FAMILIAL RELATIONSHIPS AND ECONOMIC WELL-BEING: FAMILY UNIT RULES FOR A NEGATIVE INCOME TAX

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Introduction

Would-be reformers of the traditional welfare system in recent years have gathered in large numbers under the banner of the "negative income tax."[1] The phrase "negative income tax" carries appealing overtones of a positive income tax — a system that we may grumble about but that at least avoids the more objectionable features of traditional welfare programs. However, in many respects the phrase "negative income tax" may be quite misleading. The detailed systems suggested by those people who have thought most seriously about a negative income tax differ in many significant respects from the positive tax system. For example, no one would seriously suggest writing into a poor-people's program like the negative income tax any of the many loopholes that permit the wealthy to avoid, or substantially diminish, federal and state tax liabilities. A man may be "poor" for the purpose of avoiding hundreds of thousands of dollars in income taxes, but when it comes to several hundred dollars worth of welfare benefits, legislative generosity, everyone assumes, must come to an end.

Because development of a model negative income tax requires

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1 It is assumed that the reader is generally familiar with the concepts underlying the negative income tax. Descriptions may be found in Klein, *Some Basic Problems of Negative Income Taxation,* 1966 WIS. L. REV. 776; Tobin, Pechman, & Mieszkowski, *Is a Negative Income Tax Practical?,* 77 YALE L.J. 1 (1967); Comment, *A Model Negative Income Tax Statute,* 78 YALE L.J. 269 (1968) [hereinafter cited as *Model Statute*]; Asimow & Klein, *The Negative Income Tax: Accounting Problems and a Proposed Solution,* 8 HARV. J. LEGIS. 1 (1970).

a rethinking of the proper measure of economic well-being or deprivation, students of the positive tax system and of traditional welfare programs should find it an interesting and useful standard against which to assess the existing legal structure and the social, economic, and ethical assumptions it reflects. The present article analyzes in detail one problem encountered in designing a negative income tax — that of developing rules defining the social or economic unit with reference to which benefits and "taxes" are calculated. To the reader conversant with the day-to-day problems of traditional welfare programs, the issues to be discussed in this article will be familiar ones; little effort will be made to draw comparisons or establish relevance. Apart from a very brief descriptive survey, there will be virtually no reference to the analogous problems of positive tax law. Hopefully, the reader interested in that system will ask why what is appropriate for the negative income tax is not equally appropriate for the positive income tax.

In contrast with the positive tax in this country, the negative income tax, as conceived by those who have given thoughtful attention to its details, uses the "family" rather than the individual as the unit for determining the level of payments. In this respect the negative income tax follows the pattern of traditional welfare programs. But the phrase "family unit" reflects only a vague conceptual starting point. At best it may connote a collection of notions of how certain relationships (*e.g.*, dependency, proximity, consanguinity, and responsibility) affect individual economic welfare. Anyone devising rules to take account of such relationships soon realizes the complexity of the social phenomenon with which he is working, and the limited and intuitive nature of his understanding. The lawyer, in his accustomed role as draftsman (creative genius in his own eyes, mere scrivener to the unenlightened), tries to foresee all the problems, organize them, and consider alternative solutions, all the while making heroic assumptions about the nature of man and society. For the last he should apologize and beg indulgence. Which I hereby do.

I. The Family Unit Concept

The family-unit approach will, as suggested above, be more familiar to the student of our welfare programs than to students

of our tax system. Therefore, it seems useful at the outset to present by way of contrast a very brief description of the provisions of federal income, estate, and gift tax law that illustrate the significant impact of familial relationships on the tax system, a legal structure concerned primarily with relative economic well-being. In the tax system it is most convenient, for reasons of history and ease of comprehension, to start with the notion of the individual filing his return for himself alone. The significance of family lies in the reduction of the tax burden if the individual is married and can file a joint return with his wife[2] or if he has children or other dependents who generate deductions for him.[3] The Internal Revenue Code has a special provision defining husband-wife status for the purpose of filing a joint return, excluding people who are legally separated under a decree of separate maintenance[4] and a considerably more elaborate and complex set of provisions defining the status of "dependent," taking account of consanguinity, residence, support, and school enrollment.[5] An even more intricate provision on child care expenses defines those situations in which a deduction is allowed as well as those situations in which it is limited by the amount of income.[6] Under this rather curious provision a deduction is allowed for the expense of caring for children or stepchildren as long as they are under 13 years old, but not for other dependent children unless they are "physically or mentally incapable of caring for" themselves;[7] deductions are allowed to married women (subject to an income limitation), but not to married men unless their wives are incapacitated;[8] and the income limitation is waived for a married woman whose husband is "incapable of self-support because mentally or physically defective," but is waived for a married man only if his wife is institutionalized.[9] The notion of family solidarity is reflected in the constructive ownership or attribution rules under which

2 INT. REV. CODE OF 1954, §§ 2, 6013 [hereinafter cited as CODE]. *See also* § 1304(c), which, for purposes of income averaging, assigns base period income to parties to a divorce.
3 *Id.* § 151(e).
4 *Id.* § 6013(d).
5 *Id.* § 152.
6 *Id.* § 214.
7 *Id.* § 214(d).
8 *Id.* §§ 214(a), 214(b)(2).
9 *Id.* § 214(b)(2).

a person is treated as if he owned stock that is in fact owned by another person who is a member of his family.[10] Interestingly, the rules on what relationships are close enough to give rise to attribution are not the same for some purposes as for others.[11] There are still other rules defining the relationships that result in a trust power granted to another being treated as if retained by the grantor;[12] and corresponding but quite different rules in estate and gift taxation.[13] In estate and gift taxation, the notion that husband and wife are an economic unit is reflected to some extent in the marital deduction[14] and split-gift[15] provisions, as well in provisions denying tax significance to the creation of a tenancy by the entirety.[16]

Obviously some of these provisions reflect subtle, usually unarticulated, and sometimes questionable assumptions about the nature of the family. A general, coherent model of the family is difficult to discern, though certain recurring themes are detectable. But what is clear is that the existence of the family does have economic significance, and that this reality can manifest itself in many different ways.

In the following discussion of problems arising in the formulation of family unit rules for a negative income tax, an effort will be made to be explicit about factual assumptions as well as about policy alternatives. An appendix contains rules that reflect the author's view of a reasonable set of policy choices. Before discussing specific problems, it will be useful to draw attention to several background facts and concepts and then to discuss briefly the reasons for regarding the family as the appropriate unit.

First, the notion of a "family unit" can be seen as little more than a convenient conceptual framework and a vague, somewhat metaphorical rationale for a set of rules on computation of allowances and inclusion of income. The same results can be achieved

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10 *See, e.g., id.* § 318(a)(1).

11 *Compare id.* § 302(c) *and* § 318(a)(1) *with* § 544(a)(2). *See also* § 1239.

12 *See id.* §§ 672, 674-77.

13 *See* LOWNDES & KRAMER, FEDERAL ESTATE AND GIFT TAXATION 163-66, 614-30 (1962).

14 CODE §§ 2056, 2523.

15 *Id.* § 2513.

16 *Id.* § 2515; *see also* § 2040.

using a different conceptual framework — with the individual as the relevant unit — implying a somewhat different rationale. For example, consider a family consisting of a husband and wife and two minor children. Suppose that the rules provide that the husband is to file a claim, that he is entitled to a basic allowance of $1,200 for himself, $800 for his wife, and $600 for each of his children, and that the basic allowance is to be reduced by 50 percent of the total income of the husband, wife, and two children. These rules can be conceived of in family-unit terms — that is, in terms of the family having a claim and the husband acting as its representative in filing the appropriate forms. This view seems in turn to reflect the assumption that ordinarily the family operates voluntarily and naturally in pooling its resources and in collectively making decisions affecting the economic welfare of its members. It is entirely possible, however, to conceptualize the same results with the individual as the relevant unit — but with that individual having certain obligations and rights. Thus, the concept could be that the husband files a claim just for himself but with his payment calculated to take account of his obligation to support his wife and children and, at the same time, to take account of his power or right to control their income.

While identical results can be reached under either concept, the choice of concept may in practice influence decisions as to what results ought to be achieved. For example, suppose that a household consists of a woman and her two children whom the husband-father has deserted. Using the family-unit concept one might tend to conclude that the husband-father is in fact no longer a member of the family and that therefore his income can be ignored. The questionable implicit assumption is that the income of persons who are not members of the family cannot be attributed to the family. If, on the other hand, one views the wife as the relevant unit, one might be somewhat less likely to draw the line on income inclusion at members of the household and therefore more likely to recognize that her resources may include her right to seek support from her husband. Or consider the question whether a man and woman living together, unmarried, should be treated the same as a married couple for purposes of computing allowances and aggregating income. It might be difficult for some people to conceive

of the unmarried couple as a "family unit." If aggregation of income were thought to be dependent on a finding of "family unit," then that result would be rejected by such people, without adequate examination of the considerations that point one way or the other. The point is that it may be helpful to look at concrete problems from both angles — or perhaps from neither. The results ought to turn not on general concepts but on careful appraisal of more specific factors such as the economies achieved by living together, community practice on income sharing, and community ethics concerning which individuals ought to be encouraged to live together and to support one another. Similarly, one should be ready to sacrifice conceptual purity by recognizing that a person might appropriately be treated as a member of a family unit for one purpose and not for another. For example, suppose that the allowance for a married couple is less than the total allowance for two single people. It is certainly conceivable that a husband and wife who are separated might be required to file a single return with their incomes aggregated but that the total allowance should be that for two single people rather than that for a normal married couple. In other words, they might be treated as members of a unit for purposes of income aggregation but not for purposes of allowance size.

Second, there are two predominant ramifications of a decision to include an individual within the family unit, and a rule of inclusion may produce results that are favorable or unfavorable to the unit depending on the circumstances of the particular unit. The inclusion of an individual within the unit has the effect of (1) increasing the basic allowance for that unit but at the same time it has the effect of (2) including any income the individual may have within the income of the unit. For example, if a child with no income is included in the unit, payments to the unit will increase; however, if the child has a substantial income, his inclusion within the unit may result in a decrease in the payments. Thus, a single rule on inclusion of children may be beneficial to one family and detrimental to another. In drafting the rules both effects must always be taken into account.

A third general observation bearing on the family-unit rules is that income will be defined far more broadly under a negative

income tax statute than under the present federal income tax statute.[17] Theoretically it would be possible to use the same definition of income for the negative income tax as for the positive income tax, and there are some persuasive reasons for doing so. Such a scheme would have the advantage of treating the poor and nonpoor alike and creating pressure for reform of the positive tax. However, almost everyone who has thought seriously about negative income taxation has concluded that this alternative is not politically viable. The fact is, then, that the definition of income for purposes of negative income taxation in many ways will follow the definition of income or available resources for purposes of computing payments under traditional welfare programs. In relationship to the problem of developing family-unit rules, the most significant aspect of the rules defining income for purposes of the negative income tax is that, presumably, gifts and support payments received from persons outside the family unit will be treated as income of the unit.[18] A deduction will be allowed to the person making such a gift or support payment. The effect of this rule in turn may be to permit more liberal rules for the exclusion of individuals from the family unit than would otherwise be possible. For example, to accept a rule permitting a claimant to exclude children from his family unit, and thereby exclude a child's income from the income of the unit, seems easier than it would be otherwise when it is recognized that any money that a child actually gives to his family for its own use will be treated as part of the family's income. Similarly, it is easier to accept a rule allowing husband and wife to become separate units when it is recognized that any support payments from the husband to the wife will be treated as part of her income. Indeed, if there were no difficulty in measuring the amount of gifts and support payments and if they were included in income, then the aggregation of income required by the family-unit rules could be viewed simply as a device for attributing to one individual the income of another individual that *ought to be* available for his or her support and for creating a strong pressure for certain individuals to seek the support to which they are entitled. For

17 See authorities cited note 1 *supra.*

18 *See, e.g., Model Statute* 311.

example, suppose that a husband fails to support his wife. A rule denying her the right to file for herself and ignore her husband's income will encourage her to seek support from him. If he were in fact providing support at a reasonable level, the rule including such support in her income would in most cases render immaterial any decision on whether they were separate units or a single unit as far as aggregation of income is concerned. Only if the basic allowance for a wife within a unit including her husband were lower than that for a single individual, and only, therefore, for the purpose of determining the total allowance for the two of them, would the family-unit rule have any substantive significance for them.

A fourth general observation is that the stringency of the rules on family unit will to some extent be a function of the difference between the allowance for the head of a unit or a single person and that for the wife in a husband-headed unit. For example, if the allowance were $1,000 per year for the husband, or for a single person, and the same amount for the wife when husband and wife file as a unit, the married couple might be granted considerable freedom to file as separate units (putting aside the aggregation-of-income problem, which could be dealt with in other ways). Thus, the rules could provide that a husband and wife could file as separate units whenever they were in fact living apart. But if the allowance schedule provided $1,600 for a husband or single person and $700 for a wife living with her husband, then the same rule might be considered quite undesirable in its tendency to encourage separation of husbands and wives.

Fifth, aggregation of income would be of little significance were it not for the fact that presumably the negative income tax and the positive income tax will be two separate systems and the rate of "taxation" for the negative income tax, that is, the rate at which payments are reduced as income rises, will be higher under the negative tax than under the positive. To illustrate, suppose that under the negative tax the basic allowance for a husband and a wife is $1,500 each,[19] and that the tax rate is 50 percent so that the

19 It is more reasonable to assume, of course, that the allowance for the wife will be lower than that for a head of household (husband or other adult), but at this point my discussion is concerned with aggregation of income and the assumption of identical allowance prevents needless confusion.

breakeven level is $3,000 each, or a total of $6,000. If the husband earns $6,000 and the wife earns nothing, and if they are required to file as a unit, they will break even; there will be no payment or tax and their total spendable resources will be $6,000. If the positive tax rate were 50 percent, then the result would be the same even if they were permitted to file separately. The wife would receive a payment of $1,500 but the husband would make a tax payment of $1,500 (50 percent of the $3,000 in excess of his own breakeven level of $3,000),[20] and again their total spendable resources would be $6,000. If, on the other hand, the positive tax rate were 20 percent and if separate filing were allowed, then the wife would still receive $1,500 but the husband would pay only $600 and their total spendable resources would be $6,900. Thus, under the latter more realistic assumption about the positive tax rate, aggregation of income is a significant issue.

Finally, by way of background discussion, we come to the question of why the "family" (a term that will require definition) is regarded as the appropriate unit for determination of level of benefits.[21] Since it will be argued ultimately that parents should be permitted, but not required, to include children in their unit, this question is best approached by asking why husband and wife should be required to file as a unit. It will be seen later that treating husband and wife as a unit creates some very difficult problems

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20 It is assumed that, if the negative and positive tax systems are not otherwise properly meshed, any positive tax paid on earnings below the negative tax breakeven level will be reimbursed as part of the negative tax system, so that the rate of tax will not exceed the desired rate (in the example used, 50 percent).

21 For general discussions of the desirability of using the family as the unit for positive tax purposes, see H. GROVES, FEDERAL TAX TREATMENT OF THE FAMILY (1963); 6 REPORT OF THE [CANADIAN] ROYAL COMMISSION ON TAXATION, ch. 10 (1966); Bittker, *Income Tax Reform in Canada: The Report of the Royal Commission on Taxation,* 35 U. CHI. L. REV. 637, 645-50 (1968); Note, *Tax Treatment of the Family: The Canadian Royal Commission on Taxation and the Internal Revenue Code,* 117 U. PA. L. REV. 98 (1968).

For descriptions of tax systems that do use the family unit concept see HARVARD LAW SCHOOL, WORLD TAX SERIES, FRANCE, §§ 5/1.2, 12/1.4 (1966); *id.*, UNITED KINGDOM § 5/1.3 (1957).

The state of Wisconsin at one time had an income tax law requiring husband and wife to aggregate their income on a single return. The Wisconsin law was held unconstitutional in Hooper v. Wisconsin, 284 U.S. 206 (1931). While the *Hooper* case has never been expressly overruled, it is extremely doubtful that the court today would hesitate to overrule it or somehow cast it into oblivion. See Ballester-Ripoll v. Court of Tax Appeals of Puerto Rico, 61 P.R.R. 460 (1943), *aff'd,* 142 F.2d 11 (1st Cir.), *cert. denied* 323 U.S. 723 (1944); Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax,* 30 CALIF. L. REV. 397, 425-32 (1942).

of definition and administration. These problems could be avoided by abandoning the compulsory-unit approach. Moreover, it might be argued that there is some virtue in giving both husband and wife an independent source of support, regardless of the income of the other. The arguments in favor of unit treatment seem, however, to outweigh these considerations, particularly when it is remembered that, if we have a limited supply of funds available for a negative income tax program, then generosity toward married couples on the unit issue necessarily means less benefits in some other aspect of the program.

