REVENUE SHARING: A CRITICAL VIEW

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The current discussion of revenue sharing reflects a wholesome shift away from preoccupation with federal finances and toward a more comprehensive view of our fiscal structure, federal, state, and local. Attention is focused, and rightly so, on current issues that call for immediate solution.

The fiscal plight of the cities and the need for expanded social programs are the crux of the problem. But the debate also poses the broader question of how a sensible fiscal structure of federalism would be arranged and what kind of solution one should be striving for in the longer run.

I. PRINCIPLES OF FISCAL FEDERALISM

To sketch this background, we begin by setting forth very briefly what the ground rules for fiscal federalism should be. For brevity's sake and at the risk of sounding dogmatic, these will be summarized in five basic principles:

1. *The principle of diversity*: The federal system should leave scope for variety and differences in fiscal arrangements pertaining to various states and localities. Communities may differ in their preferences for public services and should not be forced into a uniform pattern. Let the flowers bloom.

2. *The principle of equivalence*: Cognizance must be taken of the fact that the spatial scope of various public services differs. The benefits of some are nationwide, such as defense; those

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of others are region-wide, such as roads and flood control; and those of still others are local, such as city police or street lights. Similarly, the burden incidence of some taxes can be confined to a particular area more readily than that of others. For fiscal arrangements to be truly efficient each type of service would be voted on and paid for by the residents of the area which benefits.

3. *The principle of centralized redistribution*: The redistributive function of fiscal policy (i.e., progressive taxation and transfers) should be centralized at the federal level. Otherwise, redistribution becomes ineffective and location decisions are distorted.

4. *The principle of locational neutrality*: Regional fiscal differences tend to interfere with the location of economic activity. Some degree of interference is an inevitable cost of fiscal federalism, but it should be minimized. Differential taxes which (in the absence of offsetting differential benefits) distort location decisions should be avoided.

5. *The principle of centralized stabilization*: The use of the fiscal instrument for purposes of macro (stabilization, growth) policy has to be at the national level. State treasuries, like regional Federal Reserve Banks, cannot make stabilization policy on their own.

These principles are more easily stated than applied. In the real world fiscal institutions are the result of historical forces and imperfect in many respects. Various public services are not readily classified by their spatial incidence; existing jurisdictions frequently do not correspond to benefit areas, spill-overs occur, and more suitable jurisdictions are difficult to create; in other cases, jurisdictions are saddled with the spill-in of national burdens which are not of their making; the cost of taxes used to finance local benefits may be shifted to nonresidents; state and local finances do not operate in a setting where adequate distributional adjustments have been made at the federal level, and so forth. For these and other reasons the design of fiscal federalism should allow for three supplementary criteria:

6. *Correction for Spill-overs*: Benefit spill-overs between jurisdictions lead to inefficient expenditure decisions. This calls for correction by higher levels of government.

7. *Minimum Provision for Essential Public Services*: The national government should assure that each citizen, no matter in which state or locality he resides, is provided with a minimum level of certain essential public services, such as safety, health, welfare, and schooling.

8. *Equalization of Fiscal Position*: While redistribution is primarily an inter-individual matter, the existence of sharp regional differences in the balance between fiscal capacity and need among governments cannot be disregarded entirely. Some degree of fiscal equalization among governments is called for so that minimum service levels can be secured with more or less comparable tax efforts.

Not all these points are of equal importance for this discussion, and the last two are more controversial than the others. However, we shall find them to be necessary conditions of a sound fiscal federalism in the current U.S. setting, and essential to a solution of our fiscal crisis.

II. Fiscal Needs and Resources

With these considerations in mind, we now turn to the role of revenue sharing, first proposed by Walter Heller in 1964.[1] At that time, economists were concerned with countering a slackening economy and averting the repetition of stagnation by "fiscal drag," such as had occurred in the late fifties.[2] The outlook was for a steadily rising federal full-employment surplus and widespread fiscal deficiencies at the state-local level.

In this setting, the transfer of federal revenue to the states and localities would avoid repetition of fiscal drag and do so better than tax reduction. At the same time, it would serve to finance a wide range of state and local needs and do so with a tax structure

1 *See* W. Heller, New Dimensions of Political Economy 117, 144 (1967).

2 Worsnop, *Federal-State Revenue Sharing*, in 111 Cong. Rec. A4780 (daily ed. Aug. 25, 1965).

superior to that at the state-local level. To expedite enactment and minimize opposition, the plan was proposed in the simplest possible form, i.e., distribution to the states on a population basis, without strings and pass-through provisions.[3] This is also said to have been the spirit of the Johnson task force report under the chairmanship of Joseph Pechman.[4] Since then much has happened. The scene, initially so conducive to revenue sharing, has undergone substantial change.

A. *Federal Outlook*

It is now apparent that the silver lining on the fiscal horizon has been tardy in developing. The magic formula of "$15 billion annual built-in revenue gain minus $10 billion annual expenditure increase (present programs) equals a $25 billion dividend in five years, which, after adding a $20 billion one-shot reduction in defense, gives a $45 billion surplus five years from now" has refused to materialize.

The revenue response has been slowed down by premature (current and postdated) tax reduction, the hoped-for decline in defense spending has been slight, and increases in other programs (including the Great Society programs of the Johnson Administration and the proposed plans of the Nixon Administration) have outweighed the reductions that did occur. The immediate prospects are for deficit rather than surplus, and the current discussion is in terms of finding new revenue rather than of disposing of surplus. Most important, it now appears that a fiscal dividend in the $40 to $50 billion range is unlikely to materialize even over the next five years or more.

Recent estimates by Charles Schultze visualize a potential full-employment surplus of $23 billion for 1975.[5] This figure allows

3 "Pass-through" provisions generally provide that all or a portion of shared federal revenues go directly to local governments rather than following a plan of federal distribution to state governments which then allocate funds to local governments. These "pass-through" plans are seen as a method of easing the current urban fiscal crisis. For a more detailed examination see Turnbull, *Federal Revenue Sharing*, 29 MD. L. REV. 344, 359 (1969).

4 *See*, Pechman, *Financing State and Local Government*, in 2 JT. ECONOMIC COMM., 90TH CONG., 1ST SESS., REVENUE SHARING AND ITS ALTERNATIVES: WHAT FUTURE FOR FISCAL FEDERALISM? 763 (1967).

5 *See* Table 1 *infra*. The text statement and the figures in Table 1 are based on the outlook as it presented itself in early 1970. The revised estimates for fiscal 1971

for the effects of the Tax Reform Act of 1969, for built-in increases in present programs, as well as for the Administration's welfare and revenue sharing plans. Vietnam expenditures are assumed to have fallen to $1 billion and defense expenditures are reduced (in real terms) by $9 billion below 1971 levels.

Schultze further holds that a budget surplus of $10 billion will be needed if the Administration's housing goals are to be implemented in a noninflationary fashion. His free dividend is thus reduced to $13 billion, or $18 billion prior to the Administration's revenue sharing program.

While it is difficult to predict the need for surplus five years from now and while we would be unwilling to place general (as against low-cost) housing expansion ahead of social programs, it is evident from these estimates that the federal budget outlook is not one of unlimited slack. Not only will the budget remain tight over the next couple of years, but even by 1975 the magnitude of potential slack will be substantially less than had been expected.

B. *State-Local Outlook*

At the state-local level we also note some change from the earlier setting. Whereas the estimates of a few years ago projected a rapidly rising level of deficits, more recent approaches give a less alarming picture. W. H. Robinson estimates that in 1975 state and local expenditures will be at $191 billion after allowing for increased work load due to rising population and for quality improvement at past rates.[6] Revenue, including federal aid expanding at normal rates, is estimated at $174 billion, leaving a deficit of $17 billion.

Of this, $11 billion will be covered by normal borrowing, leaving a gap of $6 billion. This is only slightly above what the Administration's revenue sharing program would add annually by 1795. Alternatively, it could be met by a 5 percent increase in tax rates at the state-local level, an increase which seems well within

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as presented in the 1972 budget (January 1971) show receipts of $194 billion, expenditures of $250 billion, and a deficit of $19 billion. Regarding 1975, the 1972 budget estimates a full-employment surplus of $12 billion, falling substantially below the figure given in Table 1. However, the substance of our argument is not affected thereby.

6 *See* Table 1 *supra.*

TABLE 1

FISCAL OUTLOOK AND VERTICAL IMBALANCE

(Fiscal years and billions of dollars)

FEDERAL	1971*	1975
Revenue		
1. Employment Taxes	49.1	68.8
2. Other Taxes, etc.	153.0	207.2
3. Total, budget revenue	202.1	276.0
Expenditures		
4. Defense	73.6	75.0
5. Grants-in-aid	24.8	33.0
6. Other	102.4	140.0
7. Total, budget expenditures	200.8	248.0
8. Balance, expenditure account	1.3	28.0
STATE AND LOCAL	1967	1975
Revenue		
9. Own Revenue	76.4	141.2
10. Federal Grants	15.5	33.0
11. Total	91.9	174.2
Expenditures		
12. Total	96.8	191.4
13. Balance	−4.7	−17.2
14. Net Borrowing	4.7	10.7
15. Deficiency		6.5
16. GNP	985	1,428

Lines 1-8: From C. L. SCHULTZE, SETTING NATIONAL PRIORITIES, THE 1971 BUDGET —(1970).

Lines 9-15: See W. H. ROBINSON, FINANCING STATE AND LOCAL GOVERNMENT: THE OUTLOOK FOR 1975, Table 9 (19—). Profits on liquor stores is included in line 9. Additional employee retirement and deficit in utility operations are included in line 12. Line 13 equals net borrowing minus addition to liquid assets. For revenue data see *id.* at 181. For 1971 expenditures, see *id.* at 12. For 1975 expenditures total, see *id.* at 186. Schultze's figure of $253 billion is reduced by $5 billion to exclude revenue sharing. For figures on national defense in 1975, see *id.* at 184. The grant-in-aid figure for 1975 is taken from line 10 increased by $5 billion for revenue sharing and line 6 is residual.

Line 16: The figure for 1975 is from Schultze, *supra*, at 180. Rate of price increase is assumed to taper off from 4½ percent in 1970 to 2¼ percent in 1975. Unemployment is assumed at 3.5 percent after 1973. The 1975 GNP underlying lines 9-13 (see Robinson, *supra*) is assumed at $1,340 billion.

* See note 5.

the reach of state-local governments, given their past record of rate increases.

C. *Vertical Imbalance and New Programs*

Putting the two sides together, one appears to arrive at a fairly complacent conclusion. While the prospective federal excess will not be as substantial as had been expected, neither will be the deficiency at the state-local level. This conclusion, however, is misleading in two respects.

A first flaw is that these estimates do not allow for major new programs which will become part of the public agenda. While a start has been made under the Johnson and Nixon Administrations, this is surely just a beginning. The Administration's welfare plan is a qualitative improvement but amounts to very little in magnitude. There clearly remains the need for a major move towards an income maintenance plan, be it through a negative income tax or in some other form. Urban reconstruction, improved primary and secondary education for the disadvantaged, low-cost housing, and anti-pollution measures are other items. The cost of these programs can (and should) easily reach the prospective excess of federal revenue by 1975. The dividend dollars, if and when they materialize, will not be lacking of claimants. Rather, the problem will be one of using scarce dollars in the most efficient fashion.

In place of the 1964 outlook for a large and freely available federal dividend, combined with a widespread deficiency at the state-local level, we now find (1) that only a limited federal surplus is in sight, (2) that state-local resources will keep approximately (though not quite) in step with rising costs of existing programs, and (3) that substantial new programs — in particular, programs oriented toward poverty and disadvantaged groups — will be called for.

It follows that the bulk of the potential revenue slack will be needed to finance these social programs. If one accepts these priorities, the case for revenue sharing at this time depends on what it contributes to meeting them. This is to say, it depends on whether responsibility for these programs can be centered at the

state-local level; and if so, whether *generalized* sharing will produce the proper distribution of funds.

The answer is no on both counts. Any major expansion of income maintenance must be uniform on a nationwide basis. This follows from the principles of equivalence and centralized redistribution. It is clearly a federal function and has to be performed at that level. Such a program implemented at an adequate scale will cost at least $10-15 billion. It alone might well absorb the available slack in the federal budget, not to speak of other urgent programs such as rehabilitation of urban slums.

Given our premise that concern with poverty should receive top priority, these programs outrank generalized revenue sharing. The basic hypothesis of generalized vertical imbalance — federal excess with state and local deficiency — is invalid. On the contrary, we are fortunate in that the excess revenue will accrue where it will be most needed, that is, at the federal level.

But though there may be no generalized vertical imbalance, it does not follow that there exists a happy coincidence of revenue sources and needs throughout the system. Taking too aggregative a view is misleading. Though there may be no major imbalances (in terms of these estimates) for state and local governments as a whole, this does not exclude a mismatching of resources and needs among states or areas within states. Far from it. The gross deficit (total deficit of deficit units) is substantially larger than the net deficit of $6 billion (which includes the surplus of surplus units). The system is riddled with instances of regional imbalance, to some degree on an interstate basis, but primarily among areas within states. This is brought out most strikingly in the fiscal dilemma of the older cities although it is by no means only an urban phenomenon.

It is this horizontal imbalance which is the real trouble and toward which the potential surplus must be directed. Moreover, this imbalance is linked to the burden of present social expenditures and to the new social programs that are needed. As we shall see presently, solving the one will also go far in solving the other.

III. Instruments of Inter-governmental Transfer

Before proceeding with this point, let us pause to compare the merits of alternative techniques of matching needs and resources.

Revenue sharing, categorical grants, transfer of expenditure functions, tax credits all present possible approaches. What are their characteristics and how well are they suited to meet the present situation?

A. *Similarities*

To begin with, there are similarities as well as differences. In particular, there is no sharp distinction between revenue sharing and grants. Revenue sharing, after all, involves the making of grants, and grants involve the sharing of revenue. Revenue sharing with a population-based formula is similar to a population-based grant. Revenue sharing without strings is equivalent to block grants, while sharing with strings is equivalent to categorical grants. Addition of an effort element into the sharing formula is similar to adding a matching requirement and so forth.

Both the Administration[7] and ACIR[8] plans provide for a population-based block grant with a slight matching (or revenue effort) requirement. The Javits plan[9] gives 85 percent of the cost to this type of grant, but distributes the remainder among the lower income states in inverse relation to per capita income.

But though there is a formal equivalence between grants and revenue sharing, there is an important difference in emphasis between the two. The sharing approach is typically viewed in terms of unconditional block grants (without strings) and only a modest equalization effect, while the grant-in-aid approach is traditionally viewed in terms of categorical and matching grants with considerable emphasis on equalization. The basic questions, therefore, are (1) should the transfers be general or categorical, (2) should they be nonmatching or matching, and (3) should they be heavily equalizing or not?

B. *Block versus Categorical Transfers*

There is a strong case for the block (no strings) approach, inherent in general revenue sharing, if the purpose of revenue transfer is merely the substitution of federal for state-local taxes. In this case there is no reason for interfering with the use of the funds.

7 This proposal was introduced by Sen. Baker as S.2948, 91st Cong., 1st Sess. (1969).

8 This proposal was introduced by Senators Goodell and Muskie as S. 2483, 91st Cong., 1st Sess. (1969).

9 S. 482, 90th Cong., 1st Sess. (1967).

Substitution of federal taxes is a worthwhile objective in itself. Federal taxes — the progressive income tax in particular — are superior. They are more equitable, more easily administered, and locationally neutral. But improving the composition of the tax structure is not enough, nor can it be given top priority at this time. The priorities are on the expenditure side and the question is whether they will be better served with or without federal strings.

The argument in support of the block (no strings attached) approach is that state and local governments are closer to the people and know better what they want. This is our principle of diversity. The opposing case, stated in our principle of equivalence, is that the national government has primary concern with services whose benefits are nationwide in scope. Moreover, it may wish to assure minimum levels of selected services which are considered most essential and treated as "merit goods." At the same time this does *not* justify an across-the-board support of *all* public services at the state and local level. Unconditional federal financing of local public services is difficult to reconcile with the principles of fiscal federalism. It conflicts with the principle of equivalence and meets neither the equalization nor the minimum-standard criteria.

This objection does not apply to categorical grants which deal with services of national importance (correction for spill-overs) or set specific minimum standards. This has been the traditional intent of categorical grants, and on the whole these grants have worked well. While there is some reason for complaint about excessive proliferation of such grants, this does not invalidate a sensible use of the categorical approach.

A desirable compromise might be to consolidate the existing 400 plus grants into a smaller number covering broader categories, and to provide a mechanism by which such programs can be subject to periodic review, as has recently been proposed by ACIR. While a good deal can be done to improve the present system, the categorical approach is basically sound and should be retained at least over the area to which it now applies. This appears to be accepted by most parties to the debate. The Heller-Pechman[10] plan, in par-

10 *Supra*, notes 2 and 4.

ticular, makes it clear that the proposed revenue sharing is to be supplementary to, not in lieu of, existing categorical grants.

At the same time, as far as new outlays are concerned, revenue sharing competes with expanded categorical grants or direct federal programs. If there is to be revenue sharing, the same arguments which support categorical grants also suggest that some strings be attached, both with regard to assigning the funds to broad service areas (those most essential from the national point of view) and to maintaining minimum standards. The objection to earmarking along broad expenditure categories is that it may be easily evaded. If transfers or grants are earmarked for purpose A, the receiving government can always direct its own resources towards area B. This difficulty exists, but it is not insuperable, especially if coordinated with consolidation of existing specific grant programs into larger units.

Apart from earmarking provisions, legislation to make new funds available may also be used to encourage other improvements in state-local performance, such as consolidation of governmental units called for in the Reuss bill,[11] or the adoption of performance standards for certain programs.

C. *Outright versus Matching Grants*

Moreover, the difficulty of sidestepping grant objectives goes farther and points to a serious shortcoming of any outright (as against matching) grant approach. Just as earmarked grants may be diverted to other uses, so may outright grants be diverted into state-local tax reduction (or omission of increase) rather than provide more adequate expenditure programs. The grant is then equivalent to a transfer to those individuals whose taxes are reduced. There is no objection to this as long as the result is merely substitution of superior federal for less desirable state-local taxes. But it is not sufficient if the transfer is also designed to secure higher expenditure levels. For this objective, matching type grants are clearly more efficient. They reduce the own-cost of public

11 H.R. 1166, 90th Cong. 1st Sess. (1967). *See* Reuss, *Revenue Sharing as a Means of Encouraging State and Local Government Reform*, in 2 JT. ECONOMIC COMM., 90TH CONG., 1ST SESS., REVENUE SHARING AND ITS ALTERNATIVES: WHAT FUTURE FOR FISCAL FEDERALISM? 977 (1967). The latest version of this plan is H.R. 11764, 91st Cong., 1st Sess. (1969).

services and exert a substitution effect which the outright grant fails to provide.

As noted before, the inclusion of a tax effort component into the revenue sharing formula (all the major proposals contain an effort component) does in effect act as a matching provision. If the grant received by any one state depends on the product of its population and tax effort (ratio of tax revenue to personal income) relative to that for all states as a whole, then any one state (acting by itself) may increase its grant by increasing its tax effort. Taking the Administration's plan, this works out for Massachusetts as 7 cents per additional dollar of tax revenue, i.e., a matching rate of 7 percent.[12] By the nature of the formula, the matching rate works out somewhat higher for poorer states, but it remains at a generally low level.

While the effort component is not an adequate substitute for a matching provision, it does serve a useful purpose on other grounds. If the equalization criterion is applied, the donor states (i.e., those that are fortunate enough to be fiscally strong) are entitled to assurance that the donee states (i.e., the less fortunate states which are fiscally weak) make an adequate effort of their own. They can be more readily expected to help those who help themselves, than to support free riders. The effort component should thus be in the formula, but it is not an adequate substitute for matching.

D. *Tax Credits*

While tax credits bear some similarity to the revenue sharing and grant approaches, there are also important differences. Sup-

12 The formula under the Administration proposal is

$$G_j = B\frac{N_jR_j}{Y_j} \Big/ \sum \frac{N_iR_i}{Y_i}$$

where G_j is the grant to state j, B is the total amount distributed, N_j is population in the state j, Y_j is personal income in state j, and R_j is state and local tax revenue in state j. Setting B = $5 billion; N_j for Massachusetts = 5.4 million; Y_j = 18.9 billion; and R_j = 2.0 billion. Using figures for 1967, the aggregated term in the denominator equals 19763.47. and we obtain

$$\frac{dG_j}{dR_j} = .0722$$

For a similar computation, see Goetz, *Federal Block Grants and the Reactivity Problem*, THE SOUTHERN ECONOMIC JOURNAL, July 1967, at —.

pose that income taxes at both federal and state levels are proportional, that the entire revenue of states comes from the income tax, and that the federal credit for state taxes is paid to the state treasury rather than to the taxpayer. Given these conditions, a 50 percent federal credit would be equivalent to a 50 percent matching grant.

Actually, these conditions are not met. Since the credit is given to the taxpayer rather than to the state treasury, the latter may not be able to recoup and to raise its taxes accordingly. In this case, the credit becomes a federal grant to individuals. But even if it were to go to the state treasury, the credit approach differs in two respects. Since the states use a variety of taxes other than the income tax, the credit device — being in the nature of categorical revenue matching — may be used to improve the composition of the state-local tax structure.

As a device for tax structure improvement, it thus ranks ahead of grants or general revenue sharing.[13] But against this advantage, the credit has the disadvantage that it does not permit application of the equalization criterion. Federal support is necessarily related to the own revenue of the locality. Since the equalization aspect turns out to be of central importance, we do not assign a major role to the credit approach.

E. *Transferring Expenditure Functions*

The final technique is that of transferring expenditure responsibilities rather than revenues. This would be a weak candidate if the revenue deficiency at the state and local level were general, and all state-local programs were equally important to the nation. But neither condition holds. Rather, the incidence of fiscal imbalance is uneven. National priorities apply, and the two problems are not unrelated. The transfer of some expenditure functions (or the financing thereof at the federal level) thus becomes a major contender.

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13 Substitution of a credit for the present deduction would redirect the grant from higher towards lower income recipients. Under a recent C.E.D. proposal, a credit is added to the deduction, but the credit is limited to a given percent of the *net* cost imposed by the state tax, allowing for reduction in Federal tax due to deduction of state tax. See *A Fiscal Program for Balanced Federalism*, Committee for Economic Development, June 1967, Appendix V.

IV. Horizontal Imbalance and Equalization

This brings us to the crux of the problem, i.e., the existence of horizontal imbalance on the one side and the need for more adequate social programs in dealing with poverty on the other. While the problem of distribution is primarily one of distribution among individuals (not governments), the issue of "poor governments" exists as well; and it does precisely because the state of distribution among individuals is unsatisfactory. How are these two key problems related, and how can they be met at the same time?

A. *Interstate Differentials*

To measure imbalance among states (using the term to include state and local functions within states), it is necessary to design measures of fiscal capacity and need. Capacity is measured in terms of the per capita yield of a representative state-local tax system. Need as here defined is measured as the cost of supplying average performance levels for the existing mix of state-local programs.[14]

Measurement is possible, without too much difficulty, on the capacity side. Using income as a rough guide, we find per capita income of the lowest state to be about one half that of the highest. Better indicators of fiscal capacity may be obtained by applying a model tax system to the various states. Here we find an even wider spread, with per capita capacity at the top of the scale nearly three times that at the bottom.[15]

Determination of need (or better: of relative expenditure levels required to provide equal service levels) is a much difficult proposition. Per capita expenditures are readily available and differ widely, although not as much as fiscal capacities. Federal transfers are an equalizing factor, as is a tendency for states with low capacities to exert a greater effort. The important point, however, is that relative expenditure levels do not measure relative need.

The cost of providing similar service levels differs due to both differences in factor prices and in the inputs required to achieve

14 For a further discussion of needs, see Musgrave & Polinsky, *Revenue Sharing—A Critical View*, in Federal Reserve Bank of Boston, Financing State and Local Governments, 17, 38, (1970).

15 Advisory Comm'n on Intergovernmental Relations, Measures of State and Local Fiscal Capacity and Tax Effort, table 13 (ACIR Rep. No. M-16, 1962).

similar outputs (road maintenance in Florida calls for lower inputs per mile than in Vermont). Also, different communities vary in their preferences and choose to furnish (or are capable of furnishing) different service levels. Relative needs, therefore, cannot be deduced from expenditures. They are difficult to measure, for both conceptual and statistical reasons.[16]

Yet, a measure of relative capacities and needs and of capacity-need differentials is required to determine what pattern of equalization is called for. More information is required than rough generalizations, such as that per capita distribution favors the Eastern seaboard states, while distribution with allowance for average income favors the South. In the absence of a comprehensive study of needs, leading to a composite needs index, we attempted to take a stab at the problem.

Using 1960 data, we endeavored to compute an index of fiscal position, showing the differential between capacity and need for each state, standardized such that the sum of excess needs (in excess-need states) equals the sum of excess capacities (in excess-capacity states). We then raised the level of need by $5, $10, and $20 billion respectively by proportionately increasing the levels of existing needs. Finally we applied a number of revenue sharing plans of corresponding magnitudes but with different distribution patterns. The efficiency of these plans was then measured in terms of the resulting percentage reduction in excess needs.[17]

While the underlying analysis is quite rough (a careful study of this sort would involve a major research effort), the results are nevertheless interesting and are suggestive of the kind of study that is needed. The major conclusions regarding the existing imbalance among states[18] are as follows:

1. Twenty-one out of 51 states have an excess of need over

16 Many of the difficult problems in this area have been attacked by Dr. Selma J. Mushkin, director of the State and Local Finances Project of the Council of State Governments. She and her colleagues have examined in detail the more important state and local activities in an effort to project future expenditures. This work was published by the Council of State Governments in 1965 and 1966 as Research Memoranda 374-5, 379-382, 384, 389-90. No attempt was made, however, to compute a composite index of fiscal position based on these studies.

17 The assumptions and procedures of this study are explained in Musgrave, *supra* note 14, at 38.

18 Musgrave, *supra* note 14, at 46-47.

TABLE 2

MEASURES OF PROGRAM EFFICIENCY

(a)

Percent of Deficiencies (Excess of Need Over Capacity) Removed*

Program	Without Federal Transfers			With Federal Transfers		
	$5 Billion Program	$10 Billion Program	$20 Billion Program	$5 Billion Program	$10 Billion Program	$20 Billion Program
Revenue Sharing Per Capita Plan	38.6	59.4	77.5	42.6	63.6	79.9
Revenue Sharing Administration Plan	37.7	58.1	75.9	41.5	62.2	78.1
Revenue Sharing Javits Plan	41.2	62.1	79.3	44.2	64.9	80.0
Welfare Assistance Proportional to Potential Recipients Plan	47.1	69.6	85.6	50.3	71.6	84.5
Welfare Assistance Proportional to Own Welfare Expenditures Plan	31.6	49.8	65.7	35.2	54.1	67.7
School Assistance Proportional to School-Age Population Plan	39.6	60.6	78.7	43.6	64.8	81.1
School Assistance Proportional to Own School Expenditures Plan	34.2	53.5	70.9	38.2	58.0	73.6
Negative Income Tax Plan	4.4	8.8	13.8	5.7	9.4	13.9
Combination Weighted Welfare and School Assistance Plan	41.6	63.2	81.4	45.3	66.9	83.4

TABLE 2 CONTINUED

(b)

Percent of Program Funds Used to Remove Deficiencies

Program	Without Federal Transfers			With Federal Transfers		
	$5 Billion Program	$10 Billion Program	$20 Billion Program	$5 Billion Program	$10 Billion Program	$20 Billion Program
Revenue Sharing Per Capita Plan	53.7	63.7	77.6	56.7	68.1	80.3
Revenue Sharing Administration Plan	52.4	62.3	76.0	55.3	66.6	78.5
Revenue Sharing Javits Plan	57.2	66.6	79.4	58.9	69.5	80.4
Welfare Assistance Proportional to Potential Recipients Plan	65.4	74.6	85.8	67.0	76.6	84.9
Welfare Assistance Proportional to Own Welfare Expenditures Plan	43.9	53.4	65.8	46.9	57.9	68.0
School Assistance Proportional to School-Age Population Plan	55.1	65.0	78.8	58.1	69.4	81.5
School Assistance Proportional to Own School Expenditures Plan	47.1	57.3	71.0	50.9	62.1	73.9
Negative Income Tax Plan	6.1	9.4	13.8	7.6	10.1	14.0
Combination Weighted Welfare and School Assistance Plan	57.8	67.7	81.6	60.3	71.6	83.8

capacity. The size of the deficiency relative to expenditure needs is largest, ranging from 40 to 70 percent (after allowing for federal transfers), in the Southern low-income states. The size of the gap in other deficiency states is much less. Deficiencies are explained primarily by below-average capacities, but above-average needs also contribute to the result.

2. Twenty-nine states, including the high-income states, show an excess of capacity over need. The level of excess relative to expenditure needs runs up to 48 percent, but on the whole these ratios are less extreme than for deficiency states. By our measure, the occurrence of excess is primarily due to above-average capacity.

3. If we exclude the dozen or so lowest income states, the size of the gap (positive or negative) is mostly modest relative to needs. Outside this group, the gap (positive or negative) exceeds 20 percent of expenditure needs in only four states.

While this result may be biased by inadequate accounting for need differentials, it nevertheless suggests that the problem of imbalance (with the exception of the low-income Southern states) is not primarily an interstate problem.

The results obtained from the application of various transfer plans are shown in Table 2, parts (a) and (b). Nine distribution patterns are compared, and they differ substantially in their performance. Our measure of performance in part (a), as noted before, is the percent of the fiscal gaps (*i.e.*, excess of need over capacity) which are removed by the various plans. The Table also shows, in part (b), the percent of the program cost going to close these gaps rather than as payments to states with excess capacity. The results under each program are computed on a base which excludes present federal transfer programs (columns 1 to 3) and on a base which includes such transfers (columns 4 to 6). The results indicate that:

4. At any given budget level, distribution by potential welfare recipients consistently did the best. A plan based on a combination of welfare recipients and school-age population was the next most efficient. A per capita distribution plan or the Ad-

ministration program did less well, while the Javits plan fell in between the Administration and welfare plans.

At the $5 billion program level, for instance, (including federal transfers in the base) we find that the plan based on potential welfare recipients closes 50.3 percent of the gaps while the Administration plan closes 41.5 percent and the per capita plan closes 42.6 percent. The Javits plan, at 44.2 percent, falls in between. Stated differently, under the potential welfare recipient based plan, 65.4 percent of payments, or $3.3 billion, goes into gap closing as against 52.4 percent, or $2.6 billion, under the Administration plan. The corresponding amounts of slippage are $1.7 and $2.4 billion.[19]

5. The relative efficiency of the various plans narrows as the budget increases, with the absolute differences in efficiency showing little change.

6. The results are essentially the same, whether present federal transfers are or are not included in the base.

In all, it appears that the various distribution patterns differ significantly in their efficiency and that distribution by welfare and school population is to be preferred. This is an interesting finding because (1) such distributions also tend to be in line with meeting intrastate differentials and (2) welfare and school needs carry high national priority.

B. *Intrastate Differentials*

The next step in a careful analysis of the problem would be to apply similar techniques of measuring fiscal capacity and need to subregions within states. Such an analysis may be expected to show a higher differential than is yielded by comparison among states. The situation will be influenced substantially by the incidence of poverty with its bearing on both the capacity and the need side of

19 These are significant differences but the differential may well be understated due to our rather crude method of evaluation. Ideally one would want to weigh each dollar in relation to the relative size of the gap closed, and to weigh dollars given excess of the gap in relation to the degree of excess. Our cruder measure gives equal weights to gap-closing dollar and zero weights to all dollars which do not go towards closing gaps. We do not mean to suggest that money not used for closing gaps is entirely wasted.

the fiscal equation. Without going into detail, the following facts — some of which are rather contrary to the conventional assumptions — may be worth noting:

1. The poverty problem is by no means exclusively an urban problem. About 50 percent of the poor are outside metropolitan areas. Only 26 percent are in metropolitan areas of over one million; and only 17 percent are in the central cities of such areas. It is thus quite misleading to think of the large eastern cities as reflecting the poverty problem.[20]

2. Within metropolitan areas the incidence of poverty is by no means only a core city phenomenon. About 60 percent of the poor are located in central cities, while 40 percent are located in the suburban rings.[21] However, core city costs are higher, so that these unadjusted data tend to understate the relative magnitude of the core city problem.

3. The incidence of nonurban poverty is typically in low-income states, while that of urban poverty is typically in high-income states.

4. The metropolitan areas which suffer most acute fiscal distress are not only in relatively high income states but are also characterized by relatively high average incomes compared to other SMSA's. Thus, out of 216 SMSA's (1967 data) only 34 had per capita income above $3,400. Yet all but two of the twelve largest SMSA's belonged to this group, including (with the exception of Baltimore) all the large eastern seaboard cities.[22]

5. With the exception of New York the tax effort of these high-income SMSA's is not above the average for all SMSA's.[23]

The conclusion to be drawn from these facts is that revenue sharing modified by an income-type capacity variable would do little to solve the problem. Not even income equalizing distribution to SMSA's would serve the purpose. Fiscal differentials in

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20 *See* BUREAU OF THE CENSUS, TRENDS IN SOCIAL AND ECONOMIC CONDITIONS IN METROPOLITAN AREAS 53 (Series p-28, No. 27, 1969).

21 *Id.*

22 *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL FINANCES, SIGNIFICANT FEATURES, 1967 TO 1970, Table 2, at 13-20 (1969).

23 *Id.*

these instances primarily result from the need rather than the capacity side. The only major exception of association of need and generally low capacity is in the low-income states. This is recognized to some extent in the Javits plan, where 15 percent of the total disbursement is allotted to low-income states. This minor part of the plan may well be its most useful component.

As to the other part of the problem — poverty in the SMSA's — the question arises whether, given the relatively high income levels of these SMSA's, the residents should not be called upon to put their "own" house in order and to take care of their "own" problems. This would require governmental units corresponding to SMSA's. But suppose that such units could be set up. Even then, this would not be the proper solution. To be sure, it is altogether proper to ask the suburbanites to help defray the cost of city services which they consume. But it does not follow that they should be called upon to pay for the welfare and social-service costs which arise from the concentration of low-income families in the city core. This responsibility should be carried by those who are more fortunate regardless of where they live. This being the case, the proper solution is the assumption of such costs on a nationwide basis, financed by progressive income taxation.

If per capita income in Westchester is high, Westchester residents should contribute more to the national finance of such services than the residents of Harlem; but so should wealthy residents of Arizona or Honolulu. The fact that Westchester is close to New York City, we repeat, is good reason for calling upon Westchester residents to contribute to commuter and other city facilities which they enjoy, but it should not be a reason for paying a disproportionate share of the city's welfare costs. These costs are a "spill-in" which result from national problems and that is where the cost should lie.

The question remains how national financing of such costs is to be accomplished. One way of doing so is to implement a fiscal system (a grant system, call it revenue sharing if you wish) where the distribution is from the federal government to localities in line with their share in such national needs.

This, however, would require a complicated system of grants much more complex than is implied in a present expenditure-

based pass-through provision, as provided for in the Administration plan. It would be revenue sharing in name only. Instead, the objective could be met more effectively and simply by federal assumption of responsibility for the financing of the welfare system, initially at its present level and hopefully by way of an expanded income maintenance plan later on.

Beyond this, at least partial federal finance of minimum levels of primary and secondary education is a desirable objective. These also are functions which in a highly mobile society have come to be of fundamental national importance and thus justify federal financing. Taking the form of a minimum per student grant (with allowance for cost differentials), such a plan need interfere in no way with local responsibility for educational policy except, we would hope, for the basic requirement of school integration. Given such a transfer of responsibility for welfare and at least part of primary and secondary education, the states and cities would then be in a position to take care of their remaining needs, out of their own fiscal resources and in line with their own preferences.

V. Conclusions

The conclusions to which this analysis leads may be summarized as follows:

1. The combination of large federal surplus with generalized across-the-board state-local deficiencies does not now exist and is not likely to materialize in the foreseeable future.
2. Instead, the problem is one of scarce federal funds, matched by a highly complex pattern of deficiency at the state and local level.
3. Deficiency areas fall into two major parts:
   a. the low-income states in which relatively high general needs are combined with low capacity, and
   b. urban areas within high-income states, areas which have relatively high incomes but even higher national needs.
4. Problem (a) may be met in part by general transfers or revenue sharing limited to low-income states, e.g., the 15 percent part of the Javits plan carried out on a larger scale.

