civil rights of millions of young Americans can scarcely be said to offend the purposes of that amendment.

However, it is not possible to predict with certainty the Court's

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157 *Id.* at S3578 (daily ed. March 12, 1970). The effective date of Title III was not considered separately in the House, since there was only one vote on the entire Title.

158 *Id.* at S3501 (daily ed. March 11, 1970).

159 *Id.* at H5654 (daily ed. June 17, 1970).

160 *Id.* at H5653-54.

161 *See* text accompanying notes 105, 106 and 107 *supra.*

162 *See, e.g.,* 116 CONG. REC. S3584 (daily ed. March 12, 1970) (testimony of Earl Blumenauer, director of an Oregon youth group, before the Bayh Committee).

decision regarding the constitutional validity of Title III. The Court which decided *Morgan* has now been changed with the retirement of two justices and the addition of two Nixon appointees.[163] Nonetheless, five members of the original *Morgan* majority still remain. Moreover, if the principles announced in *Morgan* are to endure, and if the Court is to account for the political considerations which motivated the enactment of Title III, then it is not unreasonable to suggest that the Court may conclude that Title III is fully consistent with our federal system of government and the rights conferred by the fourteenth amendment.

*Lewis J. Paper**

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163 Chief Justice Warren Burger in 1969 and Justice Harry A. Blackmun in 1970.

*Mr. Paper is a member of the class of 1971 in the Harvard Law School. He assisted in the preparation of a brief filed on behalf of the Youth Franchise Coalition in Christopher v. Mitchell, Civil No. 1862-70 (D.D.C. 1970), which concerned Title III of the Voting Rights Act of 1970.

PROPERTY TAXATION OF AGRICULTURAL AND OPEN SPACE LAND

Introduction

Concern has increased in the last decade over the conversion of farm and open space land on the fringes of growing urban areas into other uses. Various land-use control devices such as the exercise of eminent domain[1] and zoning[2] have been employed to control this process. As another means of forestalling this process, many states have enacted legislation granting preferential treatment to agricultural and open space land for property tax purposes.[3]

Statutes granting preferential tax assessment to undeveloped land seek to accomplish a variety of objectives. One commonly stated purpose is the preservation of open space land. However, the concept of open space land is not easy to articulate and may mean different things to different people. For one interest group, open space is valued for the visual enjoyment and sense of peace experienced by people who travel through areas devoted to agricultural pursuits.[4] For a legislative committee charged with the task of defining open space, it means (1) land which, due to its inherent features, "is more valuable to society for open space purposes than for any other," (2) "land which would be danger-

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1 *E.g.*, one mechanism for halting the process of conversion is the use of "conservation easements." This method involves government acquisition of the "development rights" in open space land to prevent its conversion to more intensive uses. See Whyte, *Securing Open Space for Urban America: Conservation Easements*, URBAN LAND INSTITUTE TECHNICAL BULL. No. 36 (1959). California has enacted legislation authorizing the use of this technique. CAL. GOV'T CODE §§ 6950-54 (West 1966). However, the statute is rarely used because of the high costs of acquiring such interests. *See also*, MINN. STAT. § 273.13 (1961).

2 Perhaps the oldest method of attempting to halt the conversion of farm land to other uses is the simple expedient of zoning the land exclusively for agricultural purposes. Historically, however, zoning has been an ineffective means of controlling development. *See* Hagman, *Open Space Planning and Property Taxation — Some Suggestions*, 1964 WIS. L. REV. 628, 630-32.

3 The traditional purpose of taxation has been to raise revenue. This Note will ignore that goal, and, generally, the degree to which that goal is impaired by the use of property taxes as a land-use control device.

4 Statement by T. Forbes, Chairman, Tax Committee, California Cattlemen's Association, to the California Legislature, Joint Committee on Open Space Lands, in San Francisco, November 3-4, 1969.

ous to use for any urban purposes," and (3) land which is restricted "as part of a planning process which directs development elsewhere."[5]

Another common purpose of preferential assessment legislation is property tax relief for farmers on the urban fringe. In recent decades rising property taxes have burdened farm income. Some 10.2 percent of the average farmer's net cash income went for property taxes in 1950. In 1963, 16.3 percent of net cash income was paid out in the form of property taxes.[6] For the same period, as the dollar amount of taxes nearly doubled, net cash incomes rose only 17 percent.[7] These increases in the level of property taxation are considered inequitable from the farmer's viewpoint because they usually stem from increased demand for schools, roads, and municipal services. Compared to suburban interests, agricultural interests benefit little from these services, and contribute little to the demand for them.

Closely related to the goal of preserving open space is the objective of halting the spread of "slurbs," or "urban sprawl." The statutes seek to accomplish this by slowing the cycle which results in the premature development of farm land on the urban fringe. As urban dwellers seek open spaces, they buy up farms. When speculators and others follow their example, tax assessors note the rising land values evidenced by the scattered sales, and associate those values with all the land in the area. Taxes on farmland then rise to a point where agriculture becomes an unprofitable occupation.[8] This causes even more scattered sales and construction. The new homes must have municipal services and schools which are likely to be inordinately expensive because of the diffuse character of development. A frequent response to this cycle has been, as one authority notes:

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5 CAL. LEGIS. JT. COMM. ON OPEN SPACE LAND, FINAL REPORT 54 (Feb. 1970) [hereinafter cited as FINAL REPORT].

6 Barlowe, *Taxation of Agriculture* in PROPERTY TAXATION U.S.A. 90 (R. Lindhom ed. 1967).

7 *Id.* at 87.

8 *Id.* at 96-97. As may be seen clearly by the description, this process of land sales does not occur in a perfect market. For a consideration of the speculator's role in a theoretical and perfect land market, see Elias and Gillies, *Some Observations on the Role of Speculators and Speculation in Land Development*, 12 U.C.L.A. L. REV. 789 (1965).

> The idea . . . that urban sprawl could be averted, and open spaces preserved in their pristine state, by simply holding down assessed values, on the old theory that, if high taxes on undeveloped land speed the land into high (more productive) uses, lower taxes would retard this movement.[9]

The goals of preserving open space, providing equitable tax relief, and halting urban sprawl have now been embodied, to varying degrees, in the property tax statutes of nineteen states.[10] This Note will survey these statutes, pointing out their common features and differences and attempting to assess their effectiveness. The Note will also focus on the history of California's attempts to draft effective preferential assessment legislation and will draw conclusions for the future from that experience.

I. State Assessment Statutes

The nineteen state statutes have in common the feature of providing for "use-value assessment." The statutes direct that property be assessed on the value of the land when used only for agriculture, rather than on its value in a free market sale. However, important differences among the statutes can be found even within this shared provision for use-value assessment. In some states valuation seems to be based on the highest productive potential of the land in agriculture, while in others it seems to be based on the land's current agricultural production. For example, the Connecticut statute directs that land be assessed on its current use only,[11] whereas in Alaska the land is to be "assessed on the basis of its full and true value for farm use."[12] New Jersey seems to stand with Alaska, for the value in that state is to be derived with reference to the land's productive capability, as derived from soil survey data.[13] In Pennsylvania, however, there may be yet a third assessment procedure: the landowner must

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9 Stocker, *Assessment of Land in Urban-Rural Fringe Area* in The Property Tax and Its Administration 143-44 (A. Lynn ed. 1969).

10 See the Appendix following this Note for a compilation of the state statutes and their provisions.

11 Conn. Gen. Stat. Ann. § 12-63 (Supp. 1970).

12 Alaska Stat. § 29.10.398(b) (Supp. 1969).

13 N.J. Stat. Ann. § 54:4-23.7 (Supp. 1969).

enter into a covenant with the county and the assessment "reflect[s] the fair market value of the land as restricted by the covenant."[14] This figure may represent neither productive potential nor current use but some third amount which includes extraneous market influences. Whether these use-value statutes really would cause three different values to be placed on identical land depends on the rules followed by the assessor, his judgment, and the market. For example, if the assessor is able to use market sales data, and if the market is ideal, the Connecticut and New Jersey standards may both reflect the productive potential.[15]

Another feature common to many of the use-value statutes is a "roll-back" provision for the payment of additional taxes when the land use is changed from agricultural or open space to a more intensive use. Typically the statutes require that the assessor make two valuations of the land each year; one of the full market value, and one of the use-value. When the land use changes, the difference between the taxes actually paid and the taxes that would have been payable for a specified number of previous years becomes due. Most often the roll-back is for only two or three years, and usually no interest is due on the deferred amounts. Washington, on the other hand, is notable for the severe roll-back imposed.[16] For timberland it can run up to 20 years, and for other land, up to 14 years. In addition, a special penalty payment of 20 percent of the deferred taxes is payable plus interest. California also has a severe penalty payment of 50 percent of the full cash value of the land which is assessed at the time the land use is changed.[17]

At the other extreme, many states impose a slight penalty or no penalty at all for change of use. In Maryland the roll-back may not exceed 5 percent of the full cash value of the land at the time of sale or conversion.[18] Connecticut[19] and Iowa,[20] among

14 PA. STAT. ANN. tit. 16, § 11943 (Supp. 1970).

15 However, it is possible that there will not be enough sales of similarly situated land for the assessor to rely on market data. Some of the assessment rules for California are considered *infra*, text at notes 122 to 125, 142 to 146.

16 Ch. 87, § 8, [1970] Wash. Laws 2d Ex. Sess. 705 (effective Jan. 1, 1971).

17 CAL. GOV'T CODE § 51283 (West Supp. 1970).

18 MD. ANN. CODE art. 81, § 19(b)(2) (1957).

19 CONN. GEN. STAT. ANN. § 12-107a *et seq.* (Supp. 1970).

20 IOWA CODE ANN. § 441.21 (Supp. 1970).

others, have no roll-back at all. Because of the character of the state, and the lack of language indicating a legislative intent to preserve open spaces, it may be inferred that in Iowa the interest in conserving open spaces plays a secondary role to that of providing tax relief for the farmer. The lack of a penalty, then, for the farmer's conversion of his land from farmland to some other more profitable use is not surprising. In Connecticut, however, it is the declared policy "that it is in the public interest to encourage the preservation of farm land, forest land and open space land."[21] Despite this expression of the public interest, there is no roll-back to serve as its guardian.