The idea that husband and wife should be required to file as a unit seems to me to be based primarily on the assumptions (1) that married couples share income and expenses and feel a strong mutual obligation of support and (2) that payments should be strictly tailored to need. Consider first the married couple living together in harmony, with no children (or at least with no children still living with them or dependent on them). Suppose that the husband earns $10,000 a year and the wife earns nothing. If the negative income tax is viewed as a substitute for traditional welfare programs — in other words, if the negative income tax is appraised in welfare terms — then obviously it makes no sense to make payments to the wife, for the simple reason that she is not in need and there are others who need the money much more than she does. Even viewing the goals of the negative income tax as being broader than mere replacement of welfare, a payment to the wife seems inappropriate. If we make payments to wives of men above the poverty level we will need to raise the money somewhere. To the extent that the burden falls on married men, then essentially it is just a "wash" — though there might be some degree of increase in the progressivity of the tax structure if the structure is progressive to begin with. But the burden will also fall on single people and, to that extent, single people will be sharing the burden of "supporting" married women, regardless of the income of the husbands of those women. This prospect seems inconsistent with the still prevalent notion that the husband has the primary duty to support. The prospect of redistributing income to any family with a wife who has no income of her own seems particularly disturbing when it is recognized that many, perhaps most, married women

who have little or no income, and who have husbands who are capable of supporting them, have chosen not to work precisely because they expect their husbands to support them — a decision in which, in most cases, the husband has presumably acquiesced. Payments to the wife could, of course, be conditioned on her willingness to accept suitable employment. But to return to that vestige of traditional welfare programs would be to sacrifice one of the principal virtues of the negative income tax.

It might be thought that any advantage of separate treatment would be virtually eliminated by the inclusion in the wife's income of the amount of support supplied by the husband. The fact is, however, that the amount of support supplied would be exteremely difficult to measure.[22] Any serious effort to make accurate determinations of the value of support on a case-by-case basis, in a huge number of cases, would undoubtedly produce an administrative nightmare. The only feasible solution would be to develop arbitrary rules. But what kind of arbitrary measure of the assumed value of support would be most reasonable? Probably the most sensible answer would be to include in the wife's income some portion of the husband's income. But that, of course, would be tantamount to treating the couple as a unit.

Another justification for treating the husband and wife as a single unit is to prevent, in certain income ranges, the couple with two wage earners from being worse off than the couple with the same total earnings all earned by one person (assuming that the rate of taxation for the positive tax is lower than that for the negative tax). To illustrate, assume again that the basic allowance is $1,500 for the husband and $1,500 for the wife, that the tax rate under the negative income tax is 50 percent and that the tax rate under the positive tax is 20 percent. If the husband and wife each earn $3,000, then each will be at the negative tax breakeven level and no payments will be made. They will wind up with $6,000. If, on the other hand, the husband earns $6,000 and the wife earns

22 At least in the long run we must assume that the wife will have managed to begin receiving negative tax payments before the issue of support arises, so she will be able to show a source of self-support. Then the question would be, for example, how much of the value of the apartment that she shares with her husband, or of the television set, is "hers"; whether to treat as a "gift" the value of a meal eaten at a restaurant; and so forth.

nothing, and assuming still that they are treated as separate units, the wife will receive $1,500, the husband will pay $600, and they will wind up with $6,900. If one accepts the idea that the system should be geared to need and assumes further that generally husbands and wives do share income and expenses and feel a strong mutual obligation of support, then this kind of difference in outcome seems unjustifiable.

Furthermore, none of the definitional and administrative problems of unit treatment can be avoided if it is agreed that people with similar needs should receive similar allowances, that a married couple achieves significant economies, and that, therefore, the allowance for the wife should be lower than that for the husband or for a single adult.[23] Assume, for example, that it is decided that the basic allowance should be $1,500 for a single person and $2,500 for a married couple, in order for all individuals to achieve the same standard of living. Once that decision is made, the problems to be discussed below cannot be avoided, and one of the principal arguments for separate treatment evaporates. It must be remembered that, if it is granted that an economy is achieved by living together in marriage, then unless there is a lower total allowance for husband and wife than for two single adults, money will be paid to married couples that is presumably more needed by single persons.

On balance then it seems that unit treatment of married couples is appropriate. As for children, it is obvious that someone else will be required to file claims and income reports for them and receive the allowance to which they are entitled. Thus, it will be convenient in most cases to include children in a unit containing an adult. It is not so obvious, however, that parents or other adults caring for children should be *required* to include in their unit all children living with them, where it would be disadvantageous because of relatively high earnings of the child. This problem will be discussed later, along with other issues, such as which adults should be permitted to claim which children.

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23 It is true, of course, that there will be some frivolous marriages and some marriages of convenience in which these characteristics will be missing and in which the husband and wife are more like roommates or casual lovers. But presumably these will be exceptions, and it is impossible to imagine how they could be identified for purposes of special treatment.

II. The Concept of "Marriage" for Purposes of of Negative Income Taxation

The simple case of a man and woman who are legally married[24] and living together is of course the prototype for a rule based on the notion of an economic unit. As has been indicated, the effect of such a rule is (1) to aggregate income, presumably on the theory that the income of each is in fact available for the support of the other (*i.e.*, that income is pooled) and possibly (depending on decisions on allowance schedules) (2) to produce a lower total allowance than would be made to two single individuals, presumably on the theory that savings in living costs can be achieved by living together.[25] Problems of definition or line drawing arise, however, by virtue of the fact that the mere existence of a legal marriage cannot by itself be determinative of whether an economic unit exists without doing violence to the justification for unit treatment. There are some situations in which a man and woman who are married to one another but not living together should not be treated as a unit and some situations in which it might be argued that a man and woman who are not married but are living together should be treated as if they were married.

A. *The Separated Couple*

1. *Problems of Allowance Size.* — In examining the problems raised by the separated couple, it will be useful to consider separately the problem of allowance size and the problem of aggregation of income, even though it may be concluded (as seems likely) that a single rule should be used to determine both issues. I begin with the problem of allowance size.

The difficulties in dealing with the allowance-size problem can be suggested by considering an extreme, quite unrealistic possibility. Suppose that for some reason an allowance schedule were adopted under which the maximum payment to a single individ-

24 The determination of the existence of a legally cognizable "marriage" is not in all instances a task without difficulty, since common law and putative marriage are possible and depend on complex facts and law. *See, e.g.*, Weyrauch, *Informal Marriage and Common Law Marriage*, in Sexual Behavior and the Law 297 (Slovenko ed. 1965).

25 Conceivably marriage could increase the total allowance if, for example, the wife were too young to qualify for a single-adult allowance.

ual were $2,000 while the maximum payment to a married couple (no children) were $2,500.[26] A question would arise about a couple that splits up and gets divorced. There are, of course, compelling reasons for treating both the man and the woman as separate units, each entitled to a payment of $2,000. Each of them presumably needs that much to live on and it would simply seem unfair to treat either of them worse than other single people. The trouble is that a rule that would provide such an increase in total payments to them as separate units might be thought to create an incentive to divorce — surely an effect that ought to be avoided.[27]

It may be argued, of course, that the problem just raised is a function solely of the allowance schedule and not of the family-unit rules. If the allowance schedule were thought to be geared accurately to individual needs, then any cause for concern would largely disappear; there would be no net advantage to living apart because the cost of doing so would fully offset the added payments. This argues for extreme caution against setting a wife's allowance too far below that of a single person; if anything, error in favor of the married couple should be preferred.[28] But as long as the total allowance of a married couple is less than that for two single adults, it will be necessary to be careful in defining "married couple." The preceding discussion suggests that the greater the gap between the allowance for two single people and the allowance for a married couple, the more critical this problem of definition becomes.

The definitional problems arise by virtue of the fact that many family breakups fall short of divorce or other legal separation. As

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26 Actually this relative difference in allowances is not much greater than that found in the poverty index used by the Social Security Administration. *See, e.g.*, Orshansky, *The Shape of Poverty in 1966*, 31 SOCIAL SECURITY BULL. 3 (1968); Orshansky, *Counting the Poor: Another Look at the Poverty Profile*, 28 SOCIAL SECURITY BULL. 3, 5-11 (1965). The Social Security Administration index covers families with children and elderly couples, for whom certain costs, particularly housing, may not vary much with the presence or absence of one parent. For young couples without children, in contrast, there may be very little saving achieved by living together — for example, if poor single people tend to live in rooming houses but poor couples need an apartment with greater privacy.

27 The most extreme form of incentive to separate is found in the Aid to Families with Dependent Children (AFDC) rule now in effect in most states, under which the mere presence of a husband in the household results in a total denial of benefits which the family would otherwise receive. *See* King v. Smith, 392 U.S. 309, 318 n.13 (1968).

28 *See Model Statute* 280.

a practical matter, some of these nonformalized breakups may lead to the same economic circumstances as occur with divorce and may therefore equally justify acceptance of separate economic units. At the same time, there may be situations in which some sort of physical separation has occurred but in which no significant economic change from married status has taken place. Thus the question becomes what kind of separation justifies treatment of the husband and wife as separate units for the purpose of allotting to each a single person's allowance, and how the existence of such a separation is to be determined.

The most sensible rule for determining the existence of a husband-wife unit might require unit treatment of any legally married couple unless the husband and wife had separate domiciles (so that for each of them the cost of living would be comparable to that of a single person), and unless the separation appeared likely to be permanent or of reasonably lengthy duration (so that the administrative burden of adjusting to the change in circumstances would not be incurred in cases in which the difference in benefits would not be significant enough to justify that burden). In addition, the rule would have to be one that could reasonably be administered — without great cost to the government or psychic burden on the claimants.

The problem can best be seen from the standpoint of the wife whose husband has left and who wants to claim an allowance as a single person. Her claim to separate-unit status could be made dependent on her establishing either that (1) she had instituted an action for divorce or legal separation, or had sought a support order,[29] or that (2) her husband had established a separate domicile,

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29 Compare CODE § 214(d)(5), which for purposes of the child-care deduction, provides:

> (5) Determination of Status. — A woman shall not be considered as married if —
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> (A) she is legally separated from her spouse under a decree of divorce or of separate maintenance at the close of the taxable year, or
>
> (B) she has been deserted by her spouse, does not know his whereabouts (and has not known his whereabouts at any time during the taxable year), and has applied to a court of competent jurisdiction for appropriate process to compel him to pay support or otherwise to comply with the law or a judicial order, as determined under regulations prescribed by the Secretary or his delegate.

or that (3) her husband had in fact been absent. The first possibility has the advantage of objectivity, and therefore is appealing for administrative reasons. It also minimizes the chance of unwarranted benefits. At the same time, however, it would be very harsh in some cases — for example, where the wife is hoping for her husband to return to her and is unwilling to risk worsening the breach by instituting legal action against him but still needs a full single person's allowance in order to survive (particularly if she wants to stay in the house or apartment that once had been suitable for two people). The second possibility again seeks to insure against unwarranted benefits but at the same time provides adequate benefits, geared to need, and thus, as suggested above, might seem ideal. It suffers the obvious shortcoming, however, that in many circumstances the wife simply will have no way of knowing of her husband's circumstances. In addition, if the husband is in fact absent and the wife continues to maintain their previously common domicile it is not the wife but the husband who creates the problem. Consequently, the rules should be lenient towards her. It may be true that some husbands will avoid the expense of maintaining a separate residence by living with friends or relatives or in other ways, but perhaps this is not a matter for serious concern in any event because, presumably, there will be no rule denying benefits to single people who achieve similar economies. Thus, the third standard seems the most appropriate for the purpose of determining allowance level. (For purposes of aggregation of income a different standard might seem more appropriate.) Presumably after the husband has left his wife he will continue to file as the head of a unit consisting of himself alone and will be denied the right to claim his wife as a member of his unit once she has become entitled to treat herself as a separate unit.

Assuming that the husband's mere absence without divorce or legal separation is determinative of the wife's right to file and to be paid as the head of a separate unit, some difficult problems of definition and enforcement arise. These problems stem from the question of what degree of absence is sufficient and how it is to be proved. In other words, there will be problems of ambiguity and of fraud. The same kinds of problems have proved to be a source of

friction and of potential or actual oppression in traditional welfare programs;[30] it is disconcerting to find that they do not disappear under a negative income tax.

As for ambiguity, if the husband leaves and is never seen again the answer is easy. The same is true if he returns once or twice a week merely to see his children. But what if on those occasions he stays and sleeps with his wife? What if he stays more frequently and perhaps performs other husband-like acts such as bringing in groceries, letting his wife or children use his car, and so forth?[31] Hopefully the pressure for the kind of interpretation and enforcement that leads to serious friction or oppression will be considerably lower under a negative income tax than under traditional welfare. This is because less money will be at issue and because a federally administered program will be less susceptible to the excesses of local officials responding to the paranoid delusions of ill-informed but aroused constituencies. To insure that the amounts at issue will not be large at any one point of dispute it might be helpful to have a rule to the effect that the operating agency, when challenging a woman's assertion that her husband has been absent, must prove its case for each month in issue, with no presumption that proof of his presence in one month establishes or even tends to establish his presence in any other month, with the possibility of a criminal prosecution for fraud present to prevent serious abuse. An even greater protection of the wife's right to payment and of her privacy might be achieved by the adoption of a rule that any inquiry into the husband's presence or absence would be ended by proof by the wife that he in fact maintained a separate domicile somewhere. In other words, she would not be required to prove that he had a separate domicile, but, if a question were raised as to his absence, she would win if she could show a separate domicile; if he had the separate domicile she would be relieved of any cause for concern about how often he spent the night

30 *See, e.g.*, Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 LAW & CONTEMP. PROB. 377, 382-83 (1966); Parrish v. Civil Service Commission, 66 Cal. 2d 260, 425 P.2d 223 (1967).

31 See Western Center for Law and Poverty, Welfare Files for Ester J. Penniless (1969) (mimeo, hypothetical welfare file); CCH POV. L. REP. ¶ 1320 (1968) (digesting materials on substitute father and man-in-the-house rules). Compare California regulations setting forth facts to be taken into account in determining whether a man has assumed a role of spouse, note 37 *infra*.

with her. Alternatively, it might be provided that, whenever the operating agency challenged the wife's claim that her husband had left her, it would be required to prove that he did not have a separate domicile or to prove that he spent more than half of his nights with her, or both. These kinds of rules will not, of course, eliminate all friction and oppression, but might reduce it to tolerable levels. After all, some people have been highly incensed by individual enforcement activities of the Internal Revenue Service. I assume that the same is true of the Social Security Administration, the Veterans Administration, and other agencies. Yet it is my impression that in general the level of resentment is low enough to be tolerable (though undoubtedly other factors are involved as well). Enforcement becomes obnoxious when the rule being enforced fails to take adequate account of the individual's right to freedom, dignity, and privacy.

As for fraud, obviously there must be some effort to prevent outright, deliberate cheating. There will be a criminal division of the agency administering the negative income tax, though it might be helpful to integrate this division with the division of, say, the Internal Revenue Service or the Social Security Administration, so that the poor would be exposed to the same procedures and personnel as the nonpoor. The question is, how can excesses of enforcement be prevented or at least minimized? This question is beyond the scope of the present article. However, if it is true that the Internal Revenue Service, the Social Security Administration, and the Veterans Administration have deservedly better reputations for their enforcement activities than do many welfare agencies, then we might consider the reasons and make sure that we follow the better model.

As for the permanency of the separation, one possibility would be to require a "waiting period" — that is, require that the husband be gone for, say, at least sixty days. This kind of rule might be a bit harsh[32] but has some obvious administrative advantage. Alternatively, or additionally, the wife could be required to establish that she did not expect her husband to return — which

32 Indeed, conceivably it could be deemed so harsh as to result in an unconstitutional denial of substantive due process. *See* Shapiro v. Thompson, 394 U.S. 618 (1969). *But see* Dandridge v. Williams, 397 U.S. 471 (1970).

raises the issue of what kind of expectation should be required. There are "trial" separations that turn out to be permanent and "permanent" separations that turn out to be short-lived, plus endless variations. Should it be enough that the wife is uncertain whether her husband will return or should she be required to establish somehow that she cannot reasonably expect him to return? Perhaps it would be true that any distinction of this sort would in practice be without significance, but the issue is at least worth some consideration and must be resolved one way or another at the drafting stage.