5. Problem (b) cannot be met by leaving the responsibility with the residents of the particular SMSA's. Nor can it be met adequately by capacity-related or per-capita-based generalized forms of revenue sharing. Rather it calls for the federal government to assume full financial responsibility for welfare, first at present levels and later on at a substantially increased scale of income maintenance.

6. If and when a more substantial surplus in the federal budget develops, the federal government should then assume partial financial responsibility for minimum performance levels in the primary and secondary schools.

7. The existing system of categorical grants should be consolidated, but the basic principle of matching, specification of project area, and setting of general performance standards should be maintained.

Given such adjustments, the fiscal ills at the state-local level will be relieved and limited federal funds will be used in a more effective fashion than under generalized revenue sharing. While such sharing is better than federal tax reduction, it does not at this stage constitute the best or even second best use of funds.[24]

24 For text of appendix explain the analysis underlying the results of Table 2, see Musgrave, *supra* note 14, at 38-45.

REVENUE SHARING: AN ANALYSIS OF ALTERNATIVE STATUTORY APPROACHES

STEVEN V. BERSON*

Introduction

The Nixon Administration's new revenue sharing bill outlined by the President in his recent State of the Union message,[1] has greatly intensified interest in the broader topic of tax sharing.[2] This article will explore the general issues raised by tax sharing by focusing on three recent tax sharing proposals, all introduced in Congress in 1969. S. 2483 was presented by Senators Edmund Muskie (D.-Me.) and Charles Goodell (R.-N.Y.);[3] S. 2948 was sponsored by the Nixon Administration;[4] and H.R. 13663 was introduced by Representative Ullman (D.-Ore.).[5]

Before turning to a detailed analysis of these proposed statutes, one should at the outset have some understanding of the basic economic and political factors that have given rise to the alleged need for tax sharing. In economic terms, the case for tax sharing is based on an examination of certain trends in public finance

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1 117 CONG. REC. H83-84 (daily ed. January 22, 1971). See note 118 *infra*.

2 "Tax sharing" includes the concepts of both revenue sharing and tax credits. Revenue sharing refers to any system whereby tax dollars are collected by the federal government and then returned to states and localities according to a given formula. A system of tax credits, on the other hand, entails no direct movement of funds between levels of government; it involves instead a credit allowed an individual on his federal income tax return for personal income taxes he has paid to a state or local government.

3 S. 2483, 91st Cong., 1st Sess. (1969) [hereinafter cited as Muskie-Goodell] combines the revenue sharing with the tax credit approach. It was prepared by the Advisory Commission on Intergovernmental Relations (ACIR) and introduced June 25, 1969.

4 S. 2948, 91st Cong., 1st Sess. (1969) [hereinafter cited as Nixon] contains only a revenue sharing approach. It was introduced by Senator Howard Baker (R.-Tenn.) on September 23, 1969.

5 H.R. 13663, 91st Cong., 1st Sess. (1969) [hereinafter cited as Ullman], which contains only the tax credit approach, is substantially the same as Title II of the Muskie-Goodell proposal. No reference will be made to the specific provisions of the Ullman bill. It was introduced September 8, 1969.

that have generally characterized the period since 1964 when Walter Heller first offered his revenue sharing proposal. During that period the expenses facing state and local governments have grown at a faster rate than has the economy; at the same time, the relatively inelastic taxes relied on by those governments have yielded revenues growing at a pace slower than that of the economy. The federal government, on the other hand, has enjoyed just the opposite situation with revenues rising at a faster rate than expenditures (particularly before the Vietnam buildup).

Proponents of tax sharing, noting these trends, have argued that state and local governments cannot continue to cope with the financial strain that has been experienced in recent years. Indeed, it is expected that state and local governments will, in the future, be called upon to supply even greater public services. Thus, it is argued that it is incumbent upon the federal government to rescue the states and localities by directing some of its wealth in their direction.[6]

The political rationale underlying tax sharing has been labeled "creative federalism" or "new federalism", depending on the administration in power. The political argument runs somewhat along these lines: State and local governments have surrendered to the federal government too much authority with respect to domestic matters. As a general rule, the governing of domestic affairs is best handled at that level of government least remote from the people. Thus, state and local governments should continue to assume more and more responsibility in solving domestic problems; and the federal government should take steps, through some form of unconditional aid, to insure that states and localities will have the financial resources needed to enable them to do so.[7]

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6 This economic rationale for tax sharing is mentioned in virtually every article published in this area. For a detailed consideration, see 1 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM, ch. 3 (1967) [hereinafter cited as ACIR]. For the argument that this economic justification may no longer be sound, see Musgrave, *supra* at 200.

7 In his official message to Congress on August 13, 1969, President Nixon listed the following as the "ultimate purposes" behind his proposed revenue sharing legislation: To restore to the states their proper rights and roles in the federal system with a new emphasis on and help for local responsiveness; to provide both the encouragement and the necessary resources for local and state officials to exercise leadership in solving their own problems; to narrow the distance between people and the government agencies dealing with their problems; to shift the balance of

A critical appraisal of the economic and political justifications for tax sharing is not within the scope of this article. For the most part, it will be assumed here that there is a genuine need for increased federal aid to states and localities and that some form of tax sharing is a desirable way of satisfying that need. The main concern in this discussion will be a close and critical analysis of the three statutory approaches noted above. These legislative responses will be examined and evaluated in terms of how well they meet the problems they were fashioned to solve.

Four criteria will be employed to compare and to criticize these statutory approaches: the size and growth potential of the aid involved; the effect of these proposals on federal, state, and local tax systems; the issue raised by the lack of federal controls; and the alleviation of fiscal disparities existing among states and localities.

I. Size and Growth Potential

In terms of the number of dollars initially available to states and localities, the 1969 Administration bill is by far the least generous. In fiscal year 1971 this bill would have provided state and local governments one sixth of one percent of the "total taxable income reported on federal individual income tax returns for the calendar year for which the latest published statistical data was available . . . ." The relevant calendar year would have been 1967, when the personal taxable income was about $315 billion; thus, there would have been around $500 million available for distribution to state and local governments.[8] The revenue sharing provisions in Title I of the Muskie bill, relying on statistics of the previous fiscal year and using a different formula,[9] would have made available in its first year of distribution (fiscal 1970) about $2.8 billion. The tax credit in Title II of that bill, assuming a moderately strong acceleration effect, would have in-

political power away from Washington and back to the country and the people. *Hearings on S. 2483 before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations,* 91st Cong., 1st Sess. 155 (1969-70) [hereinafter cited as *Hearings on S. 2483*].

8 Nixon § 301. 115 Cong. Rec. S11113 (daily ed. Sept. 23, 1969) (table, state and local shares under administration revenue sharing proposal).

9 See text at note 15 *infra.*

creased state revenues by an additional $2.1 billion.[10] We may assume that the tax credit approach alone, as in the Ullmer bill, would likewise have yielded $2.1 billion.

Some perspective on these figures can be gained by comparing them to the figure of $102.4 billion, which was the level of total general expenditures made by state and local governments in fiscal 1968. In the same year the total general revenues raised by those governments from their own sources was only $84.1 billion. This gap of $18.3 billion had increased from $10.9 billion in fiscal 1964.[11]

It is difficult to pass judgment on the size of these initial amounts without reference to the economic and political justifications for tax sharing that were presented at the outset of this paper. On the one hand, those who remain skeptical of the wisdom of tax sharing as a solution to the problems of public finance might think it sensible to begin modestly and cautiously by not committing large amounts of money until it is known how the system works. The money distributed, after all, would be in addition to all the other federal funds going to states and localities. Even to those who are favorably disposed to tax sharing there are budgetary considerations which may demand relatively small initial amounts.[12]

On the other hand, those who are completely persuaded by the economic and political justifications for tax sharing want to see as large an initial fund for distribution as possible. The gap

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10 115 CONG. REC. S7108 (daily ed. June 25, 1969) (Muskie-Goodell, Exhibits E and F).

11 U.S. BUREAU OF THE CENSUS, GOVERNMENTAL FINANCES IN 1967-68, at 18 (1969) [hereinafter cited as GOVERNMENTAL FINANCES].

12 In testimony before the Senate Subcommittee on Intergovernmental Relations, September 25, 1969, Assistant Secretary of the Treasury, Murray L. Weidenbaum, criticized the Muskie-Goodell bill as "simply too large a budgetary undertaking in view of stabilization requirements and available revenues." *Hearings on S. 2483*, at 163.

It is interesting to note that much of the impetus behind tax sharing in 1964 was the existence of a budgetary surplus at the federal level and the concern over "fiscal drag." Large scale involvement of the United States in Southeast Asia and its consequent impact on the economy eliminated this concern as a major argument for tax sharing. For a discussion of the stabilizing effectiveness of tax sharing, see Weidenbaum, *Federal Aid to State and Local Governments: The Policy Alternatives*, in 2 SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 90TH CONG., 1ST SESS., REVENUE SHARING AND ITS ALTERNATIVES: WHAT FUTURE FOR FISCAL FEDERALISM 651, 661-63 (1967).

between state revenues and expenditures is likely to grow as governments pay more careful attention to such important tasks as education, welfare, and the preservation of the environment. There are several possible ways to narrow this gap. The federal government could perform a larger share of these domestic tasks either directly or through more conditional aid; states and localities could continue to place more strain on their present systems of inelastic, generally regressive, taxes; or, as a final alternative, these very important tasks might simply be neglected.

None of these alternatives are very satisfactory to advocates of tax sharing. To them, tax sharing is the best remedy, and there is a need for a large dose of that remedy immediately. The $4.9 billion offered by the Muskie-Goodell bill would probably be regarded as a fair beginning; the $500 million offered by the 1969 Nixon bill, on the other hand, would seem hardly more than a token.

A much more important factor than the initial amounts is the rate of growth of the funds provided by these bills. A modest beginning is relatively insignificant if state and local governments can be assured of adequate funds in the long run. Comparing first just the revenue sharing provisions in the bills, there are some interesting differences with respect to growth. In order to make a fair comparison, fiscal 1976 should be used as the reference year since that is the first year in which the Nixon bill reaches its full 1% multiplier for determining the fund for distribution. In that year the Nixon bill would make $5.1 billion available for distribution whereas in the Muskie-Goodell bill the figure would be $5.2 billion.[13]

Beginning in fiscal 1976, the Nixon bill provides that one percent of taxable income reported on federal individual returns be distributed to states and localities. The Administration estimates that taxable income will grow at an annual rate of about 10%; if this is true, the growth of the fund available for distri-

13 The $5.2 billion figure is calculated on an estimated $644.5 billion federal taxable income and an estimated $16.0 billion state individual income tax collected in fiscal 1975. These estimates are based on an assumed 10% annual growth in these items. This estimate is derived from INTERNAL REVENUE SERVICE, 1967, INDIVIDUAL INCOME TAX RETURNS (1969) and U.S. BUREAU OF THE CENSUS, SERIES GF 68—NO. 1, STATE TAX COLLECTIONS IN 1968 (1968).

bution would also grow at a rate of 10%.[14] In the Muskie-Goodell bill, the fund for distribution is equal to one-half the sum of one percent of taxable income plus twenty-five percent of state income taxes collected.[15] Assuming again a growth rate of 10% in taxable income, an annual growth rate of more than 10% in state income taxes collected would cause the fund for distribution to grow at an annual rate also greater than 10%.[16] There is reason to expect that state income tax collections will grow by more than 10% per year;[17] thus, not only would the fund available under the Muskie-Goodell revenue sharing provisions be greater than the Nixon fund in 1976, but it would also be likely to continue to outpace the Nixon fund by growing at a faster rate each year.

Another potentially important difference in the revenue sharing provision of the bills is that the Muskie-Goodell bill requires the fund distributed in any year to be not less than that of the preceding year.[18] The Nixon bill has no such provision. This could be of some consequence to states if taxable income were to decline.

In general, both bills with respect to size and growth have much to commend them to state and local governments. The funds under either bill are likely to increase each year, growing along with the economy. They will be distributed whether the

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14 This 10% growth rate seems a reasonable estimate. After recovering from the 1958 recession, the growth rate moved steadily up to 10% by 1964 and remained near that level through 1967. *See* INTERNAL REVENUE SERVICE, STATISTICS OF INCOME 1967, INDIVIDUAL INCOME TAX RETURNS (1969).

15 Muskie-Goodell § 102(b).

16 This may be worked out mathematically as follows:

$$x = (.01y + .25z)/2 = .005y + .125z$$
$$\Delta x = .005\Delta y + .125\Delta z$$

Assume that $\Delta y = .1y$, and substitute this into the equation. Then in order for Δx to be greater than $.1x$, Δz need only be greater than $.1z$.

17 Between fiscal 1964 and 1968 the annual percentage increases in state personal income collections were respectively: 5.8%, 19.2%, 12.4%, and 28.6% (approximate percentages). U.S. BUREAU OF THE CENSUS, SERIES GF 68 — No. 1, STATE TAX COLLECTIONS IN 1968 (1968). The ACIR staff estimates that between fiscal 1970 and 1971 state income tax collections will increase 17.6% and another 20% by fiscal 1972. 115 CONG. REC. S7108 (daily ed. June 25, 1969) (Muskie-Goodell, Exhibit E). This assumes no tax credit. Such increases would probably be much greater if a tax credit were instituted.

18 Muskie-Goodell, § 102(b).

federal government runs a surplus or a deficit. And the distribution will be made automatically without the need for additional appropriations by Congress. On balance, however, state and local officials would no doubt be much happier with the revenue sharing provisions in Muskie-Goodell than with those in the Nixon bill. Not only would the Muskie-Goodell bill provide greater growth and more security, but it would also allow state officials to have a greater say in determining that growth rate. In the Nixon bill, the amount that states and localities receive would be controlled solely by movements in the national economy and by the changes made by Congress in those provisions of the Internal Revenue Code (such as personal exemptions and other deductions) that affect the level of taxable income. In the Muskie-Goodell bill, the amount received would depend in part on the personal income taxes collected by the states.

In considering size and growth of funds available, the Muskie-Goodell bill is much more generous than has been suggested so far because it adds the tax credit to its provisions for revenue sharing. It is difficult to predict with any certainty the long run growth of additional tax revenues that state and local governments might receive as a result of a tax credit. But even a cautious estimate indicates that this is potentially a strong source of additional revenue for them. Short-run estimates in the Muskie-Goodell bill show the tax credit yielding the states and localities a full $7.2 billion in only the third year of operation, up from $2.1 billion in the first year.[19]

The crucial question is to what extent states would take advantage of the tax credit by initiating or increasing their own personal income taxes. Clearly there is a lot of distance for them to cover if that is the direction in which they choose to move. At the end of 1968, thirty-eight states (plus the District

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19 115 CONG. REC. S7108 (daily ed. June 25, 1969). Exhibits E and F show that aid would cost the federal government less per dollar than would revenue sharing. The $7.2 billion that states would receive in 1972, for example, would cost the federal government only $5.5 billion in revenue foregone. Reliance by local governments on income taxes is negligible. *See* note 125 *infra*. Thus, in this discussion on size and growth, only the states are considered. Income tax on the local level is discussed in a later section of this paper concerning intrastate fiscal disparities.

of Columbia) had some form of individual income tax, but the effective rates ranged only from .05% to 3.09%, the average being 1.29%.[20]

Interstate competition is the main factor which keeps states from placing greater reliance on the income tax. Particularly in the dozen states with no income tax, imposing such a tax must be regarded as politically a "last resort" option. A major argument for the tax credit is that it would relieve such political pressures. As a credit, the state income tax would present a much more visible and obvious "tax break" to federal taxpayers than is presented by the ordinary deduction provisions for state taxes. As the states began to place greater reliance on income tax, their tax base would be broadened so that the pressure on overall rates — politically the most visible and sensitive tax features — would be relieved.[21]

Because of the high yield of the income tax, the results in increased revenues might be striking if states were persuaded by the logic of the tax credit argument. For example, in 1964 slightly less than $3.5 billion was raised by the individual income taxes of 36 states. If in that year every state had levied a two percent income tax on a base equivalent to federal adjusted gross income (less federal personal exemptions), the total yield would have been $5.2 billion. If the rate had been 4.6% (the highest state rate in existence at the time), the yield would have been over $12 billion.[22]

In 1964 the elasticity of state general revenues was about .92. If the above-mentioned two percent rate had been operative, that elasticity would have been raised to .98; if the 4.6% rate had

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20 U.S. BUREAU OF THE CENSUS, SERIES 68 GF — No. 1, STATE TAX COLLECTIONS IN 1968, at 7 (1968). These effective rates are the quotients of personal income tax collected in 1968 divided by personal income in 1967. Thus, these percentages may actually be a bit inflated. The lowest effective rate (.05%) was in New Jersey, which has a partial income tax applying essentially only to New York residents who have a New Jersey source of income. Two other states had partial taxes, covering income from stocks and bonds only. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL FINANCES — SIGNIFICANT FEATURES 1966-1969, at 49 (1968) [hereinafter cited as STATE AND LOCAL FINANCES].

21 For a more thorough analysis along these lines, see ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FEDERAL-STATE COORDINATION OF PERSONAL INCOME TAXES chs. 1, 5, 6 (1965).

22 *Id.* at 102.

been in effect, the elasticity would have been raised to a healthy 1.09.[23] Increases such as these would be extremely significant because it is the inelasticity of state revenues which is the principal economic justification for tax sharing.

The tax credit provision in Title II of Muskie-Goodell, in addition to the revenue sharing provision, clearly places that bill ahead of the Nixon and Ullman bills with respect to the growth potential and the initial amounts involved. However, assuming this combined approach is not politically feasible, it becomes a more difficult problem to choose between the remaining alternatives.

If the revenue sharing approach were in the form of the Nixon bill, then the tax credit would appear to be the safer bet in terms of long-run revenue yield. Because of the great revenue producing potential inherent in the tax credit, it is likely that it would yield the states far more than $5 billion by fiscal 1976.

In view of the Administration's position that it favors revenue sharing but that it is at present shackled by budgetary restraints, it must be assumed that a substantial increase is possible in the fund for distribution even before 1976. In other words, the Administration might regard these first few years as a trial period for revenue sharing with the thought of pouring more funds into the program as those funds become available and as the program appears to be initially successful.

If the choice becomes one of the Nixon bill or nothing at all, then the relatively small amounts involved should not alone bar adopting the plan. As long as there is no corresponding reduction in other federal grant programs, the Administration plan offers at least a modest step into the field of revenue sharing.[24]

II. Impact on Tax Systems

Tax sharing may be viewed as an attempt to manipulate the tax systems of the country in order to achieve certain desired results. Thus, in examining each of these tax sharing bills, it is

23 *Id.* at 102-05.

24 The revised Nixon administration proposal involves an outlay of $16 billion for the first operating year, a vast increase over the $500,000,000 envisioned in the 1969 bill. 117 Cong. Rec. H83-H84 (daily ed. Jan. 22, 1971). See note 136 *infra*.

appropriate to consider how this manipulation will be accomplished. The relevant questions to be asked are the following: How do the proposed statutes rely on present tax systems, and what are some likely consequences to the systems as a result of that reliance?

A. *The Impact on the Federal Tax Structure*

1. Revenue Sharing

Looking first to the relationship between the revenue sharing approach and the federal tax structure, the connection between the two appears very slim indeed. The only reliance on the Internal Revenue Code is in the use of the term "taxable income" as an element in determining the size of the fund for distribution. Taxable income is defined in Section 63 of the Internal Revenue Code of 1954 basically as gross income minus the deductions allowed by Chapter I of the Code.[25]

There is no logically compelling reason for maintaining any link at all between revenue sharing and the Internal Revenue Code. It might be more useful in fact to establish a fund with the initial size and the rate of growth determined by factors completely outside the federal tax system. The advantage of this type of system can be illustrated by considering the likely results of a system tied even more closely to the code than the ones now proposed. If, for example, the fund for distribution was based on individual income taxes collected by the federal government, it is likely that state and local officials would oppose any suggested amendment to the code lowering the rates or shrinking the base. As the proposal now stands, these officials would have little reason to care about rate reduction, but they would be very concerned about any tampering with the exemption and other deduction provisions leading to a reduction in taxable income.[26] The federal government should be free to raise or lower taxes unhampered

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25 Muskie-Goodell § 101(4) defines taxable income expressly in terms of § 63 of the Internal Revenue Code. The Nixon bill, in § 201(10), talks about the term "as defined by the internal revenue laws." Presumably, taxable income means exactly the same thing in both bills.

26 Harriss, *Federal Revenue Sharing with the States*, in 2 SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 90TH CONG., 1ST SESS., REVENUE SHARING AND ITS ALTERNATIVES: WHAT FUTURE FOR FISCAL FEDERALISM 796, 805 (1967).

by the necessity of considering the effects on the fund available for distribution to states and localities. Divorcing revenue sharing from the federal tax system would give the government that freedom. The size and growth rate of the fund could be determined on the basis of an estimate as to the needs of the states and localities.

As another possible relationship between revenue sharing and the federal tax structure, the effect of revenue sharing on the progressive character of the federal tax structure should be considered. Under the plans which provide for some degree of redistribution,[27] federal tax dollars would be taken from relatively wealthy states and spent on public services in relatively poor states. In one sense, this may be regressive in that a person who makes $8000 a year and lives in a poor state may be getting more government services per federal tax dollar than a person making $6000 a year and living in a richer state. Nonetheless, viewing the nation as a whole, the redistribution effect of revenue sharing would probably result in greater progressivity in the tax system.

2. Tax Credits

The probable impact on the progressivity of the federal tax structure is much clearer in the case of the tax credit approach. Here the individual taxpayer is given the choice of taking the 40% credit or continuing to list state and local income taxes among his itemized deductions.[28] Choosing the credit instead of the deduction is profitable only to those taxpayers who are in a less than 40% bracket.[29] Also, those people (generally in the lowest brackets) who take the standard deduction can take advantage of the tax credit without sacrificing any loss of deduction. Since those taxpayers above the 40% bracket would be no better off than before while taxpayers in brackets below 40% would pay less taxes than before, the net effect of the tax credit would be to enhance the progressivity of the federal tax system.

27 *See* text at notes 81-104 *infra*.

28 Muskie-Goodell §§ 201(a)(2), 201(b).

29 Assume a taxpayer is faced with a state income tax liability of $100. If he is in the 40% federal bracket, then he will get a reduction in his federal taxes of $40 whether he chooses the credit or the deduction. If his bracket is above 40%, then taking a deduction will yield more than a $40 reduction; likewise, if his bracket is below 40%, the deduction will yield less than $40.

There are, however, serious criticisms which can be made of the impact of the Muskie-Goodell tax credit on the federal tax structure. In a series of recent articles,[30] Professor Stanley Surrey, former Assistant Secretary of the Treasury for Tax Policy, has argued that special federal tax credits and deductions are generally inferior to direct expenditures as a means of achieving social objectives for a number of reasons. First, Surrey argues that tax incentives, such as the charitable deduction,[31] have inequitable effects on taxpayers in the same tax bracket by permitting windfalls to some taxpayers for doing what they would have done even in the absence of the incentive.[32] Such incentives also have inequitable effects as between taxpayers in different brackets because they usually benefit persons in high brackets most.[33] Moreover, because tax incentives are built into the tax structure they tend to escape congressional scrutiny; thus large "backdoor expenditures" are made annually without any consideration of the size of the expenditure and the competing demands for the funds that would normally be considered in the budget process were direct expenditures involved.[34] Lastly, Surrey argues that tax incentives are to be avoided because of the needless complexity and confusion which they cause in the federal tax system.[35]

Certain of the objections raised by Professor Surrey to tax incentives in general are not applicable to the proposed Muskie-Goodell tax credit. As noted, the Muskie-Goodell credit is de-

30 Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970); Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary To Replace Tax Expenditures With Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970).

There is, of course, a considerable definitional problem in determining which tax rules are "special" and which tax rules are simply part of a neutral attempt to measure taxable income. The Treasury has coined the phrase "tax expenditure" to describe those provisions of the federal income tax system which deviate from widely accepted definitions of income to achieve various social and economic objectives. 1968 SECRETARY OF THE TREASURY ANN. REPORT OF THE STATE OF THE FINANCES 326-30; *see* Statement of Joseph W. Barr, Secretary of the Treasury, *Hearings on the 1969 Economic Report of the President Before the Joint Economic Comm.*, 91st Cong., 1st Sess., pt. 1, at 4, 8-44 (1969).

31 INT. REV. CODE OF 1954, § 170.

32 Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 719 (1970).

33 *Id.* at 721.

34 *Id.* at 728-31.

35 *Id.* at 731-32.

signed not to give greater benefits to the rich than to the poor; it also avoids the problem of unintended windfalls to certain taxpayers.

However, other of the general criticisms of tax incentives made by Surrey are equally applicable to the Muskie-Goodell tax credit. Because it is covert and automatic, the tax credit will receive less annual scrutiny than would direct subsidies to states and localities. From the perspective of some proponents of revenue sharing this may be the hoped for result since it would give the states a secure source of income not dependent on annual congressional appropriations. However, for those concerned with establishing rational mechanisms for the allocation of federal fiscal resources, this is undesirable. The Muskie-Goodell tax credit would perhaps add to the complexity and confusion of the code. Furthermore, annual review of the credit would be by a tax committee which might have only slight expertise with respect to state fiscal needs. On balance, then, the tax credit might be regarded as an unfortunate tampering with the federal tax structure according to the Surrey analysis.

B. *Impact on State and Local Tax Systems*

1. Revenue Sharing

The probable impact of tax sharing on state and local tax systems is considerably greater than the impact on the federal system. Looking first at the revenue sharing provisions, the bills establish basic incentives for state and local governments to make greater use of their own tax resources. After the yearly fund for distribution is determined, each state's share depends in part on the tax effort made by it and its localities as compared with other states. Likewise, each locality's share of the state's take depends in part on the tax effort it makes as compared with the other local governments in the state.[36]

These basic incentives play an important role in the revenue sharing scheme. Skeptics of revenue sharing regard these incentives as insuring that states and localities do not get a "free ride" at the expense of the federal government. There is a fear, in

36 Muskie-Goodell §§ 104; 105(b), (e); 101(6)-(8). Nixon §§ 401, 501.

other words, that state and local governments might rely on federal funds to hold steady or even to reduce their own levels of taxation. It is difficult to assess how justifiable this fear is; it depends on a complicated variety of economic and political factors within each community. If the federal funds going into a given area were sufficiently large to allow a cutback in local taxes without any significant reduction in public services, then it must be recognized that such a cutback would be a politically attractive possibility to local leaders.

Such a reduction in the state tax effort would fall on the sales and property revenues since those have increased most in recent years.[37] If the relatively regressive sales and property taxes were decreased in a given area while the income tax was held steady or possibly even increased, the result would be an increase in the overall progressivity of the state and local tax system. This increased progressivity, a goal of tax sharing supporters, is seen as an offset against the possibility that the fears of the skeptics may be realized.

However, from the point of view of revenue sharing advocates, these basic incentives play the more positive role of encouraging states and localities to increase tax levels. The scheme is designed to channel more federal funds into those areas that have greater tax efforts. The Muskie-Goodell bill goes even one step further by substituting an additional "tax effort ratio factor" into the formula which rewards those states which have increased their tax effort factor from that of the previous year.[38]

On balance, the anticipation of revenue sharing advocates is probably more realistic than that of the critics in this respect. Because the needs of states and localities are generally great and the federal funds for distribution would be at least initially small, it seems unlikely that there would be much cutback in the level of state and local taxes.

There is one major difference between the two bills with respect to these basic incentives. In the Nixon bill the revenue effort factor is determined by taking the total general revenue

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37 G. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 143-44 (1967) [hereinafter cited as BREAK].

38 Muskie-Goodell §§ 104(b)-(d).

raised annually by each state and its localities (excluding intergovernmental revenue) and dividing that sum by the total personal income for the state. In the Muskie-Goodell bill, the tax effort factor is determined by taking the total taxes collected annually by a state and its localities plus net profits from state owned liquor stores, and dividing that sum by the personal income of the state.[39]

The Nixon administration has criticized this provision of the Muskie-Goodell bill as unfair discrimination against state and local user charges. It has also criticized as an unwarranted interference in state tax systems the incentive favoring income taxes which Title I of Muskie-Goodell has incorporated into its formula for determining the size of the fund for distribution.[40] There may be sound reasons for encouraging state use of the income tax; but there appears to be no compelling explanation for the unfavorable treatment effectively given by Muskie-Goodell to all other forms of state and local revenues besides taxes and state liquor store profits.

In fiscal 1968 taxes collected by state and local governments accounted for about $67.6 billion of the $84.1 billion in general revenues those governments raised from their own sources. Thus there was a sizeable $16.5 billion in revenue which the Nixon bill would have accounted for but which the Muskie-Goodell bill would have ignored.[41] In the absence of a persuasive explanation for this discrimination by Muskie-Goodell, and in view of the fact that the Nixon bill in this respect evidences a greater redistributive effect,[42] the Nixon approach seems preferable.

2. Tax Credit

The largest and most probable impact on state and local taxes from tax sharing is the increased reliance on income taxes that is envisioned by the tax credit. This obvious discrimination in favor of the income tax over other state and local taxes invites the

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39 Nixon § 401(c). Muskie-Goodell § 104(c). Note that this same distinction holds true in determining the share of each state's fund that localities receive. See Nixon § 501(b); Muskie-Goodell §§ 105(b), 101(6).

40 *Hearings on S. 2483*, at 163.

41 Total profit from state liquor stores was only $370 million in fiscal 1968. GOVERNMENTAL FINANCES, at 20, 21.

42 *See* text at note 98 *infra*.

argument that the federal government is veering from its proper course of neutrality with respect to state and local taxes. One answer to this argument is based upon a careful analysis of the historical trends concerning state reliance on the income tax.

In 1911 Wisconsin became the first state to adopt a personal income tax. By 1930 there were fifteen states with some form of tax. The depression years brought a rash of states into the fold so that by 1937 the total number was thirty-one. Then between 1937 and 1960 not one new state adopted a personal income tax.[43] Probably the main reason for the halt in the spread of the income tax during this period was the increasingly heavy reliance placed on this tax source by the federal government. Five more states adopted income taxes during the 1960's, but the federal government still clearly dominated the field. Of the $76.0 billion in individual income taxes collected by all levels of government in fiscal 1968, the federal government accounted for $68.7 billion (90.4%); states collected only $6.2 billion (8.2%), and local governments a mere $1.1 billion (1.4%).[44]

In contrast to the income tax, the federal government makes relatively little use of sales and property levies — the taxes traditionally relied on most heavily by state and local governments. Thus, it can be argued that in order to insure a meaningful neutrality, the federal government should return a portion of the income taxes collected. The federal government would in a sense be giving back to the states what it has taken from them by preempting the personal income tax.[45]

Aside from the preemption argument, there are other compelling policy reasons that justify efforts by the national government to encourage states and localities to make greater use of that tax. The two features of the income tax that lead to this conclusion are its progressivity and its elasticity.

The progressive character of the federal income tax can be

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43 STATE AND LOCAL FINANCES, at 50. By 1960 the actual total number of states with some form of income tax was thirty-three, Alaska and Hawaii having become states in the meantime.

44 GOVERNMENTAL FINANCES, at 20.

45 For a more complete discussion of this neutrality preemption argument, see ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FEDERAL-STATE COORDINATION OF PERSONAL INCOME TAXES, chs. 1, 6 (1965).

viewed as an established national policy. State and local taxes however are generally regressive.[46] Since these taxes have been increasing at a great rate,[47] while the federal tax structure has remained relatively constant, the net effect for taxpayers paying both federal and state and local taxes has been a gradual erosion of the progressivity of the federal system. Hence, to buttress the policy of a progressive federal income tax, incentives for the state and local governments to rely on the income tax are justified. This policy would seem sufficiently strong to quell the doubts of those who fear that revenue sharing represents an additional federal encroachment on concerns which properly belong to the states.

Title II of the Muskie-Goodell bill does not guarantee progressivity in the income taxes of those states and localities which would benefit from the credit. It is only required[48] that the state and local income taxes allow deductions for personal exemptions comparable to those allowed in the Internal Revenue Code.[49] This absence of a guarantee of progressivity may prove not too great a problem. An examination of the state income taxes in effect at the end of 1968 reveals that almost all of them had a progressive rate structure; and even those with flat rates had features to insure some progressivity.[50]

The tremendous importance of the elasticity feature of the income tax has already been discussed in the context of the size and growth of the fund for distribution. It is worth emphasizing again that the increased reliance on the income tax with its high revenue yield may be the key for insuring long-run fiscal independence for state and local governments.

III. The Issue of Control

A. Generally

An essential feature of the proposals under consideration is that they provide funds to state and local governments with no

46 *See* text at note 37 *supra.*

47 *Id.*

48 Muskie-Goodell § 201(a)(2). The Ullman bill does not have even this requirement.

49 Int. Rev. Code of 1954, §§ 151-54.

50 State and Local Finances, at 78-83.

conditions or "strings" attached. This feature presents an important and controversial issue in the discussion of tax sharing. It is used strenuously to bolster the arguments both of the proponents and the critics of sharing proposals.

Except for the pass-through requirements, the revenue sharing provisions of the Nixon and Muskie-Goodell bills impose no substantive conditions on the spending of funds that are distributed. There are certain procedural requirements to insure, for example, adequate public accounting for the funds; and there are requirements that periodic reports be made to the federal government.[51] The Muskie-Goodell bill includes the further provision that the states and localities "adhere to all applicable Federal laws" in spending the funds they receive.[52] The tax credit provisions of Muskie-Goodell impose no conditions at all as to how the states may spend the additional funds they receive as a result of the credit. Thus, it is fair to conclude that tax sharing under these bills leaves states and localities free to spend the funds as they please.

To proponents of tax sharing the absence of control is an essential aspect of the scheme dictated by its political rationale. That rationale calls for a restored independence to states and localities. While increased federal funds might be necessary for that independence, tying any strings to the aid would only defeat its purpose. In addition to this philosophical rationale, there is the more practical argument for unconditional aid that it offers an escape from the administrative morass of the present system of conditional grants-in-aid.[53]

To the critics the lack of controls is disturbing. They argue that it is a matter of national concern how the federal funds are spent and fear that the spending decisions of states and localities may not best serve the national interest. This argument has more force in the case of revenue sharing than in the case of the tax credit. Under the tax credit approach, the federal government can be viewed as merely releasing to each state some of the state's

51 Muskie-Goodell § 105(a); Nixon § 601(a).

52 Muskie-Goodell § 105(a)(4).

53 Hearings on *Creative Federalism Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations*, 89th Cong., 2d Sess., pt. 1, 90th Cong., 1st Sess., pt. 2-A (1967) [hereinafter cited as *Creative Federalism*].

own resources. It is arguable that the federal government has no more right than the state to those resources in the first place and thus that it has no legitimate interest in the use that the state makes of those resources. With revenue sharing, on the other hand, resources are taken from one state and redistributed to some extent to others. Here it makes more sense to talk in terms of federal funds being turned over to states, and thus the federal government arguably has a more legitimate interest in controlling how those funds are spent.

Another source of national concern with state and local expenditures is the theory of "spillover" costs and benefits. In a mobile country, the efforts made by one community in such areas as education, welfare, and pollution are bound to have an impact on other communities as well. Walter Heller has recognized this spillover as justification for conditional grants-in-aid in specific functional areas (such as those listed above), but he implied that spillover considerations do not require that conditions be placed on general, multi-purpose grants.[54] This distinction is of questionable force. It is very likely that the funds received through revenue sharing would be spent in many of the very same areas in which grants-in-aid are made. The degree of spillover would depend on the relative size of the funds involved in revenue sharing.

There are three general arguments that can be made in favor of placing controls on the funds distributed through revenue sharing. The first argument derives from the separation of taxing and spending authority inherent in revenue sharing. It is argued that states and localities would be less responsible in spending funds which they bore no responsibility for raising. However this theory is not particularly convincing. The federal funds received by a given community are likely to be small as compared with its financial needs. Hence, it seems unlikely that the community would squander those funds.

The second general argument is that national domestic priorities would be adversely affected by revenue sharing. The concern here encompasses two possibilities: either that states and locali-

54 Heller, *A Sympathetic Reappraisal of Revenue Sharing*, in REVENUE SHARING AND THE CITY 3, 14-16 (H. Perloff & R. Nathan eds. 1968) [hereinafter cited as Heller].

ties would lower their own taxes, thus reducing total public spending, or that they would spend the funds in ways not geared to maximize national welfare. The unlikelihood of the first possibility because of the incentives built into the proposals has already been discussed.[55]

The second possibility may present greater cause for concern. It is not easy to articulate national priorities. Priorities may refer to those basic areas of national concern — education, health, welfare — that seem to withstand the passage of time and the changes in administrations. The concept may also include what seem to be the more pressing concerns of the moment — race relations, the urban crisis, environmental control, and law and order.