The use-value assessment statutes always apply to agricultural land, and sometimes to forest land, recreational areas, and open space land. To insure that there are no unintended beneficiaries of this form of assessment there are criteria which must be met for land to qualify under one of these categories. Alaska[22] and Texas[23] have criteria which relate to the source of the owner or farm operator's income. In Alaska, one-fourth of the owner's income must be derived from the land; and Texas requires that the agricultural uses must be the "primary occupation and source of income of the owner."[24] Many states list approved agricultural or horticultural uses.

"Open space land" is entitled to a use-value assessment in five states. It is defined usually as land which (1) conserves natural or scenic resources, (2) protects streams or water supplies, (3) promotes conservation of soils, wetlands, beaches, etc., (4) enhances the value to the public of abutting or neighboring parks, forests, etc., (5) enhances recreational opportunities, and (6) preserves historic sites. Washington's definition also includes land in a tract of at least five acres in an urban area which is open to the public, if the land is in its natural state. Rhode Island and Connecticut add to the list provisions designed to promote orderly suburban or urban development.[25] In general, the trend of use-

21 CONN. GEN. STAT. ANN. § 12-107a (Supp. 1970).
22 ALASKA STAT. § 29.10.398 (Supp. 1969).
23 TEX. CONST. art. VIII, § 1-d(a).
24 *Id.*
25 R.I. GEN. LAWS ANN. § 44-27-2 (Supp. 1968); CONN. GEN. STAT. ANN. § 12-107b (Supp. 1970).

value assessment statutes has been to expand the definition of open space and the classes of land which fall within their provisions.[26] This expansion reflects an increase in the functions which the statute is to perform, and necessarily, an increase in the interests affected.

In addition to the criteria for use-value assessment noted above, most states have procedural requirements which must be fulfilled in order to qualify. Typically there is simply a requirement of yearly application and approval by the assessor. In some states, such as Washington, the land must be specially designed as qualifying for use-value assessment by the local planning commission. Applications in Washington for such an assessment are treated in the same fashion as are proposed amendments to the local comprehensive plan.[27] California requires that the planning department or commission review the application. Furthermore, beginning in 1971, to establish an agricultural preserve which qualifies for use-value assessment, the county or city must have a general land-use plan.[28] In California, and in Pennsylvania, to obtain the lower assessment the landowner must enter into a covenant restricting the use of the land for a definite period.[29] Washington has a provision with a similar effect. There, land which qualifies for use-value assessment must be retained in its qualifying use for 10 years. In addition, the granting authority may require other conditions such as easements.[30] The substantive character of these different procedural requirements clearly varies greatly. In general, the lack of provisions for planning is notable.

Any survey of state use-value assessment statutes should also note the degree to which other statutes not so classified result nevertheless in a use-value for land. Some state statutes, for

26 *Compare* the provisions of an early statute, ch. 9, § 1, [1956] Md. Laws 10 ("Lands which are actively devoted to farm or agricultural use shall be assessed on the basis of such use . . . ."), *with* those of a more recent statute, ch. 87, § 8, [1970] Wash. Laws 2d Ex. Sess. 705 (effective Jan. 1, 1971). For example, see the development of the California statute, text following note 72 *infra*.

27 Ch. 87, § 4, [1970] Wash. Laws 2d Ex. Sess. 702 (effective Jan. 1, 1971).

28 CAL. GOV'T CODE § 51200 *et seq.* (West 1970). See also text following notes 82, 125.

29 CAL. GOV'T CODE §§ 51240-54 (West Supp. 1969); CAL. REV. & TAX. CODE §§ 422-23 (West 1970); PA. STAT. ANN. tit. 16, § 11943 (Supp. 1970).

30 Ch. 87, §§ 4, 7, [1970] Wash. Laws 2d Ex. Sess. 702 (effective Jan. 1, 1971).

example, imply that the assessed value may deviate from full market value. In Tennessee assessment is on the "sound, intrinsic, and immediate value," but "no assessment . . . shall be unduly influenced by inflated values resulting from speculative purchases in particular areas in anticipation of uncertain future real estate markets."[31] Other states, in listing factors which the assessor is to consider, include ones which arguably result in use-value assessment.[32] The Kansas statute for example mentions the (1) "effect of location on value," (2) "earning capacity as indicated by lease price or by capitalization of net income," and (3) "sale value on the open market with due allowance to abnormal and inflationary factors influencing such values."[33]

The language of still other statutes leads to the conclusion that the assessed value must approach the use value. Arizona directs that "current usage . . . be included in the formula for reaching a determination of full cash value."[34] The value of farms in West Virginia is "arrived at by giving primary, but not exclusive, consideration to the fair and reasonable amount of income which the same might be expected to earn, under normal conditions in the locality wherein situated, if rented."[35] Thus, even though many statutes are not classified as use-value assessment statutes, their provisions permit consideration of use-value elements in varying degrees.

It is uncertain however, whether these statutes actually result in assessed values approaching use-values. Whether or not any of the statutes provide assessment guidelines,[36] the actual practices followed by assessors invariably control valuation. Unfortunately, little empirical information is available regarding assessment practices. Some commentators have argued that these practices have caused agricultural land to be assessed at less than full market value in some states.[37] However, the dominant tendency

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31 TENN. CODE ANN. § 67-605 (Supp. 1969).

32 *E.g.*, N.D. CENT. CODE § 57-02-01 (Supp. 1969); *see also* NEB. REV. STAT. § 77-112 (1966).

33 KAN. STAT. ANN. § 79-503 (Supp. 1968).

34 ARIZ. REV. STAT. ANN. § 42-123(A)(5) (Supp. 1969).

35 W. VA. CODE ANN. § 11-3-1 (1966).

36 For statutes giving no assessment guidelines, see OHIO REV. CODE ANN. § 5715.01 (Page Supp. 1969); IDAHO CODE ANN. § 63-202 (Supp. 1969).

37 *See* Hagman, *Open Space Planning and Property Taxation-Some Suggestions*, 1964 WIS. L. REV. 628, 636.

has been resistance to assessment at less than full cash value, regardless of statutory provisions.[38]

The California experience in attempting to develop an effective use-value assessment scheme is instructive in many respects. The first legislation encountered constitutional impediments which are also present in many other states. California's experience reflects the extent to which procedures followed by local assessors can undermine use-value legislation. In addition, California's experience serves as a useful point of comparison with the states discussed *supra* since California has passed through most of the stages currently occupied by other states.

II. The California Experience

In California, both the farmers' and conservationists' arguments for use-value assessment have seemed especially strong. From 1949 to 1962 farm property taxes rose 147 percent.[39] For the same period, farm incomes before taxes declined from $543 million to $532 million.[40] Simultaneously, there was a rapid decline in the number of acres in California suitable for farming. In 1963, there were approximately seven million acres of prime farm land which produced the bulk of California's three-billion dollar farm income.[41] These acres produced 42 percent of the nation's fruits and nuts, 43 percent of the nation's vegetables and nearly 100 percent of many specialty crops.[42] One authority estimated in 1963 that the rate of withdrawal of this land from agriculture was averaging 150,000 acres per year.[43]

The increase in property taxes and the withdrawal of agricultural land has proceeded faster in some areas than in others. The experience of Santa Clara County, for example, is well documented. There, population grew from 280,000 to 600,000 in the

38 *See* text following note 103 *infra*.

39 Cal. Legis., Assembly Interim Comm. on Revenue and Taxation, A Major Tax Study, Taxation of Property in California, pt. 5, 205 (1964) [hereinafter cited as Major Tax Study].

40 U.S. Dep't of Agriculture, Farm Income 1949-62, State Estimates (August 1963).

41 Major Tax Study, *supra* note 39, at 207.

42 *Id.* at 208.

43 J. Snyder, The City as Seen from the Farm, March 13, 1963 (paper presented at a conference at the University of California at Davis).

ten years from 1949 to 1959, while the acreage in agriculture declined from 247,000 to 187,000.[44] From 1952-1962, the average value of prunes per acre was $468. However, "in the Cupertino area of the county, the average property tax on an acre of prunes amounted to $380. In the Gilroy area of the county, not yet reached by suburbia, the average property tax on an acre of prunes was only $28.50."[45] As a result, 26 square miles of farmland were converted to other uses. Moreover, nearly each of the 200 square miles in the county was directly affected.[46]

A. *Constitutional Assessment Standards*

Attempts in California to give preferred tax treatment to agricultural lands may be seen as a long search for means to circumvent state constitutional assessment standards. Prior to the passage of Proposition Three in 1966,[47] property tax assessment standards were governed solely by articles XI and XIII of the California Constitution. Article XIII, section 1 states that all property must be taxed "in proportion to its value, to be ascertained as provided by law, or as hereinafter provided."[48] Section 2 provides that "land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value."[49] Section 9, concerning the duties of the state and county boards of tax equalization, requires that assessment reflect the property's "true value in money."[50]

The courts have attempted at times to refine these measures. "Full cash value," for example, was defined by the courts as:

> the price that property would bring to its owner if it were offered for sale on an open market under conditions in which neither buyer or seller could take advantage of the exigen-

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44 MAJOR TAX STUDY, *supra* note 39, at 211.

45 *Id.* at 205.

46 Snyder, *A New Process for Agricultural Land Use Stabilization: The California Land Conservation Act of 1965*, 42 LAND ECON. 29, 31 (1966).

47 *See* text at note 112 *infra*.