Assuming that a decision is made that some level of expectation of permanence of the separation must be established, the next question that arises is how the fact is to be established. It would be possible to use the approach of traditional welfare and require some sort of immediate verification, at least by personal interview, by an employee of the agency administering the program. It seems more consistent with the philosophy and objectives of a negative income tax, however, simply to rely on the wife's signature on a form declaring the necessary facts. Then the only question is the extent of audit of this kind of declaration. If auditing became rigorous and thorough enough it could, of course, become tantamount to the caseworkers' policing that is regarded as one of the unfortunate aspects of traditional welfare programs. On the other hand, there must be some limited effort at verification — at least of the formal records in a sample of cases. This is a matter that apparently must be left largely to administrative discretion, with appropriate response to actual experience.

2. *Problems of Income Aggregation.* — While it may be concluded that, for the purpose of allowance size, fairly lenient rules permitting the establishment of separate units for husband and wife are not a cause for serious concern, the same conclusion may be more difficult to accept when the focus is on aggregation of income. For the latter purpose significant concern may arise from what may be referred to as the "nest egg" problem. To illustrate, suppose that the rule is that a husband's mere absence for thirty days is sufficient to permit his wife to establish herself as the head of a separate unit that includes any children present. Suppose that the basic allowance is $1,200 for the head of the unit, $800 for the

spouse, and $600 for each child, and that the tax rate is 50 percent so that the breakeven point is $6,400. Now consider a family of four with no income at all which receives a benefit of $3,200 and assume that the husband is offered a job paying $6,400. If he takes the job, payments to the family will end. This is just another way of saying that he is confronted with a tax rate of 50 percent. But now suppose that the negative and positive tax systems are not coordinated and that the rates under the positive tax remain the same as they are now. If the husband moves out and his wife establishes herself as a separate unit, then the unit consisting of herself and the two children can receive an allowance of $2,400. This amount would be reduced by 50 percent of any support that the husband provided, so that no serious problem of "abuse" arises unless the husband decides (presumably, in most cases, with the acquiescence of his wife) that he will allow his family to exist on the negative income tax allowance while he saves and establishes a "nest egg" that will be available upon his ultimate return.[33] The husband's net after a positive tax of about $1,000 will be $5,400. Thus, total resources available to the family will be $7,800 instead of the $6,400 that would have been available if the husband had remained a member of the family unit. Suppose that the husband is able to live on $1,200 and therefore to save $4,200. Of this amount, $1,400 may be said to be derived from "beating the system" and the remaining $2,800 from the family's own thriftiness.

Perhaps the problem is not really worth worrying about. As has been indicated, it is a function of the factor of a significantly lower tax rate under the positive income tax than under the negative income tax — a factor that probably should be eliminated under any ultimate, ideal negative income tax plan. But that is a factor that in reality is likely to be present at least in the short run and certainly in any experimental program. It may also be argued that allowing, or even encouraging, a family to establish a nest egg is a good thing. But certainly it cannot be argued that a couple should be encour-

33 I am not concerned here with the problem of the husband who decides that he will go off and "live it up" — spending his whole salary while his family lives at a subsistence level on negative income tax payments. I would view that as a true separation, raising only the problem of a husband's legal obligation of support, which is discussed below.

aged to separate in order to augment the nest egg. And it does seem somewhat unfair that the wife and children in this kind of situation should be supported by negative income tax allowances when true need does not exist. Finally, it may be argued that there are not likely to be many cases in which the kind of finagling described in the example is likely to occur; not many men would leave their homes and deprive their families of better support for the sake of a rather modest opportunity to save. But that observation merely raises the question of whether the abuses can be eliminated when they do arise, no matter how rarely, without sacrificing other goals.

Assuming that we do want to foreclose the kind of "nest egg" possibility that the example illustrates, the question becomes, what kind of rule can and should be adopted? In approaching this problem it must be remembered that we want to avoid depriving a female-headed family of support when that support is really needed and that, as far as possible, we should avoid adopting rules that cannot be effectively implemented without an intolerable level of personalized inquiry or "snooping."

The problem could, of course, be virtually eliminated by treating the husband and wife as a unit in the absence of a divorce or legal separation, but, as suggested in connection with the discussion of problems of allowance size, that seems too harsh. The rule favored in the earlier discussion — requiring the wife's declaration that the husband's absence was expected to be permanent or at least indefinite — would eliminate the problem for all honest claimants but, at the same time, would leave a significant opportunity to cheat, since the critical fact would be the wife's perception, and it would be virtually impossible for an administering agency to challenge her assertions about that perception without becoming somewhat oppressive in its interrogations or investigations.

Another possible solution is a rule to the effect that if the husband did in fact return within, say, twelve months, then benefits would be recomputed retroactively as if he had never left. Such a rule would be subject to manipulation, of course — the husband could wait for twelve months and a day. Moreover, it would tend to create financial disincentives to reconciliation in cases of true

(that is, emotionally rather than financially motivated) separations. And, to the extent that the problem of manipulation were eliminated, the financial disincentive to reconciliation would be increased. Thus, on balance, a rule permitting a wife to establish herself as a separate unit on a mere declaration of her husband's absence and her understanding that he had, to her knowledge, no definite intention to return, seems most acceptable, at least until experience proves the need for a tougher rule. The problem of the rigorousness of efforts to verify the declarations has been discussed in the preceding section.

3. *Obligations of Support.* — One final problem of the separated couple deserves separate consideration, if only because it is the source of so much administrative difficulty and personal grief in traditional welfare programs.[34] The problem is the absent father's obligation to support his wife and children. The absent father is exemplary of a wider class of persons who are legally obligated to support relatives — for example, the successful adult who is legally obligated to support destitute parents — but neglect by a man of his legally prescribed duty to support his wife and children seems to evoke the most serious public concern. To take the clearest case, suppose that there has been a divorce and that pursuant to the divorce the husband has been ordered to make payments to support his ex-wife and children; suppose further that the man is financially capable of making the payments but fails to do so, and that the woman makes no effort to enforce the support order, despite the fact that the man could easily be found. In this kind of case it might be argued that the woman has turned her back on income and that her payments should be no higher than they would be if she had received the support from her ex-husband to which she and the children were entitled; in other words, it might be argued that the amount that the man is obligated to pay should be treated as if it had in fact been paid. At the very least it may be thought that the woman should, as a condition for receiving full payments, be required to make some sort of reason-

34 See Note, *Maintaining Welfare Families' Income In Kentucky: A Study in the Relationship Between AFDC Grants and Support Payments from Absent Parents*, 57 KY. L.J. 228 (1969).

able effort to enforce her own and her children's right to support. On the other hand, even in the kind of case hypothesized it may be that the best policy is to rely simply on the woman's financial incentive to seek added income (which under the negative income tax is subject to a tax rate of less than 100 percent) in order to avoid the possibility of inflicting psychic wounds on her and administrative burdens on the system. Her position arguably is no different than that of a man who is capable of working harder and earning more but fails to do so. Under a negative income tax system we ask not what the man could earn but rather what he did earn, despite the fact that in some instances it will be clear that more could have been earned, and despite the fact that his failure to earn more will mean greater burdens or reduced benefits for others. Similarly, under existing systems of positive income taxation, we look not to what a man could have earned but rather to what he did in fact earn, despite the fact that a man who chooses to be lazy or to pursue a low-paying profession will pay less in taxes than he would otherwise pay. The case for ignoring the potential income from enforcement of an obligation of support becomes much stronger, of course, when we recognize that, as a practical matter, it is probably impossible to identify those situations in which the effort to enforce a support obligation is worthwhile — that is, to identify those situations in which it is really true that the woman could have gotten a significant amount of money if she had tried, and to determine how much she could have gotten.

It may be worth noting that the problem of obligation of support is, again, a function of the lower rate of positive tax than of negative tax. If support payments and alimony are included in the wife's income then presumably they must be deductible by the husband. If the rate of taxation of the husband is at least as high as that of the wife, then the government loses nothing by virtue of his failure to pay; payments to her are higher but taxes on him are equally higher than they would be if he did not pay. Looking at this thought somewhat differently, in traditional wefare programs the entire amount of any support payment received by the wife is "profit" to the government, since the wife is taxed at 100 percent

and the husband gets no deduction. It is not surprising, then, that coping with the problem of obligation of support has proved to be one of the most serious problems of welfare administration.

III. Single Adults

Accepting the general notion that the family is the appropriate unit for determining the level of benefits under a negative income tax, one of the most troublesome problems is that of the unmarried man and woman who are living together in a nonplatonic relationship. This problem can best be examined in the context of the broader problem of allowance level and aggregation of income for unmarried adults sharing accommodations in various ways. Obviously there are a virtually infinite number of possible sharing arrangements, but a few prototypical cases should serve to illustrate most of the basic issues.

Let us assume that a single adult living alone would be entitled to file for himself and to receive the maximum individual allowance, but that, if he were married, the filing unit would be the couple, with aggregation of income and with a lower allowance for the spouse than for the filer (head of household). As indicated earlier, the assumptions underlying this approach are that a married couple pools income and shares expenses and that economies in living are achieved by virtue of the fact that they live together. Now consider the case of two unrelated women living together. Assume that, while they do allocate expenses (*e.g.*, each pays half of the rent and half of the normal grocery bills) they do not in general pool their separate incomes. Should each be treated as if she were single and living alone or should they be treated the same as a married couple, or is there an appropriate middle ground? It does seem reasonably clear that aggregation of income would be undesirable, and that they should therefore file separately. To make one person's claim to welfare benefits dependent on the income of another person who has no obligation to support him seems exceedingly unfair.[35] Wholly apart from the question of

35 Before Dandridge v. Williams, 397 U.S. 471 (1970), it might reasonably have been argued from cases such as Levy v. Louisiana, 391 U.S. 68 (1968), Douglas v. California, 372 U.S. 353 (1963), Shapiro v. Thompson, 394 U.S. 618 (1969), and

fairness it could be predicted that, if one of them had income above the breakeven level and the other did not, aggregation would be a strong inducement to live apart, an inducement which there is no good reason to create. In other words, it would be unwise to say in effect to a single adult with an income below the breakeven level that his allowance will be reduced if he moves in with another single adult with an income above the breakeven level; to do so not only might seem harsh and unrealistic in light of common income-sharing arrangements but also would, for no good reason, tend to prevent movement into such joint living arrangements.

The question of allowance size, however, is not so easily disposed of. If the amount of reduction of allowance for a second unrelated adult in any dwelling truly reflected savings in cost of living, there would be no financial disincentive to sharing of dwellings. But that observation certainly does not settle the matter. Consider the question in these terms: Would it make sense to have a rule to the effect that, for purposes of allowance size, only one person in any dwelling unit can receive the maximum (head of household) allowance and that any other person must receive a lower allowance? To be more concrete, if the allowance for a husband were $1,500 and for his wife $1,000, would it make sense to provide that any adult could file separately and need report only his or her own income but that, in any dwelling unit, only the owner or lessee would be entitled to an allowance of $1,500 and all other adults would be entitled to allowances of $1,200? Such a rule could be defended, if at all, only on the assumption that by living with another adult one generally achieves a measurable reduction in the cost of living. But is this a valid assumption, and even if it is, should the assumed circumstance affect allowance size?

First, the validity of the assumption is at best questionable. To be sure, situations can be imagined in which economy is achieved

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Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967) (three-judge court), *aff'd* 292 U.S. 309 (1968) that such a rule would be unconstitutional, in violation of the emerging doctrine of substantive equal protection. See Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* in 1967 SUP. CT. REV. 39. But Dandridge v. Williams seems for the present to have laid to rest the doctrine and the argument.

— but often only at some sacrifice. If two women, each of whom had been living in a one-room apartment, decide to share an identical one-room apartment at the same rental, then each of them saves half of the rent previously paid. But if, as seems more likely, they decide to live together in a two-room apartment, then the saving may be minimal. And even if they do decide to share a one-room apartment, can it not be said that each has simply decided to achieve an economy by sacrificing something (in this case, privacy, convenience, and space)? Surely the income maintenance system should not penalize the person who achieves an economy in this way, any more than it should penalize the person who economizes on clothes, food, or any other item — not only because to do so would be to intrude too much into the individual's freedom to allocate his income among various items of consumption but also because it is, as a practical matter, impossible to measure and account for indirect benefits of this sort. It must be remembered, after all, that one of the objectives of negative income taxation, presumably is to allow the individual maximum freedom to make decisions on consumption patterns, to avoid telling people how to spend their money.

There is an additional objection to the idea of providing a reduced allowance in cases where a dwelling is shared — namely, that any rule designed to effectuate the idea would have to be either highly arbitrary or would have to vest in administrative officials a degree of discretion that should be avoided whenever possible. After all, what is a separate dwelling unit and what is sharing? What about the woman who is a "boarder" — that is, who lives with a family and has a room of her own but must pass through the family premises in order to get to it? Should it matter that she has to share a bathroom? What if there is a private entrance to her room? How can she be distinguished from a woman who has a room in a hotel, with a wash bowl and running water? Would the rule be that, in order to be a head of a household, one must have a room with minimum prescribed square footage, cooking facilities (would a hot plate do?), a shower or bath, and a toilet? The point is, of course, that it is virtually impossible to imagine any rule that would be reasonably objective and at the same time would not produce a significant number of very incon-

gruous results. One might have a vague, abstract concept of a mere boarder on the one hand and roommates on the other hand. But how could the line be drawn in practice? And, in any event, why should it be? One can imagine, in wild speculation, a system in which payments were geared very precisely to the peculiar needs and circumstances of each individual. Many of the features of traditional welfare programs are designed to achieve this kind of result. But it is unlikely that the benefits of such a system would outweigh the costs of administration and the inevitable loss of individual freedom, both from governmental intrusion into personal privacy and from dependency on the essentially uncontrollable decisions of government officials. For all these reasons the positive tax system wisely ignores most personal bargains, economies, and psychic benefits.

Turning from roommates and boarders to adults living with friends, the argument for a reduced allowance may at first seem stronger. For example, consider the man who has been married but leaves home and "sponges off" friends, living a month here, two months there, and so forth. One might feel inclined to reduce or even eliminate benefits for such a person, but again it is difficult to imagine how this kind of "bad" case could be identified. And, even if it could, there remains the question of whether the kind of economy that the man has achieved ought to affect his benefit level when we know that many other economies and indirect benefits will be ignored.

Proceeding along the spectrum, we next consider an adult living with his parents. Is this case any different from that of an adult living as a boarder with an unrelated family or sharing an apartment with other adults? The difference, if any, would no doubt lie in assumptions about the value of what the individual will derive from the arrangement *in most cases.* That is, in most cases will he be getting, at reduced cost, housing and food comparable in value to that purchased by adults living alone? It must be noted, however, that the rules on definition of income will probably include in income the value of support received in kind, so the adult living with well-off parents who help to support him will receive reduced payments by virtue of that rule. The focus, then, should be on the adult living with parents (or other relatives) who

are themselves poor or who are not inclined to provide any financial support. Conceptualized in those terms, this case begins to look much more like that of a person who is a boarder or who simply shares a dwelling with roommates. Any savings in the basic costs of living for a poor adult living with his parents may well be minimal and the value of indirect benefits (such as easy access to the kitchen or the TV set) can be ignored because they would be impossible to measure, because they are difficult to distinguish from other unaccountable benefits, and because they will probably not reduce the basic costs of living.

Next, there is the case of the man and woman living together with no children. They could, of course, be mere roommates, a likely possibility if they are both elderly. Or the woman could be a housekeeper. But in the case of younger people it is more likely that they would be lovers, having some degree of mutual fidelity and sexual and emotional intimacy. At the same time, there would probably be a lesser compulsion to share income and to stay together than with husband and wife. It certainly seems clear that no rule could be devised to distinguish between those unmarried couples who are like husband and wife and those who are merely "shacking up" (like very friendly roommates with convenient access to sexual gratification). Or at least no rule could be applied without flagrant disregard for commonly shared notions of the proper limits on the powers and activities of government employees.[36]

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36 Indeed, it might be argued that no imaginable rule could pass the constitutional barrier erected by Griswold v. Connecticut, 381 U.S. 479 (1965). In that case the Supreme Court overturned a criminal conviction for violation of the state's statute prohibiting the giving of advice on methods of birth control. The theory of the Court was that there is a constitutionally protected right of privacy; that a married couple's sexual activities are entitled to the protection afforded by that right; and that the statute in issue unduly intruded upon that protection. It is possible, of course, to read the decision narrowly, because the Court stressed the peculiarly sacrosanct status of privacy in the marital context and because the statute represented an effort to control or prevent activity. But the Court suggested a much broader notion in the following language:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. 381 U.S. at 485-86.