Some proponents of revenue sharing have argued that an analysis of past state expenditure patterns indicates that the concern over priorities is unfounded.[56] Taking the approach of these men, but relying on more recent statistics, one can make some observations on the nature of state and local expenditures. In fiscal 1968 almost 80% of state and local general expenditures was accounted for by the following categories: education (40.2%); highways (14.1%); public welfare (9.6%); health and hospitals (7.4%); police and fire (4.9%); and sewerage and other sanitation (2.6%).[57] A similar pattern was also reflected in the growth of state and local expenditures over a five year period. Of the $33.1 billion increase in such expenditures since fiscal 1964, almost 80% consisted of the following: education (44.9%); highways (8.5%); public welfare (12.4%); health and hospitals (8.0%); police and fire (4.4%); and sewerage and other sanitation (1.3%).[58]

These statistics provide at least some indication of how state and local governments mights in the future allocate increased revenue received through tax sharing. It seems reasonable to assume that the great bulk of state and local effort will continue to be in these areas of vital concern to the public. This, of course, is not a complete answer to the worry over priorities. The fact

55 *See* text at notes 36-38 *supra.*

56 Heller, *supra* note 54, at 20-21. *See also* BREAK, *supra* note 37, at 137; Brazer, *Comments on Block Grants to the States*, in REVENUE SHARING AND THE CITY 100-03 (H. Perloff & R. Nathan eds. 1968).

57 GOVERNMENTAL FINANCES, at 18-19.

58 *Id.*

that 40% is being spent in education does not guarantee that the money is being well spent (for example, there may be functional and geographical areas in the field of education that are not getting their fair share of funds). Also, there are those currently more pressing concerns mentioned above to which state and local governments may be slow in responding. But these additional arguments seem only to indicate that there remains a need of federal attention to domestic problems, either through direct action or specific grants-in-aid. On balance, the concern over priorities does not demand the conclusion that funds should properly be given to states and localities only with strings attached.

The third argument in favor of controls derives from fundamental doubts as to the administrative capabilities, and sometimes as to the integrity, of state and local governments. Senator Muskie, a present advocate of tax sharing, pointed out in Senate hearings on creative federalism four years ago that the reason for conditions on grants-in-aid was "the reluctance of past Congresses to trust the state and local governments to do this job effectively."[59] In response to Governor Rockefeller's argument that states in recent years had made great improvements in meeting the difficult problems facing them, Senator Muskie remained skeptical, suggesting that "[t]he picture is certainly a spotty one."[60] Others have noted that corruption, over-decentralization, and inefficiency are most prevalent at the state level of government.[61] With respect to local governments, one authority has referred to their "fragmentation, political weakness, and antiquated organization which greatly impair them for useful service as decision-making instruments to meet the problems of this high-flying age."[62] One answer that can be made to these critics is that the states can be expected to get their administrative houses in order once tax sharing relieves them from the severe financial pressures of recent years. But if these criticisms are valid, such a response sounds like little more than wishful thinking.

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59 2-A *Creative Federalism*, at 565.

60 *Id.* at 566.

61 Fitch, *Reflections on the Case for the Heller Plan*, in REVENUE SHARING AND THE CITY 75, 78 (H. Perloff & R. Nathan eds. 1968) [hereinafter cited as Fitch].

62 *Id.* at 79.

A much more useful response might lie along the lines suggested by Representative Henry Reuss of Wisconsin.[63] Under the Reuss bill, a very small amount (an average of about $1 million per state) would first be granted to every state. Each state would use this initial fund to finance the planning of a Modern Government Program. In order to qualify for additional federal funds, each state would have to receive approval of its plan first by a regional committee of state governors and then by the federal government. Such programs would include plans for dealing with interstate regional problems, plans for the use of the federal funds to be distributed, and plans for "strengthening and modernizing state (and local) governments — by constitutional statutory and administrative changes — including recommendations concerning more efficient executives and legislatures, state borrowing powers, taxation and expenditures, and personnel systems."[64]

In the 1967 Senate hearings on creative federalism, there was some support for the imposition of broad "conditions" along the lines of the Reuss bill. Senator Muskie and HEW Secretary Gardner agreed that some sort of state plan for allocation of resources might be a proper prerequisite to any distribution of tax sharing funds.[65] Later in the hearings, Governor Hoff of Vermont recommended that "each state should be required to put its own house in order administratively and socially as a precondition to assistance under any tax sharing program."[66] He further suggested that the distribution of "funds under any such (revenue sharing) agreement should be an instrument for reform in the structure and operation of state and local government to assure higher quality public services."[67]

Neither the Nixon nor the Muskie-Goodell bill contains any planning requirements of the kind contained in the Reuss bill. Senator Muskie apparently has changed his views since the 1967

63 H.R. 1166, 90th Cong., 1st Sess. (1967).

64 Reuss, *Revenue Sharing as a Means of Encouraging State and Local Government Reform*, in 2 SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 90TH CONG. 1ST SESS., REVENUE SHARING AND ITS ALTERNATIVES: WHAT FUTURE FOR FISCAL FEDERALISM 977, 988 (1967).

65 1 *Creative Federalism*, at 283.

66 2-A *Creative Federalism*, at 537.

67 *Id.*

hearings. Such requirements may have been omitted for the sake of simplicity in the proposals or as a concession to those who are wedded to the political rationale of revenue sharing. That rationale calls for increased independence for the states which might be thwarted by conditioning the aid on federal approval of self-improvement plans.

B. *Pass-through*

The one feature of the Nixon and Muskie-Goodell bills that can be regarded as a substantive condition is the so-called pass-through requirement. Under this provision, each state is required to give a certain percentage of the federal funds it has received to the local governments within its borders.

The pass-through requirement is a significant departure from early thinking in this field.[68] It is considered today to be an extremely important provision, one that is necessary in order to make revenue sharing politically acceptable to those concerned with urban problems. The alleged need for pass-through stems from the indictment that the states have, as the urban crisis has developed, remained faithful to "their historic disinterest in urban affairs."[69]

This theme echoed throughout the 1967 Senate hearings on creative federalism. Senator Muskie argued that the problems of central cities were the "principal domestic problems of this country."[70] But most governors who testified admitted that their states had been somewhat neglectful of urban areas. While the governors contended that a new day of awareness of urban problems was dawning, the mayors who testified remained skeptical. Mayor Tollefson of Tacoma, President of the National League of Cities, noted that "[i]n spite of the governors' good intentions . . . [t]he past leaves too many doubts."[71] Mayor Collins of Boston argued that "most state governments are not yet equipped to assist their cities and towns with comprehensive efforts to solve urban problems," and that the interests of cities "would be jeop-

68 Originally, Heller left open the question of pass-through. Later he concluded that there was a need for some sort of pass-through requirement. Heller, at 32.

69 Fitch, at 77-78.

70 2-A *Creative Federalism*, at 571.

71 *Id.* at 649.

ardized if federal assistance for urban programs were to be channeled through the states."[72]

The pass-through requirement of the Muskie-Goodell bill applies only to cities and counties with a population of over fifty thousand as well as to all school districts within the state.[73] The amount of funds that a city or county receives is based on a formula that measures its tax effort as compared with that of the state and the other localities within the state.[74] After the major cities and counties are taken care of, a portion of what remains is distributed to each school district according to a similar tax effort formula.[75] The pass-through to local governments in the Nixon bill is based on a similar tax effort formula. The main difference is that funds go to every local government within the state, regardless of size or function.[76] Both bills, in order to allow flexibility, provide that a state and its localities may work out an alternative pass-through plan. The local governments in each case are given some protection to assure that the alternative plan is not less favorable than the primary plan established by statute would have been.[77]

One way that a state might attempt to circumvent pass-through is by cutting back on the level of aid it had previously been giving to localities. Both bills attempt to foil such an attempt. The Muskie-Goodell bill requires that in its first three years under the plan each state maintain a level of aid to localities equal to the level in the year prior to the effective date of the statute.[78] This is rather limited protection to local governments. Even during the three year period the state could decline to grant the usual increases in aid to localities. After the three year period the state would be free to reduce aid at will. The Nixon bill has a somewhat stronger provision requiring that a minimum level of aid

72 *Id.* at 653.

73 Muskie-Goodell, §§ 105(b), (e).

74 Muskie-Goodell, §§ 105(b), 101(6), (7).

75 Muskie-Goodell, §§ 105(e), 101(8).

76 Nixon, §§ 501(a), (b). Again, there is the difference that in the Nixon bill all the revenues raised by localities are taken into account while in Muskie-Goodell only the taxes raised are counted. See note 39 *supra*.

77 Muskie-Goodell, § 105(c). Nixon, § 501(c). Whereas the Muskie bill is explicit that the plan not be less favorable, Nixon relies on that being achieved by requiring approval of the alternative plan by greater than 1/2 of the local governments.

78 Muskie-Goodell, § 105(a)(3).

be maintained by the state indefinitely.[79] However, this provision is not operative when a state and its localities have adopted an alternative plan for pass-through.[80]

IV. Fiscal Disparities

A. *The Problem Defined*

The concept of fiscal disparaties originated in a study made by the Advisory Commission on Intergovernmetal Relations (ACIR) on the financial health of governments at different levels in the United States.[81] The term "fiscal disparities" refers to the significant differences that exist in the fiscal capacities of the various governments in the country.[82] Such disparities exist among states, between a state and its local governments, and among localities themselves. Evidence of this is included in the discussion that follows.

The problem of fiscal disparities raises the most important and interesting test of the tax sharing concept. It subjects the Nixon and Muskie-Goodell bills to perhaps their most serious challenge. However, one fundamental point should be noted at the outset. It is on this question of disparities that the difference between the revenue sharing and tax credit approaches is most significant; the tax credit approach does not purport to alleviate fiscal disparities. The tax credit can only encourage states to increase their level of taxation. Unlike revenue sharing, it cannot take funds from a wealthy jurisdiction and give them to a poor one. This fundamental difference between the two approaches should be borne in mind throughout the following discussion.

One recent commentator on the subject of tax sharing has argued that to discuss revenue sharing in terms of alleviating fiscal disparities is to veer from the original and primary purpose of revenue sharing, which was "strengthening state fiscal discretion."[83] Further, he contends that the questions "of equaliza-

79 Nixon, § 601(b).
80 *Id.*
81 1, 2 ACIR.
82 The term "fiscal capacity" refers to the tax resources available to a government in relation to the level of public services it must provide.
83 Turnbull, *Federal Reserve Sharing*, 29 Md. L. Rev. 344, 352, 354-55 (1969).

tion and pass-through originate principally in the political arena, not in fiscal federalism."[84]

The argument that alleviating disparities should not be an primary goal of revenue sharing is disturbing. From the outset, Heller's plan called for the distribution of funds on a per capita basis, and thus some redistribution was inherent in the scheme. Moreover, in reviewing six ideal criteria of any revenue sharing scheme, he listed the following two among them: "[reducing] economic inequalities and fiscal disparities among the states; and [ensuring] that the plight of local, and especially urban, governments will be given full weight."[85] According to Heller, "a significant part of the case for revenue sharing rests on its role in narrowing the gaps in service levels between wealthier and poorer states."[86]

As noted, the equalization feature of revenue sharing distinguishes it most significantly from the tax credit approach. If one were primarily concerned with strengthening the state fiscal discretion, then the tax credit or a system of tax sharing whereby funds were returned to the state of origin would be the logical answer. The concept of revenue sharing, on the other hand, seems to point very much in the direction of at least some degree of equalization.

B. *Interstate Fiscal Disparities*

Although there is some indication that the disparity in interstate fiscal capacity has been decreasing gradually in the past two decades,[87] it still remains a significant problem. In 1965, George Break concluded that according to "any measure used (and state per capita personal income seems to be the best single choice currently available) interstate differences in both fiscal capacity and the need for public services are clearly very wide."[88] Break examined four measures of a state's fiscal capacity. These measures, developed in a study by ACIR, were personal income, income of above minimum families, income produced, and yield of a repre-

84 *Id.* at 352.
85 Heller, at 5, 6.
86 *Id.* at 25.
87 *See* 1 ACIR, at 76-77.
88 BREAK, at 119.

sentative tax system. In each of these categories, the variations among states were substantial.[89] In 1967 Walter Heller observed how much larger were the per capita public expenditures and tax receipts of some wealthier states as compared with those of their poorer neighbors. He noted further that the tax efforts of the poorer states were just about as great as those of the wealthier ones. According to Heller, "the inescapable conclusion that the poorest states are making just as great a tax effort as the richest states — and getting a much poorer diet of governmental services for their pains — is a serious indictment of . . . our fiscal federalism."[90]

Taking per capita personal income as the measure of state wealth, recent figures indicate that there still exists a good deal of disparity in that wealth. Per capita personal income in 1967, as a percentage of the United States average, ranged from 126% in Connecticut (131% in Washington D. C.) to 60% in Mississippi.[91] The fifty states (plus the District of Columbia) are ranked according to these percentages in the Distribution Table. This Table will serve as a guide for examining the ways in which revenue sharing might be fashioned to meet the problems of fiscal disparities.[92]

The calculations posted in the Distribution Table do not reveal any obvious or striking patterns; those that do emerge are fraught with exceptions. Nonetheless, the Table does serve as a useful focus for discussion.

There are eight columns in the Table, lettered from A to H. Each column reflects how the revenue sharing funds would be distributed according to eight different methods. Roughly speaking, as the columns move from left to right across the Table, the methods result in greater redistribution of the funds. This pattern

89 *Id.* at 114.

90 Heller, at 25.

91 115 CONG. REC. S7106 (daily ed. June 25, 1969) (Muskie-Goodell, Exhibit B).

92 This Table derives from analysis made by George Break. BREAK, at 128-36. The statistics used here update his tables by five years. Also, some of the formulas he suggested were modified here in order to make use of the data available.

Statistical sources for the Table are as follows: Column A — INTERNAL REVENUE SERVICE, STATISTICS OF INCOME 1967, INDIVIDUAL INCOME TAX RETURNS (1969); Columns B, C, F, and G — U.S. BUREAU OF THE CENSUS, SERIES GF 68 — No. 5, GOVERNMENTAL FINANCES IN 1967-68 (1969); Column D — 115 CONG. REC. S7106 (daily ed. June 25, 1969) (Muskie-Goodell, Exhibit B); and Column E and H — NIXON.

DISTRIBUTION TABLE

States Ranked By Per Capita Income As Percent of U.S. Average	Eight Methods for Fund Distribution							
	A	B	C	D	E	F	G	H
1. D.C. 131	.50	.53	.40	.35	.45	.30	.24	.36
2. Conn. 126	2.35	1.86	1.48	1.26	1.21	1.14	.92	.97
3. N.Y. 119	12.40	11.02	9.06	12.25	10.85	7.39	8.74	8.68
4. Ill. 119	7.27	6.53	5.49	4.22	4.28	4.49	3.54	3.42
5. Alsk. 118	.14	.16	.14	.12	.16	.11	.14	.13
6. N.J. 116	4.52	4.11	3.54	3.23	3.02	2.96	2.53	2.42
7. Calif. 116	11.14	11.23	9.62	11.10	10.73	8.05	9.67	8.58
8. Del. 115	.36	.30	.27	.25	.28	.22	.23	.22
9. Nev. 113	.27	.25	.23	.25	.26	.19	.24	.21
10. Mass. 112	3.26	3.07	2.72	3.04	2.69	2.35	2.28	2.15
11. Wash. 112	1.80	1.74	1.64	1.67	1.79	1.43	1.59	1.43
12. Md. 108	2.35	2.01	1.88	1.94	1.74	1.68	1.64	1.39
13. Mich. 108	5.01	4.66	4.37	4.08	4.27	3.95	4.08	3.42
14. Ha. 105	.37	.39	.39	.50	.48	.36	.44	.38
15. R.I. 105	.48	.48	.46	.40	.39	.42	.37	.31
16. Ohio 102	5.60	5.38	5.30	4.05	4.35	5.06	4.23	3.48
17. Ind. 101	2.49	2.56	2.53	2.46	2.43	2.43	2.23	1.94
Totals For 17 Richest States	60.31	56.28	49.52	51.17	49.38	42.53	43.11	39.49
18. Penns. 101	6.04	5.93	5.86	5.39	5.03	5.64	4.78	4.02
19. Wisc. 100	2.00	2.11	2.11	2.31	2.40	2.05	2.28	1.92
20. Colo. 99	.90	.99	1.02	1.10	1.18	1.00	1.12	.94
21. Minn. 99	1.57	1.78	1.82	2.11	2.15	1.79	2.18	1.72
22. Iowa 98	1.12	1.37	1.37	1.37	1.52	1.36	1.46	1.22
23. Neb. 98	.60	.71	.72	.64	.69	.71	.72	.55
24. Ore. 97	.93	.98	1.00	1.10	1.13	1.00	1.06	.90
25. Kan. 97	.90	1.11	1.15	1.16	1.23	1.15	1.16	.98
26. N.H. 97	.34	.33	.35	.32	.30	.35	.29	.24

DISTRIBUTION TABLE (Continued)

States Ranked By Per Capita As Percent of U.S. Average	Eight Methods for Fund Distribution							
	A	B	C	D	E	F	G	H
27. Wyo. 95	.13	.15	.16	.21	.22	.16	.22	.18
28. Mo. 95	2.13	2.20	2.31	2.10	2.05	2.37	2.00	1.64
29. Fla. 90	2.69	2.73	3.08	3.12	3.17	3.31	3.42	2.54
30. Vt. 89	.16	.19	.21	.23	.23	.23	.26	.18
31. Va. 89	1.97	2.03	2.30	2.17	1.98	2.51	2.27	1.58
32. Mont. 88	.24	.31	.35	.38	.40	.38	.45	1.32
33. Tex. 87	4.56	4.77	5.49	4.58	4.96	6.13	5.44	4.97
34. Ariz. 86	.62	.71	.83	1.00	1.03	.94	1.12	1.82
35. Me. 84	.35	.41	.49	.50	.47	.56	.52	1.38
36. Okl. 84	.89	1.05	1.26	1.28	1.35	1.46	1.56	2.08
37. Utah 82	.34	.43	.52	.58	.61	.61	.70	1.49
38. S.D. 82	.18	.28	.33	.37	.41	.39	.46	1.33
39. Idaho 82	.23	.29	.35	.42	.43	.42	.49	1.34
40. Geo. 80	1.55	1.83	2.30	2.07	2.22	2.77	2.75	2.78
41. N.D. 79	.18	.25	.31	.34	.46	.38	.55	1.37
42. N.M. 78	.32	.40	.51	.54	.66	.63	.80	1.53
43. La. 78	1.27	1.44	1.87	1.99	2.22	2.33	2.75	2.78
44. N.C. 77	1.58	1.96	2.57	2.34	2.43	3.23	3.02	2.94
45. Kent. 77	.99	1.24	1.61	1.48	1.54	2.04	1.93	2.23
46. Tenn. 76	1.34	1.50	1.99	1.78	1.85	2.55	2.35	2.48
47. W. Va. 74	.59	.67	.90	.91	.89	1.19	1.21	1.71
48. S.C. 70	.73	.92	1.35	1.18	1.26	1.87	1.72	2.01
49. Ala. 68	1.00	1.22	1.78	1.58	1.80	2.53	2.47	2.44
50. Ark. 66	.49	.66	1.01	.92	1.00	1.47	1.35	1.80
51. Miss. 60	.49	.71	1.17	1.23	1.34	1.89	2.03	2.07
Totals For 17 Poorest States	12.52	15.26	20.32	19.51	20.94	26.32	26.66	33.76

can be seen most clearly by looking at the total percentage received by the wealthiest 17 jurisdictions (the wealthiest third of the states, including the District of Columbia) as compared with the percentage received by the poorest 17. As one moves from A to H, the share received by the wealthiest 17 decreases while the share of the poorest 17 increases.

The first column, A, shows the precentage of the total each state would receive if the funds were returned to the state of origin.[93] The resulting distribution is analogous to the effect of the tax credit. There is no equalization involved. Naturally, the richer states which have paid the most taxes would get the higher percentages in return. Column B, under which the funds are distributed according to state personal income, yields similar results.[94] Again, the richer states get the higher percentages. Unlike column A, column B does have some equalizing effect. The wealthier states under B would not get as much back as they would under A. The reason for this, however, is the progressivity of the federal income tax; redistribution is not part of the design of this particular method.

Column C presents what has been regarded as a most obvious and useful basis for distribution. The funds under this column would be distributed according to each state's fractional share of the national population. As viewed by Break, population "is the simplest and most readily available measure of the general need for public services."[95] Pechman agreed with this, and he also noted that population takes some account of capacity to tax. Under column C there would be some redistribution of funds from rich states to poor because the former pay more federal taxes per capita than do the latter.[96]

This double advantage of population as a basis for distribution brings up an important point. Thus far, for the sake of statistical analysis, personal income has been assumed to be the sole measure

93 The percentages are calculated by dividing the federal income tax collected annually from each state by the total federal income taxes collected in the country.

94 The percentages are calculated by dividing each state's personal income for the year by the total personal income in the United States.

95 BREAK, at 128.

96 Pechman, *Financing State and Local Governments*, in 2 SUBCOMM. ON FISCAL POLICY OF THE JOINT ECONOMIC COMM., 90TH CONG., 1ST SESS., REVENUE SHARING AND ITS ALTERNATIVES: WHAT FUTURE FOR FISCAL FEDERALISM 763, 771 (1967).

for determining the fiscal capacity of a state. However, the taxable resources of a state tell only one side of the story. The other side depends on the amount of public services that are demanded within that state. Population may provide some key to determining the level of public services. But, as indicated below in the discussion on intrastate disparities, population density may be a much more accurate determinant.

Columns D and E show the distributions that would result under the Muskie-Goodell and Nixon bills.[97] Of the top 17 states on the list, nine would receive more funds under the Muskie-Goodell bill than under the Nixon bill; of the 17 poorest states, no less than 15 would receive more money under the Nixon bill. In percentage terms, moving from Muskie-Goodell to Nixon, the share of the 17 wealthiest states would fall from 51.17% to 49.38%; and the share of the poorest 17 states would climb from 19.51% to 20.94%. The reason for the larger redistribution effect of the Nixon bill is its tax effort formula which is based on the general revenues raised by states and localities. The tax effort formula in the Muskie-Goodell bill, on the other hand, is based mainly on the taxes raised by state and local governments.[98]

The addition of a tax effort factor to the population factor does not increase redistribution significantly. Looking at columns C through E, there is little variance either in the total percentage figures for the wealthiest 17 states or in the totals for the poorest 17. As noted earlier, the tax effort factors were placed in these bills for reasons other than equalization.[99]

The remaining columns show how a greater degree of equalization could be achieved. In column F there is added to population an additional factor of the reciprocal of per capita income. This additional factor consists of the average per capita personal income in the United States divided by the per capita personal income of the given state.[100] The use of the reciprocal income

97 To calculate the percentage for each state under these methods, the population of each state is multiplied by its tax effort factor; this product is then divided by the sum of all such products for every state.

98 *See* text at notes 39-42 *supra.*

99 *See text* at note 36 *supra.*

100 To calculate the percentage for each state, the state's population is multiplied by this reciprocal factor, and the product is then divided by the sum of all such products for every state.

factor is appealing. One may suppose that per capita personal income varies directly with a state's capacity to raise revenue, and that it varies inversely with the need for public services within the state. The reciprocal per capita income factor takes account of these factors, and thus it serves to direct funds to those states where they are most needed and least available.

Column G demonstrates that a revenue effort factor can be engrafted on the formula in column F to insure that the system is not helping those states that do not help themselves. The revenue effort factor used here is the total general revenues raised by each state per $1000 of personal income, divided by the average of all states.[101] However, the addition of the revenue effort factor does not seem to have a significant impact on equalization.

Column H reflects a type of "rule of thumb" equalization. Here, 20% of the fund is divided equally among the 20 poorest states. The remaining 80% is distributed among all 51 jurisdictions, according to the formula of the Nixon bill. The result is a greater degree of equalization than under any of the other methods listed. This approach seems to have had the most support among those who have recommended increasing the redistribution effect beyond that of the population basis.[102] The formula is arbitrary, but it is the easiest one with which to work. One can achieve lesser or greater degrees of redistribution simply by juggling the number of poor states to receive the additional amount as well as by varying the percentage which determines that additional amount.

Having examined several possible ways of distributing revenue sharing funds, one is tempted to ask which method is best. Some argue that there should be no equalization at all because the rich states already contribute enough to poor states through the federal

101 This factor is added as an additional multiplier to the numerator used for each state in Column G, and the new product is then divided by the sum of all such new products for every state.

102 *See, e.g.*, Heller, at 26; *see also* 1 ACIR, Appendix B, Table B-2. Senator Jacob Javits (R-N.Y.) introduced a similar bill in 1967. S. 482, 90th Cong., 1st Sess. (1967). Under the Javits plan, 85% of the total fund for distribution would go to all of the states according to a formula based on population plus relative revenue effort. The remaining 15% would go to those states with below average per capita income; the actual amount that each of these poorer states would receive would depend on how far below the per capita average it fell. As an additional limiting factor, no one state could receive more than 12% of the total fund.

grants-in-aid program.[103] However, George Break's examination of the equalization effect of present federal grants indicated that such effect is "strictly limited."[104] Another argument is that equalization among states is relatively insignificant because more serious disparities exist below the state level. These disparities are discussed *infra.*

Some degree of equalization seems to serve best the purposes of tax sharing in terms of both its economic and political rationales. It seems doubtful that states with low fiscal capacity can benefit significantly from tax sharing save at the relative expense of their wealthier neighbors. Exactly how much equalization should be achieved is a matter of judgment which would depend in part on the careful analysis of considerably more data than has been presented here.

For purposes of this article, it is sufficient to articulate the factors that should be utilized in fashioning a statutory response to this problem. The three factors which appear to be most valuable are population, personal income, and revenue effort. The Muskie-Goodell and Nixon bills take two of these factors into account. The decision not to include the personal income factor was perhaps a political one. Even without this third factor, both bills achieve a considerable degree of redistribution, particularly as compared with returning the funds to their state of origin.

C. *Intrastate disparities*

During the past decade the nation became painfully aware of the magnitude of the problems facing the great urban centers. Solutions to these problems have been thwarted to some extent by the paucity of financial resources of local governments. In part this problem may be attributed to the fact that severe fiscal disparities exist among localities which are probably more significant than those existing between the states. The most serious intrastate disparity is that existing between central cities and outlying suburbs. The final section of this article will discuss the factors underlying this disparity and examine how successful tax sharing proposals might be in alleviating it.

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103 Turnbull, *Federal Revenue Sharing*, 29 MD. L. REV. 344, 351 (1969).
104 BREAK, at 120-27.

Some clarification of terminology is necessary at the outset of the discussion. The term, metropolitan area, as used in this discussion refers to the "standard metropolitan statistical area" (SMSA).[105] An SMSA, according to the Bureau of the Census, is a county with at least one city in it with a population of 50,000 or more. A "central city" is the largest city within an SMSA.[106] Those parts of the SMSA outside of the central city may be referred to as "suburbs" or "suburban areas." In 1968 an estimated 127.5 million people of a total United States population of 198.2 million (64.3%) lived in metropolitan areas. Of those 127.5 million, about 58.4 million (45.8%) lived in central cities.[107]

The central city — the oldest, most densely populated part of the metropolitan area — is generally faced with the most severe fiscal difficulties. It is here that the need for public services is greatest while the taxable resources available are the smallest. An examination of the factors underlying this situation is useful for two purposes: first, to prove that the situation does in fact exist; second, to provide clues as to how tax sharing might seek to remedy the situation. A very valuable guide for such an examination is an extensive report on the subject made in 1967 by ACIR.[108]

Looking first to the taxable resources available to central cities, there are significant differences in the incomes of central city residents as compared with their suburban neighbors. The average suburban income is higher than that within the central city. Moreover, this gap increases with the size of the SMSA. In 1964, the average suburban household income was larger than the average city income in every one of the thirty-seven largest SMSA's (after adjustments were made for rural components outside the central city).[109] More recent statistics illustrate this pattern more

105 U.S. BUREAU OF THE CENSUS, SERIES P-20 — No. 181, POPULATION OF THE UNITED STATES BY METROPOLITAN-NONMETROPOLITAN RESIDENCE: 1968 AND 1960, at 9 (1969). A county may also qualify as an SMSA if it has "twin cities" with a combined population of at least 50,000. In New England, cities and towns, rather than counties, comprise SMSA's.

106 *Id.* at 9. One SMSA may have as many as three central cities. In such cases, the first city must be the largest city within the SMSA; the second city must have at least 250,000 inhabitants; and the third city must be at least one-third the size of the first, with a minimum population of 25,000.

107 *Id.* at 1.

108 2 ACIR, at chs. 3, 4.

109 *Id.* at 40-45.

clearly. In 1967 the median income of central city families was 83% of the income of suburban families (down from 88% in 1959). In the case of metropolitan areas of less than a million population the figure was 90% (down from 95% in 1959). And in metropolitan areas of more than a million inhabitants, the median income of central city families was only 79% of that of their suburban counterparts (down from 83% in 1959).[110]

A much more common source of tax revenue than income for local governments is property.[111] Although the evidence is sketchy, there is some indication that in this area as well, the wealth of central cities is declining while the wealth of the suburbs is increasing. In terms of residential property, the percentage of single-dwelling and owner-occupied homes is much greater in the suburbs, while the proportion of unsound housing is much higher in the central city.[112] In terms of industrial property, the ACIR report noted that between 1960 and 1965 "62% of the valuation of permits for new industrial building in SMSA's was issued for construction outside the central cities."[113] Also, between 1958 and 1963 manufacturing employment increased 15.6% in the suburbs while in the central cities it declined by 6%.[114]

A final potential source of local tax revenue is retail sales. Again, there is evidence of the same trend of increasing disparity between central cities and suburbia. Between 1958 and 1963 retail sales in the suburban areas of the thirty-seven largest SMSA's increased by 45.5%; the increase for the central cities in those same metropolitan areas was a mere 4.8%.[115]

Turning now to the expenditures facing local governments in metropolitan areas, in fiscal 1965 the central cities of the thirty-six largest SMSA's had per capita expenditures 21% higher than those of the suburbs and almost two-thirds higher than those of local governments in the rest of the nation.[116] This disparity was

110 U.S. BUREAU OF THE CENSUS, SERIES P-23-No. 27, TRENDS IN SOCIAL AND ECONOMIC CONDITIONS IN METROPOLITAN AREAS 36 (1969).

111 In fiscal 1968 local governments in this country raised $26.8 billion in property taxes out of $31.2 billion total of all taxes raised. In the same year the total amount of general revenue (including taxes) raised by local governments from their own sources was $40.9 billion. GOVERNMENTAL FINANCES, at 20.

112 2 ACIR, at 47.

113 *Id.* at 53.

114 *Id.*

115 *Id.* at 50.

116 *Id.* at 62.

even greater with respect to noneducational expenditures with central cities spending $232 per capita, suburbs spending $132 per capita, and the remainder of the local governments spending only $96 per capita.[117]

There are several causes for these differences in rates of expenditures. The rate of poverty tends to be higher in the central city than in the suburbs, and thus the per capita expenditure on welfare is correspondingly greater.[118] Also, higher crime rates and poorer building conditions in the central city cause the per capita expenditure on police and fire protection to be higher than in the suburbs.[119] With respect to education, however, the per capita expenditure in fiscal 1965 was less in the central city than it was in both the suburbs and the nonmetropolitan areas. Also, the per pupil expenditure was less in the central city than in the suburbs.[120] This comparison of education expenditures describes an unfortunate situation, since the underprivileged ghetto children of the central city arguably require a larger per pupil expenditure in order to obtain the same educational opportunities afforded the more affluent children of the suburbs.

The critical disparities that exist in metropolitan areas are not appreciably alleviated by the current system of state and federal grants. In fiscal 1965, state and federal aid supported 27% of central city expenditures in the thirty-seven largest SMSA's and 29% of suburban expenditures.[121] In the absence of any fundamental change in the grant system, there is reason to expect that these disparities will continue to exist and probably grow in the future.

In searching for solutions to the problems of central cities, one is tempted to depart from the scheme of analysis in this paper and look for approaches other than tax sharing. It is attractive, for example, to think in terms of direct federal aid to the cities, or direct assumption of urban chores by the federal government. In view of the traditional neglect of cities by states, the federal

117 *Id.* at 71.

118 In 1967, 14% of the residents of central cities were living below the poverty level. The figure for suburban areas was 7%. U.S. BUREAU OF THE CENSUS.

119 See 2 ACIR, at 48, 108-09.

120 *Id.* at 64-65.

121 *Id.* at 84-86.

government could simply by-pass the states completely and give unconditional funds directly to big cities.[122] Alternatively, the federal government could relieve cities of the responsibility for welfare and make it a national burden.[123]

These alternatives seem at first blush to be more direct and effective ways of solving the fiscal problems of the city than tax sharing. But to advocates of tax sharing these alternatives are much less satisfactory. For one thing, the federal assumption of local responsibilities is inconsistent with the political rationale of tax sharing. Also, direct unconditional grants to the cities would so undermine the states as to cause, according to Heller, a disturbing "basic realignment of powers" in the federal system.[124] Thus, this article returns to analysis of the tax sharing bills to discover the degree to which these approaches meet the problem of intrastate fiscal disparities.

In fashioning a tax sharing approach to meet this problem, it is important once again to note the fundamental difference between revenue sharing and the tax credit. The tax credit would not alleviate disparities existing between the central city and the suburbs. The tax credit would at best only encourage a local government to tap the resources within its boundaries. Thus, the credit would potentially benefit the suburban areas (with their relatively greater taxable resources) more than the central city. However, in all probability, it would be of little benefit to any local government whether central city or suburban. Local governments place little reliance on the personal income tax as a source of revenue.[125] Usually local governments can impose an income tax only after obtaining state authorization. It is doubtful that states would be willing to grant to the cities the opportunity to take advantage of the tax credit. Even if states did grant permission, localities still might be reluctant to impose an income tax, since tax competition among neighboring localities may be keener than it is among the states.

122 See H.R. 13479, 91st Cong., 1st Sess. (1969).

123 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICAN AND THE FEDERAL SYSTEM, 24-25 (1969). Musgrave among others favors this proposal. See Musgrave, *supra* at 219.

124 Heller, at 35.

125 In fiscal 1968 local governments collected only $1.1 billion in personal income taxes out of the $31.2 billion in total taxes. GOVERNMENTAL FINANCES, at 20.

The revenue sharing approach potentially offers a more suitable way of distributing federal funds so as to alleviate intrastate fiscal disparities. Unfortunately, the bills under consideration do not take advantage of that potential. In the Nixon bill, no distinction is made in the size or type of local government in determining each locality's share of the state's take. In the first year of operation, the total amount received by all the local governments would be about $150 million (or about 30% of the total $500 million fund for distribution).[126] The administration regards this absence of intrastate redistribution as one of the "guiding principles" of its revenue sharing scheme. It has suggested that "distributions should be as equivalent within states as possible, with no attempt to punish or reward certain forms or sizes of general government ...."[127] This principal of neutrality seems to stem more from political considerations than from strict concern over public finance. The federal government, if it is to enter the area of revenue sharing at all, should spend its funds so as to favor those areas where the money is most desperately needed.

The amount of money that each local government would receive under the pass-through provisions of the Nixon bill depends on the amount of revenue it raises from its own sources in relation to the amount of revenue so raised by all the other local governments within the state plus that raised by the state itself. The administration has pointed out that this would be advantageous to central cities because they tend to raise the most revenue per capita.[128] However, argument ignores the fact that the higher per capita revenue effort on the part of central cities reflects a much greater per capita burden placed on its residents. The Nixon scheme would reward central cities only to the extent that they continue to impose this heavier burden.

The Muskie-Goodell bill goes a bit further than the Nixon bill in assisting central cities. The main difference is that general local governments with a population of less than 50,000 would receive nothing; those between 50,000 and 100,000 would receive

126 115 CONG. REC. S11110-11 (daily ed. Sept. 23, 1969) (Table, State and Local Shares Under Administration Revenue Sharing Proposal).