48 CAL. CONST. art. XIII, § 1.

49 CAL. CONST. art. XIII, § 2.

50 CAL. CONST. art. XIII, § 9.

> cies of the other. It . . . might be called the market value of property for use in its present condition.[51]

The phrase "market value of property for use in its present condition" could arguably be construed as the price of the working farm for use as a working farm. In fact, however, the speculator's market value has become the accepted interpretation.[52]

Statutes define "full cash value," and "cash value" as "the amount at which property would be taken in payment of a just debt from a solvent debtor."[53] More importantly, the assessor's handbook required assessment at "highest and best use," which was "defined as the most profitable use over a period of time. It is the program of property utilization which will develop the highest value."[54] As a result, in assessing farmland, the assessor tried to calculate the price which the land would bring on the open market.

B. *A First Attempt*

In 1957, a first attempt was made to alter this standard.[55] A statute was enacted which provided that land exclusively zoned for agricultural purposes was to be assessed at its use value, provided that "there [was] no reasonable probability of the removal or modification of the zoning restriction in the near future." The statute resulted in the enactment of zoning ordinances, but assessors were skeptical of their permanence and continued to assess land on the basis of "highest and best use." An opinion by the Attorney General stating that the statute merely restated existing law further encouraged assessors in ignoring the law.[56] The Attorney General's opinion was apparently motived by fear that the law was violative of articles XI and XII of the constitution.

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51 DeLuz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 563, 290 P.2d 544, 554 (1955).

52 *E.g.*, Texas Company v. County of Los Angeles, 52 Cal. 2d 55, 61-62, 338 P.2d 440, 443 (1959).

53 CAL. REV. & TAX. CODE § 110 (West 1970).

54 CAL. STATE BD. OF EQUALIZATION, ASSESSOR'S HANDBOOK: GENERAL APPRAISAL MANUAL 35 (2d ed. 1962).

55 Law of July 8, 1957, ch. 2049, § 1, [1957] Cal. Stats. 3630 (repealed 1966).

56 Land, *Unravelling the Rurban Fringe: A Proposal for the Implementation of Proposition Three*, 19 HASTINGS L.J. 421, 430 (1968).

Three years later the Open Space Act was enacted.[57] This act provides for the purchase by local government of development interests in land. However, because of the high price of such interests, the statute is seldom used. Yet the statute is important in that it represented the first attempt to define open space. The statute provides that "open space" is:

> any space or area characterized by (1) great natural scenic beauty or (2) whose existing openess, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of natural or scenic resources.[58]

C. *Proposition Four*

In 1962, the question of the constitutionality of use-value assessment was faced squarely by Proposition Four which would have added section 2.8 to article XIII. Proposition Four would have allowed farmers whose land had been "used exclusively for agriculture" during the previous two years to file an application for tax relief. If the county had elected to participate in the program, and if the assessor determined that the farmland was "used exclusively for agriculture," assessment was to be made according to use-value. The land was to be so valued until a new application was made or until its use changed. When it was no longer "used exclusively for agriculture" the owner would have been required to pay a roll-back tax of the difference between the taxes actually paid for the previous seven years and the taxes that would have been payable had the land been assessed at "highest and best use." In November, 1962, Proposition Four carried a majority of counties (37) but was rejected by an overall vote of 2,147,761 to 2,384,064.

Had Proposition Four passed, the law in California would have been very similar to that found in many of the states discussed earlier. All such state statutes which simply give the farmer tax relief and impose penalties on the change of use are subject to a class of criticisms. First, it can be argued that the

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57 CAL. GOV'T CODE §§ 6950-54 (West 1966). *See* note 117 *infra.*
58 CAL. GOV'T CODE § 6954 (West 1966).

statutes are undesirable because they reduce the holding costs of the land speculator. For the same amount of money he can hold more land, or hold the same land longer. In addition, the cash payment becomes due only when the speculator has sold for development and can best afford to pay. Also the speculator works with public money while his taxes are shifted onto other property owners. If no interest is paid when the back taxes become due, he has had the benefit of an interest-free loan. Finally, the taxes which need never be paid because they were calculated prior to the statutory roll-back constitute a grant to the speculator.

On the other hand, it is clear that with respect to the farmer such a statute is performing its intended function. Under a roll-back statute, the farmer pays taxes which are properly low because the farmer requires only a low level of municipal services. When he sells his land for a subdivision, he pays the large sum which the city will then need to provide public services for the development.

Thus, if the landowner is a speculator the statute may give rise to an unintended windfall. On the other hand, such statutes are basically equitable if the landowner is a farmer. Unfortunately, in drafting a use-value assessment statute it is extremely difficult to distinguish between these two classes of landowners.[59]

The attempted distinction may not be worthwhile if it can be shown that open space will tend to be preserved if either the farmer or the speculator is the landowner. Regardless of who is the owner, for example, the effect of a use-value assessment statute will be to shift property taxes onto non-qualifying land. This will cause the cost of holding this land to rise, and encourage its conversion into higher uses. Similarly, the probable effect of granting use-value assessment to undeveloped land will be to delay its conversion to a more intensive use. To the extent that this delay causes the supply of land available for development to diminish or remain constant, the value of this land will rise and the likelihood of its more intensive use will increase. Hence, it is arguable that use-value assessment will tend to curb urban sprawl even though it benefits the speculator. Unfortunately we do not

59 *See* WHYTE, *supra* note 7, at 108-09.

know how sensitive the market is to these forces. For that reason, the conclusion that use-value assessment will have the tendency of halting urban sprawl regardless of who is the landowner is probably unsupportable.

Neither the delay in conversion nor the shift in taxes are likely to contribute to curbing urban sprawl and preserving open space, however, unless the use-value assessment statute is integrated with local planning. As noted above, few of the statutes have mandatory planning requirements.[60] Relying on individual decisions to preserve open space may simply exaggerate the scattered pattern of growth.[61]

Because the tax relief is designed for farmers and because it is felt that they will be more likely to keep their land in open spaces, efforts have been made to draft use-value assessment statutes which distinguish the farmer from the speculator. The statutory requirement that a certain portion of the owner's income derive from the land, discussed *supra*, provides one example. The roll-back tax may be viewed as another instance. In Maryland, for example, the use-value assessment statute as originally enacted[62] contained no penalties for a change in the use of the land from farming. Then, finding that "non-farmers with financial means began buying farms which are actively devoted to agricultural use in all parts of Maryland,"[63] a bill[64] was introduced which excepted from use-value assessment land which was purchased for seven times the assessed value, land for which a subdivision plat was recorded, or land which was rezoned for a more intensive use. The bill was vetoed by the governor, but the following year the present roll-back provision of up to three year's taxes, not to exceed 5 percent of the full cash value assessment, was enacted. It is not known whether this provision has succeeded in separating the bona fide farmer from the speculative holder of

60 See text at notes 27 to 30 *supra*.

61 CAL. LEGIS., JT. COMM. ON OPEN SPACE LAND, PRELIMINARY REPORT 31 (1969) [hereinafter cited as COMM. ON OPEN SPACE].

62 MD. ANN. CODE art. 81, § 19(b)(1) (1957).

63 Address by W. H. Cae, Chief Supervisor of Assessments and Taxation, Thirty-Fifth Annual Conference of the International Association of Assessing Officers, Sept. 7-10, 1969.

64 S.1, Md. Legis., 1968 Sess.

land. One study of land sales in Maryland, though drawing no explicit conclusions, cannot be said to be very encouraging.[65]

The Maryland roll-back provision is fairly typical of state use-value assessment statutes, as noted above. Since the roll-back is such a popular device in these statutes, the effectiveness of a slightly harsher roll-back clause, such as was contained in California's Proposition Four, should be considered. The clout in a roll-back tax on land whose use has changed depends on the assessed value of the land, the tax per $100 of assessed value, and the difference between the value when used in agriculture and the price when sold for a subdivision. For example, assume a use-value of high-grade agricultural land of $600 per acre.[66] Also assume an assessed value of 22 percent of full value. This was the average ratio for 1964 in California.[67] The average tax per $100 of assessed value was $8 during this period.[68] Thus, if the land sells for a price of $1,200,[69] and the taxes are rolled back seven years as in Proposition Four, the farmer will pay $73 on a capital gain of $600.[70] This amount does not seem large enough

65 Walker, *Farm Ownership Valuation and Taxation in Rural-Urban Maryland,* 3 ASSESSORS J. 12 (1968).

66 Land values vary in California as elsewhere. In Connecticut, the value per acre is rated according to a productivity classification. "Tillable A" (shade tobacco) and "tillable B" (nursery) are valued at $500 per acre. "Vegetable crops and potatoes" are valued at $250, and "orchard" at $200 per acre. See P. Perregaux, A Study of the Operation of Public Act 490 at 9 (unpublished report of the Dep't of Agriculture & Natural Resources, Connecticut). In New Jersey, the best class of land, called "cropland harvested," varies among counties from $600 to $280 per acre. The second class, "cropland pastured," varies from $300 to $130. One study uses $400 per acre as the arbitrary cutoff point between farm and non-farm values. W. Walker, *Improving Farm Land Tax Assessments in Maryland Under Nonfarm Use Pressures* 8 (U. of Maryland, Dep't of Agriculture, Misc. Publ. No. 553, June 1955).

67 Although the California Constitution requires "full value," or market value assessment, the "assessed value" is traditionally about one quarter the market price. This practice of fractional assessment means inequality among counties however. In 1963 for example Alameda and San Francisco counties assessed property at 21.7 percent of full cash value while Contra Costa valued property at 23.4 percent. By the fiscal year 1971-72 however all land must be assessed at 25 percent of its full market value. CAL. REV. & TAX. CODE § 401 (West 1970).

68 The tax rate varied from $9.73 per $100 in Alameda County to $0.36 per $100 in Plumas County, so the average conceals significant differences.