This statement might well be extrapolated to protect single people as well as married couples. It seems to me entirely reasonable to argue that any imaginable process of investigating a single person's sexual activity would necessarily be re-

There are, then, two polar possibilities: all men and women living together could be treated as husband and wife (with possible exceptions for related persons and for cases of great age disparity) or none at all. Neither result is wholly satisfactory. On the one hand, a rule that did not treat an unmarried couple living together without children as husband and wife would seem to deal with like cases differently, especially if the married couple were closely knit. It might properly be criticized for producing a financial inducement to avoid marriage. On the other hand, the contrary rule would produce equally disturbing results. Suppose, for example, that whenever any unrelated man and woman, both less than 60 years old, had the same residence they would be treated as husband and wife. Such a rule would cover a man and woman who were just good friends and decided to live together as roommates as a matter of convenience. However objectionable the result in such a case, it could perhaps be dismissed as too rare to worry about. The rule would also cover cases in which the man was truly just a boarder, unless it were fashioned on the basis of a case-by-case determination of whether the couple engaged in sexual intercourse. The more likely, and still somewhat disturbing, kind of case would be that of a man and woman who were lovers but

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pulsive — even if private, consensual sexual activity could be labeled criminal in the absence of the problems of protection of privacy that the enforcement of such a law inevitably creates. If that is so, then any rule that is unenforceable without such a process of investigation will be constitutionally suspect. The fact is, however, that any family-unit rule that treats as husband and wife a man and woman who are not in fact married will likely require inquiries into whether or not they fornicate with one another. Suppose, for example, that we know that a man and woman are living in the same apartment or house. What can we infer from that fact standing alone? The man could be a boarder or the woman could be a housekeeper. Or they could be mere roommates. In what circumstances, then, will we treat them as husband and wife? We could borrow the standard of common-law marriage and make the outcome turn on whether they hold themselves out as husband and wife. But that seems to be an insufficiently encompassing test, and perhaps one that rewards secrecy (or discretion) too highly. It would be possible to make the outcome turn on whether the man supported the woman, but that might be too difficult to administer and again might be thought of as a too narrowly cast net. The temptation, then, will be to make the outcome turn on the presence or absence of continued intimacy, manifested primarily in fornication. But under the *Griswold* language quoted above, it may be that the presence or absence of that kind of relationship cannot be made the pivotal issue because any process of inquiry into whether it exists would necessarily be repulsive. We can only speculate on whether the Supreme Court would expand *Griswold* to that point. Very likely it would not. But the possibility that it would does seem to exist.

who had not reached the degree of closeness and mutual dependence in which they felt obliged to share their incomes. Suppose that the woman has no income, but the man has a good job. If he has enough money so that he can keep some sort of residence elsewhere, then, assuming that he contributes nothing to her support, she would continue to receive a full adult allowance. As soon as he gives up his other residence (assuming that his income is above the breakeven level for a husband-wife unit) she would receive nothing. Such a rule might create a market for phony residences — places where a man would have a bed that he called his own, where he might keep some clothes, and where he could receive his mail — for all of which he would presumably pay a modest rent. And, even if the phony residence could be ignored, the rule suggested would induce the man to engage in the wasteful conduct of maintaining an idle room or apartment. Of course a husband-wife status could turn on the amount of time the man spent at the woman's home. But in these kinds of cases do we really want to induce the man to avoid conduct that might be determinative of whether he was in fact "living with" his paramour — to go home every night at midnight, to avoid eating supper or breakfast too often at the woman's residence, to limit the number of personal effects he kept at her home, or to avoid seeming too friendly toward her in front of the neighbors?[37] The answer must, I think,

37 Compare California's regulations defining a "man assuming the role of spouse" (MARS) for purposes of AFDC (State of Calif., Dept. of Social Welfare, Manual of Policies and Procedures, Public Social Service, Rule 42-515.4, 3-1-69):

Man Assuming the Role of Spouse

.41 *Definition*

A man will be considered to be assuming the role of spouse if it has been found that he is not married to the mother and not the father of any of her children, but that:

.411 He is in or around the home and is maintaining an intimate relationship with the mother; *and*

.412 Either he has assumed substantial financial responsibility for the ongoing expenses of the *AFDC* family; or

.413 He has represented himself to the community in such a way as to appear in the relationship of husband or father, or both.

.42 *Criteria*

The determination of whether the man has assumed financial obligations or has represented himself as spouselike shall include but shall not be limited to consideration of the following factors. The existence of a single factor may not be conclusive proof that the criteria are met. A man may take

be "no," not only because the negative income tax system should not be used to alter patterns of conduct of the poor when the non-poor are free from similar pressures, but also because enforcement of such rules would encourage the most odious kind of government snooping and neighborhood back-biting. Any such rule would, for example, almost inevitably invite reliance on such infamous enforcement techniques as the so-called "midnight raid."[38]

There is one other factor that must be noted about the tax treatment of the unmarried couple — the rules will presumably treat as income not only support received in cash or in kind but also gifts. Thus, where a man pays more than his share of the rent or food costs or buys clothes and other things for the woman, she will have income and her payments will be reduced accordingly. These

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the children on outings, provide gifts or even discipline them. This fact alone would not be proof of a spouselike relationship.

.421 Man has Assumed Financial Obligations
- a. Man has paid family bills, opened charge accounts jointly or in his name for use of the family, or similarly obtained credit for the benefit of the family.
- b. The man has paid medical or other bills incurred by the family.
- c. Man has claimed mother and children as dependents in filing income tax.

.422 Man Represents Self as Spouselike
- a. Representation to others, such as landlords, friends, community, as husband and wife.
- b. Use of man's name by children for various purposes, including school records.
- c. Man's attendance as parent at children's school function.
- d. Man is attentive to children (other than casually) and provides recreation, gifts, etc., or admittedly disciplines children.
- e. Children refer to man as father.
- f. Substantial use of man's automobile by *AFDC* family or registration in man's and mother's names.
- g. Use of *AFDC* family's address by man for mail, employment records, hospitalization, arrests, etc.
- h. No demonstrable or confirmable alternative living arrangement other than with the *AFDC* family.

38 To be sure, if such a rule were plainly reasonable and necessary then we should be willing to accept the burden of difficult enforcement. For example, espionage and drug "pushing" are difficult crimes to detect and prevent and often evoke objectionable police techniques, but we do not conclude that the conduct should therefore be authorized. But the interest in treating the unmarried couple as a unit is not of the same order as that in preventing espionage or drug trade.

rules will tend to eliminate the disparity in treatment between the married couple and the closely knit unmarried couple who pool their income. It is true that these rules will create serious problems of definition and administration. But these problems will involve the estimation of amounts instead of all-or-nothing determinations, and will therefore probably be more malleable than the definitional and administrative questions involved in treating some unmarried couples as if they were married. The rules on income from support and gifts, by reducing the possible financial advantage of being unmarried, certainly make more palatable a rule that leaves the unmarried couple in the same status as roommates. On balance that result is clearly preferable.

The immediately preceding discussion has focused on unmarried couples with no children. Assume that the unmarried couple with no children is not required to file as a unit. There are cases in which a man and woman living together have no children of their own, but one of them (usually the woman) does have children who are the offspring of previous relationships and who live with her. The question here is whether this change in circumstances — the presence of children other than common offspring — justifies a change in result. Basically the same arguments pro and con, the same issues and problems, are presented regardless of whether there are children. There is still a wide variety of possible relationships, ranging from the fleeting encounter to the permanent liaison, with or without pooling of income. A flat rule turning on a legally recognized marital relationship is bound to produce unsatisfactory results, but it is virtually impossible to imagine any other criterion that would be both fair and capable of administration. Of course the problem is simplified if the following assumptions are made: where there are children present, no man other than the husband should be present; it is appropriate for an income maintenance program to effectuate this policy; and therefore a woman who cannot find a man who is willing to support her and her children must choose between having a live-in male companion and feeding her children. One obvious objection to any rule reflecting these assumptions is that it would still leave serious definitional and enforcement problems. For example, how much time can a man spend at the woman's home and what other

conduct can he engage in before he stops being a mere "date" or "boyfriend" and becomes a putative spouse? Furthermore, who determines the relevant facts, on the basis of what kinds of leads or suspicions, and how?[39] An even more serious objection is that such a rule would, in some cases, deprive a person of a relationship that may be common and accepted among the poor and not subject, as a practical matter, to any formal sanctions among the nonpoor. Perhaps the most significant objection is that a compulsory unit rule in many cases would deprive children of support in order to punish the conduct of their mother.[40] These objections suggest that the rule on compulsory units should be the same regardless of the presence of children — while income would include support and gifts, a man and woman could always file as separate units unless they were married.

It may be, however, that the presence of children is an indicator of certain other pertinent facts, a predictor of the likely aggregate effects of a rule. Suppose, for example, that there is reason to believe that not more than 10 percent of unmarried couples without children had a feeling of mutual obligation to support one another but that among unmarried couples with children in the household 90 percent did have that sense of mutual obligation. If the rule treated as husband and wife (that is, produced a lower allowance level than for unmarried adults and required aggregation of income) all couples living together without children, it might reasonably be predicted that the rule would induce alterations of conduct among this class of people seeking to avoid its adverse

39 *See* California "MARS" rule, note 37 *supra.*

40 It would, of course, be possible to take a middle ground by continuing to make the children's allowance independent of the income of their mother's male friend while at the same time treating the man and the woman as a unit for the purpose of determining her allowance. But the fact is that if the woman is not being supported by the man and she accepts responsibility for the care of her children, the effect of cutting off the allowance for her will undoubtedly be adverse to the welfare of the children.

It is worth noting that, in the case of married couples, the draftsman of negative income tax rules is in effect forced to ignore the possibility that one member of the unit (usually the father) might not in fact make his income available to others. Family unit rules make no sense unless sharing is assumed. Actions under state law must be relied upon as the ultimate tool for enforcing the obligation of support. *See Model Statute,* 280. However, one possible device for reducing the danger of refusals to support is to issue checks jointly to husbands and wives. *Id.* at 306.

effects. For example, assuming that the man had no intention of supporting the woman, or at least that he would go pretty far to avoid doing so, and that the woman had no prospect of becoming self-supporting, then presumably the man would keep a separate room, limit the time he spent with the woman, leave her home very early every morning, or do whatever he would have to do to avoid having her treated as his wife. This result would appeal only to those who placed a high premium on maintaining among the poor the *appearance* of adherence to conventional morality. Even for those couples with a strong sense of mutual obligation to share income, avoidance might still be possible. Thus, the number of cases in which the rule actually did produce a family unit and thereby reduce payments would be relatively small. In other words, there would be relatively few cases in which it could be claimed that the rule produced the presumably desirable effect of treating the close-knit unmarried couple like its married counterpart, while there would be a relatively large number of cases in which the principal effect would be simply to alter pre-existing patterns of behavior. The opposite might be true, however, for the class of unmarried couples with children in the household — depending, of course, on assumptions as to the typical patterns of behavior and attitude among that class of people. In other words, a fact that is relatively easily determined (that is, the presence of of children) might be regarded as a reliable indicator of another fact, not easily determined (namely, the degree of mutual commitment or obligation), and the existence of the inferred fact might be relevant to a prediction of the effect of a rule. It is well beyond the scope of the present article to inquire into the true state of facts among either group, but it does seem worthwhile to point out that many proposals and discussions do often make the assumptions that I have offered hypothetically. Explicit recognition of these assumptions would at the very least reduce misunderstanding; beyond this, it might result in rules better adapted to the assumptions.

The strongest argument for treating an unmarried couple living together as husband and wife can be made where they have a common child living with them. The arguments pro and con on the question of unit treatment in such cases are easily derived from

the preceding discussion, and need not be reviewed, but the balance is far more heavily weighted in favor of treatment as a unit.[41] In these situations the number of relationships analogous to marriage seems likely to be large in relation to the total. Furthermore, the number of cases likely to present administrative difficulty, or in which a rule requiring unit treatment might be unfair, seems likely to be relatively small. It should be recognized, however, that unit treatment will present some problems of determination, such as whether a man is living with a woman. But the same problem arises, as has been demonstrated, with a legally married couple, with or without children.

There is one final point about marriage and similar arrangements. Any couple, whether married or not, ought to be *permitted* to file as a husband-wife unit. Usually it will be disadvantageous to do so, but some couples might want to do so anyway. In some instances it might be advantageous to file as a unit — e.g., where one had an income just at the breakeven point for a single person and the other had large medical deductions and no income. But presumably such cases would be rare and possible abuse does not seem disturbing. However, in order to prevent a trafficking in unused deductions, there might be a rule requiring that the couple be either married or living together, or some other kind of protective rule.

IV. Children

The proper treatment of children turns out to be a surprisingly complex problem because of the great variety in their circumstances as they go through the transition from infancy to adulthood. The young child living with his natural parents presents no problem. There ought to be an allowance for him, payable to one of the parents, payments to be based on need as measured by the parents' unit's income. Problems arise as the child becomes older and more independent. The indicia of independence are many; independence itself is a relative matter. Moreover, the child's "in-

41 It would probably be wise, however, to make payments for any stepchildren whom the man is not legally obligated to support, if he chooses not to support them. See *id.* at 279, 309.

dependence" is relevant to several issues: whether some adult should be permitted to claim him as a dependent for purposes of determining the allowance level of the adult's unit; whether an adult should be required to include him in the adult's unit for purposes of determining the unit's total income; and whether the child should be permitted to file a claim for himself; and, if a child is allowed to file individually, whether his allowance level should be that of a child living with his parents or of an adult, or something in between. Consequently, there is an endless variety of reasonable sets of rules relating to children. For present purposes, a rather discursive examination of issues and relevant factors seems most appropriate.

One of the most significant problems is best posed by asking whether a parent should always be permitted to exclude a child from the parents' unit in order to exclude the child's earnings from the income of the unit; and, if so, how often should the parent be permitted to alter his decision on the matter. In order to put the issue most sharply, it is best to think in terms of a child whose connection with the family has not in any observable way become attenuated. A typical "patently connected" child might, for example, be an unmarried 16-year-old girl living with her natural parents and two younger children, and regularly attending high school. What about her earnings from an after-school job? If she actually gives her earnings to her parents then there is no problem — the money would be treated as part of the parents' unit's income even if the daughter is not included in the unit.[42] If the earnings are below the breakeven level for the daughter's allowance level, her parents achieve no advantage by excluding her (and her income) from the unit, since they could do so only by sacrificing the additional allowance for her.[43] The question boils down, then, to whether or not the operating assumption should be that a child will and should share his "extra" earnings with his

42 Except, presumably, to the extent used to cover the daughter's expenses if she is not treated as a member of the unit.

43 Suppose that the basic allowance for the family is $50 a month greater with the daughter than without her, and that the tax rate is 50 percent. The breakeven level for her is $100 per month. As long as she earns less than $100 per month, the payments to the unit will be greater if she is included than if she is not.

family — that is, whether or not those earnings ought to be regarded as being available to the rest of the family.[44] If the answer is negative, then the rules should provide the parent with the option to exclude the child. The question then becomes how long the parent should be bound by a decision to include or exclude. The last problem involves primarily accounting issues, however, and cannot appropriately be pursued in this article.[45]

Another important issue arises over who should claim children not living with their natural parents. One alternative, following positive tax law, is to allow a child to be claimed only by a person who provides more than half the child's support.[46] This alternative has obvious appeal on grounds of equity and need but creates some serious problems of administration and proof. Another alternative is to permit the child to be claimed by the head of the unit with whom the child is in fact living.[47] This kind of rule might still require in some instances a difficult factual determination; but presumably such cases would be relatively rare.[48] The simple residency test seems to produce fair results even if the person claiming the child (*e.g.*, the mother) receives substantial support payments from someone not a member of the unit (*e.g.*, an absent father), since support payments will be treated as income by the unit receiving them and will be deductible by the unit from which they come. It might be suggested that a simple residency test could lead to horrors such as a group of 15-year-old runaways moving into a communal "pad" with some 21-year-old

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44 It may be that in the aggregate the earnings of children are so insignificant that they ought to be ignored in all cases for the sake of administrative convenience.

45 See Asimow & Klein, *supra* note 1.

46 *See* CODE § 152. *See also Model Statute* 308.

47 If two or more units share a dwelling, the child could be deemed to live with the unit with whom he has the closest blood relationship or with the one whose head either was the owner or the lessee of the dwelling.

48 One problem that would not be rare would be the proper treatment of students who go away to college (assuming they are to be treated as children rather than as independent adult units). Normally they should, I suppose, be treated as members of the unit with which they lived before going away to school and with which, usually, they will spend their vacations. However, it may be that the children of the poor may tend, more than the children of the middle class, to assume financial independence upon leaving high school and that therefore no rule requiring that they be treated as dependent members of any unit can work fairly.

hippie serving as head of the unit. But if that is an evil, surely we can rely on enforcement of state and local law to prevent it.

Obviously, there are other variables that could be taken into account in determining who should be permitted to claim a child, such as the relationship of the child to the person claiming him, the length of time in which the child has lived with such person, the relative ages of claimant and child, and approval of the living arrangement by a competent official. But it is my belief that elaboration of the provisions on this issue is likely to do more harm than good. Therefore, draftsmen should opt for a simple residency test, with the realization that necessary changes can be made as actual problems arise.