127 *Hearings on S. 2483*, at 150.

128 Unpublished Remarks by M. Weidenbaum, Assistant Secretary of the Treasury, before the 46th Annual Congress of Cities, San Diego, Calif., Dec. 3, 1969, at 3-4.

slightly less proportionately than those over 100,000. Also, the revenue efforts of these localities are calculated by multiplying by a factor of two in order to give them double weight. According to the ACIR, which prepared the Muskie-Goodell bill, the "50,000 cutoff coupled with the double weighting of the tax performance of these major local governments reflect the Commission's concern for the growing fiscal plight of the nation's largest cities and counties."[129]

Under the pass-through provisions of the Muskie-Goodell bill, all the "major" cities with qualifying populations would receive a total of 22.12% of the fund for distribution. "Major" counties would receive an additional 12.48%. Independent school districts, the only other jurisdictions entitled to a portion of the states' share, would receive 16.09%, bringing the total share of all local governments to just over 50%.[130] Central cities would of course have to share these percentages with suburban cities having over 50,000 populations and in effect with all the suburban communities within highly populated counties. The benefit central cities would receive from the share going to independent school districts would depend on the extent to which there are such school districts within central cities.

Aside from the 50,000 and 100,000 population standards, the Muskie-Goodell bill, like the Nixon bill, gives no special consideration to intrastate fiscal disparities. The distribution is based on the taxes raised by localities without any direct regard for the factors of need and capacity.

Formulas for distribution pass-through funds similar to those previously discussed for interstate disparities could be devised to alleviate intrastate fiscal disparities. One could by formula take account of population weighted by all of the following per capita factors: income, property values, and retail sales activity; education and welfare expenditures; crime and poverty levels; tax effort; and the way in which the burden of providing public services within a community is allocated among the various levels of government. For the sake of simplicity and proper emphasis, it is useful to limit these factors to a few of the most important ones.

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129 *Hearings on S. 2483*, at 89.
130 Muskie-Goodell, Exhibit C.

Population alone provides a good starting point. In absolute terms, this would give larger percentages of the fund for distribution to the larger cities. For the sake of administrative efficiency, the 50,000 population cutoff of the Muskie-Goodell bill could be retained; this would also increase further the advantage to large cities. An even more equitable distribution of the fund could be achieved just by weighting the population by four relatively simple factors.

The first factor is the reciprocal of per capita income. The value of this factor has already been discussed[131] with respect to interstate disparities, and the same reasoning holds true here. The second factor is a measure of density, the population per square mile. This factor would tend to favor central cities over the sprawling suburbs. Moreover this factor makes a good deal of sense as a theoretical proposition since one would expect that as density increases the need for public services also increases. The third factor is one which would take account of tax effort. This would be necessary to encourage self-help and to discourage "free-riders." The fourth factor is one that would take account of the way in which the responsibility for public services is allocated among the various concerned governments. The funds going to a given locality would depend in part on the proportion of the total public services provided within that community that is funded by the locality itself rather than by the federal, state, or other local government either directly or through intergovernmental grants. The higher this proportion, the greater would be the funds distributed to that locality. This factor and the tax effort factor would be particularly important in determining the amounts to be received by a county and a large city within the county, where the city provides more public services than the county.[132]

Using these four factors it would be relatively easy to calculate each local government's fractional share of the total pass-through fund.[133] However, once the fractional share is calculated, there

131 See the text following note 100 *supra*.

132 The Javits bill approximates this approach. See note 102 *supra*. It calls for pass-through based on each locality's population, population density, per capita income, costs and certain other "relevant factors."

133 The numerator of the fraction would be the product of the population of the local government multiplied by the four factors. The denominator would be the sum of all such products for every local government in the state.

still remains the problem of determining the total pass-through fund against which the fraction is applied. In determining the amount of the pass-through fund, and consequently the state's residual share, this population and per capita factor analysis will not work because the population of the state is precisely equal to the population of the sum of all its local governments.

In determining the total fund for pass-through one might well fall back on something similar to the Nixon or Muskie-Goodell approaches. The total share for localities could be proportional to the total taxes raised by all the local governments in relation to the total taxes raised by the state and local governments combined. Another approach could be simply to require a given percentage figure, for example 50%, to be passed-through.

Walter Heller has favored this last, simple percentage figure approach; and in the interest of further simplicity, he would leave the distribution of that 50% completely to the discretion of each state. Thus, he would no doubt frown on the elaborate intrastate distribution formula just presented. According to Heller, "Formula after formula aimed at moving funds through the states to the most needful urban units shatters on the rocks of definition and complexity."[134]

Although problems of definition and complexity are no doubt formidable, they do not seem insurmountable. This article, of course, cannot prove the administrative practicality of any particular formula. This article does, however, suggest general avenues of approach that appear likely to yield results in fashioning a statutory response to this problem. The problem of intrastate fiscal disparities — in particular the plight of the central city — is real and pressing. While revenue sharing may never be a cure-all for this problem, it should be designed to be of maximum effectiveness in alleviating intrastate disparities. Neither the Muskie-Goodell nor the Nixon bill accomplish this objective.

V. Conclusion

The basic assumption of this article is that some form of tax sharing would be a desirable way of solving some of the major current problems of public finance in our federal system. Given that

134 Heller, at 33.

assumption, the discussion has focused on what form such tax sharing should take. Three basic approaches — revenue sharing, the tax credit, and a combination of the two — have been examined in the light of four broad criteria. Also, two specific statutory proposals for revenue sharing — the Muskie-Goodell (Title I) and Nixon bills — have been analyzed in some detail according to the same criteria. The question remaining is what, on balance, would be the best form for tax sharing to take.

With respect to size and growth potential, the combined form emerges as the best; the tax credit is second, leaving revenue sharing third. As between the two revenue sharing proposals, Title I of Muskie-Goodell would yield considerably more than the Nixon bill.[135] In terms of the impact on the tax systems, the tax credit admittedly has certain undesirable effects on the federal tax structure which seem to be inherent in all efforts to accomplish social objectives by the use of special tax provisions. However, the tax credit does assure the states of a relatively secure source of revenue not dependent on annual appropriations. Moreover, the tax credit does encourage more progressive and elastic state tax systems. Title I of the Muskie-Goodell bill has the advantage of encouraging increased reliance on state income taxes while the Nixon bill has the preferable revenue effort formula which rewards all revenues raised instead of just taxes and state liquor store profits.

On the issue of federal control, there is really no basis for comparison. None of the approaches discussed imposes any substantive controls. With respect to the last criterion — the alleviation of fiscal disparities — the difference between the approaches is most significant. The revenue sharing approach does alleviate disparities whereas the tax credit does not. The Nixon proposal surpasses Title I of Muskie-Goodell in alleviating interstate fiscal disparities, but the opposite is true in the case of intrastate disparities.

If the political process produces a mandate for some form of tax sharing, then the three most important tests for shaping that form would appear to be as follows: First, the size and growth potential of the fund to be distributed must be adequate in rela-

135 *But see* note 24 *supra.*

tion to the fiscal problems states and localities are likely to face over the next few years. Second, there must be some provision for alleviating the interstate and intrastate disparities that exist today. Finally progressivity and elasticity of the various tax systems involved, particularly on the state and local level, should be encouraged. The one proposal which best meets all three tests is the combined approach of the Muskie-Goodell bill. The Nixon bills fail the first and third tests plus part of the second (*i.e.*, with respect to intrastate disparities). The Ullman bill fails the second test. The Muskie-Goodell bill may have certain shortcomings with respect to each of these tests; but on balance it comes much closer than the other two in fitting the mold of the ideal tax sharing proposal.[136]

136 As of the beginning of 1971, the Nixon approach, in some revised form, is of the three discussed, the one most likely to be enacted eventually into law.

During 1970 the administration's revenue sharing bill met with considerable resistance in Congress. Much of that resistance was provided by Representative Wilbur Mills (D.-Ark.), Chairman of the House Ways and Means Committee. On October 21 Mills criticized revenue sharing publicly for the first time, warning that Congress must guard against such "proposed drains on the revenue." N.Y. Times, October 22, 1970, at 51, col. 1.

The administration, in an effort to overcome Congressional opposition, has attempted to rally support for tax sharing among state and local officials. In early December Murray L. Weidenbaum met with state and local leaders at the National League of Cities Conference in Atlanta. The members of the conference pressed for two changes in the Nixon bill. First, they wanted a greater percentage of the funds to be allocated to the nation's cities. Second, they urged that greater emphasis be placed on the "local option" provision of the bill whereby each state would be able to work out an alternative plan for pass-through. N.Y. Times, December 7, 1970, at 55, col. 1.

In his State of the Union message on January 22, 1971, President Nixon proposed that Congress "enact a plan of revenue sharing, historic in scope, and bold in concept." 117 CONG. REC. H93 (daily ed. January 22, 1971). His revised plan involves a $16 billion package for its first year of operation. Of that amount, $5 billion would be in new and unrestricted funds. The remaining $11 billion, consisting of $10 billion to be allocated from existing federal grant programs and of $1 billion to be appropriated in new funds, would finance very broad categorical grants to state and local governments in the areas of urban development, rural development, education, transportation, job training, and law enforcement. *Id.* at H93-H94.

STANDING COMMITTEE JURISDICTIONS IN STATE LEGISLATURES

ALVIN D. SOKOLOW*

Introduction

The organization of the subject-matter jurisdictions of standing committees is critically important to the handling and disposition of legislation in state legislatures.[1] The diversity of legislative topics a committee is set up to consider can determine the types of legislators who seek and receive assignments to the group,[2] the

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This article is drawn from a larger study of the standing committee structure of the California Senate, prepared for the Senate Rules Committee by the Institute of Governmental Affairs, University of California, Davis, in late 1969. This report was written by the author with the assistance of Race Davies and Raymond Davis, both of the University of California, Davis. The preparation of this "applied research" report in turn benefitted from a long-term study of the California Legislature after reapportionment, undertaken by the Institute through a grant from the National Municipal League.

1 The Illinois Legislative Council has noted that:

> Most observers of the legislative process agree that the most concentrated study and discussion of proposals for legislation occurs in the committee. The committee affords the average member of the legislature the opportunity to raise questions in an informal atmosphere concerning bills before the committee; more important, a committee hearing affords the only formal opportunity for the private citizen to present his views on bills. Consequently, it is probably correct to assert that both the quality of the legislative product and the image that the legislature presents to individual citizens who are actively interested in bills before the legislature is probably largely determined by the manner in which the committee system functions.

ILLINOIS LEGISLATIVE COUNCIL, FUNCTIONING OF ILLINOIS HOUSE COMMITTEE SYSTEM 4 (1965), reprinted in IMPROVING THE STATE LEGISLATURE: A REPORT OF THE ILLINOIS COMMISSION ON THE ORGANIZATION OF THE GENERAL ASSEMBLY (1967) [hereinafter cited as IMPROVING THE STATE LEGISLATURE]. *But cf.* W. CRANE & M. WATTS, STATE LEGISLATIVE SYSTEMS 61 (1968) [hereinafter cited as CRANE & WATTS] which cautions, "In state legislatures, committees are not the powerful, independent, decisionmaking institutions that they are in Congress; but they do influence some decisions . . ." *See also* Wahlke, *Organization and Procedure*, in AMERICAN ASSEMBLY, STATE LEGISLATURES IN AMERICAN POLITICS 143 (A. Heard ed. 1966).

2 For example, one commentator has observed:

> It is frequently a practice for legislative committees to be heavily weighted with members who have some personal interest in the subjects under the committee's jurisdiction. This does guarantee considerable committee familiarity with the subject and perhaps

outside interests which develop access to the members, and the pattern of bill referrals to the committee. These variables in turn affect the ultimate fate of legislation, particularly in states where standing committee recommendations are normally ratified by house floor actions.[3]

Despite the importance of the jurisdictional lines in a committee system, almost no attention has been devoted to this factor in the considerable literature on state legislative organization and procedure.[4] Most studies of the reorganization of legislatures in spe-

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> a degree of independence from control by legislative leadership. It may also guarantee that certain lobbyists receive highly preferential treatment in these committees. Perhaps the most frequent practice is to place only lawyers on the judiciary committee. . . . When a committee is likely to deal with legislation regulating a particular interest, the composition of the committee becomes particularly important. The Senate banking committee in Alabama, for example, a few years ago had a majority of bankers. The alcoholic beverage control committee in the Maryland House recently consisted mostly of tavern keepers, beer distributors, and lawyers representing liquor interests. . . .
>
> At best this practice may simply guarantee that legislators will serve on committees where they can contribute the most knowledge and experience. At worst the system can turn a committee into a powerful lobby influential in passing legislation favorable to a single interest and, more important, unchallengeable in its veto of bills opposed by that interest.

M. JEWELL, THE STATE LEGISLATURE, POLITICS AND PRACTICE 99-100 (1962).

The quality of committee assignments is also a function of which official makes the appointments. In all but three of the houses of the several states, the speaker alone has this power. In the state senates there is less uniformity: in about half, the president of the senate appoints, in about one-quarter, a committee on committees has the power, with the remainder using diverse methods. See 18 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1970-71 at 73 (1970). For a survey of this power of appointment in Congress and in other nations, see M. AMELER, PARLIAMENTS 113-14 (2d ed. 1966).

3 There is, of course, wide variation from state to state in the extent to which committee decisions determine the fate of legislation. Crane and Watts have noted that in some state legislatures committee decisions are not conclusive because the committees approve almost everything presented throwing the responsibility for actual decisions to the total membership. Indeed both houses in fifteen states require that committees report out all bills. *See* CRANE & WATTS 66.

4 See, for example, such overall reports on state legislative reorganization as AMERICAN ASSEMBLY, STATE LEGISLATURES IN AMERICAN POLITICS (1966); COUNCIL OF STATE GOVERNMENTS, AMERICAN STATE LEGISLATURES: THEIR STRUCTURES AND PROCEDURES (1967); COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING STATE GOVERNMENT (1967); STATE LEGISLATURES PROGRESS REPORTER, published by the National Municipal League; and the periodic reports of the Citizens Conference on State Legislatures.

cific states do not deal at all with jurisdictions.[5] They concentrate on the more obvious aspects of standing committee structure — the number and sizes of the committees,[6] the number of assignments per legislator,[7] interim operations, and the conduct of hearings.[8] This neglect is probably due in large part to the haphazard manner in which state legislatures generally establish and maintain jurisdictions. The subject-matter scope of committees is rarely specified in the written rules or resolutions of legislative chambers,[9] but is inferred from the titles given individual committees.[10]

This article surveys several approaches to the organization of standing committee jurisdictions, suggests a general principle for such organization, and considers the related issue of bill referral

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5 A notable exception is a recent report on the Illinois legislature, IMPROVING THE STATE LEGISLATURE. This report discusses in some detail a distinction between "legislation" and "service" committees as a way of efficiently distributing scarce professional staff resources. The service committees, whose responsibilities extend primarily to the administration of house and senate affairs, would require only competent clerical assistance while legislation committees, those committees that actually consider pending legislation, would be the only committees to receive the aid of a professional staff. *Id.* at 56, 67-8.

Committee jurisdiction is also discussed in G. BELL & J. SPENCER, THE LEGISLATIVE PROCESS IN MARYLAND 76 (2d ed. 1963).

6 The number of standing committees, of course, is not completely unrelated to problems of jurisdiction. For example, B. ZELLER, AMERICAN STATE LEGISLATURES 96 (1954), notes: "In practically all states there are too many standing committees in each house, resulting in some cases in needless duplication, confusion, waste of legislative talents, and the absence of clear-cut responsibility of each committee for legislation in its assigned field." And while a half-century ago the number of state legislative committees was rapidly increasing, P. REINSCH, AMERICAN LEGISLATURES AND LEGISLATIVE METHODS 163 (1913), today the trend seems clearly to be towards a reduction in the number of committees, with thirty states showing a net decline, often substantial, 10 states remaining the same in total, and 10 states exhibiting an increase, often minor, between 1964-65 and 1968-69. *Compare* 16 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1966-67 at 53 (1966) *with* 18 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1970-71 at 73 (1970).

7 *See, e.g.*, CRANE & WATTS 61, 66. One frequently voiced criticism is that the practice of assigning individual legislators to a large number of committees makes it difficult for the legislator to develop expertise on any single committee. *See* IMPROVING THE STATE LEGISLATURE 66-67.

8 *See, e.g.*, 18 COUNCIL OF STATE GOVERNMENTS, BOOK OF THE STATES 1970-71 at 73 (1970); CRANE & WATTS 66.

9 This is not the case in Congress where committee jurisdiction is set out in the standing rules of the House and Senate. J. LEES, THE COMMITTEE SYSTEM OF THE UNITED STATES CONGRESS 6 (1967).

10 *See, e.g.*, H. LEWIS, LEGISLATIVE COMMITTEES IN NORTH CAROLINA 13 (1952) in which it is noted that "the best single clue to the areas in which each standing committee functions is furnished by its name." *See also* CRANE & WATTS 65.

practices. Most of this material is taken from a larger study of the standing committee structure of the California Senate[11] prepared for the Senate Rules Committee by the Institute of Governmental Affairs, University of California, Davis, in 1969. Although the observations in this article are applicable to state legislatures in general, most of the specific data used is based on the past organization and procedures of the California Senate. Committee jurisdictions are detailed in the standing rules of this chamber, unlike most other state legislative houses, including the California Assembly.

I. Alternative Classifications

Committee jurisdictions are really statements or inferences about the classification of legislation. Any one legislative body follows more than one classification scheme in establishing and maintaining committee jurisdictions. Several alternative classification schemes or rationales for committee jurisdictions are suggested below. Most of these types of classifications are illustrated by standing committee jurisdictions in the California Senate (Table 1).

TABLE 1

Standing Committee Jurisdictions, by Type of Classification, in the California Senate, 1969

Committee	Jurisdiction*	Type of Classification
Agriculture	Agricultural Code and related uncodified bills.	Statutory Code
Business & Professions	Business & Professions Code and related uncodified bills except horseracing and liquor.	Statutory Code
Education	Education Code and related uncodified bills including the University of California.	Statutory Code, Executive Department
Elections & Reapportionment	Elections Code, related uncodified bills, and constitutional amendments.	Statutory Code, Process
Finance	Appropriations bills including the Budget Bill.	Process

11 A. Sokolow, The Standing Committee Structure of the California Senate: Possibilities for Reorganization, (Institute of Governmental Affairs Research Report 16, University of California, Davis, Feb. 1970).

TABLE 1 (*Continued*)

Committee	Jurisdiction*	Type of Classification
Fish & Game	Fish & Game Code and related uncodified bills.	Statutory Code
Governmental Efficiency	Bills not specifically referred to another committee relating to state policy, property and employees; new state functions; reorganization; horseracing; alcoholic beverages; and judges' salaries.	Policy Area, Process
Institutions	State Department of Mental Hygiene, Youth Authority, and their institutions.	Executive Department
Insurance & Financial Institutions	Unemployment Insurance, Insurance, Financial codes; bills relating to unemployed and workmen's compensation; and Corporate Securities Act.	Statutory Code, Policy Area
Judiciary	Civil, Civil Procedure, Evidence, Probate & Penal codes; bills of a penal nature.	Statutory Code, Policy Area
Labor & Social Welfare	Labor Code, related uncodified bills except workmen's compensation, Department of Social Welfare, and public assistance.	Statutory Code, Executive Department, Policy Area
Local Government	Counties, municipalities, special assessment and other local districts.	Governmental Level
Military & Veterans Affairs	Military & Veterans Code and related uncodified bills.	Statutory Code
Natural Resources	Public Resources Code, Department of Harbors and Navigation, mining, oil, forestry, parks, and public domain.	Statutory Code, Executive Department, Policy Area
Public Health & Safety	Health & Safety Code and related uncodified bills.	Statutory Code
Public Utilities & Corporations	Public Utilities Code, Corporations Code except for Corporate Securities Act, related uncodified bills.	Statutory Code
Revenue & Taxation	Revenue & Taxation Code, state and county taxes.	Statutory Code, Process
Rules	Rules amendments and resolutions relating to the business of the Senate.	Housekeeping
Transportation	Vehicle, Streets & Highways, Harbors & Navigation codes; aviation.	Statutory Code, Policy Area
Water Resources	Water Code and related uncodified bills.	Statutory Code

*Excerpted from *Standing Rules of the Senate*, in CALIFORNIA LEGISLATURE HANDBOOK 130-33 (1969).

1. *By Executive Departments or Budget Categories.* This approach recognizes the importance of legislative oversight — the need for the legislature to review administrative programs on a continuing basis.[12] By establishing committee jurisdictions to parallel major executive departments, legislators can keep close track of how the state's money is being spent, can critically evaluate the worth of specific programs, and can determine how departments are implementing legislative policy mandates. Different committees organized in this manner can also participate in the review of the budget, an executive-originated document which becomes the most important single proposal of a legislative session.[13]

There is some doubt, however, whether a standing committee structure designed to parallel major executive departments really results in superior legislative oversight. Under such an arrangement, individual committees can in fact become the political "captives" of the departments they are supposed to oversee by developing overly sympathetic viewpoints to the problems and requests of individual administrators and departments. To the extent that this occurs, the independence of the legislative branch suffers. Furthermore, committees organized in this fashion may not be equipped to handle policy questions which cut across departmental lines. Committees could be limited in their ability to review proposals for new policies which do not fit into existing administrative frameworks. Finally, it is not certain whether standing committees could ever adequately perform the job of oversight because of limited independent information and expertise. To impose this responsibility through a definition of their jurisdictions might divert committees from other more suitable functions, such as policy innovation.

2. *By Statutory Codes.* Most bills referred to committees in the

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12 To a large degree, this system of classification is the one used with some success by Congress. In general, the congressional committees parallel the major administrative agencies of the federal government. See, G. BLAIR, AMERICAN LEGISLATURES: STRUCTURE AND PROCESS 181 (1967). This system is also used in many foreign governments. For example, in Parliament committee jurisdiction corresponds to the various ministerial departments. For a more detailed discussion of committee jurisdiction in foreign countries see M. AMELLER, *supra* note 2, at 107.

13 For a discussion of budget review at both the federal and state level see M. JEWELL, *supra* note 2, at 95-96.

California legislature propose amendments to, or deletions from, an existing body of state statutes classified by codes. Defining committee jurisdictions according to the codes is a simple and logical approach. Such legalistic definitions can be very precise, and can therefore sharply reduce the amount of discretion involved in deciding where to refer particular bills. Most committee jurisdictions in the California Senate are based, at least in part, on specific codes.

Statutory codes, however, are tradition-bound and somewhat arbitrary in their classification of public policies. The present California codes, for example, date from the 1930's. Even a continuing process of recodification does not permit an easy adjustment of legal classifications to the ever-shifting dimensions of public policy. This is seen in the fact that large numbers of bills introduced in the California Legislature affect more than one code. The reorganization of a state's statutes at any one time cannot anticipate the policy complexities of the future.

3. *By the Affected Interests or "Publics."* Since most bills referred to committees are proposed and opposed by specific interests, and affect other interests, it may be appropriate to establish committee jurisdictions according to the organized interests which represent major segments of a state's economy and society. Jurisdictions could be established for such major "publics" as labor unions, large utilities, farmers, racial minorities, etc.[14] This approach assumes that the legislative process should be structured to give the views of outside interests maximum consideration. Individual legislators represent geographical constituencies; why not permit standing committees to represent "functional" constituencies? Each committee under this arrangement would review legislation dealing with public services or public regulation affecting a major interest.

There are two immediate problems with this approach. One is

14 Massachusetts, for example, has established joint standing committees on Banks and Banking, Commerce and Labor, Insurance, Natural Resources and Agriculture, and Social Welfare. COMMONWEALTH OF MASSACHUSETTS, MANUAL FOR THE GENERAL COURT FOR 1969-70 at 403 (1969). Massachusetts makes extensive use of joint committees and is almost the only state that does so besides Connecticut and Maine. For a discussion of the origins of the use of joint committees in New England legislatures, see R. DISHMAN & G. GOODWIN, STATE LEGISLATURES IN NEW ENGLAND POLITICS 27 (1967).

that a complete or adequate representation by committee of all affected segments of the public is impossible. Representation by committee would tend to benefit the relatively few interests which are well organized and articulate in dealing with the legislature, while leaving out the many unorganized and amorphous "publics" which exist in a state's population. A second problem arises from the assumption that standing committees act for their parent bodies in giving preliminary review to legislation and thus disposing of most bills before the stage of floor action; this responsibility is to the entire legislature, not to specific interests.

Legislative committees, of course, are obligated to consider the positions of outside interests affected by proposed legislation. But, this implies accessibility to outside interests and not control by them.[15]

4. *By Level of Government.* This approach most commonly is reflected in the organization of separate committees for local and state government. Some legislatures break this down further by having separate committees for municipal, county, and school district governments.[16] The assumption is that the interests of local government — or specific units of local government — are significant enough in terms of statewide policy to warrant separate committee jurisdictions. In effect this approach suggests a form of jurisdiction according to interests affected by legislation.

A criticism of this approach is that with the increasing complexity of legislative policies there remain few issues which can be isolated to either the state or local level. Even questions relating to municipal incorporation and local civil service systems, for example, have statewide policy implications.

5. *By Housekeeping Functions.* Most legislatures have committee jurisdictions which correspond to internal legislative management needs. Examples include committees on rules, legislative representation, engrossing and enrolling, printing, legislative organization, contingency expenses, etc.[17] Such committees may review resolutions dealing with legislative housekeeping functions,

15 See note 2, *supra.*

16 Massachusetts, for example, has joint standing committees on State Administration, Counties, Urban Affairs, Local Affairs, and Education. COMMONWEALTH OF MASSACHUSETTS, *supra* note 14, at 403.

17 Massachusetts has separate standing Senate and House committees on Rules, Bills in the Third Reading, and Engross Bills. In addition, there is a House committee on Pay Roll. *Id.* at 329-30, 362-63.

but ordinarily they do not receive bill referrals. It has been argued that having several housekeeping committees enables many members to participate in the management of their house.

Housekeeping assignments, however, tend to divert the time and energies of members from their principal duties — the sponsorship and review of legislative proposals. Many decisions handled by housekeeping committees in some legislatures, such as the engrossment of bills and the acceptance of lobbyists' registrations, are of a highly routine nature and are in fact undertaken by employees. Perhaps the most desirable system, then, is to maintain only one management-type committee in a legislative chamber. Its jurisdiction could combine both leadership (appointment of members to other standing committees, etc.) and housekeeping (legislative process, personnel, etc.) functions.

6. *By Process Functions.* Legislative proposals frequently can be classified according to the types of governmental procedures involved — according to the process rather than the ends of government. Thus, jurisdictional lines are drawn which follow the "staff" rather than the "line" functions of government. For example, virtually every legislature has some standing committee jurisdictions oriented exclusively to such subjects as state government appropriations, public revenues, constitutional amendments, and public employment.[18] Particularly in the public finance area, such committees permit legislatures to review comprehensively certain procedures of state and local government that affect all public policy areas. An excessive use of process jurisdictions, however, tends to prevent a legislature from concentrating on the public service and regulatory ends of most legislation.

7. *By Policy Areas.* The jurisdictions of perhaps most standing committees in state legislatures correspond to the particular public policy and program ends of state government. Committees with such titles as Education, Social Welfare, Transportation, and Criminal Procedures are oriented to the major service and regulatory programs of state and local government — the ends of most legislative proposals.[19]

18 Massachusetts has separate standing House and Senate committees on Ways and Means, and joint committees on Taxation, and Federal Financial Assistance. COMMONWEALTH OF MASSACHUSETTS, *supra* note 14, at 329, 362, 403.

19 In Massachusetts there are, for example, joint standing committees on Education, Public Safety, Public Service, Social Welfare, Transportation, and Urban Affairs. COMMONWEALTH OF MASSACHUSETTS, *supra* note 14, at 403.

How different is this approach from others discussed previously? A classification of committee jurisdictions by policy areas appears to contain elements of the approaches oriented to executive departments and statutory codes. The key question is how the policy areas are defined — by departments, codes, or other standards? Existing programs of state and local government would be implicit in most definitions of particular policies; education and social welfare policies, for example, are the direct subjects of many legislative proposals, as well as being the basis for the organization of major executive departments. But this approach stands by itself to the extent that it recognizes policy issues that cut across existing departmental and code lines.[20] This could involve legislation which proposes new policies and programs for which there are as yet no appropriate administrative frameworks. Examples include bills that propose broad approaches to the problems of the urban and natural environments, and which therefore involve an overlapping of the areas of housing, health, welfare, education, and transportation on the one hand, and conservation, water, air pollution, and recreation on the other. A committee system capable of handling such issues would require very broad and flexible jurisdictions. One scheme would be to classify legislation according to the ways public programs and policies affect individuals and groups in the society — such as providing certain kinds of public services or regulating certain kinds of private behavior.[21]

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20 Such complex policy issues create problems in Congress, where committees generally reflect departments of the executive. As Blair observes:

> [F]ew of the measures before Congress deal only with one subject. Yet proposals are normally sent to a single standing committee, resulting in inadequate treatment and conservation of the policy interrelationships that should occur. Or committees may even work at cross-purposes with each other since each of the several committees approach the general topic from their own specialized points of view. G. BLAIR, *supra* note 12, at 190.

21 Other schemes have been suggested for dealing with jurisdictional problems arising from bills affecting more than one policy area. A proposed solution for this problem in Congress included: (1) creating parallel committees in the House and Senate; (2) overlapping and interlocking memberships among committees involved in common concerns; (3) simultaneous referral of a bill to all the concerned committees; (4) greater use of joint committees with joint staffs. G. GALLOWAY, SOME PROBLEMS OF COMMITTEE JURISDICTION, S. Doc. No. 51, 82nd Cong., 1st Sess. 1-4 (1951). For a sampling of methods used in foreign legislatures, see M. AMELLER, *supra* note 2, at 109-10.

II. Which Approach: A Recommendation

Each of these seven types of classification offers a distinct rationale for the organization of committee jurisdictions. Because of the varied functions of state legislatures, it is probably undesirable to rely on any one rationale for the distribution of jurisdictions in a house. However, the current nationwide emphasis on turning American state legislatures into more effective policy-making bodies requires a consideration of these different approaches and their relationships with the primary role of legislatures. The basic issue is whether the legislature is to assume a reactive or an innovative role. Are they to be primarily concerned with the review of proposals which originate outside their memberships — usually with governors, executive departments, private interests, and local governments? Or are they to be responsible themselves for proposing and developing major changes in state policies and programs? This second role is broader but is not incompatible with the first. A legislature with the necessary disposition and resources to engage in major policy innovation is also better equipped to perform its review function in that it has the ability to view bills from a variety of perspectives.

If the broader role of policy innovation is intended for state legislatures, standing committee jurisdictions should be as wide as possible. The larger the scope of a committee's jurisdiction, the wider its outlook in reviewing proposed legislation and initiating new policies. The approach most conducive to such an outlook is the last one listed above — the definition of jurisdictions according to the policy areas or ends of government. Under this approach legislation is classified according to the manner in which state and local governments and their programs affect people. Most governmental activities can be reduced into one of two categories — either public services provided to benefit particular groups in the society (students, motorists, businessmen, campers, poor people, etc.) or public restrictions intended to regulate the private behavior of other individuals and groups (criminals, employers, unions, corporations, professions, etc.) for the benefit of all of society. A third irreducible category would include those activities necessary to the fulfillment of the "substantive" ends of government includ-

ing such "procedural" policies and programs as taxation, appropriations, civil service employment, and elections. A fourth category would be necessary for the legislature's internal needs including its rules-making and management functions.

Theoretically we could establish only four standing committees in a legislature with these jurisdictions:

1. Public Services
2. Public Regulation
3. Public Procedures
4. Rules

As a practical matter, a four-committee system for a house with a substantial number of members and heavy workload would be unworkable. The membership size and bill volume per committee would be very large, compelling extensive, and perhaps inefficient, use of sub-committees. Other aspects of committee operations, including the ability of outside interests to present their views, would also be affected. In short, the effectiveness of the committee system as a time and work saving device for the entire house would be sharply reduced.

The logic of such a division of committee jurisdictions still stands. Perhaps it would be feasible to expand the four-part division to include a larger number of separate committees. A system of seven or more committees, such as the following, would then emerge:

1. *Public Services.* — Separate committees on Natural Resources (water, land, air) and Human Resources (welfare, health, education, etc.).
2. *Public Regulation.* — Separate committees on Deviant Behavior (criminal law) and Economic Regulation (labor-management relations, business regulation, etc.).
3. *Public Procedures.* — Separate committees on Public Funds (revenues and appropriations) and Governmental Organization (civil service, procedures, elections, etc.).
4. *Rules.* — One committee for all internal leadership and management functions.

Of course this core could be enlarged to even more than seven

committees, depending on the workload and political needs of a legislature.[22] Under this proposal, only three types of jurisdictional rationales are used. They are the classifications according to policy areas (public services and regulation), process (public procedures), and housekeeping (rules). Conspicuously absent from this scheme are committees organized according to executive departments, statutory codes, and level of government (counties, municipalities, etc.). These are categories which have proven to be relatively rigid and limited.

III. The Referral Process

However important jurisdictional definitions may be, they do not operate by themselves in influencing committee actions. The power of the leadership — either a presiding officer or a rules committee — to refer bills to particular committees involves considerable discretion which can reinforce or wreck any jurisdictional scheme.[23] Particularly damaging to the effectiveness and efficiency of a committee system is a pattern of inconsistent referrals, in which bills dealing with the same subject are referred to different committees depending on the relative controversy of the proposals and the membership compositions of the committees.

Perhaps the strongest check on capricious bill referral actions is to publish the details of standing committee jurisdictions in the rules of a legislature. A clear description of each committee's scope would make it difficult for legislative leaders to justify inconsistent referrals, and thus reduce their number.[24] Published jurisdictional

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22 Our study of the committee structure in the California Senate recommended 13 committee jurisdictions, organized according to policy areas, process functions, and housekeeping functions. Policy committees included Community Affairs, Civil Law and Judicial Organization, Criminal Law, Economic Regulation, Environmental Resources, Human Resources, Education, and Transportation. Process committees included Government Organization and Procedures, Public Employment, Finance, and Revenue and Taxation. The housekeeping committee suggested was Rules. The California Senate implemented a number of our recommendations in January, 1970 by establishing 15 committees — a reduction from the previous 21. A further reorganization a month later added two committees for a total of 17.

23 One interesting exception is Nevada, where the sponsor of the bill refers it to committee. For a list of the officer in charge of referral in each state see 18 Council of State Governments, Book of the States 1970-71, at 74-75 (1970).

24 Inconsistent referrals probably would not be entirely eliminated. Even with the guidance provided by jurisdictional definitions in their house rules, the leader-

statements can also assist the committee chairmen and members, by indicating the range of their authority and giving them a clear expectation of the kinds of bills they will be reviewing.

Some discretion in assigning bills to different committees is desirable, both because legislative leaders need this power to exercise control and because a number of individual bills may include subjects from a number of separate policy areas. A set of specific jurisdictional statements cannot anticipate all of the policy combination proposals which can result from the problems of a complex society. One bill, for example, may deal with the problem of unemployment by changing aspects of a state's education, welfare, labor-management, and taxation systems. The bill referral flexibility necessary to handle such legislation can be provided by jurisdictions which are not defined by specific statutory codes and executive departments and programs, but which are oriented to more general areas of public policy. Overlapping jurisdictions would permit separate committees to deal with complex bills on a joint basis.

Leadership discretion in the referral process is not intrinsically bad. What should be avoided in the interests of an effective committee system are inconsistent referrals intended to seal the fate of individual legislative proposals by sending them to committees where a completely unfavorable or favorable reception is assured, thus bypassing a thorough committee review.[25]

IV. Conclusion

Few state legislatures have devoted sufficient attention to the design of committee jurisdictions, and this may be a major reason

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ship of the California Senate in the past frequently diverted bills from such clearly-defined committees as Education and Natural Resources. This was possible largely because of the existence of a "catchall" committee, Governmental Efficiency, which was stacked with members loyal to the leadership and which was given the responsibility of handling highly controversial legislation in many different policy areas. *See* A. Sokolow & R. Brandsma, Leadership Strategy and Legislative Committee Assignments: California After Reapportionment 29-30 (Institute of Governmental Affairs, Research Report 9, University of California, Davis, 1969).