69 *See* note 66 *supra.*

70 This assumes, unrealistically, that the agricultural value and market value were constant at $600 and $1200 respectively over the seven years prior to the change of use. Note also that the necessity of paying income or capital gains taxes will make the impact of any roll-back tax more severe.

to deter the sale. For the tax to absorb the capital gain completely, the tax rate per $100 of assessed value would have to approach $64, or the period of the roll-back would have to approach fifty years.

Since most states have roll-back provisions of a less stringent character,[71] the deterrent to a change of use is usually even slighter. The size of the deterrent is immaterial, of course, to the landowner who simply wants to farm. It must be concluded, however, that without a deterrent of much greater force than that which was found in Proposition Four, the use-value assessment statute remains unfocused: it offers the same tax relief to the farmer and speculator, and it fails to stem the progress of urban sprawl.

D. *The California Land Conservation Act of 1965*

After the failure of Proposition Four, the next effort to introduce use-value assessment was the California Land Conservation Act of 1965.[72] This act sought to circumvent the constitutional requirement of "full cash value" by forcing the market value to reflect only the value of the land when used for farming. The heart of this statute lay in contractual agreements between landowners and the government to restrict the use of land to farming for at least 10 years. This restriction would presumably lower the "full cash value" of the land to its value when used exclusively as farm land. To buttress this plan, a new section 402.6 of the Revenue and Taxation Code was enacted at the same time which required assessors to value farmland at its value as restricted, if there was no reasonable probability of removal or modification of the restriction in the near future.[73]

It was never decided in the courts whether these statutes met the constitutional requirements of "full cash value" and uniform assessment. On the grounds that section 402.6 did "not . . . require property to be assessed at less than its fair market value" the Attorney General found no constitutional conflict.[74] The

71 *See* text following note 17 *supra.*

72 CAL. GOV'T CODE § 51200 *et seq.* (West 1966), *as amended* CAL. GOV'T CODE § 51200 *et seq.* (West Supp. 1969).

73 Law of July 11, 1965, ch. 2012, § 2, [1965] Cal. Stats. 4543 (repealed 1966).

74 47 OP. CAL. ATT'Y GEN. 173 (1966).

Land Conservation Act contained a finding that "the limitation of the use of prime agricultural land pursuant to contract under this chapter is a determination . . . that the highest and best use of such land . . . is for agricultural uses. . . ."[75] Whether this finding would have eliminated the constitutional issue is unknown also. One authority feels that such a legislative preamble may reduce the likelihood of a statute being held invalid.[76] The experiences have been mixed in other states which have enacted statutes basing assessment on some standard other than full cash value.

Many state constitutions require that property be assessed at its full market value, or that all property be taxed uniformly.[77] A Nevada statute basing assessment on use-value was invalidated as was the first Maryland statute of that variety.[78] On the other hand, a Florida statute was found consistent with a constitutional full cash value standard in *Tyson v. Lanier*.[79]

In short, to enact use-value assessment statutes, states may find it necessary to resolve a constitutional question. A current example is Arkansas where article 16, section 5 of the state constitution states, "No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value . . . ." In 1969, Arkansas enacted a statute for taxation of agricultural lands on the basis of use.[80] However, county assessors have generally ignored it because they feel it is unconstitutional.[81]

In California a court test was avoided by an amendment to the

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75 Law of July 16, 1965, ch. 1443, § 1 ¶ 51222, [1965] Cal. Stats. 3379 (repealed 1969).

76 Hagman, *supra* note 37, at 642.

77 Virginia and Oklahoma, for example, have constitutional provisions requiring taxation at full market value. Nevada and Arkansas require equal and uniform taxation. For a useful compilation of "value" as defined for property tax purposes in different states, see CAL. LEGIS., ASSEMBLY COMMITTEE ON REVENUE AND TAXATION, PT. 1, PROBLEMS OF PROPERTY TAX ADMINISTRATION IN CALIFORNIA, App. D (December 1966).

78 Boyne v. State, 80 Nev. 160, 390 P.2d 225 (1964); State Tax Commission v. Gales, 222 Md. 543, 161 A.2d 676 (1960).

79 156 So. 2d 833 (Fla. 1963).

80 ARK. STAT. ANN. § 84-484 (Supp. 1969).

81 Letter from J. Burlingame, Director, Assessment Coordination Division of the Public Service Commission, to the author, March 13, 1970.

California Constitution.[82] A vote in the general election of 1966 on Proposition Three added article XXVIII to the constitution which permits assessment on some basis different from full cash value when dealing with open space land.

The Land Conservation Act as enacted in 1965 may be conveniently divided into three parts: the agricultural preserve, the enforceable restriction, and restrictions on powers of eminent domain.

Cities and counties are authorized to designate areas within their jurisdictions as "agricultural preserves." Areas so designated are recorded in the county's master plan, if it has one, and are intended for restriction to agricultural or "compatible uses" as determined by the county. County officials must devise rules for determining what constitutes a "compatible use."

Some idea of what might be "compatible uses" may be derived from the San Diego regulations.[83] There the size, number, and type of advertising signs is strictly regulated; "dwellings incidental to the agricultural use of the land" for a residence are permitted; also the "processing for market of crops raised on premises" is allowed. There does not seem to be any abuse of the discretionary authority here. A clearly questionable "compatible use" such as packing or processing plants for farm crops, or farm labor camps, must acquire a "special use permit" from the planning commission or board of supervisors. Applications for these are handled like those for special permits under the zoning ordinances.

Having established "preserves" the city or county may enter into an enforceable restriction with the landowner on the use of that land. As enacted in 1965 these restrictions were of two types: contracts and agreements. Contracts were restricted to prime agricultural land, defined either by a Soil Conservation Service land-use capability classification or by producing for three of the last five years an annual gross value of $200 per acre of unprocessed agricultural plant products. Capitalized at 6 percent this

82 The New Hampshire and Kentucky constitutions have been similarly amended. N.H. CONST. pt. II, art. 5-B; KY. CONST. § 172A. Maine voted to amend article IX, § 8 of its constitution in November, 1970.

83 San Diego County Planning Dept., Calif. Policies for Agricultural Preserves (October 14, 1969).

income gives a value per acre which is considerably higher than that of land assessed at use-value in other states.[84] However it is low compared to the capitalized value of land in Santa Clara County which produced income of over $400 per year per acre.[85]

To qualify for a contract, the preserve must have contained at least 100 acres, and when placed under a contract, the land must have been restricted to agricultural and "compatible" uses for ten years. In return the farmer received an assessment based on the restricted value.

To encourage placing land under a restriction the act provided for a direct subsidy by the county to the landowner of five cents for every dollar of assessed value under contract. The city or county could require a waiver of the payment as a condition of entering into the contract but the waiver was not to exceed the amount of the assessed valuation at the time of entering into the contract. Thus, unless the landowner waived payment entirely, for every dollar increase in the landowner's assessed value the government was to pay him five cents. The result was to nullify most of the effect of an increase in assessed values. Furthermore since in rural counties, the county (as distinguished from the composite) tax rate per hundred dollars was usually below three dollars,[86] counties would lose money when the assessor raised his assessment. In fact, since it may be shown that the county tax rate was even lower in those counties experiencing urban pressure than in more rural counties, the incentive was even greater in the urban fringe counties to keep assessments stable.[87]

The potential impact of such a payment by the county on its tax revenues might be suggested. Suppose the average value per acre is $3,300[88] and that the assessed value is about $725. Assume

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84 *Supra,* note 66.

85 *Supra,* note 45.

86 Note, *Assessment of Farmland Under the California Land Conservation Act and the "Breathing Space" Amendment,* 55 CAL. L. REV. 273, 278 (1967).

87 From the tables in MAJOR TAX STUDY, *supra* note 39, at 4, 5, the rates for Ventura, Riverside, and Orange Counties may be calculated to have been $1.60, $1.99, and $1.30 per $100 of assessed value respectively. These counties experienced more urban pressure than Fresno, Napa, and Sacramento Counties where the rates were $2.30, $2,60, and $2.40 respectively.

88 *See* text at note 85 *supra.*

that the assessed value increases $100 per acre, or 14 percent.[89] Assume the land is in Fresno County, where, in 1968-69, about 148,000 acres were under restriction,[90] where the tax rate per acre was $2.30, and the total revenue from secured property taxes[91] in 1961-62 was 14 million dollars.[92] Then, if the assessed value of only the land in the preserve increased by $100 per acre, the net decline in the county revenue from secured property taxes would amount to about 2.7 percent. Even if every acre in the county increases in assessed value by $100, the payment to the landowner would comprise about 2 percent of the total income of the county from secured property.[93] Thus, the incentive would have been significant for the county to hold assessed values constant for land under a contract.

These subsidy payments to the farmer, however, did not serve as a significant inducement for farmers to place their land under contract. Since it was usually required that the direct subsidy be waived as a condition of entering into a contract, the farmer who was considering restricting his land balanced a possible slighter than otherwise increase in taxes while under contract against the freedom to realize large capital gains when the right buyer appeared.

Perhaps because of the small incentive to landowners and the potential threat to county income, few landowners entered into contracts and few counties offered them in comparison with the number of agreements concluded. As of March 4, 1968, only two counties had offered contracts and only 79 landowners had entered into contracts. By contrast, at the same date, a total of

89 This is a large increase if maintained yearly, but it is not unrealistic where assessment occurs periodically. For evidence that reassessment of property in Los Angeles often caused property taxes to rise 100 to 200 percent every four or five years, see MAJOR TAX STUDY, *supra* note 39, at 110.

90 COMM. ON OPEN SPACE, *supra* note 61, at 51.

91 Secured property is land and improvements.

92 CAL. LEGIS., SENATE FACT FINDING COMM. ON REVENUE AND TAXATION, INTERGOVERNMENTAL FISCAL RELATIONS IN CALIFORNIA 53 (June, 1965).