In defining an "adult" for purposes of the negative income tax, it is difficult to discuss any one factor in isolation. For example, age is certainly an important factor, but a person who is 17 years old might properly be treated as a child if he is living with his parents and going to high school, but as an adult if he is working, married, and living apart from his parents. The possible combinations of relevant factors are endless. Consequently only the most relevant factors will be listed and commented upon. The appendix contains a set of rules[49] that illustrates how these factors might be taken into account in combination with one another. By examining those rules, the reader will be able to appreciate the wide variety of alternatives that are open.

Age is clearly a relevant factor. Even if, for example, a child continues to live with his parents for his entire life, there may be some point at which he should be entitled to receive his own benefit claim. It is difficult, however, to think about age without thinking simultaneously about whether or not the child is living with his parents. A child living alone is certainly more like an independent adult than a child of the same age living with his parents. To take account of where a child lives, however, is to create some serious problems of incentive for unnatural split-ups ("unnatural" split-ups being those in which a child who would

49 These are a modified version of rules that Professor Joel F. Handler and I drafted for a model income maintenance statute designed to reflect the recommendations of the REPORT OF THE PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, POVERTY AMID PLENTY (The Heineman Commission) (1969). Also see *Model Statute* 307-09.

normally continue to live with his parents is induced by the negative income tax system to move out). These problems are exacerbated if the parent in all circumstances is required to include a child in his unit (*i.e.*, if he is denied the option to exclude). For example, consider the case of a 17-year-old boy who has dropped out of school. If he has no income and if his right to a benefit check of his own is made dependent on whether or not he is living with his parents, then the system creates an incentive for him to move out; the incentive may be enough to induce him to move even though he would have preferred to continue to live with his parents. If the boy does get a job, and if his income is high enough, then, unless the parent is *permitted* to exclude him even if he lives at home, there is again a financial incentive for him to move out (unless, of course, the parent were required to include him even if he in fact moved out — a possibility that is too draconian from the parent's viewpoint). These considerations suggest that it may be very risky to make a person's status as a claimant turn on whether he lives with his parents or some other adult.

Another possible criterion of independence is whether or not a person is in school. Here again there is a danger of creating undesirable incentives. On the one hand, being in school suggests dependence. On the other hand, to allow a person to become an independent claimant only if he is not in school may be to create too significant an incentive to quit school. It might seem anomalous to treat an 18-year-old high school senior as an independent claimant, but it might seem equally anomalous to refuse to treat as independent an 18-year-old who has left school and is trying seriously to support himself. But it may be necessary to accept the latter anomaly because it is impossible to distinguish between those 18-year-olds who have left school in order to qualify as independent claimants and those who would have left anyhow. A youngster's status could also be made to turn on whether or not he has graduated from high school. For example, the rules could provide that a person is to be treated as an independent claimant if he is either over 18 years old or a high school graduate. The theory would be that a person should be encouraged to stay in school at least until his 19th birthday. The problem with this

approach is that it seems unfair when applied to those persons who may have left school for good reason — for example, because they simply can no longer get anything worthwhile out of it, or because they are married.

The student-nonstudent dichotomy has been thought by some to be particularly significant where the school in issue is not high school but college. Thus, it has been proposed that a person 19 or 20 years old be treated as an independent claimant if and only if he is not a college student.[50] The theory behind this proposal is not entirely clear, but it seems that it is an outgrowth of the assumption that college students come from middle-class families and have no need for negative income tax support because they ought instead to be supported by their families. It would be peculiar indeed to turn the negative income tax into a device for supporting the children of the wealthy while they are in college. But, as applied to the children of the poor, the proposal seems downright pernicious in that it exaggerates financial difficulties that those children are faced with if they want to go to college. In other words, the proposal tends to create a financial incentive to avoid going to college. The problem is how to avoid this effect without creating an unintended subsidy for children of the nonpoor. One solution might be to impute to any person under 21 some percentage of the income of his parents. If this solution seems too harsh because some well-to-do parents actually do refuse to support their children's college education and because ad hoc inquiries into parents' willingness to support might be impractical and unfair, then perhaps the negative income tax should be permitted to become a device for subsidizing higher education.

Another relevant factor is marital status. The thought would be simply that, once a person is married, he occupies a different place in society than another person of equal age and similar characteristics. Again, there may be some fear of encouraging early marriages. The thought of a 16-year-old boy marrying a 15-year-old girl in reliance on the prospect of living on a negative income tax allowance is somewhat disturbing though probably fanciful. Furthermore, it is arguable that we should refrain from implicit condemnation through a welfare program of a practice that has

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50 *See* Tobin, Pechman, & Mieszkowski, *supra* note 1, at 10.

not been prohibited in any other way. The youthful marriage does suggest another problem of more general concern — whether young people, even though fully independent, can be expected to live on less money than older people. This possibility raises a factual question that is difficult to appraise; it seems sufficient to point out that this problem is best attacked by adjusting allowance levels, not by treating people as dependents.

The foregoing factors seem the most significant ones. Others might include whether the person is a boy or a girl, whether the person's parents are living, whether the person has children, and how long the child has been living apart from his family. It is no more possible in the area of family units than in other areas to draft simple rules to cope with complex problems. But, at the same time, there is some point at which one must accept the fact that no set of rules will be perfectly adapted to all conceivable circumstances. Particularly in the early stages of rule-development, when there is little experience to guide us, we must therefore be content with fairly gross distinctions.

APPENDIX
Family Unit Rules

I. Filers and Members of Units

A family unit may consist of one or more individuals. The person who is responsible for filing the claim for a family unit, and to whom payment under this program will be made, is called a "filer." The following rules establish which individuals may be filers, which individuals *must* be included in the filer's family unit, and which individuals *may* be included in the filer's family unit. A filer will become entitled to additional payments for each additional member of his family unit but will be required to include in the income of the family unit the income of all members of the unit.

A. *Male Filers*

1. A man is a filer if he is:
   (a) At least 18 years old; or
   (b) married; or
   (c) a high school graduate.

2. A male filer must include his wife in his family unit unless they are legally separated or informally separated (as defined in Section C). A male filer must also include in his family unit any woman who is living with him and is the mother of one or more of his children living with him.

3. A male filer may include in the family unit any person who is under 18 years old and who lives with him provided, however, that no person under 18 years old who is not a child of the filer or a woman who must be included in his unit may be included until such person has lived with him for 90 consecutive days. (But see Section E 2.)

B. *Female Filers*

1. A woman is a filer if she is:

(a) At least 18 years old and either unmarried, divorced, legally separated, or informally separated (as defined in Section C);

(b) a high school graduate and either unmarried, divorced, legally separated, or informally separated (as defined in Section C);

(c) married and has received a consent from her husband as described in Section E 1.

2. A female filer must include in her family unit any man who is living with her and who is the father of one or more of her children living with her.

3. A female filer who is eligible to be a filer by virtue of Section E 1 must include her husband in her family unit.

4. A female filer may include in the family unit any person who is under 18 years old and who lives with her provided, however, that no person under 18 years old who is not a child of the filer or a man who must be included in her unit may be included until such person has lived with her for 90 consecutive days. (But see Section E 2.)

C. *Informal Separation Defined*

A man and woman will be deemed to be informally separated if

1. (a) they have not lived in the same dwelling unit for 30 consecutive days, and

(b) they do not maintain a common residence, and

(c) one of them files an affidavit with the Secretary, swearing or affirming these facts on information or belief and further stating a belief that the separation will continue indefinitely; or

2. if either of them is confined to a penal institution for a period of time not certain to expire within 120 days.

D. *Special Rules for Incompetents, Stepchildren, Children Confined to Public Institutions, Etc.*

1. If a person is otherwise eligible to be a filer, but is physically or mentally incapable of filing reports, then reports may be filed and payments received in his or her behalf by the person who is responsible for his or her care.

2. If a person under 18 years old is living in a State-approved foster home or a State-operated institution (other than a penal or correctional institution) and if the State has adopted a plan approved by the Secretary for seeking to enforce the legal obligation of any other person to support such person, then the State shall be entitled to receive in respect of, and for the benefit of, such person an amount equal to the allowance prescribed for such person, reduced by the full amount of any support payment received by the State.

3. A person who is eligible to be a filer may, regardless of his income, file a claim for a unit consisting of any persons under 18 years old and living with him, for whom he certifies that he has no legal obligation of support under the law of the State in which he resides, and whom he refuses to support, except that he must include in such unit's income not only the income of such person or persons under 18 years old but also the income of any other persons living with him who do have a legal obligation to support such persons under 18 years old and except that this provision shall not apply to persons under 18 years old for whom payments are or could be made under Section D 2.

E. *Miscellaneous Provisions*

1. A husband may file a written consent to allow his wife to be the filer for their family unit, in which case payments will be made to her.

2. No person may be a member of more than one unit. If a person who is under 18 years old lives with more than one filer then he can be claimed only by the filer who supplies the greatest amount of support.

3. Each time a monthly report of income is made, the filer may make a new choice as to whether to include any person (other than his spouse) in the family unit.

4. A person will be deemed to be continuing to live with a unit if he was living with the unit and is expected to return and if he is:

(a) absent for the purpose of working or seeking work;

(b) in a prison, jail, or other penal or correctional institution and either (i) can with reasonable certainty be expected to be released within 30 days or (ii) has not been convicted or pleaded guilty or been adjudged a delinquent;

(c) in a hospital or mental institution and (i) can reasonably be expected to be released within 60 days or (ii) continues to receive, directly or indirectly, substantial support from the unit; or

(d) is absent for any other reason for a period not expected to exceed 30 days.

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To cope with the problem (if it is seen as one) of supporting the minor but independent children of the well-to-do, the following provision can be added to the rules defining the amounts to be included in income:

(a) In the case of any person who is less than 21 years old, an amount equal to one-tenth of the income (as determined in subsection 1(b) below) of his parents (other than a parent who is a filer or a member of a unit receiving benefits under this Act), except to the extent that it can be established, under Regulations promulgated by the Secretary, by such person under 21 years old, if a filer, or by the filer who claims such person as a member of his unit, that such parents have no legal obligation to support such child, or cannot with reasonable diligence on the part of the filer be induced to provide such legally required support.

(b) For the purposes of this section income means taxable income as defined in section 63 of the Internal Revenue Code of 1954, less $5,000 for two parents filing a joint return or $2,500 for each parent filing a separate return (or treated as if filing a separate return under subsection 1(c) below).

(c) If the parents of a person under 21 years old do not file a joint return, and if either of them files a joint return with some other person, the income of such parent filing with such other person will be determined as if such parent had filed separately.

DECENTRALIZATION IN NEW YORK CITY: A PROPOSAL

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Introduction: Policy and Theory — Some Observations

Municipal decentralization is a frequently mentioned solution to the multi-faceted "urban crisis."[1] This article presents a "model" of decentralization for New York City, a working plan that indicates how power might be shared between a central administration and the neighborhoods in America's largest city.[2] The fundamen-

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This paper was prepared during the summer of 1969 when the authors were working for the New York City Bureau of the Budget. We are particularly grateful to two of Mayor John V. Lindsay's aides at that time, Peter Goldmark and Dinni Gordon, who guided the work from the outset. Fred Hayes, then Director of New York's Bureau of the Budget, John Forrer, then Assistant Director of the Bureau of the Budget, and the Bureau's program planners were also exceptionally helpful.

Our task was to attempt to construct a model which was to be both "feasible" and "specific," although those terms were not carefully defined. There was some thought that Mayor Lindsay might propose a decentralization plan during the mayoral campaign and thus the word "feasible" may have had overtones that reflected the political climate of the time. The core ideas of the plan, however, are not dependent upon the politics of the moment, although some of the details (especially the omitted ones) might be.

Structural aspects of the plan here presented are reflected in "A Plan For Neighborhood Government in New York City" announced by the Mayor in June of 1970. See note 2 *infra*.

1 *See, e.g.*, A. ALTSCHULER, COMMUNITY CONTROL: THE BLACK DEMAND FOR PARTICIPATION IN LARGE AMERICAN CITIES (1970); M. KOTLER, NEIGHBORHOOD GOVERNMENT: THE LOCAL FOUNDATIONS OF POLITICAL LIFE (1969); L. MUMFORD, THE URBAN PROSPECT (1968); A. WALSH, THE URBAN CHALLENGE TO GOVERNMENT (1969); Babcock & Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 LAW & CONTEMP. PROB. 220 (1967). For an extensive source of materials in this area, see Pellegrin, *Selected Bibliography on Community Power Structure*, 48 S.W. SOC. SCI. Q. 451 (1967).

2 Although "decentralization" has been a very potent issue in New York at least since the school strikes of 1968, prior to the preparation of this plan there appears to have been no comprehensive proposal for devolution of power over a number

tal innovation of the proposal is the creation of 62 Neighborhood Councils that would assume an active role in determining the mix of city services within a community. By allowing neighborhoods to make choices between city services, the plan attempts to give significant power to community institutions while not destroying central city government or taking from it the power to raise revenue through its large tax base. It is thus a proposal neither for *administrative decentralization* in which city agencies retain power but simply transfer certain decision-making powers down the bureaucratic hierarchy into "the field," nor for *complete decentralization* in which the city is balkanized into small, autonomous municipalities with independent revenue bases. Rather the plan might be termed *decisional* or *allocational decentralization, i.e.,* revenue raising and many important agency functions remain centralized but decisions about allocation of certain types of resources and some operational decisions are ceded to community institutions.[3]

In formulating any plan for municipal decentralization, at least four basic questions must be asked: (1) What is the area (the "community" or "neighborhood") upon which the plan should focus?

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of city services, to some group of neighborhood governments. A confidential report prepared for the Mayor's office in 1969 by Pat Lines surveyed the then existing community role in decision-making in every municipal agency, but the report advanced no new scheme of decentralization. During the fall of 1970, the Association of the Bar of the City of New York prepared a centennial volume evaluating alternatives for decentralization in the city. The volume, forthcoming in 1971, did not affect this plan.

In June of 1970 Mayor Lindsay announced "A Plan for Neighborhood Government of New York City" (available from City Hall, New York) [hereinafter cited as City Hall Plan]. That plan reflects some of the ideas presented in this article, but in important respects it differs from our proposal. Throughout this article the contrast between the two proposals is drawn by footnoting the City Hall version where it differs from ours.

Other cities have considered decentralization of individual services, principally schools, hospitals, and police, but with one exception we have found no comprehensive plan developed for the decentralization of any American municipality. Financed by a small Ford Foundation grant, a group of Harvard Law School students produced an incomplete, though massive, scheme for decentralization of municipal government in Boston. See BOSTON URBAN SERVICES PROJECT, POLITICAL AND ADMINISTRATIVE DECENTRALIZATION OF MUNICIPAL GOVERNMENT IN BOSTON (1969). Readers of both plans will note that our recommendations differ considerably from those of the Harvard group.

3 For an interesting discussion from the economist's viewpoint of this type of decision making, see Davis & Haines, *A Political Approach to a Theory of Public Expenditures: The Case of Municipalities,* 19 NAT'L TAX J. 259 (1966).

(2) What powers presently held by the central administration should be transferred to the community? (3) What institutions should be created both to receive the ceded powers and to insure that efficiency and fairness are maintained? (4) How shall revenue be raised and distributed among the new institutions? This paper is concerned primarily with the second and third of these issues. In order to give the plan concreteness, it was initially decided to make the boundaries of the Neighborhood Councils coterminous with New York City's sixty-two city planning districts, geographical areas that had been carefully delineated during the past decade as historic neighborhoods with which residents identified.[4] Thus, it has been possible to avoid very difficult decisions about boundaries and scale that would otherwise have to be confronted in any decentralization planning process.[5] Regarding the fourth question, we simply assumed that revenue would continue to be raised by the central city administration; our concern then was with how the current budgeting process could accommodate the devolution of decision-making power to the community institutions.

Having thus focused our attention, we have chosen a primarily programmatic approach even within these terms. While fundamental normative and empirical questions cannot be and should not be avoided in evaluating a decentralization plan, the formulation of a working proposal can encourage the initiation of meaningful debate. Therefore, the reader may wish to keep in mind as he proceeds certain questions which we did not analysze in the plan itself. Some of the more salient points may be outlined as follows:

1. *Problems of Decentralization Viewed as an Instrument for Achieving Socio-Therapeutic Ends.* — Decentralization has often been proposed as one means of dealing with the reinforcing psy-

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4 For a variety of views on how the area of a community should be defined see AREA AND POWER (A. Maas ed. 1959).