25 Once a bill is referred to committee, in thirty-six states it need not be reported out, allowing silent disapproval of the measure. Even in several of the states where all bills must be reported out, the requirement can be circumvented by bringing the bill out of committee on the last day of the session without recommendation. 18 Council of State Governments, Book of the States 1970-71, at 74-75 (1970). *See also* note 3, *supra*.

why their standing committees have operated poorly as review and research bodies. This article has suggested that the policy innovation and bill review roles of legislatures can best be served by clearly-stated and written jurisdictions which are based primarily on broad areas of public policy. Other aspects of a legislature's standing committee structure, usually cited in the studies of committee reorganization, are related to this suggestion. Broad jurisdictions permit a legislature to maintain a small number of standing committees, a limited number of committee assignments per member, and an equalization of committee workloads. Finally, the flexibility of broad jurisdictions means that the responsibilities of individual committees can be revised from time to time to reflect shifts in the nature and scope of public policy areas.

UNIFORM JURY SELECTION AND SERVICE ACT

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Introduction

In August, 1970, the National Conference of Commissioners on Uniform State Laws approved a Uniform Jury Selection and Service Act.[1] The uniform act, to a considerable extent modeled after the Federal Jury Selection and Service Act of 1968,[2] clearly states its policy in Section 1:

> . . . that all persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens shall have the opportunity in accordance with the provisions of this Act to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

In implementation of this policy the act provides for the selection of jurors at random from as broadly inclusive a list of citizens as possible. It also strictly limits disqualifications from jury service, prohibits automatic exemptions and sharply limits excuses to individual cases of undue hardship, extreme inconvenience, or public necessity. Finally the act would work to mitigate the burden of jury service upon the individual by providing a per diem rate higher than now prevails in most states, by restricting the length of the individual's jury service, and by protecting him against loss of employment resulting from such service.

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1 The Conference had undertaken this drafting after the House of Delegates of the American Bar Association had referred to it a resolution urging drafting of uniform jury legislation presented to the A.B.A. 1966 Annual Meeting by Judge Nathan J. Kaufman of Detroit, Michigan. 91 A.B.A. REP. 343-44 (1966).

2 28 U.S.C. §§ 1861-69 (Supp. V 1970).

I. The Need for the Uniform Act

The need for improved methods of jury selection has been strongly pointed up by court decisions[3] which have challenged as discriminatory both state and federal jury venires. The most recent Supreme Court case is *Carter v. Jury Commission of Greene County*,[4] where the Court set down minimal constitutional guidelines for jury selection methods.

The *Carter* case involved a state jury selection statute[5] which directed a commission to compile a list of names of citizens between twenty-one and sixty-five years of age, and to select therefrom as prospective jurors all qualified, non-exempt citizens who are "generally reported to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment . . . ."[6] The trial court found that in Greene County, even after a substantial expansion of the jury rolls, only 32% of the potential jurors were Negro while the same group comprised an estimated 65% of the population. It had also found that in operation the jury selection system was run totally by whites, and lacked any meaningful procedure for considering Negro names. This resulted in invalid exclusion of Negroes on a racially discriminatory basis. On appeal the Supreme Court said:

> Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise. Once the State chooses to provide grand and petit juries, whether or not constitutionally required to do so, it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias.[7]

3 *See, e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967) (27% of taxpayers in county were black, yet out of 33 prospective grand jurors chosen, only three were black); Arnold v. North Carolina, 376 U.S. 773 (1964) (39% of taxpayers in county were black, yet in 24 years only one Negro on a grand jury); Eubanks v. Louisiana, 356 U.S. 584 (1958) (one-third of parish black, but only one black picked for grand jury "within memory"); United States v. Butera, 420 F.2d 564 (1st Cir. 1970) (underrepresentation of women and certain age and educational groups). *See also* Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

4 396 U.S. 320 (1970). *Carter* was the first case to reach the Court in which the composition of a jury was attacked, not by a convicted criminal defendant, but by plaintiffs seeking affirmative relief.

5 Ala. Code, tit. 30, §§ 1-24 (Supp. 1967).

6 *Id.* at §§ 20, 24.

7 396 U.S. 320, 330 (1970).

However, the Court at the same time reaffirmed the proposition that there is a permissible range for the exercise of judgment in determining juror qualification:

> It has long been accepted that the Constitution does not forbid the State to prescribe relevant qualifications for their jurors. The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing *good intelligence, sound judgment,* and *fair character.* Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross section of the population suitable in character and intelligence for that civic duty.[8] (Emphasis added)

The Court ultimately held that although the jury statute was not unconstitutional on its face merely because it provided that the jury commission was to exercise its subjective judgment in the selection of competent jurors, the statute had been administered in a discriminatory manner.

In response to the same problems which the *Carter* court faced, Congress had two years earlier enacted the Federal Jury Selection and Service Act of 1968,[9] and several states have revised or replaced their jury statutes[10] in order to attain objectives similar to those of the uniform act. Both empirical study[11] and legal commentary[12]

8 *Id.* at 332.

9 28 U.S.C. §§ 1861-69 (Supp. V 1970). The declarations of policy in §§ 1 and 2 of the uniform act come almost verbatim from §§ 1861 and 1862 of the federal act. The need to improve on the representational character of federal juries, by eliminating the "key man" system formerly employed in many districts and by imposing only objective, judicially applied criteria for disqualifications, is extensively documented in the Senate Report to the bill that became the federal act. S. REP. No. 891, 90th Cong., 1st Sess. 9-25 (1967).

10 *See* ME. REV. STAT. ANN. tit. 14 §§ 1254-55 (Supp. 1970); MD. ANN. CODE art. 51, §§ 1-22 (Supp. 1969); MICH. COMP. LAWS ANN. §§ 600. 1301-54 (Supp. 1970); N.C. GEN. STAT. §§ 9-11 to -26 (1967).

11 *See* Lindquist, *An Analysis of Juror Selection Procedure in the United States District Courts,* 41 TEMP. L.Q. 32, 33 (1967); Mills, *A Statistical Study of Occupations of Jurors in a United States District Court,* 22 MD. L. REV. 205 (1962). The latter author points out that in the district in question, "managers, officials, and proprietors" made up only 9.5% of the labor force, while the same group accounted for 33.5% of all grand and petit juries. *See also The Jury System in the Federal Courts, Report of the Judicial Conference Committee on the Operation of the Jury System,* 26 F.R.D. 409 (1960), in which the Committee recommended "that the sources from which the [jurors] are selected should include all social and economic groups in the community . . . ." *Id.* at 421. *See generally Hearings before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary,* 90th Cong., 1st Sess. (1967), *passim.*

12 *See, e.g., The Jury: A Reflection of the Prejudices of the Community,* 20

have demonstrated a clear need for the two principal features of the uniform act: (i) random selection from a broadly inclusive list of citizens, and (ii) objective qualification criteria.

The uniform act, both in its policy declaration and in its prescription of the mechanics of jury selection conforms with the Supreme Court's holding that discrimination cannot be tolerated in jury selection. To that extent, the Commissioners have made available to the states a ready means for satisfying the constitutional mandate that governs them all. The act, however, goes beyond the Supreme Court requirements in eliminating the use of subjective criteria as a basis for testing qualification for jury service. It rejects such criteria as being very difficult, if not impossible, to administer fairly and impartially. Instead the act imposes only the requirement that each juror be able to read, speak and understand the English language and have no physical or mental disability impairing his capacity to render satisfactory jury service.

Even though the uniform act goes further in freeing the jury selection process from subjective tests than is now required to pass constitutional muster, its draftsmen believe it will as a practical matter better assure the implementation of the constitutional prohibition against discrimination. Subjective criteria of any kind, although not presently prohibited by the Court, are highly likely to produce litigation. At best they call for the kind of qualitative personal judgments which are open to attack as discrimination-motivated wherever substantial underrepresentation of identifiable groups occurs in the resulting jury rolls. Even when such criteria are applied by well-intentioned officials, experience has shown that they produce discriminatory results, particularly with regard to low income and minority groups.[13] Whether or not the Supreme Court ultimately moves in the direction of proscribing subjective tests for juror qualification, the administration of the judicial system would be well served by removing this fertile source of attacks on jury verdicts.

In meeting the demonstrated need for jury selection reform, the National Conference concluded that a uniform jury selection and service act is preferable to a model act. To be sure, jury selection

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HASTINGS L.J. 1417 (1969); Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235 (1968); Kaufman, *A Fair Jury: The Essence of Justice*, 51 JUDICATURE 88 (1967); Broeder, *The Negro in Court*, 19 DUKE L.J. 21 (1965).

13 *See, e.g.*, Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

and service laws do not have the substantial interstate implications of statutes like the Uniform Commercial Code or the Uniform Criminal Extradition Act. However, to the extent the Federal Constitution imposes a uniform fourteenth amendment standard upon state jury selection, it is useful to the states to have uniform statutes satisfying that standard. Furthermore, the Uniform Jury Selection and Service Act is intended "to fill emergent need" and "to modernize antiquated concepts," purposes which traditionally justify the drafting of uniform acts.[14] In this respect, the Uniform Jury Selection and Service Act can be analogized to the Uniform Declaratory Judgments Act, which also involves state procedure without substantial interstate implications. The ultimate test for the designation "uniform act" is whether the proposed act has "a reasonable possibility of ultimate enactment in a substantial number of jurisdictions."[15] Recent judicial and legislative activity in the jury selection area support the Commissioners' judgment that the proposed act meets this test.

II. Analysis of the Uniform Act

The act itself is straightforward in its proscriptions and explicit in its directions. Section 1 states the basic policies of the act, which are random selection from a fair cross section, and opportunity and obligation for juror service for all citizens. Section 2 states unequivocally that discrimination in virtually any form is prohibited. It is significant that the section 1 declaration of policy contains an affirmative requirement that all qualified citizens be accorded the opportunity to be considered for jury service. There is no *promise* of jury service, but there is a promise that the *opportunity* for jury service will be equally available to all qualified persons. Also, the uniform act does not require that in every case a jury consist of jurors who represent a cross section or microcosm of the particular community. No group has a right to proportional representation on any particular grand or petit jury. The intention of the act is simply to provide a jury chosen *from* a fair cross section of the community by random selection. If this method should produce an

14 National Conference of Commissioners on Uniform State Laws, Handbook, 227 (1969).

15 *Id.* at 228.

all black jury in a predominantly white community, then that is the result of the operation of the laws of chance, not the practice of discrimination. This aspect of the act is entirely consistent with constitutional requirements as declared by the Supreme Court.[16]

Section 3 contains the definitions vital to a complete understanding of sections 4 through 12. These latter sections must be read together to understand the jury selection process. That process, managed under court supervision by a jury commission constituted as prescribed in section 4, commences with the compilation of a "master list" (section 5). The jury commission randomly chooses from the master list names for a "master jury wheel" in a number more than sufficient to meet all needs for jurors in the district for a two-year period (section 6). From time to time the jury commission draws names from the master jury wheel (section 7(a)), and after determination that the persons whose names have been drawn are qualified for jury service (sections 7(a) and 8), their names are put into a "qualified jury wheel" (section 9). Disqualifications from jury service (which can be only on the grounds listed in section 8(b)) are determined upon the basis of juror qualification forms completed by all persons whose names are drawn from the master jury wheel, supplemented as needed by interviews. Upon request from the trial court, the jury commission publicly draws from the qualified jury wheel the number of names required for particular juries or jury pools. (section 9(b)). There are no exemptions from jury service (section 10) and excuses will be granted only upon a showing of specific need in the individual case. Even then excuses will be granted only as long as the excusing circumstance continues to exist (section 11). All objections to the jury selection process based on substantial failure to comply with the act must be raised before the swearing in of the petit jury (section 12).

In the master list the jury commission should seek to include the names of all adult citizens resident in the district. The uniform act, as does the federal act,[17] uses voting lists as the starting point; but voting lists are obviously incomplete, and the uniform act requires that they be supplemented from other sources to be

16 See Carter v. Jury Commission of Greene County, 396 U.S. 320, 337 at n. 44 (1970); *see also* comment to § 12 of the uniform act.

17 28 U.S.C. § 1863(a)(2) (Supp. V 1970).

designated by some rulemaking authority such as the state supreme court. In designating supplementary sources of names for the master list, the rulemaker should strive for completeness, since this is the only way to carry out the direction of section 3(3) "to foster the policy and protect the rights secured by this act (sections 1 and 2)." It is, however, only a *fair* cross section of the community that is required. Absolute completeness is neither possible nor necessary.

Since the master list encompasses, or strives to encompass, all potentially qualified jurors regardless of whether or not they are on the voting list, the uniform act minimizes any "chilling effect" that exclusive use of voting lists for jury selection may have upon exercise of the voting franchise.[18]

Section 6 details the procedures for selecting names from the master list for the master jury wheel. Recognizing that populations and the number of jury trials in judicial districts will vary greatly even within a single state, the act requires that the minimum number of names in the master jury wheel comprise the lesser of (i) the total number of names on the master list and (ii) 1,000 plus 1% of the total number on the master list. The jury commission may from local experience find it necessary to select for the master jury wheel more than the statutorily prescribed minimum. Following the procedures set forth in section 6(b) for use of a "key number" and a "starting number," the required number of names are selected from the master list in random fashion. The mechanics of this random selection process, which may be performed either manually or by use of electronic or mechanical devices, are illustrated in the official comment to section 6(b).

The master jury wheel, filled once every two years with names selected at random from the master list, remains available for periodic drawings of names, which will, after elimination of disqualified persons, be placed in the qualified jury wheel. Equally as important, and vitally supplementary to the mechanism of achieving random selection, are those sections of the act which seek to broaden the base of prospective jurors by limiting sharply disqualifications and excuses, and entirely eliminating any exemptions, from jury service. Once the name of a prospective juror is

18 *See* comment to § 5 of the uniform act.

drawn from the master jury wheel, he is sent a juror qualification form to be filled out and returned. Among other data, the form will elicit information relative to the prospective juror's ability to comprehend English, his citizenship, the record of any criminal convictions, and any physical or mental disabilities which could impair satisfactory jury service. Any question with regard to race is intentionally omitted from the juror qualification form. Although the Commissioners recognized that such information would facilitate investigation of possible discrimination, they concluded that the information could just as easily facilitate the discrimination they were trying to prevent. Also, it was believed that the omission reflects the act's policy of making race irrelevant in jury selection.

Section 8(b) explicitly limits disqualification from jury service to a person who is a minor, not a citizen of the United States, not a resident in the judicial district, unable to read, speak and understand the English language, has a mental or physical disability making him incapable of rendering satisfactory jury service, or is deprived of the right to vote due to a criminal conviction. The act conspicuously omits any educational requirement for jury service, other than an ability to read, and understand the English language. Such a minimal educational requirement is significant in light of the dictum in the *Carter* case, supra, that the "states remain free to confine selection . . . to persons meeting specified . . . educational attainment . . . ."[19] Although the uniform and federal acts adopt similar approaches in most cases of disqualification, they part company over the degree of comprehension of the English language necessary for effective jury service. The federal act[20] makes inability to *write* the English language a ground for automatic disqualification, while the uniform act does not even mention the word "write". In addition, the federal act imposes a narrow objective standard by disqualifying a prospective juror who

> is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form.[21]

19 396 U.S. 320, 332 (1970).
20 28 U.S.C. § 1865(b)(2) (Supp. V 1970).
21 *Id.*

The uniform act does not expressly declare what degree of inability to read, speak or understand the English language will disqualify a prospective juror. It is implied that a juror must be able to read, speak and understand the English language well enough to follow the course of a jury trial conducted in English. It should be noted at this point that both the federal and the uniform acts in no way limit the traditional right of the parties to challenge a proposed juror for cause or to strike him peremptorily. "The eagerness of at least one party to eliminate an unsuited juror cannot be discounted as an effective bulwark against all forms of juror incompetence."[22]

Only the court determines whether prospective jurors are disqualified. Thus the uniform act keeps this delicate step in juror selection under the direct control of a judge. What at first consideration may seem merely an onerous task for already overburdened judges is in fact necessary in view of its importance. The bases for disqualification are few in number and relatively easy to apply. The jury commission will make its recommendation of any disqualifications on the basis of the juror qualification forms and interviews. Although the judge should not accept that recommendation perfunctorily, as a practical matter the judge will find it necessary to expend an appreciable amount of judicial effort only as to that very small minority of jurors believed by the jury commission to be disqualified.

All names drawn from the master jury wheel, except those of persons determined by the court to be disqualified, are placed in a "qualified jury wheel," from which a subsequent random selection will draw the number of qualified jurors necessary for one or more jury panels or for a grand jury. The uniform act does not require that the jury for an individual case be drawn at random directly from the qualified jury wheel. The uniform act, like the federal act, "permits procedures designed to utilize jurors more efficiently, such as jury 'pools' and 'rotation' systems."[23]

After a name is selected from the qualified jury wheel, the act attempts to insure that those persons chosen will not be able to avoid service except upon an individualized showing of good

22 S. REP. No. 891, 90th Cong., 1st Sess. 23 (1967).
23 *Id.* at 32.

cause. To allow wholesale avoidance of jury service through extensive categories of exemptions and excuses would obviously detract from the goal of producing juries representative of the community. Section 10 declares flatly that no qualified prospective juror is exempt from jury service. This is in sharp contrast to the federal act, which allows each district to specify by its jury plan which groups will be exempt. The federal act grants statutory exemption to members of the armed services, firemen, policemen, and public officers.[24] Although the uniform act prohibits *exemptions*, it does allow individual *excuses* by the court upon a showing of undue hardship, extreme inconvenience, or public necessity. This is an extremely narrow and limited possibility of escape from jury service in comparison, once again, with what is possible pursuant to a jury plan under the federal act. As with *exempted classes*, the federal act also allows each district to specify groups within which *individual* requests for *excuses* from service will be automatically granted. The uniform act's provision for no exemptions and only individually justifiable excuses reflects the Commissioners' belief that underrepresentation of groups which have traditionally been quick to avoid jury service, such as businessmen and professionals, is inconsistent with selecting jurors by a process starting with a list of all adult citizens resident in the district.[25] There appears no reason why a nurse or a teacher or a funeral director or a pharmacist (professionals often exempted or automatically excused) should not render jury service unless excused by undue hardship, extreme inconvenience or public necessity. The uniform act rejects the notion of the "blue ribbon jury"; ability to read, speak and understand the English language is the minimal kind of educational requirement imposed by the act. At the same time the uniform act assures that those members of the community with relatively greater education and business and professional experience will not be lost from jury service.

Section 12 prescribes the means for challenging failure to comply with the act in selecting either a grand or petit jury. That section, derived from the federal act, is "designed to reduce the possibility that such challenges will be used for dilatory pur-

24 28 U.S.C. § 1863(b)(6) (Supp. V 1970).
25 *See* comments to §§ 10 and 11 of the uniform act.

poses."[26] In the first place, only a substantial failure to comply with the act is subject to challenge. Since jury selection under the act is "a largely mechanical process in which the role of human discretion is minimized,"[27] it should be relatively easy to determine whether there has been any substantial departure from the specified procedures. Secondly, section 12(a) imposes a strict time limitation on motions challenging compliance with the act. A motion challenging the method of selection of either grand or petit jurors may be filed no later than the swearing in of the petit jury, and must be filed even earlier if the moving party knew, or should have known through reasonable diligence, of the grounds therefor. Finally, by section 12(b), only a motion supported by an affidavit making out a prima facie case of substantial noncompliance with the act will be entertained by the court.

Section 12 itself declares that its procedures are the exclusive means of challenging the selection of the jury on the grounds of nonconformity with the act. Without mention in the act itself, it is equally clear, as the Commissioners' comment indicates, that enforcement of rights created by the Constitution and by other laws are not subject to the uniform act's procedural limitations. However, any jury challenge, no matter how it is phrased, which in substance constitutes a claim of substantial failure to comply with the uniform act, should be subject to the limitations of section 12.

Although they do not directly relate to jury selection, section 14, providing compensation for jurors, section 15, limiting their length of service, and section 17, providing protection of their employment, are significant in view of other provisions of the act sharply restricting excuses from jury service. For the wage earner, the traditionally low per diem paid to jurors,[28] the potentially long duration of jury service, and the threat of loss of his job have

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26 S. REP. No. 891, 90th Cong., 1st Sess. 33 (1967), commenting on that part of the bill which became 28 U.S.C. § 1867 (Supp. V 1970).

27 *Id.* at 34.

28 *See, e.g.*, ARIZ. REV. STAT. ANN. § 21-221 (1956) ($8 per day); GA. CODE ANN. § 59-120 (Supp. 1969) (not less than $2 nor more than $10 per day); MASS. GEN. LAWS ANN. ch. 262, § 25 (Supp. 1970) ($14 per day); PA. STAT. tit. 17, § 1121(a) (1962) ($9 per day); VT. STAT. ANN. tit. 32, § 1511 (Supp. 1970) ($15 per day); WIS. STAT. ANN. § 255.25 (Supp. 1970) (not less than $4 nor more than $16 per day).

been serious deterrents to his willing service as a juror. The uniform act provides effective civil as well as criminal remedies to protect an employee against injury in his employment because he is summoned or attends court for jury service. The act provides for payment of the juror's travel expenses and for setting a per diem compensation at levels commensurate with present-day wages; the $20 provided in the federal act[29] should be the minimum.

Raising jurors' pay and protecting their employment will in themselves do little to make jury service more attractive to professional and business men and women, but limitation on the length of jury service required of any one person has just as much meaning to them as it has to wage earners. The suggestion is that in any two-year period a person should not be required to serve on more than one grand jury or for more than 10 days on a petit jury or on both a grand and a petit jury. Spreading jury service will reduce requests for excuse because of hardships, will increase the representative character of juries, and permit more citizens to participate in this important governmental function. The increased cost resulting from higher juror compensation and the limitation on the length of the individual juror's service seems minor in comparison with the improvements in the jury system that should result.

Conclusion

We strongly recommend the Uniform Jury Selection and Service Act for enactment by the state legislatures. It implements policy desiderata that have both constitutional stature and public acceptance. The policy of the uniform act is that litigants entitled to trial by jury should have the right to grand and petit juries "selected at random from a fair cross section of the community," and that there be no discrimination on account of race, religion, sex, national origin or economic status. This policy has its foundation in constitutional mandate and also, we believe, public demand. Despite the increasingly frequent suggestions that American jurisdictions follow England's lead in abolishing jury trials

29 28 U.S.C. § 1871 (Supp. V 1970).

in civil cases,[30] grand and petit juries remain prized features of our system of criminal justice. Enactment of the Uniform Jury Selection and Service Act will make the jury system work more fairly and more effectively.

TEXT OF UNIFORM JURY SELECTION AND SERVICE ACT*

Section 1. [*Declaration of Policy.*] It is the policy of this state that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity in accordance with this Act to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.

COMMENT: This section is derived from the comparable section of the Federal Jury Selection and Service Act of 1968 (hereinafter called the "Federal Act"), 28 U.S.C.A. § 1861. See also Section 1 of 1969 Maryland Jury Act.

Section 2. [*Prohibition of Discrimination.*] A citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status.

COMMENT: Derived from the Federal Act, 28 U.S.C.A. § 1862, and Section 2 of 1969 Maryland Jury Act.

Section 3. [*Definitions.*] As used in this Act:

(1) "court" means the [———] court[s] of this state, and includes, when the context requires, any [judge] [justice] of the court;

(2) "clerk" and "clerk of the court" include any deputy clerk;

(3) "master list" means the [voter registration lists] [lists of actual voters] for the [county] [district] which shall be supplemented with names from other sources prescribed pursuant to this Act (Section 5) in order to foster the policy and protect the rights secured by this Act (Sections 1 and 2);

30 *See, e.g.*, Landis, *Jury Trials and the Delay of Justice*, 56 A.B.A.J. 950 (1970); Chief Justice Burger's Philadelphia speech of Nov. 14, 1970, as reported in N.Y. Times, Nov. 15, 1970, § 1, at 32.

*Approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws at its annual conference held at St. Louis, Missouri, August 1-7, 1970; approved by the House of Delegates of the American Bar Association, February 9, 1971. Official prefatory note omitted. Printed with permission.

[Alternative A]

[(4) "voter registration lists" means the official records of persons [registered] [qualified] to vote in the most recent general election;]

[Alternative B]

[(4) "lists of actual voters" means the official records of persons actually voting in the most recent general election;]

(5) "jury wheel" means any physical device or electronic system for the storage of the names or identifying numbers of prospective jurors;

(6) "master jury wheel" means the jury wheel in which are placed names or identifying numbers of prospective jurors taken from the master list (Section 6);

(7) "qualified jury wheel" means the jury wheel in which are placed the names or identifying numbers of prospective jurors whose names are drawn at random from the master jury wheel (Section 7) and who are not disqualified (Section 8).

COMMENT: It is the purpose of the Uniform Act to provide for the selection of jurors from as broadly inclusive a list of citizens as possible. The term "master list" (Section 3(3)) is used to designate that broadly inclusive source of names from which the names to be placed in the master jury wheel will be first selected by a random process. Voting lists are used as the starting point for compilation of the master list, but they must be supplemented to carry out the policy of the Act. Section 5 spells out the way in which the supplementation is to be effected. The voter lists used will be the registration lists, except in those states where the only available lists are those of actual voters.

The random selection of names can be efficiently carried out through electronic or mechanical devices and the definition of "jury wheel" in (5) permits their use. See also Section 6(b).

Activities of the court hereunder, as, for example, in drawing or directing the drawing of names from the master jury wheel under Section 7(a) or in determining disqualifications or excuses under Sections 8 and 11, will ordinarily be conducted by the particular judge holding the jury trial term or otherwise assigned to supervising jury selection.

Section 4. [*Jury Commission.*] A jury commission is established in each [county] [district] to manage the jury selection process under

the supervision and control of the court. The jury commission shall be composed of the clerk of the court and a jury commissioner appointed for a term of [4] years by the [court] [chief justice of the Supreme Court] [chief administrative officer or board of the [county] [district]]. The jury commissioner must be a citizen of the United States and a resident in the [county] [district] in which he serves. [The jury commissioner shall be reimbursed for travel, subsistence, and other necessary expenses incurred by him in the performance of his duties and shall receive compensation at a per diem rate fixed by the [chief justice of the] [Supreme Court] or as provided by [law].]

COMMENT: The Uniform Act prescribes the minimum standards for the jury selection process and avoids what appears as unduly cumbersome in permitting diverse jury selection plans within a single state. Some degree of flexibility is, however, permitted by the provision for court-made rules, see Section 18, and by special court orders as, for example, for adding names to the master jury wheel (see Section 6(a)).

Section 5. [*Master List.*]

(a) The jury commission for each [county] [district] shall compile and maintain a master list consisting of all [voter registration lists] [lists of actual voters] for the [county] [district] supplemented with names from other lists of persons resident therein, such as lists of utility customers, property [and income] taxpayers, motor vehicle registrations, and drivers' licenses, which the [Supreme Court] [Attorney General] from time to time designates. The [Supreme Court] [Attorney General] shall initially designate the other lists within [90] days following the effective date of this Act and exercise the authority to designate from time to time in order to foster the policy and protect the rights secured by this Act (Sections 1 and 2). In compiling the master list the jury commission shall avoid duplication of names.

(b) Whoever has custody, possession, or control of any of the lists making up or used in compiling the master list, including those designated under subsection (a) by the [Supreme Court] [Attorney General] as supplementary sources of names, shall make the list available to the jury commission for inspection, reproduction, and copying at all reasonable times.

(c) The master list shall be open to the public for examination.

COMMENT: The Federal Act, 28 U.S.C.A. § 1863(b) (2), uses the voter registration lists as the most inclusive list of names of potential jurors, providing, alternatively in those situations where

registration lists are not maintained, that lists of actual voters will be used. The Federal Act leaves it up to the plan adopted in each federal district to "prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured" by that Act. The Uniform Act leaves such responsibility for supplementing the voter lists to either the Supreme Court or the Attorney General, and it makes such supplementation mandatory.

Exclusive use of voter lists as the basis for selecting citizens to be called for jury service may have a chilling effect upon exercise of the franchise, particularly by wage-earners for whom jury service may be a particular economic hardship. Principally for that reason the Report of the President's Commission on Registration and Voting Participation (November, 1963) recommended that voter registration lists be used only for electoral purposes. Furthermore, voter lists typically constitute far from complete lists of the citizens qualified for jury service. Considerable filling out of the master list to be more inclusive than the voter lists is necessary to carry out the declaration of Section 1 that "all qualified citizens shall have the opportunity . . . to be considered for jury service." Despite these disadvantages of use of voter lists in jury selection, the Federal Act and a great many states now use voter lists for that purpose—undoubtedly because it is the most conveniently available public list.

In most instances the high court of the State should be the agency to prescribe the supplementary sources of names for the master list. Such would be consistent with the rulemaking power also granted to that court by Section 18. In some states, however, the legislature may conclude that the office of the Attorney General is better fitted to determine the availability and practicality of supplementary lists. Whichever agency is given the responsibility must act within 90 days of the effective date of the Act and must maintain a continuing watch over the matter to assure the adequacy of the supplementation. In particular the supplementary sources should be reviewed shortly before December each even-numbered year since pursuant to Section 6(a) the master jury wheel is refilled in that month by random selection from the master list.

It is frequently the case that no single voter registration list or

list of actual voters is maintained for the county or judicial district, but rather a separate list is kept for each voting precinct or municipality. In such case the starting point for the master list would be the aggregation of all the voter registration lists or lists of actual voters of the several political subdivisions. There is no need for the several lists to be put together into a single alphabetical list. It would, for example, be satisfactory for the lists simply to be put in alphabetical order by municipality. The exact method of putting together the several lists into the master list is left to the jury commission or may be prescribed by rule.

The sources of names for the master list may be public, such as voter lists and motor vehicle registration lists, or may be private, as lists of telephone subscribers or electric company customers. Section 5(b) requires such lists to be made available to the jury commission. If any expense beyond merely making the list available at reasonable times becomes involved, as for example the expense of producing a computer print-out, the owner of the private list can reasonably expect reimbursement of the actual cost thereof.

The master list is open to the public. In general other lists and papers used or produced in connection with the jury selection process, with the exception of the names of jurors drawn for jury service and the contents of their juror qualification forms (Section 9), are kept confidential, but even they can be opened up for examination by parties preparing, presenting or defending against motions for relief on the ground of a substantial failure to comply with this Act.

Section 6. [*Master Jury Wheel.*]

(a) The jury commission for each [county] [district] shall maintain a master jury wheel, into which the commission shall place the names or identifying numbers of prospective jurors taken from the master list. If the total number of prospective jurors on the master list is 1,000 or less, the names or identifying numbers of all of them shall be placed in the master jury wheel. In all other cases, the number of prospective jurors to be placed in the master jury wheel shall be 1,000 plus not less than [one] percent of the total number of names on the master list. From time to time a larger or additional number may be determined by the jury commission or ordered by the court to be placed in the master jury wheel. In December of each even-numbered year the wheel shall be emptied and refilled as prescribed in this Act.

COMMENT: The Federal Act, 28 U.S.C.A. § 1863(b)(1), specifies that the minimum number of names to be placed initially in the master jury wheel shall be "one-half of 1 per centum of the total number of persons on the lists used as the source of names for the district or division . . . but in no event less than one thousand." Section 4(b)(iii) of the Maryland Jury Act, modeled on the Federal Act, changes the irreducible minimum from 1000 to 200. The number of 1000 (plus 1% of the total number of names on the master list) is suggested in the Uniform Act to be necessary to provide jurors for a 2-year period in even a county with only a few jury terms each year. In counties with more juries the number placed in the master jury wheel should be greater. The jury commission is authorized to fix a greater number depending upon the particular circumstances.

Within a single state wide variations commonly exist between the populations of different counties or judicial districts. The Uniform Act recognizes the existence of such population differences and accommodates jury selection to the circumstances of each county or district. If the county or district has such a small population that the master list has fewer than 1000 names, all of those names will be put into the master jury wheel and the random selection process prescribed in Section 6 is not necessary. On the other hand, in a larger county the minimum number of names to be placed in the master jury wheel is 1000 plus a fixed percentage of the total number of names on the master list.

(b) Unless all the names on the master list are to be placed in the master jury wheel pursuant to subsection (a), the names or identifying numbers of prospective jurors to be placed in the master jury wheel shall be selected by the jury commission at random from the master list in the following manner: The total number of names on the master list shall be divided by the number of names to be placed in the master jury wheel; the whole number nearest the quotient shall be the "key number," except that the key number shall never be less than 2. A "starting number" for making the selection shall then be determined by a random method from the numbers from 1 to the key number, both inclusive. The required number of the names shall then be selected from the master list by taking in order the first name on the master list corresponding to the starting number and then successively the names appearing in the master list at intervals equal to the key number, recommencing if necessary at the start of the list until

the required number of names has been selected. Upon recommencing at the start of the list, or if additional names are subsequently to be selected for the master jury wheel, names previously selected from the master list shall be disregarded in selecting the additional names. The jury commission may use an electronic or mechanical system or device in carrying out its duties.

COMMENT: The process of selecting names for the master jury wheel from the master list may be illustrated by the following two examples:

A. The master list contains 1400 names. The minimum number of names for the master jury wheel is therefore 1000 plus 1% of 1400, or a total of 1014. The quotient, obtained by dividing 1400 by 1014, is 1.4. However, to provide an equal opportunity of selection for every name on the list, the Act requires that the "key number" be no less than 2, so that will become the "key number." To obtain a "starting number" a random choice is made between 1 and 2, perhaps by tossing a coin. Assuming 1 is selected, the first name on the master list is the first name picked, the third name is next picked, and so on at intervals of 2. The first time through the master list will produce only 700 names and therefore it is necessary to start again at the head of the list, but this time the names already picked must be ignored. Accordingly, in this instance, the second name on the original list will be first this time, and so on until a total of 1014 names have been picked.

B. The master list contains 360,000 names. The minimum number of names for the master jury wheel is therefore 1000 plus 1% of 360,000, or a total of 4,600. The jury commission or the court determines, however, that it would be desirable to have 4800 names in the master jury wheel. The quotient of 360,000 divided by 4800 is 75, and, therefore, the "key number" is 75. The "starting number" is determined by a random method from the numbers from 1 to 75, inclusive. If the number so determined is 4, for example, the fourth name on the master list is the first selected, and then every seventy-fifth name thereafter is picked until a total of 4800 have been selected. In this example, it is to be noted that the number of names desired to be put into the master jury wheel (4800) divides evenly into the total number of names on the master list (360,000). In such circumstances, the full 4800

names can be selected without recommencing at the start of the list.

In those districts where electronic data processing equipment is available, the Act specifically permits its use to perform the required random selection by appropriate programming.

Section 7. [*Drawings from Master Jury Wheel; Juror Qualification Form.*]

(a) From time to time and in a manner prescribed by the court, the jury commission publicly shall draw at random from the master jury wheel the names or identifying numbers of as many prospective jurors as the court by order requires. The clerk shall prepare an alphabetical list of the names drawn. Neither the names drawn nor the list shall be disclosed to any person other than pursuant to this Act or specific order of the court. The clerk shall mail to every prospective juror whose name is drawn from the master jury wheel a juror qualification form accompanied by instructions to fill out and return the form by mail to the clerk within 10 days after its receipt. The juror qualification form shall be subject to approval by the court as to matters of form and shall elicit the name, address of residence, and age of the prospective juror and whether he (1) is a citizen of the United States and a resident of the [county] [district], (2) is able to read, speak and understand the English language, (3) has any physical or mental disability impairing his capacity to render satisfactory jury service, and (4) has lost the right to vote because of a criminal conviction. The juror qualification form shall contain the prospective juror's declaration that his responses are true to the best of his knowledge and his acknowledgment that a wilful misrepresentation of a material fact may be punished by a fine of not more than [$500] or imprisonment for not more than [30] days, or both. Notarization of the juror qualification form shall not be required. If the prospective juror is unable to fill out the form, another person may do it for him and shall indicate that he has done so and the reason therefor. If it appears there is an omission, ambiguity, or error in a returned form, the clerk shall again send the form with instructions to the prospective juror to make the necessary addition, clarification, or correction and to return the form to the jury commission within 10 days after its second receipt.

(b) Any prospective juror who fails to return a completed juror qualification form as instructed shall be directed by the jury commission to appear forthwith before the clerk to fill out the juror

qualification form. At the time of his appearance for jury service, or at the time of any interview before the court or clerk, any prospective juror may be required to fill out another juror qualification form in the presence of the court or clerk, at which time the prospective juror may be questioned, but only with regard to his responses to questions contained on the form and grounds for his excuse or disqualification. Any information thus acquired by the court or clerk shall be noted on the juror qualification form.