93 Provision was also made in the act for payments from the state to the county of one dollar per acre under contract. These payments, however, were primarily to defer the costs of administering the program and only secondarily to compensate landowners for increases in property taxes. Furthermore, the state payment would only offset a fraction of the payment to the landowner. In the example, some fraction of one dollar would not offset much of a payment of five dollars per acre.

461 agreements had been entered upon in those counties, with a total of over 1,000 for all counties.[94]

The agreements offered under the 1965 act were not limited to a particular soil classification or income producing capability, nor to any minimum size, or to any set period; rather the act provided that

> . . . the length, terms, conditions, and restrictions . . . shall be determined by negotiation between the city or county and the landowners. . . . [It] shall be the policy of the city or county to secure agreements under which there is no reasonable probability of the removal or modification of the limitation or restriction within the near future.[95]

This contrasted sharply with the provisions concerning the approval and expiration of contracts.[96]

Before contracts could take effect, approval of the State Director of Agriculture was required. They expired either by nonrenewal or by cancellation. Contracts were automatically renewed for another 10 years on their anniversary. By giving notice of nonrenewal the contract expired in 9 years. During that expiration period the assessed value was to rise gradually, reflecting the approach of that date when the land would be free from its restriction. The county payments to which the landowner otherwise would have been entitled declined by 10 percent each year. Contracts could also be rescinded upon the mutual agreement of the parties to the contract and with the approval of the Director of Agriculture. Such approval would be given if cancellation was in the public interest and not inconsistent with the purposes of the act. An opportunity for another use of the land or the uneconomic character of the existing use were not considered appropriate grounds for cancellation. Furthermore, a public hearing on the cancellation was required, and if 51 percent of the owners of the land within a preserve which was under contract protested the cancellation of a contract within the pre-

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94 COMM. ON OPEN SPACE, *supra* note 61, at 51.

95 Law of July 16, 1965, ch. 1443, § 51256, [1965] Cal. Stats. 3377, 3381 (repealed 1969).

96 Law of July 16, 1965, ch. 1443, §§ 51250, 51280-86, [1965] Cal. Stats. 3377, 3383-84, *as amended* CAL. GOV'T CODE §§ 51248, 51280-86 (West Supp. 1969).

serve, the contract could not be cancelled.[97] Finally, a fee of 50 percent of the new assessed value of the property was due upon cancellation. By contrast, there were no payments under agreements, nor any set procedures for expiration or cancellation.

The third major category of The Land Conservation Act dealt with restrictions on powers of eminent domain of state government. One authority thinks that encroachment on open space by federal, state, and local governments is a major problem, and that it will worsen.[98] Since land whose value is depressed by an enforceable restriction would be a prime candidate for government purchase, sections 51290-95 of the act attempted to regulate eminent domain or other acquisitions.

It was the declared policy of those sections to avoid acquisition of land for public improvements in agricultural preserves, but the act, as drafted, lacked real force. For example, any agency contemplating such acquisition was to inform the Director of Agriculture. But the Director of Agriculture only had the power to comment on the proposed acquisition, and failure to seek his opinion would not invalidate any acquisition made. The most forceful language in the act provided that:

> (a) No public agency or person shall locate a public improvement within an agricultural preserve based primarily on a consideration of the lower cost of acquiring land in an agricultural preserve.
> (b) No public agency shall acquire land covered by a contract . . . if there is other land within or outside the preserve on which it is reasonably feasible to locate the public improvement.[99]

This section was immediately followed by exceptions from its strictures whenever (1) the Director of Agriculture, the local governing body, or the Public Utilities Commission determined that there should be an exception, or (2) whenever the improvement would be "for the primary benefit of the lands within the preserve," or, (3) whenever certain state highways or state water

97 This provision might have been invalid as an improper delegation of the police power. See D. HAGMAN & J. LARSON, CALIFORNIA ZONING PRACTICE 148-49, 211-12 (California Continuing Education of the Bar No. 43, 1969).

98 W. WHYTE, THE LAST LANDSCAPE 118-31 (1968).

99 CAL. GOV'T CODE § 51292 (West Supp. 1969).

facilities were involved.[100] Finally, the policy aginst eminent domain acquisition was only to be enforced by mandamus proceedings brought by the local governing body or the Director of Agriculture.[101] Due to these exceptions the strength of the Land Conservation Act's declared public policy against acquisition would not seem to have been very potent. Nevertheless most other state statutes do not even consider the question of eminent domain in the context of use-value assessment.[102]

E. *Section 402.6*

By the enactment of section 402.6[103] of the Revenue and Taxation Code the state attempted to compel the assessor to assess restricted land at its use value. This section required assessment at restricted value when there was no reasonable probability of removal or modification of the restriction within the foreseeable future. The assessor, however, was expected to combine this language with that of the "full cash value" constitutional requirement. His position was a difficult one much like that of assessors in Arkansas today.[104] Not surprisingly, farmers' suspicions of section 402.6 were not allayed. When surveyed, landowners said they had no assurance of the effect of the covenant upon assessed values.[105]

In summary, the combination of weak incentives for farmers to place their land under contract and fear that section 402.6 would be ineffective resulted in comparatively little land falling under the original Land Conservation Act. Those farmers who did place their land under restriction elected the more flexible vehicle of the agreement. As noted, the Land Conservation Act required a modicum of planning, but did not effectively guard against government encroachment.

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100 CAL. GOV'T CODE § 51293 (West Supp. 1969).

101 *Id.*

102 For example, New Jersey mentions eminent domain only to say that no rollback taxes will be imposed upon land so taken. N.J. STAT. ANN. § 54:4-23.17 (Supp. 1969).

103 Law of July 11, 1965, ch. 2012, § 2, [1965] Cal. Stats. 4543 (repealed 1966).

104 Letter from J. Burlingame, *supra* note 81.

105 COMM. ON OPEN SPACE, *supra* note 61, at 57.

F. *Section 402.1*

In 1966 minor changes were made in the Land Conservation Act and new section 402.1 of the Revenue and Taxation Code was enacted.[106] Like its predecessor, section 402.6, section 402.1 attempted to compel assessors to take account of restrictions when assessing land. Section 402.1, however, brought enforceable restrictions of all varieties within its ambit and erected a rebuttable presumption that "restrictions will not be removed or substantially modified in the predictable future and that they will substantially equate the value of the land to the value attributable to the legally permissible use or uses."[107] Section 402.1 also states that the expiration of a restriction at a future time certain does not constitute conclusive evidence of removal at that time unless there is no opportunity for renewal or extension. On the surface, this provision appears to bind the assessor firmly to a use-value assessment, but a closer examination reveals that this is not necessarily so.

If, for example, the land is under a contract, the possibility always exists that the contract will expire in 10 years. The market price should reflect this possibility. It is not clear what it means to "*substantially* equate the value of the land to the value attributable to the legally permissible use" (emphasis added). However, it is not inconceivable that the market value of restricted land will instead show a "similarity of sales prices for restricted and unrestricted land."[108] This is one ground for rebuttal specifically provided by section 402.1.[109]

Moreover, even where the market price data did not bring land within the statutory grounds for rebuttal, there remained a strong argument that land still could not be assessed at its agricultural use-value due to the constitutional "full cash value" standard. Despite section 402.1, this standard still seemed to require assessment at whatever value the land possessed over and above its use-value due to the possibility of future development. The

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106 CAL. REV. & TAX. CODE § 402.1 (West 1970). When enacted in 1966, § 402.1 replaced prior §§ 402.5 and 402.6 which were repealed at the same time.

107 *Id.*

108 *Id.*

109 *Id.*

Attorney General in 1966 called this the "transitional value" and stated that the constitution "does require the inclusion of transitional value in making a market value appraisal."[110]

As a result of these two qualifications, section 402.1 also proved ineffective in changing the practices of assessors. In consequence, land still did not go under the Conservation Act in large quantities. Such a movement did not occur until the California Constitution was amended in the next year, and clearer assessment procedures were enacted.[111]

G. *Article XXVIII*

In the general election of November 1966, Proposition Three added article XXVIII to the constitution. In language similar to that of section 402.1, the amendment states that "[a]ll assessors shall assess such open space lands on the basis only of such restriction and use and in the assessment thereof shall consider no factors other than those specified by the Legislature under the authorization of this section."[112] This provision settles the constitutional conflict between use-value and "full cash value" assessment, but the force of the article lies ultimately in its enabling legislation. Article XXVIII permits the legislature (1) to define open space land, (2) to specify what constitutes an enforceable restriction, and (3) to determine an assessment procedure "consistent with such restriction and use."[113] The Joint Committee on Open Space Lands has the duty of recommending solutions to these problems.[114]

H. *Sections 421-425*

New sections 421-425 of the Revenue and Taxation Code[115] were enacted in the same year to implement article XXVIII. Under these sections, contracts, agreements, open space ease-

110 OP. CAL. ATT'Y GEN., *supra* note 74, at 176, 179.
111 COMM. ON OPEN SPACE, *supra* note 61, at 46.
112 CAL. CONST. art. XXVIII.
113 *Id.*
114 COMM. ON OPEN SPACE, *supra* note 61, at 43.
115 CAL. REV. & TAX. CODE §§ 421-25 (West 1965), *as amended* CAL. REV. & TAX. CODE §§ 421-25 (West 1970).

ments,[116] and scenic restrictions[117] may qualify as enforceable restrictions. The agreement, however, must contain provisions that are "substantially similar or more restrictive than those required by statute for a contract."[118] Thus, contracts became the standard for determining whether land qualifies for use-value assessment.