5 *E.g.*, Woodruff, *Systems and Standards of Municipal Annexation Review: A Comparative Analysis*, 58 GEO. L.J. 743 (1970); *see also* Hanson, *Toward A New Urban Democracy: Metropolitan Consolidation and Decentralization*, 58 GEO. L.J. 863, 889-95 (1970).

6 *E.g.*, ALTSCHULER, *supra* note 1, at 210; M. CLINARD, SLUMS AND COMMUNITY DEVELOPMENT 129 (1966); P. GOODMAN, PEOPLE OR PERSONNEL: DECENTRALIZATION AND THE MIXED SYSTEM (1965); KOTLER, *supra* note 1, at 51-61; R. NISBET, COMMUNITY AND POWER 72 (1962 ed.); Hanson, *supra* note 5, at 877-79. See also Farnsworth,

chological and political pathologies of the slum and the ghetto.[6] So viewed, decentralization is an attempt to intervene in complicated social-psychological processes that now spawn anger, cynicism, despair. But both the understanding of those processes and the suggested means of altering them are enormously crude. Can social-psychological change predicated on community institutions occur in a "community" of 130,000, not to mention one of 300,000? Does the definition of a community around him enrich or impoverish a ghetto resident? Does it encourage indigenous leadership or local rivalry, a development which in turn must be related to an individual's consciousness?[7]

2. *The Impact of Decentralization on Class and Race Conflict.* —The demands for decentralization, which originated in black communities, have increased in the past few years because of the concerns of lower class and lower middle class whites. These citizens, fearful of the changing character of their neighborhoods and resentful of the resources deployed in favor of poor, non-white city residents, have demanded more attention for their problems.

This proposal thus urges decentralization on a city-wide basis in an attempt to make it a program which can be endorsed by residents of all races, religions and ethnic backgrounds. It frankly builds on a belief that not only is decentralization sought by non-whites, but by whites who seek neighborhood preservation. Is neighborhood preservation by the means here described an ethically acceptable goal? Is decentralization likely to dampen race and class conflict or will it merely heighten it?

Under the proposed plan, it will be necessary to assess, through geographic budgeting, the dollar amounts at the disposal of each of the 62 Neighborhood Council districts for those services being decentralized. Thus, the budget process, which in the past has been of low visibility, will be subjected to close scrutiny. Since the per capita return will not be the same as per capita tax bill in a particular community, inevitably a "balance of payments" problem

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Problems of Local Government: Developments of the Recent Past, 1 URBAN LAWYER 47, 57-58 (1969). For discussion of a parallel psychology of political powerlessness in middle class neighborhoods, see B. FRIEDEN, THE FUTURE OF OLD NEIGHBORHOODS 124 (1964).

7 *See generally* Kirp, *Community Control, Public Policy and The Limits of Law*, 68 MICH. L. REV. 1355 (1970).

will arise between districts. Will the exposure of the redistribution process in such stark terms exacerbate conflict along class or race lines? Procedures are established in the proposal for determining allocation formulas based on some concept of "need." Can these procedures bear the inevitable pressure that will build?

3. *Problems of Scale and Relevance.* — Under the proposal, some operational decisions will be given to community institutions. But, as noted, the central innovation will be to give Neighborhood Councils the power to chose the relative deployment of existing services in their area (more sanitation and less parks maintenance, for example). If there is no increase in total resources spent in a Neighborhood Council district, is the allocational choice very meaningful? Even if sanitation services can be increased by 15% at the expense of 25% of park services, will this satisfy anyone, will it be worth the institutional effort to reach that decision or will it simply cause greater dissatisfaction?

Further, are the particular services identified in this plan relevant to community residents?[8] Conspicuously absent, for example, is the vesting of community control over the police.[9] The purpose of the plan as presented is to devise a set of working principles and identify substantial city services which will comprise a package at once politically feasible but also capable of extension. An attempt is made to strike a balance: ceding enough power to create interest in an area and to generate support for a Neighborhood

8 A variety of factors led to only passing consideration of some important city services in the context of this plan. The outlines of school and hospital decentralization were already determined by legislation enacted in Albany in 1969; fire services were deemed too technical and too sensitive to spill over effects to be usefully decentralized; police unions and their civilian constituencies were thought to be too powerful and too resistant to the idea of community control to permit much delegation of power to neighborhood governments. But see note 9 *infra*.

9 See, in contrast, Waskow, *Community Control of the Police*, 7 TRANSACTION 4 (Dec. 1969) and Comment, *Neighborhood Police Districts: A Constitutional Analysis*, 57 CALIF. L. REV. 907 (1969). The National Committee To Combat Fascism, associated with the Black Panthers, has advanced a detailed scheme of charter revision which would create three neighborhood departments in Berkeley.

One of the authors of this article subsequently developed a plan for decentralization of some police functions in New York and explained there why "allocational decentralization" is not the most appropriate technique for police decentralization. See Danzig, *A Complimentary, Decentralized System of Criminal Justice* in THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK STUDY (forthcoming, 1971) [hereinafter cited as BAR ASSOCIATION STUDY]. *See also*, Skoller & Hetter, *Governmental Restructuring and Criminal Administration: The Challenge of Consolidation*, 58 GEO. L. REV. 719 (1970) which considers the administrative problems.

Council while not devolving so much power that the plan becomes politically unpalatable. It is to be a base that can be built upon. Is this balance achieved? Will the process of change occur?

4. *Problems of Legitimacy.* — For the decentralization plan to work, it is necessary for Neighborhood Councils both to have legitimacy (to resolve inevitable conflicts) and to operate efficiently. Thus, in this proposal, the decision has been made to favor a small council over a large one, and to employ a system of electoral representation rather than a system of "functional" or "categorical" representation. At issue is a complicated question of how individuals feel that they "are represented" in the council of government and why they regard decisions by governmental units as authoritative and worthy of allegiance. The traditional electoral model presupposes a pressure group system which produces compromises in the form of coalition candidates. In a system of "functional" or "categorical" representation, a political area is divided according to groups operative in that area and representatives are selected from those groups, *e.g.*, church, veterans, social, welfare, or business organizations.[10] The argument for "functional" or "categorical" representation rests on the assumption that individuals in New York's community districts would identify more closely with some group of which they were a part, like the church or a businessman's organization, than they would with a representative elected at large. Therefore, in order both to insure that citizens feel a greater sense of participation and to dampen group conflict by giving significant groups representation on a council, "functional" representation is advanced as a means of insuring that Neighborhood Councils could resolve conflict.[11]

Nonetheless, other considerations argue for the simple electoral model (with appointive additions). First, a scheme of functional representation will necessarily entail large councils, and large councils could not operate very efficiently. Second, dividing the political map of an area into sociological categories will prove to be very difficult. When is a "group" big enough or important enough to

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10 *See generally,* Hanson, *supra* note 5, at 877-79.

11 *See, e.g.,* the system for electing representatives from neighborhood clubs to the governing board of the East Central Columbus Organization (ECCO) as described in KOTLER, *supra* note 1, at 47.

warrant a seat on the council? Even within categories, how are representatives to be chosen, *e.g.*, can any religious organization with more than x members send one representative or will all organizations of that religion join to select a representative? Further, there are constitutional issues regarding dilution of individuals' votes.[12]

Whether the representative design presented is adequate in terms of the goals of the plan is another major area open to debate.

5. *The Bureaucracy and the Unions.* — Two major forces which often restrain the Mayor from initiating reform are the bureaucratic structures of the city and the municipal unions. In a fragmented city like New York, the Mayor may often have difficulty in mustering support when he has to do battle with one of these political forces.[13] The creation of Neighborhood Councils in all communities of the city may create a set of countervailing pressure groups which could aid the Mayor. The Neighborhood Councils would represent a wide spectrum of opinion — left and right, rich and poor, Catholic, Jew and Protestant, black and white. If united, thus crossing some traditional lines of cleavage, these councils might have a potent effect in combination with the Mayor in achieving reforms that the bureaucratic structures and unions resist. Yet once again, this general process, while a possibility, was not examined with any precision or in any depth during the formulation of this proposal. To an extent, the limited number of actual operational decisions ceded to the Neighborhood Councils in the plan reflects recognition of the efficiency and lack of corruption that a competent civil service may insure. But limiting the operational decisions has also been done in deference to the power of the bureaucracy and the municipal unions. Other mixes between operational and allocational decisions can be considered. Further, it is again possible, though by no means certain, that the momentum created as a decentralization plan began to be implemented could result in more operational decisions being

12 *Cf.* Avery v. Midland County, 390 U.S. 474 (1968); Hadley v. Junior College District, 397 U.S. 50 (1970) (one man, one vote held applicable to special function units of local government).

13 These and several other constraints which inhibit effective public administration and might deter decentralization are noted in Ginsburg, *Management in the Urban Crisis*, 1 URBAN LAWYER 235 (1969).

shifted to the Neighborhood Councils, if that were thought desirable by coalitions of councils. Any consideration of the relations between Neighborhood Councils and city unions must of course be made against the backdrop of the 1968 school strikes. The tensions between the teachers' union and the Ocean Hill-Brownsville demonstration district should not be viewed as a complete barrier, preventing all efforts at decentralization, but rather as a warning signal to the vital concerns of job preservation and professional control and to the political power of city-wide unions. We believe this plan assuages those concerns. Moreover, it gives rise to a potential source of countervailing power, in contrast to the school decentralization experiment, which was tried in only three districts with limited political power.[14] Whether we have succeeded in avoiding the mistakes of our predecessors is obviously arguable.

6. *Decentralization and Community Development.* — In the past decade, there have been five basic strategies of governmental intervention to attack poverty and racism and to secure minimum standards of citizenship for the disadvantaged.[15] These are: (1) maintaining income levels through transfers of cash or food; (2) insuring employment through training, job creation and other manpower policies; (3) improving and delivering key services such as education, legal aid, medical care; (4) rehabilitating the physical environment of the impoverished area through, for example, new or refurbished housing; and (5) creating political consciousness and aiding political organization as a means of augmenting the political power of the urban poor. In the past few years, attempts have been made to implement a sixth strategy, economic development, involving the transference of productive resources to impoverished communities.

Despite these diverse strategies, it has become a commonplace

14 See M. BERUBE & M. GITTELL, CONFRONTATION AT OCEAN HILL-BROWNSVILLE (1969); M. MAYER, THE TEACHER'S STRIKE, NEW YORK 1968 (1969).

15 The variety and breadth of these programs are evidenced by some of their titles: Job Corps, 42 U.S.C. §§ 2711-29 (Supp. V, 1970); VISTA, 42 U.S.C. §§ 291-94(d) (Supp. V, 1970); Comprehensive Health Services Program, 42 U.S.C. § 2809 (Supp. V, 1970); Legal Services, 42 U.S.C. § 2809 (Supp. V, 1970); Neighborhood Centers, 42 U.S.C. § 2811 (Supp. V, 1970); Aid to Families with Dependent Children, 42 U.S.C. § 601 (Supp. V, 1970); Day Care Projects, 42 U.S.C. §§ 2931-33 (Supp. V, 1970); Housing Development, 42 U.S.C. § 2797 (Supp. V, 1970); and Project Headstart, 42 U.S.C. § 2809 (Supp. V, 1970). One of the best examinations of much of the entire EOA can be found in S. LEVITAN, GREAT SOCIETY'S POOR LAWS (1969).

observation that all the ills of "underdeveloped" communities are interrelated. Underlying this observation has been an assumption that impoverished communities are, in some sense, self-contained social systems and sub-systems of larger urban and national structures. Thus, some theorists have become less concerned with improving a particular employment program or altering specific educational policies and have begun to think in terms of total community development. On the assumption that no single strategy will suffice and that all strategies are intimately related, community development is viewed as a means of joining the various strategies systematically at the local level.

From this perspective decentralization is just one form of community development. A second form of community development is the current model cities program, which attempts to unify various strategies launched by local, state and federal authorities in a coordinated and concentrated effort to improve a particular geographical area of great "need."[16] Third, community development corporations, whether privately or publicly financed, are advanced as means of establishing institutional arrangements to yoke the various strategies in a relatively systematic fashion.[17]

When decentralization is viewed in this context, a host of questions are raised. At the most difficult theoretical level is the problem of defining what a social system is and determining in what sense an "impoverished community" is a subsystem. What are the conditions of that area? How do they interrelate to create "underdeveloped conditions"? How do forces from the larger urban and national social systems impinge on the area to perpetuate such conditions? What processes of change are envisioned to alter key conditions which will affect the other conditions? Apart from these questions, there still remains the question of choosing between decentralization, model cities, community development corporations, some other form, or some appropriate combination of these

16 42 U.S.C. §§ 3301-13 (Supp. V, 1970); see Hetzel & Pensky, *The Model Cities Program*, 22 VAND. L. REV. 727 (1969).

17 See Miller, *Community Capitalism and the Community Self Determination Act*, 6 HARV. J. LEGIS. 413 (1969); Note, *Community Development Corporations: A New Approach to the Poverty Problem*, 82 HARV. L. REV. 644 (1969); for an excellent comparison of CAP, model cities, and special Impact programs, see Note, *Community Development Corporations*, 83 HARV. L. REV. 1558, 1594-1607.

"community development" approaches. For example, under the proposed plan, service delivery and the exercise of political power through formal organizations are emphasized; income, employment and economic development strategies are either de-emphasized or ignored. Will these priorities result in the necessary set of processes to effect the desired community development corporation emphasis on transferring capital and managerial skills to the designated area while still trying to attain some measure of political participation by giving area residents a large role in guiding the affairs of the corporation? The vast range of questions suggested in this subsection are probably the most difficult and at the same time the most important ones lying behind proposals like the decentralization plan. Yet the level of thought on these issues is dismayingly low.

With these difficult general problems in mind, we turn to the proposal. We have preceded the details of the plan with a sample statement a mayor might make outlining the ends he seeks to achieve in adopting such a plan.

I. The Plan: A Mayor's Hypothetical Policy Statement

A. *Purpose*

"One basic proposition informs this proposal: citizens living in the contemporary metropolis can be better served by redistributing power to smaller governmental units, units which take root and gain sustenance in the neighborhoods of New York.

"Since 1898, when the five boroughs of modern New York were first knit together in one political unit, the trend on both local and national levels has been towards centralized government. As the government's role in social and economic affairs expanded, so decisions and power became concentrated at the center.

"Now in New York City an historic turning point has been reached. City government, while retaining a concerned, responsive posture, attempts to share authority with newly created, official neighborhood units. The proposed plan is not an attempt to recapture the past, to sever historic ties, raze existing structures and return New York to a fragmented city of autonomous enclaves. Rather, it is an attempt to take advantage of benefits yielded by

past developments — from increased efficiencies in basic services to creation of the world's greatest metropolis — while at the same time moving forward to meet new needs that changing conditions and patterns of past governance have created.

B. *The Citizen's Perspective*

"The citizens of New York City, whatever their color or income level, are united by two broad desires.

"First, individuals want government to provide services and programs that enhance life at it is lived on a daily basis and that also increase life opportunities and freedom of choice for themselves and their children.

"Second, the people of New York want to conquer the staggering size and anonymity of the metropolis through the creation and enjoyment of community life. They want to live in neighborhoods that have character and cohesiveness, that will provide a setting for individual development and that will have the collective will and energy to prevent a downward spiral of deterioration.

"In attempting to realize these desires, individuals are daily confronted with a surpassing problem. They live in a city that is the richest, the most highly specialized, and the most heterogeneous in history. But they have little control over basic decisions that have impact on their lives and on their communities.

"With high specialization has come a bewildering complexity, with vast, highly-structured bureaucracies and the need for constant recourse to appropriate authority before action may be undertaken. With great wealth has come the desire to concentrate resources as the most efficient means of spending or securing greater wealth. With New York's exhilarating yet bewildering complexity has come a welter of conflicting interests and the clamor of diversity. The result of these processes is that fundamental decisions are made at a great remove from the citizen who lives in New York's neighborhoods.

"Every four years the citizen of New York elects a mayor and a councilman to represent him. Yet for many individuals the only contact they have with these officials is the isolated act of pulling a voting machine lever. Government then ceases to be an agency for effecting his immediate desires. The attenuation of the con-

nection between government and its citizens is perhaps best exemplified by the confusing variation in the boundaries of the service areas with which the citizen must deal. The resident often believes he lives in a particular neighborhood — Canarsie, Bay Ridge, East Harlem, South Bronx, Flatbush, Flushing, the Lower East Side. But the school, police, fire, planning and sanitation districts that serve him are all different. He cannot go to one central body, set in that area with which he identifies, for solutions to his daily problems, those problems which make life in the metropolis so perplexing.

"The fiscal crisis which now plagues New York makes it certain that there will be incessant complaints from individuals. As city services fall short of what the citizen expects — and has every right to expect — that citizen grows impatient and bewildered. When the government, the body to which he turns, is a distant, huge, and apparently immovable object, his bewilderment too often leads to a sense of powerlessness. This in turn spawns cynicism, apathy, disgust, or despair.