(c) A prospective juror who fails to appear as directed by the commission pursuant to subsection (a) shall be ordered by the court to appear and show cause for his failure to appear as directed. If the prospective juror fails to appear pursuant to the court's order or fails to show good cause for his failure to appear as directed by the jury commission, he is guilty of criminal contempt and upon conviction may be fined not more than [$100] or imprisoned not more than [3] days, or both.

(d) Any person who wilfully misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror is guilty of a misdemeanor and upon conviction may be fined not more than [$500] or imprisoned not more than [30] days, or both.

COMMENT: Derived from the Federal Act, 28 U.S.C.A. § 1864, and Section 5 of the Maryland Jury Act.

Section 8. [*Disqualifications from Jury Service.*]

(a) The court, upon request of the jury commission or a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror is disqualified for jury service. The clerk shall enter this determination in the space provided on the juror qualification form and on the alphabetical list of names drawn from the master jury wheel.

(b) A prospective juror is disqualified to serve on a jury if he:

(1) is not a citizen of the United States, [21] years old, and a resident of the [district] [county];

(2) is unable to read, speak, and understand the English language;

(3) is incapable, by reason of his physical or mental disability, of rendering satisfactory jury service; but a person claiming this disqualification may be required to submit a physician's certificate

as to the disability, and the certifying physician is subject to inquiry by the court at its discretion; or

(4) has lost the right to vote because of a criminal conviction.

COMMENT: Derived largely from the Federal Act, 28 U.S.C.A. § 1865.

Section 9. [*Qualified Jury Wheel; Selection and Summoning of Jury Panels.*]

(a) The jury commission shall maintain a qualified jury wheel and shall place therein the names or identifying numbers of all prospective jurors drawn from the master jury wheel who are not disqualified (Section 8).

(b) [A judge] [The court administrator] or any court or any other state or [county] [district] official having authority to conduct a trial or hearing with a jury within the [county] [district] may direct the jury commission to draw and assign to that court or official the number of qualified jurors he deems necessary for one or more jury panels or as required by law for a grand jury. Upon receipt of the direction and in a manner prescribed by the court, the jury commission shall publicly draw at random from the qualified jury wheel the number of qualified jurors specified. The qualified jurors drawn for jury service shall be assigned at random by the clerk to each jury panel in a manner prescribed by the court.

(c) If a grand, petit, or other jury is ordered to be drawn, the clerk thereafter shall cause each person drawn for jury service to be served with a summons either personally or by registered or certified mail, return receipt requested, addressed to him at his usual residence, business, or post office address, requiring him to report for jury service at a specified time and place.

(d) If there is an unanticipated shortage of available petit jurors drawn from a qualified jury wheel, the court may require the sheriff to summon a sufficient number of petit jurors selected at random by the clerk from the qualified jury wheel in a manner prescribed by the court.

(e) The names of qualified jurors drawn from the qualified jury wheel and the contents of jury qualification forms completed by those jurors shall be made available to the public unless the court determines in any instance that this information in the interest of justice should be kept confidential or its use limited in whole or in part.

COMMENT: The first four subsections are derived from the Federal

Act, 28 U.S.C.A. § 1866 (a), (b), and (f). Subsection (e) is derived from Section 4(b)(iv) of the 1969 Maryland Jury Act.

The Uniform Act contemplates that the jury commission in each county or district will carry out the selection of jurors for all juries within that territory. Any court or public official having authority to conduct a trial or hearing with a jury can, pursuant to Section 9(b), requisition the requisite number of jurors. Under subsection (c) the clerk member of the jury commission is charged with the job of summoning all jurors, including those for specialized tribunals. For the purpose of granting excuses from service on the juries used by such specialized tribunals, the presiding officer would exercise the powers of the "court" under Section 11(b).

Section 10. [*No Exemptions.*] **No qualified prospective juror is exempt from jury service.**

COMMENT: The Federal Act, 28 U.S.C.A. § 1863(b)(6), permits the plan in each district to "specify those groups of persons or occupational classes whose members shall be barred from jury service on the ground that they are exempt" provided that "the district court finds, and the plan states, that their exemption is in the public interest and would not be inconsistent" with the policies declared in the first and second sections of the Act. The Federal Act goes on to require that exemption be provided for the following:

> "(i) members in active service in the Armed Forces of the United States; (ii) members of the fire or police departments of any state, district, territory, possession or subdivision thereof; (iii) public officers in the executive, legislative, or judicial branches of the Government of the United States, or any State, district, territory, or possession or subdivision thereof, who are actively engaged in the performance of official duties." (*Ibid.*)

Many states also have a long list of exempt classes of persons. For example, Maine exempts all officers of the United States, officers of colleges, and cashiers of incorporated banks, as well as ministers, teachers, physicans, dentists, nurses and attorneys. 14 M.R.S.A. § 1201.

Exemption of particular classes by statute is believed inadvisable. The public policy declared in Section 1 is better achieved

by individual excuses pursuant to Section 11 upon a showing in the individual case of undue hardship, extreme inconvenience, or public necessity. Moreover, since petit jury service is, except in the unusual case, limited by Section 15 of the Uniform Act to a specified number of court days in any two year period, the burden of jury service upon the individual is minimized. The individual should not be given an automatic exemption merely because he comes within a particular class, but rather should be required to make out a case of hardship to the court.

Section 11. [*Excuses from Jury Service.*]

(a) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or interview with the prospective juror or other competent evidence whether the prospective juror should be excused from jury service. The clerk shall enter this determination in the space provided on the juror qualification form.

(b) A person who is not disqualified for jury service (Section 8) may be excused from jury service by the court only upon a showing of undue hardship, extreme inconvenience, or public necessity, for a period the court deems necessary, at the conclusion of which the person shall reappear for jury service in accordance with the court's direction.

COMMENT: The Federal Act permits the plan in each district to specify groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service and also fix the distance either in miles or travel time beyond which prospective jurors would not be required to travel to court. 28 U.S.C.A. § 1863(b)(5) and (7). Many plans adopted under the Federal Act give automatic excuse upon request to a long list of classes or groups, as, for example, the following list quoted from the plan for the District of Maine:

> "(1) all persons over seventy years of age;
>
> "(2) all ministers of the gospel and members of religious orders, actively so engaged;
>
> "(3) all attorneys, physicians, surgeons, dentists, veterinarians, pharmacists, nurses, and funeral directors, actively so engaged;
>
> "(4) all persons who have served as a grand or petit juror in a State or Federal court within the preceding two years;

"(5) all school teachers in public, parochial or private schools, actively so engaged;

"(6) all persons who do not have adequate means of transportation to the place of holding court;

"(7) all women who are caring for a child or children under the age of sixteen years;

"(8) all sole operators of businesses."

Other district plans have strictly limited the automatic excuses, as, for example, that for the Western District of North Carolina, which grants excuses upon individual request only to the following:

"(1) persons over seventy-five years of age;

"(2) women who have legal custody of a child or children under the age of ten years;

"(3) any person who resides more than one hundred (100) miles from place of holding court."

Section 11 of the Uniform Act is based upon the same principle as Section 10, namely, that there should be no automatic exemptions or excuses from jury service, but rather that excuse should be only upon a showing of actual need or public reason therefor. The Uniform Act proceeds on the principle that jurors should be selected by random methods from the widest possible list of citizens. The corollary is that actual service on the jury should be shared as widely as possible and in particular that professional and business groups should be excused only in cases of demonstrated need. The so-called "blue ribbon jury" is outlawed by the Uniform Act. At the same time, business and professional groups within the community should not be permitted to avoid jury service. It is also believed that citizens in general will be more willing to perform jury service if it is known throughout the community that jury service is universal, barring only particular hardship in specific cases.

The Uniform Act does not refer to those other ways in which pursuant to other provisions of law prospective jurors may be excluded from service, namely, (i) exclusion upon peremptory challenge, (ii) exclusion for good cause; and (iii) exclusion because the requisite number of jurors, including alternate jurors, have already been impaneled in a particular case. Those other occasions

for the exclusion of qualified jurors are well defined in the law. Otherwise than by exclusion under those circumstances, if a qualified juror is drawn from the qualified wheel and he is not excused upon a showing of undue hardship, extreme inconvenience, or public necessity, he has the obligation to serve and is guaranteed the opportunity to serve. See Section 1.

Section 12. [*Challenging Compliance with Selection Procedures.*]

(a) Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefore, and in any event before the petit jury is sworn to try the case, a party may move to stay the proceedings, and in a criminal case to quash the indictment, or for other appropriate relief, on the ground of substantial failure to comply with this Act in selecting the grand or petit jury.

(b) Upon motion filed under subsection (a) containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with this Act, the moving party is entitled to present in support of the motion the testimony of the jury commissioner or the clerk, any relevant records and papers not public or otherwise available used by the jury commissioner or the clerk, and any other relevant evidence. If the court determines that in selecting either a grand jury or a petit jury there has been a substantial failure to comply with this Act, the court shall stay the proceedings pending the selection of the jury in conformity with this Act, quash an indictment, or grant other appropriate relief.

(c) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the State, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this Act.

(d) The contents of any records or papers used by the jury commissioner or the clerk in connection with the selection process and not made public under this Act (Section 5(c) and 9(e)) shall not be disclosed, except in connection with the preparation or presentation of a motion under subsection (a), until after the master jury wheel has been emptied and refilled (Section 6) and all persons selected to serve as jurors before the master jury wheel was emptied have been discharged. The parties in a case may inspect, reproduce, and copy the records or papers at all reasonable times during the preparation and pendency of a motion under subsection (a).

COMMENT: This section establishes the exclusive means for

challenging a jury on the grounds that its selection was otherwise than in conformity with the provisions of this Act. The challenge must be made before the trial jury is sworn or within 7 days after discovery or constructive discovery of the grounds of the challenge, whichever occurs earlier. A defendant may not complain about the make-up of the panel; his objection can go only to the manner of selection. See *Pinkney v. United States*, 380 F.2d 882 (5th Cir. 1957).

This section is derived from the Federal Act, 28 U.S.C.A. § 1867. The Senate Committee Report on the bill which became the Federal Act had the following to say in regard to the exclusivity provision (Subsection (c) in the Uniform Act), which in the Federal Act is Section 1867(e):

> "Subsection (e) makes clear that the procedures prescribed in this section are the exclusive means for challenging compliance with the statute. Challenge procedures existing under other laws are left intact for purposes of asserting rights created by other laws and for enforcing constitutional rights, but such other procedures may not be used to challenge compliance with this statute. Your committee feels constrained to recognize that these alternatives for raising rights created by other statutes and for raising constitutional challenges are not affected by the Act. This recognition is particularly apt in light of recent Supreme Court decisions indicating that the manner in which constitutional rights may be raised cannot be narrowly prescribed. See, e.g., *Henry v. Mississippi*, 379 U.S. 443, 447 (1965); *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)."

Section 13. [*Preservation of Records.*] **All records and papers compiled and maintained by the jury commissioner or the clerk in connection with selection and service of jurors shall be preserved by the clerk for 4 years after the master jury wheel used in their selection is emptied and refilled (Section 6) for any longer period ordered by the court.**

COMMENT: Derived from the Federal Act, 28 U.S.C.A. § 1868.

Section 14. [*Mileage and Compensation of Jurors.*] **A juror shall be paid mileage at the rate of [10] cents per mile for his travel expenses from his residence to the place of holding court and return and shall be compensated at the rate of [$20.00] for each day of required attendance at sessions of the court.**

COMMENT: Compensation more adequate than has commonly been provided and also reimbursement for at least travel expenses should accompany the expanded obligation for jury service. Also, more adequate compensation will tend to reduce the occasions for excusing prospective jurors under Section 11 because of financial hardship.

Section 15. [*Length of Service by Jurors.*] In any [2] year period a person shall not be required:

(1) to serve or attend court for prospective service as a petit juror more than [10] court days, except if necessary to complete service in a particular case;

(2) to serve on more than one grand jury; or

(3) to serve as both a grand and petit juror.

COMMENT: This section is derived from the Federal Act, 28 U.S.C.A. § 1866(e), although a maximum of 10 days service on a petit jury is suggested as against the thirty-day limitation of the Federal Act. The purpose of the section is stated in the Senate Committee Report on the bill which became the Federal Act:

> "This provision is designed to distribute the 'burden' of jury service and to enhance the representative quality of juries. Moreover, since jury service involves direct participation in the democratic process, as many citizens as possible ought to have the chance to serve."

Section 16. [*Penalties for Failure to Perform Jury Service.*] A person summoned for jury service who fails to appear or to complete jury service as directed shall be ordered by the court to appear forthwith and show cause for his failure to comply with the summons. If he fails to show good cause for noncompliance with the summons, he is guilty of criminal contempt and upon conviction may be fined not more than [$100] or imprisoned not more than [3] days, or both.

COMMENT: Derived from the Federal Act, 28 U.S.C.A. § 1866(g).

Section 17. [*Protection of Jurors' Employment.*]

(a) An employer shall not deprive an employee of his employment, or threaten or otherwise coerce him with respect thereto, because the employee receives a summons, responds thereto, serves as a juror, or attends court for prospective jury service.

(b) Any employer who violates subsection (a) is guilty of criminal

contempt and upon conviction may be fined not more than [$500] or imprisoned not more than [6] months, or both.

(c) If an employer discharges an employee in violation of subsection (a) the employee within [ ] days may bring a civil action for recovery of wages lost as a result of the violation and for an order requiring the reinstatement of the employee. Damages recoverable shall not exceed lost wages for 6 weeks. If he prevails, the employee shall be allowed a reasonable attorney's fee fixed by the court.

COMMENT: In substance derived from Section 13 of the 1969 Maryland Jury Act and Michigan C.L.A. § 600.1348. The civil remedy provided in subsection (c) parallels that provided in Section 5.202 (6) of the Uniform Consumer Credit Code (relating to wrongful discharge for garnishment), with the addition of the allowance of a reasonable attorney's fee to the prevailing plaintiff.

Section 18. [*Court Rules.*] The [Supreme Court] may make and amend rules, not inconsistent with this Act, regulating the selection and service of jurors.

COMMENT: This section does not appear in either the Federal or Maryland Act [although those Acts do provide for local "plans" which are in effect rules]. It is added in order to enable the state's highest court to flesh out the provisions of the Act and to assure to the extent desirable that the same detailed methods of jury selection and administration of the Act are followed throughout the state or at least that any variations from uniformity are the result of conscious choice. In some respects the rules made by the state's highest court will serve the same function as the jury selection plan under the Federal Act. See also Section 5(a) authorizing the Supreme Court (or alternatively the Attorney General) to prescribe supplementary sources of names for the master list.

Mich. C.L.A. § 600.1353 gives rulemaking power in regard to jury selection to the judges of each circuit court.

Section 19. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Section 20. [*Short Title.*] This Act may be cited as the Uniform Jury Selection and Service Act.

Section 21. [*Application and Construction.*] This Act shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it.

Section 22. [*Repeal.*] The following acts and parts of acts are repealed:

(1)
(2)
(3)

NOTES

RECENT CALIFORNIA CAMPUS DISORDER LEGISLATION: A COMMENT

Introduction

In 1964, the Free Speech Movement at the University of California at Berkeley awakened the nation to a spreading phenomenon — militant student unrest. Since then, the issues of war, racism and the inhumanity of the "system" have aroused student passions on hundreds of campuses across the country. At places like San Francisco State College and Kent State University violent clashes between students and the police and national guard have made campus disorders a political issue of intense public concern.[1] In recent years, state after state has enacted legislation designed to prevent disruptions at colleges and universities and to punish students who engage in such disruptions.[2] Among the

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1 In the wake of the demonstrations at San Francisco State College, 47 bills to control campus disorders were introduced during the first three months of the 1969 regular session of the California Assembly. *Hearings on Section 504 of the Higher Education Amendments of 1968 and Campus Unrest Before the Special Subcom. on Education of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 120 (1969) (statement of Dr. Alex Sherriffs, Education Secretary in the Office of Gov. Ronald Reagen). For an indication of the degree of public concern, see *id., passim.*

The death of four students at Kent State University prompted the appointment of a presidential commission to inquire into the causes of campus disorders. *See* REPORT OF PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970).

2 *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1091 to 13-1094 (West Supp. 1971); ARK. STAT. ANN. §§ 41-1447, 41-1448 (Supp. 1969); FLA. STAT. ANN. §§ 228.21, 239.581, 240.045, 877.13 (West Supp. 1971); IDAHO CODE §§ 33-3715, 33-3716 (Supp. 1969); ILL. REV. STAT. ch. 38, §§ 21-4, 21-5, ch. 122 § 30-17, ch. 144, §§ 225, 226 (1969); IND. ANN. STAT. §§ 10-4531 to 10-4536 (Supp. 1970); LA. REV. STAT. ANN. §§ 14-328 to 14-329.8, 17-3101 to 17-3109 (Supp. 1970); MD. ANN. CODE art. 27, § 577B (Supp. 1970); MINN. STAT. ANN. § 624.72 (Supp. 1970); N.M. STAT. ANN. § 40A-20-9 (Supp. 1969); N.Y. EDUC. LAW § 6450 (McKinney Supp. 1970); N.C. GEN. STAT. §§ 116-174.2, 116-212, 116-213 (Supp. 1969); OHIO REV. CODE ANN. §§ 3345.21-3345.26 (Page Supp. 1969); OKLA. STAT. ANN. tit. 21, § 1326, tit. 70, § 624 (Supp. 1971); PA. STAT. tit. 24, §§ 5104.1, 5158.1 (Supp. 1970); TENN. CODE ANN. §§ 39-1214 to 39-1217, 49-4120 (Supp. 1970); TEX. PEN. CODE ANN. arts. 295a, 295b (Supp. 1970); UTAH CODE ANN. § 76-66-3 (Supp. 1969); VA. CODE ANN. §§ 18.1-173.2, 23-9.2:3 (Supp. 1970); WASH. REV. CODE ANN. §§ 28B.10.510-28B.10.573 (1970); WIS. STAT. ANN. §§ 36.43, 36.45, 36.46, 36.47, 36.49 (Supp. 1971).

most comprehensive of the new legislation is that enacted in California.[3]

This Note presents an analysis of the California legislation on campus disorders. The issue of campus disorders is a political one, and the decision of the California legislature to take action which it hoped would ameliorate the situation is also political. This Note does not undertake a constitutional analysis,[4] but a pragmatic one, and though constitutional issues are in some senses crucial to the political question, they will be studiously avoided here.

A brief summary of the legislation will be followed by a review of principal California cases regarding trespass on public property and breach of the peace, both central concepts in the new statutes.

3 Ch. 1424, [1969] Cal. Stats. 2919 codified in CAL. PENAL CODE §§ 415.5, 626, 626.2, 626.4, 626.6, and 626.8 (West 1970); ch. 1427, [1969] Cal. Stats. 2927 codified in CAL. EDUC. CODE §§ 22505, 22508, 22509, 22635, 22636 (West Supp. 1971) 31291, 31292, 31293, and 31294 (West Supp. 1970).

The statutes were written to take effect immediately upon signature by the Governor. Ch. 1424, § 5, [1969] Cal. Stats. 2924 provides:

> The schools and universities of this state are in a state of crisis and turmoil because of the attempts of various individuals to disrupt their operations. In order that the provisions of this act be applicable in the current situation and alleviate it, it is essential that this act take effect immediately.

Ch. 1427, § 8, [1969] Cal. Stats. 2932 provides:

> The fall semester or quarter, as the case may be, at institutions of higher education in this state will commence shortly. So that the campuses may be maintained in an orderly manner and in order to curtail and control disruptions that might occur thereon, it is necessary that this act take effect immediately.

4 The literature on the constitutional issues raised by campus disorders and state responses to them is extensive. For discussions of the constitutional considerations involved in the discipline of students, see Johnson, *The Constitutional Rights of College Students*, 42 TEXAS L. REV. 344 (1964); Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANSITION Q. 1 (1965); Note, *Reasonable Rules, Reasonably Enforced-Guidelines for University Disciplinary Proceedings*, 53 MINN. L. REV. 301, (1968); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT (1970). On the due process considerations specifically, see Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Comment, *Fourteenth Amendment and University Disciplinary Procedures*, 34 MO. L. REV. 236 (1969); Comment, *Due Process in Public Colleges and Universities—Need for Trial-type Hearings*, 13 How. L.J. 414 (1967). For considerations of first amendment rights, see Monypenny, *Toward a Standard for Student Academic Freedom*, 28 LAW & CONTEMP. PROB. 625 (1963); Comment, *The University and the Public: The Right of Access by Non-Students to University Property*, 54 CAL. L. REV. 132, 147-57 (1966).

The Note will then attempt an evaluation of the legislation on the criteria of necessity, probable effectiveness, and wisdom.

I. Summary of the California Statutes

The 1969 regular session of the California Legislature adopted two bills, Assembly Bills 534[5] and 1286,[6] which made important additions to the penal[7] and education[8] codes, respectively. In order to analyze the impact of this legislation, it is first necessary to understand the provisions of these two bills.

Assembly Bill 534 added new section 415.5 to the California Penal Code. This section provides that any person who "maliciously and willfully" disturbs the peace of any public college or university will be guilty of a misdemeanor, with a maximum punishment of ninety days to six months imprisonment and a fine of five hundred dollars.[9] The language of the new section defining the proscribed conduct is virtually identical with penal code section 415,[10] which is the general disturbing-the-peace statute in California. The chief difference is that 415.5 is applied specifically to state colleges and universities. The section indicates that peace would be disturbed by "loud or unusual noise, or by tumultous or offensive conduct, . . . or[11] by using any vulgar, profane, or indecent language in the presence or hearing of women or children."[12]

There is no definition in the statute of what constitutes "loud or unusual noise" or "tumultous or offensive conduct" or "vulgar, profane, or indecent language." Under section 415, the interpretation of these phrases has been left to the courts, and the courts have had little difficulty interpreting the statutory language. Section 415 has been repeatedly upheld against attack on

5 Ch. 1424, [1969] Cal. Stats. 2919.
6 Ch. 1427, [1969] Cal. Stats. 2927.
7 Cal. Penal Code §§ 415.5, 626-626.8 (West 1970).
8 Cal. Educ. Code §§ 22505, 22508, 22509, 22635, 22636 (West Supp. 1971); Cal. Educ. Code §§ 31291-31294 (West Supp. 1970).
9 Cal. Penal Code § 415.5 (West 1970).
10 Cal. Penal Code § 415 (West 1970).
11 The language here is the same as the language of § 415. The importance of the conjunction "or" as opposed to "and" is illustrated in People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (Ct. App. 1969).
12 Cal. Penal Code § 415.5 (West 1970).

constitutional grounds, including allegations that it is too vague[13] and that it interferes with first amendment rights.[14] In using the same language as 415, section 415.5 undoubtedly inherits the protection of these decisions. It may be argued in individual cases that the standard of what is "unusual noise" or "offensive conduct" is different in a university setting than in the community at large. Even if this argument should be accepted, however, it is unlikely that the whole statute would fall as a result.

Other changes in the penal code are the addition of new code sections 626 *et seq.* which provide, first, that any student or employee who has been suspended or dismissed from a state college because he has disrupted "the orderly operation" of the campus, and who has been denied access to the campus as a result, may not willfully re-enter the campus without written permission from the chief administrative officer.[15] Violation is a misdemeanor. Second, the statute provides that the chief administrative officer or his designee may notify a person that consent for his remaining on campus has been withdrawn, "whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation" of the campus. Remaining on campus after such a withdrawal of consent is a misdemeanor.[16] The section contains procedural safeguards against arbitrary exercise of authority by a subordinate of the chief administrative officer by providing for a hearing on a petition for reinstatement. Third, if it "reasonably appears" to the chief administrative officer that a person not a student or employee is committing or has entered the campus with the intention of committing an act "likely to interfere" with campus peace, he may direct such person to leave and deny him the right to return for seventy-two hours.[17] As in the other sections, violation is a misdemeanor. Finally, there is a provision prohibiting any person "without lawful business" at a grammar or secondary school whose presence

13 People v. Green, 234 Cal. App. 2d 871, 44 Cal. Rptr. 438 (App. Dep't, Super. Ct.), *cert. den.* 382 U.S. 993 (1965).

14 People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (Ct. App. 1969). For a discussion of the constitutionality of § 415 generally, see Note, *Student Unrest in a Legal Perspective, Focus on San Francisco State College*, 4 UNIV. OF SAN FRANCISCO L. REV. 255 (1970).

15 CAL. PENAL CODE § 626.2 (West Supp. 1971).

16 CAL. PENAL CODE § 626.4 (West Supp. 1971), "Chief Administrative officer" is defined in § 626(a)(4).

17 CAL. PENAL CODE § 626.6 (West Supp. 1971).

interferes with the "peaceful conduct of the activities of such school" from remaining at the school. Failure to leave when requested is a misdemeanor.[18] It is evident that these provisions reflect a desire to preserve campus order by excluding undesirable "outsiders." The basic concept underlying these provisions is that of trespass upon public land.

Assembly Bill 1286 added new section 22505 to the education code. Under this section, the chief administrative officer of a college "shall take appropriate disciplinary action" against a student or employee "who has been convicted of a crime arising out of a campus disturbance," or who has been found by a college hearing board to have "willfully disrupted" the campus. Emergency suspensions without a hearing are permitted if the chief administrative officer believes that summary suspensions are necessary.[19]

The use of the word "shall" seems to indicate a legislative intent that discretion not be left in the hands of the chief administrative officer as to whether to impose such discipline. However, while the statute compels the chief administrative officer to take some disciplinary action, he is given wide discretion as to the type and degree of punishment.[20]

It also appears that the statute prescribes different treatment as between persons liable to discipline because of criminal convictions and persons liable because they have been found by a college hearing board to have disrupted the campus. In the former case, the statute indicates that college discipline is to follow criminal conviction automatically. In the latter case, however, the college officials can exercise discretion on the question of whether or not to hold formal hearings.[21] If they do not hold such hearings, the mandatory discipline requirement of the statute is avoided. Except in the case of a criminal conviction, then, the college administration retains its flexibility in dealing with

18 CAL. PENAL CODE § 626.8 (West Supp. 1971).

19 CAL. EDUC. CODE § 22505 (West Supp. 1971). § 22508 contains definitions used in the chapter. § 22509 provides for state payment of costs incurred by municipalities when the local police respond to a disturbance on a state college campus.

20 CAL. EDUC. CODE § 22505 (West Supp. 1971) states that "[t]he disciplinary action *may include, but need not be limited to,* suspension, dismissal, or expulsion" (emphasis added).

21 CAL. EDUC. CODE § 22505 (West Supp. 1971).

discipline of students or employees who engage in "disruption." The statute, probably designed to compel reluctant college administrators to take disciplinary action, really does little to accomplish that end.[22]

New sections 22635 and 22636[23] of the education code provide that the governing boards[24] of the state colleges and universities "shall adopt or provide for the adoption of specific rules and regulations governing student behavior" and that copies of these rules and the corresponding penalties shall be made available to all students.[25] Thus, each governing board apparently has the option of formulating the rules itself or of delegating this authority according to such guidelines as it deems appropriate.

Every state college and university had rules of student behavior prior to the enactment of this statute.[26] Thus, it may be asked what purpose was served by the enactment of these sections. By way of explanation, the legislature noted that in approving this chapter it intended "that a coherent, fair and uniform system of discipline be operative upon the campuses" of the state colleges and universities.[27] However, the statute does not insure that this goal will be achieved. It is easily conceivable, since each governing board may delegate its authority to adopt rules and regulations, that there will not be a uniform code of student behavior for California's state colleges and universities. The regulations for each school can be "coherent" and "fair" without the help of either the legislature or the governing board, but uni-

22 Even where the mandate of "shall take" is clear, however, there must remain some question of enforcement against an administrator who, whether intentionally or negligently, fails to follow through with the statute's command. On the other hand, the practical political pressures to observe the statute scrupulously, especially when urged to do so by the governor, attorney general, or regents, may very well provide all the enforcement necessary to control a state college official.

23 CAL. EDUC. CODE §§ 22635, 22636 (West Supp. 1971).

24 The governing boards are defined as "the Regents of the University of California, the Trustees of the California State Colleges, and the governing board of every community college or school district maintaining a community college." CAL. EDUC. CODE § 22635 (West Supp. 1971).

25 As previously indicated, this Note avoids all constitutional issues. For a suggestion that similar legislation might be unconstitutional as applied to the University of California because Article IX of the California Constitution grants autonomy to the Regents, see Comment, *The University and the Public: The Right of Access by Non-Students to University Property*, 54 CAL. L. REV. 132, 141 (1966).

26. *See* CAL. ASSEMBLY, REPORT OF THE SELECT COMMITTEE ON CAMPUS DISTURBANCES 118-22 (1969) [hereinafter cited as REPORT OF THE SELECT COMMITTEE].

27 Ch. 1427, § 6, [1969] Cal. Stats. 2927.

formity can only be achieved through some kind of direction from above. Curiously, given the legislature's stated intention, neither section 22635 nor section 22636 contains the word "uniform." Another explanation is that the legislature wanted to see that particular substantive rules of student conduct were adopted, but by delegating the power to set such rules to the governing boards, and by permitting them to delegate in turn it has made it unlikely that this goal will be achieved.

New sections 31291 to 31294 of the education code[28] provide that state financial aid may be denied for up to two years to (1) a person convicted of a crime arising from a campus disorder or (2) a person found after a hearing to have "willfully and knowingly disrupted the orderly operation" of a campus, and for the term of suspension to a person who has been suspended as a result of such a disruption. The authority here is discretionary; the aid is not cut off automatically.

II. The California Decisional Law

In view of the importance of the concepts of breach of the peace and trespass on public property in the new statutes, it is appropriate to consider the state of the law on these points in California. It was against this background of decisional and statutory law that the legislature enacted the new statutes. The question to be asked is the extent to which these new statutes added to or altered preexisting California law.

A. *Breach of the Peace*

In considering the prominent cases in the area of breach of the peace, it is not difficult to imagine similar fact situations that could occur on college campuses. The courts have found that unruly assemblages,[29] certain kinds of picketing,[30] unreasonable noise,[31] sit-ins,[32] and obscene slogans[33] all are breaches of the

28 Cal. Educ. Code §§ 31291-94 (West Supp. 1970).

29 People v. Anderson, 117 Cal. App. 763, 1 P.2d 64 (App. Dep't, Super. Ct. 1931).

30 Chrisman v. Culinary Workers' Local Union No. 62, 46 Cal. App. 2d 129, 115 P.2d 553 (Dist. Ct. App. 1941).

31 *Id.;* People v. Vaughan, 65 Cal. App. 2d 844, 150 P.2d 964 (App. Dep't, Super. Ct. 1944).

32 People v. Green, 234 Cal. App. 3d 871, 44 Cal. Rptr. 438 (App. Dep't, Super. Ct. 1965).

33 People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (Ct. App. 1969).

peace. None of the cases discussed here dealt with a campus situation, and the question must be asked whether the college setting would or should make any difference as to the outcome of the case.

In *People v. Anderson*[34] the defendants, members of the Trades Union Unity League, were attempting to address a crowd that flowed over the sidewalk into the street. Because of the noise policemen ordered the crowd to move along and the speakers to cease. When the speakers continued, they were arrested and convicted of violation of sections 415 and 416[35] of the penal code. In upholding the convictions, the Appellate Department of the Superior Court held that when the speakers did not cooperate with the police in dispersing the unlawful assembly they became principals in the offense. The police determination that the assembly was unlawful because of its size and noise was central in this case since it formed the basis for the defendants' indictment. It was not otherwise unlawful for them to address the crowd at the location which they selected. The defendants made the not altogether improbable argument that the police had orders to break up their meeting.[36] As the case illustrates, the summary power to order dispersal may require safeguards since it may be susceptible to abuse, especially in the context of a college campus.[37]

Chrisman v. Culinary Workers Union No. 62[38] presents a case of picketing that was held to be a breach of the peace. Members of the defendant union picketed plaintiff's two places of business after plaintiff had refused to execute a contract with the union. Shouts of "Chrisman's unfair," could be heard for some distance. Plaintiff also alleged that the pickets deliberately interfered with the ingress and egress from his place of business and peered in the windows to harass customers. Plaintiff sought an injunction against these acts. The trial court granted the injunction. On

34 117 Cal. App. 763, 1 P.2d 64 (App. Dep't, Super. Ct. 1931).

35 CAL. PENAL CODE § 416 (West 1970) provides as follows:

> Refusing to disperse upon lawful command. If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a public officer, the persons so offending are severally guilty of a misdemeanor.

36 *See* People v. Anderson, 117 Cal. App. 763, 1 P.2d 64 (App. Dep't, Super. Ct. 1941).

37 This possibility of abuse raises constitutional questions. See note 4, *supra.*

38 46 Cal. App. 2d 129, 115 P.2d 553 (Dist. Ct. App. 1941).

appeal, the court stated that peaceful picketing was entirely lawful and could not be enjoined, but that picketing shown by the evidence not to be peaceful could be enjoined. The court then found the evidence insufficient to support an injunction based on the alleged ingress-egress interference and the harassing of customers. With respect to the chanting, however, the court said: "It is alleged and found that the pickets shouted in unison in a loud and boisterous manner and disturbed the peace and quiet of the neighborhood and thereby interfered with plaintiffs' peaceful enjoyment of their properties. Such conduct is unlawful."[39] The judgment was reversed with a new trial ordered to find the proper scope of the injunction.[40]

In the case of *People v. Vaughan*[41] the court upheld the conviction of two Jehovah's Witnesses under section 415 after they had been arrested for entering a hotel at 9:30 one Sunday morning and knocking on the guests' doors in an effort to start religious discussions. After they had ignored the requests of the manager that they leave, the police were summoned and the defendants arrested. While the disturbance was not violent, the court pointed out that it could be reasonably classified as offensive conduct, especially since it had been accompanied by loud noises.

Both in *Chrisman* and *Vaughan*, the injury caused by the breach of the peace was to a business establishment. Finding a breach in such a setting may be easier than finding one in a university setting for two reasons. First, the interest is readily identifiable. If the activity alleged to be in breach of the peace continues the business will suffer. Chrisman's patrons probably would not tolerate harassment from the pickets for long before taking their business elsewhere. In *Vaughan*, the hotel guests would not be likely to stay or return unless they could enjoy peace and quiet. In contrast, the concern of the university is not with profits, but with something less tangible. In great measure the similarity of cases like *Chrisman* and *Vaughan* to campus situations will depend on the interpretation of the statutory words "unusual noise" and "offensive conduct" in the campus context.

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39 *Id.* at 46 Cal. App. 2d 133, 115 P.2d 555.

40 For a discussion of the use of injunctions in situations of student unrest see Note, *Campus Confrontation: Resolution by Injunction*, 6 COLUM. J.L. & SOC. PROB. 1 (1970).

41 65 Cal. App. 2d 544, 150 P.2d 964 (App. Dep't, Super. Ct. 1944).

Assuming that there is an ascertainable interest at stake in both the business and campus cases, the injury sustained is much easier to measure in the business instance. The loss will be pecuniary. Although a perfectly accurate meaure of the loss may be impossible to obtain, a reasonably close estimate can be made. The injury to a college when the peace is disturbed is less easily determined. In some cases it may well be that the injury is not serious enough to warrant the application of a criminal sanction. It might be wise to permit the university to choose judiciously on such occasions to deal informally with the disturbance. Once the criminal law is invoked, the university loses control over the disposition of the case. This may be unfortunate since the university is better able than a criminal court to judge the seriousness of the injury.

People v. Green[42] supports the proposition that violent conduct is not a necessary element of a violation. In *Green,* defendants had been arrested for taking part in a sit-in in the lobby of a bank. Their convictions under section 415 were affirmed. The appellate court concluded that:

> [T]he public peace is disturbed when the acts complained of disturb the public peace or tranquility enjoyed by members of a community where good order reigns among its members or where acts are likely to produce violence or where acts cause consternation and alarm in the community. . . . It is not necessary that any act have in itself any element of violence in order to constitute a breach of the peace.[43]

As in *Chrisman* and *Vaughan,* this case involved a private business establishment, but the language of the court is broad enough to discourage the conclusion that its holding was narrowly based on the peculiar facts of the case. First, the court in *Green* relied on *Anderson,* a case not involving a private business. More significant is the court's emphasis on the violation of "good order" rather than the invasion of public or private rights. It can be argued that a definition of "good order" may vary with the situation and that "good order" in the lobby of a bank may be measured by a different standard than "good order" on a campus.