These sections were designed to avoid clear abuses of use-value taxation stemming from the unregulated character of agreements. Nevertheless, they do not eliminate all the problems. The words "substantially similar" are difficult to interpret; minimum conditions for qualification must be promulgated. The Board of Equalization, by Rule 51,[119] requires an initial term of ten successive years with an automatic renewal on each anniversary date

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116 CAL. GOV'T CODE § 51050 *et seq.* (West Supp. 1969):

> Grant of an open-space easement means a grant by an instrument whereby the owner relinquished to the public, either in perpetuity or for a term of years, the right to construct improvements upon the land except as may be expressly reserved in the instrument and which contains a covenant with the city or county, running with the land, either in perpetuity or for a term of years, not to construct or permit the construction of any improvements, except as such right is expressly reserved in the instrument and except for the benefit of the land subject to such covenant or public service facilities installed pursuant to an authorization by the governing body of the city or county or the Public Utilities Commission.
>
> Any such reservation shall be consistent with the purposes of this chapter or with the findings of the county or city pursuant to Section 50156 and shall not permit any action which will materially impair the open-space character of the land.

117 The scenic restrictions mentioned in §§ 421-25 refer to CAL. GOV'T CODE §§ 6950-54 (West 1966).

CAL. REV. & TAX. CODE § 421(d) (West 1970):

> "Scenic restriction" means any interest or right in real property acquired by a city or county . . . where the deed or other instrument granting such right or interest imposes restrictions which, through limitation of their future use, will effectively preserve for public use and enjoyment, the character of open spaces and areas . . . .

CAL. GOV'T CODE §§ 6950-54 (West 1966):

> It is in the intent of the Legislature in enacting this chapter to provide a means whereby any county or city may acquire by purchase, gift, grant, bequest, devise, lease or otherwise, and through the expenditure of public funds, the fee or any lesser interest or right in real property in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.

118 CAL. REV. & TAX CODE § 421(c) (West 1970).

119 Agreements Qualifying Land for Assessment As Open-Space Lands, Cal. State Bd. of Equalization, Property Tax Dep't, Property Tax Rules and Regulations, Rule No. 51 (adopted Feb. 17, 1970, effective March 1, 1971).

for ten additional years. Other mandatory provisions of Rule 51 are the exclusion of other than agricultural and compatible uses, and a clause making the agreement binding upon, and inuring to the benefit of, all successors in interest to the owner. The difficult problems lie in balancing restrictions which are in some respects more strict than those of the contracts and in other respects less strict.[120] For example, would an agreement be "substantially similar" if it required approval by both the county planning commission and the county board of supervisors, but failed to require cancellation procedures as provided in section 51282? Rule 51 only states that a deficiency in cancellation, fee-waiver, or deferral "may be compensated for by other more restrictive provisions," except that the public hearing on the cancellation request and the findings by the board or council based on the evidence cannot be dispensed with. Since it seems that a great number of agreements differ from contracts with respect to the cancellation provisions, this problem is very real. Failure to pass the test of substantial similarity carries serious consequences, for land under that agreement falls within section 402.1 for assessment purposes. Although the requirement of substantial similarity was greatly affected by the combination of contracts and agreements into one program in 1969,[121] the program remains effective for agreements entered upon before that time. More importantly, there is evidence that many of the contracts currently being written do not conform to the minimum standards adopted for agreements.[122]

As originally enacted, sections 421-425 also caused problems in assessment because they did not provide clear guidelines for valuing land which qualified for use-value assessment. An explicit prohibition against the use of sales data forced assessors to use some form of income capitalization. However, sections 421-425 left this procedure unspecified. Local discretion resulted in variations of capitalization rates and inequality. The rates varied

120 The following draws on both a letter from Ronald B. Welch, Assistant Executive Secretary for Property Taxes, Cal. State Bd. of Equalization, to the author, March 3, 1970, and an interview with Mr. Welch on August 24, 1970.

121 *Cf.* text at note 133, *infra.*

122 Rule 51, note 119 *supra*, becomes effective on March 1, 1971 only in order to provide for the elimination of this non-conformity.

in 1968-69 from 3 percent, plus an allowance for property taxes, on non-prime land, and 5 percent on prime land, with an allowance, in the County of Santa Barbara, to 9 percent for all types of land in Mendocino County.[123] Only a slight difference in the capitalization rate can make a large difference in the property tax. For example, assuming a 25 percent ratio of assessed to full value, and an 8 percent tax rate, if land produces an income of $100 per year, a 14 percent greater property tax is paid when a 7 percent rate of capitalization is used than when an 8 percent rate is used.[124] The difference in capitalization rates between the extremes of Santa Barbara and Mendocino Counties was 4 percent. This situation was remedied by the amendments to sections 421-425 in 1969.

I. *Amendments 1969: Land Conservation Act*

In 1969, substantial changes were made in sections 421-425 of the Revenue and Taxation Code and in the Land Conservation Act. These changes grew out of a study by the Joint Committee on Open Space Land of the California Legislature.

In the Land Conservation Act, the requirements for local planning were increased. Beginning in 1971 only counties which have adopted a general plan may establish agricultural preserves.[125] Proposals to create preserves must be submitted to the planning department.[126] Within two years of approval by the planning department, all land within the preserve must be restricted by zoning, and must contain at least 100 acres.[127] Local authorities are required to furnish a report to the Director of Agriculture of land under contract.[128]

Local discretion still determines which uses qualify as compatible uses within preserves, but the 1969 amendments extend eligibility to the categories of scenic highway corridors, important wildlife habitat areas, saltponds, managed wetlands, and

123 COMM. ON OPEN SPACE, *supra* note 61 at 55.
124 *Id.* at 21.
125 CAL. GOV'T CODE § 51230 (West Supp. 1969).
126 CAL. GOV'T CODE § 51234 (West Supp. 1969).
127 CAL. GOV'T CODE § 51230 (West Supp. 1969), with exceptions.
128 CAL. GOV'T CODE § 51250 (West Supp. 1969).

submerged lands.[129] These added categories lessen the purely agricultural, or special interest character of the use-value assessment statute. They also illustrate the trend toward enlargement of "open space" categories entitled to preferred tax treatment.[130]

The section which permitted the owners of 51 percent of the preserve to block cancellation of a contract was repealed.[131] It seemed anomalous to retain such a provision since contracts could not be cancelled anyway without a finding that to do so was in the public interest.[132]

The other major change in the Land Conservation Act was the combination of the two programs, contracts and agreements, into one.[133] As noted, the terms of agreements were derived from negotiations.[134] This accorded wide discretion to all parties and hence seemed desirable to everyone, except perhaps to the state. Sections 421-425, as noted above, reflected a feeling that the terms of agreements might be too liberal to justify use-value assessment. Evidence collected showed that very few agreements were as restrictive as contracts.[135] Indeed, ten counties allowed clearly ineligible agreements.[136] Typically, the agreements were more lenient than contracts with respect to cancellation. Instead of a penalty for cancellation of 50 percent of the full cash value of the property, several counties exacted a fee of 50 percent of the difference between the assessed value when the contract was entered upon and the value when cancelled. Two counties did not require a public hearing on cancellation, and nine counties permitted the county board of supervisors to cancel for any cause. In view of the earlier discussion of the impact of penalties for change of land use,[137] these more lenient terms must be looked on with suspicion.

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129 CAL. GOV'T CODE § 51201 (West Supp. 1969).

130 *See also* text following notes 4, 25 *supra.*

131 CAL. GOV'T CODE § 51285 (West Supp. 1969), *amending* CAL. GOV'T CODE § 51285 (West 1966).

132 *See* text at note 97 *supra.*

133 CAL. GOV'T CODE §§ 51240-41 (West Supp. 1969), *amending* CAL. GOV'T CODE §§ 51240-41 (West 1966).

134 *See* text following note 94 *supra.*

135 Much of the following draws on a memorandum obtained at an interview with Ronald B. Welch, Assistant Executive Secretary, Cal. State Bd. of Equalization, August 24, 1970.

136 *See* text following note 115 *supra.*

137 *See* text following note 65 *supra.*

Some counties also allowed cancellation where the estate of the owner experienced difficulty in paying probate and death taxes upon the owner's death. According to the Board of Equalization such a provision in a contract is improper.[138] Yet landowners can be caught in an inequitable position. For death taxes the land is usually assessed at its full cash value although its use may be restricted to agricultural production. Thus, the landowner's estate may be forced to sell the land at the restricted price in order to pay taxes based on full value.[139]

Some of the old regulations governing contracts were eliminated in 1969, such as the provisions for state compensation of counties[140] and county compensation to landowners. The role of the State Director of Agriculture was all but ended. The contracts which are written in the future must provide for a ten year term, automatic extension, cancellation, and nonrenewal as in the 1965 act. The eminent domain provisions have not been strengthened with the exception of a requirement of notice to the Director of Agriculture and the local authority that the governmental unit intends to acquire land in an agricultural preserve for a "compatible use."[141]

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138 Note 120 *supra.*

139 According to J. Williamson, author of the California Land Conservation Act of 1965, and Executive Director of the Joint Committee on Open Space Land, in the 1970 session the California Legislature enacted a statute (Assembly Bill 458) which requires consideration of the existence of a contract in valuing land for estate tax purposes, if the estate so requests. This statute, plus a *clear* market value standard in inheritance tax appraisal, and the danger that federal estate tax appraisers will no longer accept the state determined value if the state assessment procedure is changed, combine, in the opinion of Mr. Williamson, to "make the need to deal with inheritance tax appraisals seem much less necessary." Letter from John C. Williamson, Executive Director, Cal. Legis. Jt. Comm. on Open Space Land, to the author, Sept. 28, 1970.