"One solution to this pervasive problem, which is at the heart of the proposed plan, is to shorten the distance between the governed and the governor. When the attenuated lines of authority and responsiveness are strengthened, the residents of New York will begin to realize in a contemporary setting the ideal of citizenship that was held by Americans two hundred years ago, who could in that epoch approach meaningful "town government" and approxmate the Jeffersonian ideal of the "ward republic." At the center of this ideal are two concepts: responsibility and community — the feeling of responsibility held by community resident for the direction of his neighborhood.

"A second, but by no means solitary, solution to the problem is a vast increase in resources allocated to city services and programs. Yet this eventuality would not by itself solve the difficulties described, even if it could come to pass in the foreseeable future. By shortening the distance between citizen and official, the proposed plan will immediately place resources in new hands, thus creating a sense of self-determination in neighborhoods and, from the community's point of view, thus increasing the efficiency of resources used.

"Thus, this proposal offers citizens an opportunity to protect and develop a special local character of their communities in a time of flux. For the politically aware but frustrated individual it creates a council capable of drafting, then implementing, a response to problems that concern him and his neighbors. To the politically uninformed or apathetic, it presents a governmental decision-making process more responsive, more visible and more comprehensible than anything that now exists.

"From the citizen's perspective, therefore, this plan stands as an invitation to participate in government. It will succeeed to the extent that it destroys the sense of impotence and unimportance which afflicts those who devote less than a lifetime in politics and to the extent it allows community residents to approximate more closely the desired mix and quality of services in their area.

C. *The City Government's Perspective*

"During the past decade, government at all levels has responded to a diverse political movement — the movement for local control. Nationally, the federal government has accorded this force recognition through such diverse programs as community action, model cities, and revenue sharing. In New York City, Local Task Forces and Neighborhood City Halls are a striking recognition that the claim from the neighborhoods for a more active role in city government is legitimate.[18]

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18 Neighborhood city halls were conceived to fulfill a perceived gap in the political process caused by the disappearance of the ward politician. Following the successful use of storefront headquarters in his 1965 campaign, Mayor Lindsay proposed that the Neighborhood City Hall operate as a liaison between residents and city officials, directing the former to sources of assistance and informing the latter about grievances and local difficulties. Precisely because of the political connotations of such a system, the city council and Board of Estimate have consistently refused to allocate city money to operate Neighborhood City Halls. The Mayor has secured enough private funding to operate six Neighborhood City Halls staffed by up to a half dozen workers each. The city-wide impact of so small a number of offices is minimal, though as a model of one facet of local government they are suggestive.

The Mayor's Urban Action Task Force, created in the Spring of 1967, is rather more prominent. Designed originally to inform the Mayor about local discontents which might foster riots so that he could act on them before violence erupted, it has expanded beyond ghetto neighborhoods and now operates in more than two-thirds of the city's 62 community planning districts. If the Neighborhood City Hall performs the role of an ombudsman or ward politician, the local task force functions as a town meeting. A high level city official (usually a commissioner or an

"New York administrators are faced constantly with a disbelief in their good intentions which arises from the cynicism of those without power. This plan opens the path to a more creative partnership between officials and citizens, a covenant in which a sharing of power leads to a sharing of responsibility and concern.

"Because the till is not full in New York City, difficult choices must be made continually about allocation of scarce resources. Some fundamental allocation questions must remain with the central administration. Yet under the proposed plan more and more decisions will be made by those who must live with them. By sharing power — and responsibility — city government hopes at once to unite people in understanding problems shared by all New Yorkers and to allow them to cope with those problems according to their own preferences rather than having solutions imposed from above.

"From the perspective of the central government, the proposal is not an abdication of governmental responsibility. Many important functions of government will remain where they belong — at the center. Rather, the plan attempts to give local residents discretion over questions of significance, to let them set priorities where possible rather than have those priorities set by someone who does not live in the neighborhood and who is not directly responsible to neighborhood residents.

D. *Policy Goals Summarized*

"Through this plan the New York City administration seeks to meet the:

1. *Political needs* of community residents by (a) offering citizens the vehicle for preserving and stimulating the character and cohesiveness of their communities and (b) encouraging citizens to control a local unit of government that can give expression to the requests and priorities voiced directly to it.

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assistant commissioner) is given responsibility for a neighborhood in which he is not resident. Assisted by a resident paid "community secretary," he calls periodic meetings to discuss community issues and priorities, inviting all residents and particularly identifiable leaders to attend.

The relation of the task forces to our plan is described in the text accompanying notes 28 and 37 *infra*.

2. *Service needs* of city residents by (a) giving them the means to improve services and programs that affect both their daily lives and life opportunities and (b) reinvigorating the agencies serving New York's citizens by making them more responsive.

3. *Social-Psychological needs* of city residents by (a) reducing the distance between government and individual citizen, (b) making the decision-making process more responsive, more visible and more comprehensible, and (c) providing more meaningful opportunities for participation in government.

4. *Administrative needs* of the city administration by creating legitimate units of government to which powers can effectively be devolved.

E. *The Future*

"No one should believe that this alteration in city government can provide a solution to all of New York's problems. The fundamental difficulty lying behind these problems — an absence of revenue necessary to attack obvious concerns — remains. Further, the powers ceded to a Neighborhood Council are not comprehensive.

"Nonetheless, given existing revenues and the limited past experience of neighborhood control, this plan offers an innovation which is a logical development from what has gone before, a major improvement in the creation of a city adapted to the needs and desires of its citizens.

"If successful, the city administration can build from this plan in two directions.

"First, other powers and areas of control not considered in this plan can be examined and devolved to the neighborhoods where possible.

"Second, in the event that the proposed federal revenue sharing plan is passed, this administration may pledge that a fixed percentage of its share of federal money will be made directly available to Neighborhood Councils for expenditures within areas of general public concern.

"With this proposed alteration in the pattern of city government, New York embarks on an experiment of great moment. It

is the first city in the United States to attempt such a redistribution of power. The success or failure of this innovation may determine the patterns of government in the nation's metropolitan areas for decades to come."

II. The Neighborhood Council — Powers and Limitations

The Neighborhood Council is both the symbol and instrument of the proposed plan's basic policies. Sixty-two councils may ultimately be created in the city's community planning districts, which serve 130,000 citizens on the average.

The Neighborhood Councils will be the official local units of city government set in the neighborhoods of New York. They are a first phased step in the process of sharing power between New York's central administration and the neighborhoods themselves.

Consequently this article now turns to a discussion of the Neighborhood Council's power, its limitations and its structure, before describing the two other major innovations — the Department of Community Affairs and the Appeals Board — which comprise the basic structural elements of the proposed plan.

A. *The Power to Determine Priorities in Resource Allocations Among City Services*

The lack of resources for basic services which plagues every large urban area especially bedevils New York. All departments of city government need more money to perform at the levels desired by city residents. The proposed plan cannot obscure this reality — in fact, it makes it more visible. Nor can it shift the responsibility for scarcity back into neighborhoods unequipped to handle it. Control of an overburdened and unequally distributed tax base cannot beneficially be decentralized.

This plan suggests fundamental change in a less often discussed but equally important aspect of the governmental process. Within the constraints imposed by a scarcity of resources critical decisions about resource allocation are now being made by city administrators and civil service personnel. Often these choices are neither technical nor objective; instead, they may be simply arbitrary and unresponsive to the needs of the community being served. When

resources are limited should there be more street sweeping and less frequent garbage collection? More parks maintenance work or more parks recreational activity? Cleaner streets or cleaner parks? More parks or more libraries or more police?

The most fundamental power to be given to the Neighborhood Councils is the right to answer these questions of local preference. For the first time in a big city, the choice of priorities would not be made centrally but rather placed in the hands of residents affected by these decisions under the following procedures:

1. Subject to constraints to be described below, Neighborhood Councils will be asked each year to appropriate a block (paper) credit between the agencies responsible for police, parks, pre-school and adult education, day care, libraries, and sanitation, according to the mix of services desired.

Taking account of the cost differential between services a district might utilize this power to, for example, increase its sanitation services by instituting an additional collection and doubling sweeping, while decreasing district police resources by four percent and parks resources by ten percent. It might also choose between the types of recreational programs it desired by cutting a department of social services area allocation and increasing parks funding, or by doing the reverse, or by cutting both budgets, increasing police and sanitation service, and running volunteer recreation programs.[19]

As a logical extension of this power to determine priorities:

2. Once having made its interdepartmental decisions the Neighborhood Council is also empowered to make intradepartmental allocations between community-based operations now decided by the sanitation, library, highways, and parks agencies.

In sanitation, the council shall determine the commitment of resources for:

(a) Refuse collection,
(b) Collection of detachable containers,

19 Sample permutations of the allocational power and illustrations of possible uses of other powers outlined in this document are described in the case histories presented in Appendix A.

(c) Bulk collection,
(d) Power sweeping of city streets,
(e) Manual cleaning of city streets,
(f) Flushing (watering down) of city streets.

In libraries, the council shall determine the disposition of district resources as between professional and non-professional help and between different types of programs (mobile library, library sponsored meetings or talks, etc.)

In parks, the council shall determine the disposition of resources between:

(a) Year-round maintenance activity,
(b) Summer maintenance,
(c) Summer recreation,
(d) Year-round recreation.

In highways, the council shall determine the disposition of resources between:

(a) Filling potholes with cold asphalt as a temporary repair,
(b) Repairing potholes more permanently with hot asphalt,
(c) Repairing streets which are paved with stone materials,
(d) Paving lots for playgrounds.

Neighborhood selection of the intradepartmental and interdepartmental allocational powers will offer real opportunities for neighborhood residents to shape city decisions at the neighborhood level. It should also be recognized, however, that major metropolitan decisions associated with the budget process will affect the neighborhood's range of choices. The Neighborhood Councils should be given a regular, publically acknowledged and discussed, opportunity to influence that process. This plan, therefore, proposes that:

3 (a). When the Mayor, operating through the Bureau of the Budget, has assessed revenues and demands on revenues for the coming fiscal year, and is considering the distribution of budget cuts or increments[20] between different city agencies, he shall advise the Neighborhood Councils of the magnitude of reductions or increments

20 *I.e.,* as compared with the previous year.

expected and invite their recommendations as to which city activities they would like to see emphasized or de-emphasized.

The Bureau of the Budget shall study these opinions prior to its decision and — whether or not accepted — shall order them reprinted as an appendix to the Mayor's executive budget message.

This procedure will be followed in drawing the capital as well as the operating budget.

Further:

(b) When the Bureau of the Budget has outlined tentative block allocations to the agencies, and the agencies respond by presenting detailed PPBS and line budgets, the agencies shall also submit their proposed budgets to Neighborhood Councils inviting comment both to BOB and to the agencies themselves.

In this way, councils may affect the attention given new training, operation and equipment programs and may have a voice in the process by which metropolitan activities which remain outside the council's ambit are determined.[21]

Later in their evolution, Neighborhood Councils may collect data leading to the compilation of a geographic budget illustrating the scope and impact of city service in their areas. This effort would be of substantial value to those concerned with planning for the city's future.

Taken together, these three powers relating to the allocation of resources are designed to illuminate the relationship between

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21 A method of resolving problems relating to the division of funds between each of the sixty-two neighborhoods and between the neighborhoods generally and central metropolitan services is suggested in Section IV (B)(2).

The problem of unanticipated accruals or shortfalls of funds allocated to a particular activity in a given fiscal year requires further consideration. One suggested method of handling such unexpected surpluses or expenses would be as follows. If unanticipated operating surpluses were derived from centralized metropolitan agency activities, they would be divided between Neighborhood Councils and centralized activities in the same proportions as the original departmental budget divided revenue. If surplus accrued through the operation of neighborhood services, they would be entirely placed at the disposal of the neighborhoods in which such surpluses accrued. Unanticipated deficits, whether accruing on the neighborhood or metropolitan sides of the budget, would be shouldered by a cutback in the services directly affected or compensated for by allocation from a central contingency fund directed by the Mayor through the Bureau of the Budget.

An alternative method might simply bank surpluses as a supplement to revenues in the next fiscal year, and handle all shortfalls through contingency funding.

demands on government and government spending, and thus to offer the citizen greater understanding of the relationship between the hard-earned dollars he provides and the services he receives.

The preparation of a local budget may, in addition, enhance the resident's sense of his community. An individual may assume that he lives in a neighborhood, but he now cannot help but be confused by the variety of service boundaries that encircle him. The school, police, fire, parks, sanitation, health, housing, and planning districts that serve him are all different. The preparation of a geographic budget requires a redrawing of district lines which will concentrate information and authority in a central body, set within a fixed area with which a person may identify.[22]

The allocation of code inspectors' time is also a priority decision which may in large part be delegated to Neighborhood Councils. Local residents may have strong feelings and the soundest intuitions about where inspector time can be most profitably invested. Therefore,

4. Neighborhood Councils shall be given the option of specifying the site and type of investigation performed by housing, sanitation, transportation, and consumer protection inspectors, for up to half of their working hours.

Concurrently, because of the city's wider interest in code enforcement, it will retain at least half of the inspectors' time under centralized direction. This council power is listed separately from the general allocational power because it is not an activity which may be reduced by transferring resources to another service. This difference is demarcated by designating council inspector resources in terms of man-hours rather than dollars.

5. In all its activities the Neighborhood Council is subject to constraints protecting minorities, residents of other areas and city employees.

In the context of allocational decisions these constraints assume four forms:

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22 The City Hall Plan announced that "The City would develop information about the service levels of City agencies. This information would enable the Community Board to monitor and evaluate city services and to recommend future priorities within the district."

(a) No Neighborhood Council is permitted to reduce any service beneath a minimum standard to be determined by a process described below. Minimum standards take account of the interests of both minorities within the council's constituency and those affected outside of the council's area. It will be noted that resource decisions for those services which raise particularly difficult questions of minority rights and externalities, such as fire, police, health and education have not been delegated to the Neighborhood Councils in this plan. Moreover, Neighborhood Councils are not given responsibility for the allocation of resources needed to maintain facilities widely used by citizens living outside the council area. Dollars needed to maintain large parks with more than 30% non-resident users are not, for example, included in the computation of the pool of resources available to a Neighborhood Council.

(b) Neighborhood allocation decisions do not affect the civil service by influencing the conduct of employees' day to day work, in the assignment of individuals, or in the selection of work methods. The delegation of the allocation power from the city's central administration to the councils removes no civil service controls and intrudes on none of the civil servant's established rights.

(c) The sum of the city's sixty-two Neighborhood Council allocation choices will not be permitted to result in a reduction of the city's civil service work force. Before any proposed district cut is initiated by the central budgeting authority, a mirror-image request (or requests) for an addition must be found among the other sixty-one districts. Thus, to satisfy district A's request for less than its allocation of sanitation men and for more park recreation supervisors, some district (or combination of districts) must request more sanitation men and fewer park workers.

Though the diversity of the city can be expected to generate many contrasting requests, this is an important constraint. When several districts ask for variations which are not matched on a city-wide basis by mirror image preferences, then each council will have only a percentage of its request filled.[23]

23 In the Sanitation Department, permissible intra-departmental shifts do not

(d) As should be clear, these allocational decisions relate solely to city administered services. Councils are not permitted to channel agency appropriations to private contractors.

B. *The Power to Make Operational Decisions in Some Areas*

Examination or areas of provision of municipal services illustrates the decision-making process:

1. The Parks Department central administration now hires seasonal (summer) personnel without civil service examination. These employees, serving as recreational instructors or maintenance men, may perform their work more effectively and take greater pride in it if they are local residents selected and dismissed according to criteria satisfactory to other local residents elected to the Neighborhood Councils. Community cooperation and pride in the work of park employees may increase if they are community employees. The power of hiring and firing and directing the use of these personnel should be delegated to the councils.

2. In many areas the Parks Department is understaffed and recognizes that it cannot maintain all district facilities even at a minimally desired level. In few, if any, districts can the department provide enough recreational supervisors to meet community demands. Under such conditions of scarcity, this plan proposes that the Parks Department be directed to offer the Neighborhood Councils an annual lease of the district's least supervised facilities. Councils may assume direction of these parks and playgrounds if they can mount a volunteer program or choose to use their allocation of seasonal personnel to make them once again operable.

3. A shortage of trained library professionals is forcing the adoption of a system which employs only clerical help in local branches or reading centers. Relying on regional libraries for professional assistance, the Neighborhood Councils should be empowered to make policy decisions on such local library matters as the hours reading centers will be open, their use of meeting

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require transfer of specialized personnel to or from a district. All sanitationmen are capable of all types of collection, sweeping, cleaning, and flushing operations. A Neighborhood Council allocation between these services does not, therefore, require a mirror-image request from another district.

rooms and other facilities, program emphasis (lectures, reading clubs, concerts, etc.), book selection (pre-school, adult, foreign language, large print, etc.), and hiring practices.