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42 234 Cal. App. 2d 871, 44 Cal. Rptr. 438 (App. Dep't, Super. Ct. 1965).

43 *Id.* at 234 Cal. App. 2d 873, 44 Cal. Rptr. 439; *see also* People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (Ct. App. 1969).

Again, this raises the question of whether the university presents an entirely unique situation.

B. *Trespass on Public Property*

There have been two recent cases dealing with prosecutions under the predecessor of penal code section 602(n)[44] which prohibited persons from remaining in a public building after normal business hours without lawful business to pursue. The considerations that would support a conviction under this section are probably similar to the factors that would be crucial to conviction under the new section 626. Both are aimed at situations where persons remain on public property after an administrative determination that they should not be there. In the former statute, the question is whether the person has lawful business to pursue. In the latter, the issues are whether consent to remain on campus has been withdrawn and whether it reasonably appears to an administrator that such person is likely to commit an act disruptive of the orderly operation of the campus.

In re Bacon[45] deals with the conviction of several University of California at Berkeley students under the predecessor of section 602(n). The students had been engaging in a sit-in in Sproul Hall on the Berkeley campus when they were arrested after having been requested by the chancellor to leave the building. Upholding the convictions, the court said: "The circumstances in the instant case are not such as to indicate to a reasonable man that administrators of the university were required to keep Sproul Hall open beyond the regular 7 p.m. closing time in order that the stated grievances might be expressed in the manner chosen by the protesters."[46] If the court had reached the opposite conclusion on the issue of reasonableness — namely, that the request to leave the building was unreasonable — it is difficult to see how the convictions could have been upheld. When the issue is framed in these terms, it is at least plausible to imagine a case in which

44 Section 602(o) was changed to § 602(n) by Ch. 43 § 1, [1969] Cal. Stats.

45 240 Cal. App. 34, 49 Cal. Rptr. 322 (Dist. Ct. App. 1966).

46 49 Cal. Rptr. 322, at 329-30. The protesters themselves helped the court decide that their action was not reasonable. The court observed that "one of appellants testified that the purpose of the protesters was 'in some way stopping the temporary function of the University.'" *Id.* at 330, n.5.

the particular circumstances of a given campus would make some otherwise unlawful action "reasonable."[47]

A challenge to the objectivity of the standard of reasonableness contained in the predecessor of section 602(n) failed in *Parrish v. Municipal Court*.[48] Plaintiff contended that the statute was invalid for failure to lay down an objective standard. The court rejected the argument, saying that the test of reasonableness was as valid in this instance as in a tort case. Moreover, the court held that a person's belief that he has lawful business to pursue in a public building well after closing time is not enough to justify his actions if a "reasonable man" considering all the facts could not agree.[49]

III. Some Observations on the Statutes

A. *Necessity*

When the California legislature enacted these statutes, it was responding to events which made out a prima facie case for legislative action. The disorders which had occurred at certain state colleges and universities threatened, in the legislature's view, the orderly operation of public institutions of higher education.[50] Given the persistence of the tumult, it is difficult to argue that the legislature was unwarranted in its belief that some state action

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47 This analysis holds only for offenses which are *malum prohibitum*, as opposed to those which are *malum in se*. *See generally* R. Perkins, Criminal Law 784-98 (2nd ed. 1969).

48 258 Cal. App. 2d 497, 65 Cal. Rptr. 862 (Ct. App. 1968).

49 *Id.*, at 258 Cal. App. 2d 503, 65 Cal. Rptr. 866.

50 In urging action by the legislature, the Select Committee on Campus Disturbances said in part:

> During the past five years California's extensive system of public and private higher education has been assailed by a series of violent disorders. Beginning in 1964 with the Free Speech Movement on the Berkeley campus of the University of California, disorders have since spread, in one form or another, to most of the major University and state college campuses, and to several private colleges and universities. . . .
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> California's institutions of higher education have had no monopoly on disorders and challenges to authority in recent years. Few major institutions across the country have been exempt. . . .
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> Nevertheless, it is on California's campuses that serious clashes have occurred, and it is for California's institutions of higher education that we seek effective means of ending disorder and violence.

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was necessary and appropriate. On the first level, then, the question of whether statutory action was necessary seems to merit an affirmative answer.

Granting this, however, it still must be asked whether the new statutes provided the state or the colleges with new means of coping with the perceived problem. It seems clear that penal code section 415.5 is not a significant addition to the existing section 415. As pointed out above, the language of the two sections, insofar as it defines the elements of the offense, is identical. The main effect of 415.5 is to emphasize the fact that the statute will be applied to situations involving a breach of the peace on state college campuses. This is not a major addition to the penal code since such disturbances could have been successfully prosecuted under section 415.[51] Nevertheless, the legislature may have sought the additional assurance the specificity brings.

Another object of the new section was to prescribe escalating penalties for repeated violations of the section. The Select Committee on Campus Disruptions, which proposed this legislation substantially in the form enacted, included in its report the following recommendation:

> Legislation [should be enacted] clarifying misdemeanant disruptive acts already in the code to make them apply directly on campuses. This would include mandation of penalties for repeat offenders.[52]

Section 415 would not have been sufficient to meet this latter goal.

Sections 626 *et seq.* reflect the legislature's unwillingness to rely solely on the precedential law regarding trespass on public property in the context of college campuses.[53] The legislature wanted to insure that an "outsider" could be excluded from a public college campus if there were reasonable cause to believe that his presence would be disruptive of good order.[54] Section 602(n)

51 For example, on January 23, 1969, police arrested demonstrating students at San Francisco State College under the authority of § 415, among others. Note, *Student Unrest in a Legal Perspective, Focus on San Francisco State College*, 4 UNIV. OF SAN FRANCISCO L. REV. 255 (1970).

52 REPORT OF THE SELECT COMMITTEE, 5 (1969).

53 CAL. PENAL CODE §§ 626.6, 626.8 (West Supp. 1971) are replacements for former §§ 602.7 and 602.9.

54 The Select Committee on Campus Disturbances argued that "[c]ampus officials need clear authority to protect educational institutions from individuals who have engaged in illegal campus disturbances and who return with the intention of illegally disrupting the campus." REPORT OF THE SELECT COMMITTEE 2.

forbids remaining in a public *building* after normal business hours without lawful business to pursue. The new sections provide university officials with the power to exclude potentially unruly visitors not only from buildings, but also from the campus grounds. Furthermore, the exclusion may take place during normal business hours under the new sections if disruption is "likely" to occur if the person remains.

Section 22505 of the education code, providing for university discipline of persons who have been found by a criminal court or by a university hearing board to have disrupted the campus, is another example of an attempt by the legislature to make certain what had previously been only highly probable. Subject only to the discretion of the university officials in holding disciplinary hearings, the legislature has commanded the officials of state colleges to discipline the members of their communities who have been found guilty of disrupting the campus. Although it is likely that in the majority of cases such discipline would have been enforced in the absence of statutory command, the legislature has made the imposition of discipline definite in every case. From one perspective, the statute may increase fairness in the administration of discipline on college campuses. Presumably every offender will be penalized. From another perspective, however, the general rule may prevent suitable flexibility for dealing with the circumstances of individual cases.

Sections 22635 and 22636, which require that the governing boards adopt rules for student behavior, have a less apparent purpose. The state colleges had student rules and regulations before these sections were enacted.[55] The provisions probably were intended to counter constitutional objections which might be made before a reviewing court considering whether the regulations were issued and enforced in accordance with due process.[56] Section 22635 requires that the rules be "specific," that the penalties to be incurred be stated, that copies of the rules be provided to the students, and that students be notified of any change in the rules. The provisions have little effect other than to immunize college

55 REPORT OF THE SELECT COMMITTEE 118-22.

56 On the standards of due process in a college disciplinary hearing, see Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), *cert. den.* 368 U.S. 930 (1961). See also articles cited *supra* n.4.

discipline from attack for failure to comply with procedural due process.[57]

The forfeiture-of-financial-aid provisions, sections 31291 through 31294 of the education code, are original. They introduce a new penalty for the disruption of college campuses. It is possible that individual colleges made use of the power to terminate financial aid as punishment before these sections were enacted. Whether or not they did, colleges must now, at minimum, hold a hearing to determine whether to terminate state-supported aid. The legislature has not made termination automatic, but it has insured that the question be considered.

Whether legislation is necessary or appropriate is not solely a question of the extent to which it may duplicate or overlap other legislation. In each of the above situations the new statutes arguably amended existing law to accommodate situations peculiar to the college campus. However, a legislative determination that existing laws have not been effective in dealing with campus disorders should not necessarily lead to the conclusion that additional legislation is needed. Also to be considered is the extent to which new legislation may interfere with other effective nonstatutory means of accomplishing the same goals. Indeed, a central question here is whether the problems of student unrest can be resolved at all through the application of the criminal law.[58] Any judgment on this issue must be based on the probable effectiveness of statutory remedies as compared with other possible solutions, and the policy reasons for favoring one approach over another.[59]

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57 See note 4, *supra*.

58 The Select Committee contended that "[a]cademic discipline, properly implemented, is preferable to law enforcement action on campus in dealing with students and faculty." REPORT OF SELECT COMMITTEE 2.

59 For example, the Select Committee stated its belief that academic discipline was generally preferable to criminal action, but found that university discipline was often too slow and ineffective. REPORT OF THE SELECT COMMITTEE 2. Recently the Scranton Commission, considering the role of the federal government with respect to campus disorders, noted:

> [G]overnment intervention could readily suggest repression to many students without bringing about results that could not be obtained by other means. Among faculty and administrators, such intervention would erode their sense of responsibility for affairs within the university.

REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST (1970) published in 5 The Chronicle of Higher Education, October 5, 1970, 24. Similarly, the Cox Commission in 1968 emphasized that the university cannot look to government or others

B. *Effectiveness*

Any judgment as to the probable effectiveness of the new statutory provisions must depend on the purpose one conceives of the statutes as serving. As with misdemeanor statutes generally, the penal code sections of the new legislation are intended to forestall or prevent the acts or activities which they proscribe.[60]

Deterrence is, of course, one of the major goals of the criminal law,[61] but it is probably true that, while its effect is not negligible, no one really knows how well deterrence works.[62] In measuring a statute by the standard of its deterrence value, the questions of "how much" and "how well" are crucial. Moreover, the deterrence value of a statute cannot be estimated without an understanding of whom the law is intended to deter. Thus, it is worthwhile to ask at whom these California laws are primarily aimed. The provision for student rules, the financial aid punishment, and the prohibition of breaches of campus peace are aimed at students. The sections permitting an administrator to request a person to leave the campus or to withdraw consent to remain are aimed at "outsiders," *i.e.*, persons who are neither students nor employees at the college.

Because students and employees are susceptible to internal punishment, whereas "outsiders" are not, the measures of deterrence are different. For members of the university community, the deterrent consists of two components — the university's punishment and the state's punishment. Only the state's punishment is effective against true "outsiders." For this reason, different criminal penalties would be appropriate. It seems basically inequitable that the student violator, who will be punished by his school, should be punished by the state with the same severity as the violator who is liable for no college discipline. Beyond this, there may be some question as to the wisdom of the imposition of any

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to bring it out of its crisis: "[T]he survival—literally the survival—of the free university depends upon the entire community's active rejection of disruptive demonstrations." CRISIS AT COLUMBIA 197 (Vintage ed. 1968).

60 *See* ch. 1424, § 5, [1969] Cal. Stats. 2919; ch. 1427, § 8, [1969] Cal. Stats. 2927.

61 *See* R. DONNELLY, J. GOLDSTEIN, & R. SCHWARTZ, CRIMINAL LAW 340-45 (1962) for a good discussion of the efficacy of deterrence with respect to capital crimes. See generally Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

62 *See* L. HALL & S. GLUECK, CASES ON CRIMINAL LAW AND ENFORCEMENT 16-17 (2nd ed. 1958).

criminal penalty where the university is capable of imposing effective discipline and in fact does so. At the minimum, however, the state, in considering the penalty carried by these statutes, should have weighed the efficacy of university sanctions.[63]

The central question which remains is whether these laws have any effective deterrence value with respect to either the student or the outsider. The kinds of activity they are designed to prevent and punish are likely to be political or quasi-political. Many of the disruptions are planned to provoke disciplinary or criminal action against the demonstrators; the symbolic value of confrontation and martyrdom is often the chief reason for the incidents.[64] For example, in the cases[65] discussed *supra* in which similar California statutes were invoked, the demonstrators undoubtedly realized that their actions were unlawful and that criminal liability would ensue if they persisted. Yet they were not deterred. There is room for a good deal of skepticism as to whether these new statutes will be any more successful.

It may be argued, however, that while deterrence does not work with respect to the first offense, once a person has been fined or imprisoned for violation of these statutes, he will be more reluctant to engage in the same activity again, particularly since the penalty escalates for successive offenses. Like the question of the effectiveness of deterrence, the question of recidivism calls for substantial empirical data. It may be that there is a law of diminishing marginal utility for political martyrdom. But even if this is so, the university is in as good a position as the state to escalate its penalty for repeated offenses.

Another common goal of the criminal law is correction.[66] It may not be realistic to speak of the potential for correction with respect

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63 For example, "statistics from Berkeley show the effects on students of campus discipline. Of 369 students who have been cited for violation of University regulations since the fall quarter of 1967, 332 were not cited again, 32 were cited one additional time, and 5 were cited twice more." REPORT OF THE SELECT COMMITTEE 21.

64 See generally REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST ch. 5 (1970).

65 See People v. Green, 234 Cal. App. 2d 871, 44 Cal. Rptr. 438 (App. Dep't. Super. Ct. 1965); Parrish v. Municipal Court, Modesto Judicial District, 258 Cal. App. 2d 497, 65 Cal. Rptr. 862 (Ct. App. 1968); and *In re* Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322, (Dist. Ct. App. 1966).

66 See L. HALL & S. GLUECK, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 18 (2d ed. 1958).

to a demonstrator arrested and jailed for a campus disruption; the term of imprisonment is probably too short for much progress in this direction. Even with the maximum of six months, which can be given only after the third conviction, the time for correction is short. Furthermore, if those convicted were "political" demonstrators, their amenability to state "rehabilitation" probably would be slight. If there is to be any hope for success in such a program, it must be placed with the university. One of the great tasks of the university is to foster respect for its own ideals and traditions of individual freedom and integrity. Moreover, from a strictly administrative point of view, the university can be more flexible and innovative in the means by which it seeks to "rehabilitate" those who violate its rules.

C. *Wisdom*

In enacting Assembly Bill 1286, the California legislature declared that the state colleges and the opportunities they provide were "essential to the continued welfare of all persons in California."[67] The general validity of this observation is difficult to dispute. It does not follow, however, that the state acted wisely in singling out the state colleges for particular applications of more general penal laws. Admittedly, such laws underscore the legislature's intention that the processes of the state colleges not be disturbed. Nevertheless, the statutes imply that the penal laws appropriate for the rest of the state are inadequate for state universities. Although harmless in the present instances, such special supervision may be portentous for an educational system that grounds its hope for quality and success in its independence from political control.

Necessarily, of course, universities have not been and cannot be wholly independent of some degree of control by the broader community. Limited control is inherent in the fact that the university must look to society for its financial support. Nonetheless, the delicate nature of academic freedom requires as much independence as possible if the members of the university are to maintain intellectual integrity and the ability to expand the boundaries of knowledge in ways that often are not popular with the general

67 Ch. 1427, § 6, [1969] Cal. Stats. 2932.

electorate. The President's Commission on Campus Unrest recently noted:

> There is a long history of efforts, often successful, by those outside the academic community, to prevent the discussion of controversial views, the appearance of controversial speakers, or the advocacy of unpopular positions on university campuses.[68]

Prescription of disciplinary penalties may not seem a dangerous incursion on academic freedom, but the presumption in favor of legislative restraint should be so strong that exceptions are warranted only by extremely drastic circumstances. Thus, rather than treating the universities specially by enacting penal laws applicable only to them, it might be wise to treat universities specially in the opposite direction, by being deliberately tolerant and supportive of their attempts to work out their own solutions.

A legislative policy of home-rule would permit those with the closest contact with the problem to devise the methods of meeting and hopefully solving it. Moreover, legislative pressure applied to support rather than to limit the independence of the colleges might force those college administrators who would like to remain above the battle and leave the dirty work to the police chief and the attorney general to take an active and constructive part in the improvement of their own campuses. The quick resort to section 602(n) to evacuate a sit-in, or to section 415.5 to put an end to a noisy demonstration, or to section 626.6 to prevent controversial speakers from coming on campus may be a means by which the college administration avoids real issues. The university becomes a kind of third party when one of these sections is invoked. Although it is the university that determines the crisis and requests the police assistance, it does not take the responsibility for the action; rather, it is the force of the state at work. If the university avoids the crisis, it avoids the resolution as well.

It may be argued that in California the policy of legislative restraint had been tried and failed, and that these statutes were

68 REPORT OF THE PRESIDENT'S COMMISSION ON CAMPUS UNREST, (1970), published in the 5 The Chronicle of Higher Education, October 5, 1970, 20. *See also Developments in the Law-Academic Freedom*, 81 HARV. L. REV. 1045 (1968); REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON CAMPUS GOVERNMENT AND STUDENT DISSENT (1970).

the logical result. This argument assumes first that the new statutes add some important new weapons to the state's criminal arsenal for dealing either with trespass or with breaches of the peace on public campuses. It is doubtful that they do. The real point of the argument, however, is that administrators have had the independence to act but have failed to act effectively. The university has *not* employed its own sanctions, and the state has been compelled to intervene.[69]

Evidence cited by the Select Committee on Campus Disturbances indicate, however, that college administrations had invoked both academic and legal sanctions against demonstrators. For example, as a result of the student takeovers of Sproul and Moses Halls at Berkeley in October 1968, 171 students were given academic discipline, including 7 who were dismissed and 31 who were suspended. One hundred and ninety-six persons were arrested, of whom 22 were non-students.[70] The figures for the University of California suggest a tendency to rely more heavily on legal than academic penalties.[71] This tendency is more clearly illustrated by figures for the state college system. The Select Committee surveyed various disturbances on state college campuses between January 1968 and February 1969. During this period, 64 students were given academic penalties while 1,030 were arrested.[72] At San Francisco State College, where some of the most publicized disorders occurred, six students were suspended, five of whom later had the penalty lifted, none were expelled, and 584 were arrested.[73] The Select Committee, having considered these figures, concluded: "It appears that administrators, while professing confidence in and a preference for academic discipline over police action, have, in fact been unable or unwilling to control early and

69 College administrators felt that special legislation for the campuses was not necessary. The Select Committee noted:

> Testimony received from college and university administrators before the Subcommittee on Educational Environment indicated that they felt they had the basic tools to handle campus disruptions. They felt that campus discipline was preferable to legal penalties, and admitted to an initial but perhaps declining reluctance to call on police to control disruptions.

REPORT OF THE SELECT COMMITTEE 21.

70 REPORT OF THE SELECT COMMITTEE 146.

71 *Id.*, 144-50.

72 *Id.*, 151.

73 *Id.*, 152.

small disturbances, resulting in eventual massive police efforts."[74] The suggestion is clear that if the administrators had invoked timely academic discipline, criminal action might have been made unnecessary in many cases.

It seems hardly appropriate that the solution to this problem as recognized by the Select Committee should be to reiterate the general sanctions against breach of the peace and trespass and emphasize the university's right to rely on the criminal law. If the legislature felt compelled to take action in this area, perhaps it should have directed its efforts toward strengthening the university's internal mechanisms for dealing with disorder. In this regard, sections 22635 and 22636 of the education code, providing for the adoption of rules of behavior, are a step in the right direction. Besides focusing on the problem of making the internal mechanisms adequate, these sections have the further virtue of keeping legislative interference in university business at a minimum. The legislature has required that rules be adopted, but it has refrained from prescribing specific rules, leaving that task to the governing boards or their delegates.[75]

The legislature might similarly have urged colleges to adopt grievance and dispute settlement procedures as means of channeling disagreements before disorders occur. It might have investigated other long-term solutions, such as provisions for student participation in decision-making to a degree significant enough to head off needless disputes. Although it recognized that campus administrative mechanisms were not working,[76] the legislature balked at taking corrective measures. Of course, an overzealous effort by the legislature in these areas might raise problems of interference with the independence of the colleges and universities, but as long as the legislature refrained from prescribing the substantive terms of the rules, the restriction of independence would be slight.

Recently President Nixon acknowledged the responsibility of the university community for dealing with its own problems in a

74 *Id.*, 26-27.

75 CAL. EDUC. CODE § 22635 (West Supp. 1971).

76 The Select Committee concluded that "[a]dministrative procedures dealing with campus problems and disruptions have often been slow, cumbersome and ineffective." REPORT OF THE SELECT COMMITTEE 2.

letter to some 975 college and university administrators. He observed that "the primary responsibility for maintaining a climate of free discussion and inquiry on the college campus rests with the academic community itself."[77] The policy of allowing the university maximum autonomy to solve its own problems has also found support in a carefully written California decision. In *Goldberg v. Regents of the University of California*,[78] four students sought a writ of mandate requiring their reinstatement at the university following their suspension and expulsion as a result of a demonstration. The court of appeals held that the university's suspension and dismissal of the students was a proper exercise of its general power to make rules governing student behavior and to exclude those whose presence would be detrimental to the university. During the course of its opinion, the court observed that it would be improper for it to interfere with the university's disciplinary process. It said in part:

> Historically, the academic community has been unique in having its own standards, rewards and punishments. Its members have been allowed to go about their business of teaching and learning largely free of outside interference. To compel such a community to recognize and enforce precisely the same standards and penalties that prevail in the broader social community would serve neither the special needs and interests of the educational institutions, nor the ultimate advantages that society derives therefrom. Thus, in an academic community, greater freedoms and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in large measure, be left to the educational institution itself.[79]

The reasoning applied by the court to explain its reluctance to interfere with university discipline proceedings can also be applied to justify similar self-restraint on the part of the legislature. The legislature is no more suited than the courts to deal with the subtlety of campus problems, and both these agencies are decidedly less suited for the task than the university itself.

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77 Letter from President Richard M. Nixon to 975 college and university administrators, Sept. 18, 1970, quoted in 19 Higher Education and National Affairs, September 25, 1970, at 3.

78 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (Ct. App. 1967).

79 *Id.*, at 248 Cal. App. 2d 880, 57 Cal. Rptr. 472.

IV. Conclusion

Because of the nature of a university's commitment, the atmosphere of a campus is necessarily a fragile one. Incursions on the freedom of the members of the academic community either from the state or from other members threaten its life. The university must be prepared and able to defend its integrity and ideals from both these dangers, and the surest means of defense is an alert, sensitive, and responsible community. The California legislature has tried perhaps too hard to save its public colleges from what it rightly perceived as grave dangers. In doing so, it has exposed them to another danger — the danger of too great a reliance on the state for obligations that the university should not avoid.

Moreover, the legislature faces a danger in believing that its work in rebuilding the campuses is done. Besides its recommendations for immediate legislation, the Select Committee on Campus Disorders urged that further study be given to areas with respect to which it made no suggestions. Three of these pertinent areas here were:

> 1. Procedures for faculty and students to communicate with governing boards.
> 2. Procedures for governance of the higher education system.
> 3. The relationship of size of institutions and depersonalization of the educational process.[80]

When the legislature turns its attention in earnest to such areas as these, the deeper causes of campus disturbances may be discovered and eliminated.

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80 Report of the Select Committee 8.

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THE FCC FAIRNESS DOCTRINE AND INFORMED SOCIAL CHOICE

Introduction

As the importance of television in influencing America has increased, so has the desire to gain access to it. If, like commercial advertisers, those seeking access can pay their way and are acceptable to the broadcasters, they face no problems. Those who do not meet these conditions, however, must follow a more difficult path. In the last few years, advocates of various positions on, for example, the health hazards of smoking cigarettes,[1] the Vietnam war,[2] the pollution dangers of automobiles,[3] and military recruitment[4] have confronted this problem and have sought relief under the FCC's "fairness doctrine."

This Note will focus on the present status of the law and recent developments in that part of the fairness doctrine which requires that broadcast licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[5] It will not cover the "equal time" provisions,[6] nor, except tangentially, the "personal attack" and "political editorial" rules.[7] This Note will consider constitutional limitations on the power of the FCC only incidentally. The extent of such limitations is still unsettled, and the reader is referred to other treatments.[8] Rather,

1 Station WCBS-TV, 11 P & F RADIO REG. 2d 1901 (1967), *aff'd sub nom.* Banzaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. den.*, 396 U.S. 842 (1970).

2 Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2d 1103 (1970); Business Executives Move for Vietnam Peace, 19 P & F RADIO REG. 2d 1053 (1970); American Friends of Vietnam, Inc., 6 P & F RADIO REG. 2d 126 (1965).

3 Friends of the Earth, 19 P & F RADIO REG. 2d 994 (1970).

4 Alan F. Neckritz, 19 P & F RADIO REG. 2d 497 (1970); Albert A. Kramer, 19 P & F RADIO REG. 2d 498 (1970); Donald A. Jelinek, 19 P & F RADIO REG. 2d 501 (1970).

5 47 U.S.C. § 315(a) (1964). An excellent brief history of the fairness doctrine appears in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

6 47 U.S.C. § 315(a) (1964).

7 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1970) (all identical).

8 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Business Executives Move for Vietnam Peace, 19 P & F RADIO REG. 2d 1053 (1970) at 1060a-1060bb (dissenting opinion); Note, *Morality and the Broadcast Media: A Constitutional Analysis of FCC Regulatory Standards*, 84 HARV. L. REV. 664 (1971); Kaufman, *The Medium, the Message and the First Amendment*, 45 N.Y.U. L. REV. 761 (1970); Comment, *From the FCC's Fairness Doctrine to Red Lion's Fiduciary Principle*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 89 (1970); Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701 (1964).

when departures from present law are advocated, they will not be based on a particular constitutional theory, but on a notion of the role the fairness doctrine should play in an open society.

Briefly stated, the fairness doctrine requires that a broadcast licensee who has presented views on one side of a controversial issue of public importance provide a reasonable opportunity for the presentation of opposing viewpoints. The scope of the fairness doctrine has been the subject of much dispute, often pitting the licensees against slighted spokesmen for opposing views. Opinions of the FCC have done little to clarify the scope of the licensees' obligations under the doctrine.

The importance of the fairness doctrine is readily apparent. The recent struggle for access experienced in *Comittee for the Fair Broadcasting of Controversial Issues*[9] is illustrative. In that case, the television networks maintained a roughly balanced coverage of the Indochina war through newscasts, documentaries, interviews, and other public service programming. However, there was a major element of coverage which was not in balance: President Nixon had addressed the nation in support of the Administration's Indochina policy five times between November 3, 1969 and June 3, 1970.[10] On each occasion, the President selected the day on which he would speak and specified the most favorable formats for the presentation of his views. He was not subjected to hostile questioning, nor was there any significant interruption in his presentation. He spoke in prime evening hours, and his programs were broadcast simultaneously over all national television networks.

Against these repeated opportunities for the President to forcefully present his views, the FCC found nothing arising from the general mass of coverage on Indochina which could honestly be said to have given opposing viewpoints a reasonable opportunity to present their positions. By authority of the fairness doctrine, the Commission ordered the licensees who had carried the President's

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9 19 P & F RADIO REG. 2d 1103 (1970).

10 Ronald Ziegler, the White House Press Secretary, determined that, in the first 19 months of office, President Kennedy used 1 hour, 54 minutes, 48 seconds of prime time, President Johnson used 3 hours, 20 minutes, 40 seconds, and President Nixon used 7 hours, 3 minutes and 18 seconds. New York Times, Aug. 3, 1970, at 16, col. 7.

presentations to grant at least one opportunity for an uninterrupted presentation by an opponent of the President's views to be selected by the licensees. The half-hour television appearance of Senators Fulbright and McGovern on August 31, 1970 was a direct result of the Commission's ruling.[11]

I. Purposes of the Fairness Doctrine

Any critical analysis of the fairness doctrine must take as its starting point a consideration of the underlying purposes of the doctrine. The broadcast media serve at least two primary functions in contemporary American society. The first, and perhaps the most prominent in view of the commercially-supported structure of most of the broadcast licensees, is to provide entertainment for the public. Most of the programs broadcast fall into this category and are not intended to have lasting effect on viewers. Other broadcasts fall into a second category consisting of those programs and advertisements having significant effects on the attitudes and choices of the individual viewer. Such attitudes and choices, of course, influence the quality and direction of our entire society.

The most obvious example is found in the political process. The media's influence on public opinion affects the political process either directly through elections or indirectly through formation of public opinion on a variety of issues which influences elected representatives in the exercise of their powers. The collective governmental decisions which are a product of the political process in turn influence the quality and direction of society. Aside from the political process there are also less obvious ways in which the media affect the nation's way of life. Decisions on questions such as smoking and religion made, not collectively, but individually, can have, in the aggregate, as profound an impact on society.

The sorts of programs which have the potential for affecting social direction are most obviously discussion, interview, and news programs. It is equally clear, however, that advertisements or dramatic productions can also have an influence on molding public opinion. The soap opera featuring the unwed mother scorned by her community and embarking upon a ruined adulthood, the

11 New York Times, September 1, 1970, at 1, col. 7.

movie glorifying the homicidal exploits of soldiers in battle, can all contribute to shaping opinion.

It is from this influence of the broadcast media on what may be called "social choice" — decisions by individuals which have a significant effect on the direction of society — that the fairness doctrine derives its importance. If social choices are to be informed, then the need for the formulation and implementation of the fairness doctrine becomes evident. Without the doctrine, the public's access to opposing views on public issues would depend on the unsupervised discretion of the licensees. Admittedly, the public has access to fact and opinion from many sources other than the broadcast media. This might lead one to conclude that the fairness doctrine is unnecessary. However, the broadcast media, even though they are not the exclusive public source of information, still are an extremely important source, and are relied on so extensively as to require the fairness doctrine or some alternative form of regulation.

The fairness doctrine, however, is not a mechanical rule. To see whether it is promoting informed social choices, it is necessary to scrutinize the manner in which the doctrine has been applied by the FCC.

II. Applying the Fairness Doctrine

When a violation of the fairness doctrine is alleged, three questions must be considered. First, it must be determined exactly what issues the licensee has raised in the material he has broadcast. Second, it must be decided whether these issues are controversial and of public importance. Third, if the issues are controversial and of public importance, it must be determined whether a reasonable opportunity has been given for the presentation of opposing viewpoints.

A. *What Issues are Raised?*

Under present law, the fairness doctrine is "triggered" when a licensee has presented one side of a controversial issue of public importance. The first step in applying the doctrine therefore must be a determination of the issues raised by the licensee. At first, this

might seem as simple as looking at a transcript of the program, but there are two basic difficulties in making this determination.

First, the material broadcast may itself only raise part of an issue. An example may clarify this point. Suppose a school bond issue is a subject of controversy in a community. A local radio station broadcasts an editorial against the bond issue which deals only with the amount by which it will ultimately raise the tax rate in the community; this, of course, being the main argument against the bond issue. Proponents of the issue now seek to invoke the fairness doctrine for the purpose of speaking about the beneficial effects it will have on local education through new construction, increases in teachers' salaries and, in general, in the provision of higher quality education. The licensee replies that it has spoken about none of these things — only about the effect of the issue on the tax rate, and that if any reply is to be given at all, it must be limited to a discussion of how great the increase in taxes will in fact be. Scrutinizing the transcript may be of little help here. Has the licensee only raised the tax aspects of the issue, or by implication has it raised the spending side of it as well?

Analysis of the FCC's decisions reveals a tendency to limit the "issue raised" as narrowly as possible.[12] One of the more extreme examples of this occurred in *Tri-State Broadcasting Co.*[13] A licensee broadcast a program on the "Communist Encirclement" of the "free world." The FCC ruled that the licensee had raised an issue, not as to communism generally, but only as to the best way to combat it. The Commission took a somewhat broader view in *WCBS-TV*,[14] in which it held that cigarette commercials raised the issue of whether smoking was desirable or not, not merely which brand to smoke. But in *Friends of the Earth*[15] it returned to a narrow stance, ruling that automobile commercials raised only the question of which car to buy and did not raise the broader issue of whether automobiles are a socially desirable means of transportation.

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12 See cases cited in notes 3 and 4 *supra*.

13 Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 2 P & F RADIO REG. 2d 1901, 1908 (1964) [hereinafter cited as Applicability of the Fairness Doctrine].

14 11 P & F RADIO REG. 2d 1901 (1967).

15 19 P & F RADIO REG. 2d 994 (1970).

In deciding what issue was discussed a second major problem is raised if the same statement presents one side of a large number of different issues. For example, an advertisement advocating enlistment in military service can be thought of as raising issues relating to the desirability of maintaining a standing army, the draft, alternatives to military service, and the Indochina war, although it may touch on some of these issues only remotely. This multiplicity of issues has led to contradictory choices of "issues raised" by the FCC in two different cases based on military recruiting advertisements. In *Alan F. Neckritz*,[16] the Commission held that the issue of enlistment, but not the draft was involved; on the other hand, in *David Green*[17] the FCC ruled that the issue of the draft had been raised.

The ambiguity produced by the FCC's decisions on the "issue raised" question may be minimized by recalling the purposes of the fairness doctrine. The primary consideration is the public's access to information which is relevant to important social choices. Consider the local voter in our school bond issue hypothetical. The choice the voter is confronted with is whether to raise the taxes *and* spend the money for schools. Discussion of the increase in taxes assumes relevance only in the context of that choice. Thus viewed, it should clearly be held that the "issue" raised is all aspects of the bond issue, even though only its tax effects have been discussed, and the other side seeks to discuss a different facet of the subject. In this view the Commission's opinion in *Friends of the Earth* is not responsive to the purposes of the fairness doctrine. Automobile advertisements will not only affect the decisions of individuals as to which automobiles they will buy, but also decisions as to whether they will buy automobiles at all. Similarly, discussion of which cigarette brand to purchase may invoke the issue of whether the individual should refrain from buying any cigarettes for reasons of health.

The approach should be much the same when statements raise more than one issue. The relation of the statement to the social choices to be made provides the key. If the statement bears so tangentially on the choice as to have no significant impact on the views of the public in connection with that choice, the "issue"

16 19 P & F Radio Reg. 2d 497 (1970).
17 24 FCC 2d 171 (1970).

identified with that choice should not be considered to have been raised, even though some tenuous link between statement and issue can be constructed. On the other hand, those statements which are likely to influence choices should be considered to have raised the issues identified with those choices. Thus, military recruitment advertisements may influence the individual's choice as to how he will discharge his military obiligation. If the choice is to be an informed one, information regarding the other alternatives should be broadcast.

Admittedly, this view of the problem vastly increases the number of issues with respect to which the licensee potentially would be required to present opposing views. However, the amount of air time devoted to such presentations can be kept within limits by requiring responses only for the most "important" issues. This will ultimately require determinations of the relative importance of issues by the FCC.

B. *Is the Issue "Controversial"?*

Once it is determined what issue has been raised, it is necessary to decide whether it is a "controversial issue of public importance."[18] However, the FCC has not provided a precise definition of this term. Its reports beg the question, stating in conclusory terms that an issue is or is not controversial, and only rarely hinting at the rationale for its decision.[19] One is hard pressed to synthesize such a rationale from the specific holdings of the Commission. Matters said to be controversial have included the Vietnam war,[20] a controversial bill in Congress,[21] the establishment of the National Fair Employment Practices Commission,[22] the closing of California colleges by Governor Reagan,[23] a bond issue or the Nuclear Test Ban Treaty,[24] the effects of smoking on health,[25] and religion.[26]

18 *See, e.g.*, WCBS-TV, 11 P & F RADIO REG. 2d 1901, 1909 (1967).
19 *See, e.g., id.* at 1929-30.
20 See note 2, *supra*.
21 Editorializing by Broadcast Licensees, 13 FCC 1246, 1256 (1949).
22 Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1905 (1964).
23 Committee to Elect Jess Unruh Our Next Governor, 20 P & F RADIO REG. 2d 397, 399 (1970) (staff opinion).
24 Madalyn Murray, 5 P & F RADIO REG. 2d 263, 266 (1965) (concurring opinion of Chairman Henry).
25 WCBS-TV, 11 P & F RADIO REG. 2d 1901 (1967).
26 Robert Harold Scott, 11 FCC 372 (1946).

In seems clear that the subjects of state action are fertile ground for a finding of controversiality,[27] but it is equally clear that they are not the only ground. Generally, the FCC has attempted to apply the doctrine to a number of areas which are, or are likely to become, controversial in the sense that there will be public disagreement and discussion or debate;[28] that is, where social choices are to be made.