140 Except to school districts, CAL. GOV'T CODE § 51204 (West Supp. 1969).

141 Pursuant to CAL. GOV'T CODE § 51291(b) (West Supp. 1969):

> Whenever it appears that land within an agricultural preserve may be required by a public agency or person for a public use, the public agency or person shall advise the Director of Agriculture and the local governing body responsible for the administration of the preserve of the intention to consider the location of a public improvement within the preserve.
>
> Within 30 days thereafter the Director of Agriculture and the local governing body shall forward to the public agency or person concerned their comments with respect to the effect of the location of the public improvement on the land within the agricultural pre-

J. *Amendments 1969: Sections 421-425*

As noted *supra*[142] there was great disparity in rates of capitalization among counties. Under the 1969 amendments, the rate is now to be determined as the sum of three components: a "safe" portion, based on the yield rate for long-term United States Government bonds; a risk component based on the location and characteristics of the land and crops to be grown and any lease or rental agreement on the land; and a property tax component equal to the estimated percent of the total value of the land which is paid in property taxes per year.[143] There is no definite way to compute the risk element. It is established by bargaining between the assessor and landowner. As was seen above,[144] a small difference in the rate of capitalization makes a significant difference in the taxes due, so that the discretion in the risk calculation is important.

The income component may be derived either from rent or revenue. The fair rent is defined as that "which can be imputed to the land being valued based upon rent actually received for the land by the owner and upon typical rentals . . . for similar land in similar use. . . ."[145] Although the value of land is translatable through the interest rate into an annual rental figure, the definition of rent in section 422 seems to insulate it from speculative values. Renters would have no interest in the speculative value and would be unwilling to pay high rents for land restricted to agricultural uses.

There is a distinct problem, however, in estimating the income for many varieties of land which may be under an enforceable restriction. For example, there is an inherent difficulty in determining the income from a wildlife habitat area or from recreational areas. In addition, section 423 limits assessors to the consideration of a six year period for crops on rotation. This

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serve and such comments shall be considered by the public agency or person. Failure of any public agency or person to comply with the requirements of this section shall not invalidate any action by such agency or person to locate a public improvement within an agricultural preserve. . . .

142 *See* text at note 123 *supra*.

143 CAL. REV. & TAX. CODE § 423 (West 1970).

144 *See* text following note 123 *supra*.

145 CAL. REV. & TAX. CODE § 423 (West 1970).

fails to deal adequately with perennials which reach a peak income and die. It also results in the undervaluing of land for which there are state agricultural improvement projects under way which will significantly raise the land values, but which will not be completed for more than six years.

Assuming a constant income, a rough idea of the effect of the amendment can be gained from examining the capitalization rates. The yield rate of long-term government bonds was 7.25 percent in April, 1970. The property tax component, assuming an assessment ratio of 22 percent and a total tax rate of 8 percent, will comprise another 2 percent. Even before adding any risk factor this rate is higher than those used previously. Correspondingly, the farm values available for revenue production will be lower.

Assessment of farmland when the restriction will expire at a time certain is more complicated than assessment under a restriction which may be perpetual. Under the 1969 amendments the expiration period[146] for purposes of assessment begins immediately upon notice of nonrenewal of a contract. If the nonrenewal is given by local government and the owner protests, the expiration period begins five years from the termination of the restriction. During that expiration period land is valued by determining the difference between the full cash value and the restricted use-value as calculated by capitalization of income, *supra.* That difference is then discounted for the number of years remaining in the expiration period at the "safe" rate of capitalization. The sum of this discounted value and the restricted use-value is the value of the land for purposes of assessment. Use of only the "safe" rate of capitalization seems reasonable for it already reflects the tax burden and risk. The full use-value rate is inappropriate in fact because, since the rate used prior to the amendments was probably near the bond rate, a full use-value rate would make it cost less than it did before to hold land whose restriction will expire at a time certain. Speculators who bought land with the intention of permitting the restriction to expire and subdividing would then receive a tax advantage not intended by the statute.

146 *See* text following note 96 *supra.*

III. Conclusion

Several points for statutory draftsmen have emerged from this survey of use-value assessment legislation and the California Land Conservation Act. Attention was drawn, for example, to the possibility of the same land being valued differently under different use-value assessment statutes; and the influence of use-value factors in the assessment of land in states without a use-value assessment statute was suggested. Variations among the use-value assessment statutes in their planning provisions, their definitions of qualifying land, and in their roll-back penalties were noted. A general weakness in the roll-back clauses as a deterrent to a change of land use was sketched.

The California attempts at enacting an effective use-value assessment statute demonstrated, among other things, the need to overcome constitutional assessment standards, and to specify the actual assessment procedures to be followed. It was seen, however, that problems of administration still remain in promulgating minimum standards for the covenants and in assessing qualifying land for death taxes. In addition, the safeguards against eminent domain taking may not be adequate. There may also be seen in the California experience an expansion of the categories of qualifying land and the enactment of complimentary legislation, such as the open space easement.

The ultimate question, however, is what role use-value assessment can be expected to play in a program of open space conservation. Must it be said that "to expect preferential assessment alone to contribute too much to the preservation of open spaces is unduly optimistic"?[147] Although the most important question, whether use-value assessment comprises anything more than "essentially . . . an equitable form of tax relief in transition zones"[148] is very difficult to answer due to the lack of concrete information.

In some ways the data from California is disturbing. As of May 25, 1970, only 28.2 percent of the total land under enforce-

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147 Stocker, *Property Tax Exemptions for Farmers and the Aged* in The Property Tax: Problems and Potentials 287. (Tax Inst. of America 1967).

148 *Id.*

able restriction was prime land.[149] Since the statute was designed to protect particularly this land the figure seems rather low. The trend is encouraging however when it is noted that as of March 1, 1969, the figure was only 13 percent.[150] The change must be attributed to many factors — increased suburban pressures, increased familiarity with the statute — but the principal one among them remains unknown.

Another unfavorable statistic is that only 6.4 percent of the land under contract or agreement as of March, 1969 was located less than three miles from cities.[151] It must be concluded that the majority of landowners under contract are not under direct pressure to sell for development. The most difficult test has not yet arrived; and those close to the city who may be facing such direct pressures apparently chose not to tie up their land.

On the other hand, as of May, 1970, a total of 5,870,372 acres had been placed under an enforceable restriction. By any calculation this is a large quantity of land, and since each acre is restricted for at least 10 years, it is difficult not to conclude that the Land Conservation Act makes a contribution towards preserving open space.

The final report of the Joint Committee on Open Space Land, issued in February, 1970, makes recommendations for the future of open space in California.[152] For example, it suggests the establishment of a State Office of Conservation and Development with broad new powers. One of its tasks would be to identify specific parcels of open space land which "are of sufficient statewide importance to assure their preservation." A regional government is also suggested that would be charged with the duty of preparing regional open space plans and of reviewing local open space plans. New open space zoning ordinances are proposed which would constitute enforceable restrictions within the meaning of article XXVIII. New instruments called development planning contracts, which would also be enforceable restrictions, are sug-

149 Letter from R. B. Welch, Assistant Executive Secretary, Cal. State Bd. of Equalization, to the author, October 1, 1970.

150 FINAL REPORT, note 5 *supra*, at 116.

151 *Id.*

152 Note that the FINAL REPORT was submitted as a staff document, not as a set of conclusions on which the committee members were all in agreement.

gested for the purpose of providing "for the long range planning and staged development of parcels of land adjacent to cities. . . ."[153]

This latter proposal sounds like a logical extension of the present Land Conservation Act. It was noted, for example, that many of the contracts became broader than was originally intended.[154] Perhaps the tendency to negotiate a development contract is already present and should be exploited as a tool to preserve open space.

The majority of the *Report*'s recommendations, however, involve more planning, more direct action by government, and more potential restrictions. In the opinion of the author of the Land Conservation Act, this trend is necessary, for, "if we are striving to preserve a necessary amount of our best agricultural land, or specific parcels of open space land for enjoyment of scenic beauty, recreation, etc., it is highly unlikely that a voluntary program will suffice alone."[155] The Committee on Open Space Land succeeded in having a law enacted in the last session of the legislature which requires cities and counties to prepare and adopt plans for the long-range preservation of open space lands by January 1, 1973, and to adopt open space zoning ordinances and other regulations consistent with the plan.[156] This statute also prohibits interpretation of its provisions to find a taking or damage to private property through the adoption of an open space zoning ordinance. As other regulative proposals by the committee come before the legislature it can be expected that opposition from farmers, developers, corporations, and landowners will increase.

In summary, the Land Conservation Act has caused over 5 million acres to be restricted to open space uses for at least 10 years. To date, covenants covering a negligible amount of acreage have been cancelled or have not been renewed.[157] This must be considered a significant contribution. But in view of the problems raised in this Note, there is no reason to believe that use-value assessment will be the major tool in the curbing of urban

153 FINAL REPORT, note 5 *supra*, at 14.
154 *See* text at note 134 *supra*.
155 Note 139 *supra*.
156 A.B. 2180, Cal. Legis., 1970 Reg. Sess.
157 FINAL REPORT, *supra* note 5, at 117.

scatteration and the preservation of open space. A stiff statute, like California's, can serve as a useful land-use control device. But other devices in which the government is involved directly will probably be necessary too. These will not arrive without great struggles and a sharp test of how highly open spaces are valued in our society.

*Harris Wagenseil**

APPENDIX

STATE USE-VALUE ASSESSMENT STATUTES

As used in this appendix, "Standard" is the threshhold formula which the land must meet to qualify for use-value assessment. "Criteria" describes conditions which elaborate on or add to the formula, but which also must be met. The phrase governing assessment is given in "Assessed." "Penalty for change" reflects the penalty incurred by the landowner who changes the use of his land from a qualifying use.

ALASKA

Code Section: ALASKA STAT. § 29.10.398 (Supp. 1969), enacted 1967
Standard: "farm use lands"
Criteria: owner actively engaged in farming the land; deriving ¼ of yearly gross income from the farm land; no lease; no option to buy
Assessed: "assessed on the basis of full and true value for farm use"
Penalty for Change: roll-back of deferred taxes for two years preceding

ARKANSAS

Code Section: ARK. STAT. ANN. §§ 84-483 to 484 (Supp. 1969), enacted 1969
Standard: "actively devoted to farm, agricultural or timber use"
Criteria: none specified in statute
Assessed: "on the basis of such current use"
Penalty for Change: none

CALIFORNIA

Code Section: CAL. GOV'T CODE §§ 51200-95 (West Supp. 1970), enacted 1965; *id.*, §§ 6950-54 (West 1966), enacted 1959; *id.*, §§ 51050-65 (West Supp. 1970), enacted 1969; CAL. REV. AND TAX. CODE §§ 421-29 (West Supp. 1970), enacted 1969; CAL. CONST. art. XXVIII, adopted 1966
Standard: open space lands subject to an enforceable restriction; enforceable restriction — (1) land in an agricultural preserve subject to a contract or agreement (2) land under a scenic restriction (3) or land under an open space easement
Criteria: (1) agricultural preserve — area devoted to agricultural, open space, and compatible uses as designated by the contracting authority; restricted to such use for 10 years by contract or agreement (a) agricultural use — production of agricultural commodity for commercial purposes (b) open space use — (i) managed wetland area (ii) scenic highway corridor (iii) wildlife habitat area (iv) saltpond (v) submerged area; (2) scenic restriction — an interest acquired in real property by

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government; restrictions similar to those in contracts; (3) open space easement—covenant running with the land whereby the owner relinquishes certain development rights

Assessed: valued on a basis consistent with restriction and use

Penalty for Change: cancellation penalty of 50 percent of full cash value of land as if unrestricted; exceptions possible

COLORADO

Code Section: COLO. REV. STAT. ANN. § 137-1-3(5) (Supp. 1967), enacted 1967

Standard: "agricultural lands"

Criteria: none specified in statute

Assessed: value determined by reference to the earning or productive capacity

Penalty for change: none

CONNECTICUT

Code Section: CONN. GEN. STAT. ANN. §§ 12-63, 12-107a to 111, 7-131c (Supp. 1970), enacted 1963

Standard: farm land, forest land, open space land

Criteria: (1) farm land—a "farm unit"; (2) forest land—25 acres, a "forest area"; (3) open space land—land whose preservation or restriction would (i) conserve natural or scenic resources (ii) protect natural streams or water supply (iii) promote conservation of soils, wetlands, beaches, or tidal marshes (iv) enhance value to public of abutting or neighboring parks, forests, etc. (v) enhance public recreational opportunities (vi) preserve historic sites (vii) promote orderly urban or suburban development

Assessed: value based on current use only

Penalty for Change: none

FLORIDA

Code Section: FLA. STAT. ANN. § 193.201 (Supp. 1970), enacted 1967; § 193.11(3) (Supp. 1970), enacted 1963; FLA. CONST. art. VII, § 4(a)

Standard: outdoor recreational or park land; land used for "bona fide agricultural purposes"; agricultural land or land used exclusively for non-commercial recreational use

Criteria: 10 year covenant restricting land to such use

Assessed: assessed as agricultural lands; assessed on basis of use as recreational or park land; assessed solely on the basis of use

Penalty for Change: none

HAWAII

Code Section: HAWAII REV. LAWS § 246-12 (1968), enacted 1961

Standard: "a specific ranching or other agricultural use"

Criteria: if within an urban district, must have been used "in an intensive agricultural use for" five years preceding; forfeit right to change use for at least 10 years

Assessed: "at its value in such use"

Penalty for Change: roll-back of all deferred taxes; plus 5% interest

INDIANA

Code Section: IND. ANN. STAT. §§ 64-711a,b, 64-123 (Supp. 1970), enacted 1963

Standard: "lands devoted to agricultural use"

Criteria: rules of state board provide classification on basis of acreage, size, location, use productivity, zoning, accessibility to highways, public services and other factors

Assessed: "assessed as agricultural land"
Penalty for Change: none

IOWA

Code Section: IOWA CODE ANN. § 441.21 (Supp. 1970), enacted 1967
Standard: "agricultural property"
Criteria: none specified in statute
Assessed: assessment based on productivity, relying on a soil survey, or market value based on current use
Penalty for Change: none

MARYLAND

Code Section: MD. ANN. CODE art. 81, § 19 (1969), enacted 1956
Standard: "actively devoted to farm or agricultural use"; "bona fide farms"
Criteria: zoning; present and past use; productivity; others
Assessed: assessed on the basis of such use
Penalty for Change: roll-back of deferred taxes for up to three years; not to exceed 5% of full cash value at time of change

MINNESOTA

Code Section: N.J. STAT. ANN. §§ 54:4-23.1 to 23.23 (Supp. 1969), enacted 1964;
Standard: "actively and exclusively devoted to agricultural use"
Criteria: 10 acres or more; homestead, or owned for at least 7 years; ⅓ total family income from the land or $300 per year income plus $10 per tillable acre; devoted to various agricultural uses
Assessed: value determined solely with reference to use as agricultural land
Penalty for Change: roll-back of deferred taxes for three years preceding

NEW JERSEY

Code Section: N.J. STAT. ANN. §§ 54:4-23.1 to 23.23 (Supp. 1969), enacted 1964; N.J. CONST. art. VIII, § 1 (Supp. 1969), adopted 1963
Standard: "actively devoted to agricultural or horticultural use"
Criteria: devoted to various specified uses; at least 5 acres; so used for 2 successive years prior to assessment as agricultural land; gross sales of products average $500 per year
Assessed: consider "only those indicia of value which such land has for agricultural or horticultural use"; also capability, derived from soil survey data
Penalty for Change: roll-back of deferred taxes for two years preceding

NEW MEXICO

Code Section: N.M. STAT. ANN. §§ 72-2-14.1 to 72-2-14.2 (Supp. 1969), enacted 1967
Standard: "used primarily and principally for agriculture"
Criteria: so used for 5 straight years; not subdivided; $100 per year income "from the operating unit"
Assessed: value based on "capacity of the land to produce agricultural products"
Penalty for Change: none

OREGON

Code Section: ORE. REV. STAT. § 308.345 (1969), enacted 1967
Standard: "agricultural lands"; "bona fide farms"
Criteria: "devoted exclusively to farm use" (detailed regulations from tax commission)

Assessed: value on the basis of farm use
Penalty for Change: none

PENNSYLVANIA

Code Section: PA. STAT. ANN. tit. 16, §§ 11941 to 11947 (Supp. 1970), enacted 1965
Standard: farm land; forest land; water supply land; open space land
Criteria: (1) farm land — 50 acres; (2) forest land — 25 acres; (3) water supply land — land used for the protection of water-sheds and water supplies; (4) open space land — land whose restriction could (i) conserve natural or scenic resources (ii) enhance value to the public of abutting or neighboring parks, forests, etc. (iii) augment public recreational opportunities (iv) preserve sites of historic, geologic, botanic interest (v) promote orderly urban or suburban development
Assessed: assessment to reflect fair market value as restricted by covenant
Penalty for Change: roll-back of deferred taxes; plus 5% interest for five years or from date covenant entered upon, whichever is shorter

RHODE ISLAND

Code Section: R.I. GEN. LAWS ANN. § 44-5-12 (Supp. 1968), enacted 1968
Standard: "farm land, forest or open space land"
Criteria: (1) farm land — farm unit; (2) forest land — "a dense growth of trees"; (3) open space land — land which would (i) conserve natural and scenic resources (ii) protect natural streams or water supply (iii) promote conservation of soils, beaches, wetlands, etc. (iv) enhance value to the public of abutting or neighboring parks, forests, wildlife preserves, etc. (v) enhance public recreational opportunities (vi) preserve historic sights (vii) promote orderly urban or suburban development
Assessed: value determined by regard only to factors relating to agricultural use
Penalty for Change: roll-back of deferred taxes for 2 years preceding

TEXAS

Code Section: TEX. CONST. art. 8, § 1-d, adopted 1966.
Standard: land designated for agricultural use
Criteria: specific uses (*e.g.*, raising livestock); which "business is the primary occupation and source of income for the owner"; exclusively devoted to agricultural use 3 successive years prior to date
Assessed: consider only those factors relative to such agricultural use
Penalty for Change: roll-back of deferred taxes for 3 years preceding

UTAH

Code Section: UTAH CODE ANN. §§ 59-5-86 to 59-5-105 (Supp. 1969), enacted 1969 (effective 1971); UTAH CONST. art. XIII, § 3, adopted 1968
Standard: "land used for agricultural purposes"; "actively devoted to agricultural use"
Criteria: so used for five successive years prior to date; 5 acres; gross income from land $500 per year
Assessed: according to value for agricultural use; consider only indicia of value which the land has for agricultural use
Penalty for Change: roll-back of deferred taxes; not to exceed 5 years

WASHINGTON

Code Section: WASH. CONST. art. VII, § 11, adopted 1968; ch. 87, § 4 [1970] Wash. Laws 2d Ex. Sess. 702 (effective 1971)
Standard: "open space land"; "farm and agricultural land"; "timber land"
Criteria: (1) open space land — (a) zoned and designated on a plan (b) land which would (i) conserve natural or scenic resources (ii) protect streams or water supply

(iii) promote conservation of soils, wetlands, beaches, etc. (iv) enhance value to public of abutting or neighboring parks, forests, etc. (v) enhance recreational opportunities, (vi) preserve historic sites (vii) retain in natural state 5 acre tracts located in urban areas and open to public use; (2) agricultural land — "devoted primarily to agricultural uses"; and (i) contiguous ownership of 20 acres or (ii) of 5 to 20 acres which has produced a gross income for 3 of 5 preceding years of $100 per acre or (iii) of less than 5 acres which has produced an income of $1000 as above; (3) timber lands — land in contiguous ownership of 20 or more acres "devoted primarily to the growth and harvest of forest crops"

Assessed: consider only the use to which such property is currently applied

Penalty for Change: (1) change after 7 years, pay deferred taxes for 7 years plus interest (2) if use otherwise changed pay (i)(a) roll-back of taxes for up to 20 years on timber (b) up to 14 years for other land (ii) plus a penalty of 20% of (i)(a) or (i)(b) (iii) plus interest