An issue can be found to be controversial regardless of the format in which views are presented. Thus, if a public official makes a "report to the people" which is ostensibly nonpolitical but which in fact involves the presentation of his position on a controversial issue of public importance, the fairness doctrine comes into play.[29] Similary, if a commercial advertisement expresses a position on such an issue, the fairness doctrine must be followed.[30]

One area of "controversy" to which the fairness doctrine has been held not to apply is the question of whether a broadcaster has accurately reported the news. The FCC does not require that a broadcaster be "fair" in the sense of broadcasting "the truth," but only that he provide a reasonable opportunity for the presentation of opposing views on the issues that he covers.[31]

If the question of what is "controversial" remains confused, the question of what raises an issue to the stature of "public importance" is in nearly the same position. The FCC has adopted the same conclusory attitude toward this problem in its opinions as it has regarding what is "controversial."

To understand the requirement of "public importance," it must be remembered that the FCC has been statutorily charged to regulate broadcasting in the "public interest,"[32] and it has interpreted this to require "balanced programming" by its licensees (*i.e.*, some coverage of news, public affairs, sports, educational programs, re-

27 *Cf.* Note, *Regulation of Program Content by the FCC*, 77 HARV. L. REV. 701, 709 (1964).

28 See Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1905 (1964).

29 California Democratic State Central Committee, 20 P & F RADIO REG. 867 (1960); Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1908 (1964).

30 WCBS-TV, 11 P & F RADIO REG. 2d 1901 (1967); *accord*, Donald A. Jelinek, 19 P & F RADIO REG. 2d 501, 503 (1970) (dictum).

31 National Association of Theater Owners of Indiana, 19 P & F RADIO REG. 2d 799 (1970); CBS Program "Hunger in America," 17 P & F RADIO REG. 2d 675, 680 (1969); American Broadcasting Co., 15 P & F RADIO REG. 2d 791, 796-98 (1969).

32 47 U.S.C. § 309(a) (1964).

ligion, etc.).[33] This means that the time available for public affairs programs is limited because they must compete for time with programs of other types. Not every controversial issue, therefore, can be discussed. The criterion for determining which shall be picked out is their "importance."

Although the FCC appears to determine the importance of issues on an ad hoc basis, some broad guidelines can be discerned from Commission rulings. The Commission has remarked that, to warrant an invocation of the fairness doctrine, an issue must be "of sufficient importance to be afforded radio time."[34] Thus, it appears, there is a certain minimal level of importance which must be met, which is determined by comparing what is to be offered with other matter competing for radio time. Furthermore, if one regards television time as being more valuable than radio time, then it is possible that an issue could be ruled sufficiently important for the fairness doctrine to be invoked against radio licensees, but not against television licensees.[35] Admittedly, comparisons of importance are extremely difficult because of the highly diversified nature of the material to be compared. Yet importance is the key to limiting the scope of the fairness doctrine, and such comparisons must therefore be made.

The "ad hoc" approach of the FCC with respect to both controversy and importance has been the focus of criticism by Commissioner Nicholas Johnson. He has singled out, as a primary test on both issues, the attention which the issue receives from public officials.[36] He believes that the FCC need not decide which issues are "important" and which are not — presidential and congressional attention should suffice. This is particularly true of presidential statements:

> Whenever a President speaks one could almost say that, by definition, he has spoken on what the Fairness Doctrine characterizes as a "controversial issue of public importance" — if it wasn't such an issue before he expresses his views, it is after he speaks.[37]

33 Programming Policy, 20 P & F RADIO REG. 1901 (1960).

34 Editorializing by Broadcast Licensees, 13 FCC 1246, 1250 (1949).

35 *Cf.* Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863, 883-84 (1970).

36 Friends of the Earth, 19 P & F RADIO REG. 2d 994, 1010-11 (1970) (dissenting opinion of Commissioner Johnson).

37 Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2d 1103, at 1130b (1970) (concurring opinion of Commissioner Johnson).

This view has been explicitly rejected by the FCC in favor of its ad hoc approach.[38]

A final reason why the FCC has failed to clearly articulate its criteria for determining when an issue meets the controversiality and public importance test is its policy of giving the licensee considerable discretion in the first instance to determine whether material it has broadcast meets the test. The FCC will reverse the licensee's decision only if it has not acted "reasonably and in good faith."[39] Thus, the FCC has never made a fairness doctrine ruling on the merits of a marginal case in which controversiality and importance were not clearly present or absent. In a close case, fewer assumptions as to these points could be made and more detailed reasoning would be expected.

In sum, the FCC has left itself a wide range of discretion in its rulings but, as is often the case in such situations, has created the opportunity for considerable abuse of that discretion. Consider, for example, the FCC's ruling on cigarettes in *WCBS-TV* and its ruling on automobile pollution in *Friends of the Earth*. In the latter, the complainant's position was that automobile advertisements raised the issue of whether or not to drive, and the complainant sought access to radio and television to present material on the ecological implications of automobiles. The analogy between the health issues raised by cigarette advertisements and the health issues raised by automobile advertisements appears strong. However, the Commission ruled that there was not a controversial issue of public importance presented by the automobile advertisements; rather, it found that they were mere sloganeering.[40] Although the Commission did give some justification for the distinction (*e.g.*, the government had urged the abandonment of the use of cigarettes but had not urged the abandonment of the use of cars), the distinction is demonstrably weak in its consideration of the controversiality and importance of the issues.[41]

The "public importance" and "controversiality" issue is further

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38 See note 29, *supra*.

39 Madalyn Murray, 5 P & F Radio Reg. 2d 263, 264 (1965).

40 Friends of the Earth, 19 P & F Radio Reg. 2d 994, 1000-01 (1970).

41 *Id.*, at 1004-05 (dissenting opinion of Commissioner Johnson); WCBS-TV, 11 P & F Radio Reg. 2d 1901, 1943 (1967) (concurring opinion of Commissioner Loevinger); *but see id.*, at 1947 (concurring opinion of Commissioner Johnson).

complicated if the group seeking to apply the fairness doctrine constitutes only a minority in the licensee's service area, or if the issue is not controversial at all in that area. A number of communities might conceivably be in these positions with respect to the Vietnam issue. On this question at least, the FCC has shed considerable light and adopted positions widening the scope of the fairness doctrine. It has held that the doctrine applies to issues which are controversial nationally[42] even if the issue is not controversial in the licensee's service area.[43] The issue must be presented even if it is only likely that it will be controversial.[44]

Views of minority groups in the community must also be presented if the groups are "responsible" or "appropriate."[45] On the other hand, the Commission has refused to formulate a mechanical rule which can be applied to these situations; a group is not entitled to a percentage of broadcast time proportionate to its percentage of the service area population.[46] The Commission's approach in this area has helped to insure that the public will be informed about the issues underlying the choices confronting them. Notwithstanding the contribution which the FCC's approach has made to an informed public, at least two major problem remain unresolved.

First, the fairness doctrine is not "triggered" until a licensee has presented one side of a controversial issue of public importance.[47] Of course, the licensee cannot totally avoid the fairness doctrine by refusing to broadcast views on any issues at all to which it applies. It has a general programming obligation to provide public affairs programs,[48] and at least some of these must express partisan

42 Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1909 (1964).

43 *Id.*, at 1907.

44 Committee to Elect Jess Unruh Our Next Governor, 20 P & F RADIO REG. 2d 397, 399 (1970).

45 Democratic National Committee, 19 P & F RADIO REG. 2d 977, 987 (1970); Controversial Issue Programming—Fairness Doctrine, 25 P & F RADIO REG. 1899, 1900 (1963); Editorializing by Broadcast Licensees, 13 FCC 1246, 1250 (1949); *cf.* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389 (1969).

46 Capitol Broadcasting Co., 5 P & F RADIO REG. 2d 231 (1965).

47 *E.g.*, Controversial Issue Programming—Fairness Doctrine, 25 P & F RADIO REG. 1899, 1899 (1963).

48 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 385, 387, 390, 393; Democratic National Committee, 19 P & F RADIO REG. 2d 977, 984 (1970); Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1924; Programming Policy, 20 P & F RADIO REG. 1901, 1913 (1960); Editorializing by Broadcast Licensees, 13 FCC 1246, 1249 (1949); Mayflower Broadcasting Corp., 8 FCC 333, 340 (1941).

views.[49] However, it is in the licensee's discretion to decide which particular controversial issues it will cover in the fulfillment of its general programming obligations.[50] Therefore, if it has met its obligations by presenting views on controversial issues of public importance other than those in which a complaining group is interested, and has not presented views on their issue, they will find the fairness doctrine of little value.

Commissioner Johnson objects to this approach. He argues that, as noted above, such a position allows the broadcaster to avoid any obligation to present any views on some controversial issues which may be of central concern to his program community. Johnson advocates the imposition of a fairness doctrine obligation at the time the issue "arises."[51] Under this view, the broadcaster would be required to present contrasting views on every controversial issue of public importance. Ultimately, this would require the FCC to determine which issues are of the greatest importance. As a result, this view may significantly increase regulation of program content by the Commission, and may run afoul of the statutory provisions forbidding FCC "censorship"[52] and the first amendment in general.

Presumably, if the licensee chooses to avoid an issue entirely, he has no responsibility to educate the public concerning it. Yet there may be "latent" controversial issues; that is, issues which are not controversial, and which will become controversial only if the broadcast media present views opposed to those currently and complacently held by the bulk of the public. For example, an effectively presented documentary can *make* an issue controversial. In such cases, the objective of informed social choice would lead us to require that the licensee present both sides of the issue, even if it thus far has presented neither and no controversy has yet developed. Yet it is not likely that such a requirement would be

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49 Democratic National Committee, 19 P & F RADIO REG. 2d 977, 985 (1970).

50 *See* Alabama Educational Television Commission, 19 P & F RADIO REG. 2d 575 (1970); Dowie A. Crittenden, 17 P & F RADIO REG. 2d 151 (1969); *cf.* Bernard Hanft, 14 P & F RADIO REG. 2d 622 (1968).

51 Donald A. Jelinek, 19 P & F RADIO REG. 2d 501, 507 (1970) (dissenting opinion of Commissioner Johnson).

52 47 U.S.C. § 326 (1964). Johnson counters this argument with the assertion that what issues are the more important can be objectively determined by observing public officials. See section I, *supra*.

feasible; it would be administratively impossible to "spot" such latent controversy and require broadcast licensees to cover it. On the other hand, Commissioner Johnson's view may present a viable alternative. The licensee's obligation arises as soon as the controversy arises, and this seems to be a sufficiently definite point to allow defensible Commission rulings.

A second major problem concerns the FCC's failure to explicitly delineate the scope of the fairness doctrine in its decisions. Admittedly, it is extremely difficult to define precisely when an issue is controversial and of public importance. Nevertheless, recognizing the purposes of the fairness doctrine as well as the difficulties in administering it, some guidelines can be suggested to determine whether an issue qualifies:

1. The degree of government attention the issue has received. A subject of a major presidential address or lengthy debate in Congress is clearly controversial and important, though it is clear that not everything the government acts upon will be so.

2. Coverage by other media. The comparative importance accorded by other media to an issue may indicate whether the issue is of public importance.

3. Amount of money per capita in the licensee's broadcast area involved in the issue. Generally, the greater the sum that is involved, the more controversial and important the issue is likely to be. The "per capita" modification is designed to put thousand-dollar school bonds on a par with million-dollar state projects and billion-dollar federal programs. To the individual citizen, they are more likely than not to be of roughly equal importance. It should be remembered, however, that the amount involved is not an infallible guide; Social Security is now one of the least controversial programs in existence, but prayer in public schools is a highly controversial issue.

4. Novelty. A new program or newly-arisen social issue is more likely to be a subject of fluid public thought than one that is old or established and in which public opinions are likely to be static.

5. Number of people affected and the effect on the individual.

6. Symbolic value. Even if an issue is not clearly controversial and important under the preceeding criteria, it could still be

considered such because of its symbolic value. The supersonic transport plane, for example, although very important, received even more public attention than was warranted by its research budget or the impact it was thought to have on the environment. The added importance lies in its symbolic reflection of the choice now confronting society between unrestrained technological advancement and environmental protection.

The above criteria are only a starting point, of course, yet FCC opinions articulated in terms of them are likely to be better understood, to minimize the opportunity for arbitrary action, and to offer better guidance to licensees and complainants than the Commission's past opinions.

C. *Has the Licensee Provided a Reasonable Opportunity for Presentation of Contrasting Opinions?*

If it is determined that one side of a controversial issue of public importance has been presented, the licensee must provide a reasonable opportunity for the presentation of contrasting views.[53] However, as in the case of determining whether an issue is controversial and of public importance, the licensee enjoys broad discretion in the first instance in deciding how to fulfill his obligations: the Commission will only intervene if it finds the licensee has not acted reasonably and in good faith. In complying with this aspect of the fairness doctrine, there are several duties incumbent upon the licensee.

1. Affirmative Duty to Present Balanced Coverage

Once a licensee has broadcast a view on one side of a controversial issue of public importance, it will not fulfill its obligation if it broadcasts opposing views only after complaints have been made or an opposing spokesman offers to make a presentation. Rather, the licensee must take positive steps, on its own initiative, to insure that its coverage is balanced.[54] This obligation remains even after the licensee has approached an appropriate spokesman for the opposing viewpoint who has declined to appear.[55]

Furthermore, the licensee cannot escape from its obligations

53 *E.g.*, Dowie A. Crittenden, 17 P & F RADIO REG. 2d 151 (1969).

54 Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1909-11 (1964); John J. Dempsey, 6 P & F RADIO REG. 615 (1950); Editorializing by Broadcast Licensees, 13 FCC 2d 1246, 1251 (1949).

55 Freed Broadcasting Co., 17 P & F RADIO REG. 2d 159, 160 (1969).

because of inability to find a spokesman for the opposing view who is willing to pay for the time required to reply. If need be, the licensee must grant the opposing side free time in which to reply.[56]

2. Format and Time Allotted

a. *Timing and Delay.*—Perhaps the greatest power of a licensee to undermine the purpose of the fairness doctrine lies in its broad powers to regulate the format and time allotted to any responses which the doctrine requires to be broadcast. To begin with, the licensee is not required to give "equal time" for the response; only a "*reasonable opportunity* for the presentation of [opposing] views" is required.[57] In effect, the licensee's general discretion may allow a forceful, dramatic presentation of one side of an issue, with a weak presentation of the opposing side, perhaps by subjecting its spokesman to hostile questioning on an interview show.

Furthermore, when the licensee broadcasts matter to which the fairness doctrine applies, it need not broadcast contrasting views on the same program[58] nor immediately thereafter.[59] Thus the reply may come considerably later and its impact may be lost.[60]

Some limits, however, have been established. Although equal time is not required, if the imbalance becomes too severe the Commission will indicate its disapproval.[61] As an example, in

56 Red Lion Broadcasting Co., 5 P & F RADIO REG. 2d 503, 504 (1965), *aff'd*, 395 U.S. 367 (1969); Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1913 (1964); Cullman Broadcasting Co., 40 FCC 576, 25 P & F RADIO REG. 895 (1963). The only exception to this rule arises in an election campaign setting in which the licensee has sold time to spokesmen for one candidate whose remarks give rise to an obligation to give access to the opposing candidate under the fairness doctrine. In that case, the licensee need not offer the opposing candidate free time. The Commission felt it would be unfair to force the licensee to subsidize one side's campaign. *Compare* Nicholas Zapple, 19 P & F RADIO REG. 2d 421, 422 (1970), *with* Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2d 1053, 1123-24 (1970).

57 Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1911 (1964) (emphasis in original); *accord*, Boalt Hall Student Association, 17 P & F RADIO REG. 2d 1101 (1969).

58 American Friends of Vietnam, 6 P & F RADIO REG. 2d 126 (1965); Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1912 (1964).

59 Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2d 1103, 1117 (1970).

60 In National Broadcasting Co., 19 P & F RADIO REG. 2d 137 (1970), however, the Commission's staff ruled that a two-year delay was not reasonable under the circumstances. *Id.*, at 139.

61 Westinghouse Broadcasting Co., 15 P & F RADIO REG. 2d 1059 (1969); Metromedia, Inc., 15 P & F RADIO REG. 2d 1063 (1969); National Broadcasting Co., 15 P & F RADIO REG. 2d 1065 (1969).

Committee for the Fair Broadcasting of Controversial Issues,[62] the Commission ruled that the imbalance created by five presidential television addresses on Vietnam was so great as to require the licensees to afford an opportunity for the presentation of the other side of the issue.[63]

Viewing the licensee's obligations respecting format under present law in the light of the goal of an informed social choice, the fairness doctrine has been of mixed success. In order to insure an informed choice, it must be remembered that people respond not only to the substance of an argument, but also to the style in which it is presented and a number of other factors extrinsic to "the merits." To the extent that people are influenced by differences in the presentation of views, and not the merits of those views, there may be a departure from rational choices. Therefore, if the goal of rational choice is to be advanced, we need to concern ourselves with those aspects of presentation which are likely to influence individual views.

"Timing" and delay have a pronounced influence. "Timing" does not refer to the amount of time allotted nor the time of day (prime or non-prime hours), but to the ability to choose the day on which the views are to be presented. It is no coincidence, for example, that the President usually finds some reason to make a major address to the nation about two weeks before mid-term congressional elections. Those opposing his views have no such opportunity to choose their timing for maximum impact. They are, rather, at the mercy of the licensees. If the opportunity to respond is sufficiently delayed, the social choice may have already been made, and the information made available to the public too late.

62 19 P & F RADIO REG. 2d 1103 (1970).

63 *Id.* This was a new addition to the remedies available to complainants. Previously, although the FCC might investigate the complaint with reasonable dispatch, it would wait until the offending station's license came up for renewal before taking action against it. *E.g.*, Springfield Television Broadcasting Co., 4 P & F RADIO REG. 2d 681 (1965). In the interim, it would do no more than express its disapproval of the licensee's actions. Although licensees often heed the FCC's official disapproval of their coverage, the remedy is a very cumbersome one at best. Even if the complainant wins, he does not get his views on the air; at most he only deprives the offending station of its license. Although the remedy granted in the first cited case is much more useful from the perspective of the complainant than those previously available, the FCC there indicated that it would be granted only in extraordinary cases.

In the case of an election, where the time for making the choice is clearly defined, it often will be clear that the licensee has acted in bad faith by denying access to other views until after the vote. However, it is more difficult to establish bad faith in many other important situations. For example, in a situation in which a controversial bill is before Congress, when has the licensee presented opposing views "too late"? After action by one house? Both? After the conference report and repassage? At each of these steps, a right to information becomes less valuable as the ability to influence the course of the legislation slips away.

It seems evident that the timing of the reply has to be considered in relation to the social choice it is intended to influence. In the situations described above, it is apparent that delay is an important factor in preventing the outcome from being based on rational choices.

Resolution of this problem is well within the scope of the FCC's present interpretation of its statutory obligation and powers. A licensee is currently under a duty to present a reply at some time anyway. Consequently, it does not seem to be an oppressive increase in the regulation of broadcasting to require that a reply be allowed before its effectiveness is significantly dissipated. When providing an opportunity for reply, a critical element concerns the format allowed the opposition spokesman. For instance, in *Committee for the Fair Broadcasting of Controversial Issues*,[64] the FCC observed that the President had been allowed five opportunities to speak in formats of his own choosing while opponents were given only short coverage on interview and discussion shows in a format chosen by the licensees. Although one may present the substance of one's views in the patchwork format of interview shows, if one is allowed to develop themes in a systematic, uninterrupted way there is a greater liklihood of being understood by the audience. The FCC recognized this by requiring the networks to grant an opportunity for opposition spokesmen to make an uninterrupted presentation of their views.

The Commission's increasing concern with format is promising but further steps could be taken. For example, it would be possible to create a presumption that an uninterrupted opportunity to

64 19 P & F RADIO REG. 2d 1103 (1970).

present views on one side should, absent some special circumstances to be shown by the licensee, give rise to an obligation to provide opposing viewpoints an uninterrupted opportunity to present their views. This, of course, does not solve the problem of presenting both sides of the issue on interview programs on which the interviewer is heavily biased toward one side.

b. *"Prime" Time.*—The FCC recognizes the distinction between prime time and other time. Since the impact of broadcasts in prime time is much greater, the licensees have a duty to present balanced coverage in prime time, in addition to their general duty of balance.[65] This view derives from a recognition that a large portion of the public may hear one side of the issue when it is presented in prime time, but miss hearing the other side if it is presented during non-prime hours. This concern, coupled with the possibility of listener loyalty to a station, may explain why each licensee must present balanced coverage even though contrasting opinions are presented by other licensees. Because the requirement of balance within prime hours insures that more people will hear both sides, it promotes informed social choice and thus is an appropriate requirement.

c. *"Spot" Announcements.*—A common technique in presenting a viewpoint on television is to buy time in small packages, no more than a minute or so in length, and to present the same message repeatedly in each such "spot." That this is a cost-effective way to present a message is attested to by the volume of short "commercials" seen on television and heard over radio every day. The skilled orator knows that the force of his argument can be increased by repetition, and the same principle applies to these "spots." They are not only seen by more people than would a single presentation; the spots also penetrate listeners' minds. To say that views opposed to those expressed in such spots have received adequate expression when they are presented in a single program, even if the program is of some length, is to fail to realize the effectiveness of the spot technique.

The difference between spots and single presentations has

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65 Westinghouse Broadcasting Co., 15 P & F RADIO REG. 2d 1059, 1061 (1969); National Broadcasting Co., 15 P & F RADIO REG. 2d 1065, 1068 (1969); Chronicle Publishing Co., 15 P & F RADIO REG. 2d 1020, 1021 (1969).

received the attention of Commissioner Johnson.[66] Nevertheless, the FCC itself has failed to require that a licensee presenting spots on one side extend a similar opportunity to the other side. The FCC position allows the licensee to considerably dilute the effective presentation of views to which he is opposed. This seems to be an unnecessarily broad grant of discretion to the licensee. As with more general format questions discussed above, a salutary step might be to transfer some of the discretion from the licensee to the opposition spokesman. Thus, spokesmen for opposing views should be offered the option to select the same format as was granted to the first presentation, at least in the absence of some special showing by the licensee that this would be inappropriate.

3. Shades of Opinion

Another difficult problem in administering the fairness doctrine is created by the fact that on most issues there is a spectrum of opinion. When a licensee presents one opinion on an issue how many others is he required to present? The Commission has given the licensee "considerable discretion" in deciding what views to present.[67] Yet other Commission rulings indicate that the licensee may be expected to broadcast those opinions held by responsible or representative groups in the licensee's community.[68]

A principal purpose of the fairness doctrine is to educate the public on the major alternatives available to it in making social choices. At present, the licensee is given such broad discretion that he has, in effect, the power not to give access to spokesmen for a number of major alternatives, as long as some opposing views are presented. Acknowledging that there is a "spectrum" of opinion on many issues, it is nonetheless true that there are often clearly definable "colors" in the spectrum, even though the points at which they blend into one another may be unclear. The controversy concerning American policy in Indochina is illustrative. The alternatives include increasing military activity, maintaining the present level of commitment, a phased withdrawal

66 Donald A. Jelinek, 19 P & F RADIO REG. 2d 501, 514 (1970) (dissenting opinion of Commissioner Johnson).

67 Dowie A. Crittenden, 17 P & F RADIO REG. 2d 151, 152 (1969).

68 Democratic National Committee, 19 P & F RADIO REG. 2d 977, 987 (1970); Editorializing by Broadcast Licensees, 13 FCC 1246, 1250 (1949).

and an immediate withdrawal. It might be argued that any licensee who does not present some coverage of at least these views has failed to educate the public about the major policy alternatives available. It is possible to argue at length over whether one's proposed view is a "major" alternative or whether it can be considered to have been adequately represented by some other spokesman with a related position. But this view of the problem, even though crude, is a refinement over present policies and more likely to result in an adequately informed public.

4. Right of Reply by Particular Persons

When a group complains to the FCC of a fairness violation, it quite often asks not only that a spokesman for the opposing viewpoint be given broadcast time, but that the petitioning group be the spokesman. This has been one of the most heated areas of controversy under the fairness doctrine. The problem arises largely because of the pluralistic nature of American society. In Great Britain, for example, when the Prime Minister states his view on a controversial issue of public importance, the logical spokesman to respond is the leader of the opposition. Indeed, he is the one who does respond.[69] The system works because of the parliamentary form of government and the issue-oriented polarity of the political parties. In the United States, however, there is no comparable "shadow Prime Minister."[70] Furthermore, the correlation between issues and parties is often absent. To see this, one need only imagine what the "response" of the Republican congressional leadership would have been to President Johnson's Vietnam policy.

As a result, there is generally a variety of spokesmen who could be deemed "appropriate" to respond to issues raised. Under normal circumstances, no one of them could be clearly isolated as the appropriate spokesman. As in other matters, then, the FCC has left the choice of spokesmen in the licensee's discretion,[71] and as in other matters there is considerable opportunity for abuse.

69 New York Times, Aug. 9, 1970, § 4, at 11, col. 5 (letter to the editors).

70 Committee for the Fair Broadcasting of Controversial Issues, 19 P & F RADIO REG. 2d 1103, 1130b (1970) (dissenting opinion of Commissioner Johnson).

71 Dowie A. Crittenden, 17 P & F RADIO REG. 2d 151, 152 (1969); *see* Democratic National Committee, 19 P & F RADIO REG. 2d 977, 983-84, 985-86 (1970); Applicability of the Fairness Doctrine, 2 P & F RADIO REG. 2d 1901, 1913 (1964).

Underlying the FCC's policy here is the statutory exception of broadcasters from a status as common carriers.[72] Hence, licensees cannot be required to give access to the media to all who wish it and can pay the going rate.[73] Indeed, a licensee can reject a request for access even when it is under an obligation to permit a reply under the fairness doctrine and the person requesting the reply time is the only one who has come forward if the licensee deems the spokesman inappropriate.[74]

However, this does not imply that the Commission is powerless to require the licensee to open its studios to a particular spokesman under any circumstances. In the instances in which the FCC has sought to impose such a duty on the licensees, the spokesman it has required to be allowed access has been the "appropriate" one to reply to the initial statement to an extent not generally present. For example, if a personal attack is made on an individual, he must be allowed time to reply.[75] Here, the attack has been directed against a specific individual, and that individual manifestly is the most appropriate person to respond. Similarly, if a licensee endorses a candidate for public office, he must grant reply time to that candidate's opponent(s).[76] Here the determination of the appropriate spokesmen is not without some difficulty. It arises not directly, as in the case of a personal attack, but only by implication in the context of the election. Yet if a supporter of one candidate in an election voices opinions on the campaign issues, the FCC has said:

> [S]pokesmen for or supporters of opposing [candidates] are not only appropriate but *the only logical spokesmen* for presenting contrasting views. Therefore, barring unusual circumstances, it would not be reasonable for a licensee to refuse to sell time to spokesmen for or supporters of [opposing candidates] comparable to that previously bought on behalf of [the first candidate].[77]

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72 47 U.S.C. § 153(h) (1964).

73 Democratic National Committee, 19 P & F RADIO REG. 2d 977, 985-86 (1970); Dowie A. Crittenden, 17 P & F RADIO REG. 2d 151, 151 (1969); Editorializing by Broadcast Licensees, 13 FCC 1246, 1247 (1949).

74 Freed Broadcasting Co., 17 P & F RADIO REG. 2d 159 (1969).

75 47 C.F.R. §§ 73.123, 73.300, 73.598, 73.679 (1970) (all identical).

76 *Id.*

77 Nicholas Zapple, 19 P & F RADIO REG. 2d 421, 422 (1970) (emphasis added).

Viewed from the perspective of informed social choice, the selection of a spokesman is one of the most important factors in the effectiveness of the reply, affecting both the substance and form. As noted above the licensee must act reasonably and in good faith, but this standard still allows it a broad range of discretion. A more desirable rule would limit this discretion and enhance the prospect that speakers chosen to present opposing viewpoints are more likely to be articulate and knowledgeable. Although formulation of a concrete, comprehensive rule in this situation is particularly difficult, some steps are available to the FCC. For instance, one standard might provide that if a person requesting access under the fairness doctrine can establish his special qualifications to act as a replying spokesman, the licensee would be required to grant him air time. This would transfer some discretion from the licensee to the Commission. In a pluralistic society, it is likely that only under rare circumstances could anyone establish that he is the appropriate spokesman; yet it is possible to conceive of situations in which this rule might apply. For example, were the New York City public schools criticized, a requirement to allow reply by the chairman of the Board of Education might well be appropriate.

This scheme does not dispose of all the problems related to a determination of the appropriate spokesmen. It does not insure than an "appropriate" spokesman will present the opposing view effectively nor does it insure that the spokesman will best represent the views of a particular organization. The real test of the utility of such a rule would be whether, in the light of experience, it tends to place better spokesmen before television cameras and radio microphones than the present system which relies on the licensees' discretion.

Commissioner Johnson would go even further, advancing a wholly different conception of a licensee's obligations to the public under the first amendment from that of the Commission majority. He would at the least require specified amounts of time to be turned over to the public for public affairs programs and advertisements of views on controversial issues.[78] In Johnson's view,

78 Democratic National Committee, 19 P & F RADIO REG. 2d 977, 992c-92d, 992f (1970).

the licensee is an instrumentality of the state under any one of a number of constitutional theories. The public airwaves are an appropriate forum for the communication of ideas. Therefore, Johnson concludes, the licensee must hold itself open to all willing to pay the going rate.[79]

This argument was rejected by the Third Circuit in 1945.[80] The Supreme Court's latest pronouncements in *Red Lion* leave the question open. Although "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,"[81] we do not know what the rights of the broadcasters are as against those members of the public seeking access for their views. Presumably, as long as the public continues to receive "suitable access to social, political, esthetic, moral and other ideas and experiences"[82] there will be no substantial countervailing considerations to prevent judicial approval of Johnson's theories, assuming that the concept of state action has indeed been extended that far. There are some difficulties which arise from the anti-censorship provision of the communications act,[83] but they must, of course, yield to the strength of the first amendment.

Johnson also has a special concern for the access of a specific group — Congress. Without suitable access for the legislature, he fears, the balance of power between it and the President will be greatly upset.[84] In addition, he believes that Congress should have preferred access because congressional leaders often are the most appropriate spokesmen to answer the President.[85]

III. Conclusion

One of the few unambiguous qualities of the fairness doctrine is that its implementation by the Commission has produced confusion. Nearly every word in the familiar Commission boilerplate

79 Business Executives Move for Vietnam Peace, 19 P & F Radio Reg. 2d 1053, 1060a-60bb (1970) (dissenting opinion of Commissioner Johnson).

80 McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597 (3d Cir.), *cert. den.*, 327 U.S. 779 (1945).

81 Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

82 *Id.*

83 47 U.S.C. § 326 (1964).

84 Committee for the Fair Broadcasting of Controversial Issues, 19 P & F Radio Reg. 2d 1103, 1130c (1970).

85 *Id.* at 1130b.

remains ill-defined. Above all, it is characterized by broad licensee discretion in the first instance, and broad Commission discretion in dealing with what is left. There do appear to be some stirrings of greater specificity as the importance of the doctrine increases. However, the meaning of such developments probably will remain unsettled pending a possible first amendment breakthrough requiring general access. And even if such a breakthrough is not forthcoming, the problem may be solved by the more extensive deployment of cable television, where the unlimited channels could allow similarly unlimited access to the public.[86]

Deeper questions remain. One may ask whether the fairness doctrine can ever be refined as well as made administratively workable. The recommendations of this Note frequently require difficult determinations to be made by the FCC. Administrative agencies are accustomed to making such determinations, but it would be desirable to avoid them if possible. Furthermore, to the extent that this Note would require some issues to be covered in greater depth, it follows that fewer issues can be given any coverage if there is to be substantially the same amount of broadcast time available for other programs.

One possible alternative to the fairness doctrine would be a policy of increased diversification of station ownership or the adoption of Commissioner Johnson's proposal that licensees be required to set aside specified periods of the broadcast day for the presentation of views by the public on a first come-first serve basis. Although such a scheme eliminates a number of problems, is raises problems of its own. Does diversity of ownership insure diversity of broadcast views? Will rural communities be served by only a few stations? What will the impact be on informed social choice if those with a liberal predisposition listen only to liberal stations and those with a conservative predisposition listen only to conservative ones? If the FCC wishes to deny access to Uncle Hiram, who seeks to demonstrate his facility for bird calls, on what basis can it do so? Will the FCC become substantially involved in program regulation, the very thing this scheme sought to avoid?

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86 Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863, 891-901 (1970); Comment, *From the FCC's Fairness Doctrine to Red Lion's Fiduciary Principle*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 89, 103 & n.80 (1970).

A final, unresolved question is whether the fairness doctrine actually serves the purposes for which it was created. For example, there are no studies to demonstrate whether the anti-smoking spot announcements have had any substantial effect on people who consider smoking. Yet our society has long adhered to the proposition that the free interaction of ideas will somehow produce a better society, a proposition which is embodied in the first amendment. Perhaps, therefore, the utility of the fairness doctrine cannot be questioned unless we are willing to question this fundamental proposition as well.

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BOOK REVIEW

STATUTORY HISTORY OF THE UNITED STATES (in four volumes). CIVIL RIGHTS, PART 1, PART 2, edited by *Bernard Schwartz*[1] (General Editor), pp. 1888. LABOR ORGANIZATION, edited by *Robert F. Koretz*,[2] pp. 846. INCOME SECURITY, edited by *Robert B. Stevens*,[3] pp. 919. New York: Chelsea House in association with McGraw Hill, 1970, $120.00.

Reviewed by Lance M. Liebman[4]

The appearance of these volumes may tell us something about the publishing trade in America. It tells us very little about the statutory history of the United States.

We are offered four volumes on three subjects: single volumes on labor relations and social security, two volumes on civil rights legislation. Unless I misplaced something when I disposed of the cellophane, we are not told whether they are down payment on a larger set, or if not why these subjects were selected. We are told the price — $120.

The books contain short excerpts from official documents that were part of the process of legislation in the several subject areas: presidential messages, committee reports, congressional debates; then more generous samples of the statutes themselves; and an occasional case or two, invariably from the Supreme Court. The sum purports to be a "legislative history" of each of the topics.

It is so, of course, only in a restricted sense. We have the editors' choices of excerpts relevant to each statute. We almost never have hearings, the factual determinations that led to legislation, or enough judicial materials to show post-enactment problems. We never have the intra- and extra-congressional pressures, negotiations, hopes, or denunciations without which "the legislative process" is a grievous simplification. We have nothing on bills that were not passed, compromises that were or were not struck, relevant activity in the States, enforcement plans or achievements,

1 Edwin D. Webb Professor of Law, New York University.
2 Professor of Law, Syracuse University.
3 Professor of Law, Yale University.
4 Assistant Professor of Law, Harvard Law School. A.B. 1962, Yale University; B.A. 1964, University of Cambridge; LL.B. 1967, Harvard Law School.

later formal or informal assessments of a statute's impact. We do not have a "legislative history" of anything.

I list these omissions not to quibble over the title, nor even to suggest what this effort might have produced, but only to show my very real puzzlement over what uses the publishers and the editors intended for their weighty products.

No lawyer preparing a case, no judge writing an opinion, no legislator altering the law could rely on them. Trusting the editors' selections would be too hazardous. The original debates, hearings, and reports would have to be consulted.

No teacher of history or law could use them as text. Their view of the legislative process is too limited, and the tab would be beyond the reach of students.

I can think of only two classes of buyers:

1. Librarians whose resources do not include the Congressional Record or other serial congressional documents. I am sure readers will have to go to a facility with better resources, but the librarians may order first and seek uses later. The books, bound in harmonious pastels, will look good on the shelf.

2. The libraries of "serious" (*i.e.* rich) suburban high schools. History teachers can send their students into these depths for "research papers." Midway between interpretive text and primary source, this massaging medium may give just the right illusion of research without requiring the labor, the tedium or the imagination. Of course it will also fail to provide the unexpected discovery, the sense of prior events, or the fascination and occasional joy of handling sources.

My approval of the First Amendment is as great as the next fellow's, but I confess to the feeling that we would sometimes be better off with a Commissariat of Useful Uplifting Publications to pass judgment on whether material belongs in hard covers. Think of the trees that would still stand if this venture had been aborted in the bureaucracy. But the market can work wonders too. I am betting that the invisible hand will take care of this one for us.