4. The power over inspectors' time which we have already outlined borders on a form of organizational control in consumer affairs, housing, health and transportation. A further power in consumer affairs should be established by directing that Neighborhood Councils assume responsibility for licensing sidewalk cafes and second-hand dealers (authority now exercised by the Department of Licensing). This development will serve as a testing ground to determine whether other licensing powers can properly be shifted to Neighborhood Councils.

5. In housing this plan encourages Neighborhood Councils to create district housing authorities which are empowered to assume housing planning functions now performed by Housing Development Administration and the Community Planning Boards.[24] On receiving the centrally calculated district allocation indicating projected housing needs and intended construction, a Neighborhood Housing Authority will be authorized to determine the site location, sponsorship, and design of new units. Following the directives of the Neighborhood Council it will, in other words, make such discretionary decisions as whether vest pocket housing or major projects are to be built in a given neighborhood, whether houses will be high rise or less imposing in stature, which architects will draw the plans, whether church or civic groups will sponsor the housing, and where new units will be placed within the community. The city-wide Housing Development Administration would continue to process loan application, to handle relations with the federal government, and to direct the contracting and building process.

6. The Neighborhood Council is also given power to authorize the use of a city-run centralized emergency housing repair crew when it certifies a local building as "dilapidated" and in emergency need of repair.

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24 All the advisory functions of the Community Planning Boards would be inherited by the Neighborhood Council under this proposal. The City Hall Plan calls for a similar merger.

7. The Neighborhood Councils will be given discretion to decide on which streets and playgrounds in their district asphalt resurfacing is to occur.[25]

8. The Neighborhood Council may endorse community groups as bona fide sponsors of day care centers by approving their site selection, program content, etc. The Neighborhood Council may authorize the expenditure of whatever district moneys it has allocated for the day care center program by these groups. The council may replace the Department of Social Services in specifying the criteria by which families shall be accepted or rejected by the centers in its area.

9. If a majority of a district's affected voters so indicate, a Neighborhood Council shall assume the powers and responsibilities for self-improvement now delegated to New York's low-income communities in the form of resident controlled community corporations. As the most authoritative representative of the people in its area, it is to be expected that the Neighborhood Council will be well placed to discharge these responsibilities.

10. The Neighborhood Councils, where citizens of the areas approve, will similarly assume the responsibility for the functions now performed by the local model cities committees. The present model cities areas and the present administrative structures at the local level will be subdivided to correspond to the Neighborhood Council boundaries.

11. Though the Neighborhood Council will have no operational control of so professionalized and so sensitive a city service as police work, the Neighborhood Councils may take the initiative in making recommendations for improvement of police services in the district. The precinct commander shall reply to such requests by writing to the council, explaining his position on the recommended action. The Neighborhood Council may work in association with a precinct commander to develop plans for relieving police of non-crime tasks.[26]

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25 The Highway Department's asphalt resurfacing (resurfacing streets with hot asphalt which is laid on top of the existing street surface) is funded out of the capital budget. Because capital funds may not be used for expense items under this plan, asphalt resurfacing has not been previously listed as an item subject to council intra-departmental allocational choice.

26 As described in Danzig, *supra* note 9.

C. *The Power to Affect the Planning and Complaint Process*

One of the Neighborhood Council's central functions is to reduce the distance between citizens and city government, to expedite the performance of services, and to quickly resolve questions of citizens' rights involving city agencies. In order to carry out this policy,

1. *The Local Task Force Is Denominated a Standing Committee of the Neighborhood Council.* — It is to be headed by the Mayor's appointee to the council, and is intended to perform the same valuable function of channeling local grievances about central services as it does now. As associated with the council, it would also assume the critical task of attempting to introduce the wider considerations that characterize the Mayor's perspective into the more narrowly cast discussions of the community.[27]

2. *The Neighborhood Council Shall Assume the Information Dispensing Functions of the Neighborhood City Halls.* — The council staff assigned to perform this function would provide advice and information for citizens who were uncertain about how to approach an agency with a problem or a demand.[28]

3. *The Neighborhood Council Shall Have Power to Conduct Hearings to Consider the Quality of City Service Within its Area.* — The council will have power to subpoena witnesses and documents toward this end. It will be bound by the same rules of procedure and evidence as currently constrain New York's Department of Consumer Affairs in its hearings.

4. *The Community Planning Board is Denominated a Standing Committee of the Neighborhood Council.*[29]—The Neighborhood Council hearing power will presumably be used to investigate the pattern of daily services delivered in the area by city agencies. However, another major process — the planning process in the area — must be affected by the council. The current planning board function will thus devolve to the Neighborhood Councils

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27 The City Hall Plan parallels our proposal in this respect.

28 See note 27 *supra*.

29 Alterations in the planning board's composition and method of selection are described in the text at notes 34-36. Under the City Hall Plan the Community Planning Board becomes the Neighborhood Council by alterations in its membership and activities.

which will have the power to advise the borough president on developments affecting the community and to hold hearings with departments planning major capital projects.

D. *Powers Affecting the Public Spirit*

At least since the Declaration of Independence, the pursuit of happiness has been recognized as a legitimate goal of man and his government. In this regard, the Neighborhood Councils will have the following powers:

1. *To Declare one Day Annually as a Neighborhood Holiday.* — It shall be the law of the city that residents of the neighborhood shall be excused from work without loss of pay, just as they would be on a national holiday.

2. *To Close Off Streets in the Area.* — This power shall be exercised for reasonable periods of time in order to hold bazaars, festivals, or other events dedicated to the enjoyment of community residents, so long as closing these streets does not seriously endanger the public health or welfare.

III. The Neighborhood Council — Area of Operation

The process of defining council boundaries could have been one of the most difficult hurdles in the implementation of a plan of this type. A host of factors must go into the determination of boundaries: size, natural and manmade topological features, ethnic composition of the area, and residents' sense of identification with an area, to name but a few. A variety of boundaries in New York City define different kinds of "communities" or "neighborhoods." The city recognizes separate, overlapping, and irregularly defined "community planning," health, school, sanitation, police, fire, and parks districts, housing and urban renewal areas, model cities areas, community corporation areas, areas served by the urban action task forces, assembly Districts, and councilmanic districts.

A number of factors have led us to choose the community planning districts as the base for the Neighborhood Councils. First, we are concerned to distinguish "communities," and for this purpose the guidelines for planning CPDS enunciated in the city charter amendments of 1961 seem particularly appropriate:

> Such districts shall coincide, so far as feasible, with the historic communities from which the City has developed and shall be suitable as districts to be used for the planning of community life within the City.[30]

Administrative convenience was not the guiding principle for ascertaining a planning board's boundaries, nor should it be for determining a Neighborhood Council's area of operation. In both cases attention should be given to the psychological character of a neighborhood and to the association residents have with it and with one another.[31]

Second, through a series of public hearings extending from 1961 to 1968, the city planning commission has evolved a map of New York that is shaped by this criterion.[32] Rather than repeat this lengthy and arduous process we propose to use board's work as a starting point.

Third, the average size of the planning districts so formed is approximately 130,000. The Neighborhood Council areas could not be much larger and still offer the promise of reducing the distance between government and the citizens it serves.

Fourth, one aim of this plan is to make many of the service and planning areas coterminous and thus to mold areas that are comprehensible and manageable as single entities. For several important services, the number of administrative subdistricts roughly corresponds to the number of planning districts (although the lines are not coterminous). The number of potential Neighborhood Councils (62) is, for example, not far from the number of sanitation districts (58), and parks districts (77), and police precincts (79). This rough correspondence suggests that the alteration of

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30 NEW YORK, NEW YORK, CHARTER § 83.

31 As is apparent from the "guideline," we and the Community Planning Boards have started from the premise that homogeneous districts are desirable. To us it seems that reducing the size of units for which decisions are made (*i.e.*, decentralization) would be advantageous primarily if the smaller units had a defined character different from the polity as a whole. If a district were as heterogeneous as the city, much of the rationale for allowing special district choices about resource allocation would disappear. For arguments in favor of heterogeneity, see BAR ASSOCIATION STUDY; Ylvisaker, *Some Criteria for Proper Areal Division of Governmental Powers*, in AREA AND POWER, *supra* note 4, at 27; and R. SENNATT, THE USES OF DISORDER (1970).

32 *See, e.g.*, NEW YORK CITY PLANNING COMMISSION, CRITERIA FOR DELINEATING COMMUNITY PLANNING DISTRICTS (1966).

parks, police and sanitation boundaries to fit the new Neighborhood Council lines would not create areas that were either too large to administer effectively or too small to administer efficiently. State legislation permits no more than 33 local school board districts in New York City. Arrangements might be evolved so that one school district corresponded to every two Neighborhood Council areas.

It should be emphasized that the current planning district lines are not unalterable. An appeal system described below permits modification after a year of operation.

IV. The Neighborhood Council — Structure and Procedures

The Neighborhood Council will be composed of seven voting members: one appointed by the Mayor, one appointed by the borough president, one representing the councilman of the area, and four elected directly by the citizens of the Neighborhood Council area. The council should be a small, streamlined, yet representative body offering the promise of both efficiency and responsiveness.[33]

1. *Composition.* — Following the effective precedent established by the urban action task forces, the Mayor's appointment should be a person of stature in his administration. This person offers a direct line of communication from the council to the Mayor himself. The Mayor's appointee need not live in the council area.

In keeping with the responsibility of the borough president for the area served by the Neighborhood Council, he will appoint one member who lives in the council area.

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33 The City Hall Plan provides for a council of from 24 to 30 members. Seven members are to be selected by the Mayor, seven by the borough president and seven by relevant city council members. Three members are to be selected by community school board(s) "covering the district" and both model cities and community corporation boards operating in the area may choose up to three members each, the number of members being determined by the portion of the district's population the boards represent.

We have chosen a smaller council on the theory that by so doing (1) we improve the chances of the body's securing significant powers, because it is less likely than a larger body to be unwieldy or to degenerate into a debating society; (2) we make being a council member more important than if he were one among many; (3) we make each member's responsibility for the successes or failings of the council more apparent; (4) we force collaboration between members, rather than block voting.

Ideally, the Neighborhood Council area will be included within the district of a single city councilor. If so, the councilman may take a seat on the Neighborhood Council himself or send a voting representative. Any voting representative must live within the Neighborhood Council area. Sometimes, however, the Neighborhood Council area will be cut by two or three city councilmanic districts. In such instances the councilmen serving the Neighborhood Council area will share the city councilmanic vote on the Neighborhood Council according to the proportion of the population they represent. For example, if city councilman A serves 75% of the residents of the Neighborhood Council area and councilman B serves 25%, then councilman A or his representative earns a three-quarter vote on the Neighborhood Council and councilman B or his representative a quarter-vote.

The selection of directly elected members is discussed below.

In addition to its voting members, each council will have the following non-voting institutional representatives associated with it:

(a) A delegate from each school board whose district overlaps the Neighborhood Council district;

(b) A delegate from each community corporation operating in the council District, whose functions the council has not been authorized to assume;

(c) A delegate from the model cities committee operating in the area, if the functions of that committee have not been delegated to the council.

These delegates will work to coordinate the activities of the Neighborhood Council and the bodies they represent, and to express the Neighborhood Council's desires in the course of school board, community corporation, and model cities discussion prior to their decision-making.

2. *Creation of a Neighborhood Council.* — On the ballot choosing the representatives for their first Neighborhood Council, voters in each council district will be asked to indicate whether they want a council in their area. Should a majority of those casting ballots vote "no" on this Line 1 question, the operation of government in the area would continue as it presently exists.

Should they vote "yes," the plan described in this article would come into operation.[34] A negative decision may be challenged nine months or more after an election by the presentation of a petition signed by one thousand voters requesting a new election. A majority vote would determine any new elections. In such initial elections, all otherwise qualified residents, whether voting "yes" or "no" on the question of forming a council (Line 1), will be entitled to vote for representatives as listed further down on the ballot.

3. *The Selection Process.* — The four representatives to the council elected by direct popular vote will be selected by a system of cumulative voting. Each citizen of the Neighborhood Council area who votes shall have four voting units. These units may be cast together as a block for one individual, separately for four individuals, or in any combination for a number of individuals. This system should increase the chances for a strongly committed minority to return one member to the council.

All those eighteen years of age or older, who have resided in the Neighborhood Council area for more than thirty days, will be eligible to vote in council elections. Burden of proof regarding these requirements rests with the voter if he is not registered on already existing city voting lists.[35] Members of the council elected by this

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34 It is expected that some areas of the city which consider themselves particularly cohesive and less well governed by the metropolitan executive will opt for this program, while others which do not have a sense of community or are satisfied for the status quo will vote "No" on line 1. Thus a system of checkerboard decentralization will be created.

35 The City Hall Plan does not now provide for direct election by residents of the council area and we view this omission as a major failing. Low voter participation (almost always less than ten percent, often around two percent) in community corporation and model cities elections is undeniably discouraging, but a decentralization scheme which does not open the opportunity of direct electoral participation seems to us worse than useless. We fear that the Mayor's council will appear more like a cabinet representing officials in a community, than like a council representing residents in their dealings with officials. With the power of selection go at least the appearance and very probably the substance of control. We believe that power should be vested primarily in the community.

We expect a higher voter turnout in elections for a council with significant power to affect the kind and distribution of city resources within a district than has been produced in elections for boards with only advisory or planning powers or which can allocate funds only for training programs, pilot projects, or cultural activities. The turn-out will be lower than one would expect for a New England town bond referendum, but we take such partial participation to be a lesser evil than entailed by the Mayor's plan or the present situation.

process must be eighteen years of age and have lived in the council area for more than six months. To stand for election, a resident meeting these requirements must obtain three hundred voters' signatures on a nominating petition to be submitted to the Board of Elections three weeks before the balloting is scheduled.

4. *Recall.* — In order to give the community an opportunity to express severe dissatisfaction with the functioning of the Neighborhood Council a recall provision should be written into the legislation enacting this plan. If more than fifty percent of the total number voting in the previous direct Neighborhood Council election sign a petition, the elected representatives of the Neighborhood Council can be recalled and a new election for a new two-year term held. Upon recall, the appointed representatives of the Mayor, the borough president, or the councilmen, must submit their resignations to the official appointing them. They are, however, eligible for reappointment.

During the early stages of the Neighborhood Council system, when citizens are not familiar with its workings, it may be possible for a small percentage of the total population of the council district to take over a council and then proceed to take actions in conflict with the wishes of a large proportion of citizens in the area. The recall provision provides a stiff test for those who believe that the existing council is not representative and should be overthrown; yet it does give them the chance to require a new election, particularly where the first turn-out was small.

5. *Referenda.* — A majority of the Neighborhood Council may choose to have an issue ordinarily decided by the council resolved by a neighborhood-wide referendum. Voters in a council district may force a referendum by presenting a petition bearing 5,000 signatures requesting such a referendum. Referenda are to be decided by majority vote.

6. *Operating Procedures.* — All regular meetings of the Neighborhood Council will be open to the public. The chairman of the council, so elected by majority vote of the council, will call meetings at his own discretion, or at the behest of a council quorum (four voting members). The council will meet at least once a month. A minimum of one open meeting with members of the community must be held every six months, during which ques-

tions about the activities of the Neighborhood Council may be raised by the audience.

The detailed work of the Neighborhood Council will be carried out in subcommittees and by a permanent staff, headed by a Neighborhood Executive, chosen with the approval of a two-thirds vote of the council. The Neighborhood Council will appoint at least three standing committees. First, there will be a standing committee designated the Urban Task Force which will receive and consider day-to-day problems within the council area and refer them either to the council or to the Urban Action Task Force Center associated with city hall or to the Department of Community Affairs. This body will be broadly representative of the district and include delegates from important groups and areas. It will be chaired by a council member — where possible by the Mayor's appointee to the Neighborhood Council.

Second, there will be a standing committee modeled after the present planning boards. This committee will consider the long-range development of the Neighborhood Council area. It will have no more than twenty members: five appointed by the Mayor, five by the borough president, and ten by the Neighborhood Council.

Third, there will be a standing committee of poor residents in areas where such a body is relevant. Selected by the council, this group is particularly intended to serve as a central advisory and planning body for those Neighborhood Councils which have assumed the responsibilities for the community corporations.

V. The Department of Community Affairs

Besides the Neighborhood Councils, three new units of city government have been designed to carry out the policies of this plan. A new administration, the Department of Community Affairs, will serve as the arm of the Mayor in overseeing, effectuating, and coordinating the operations of Neighborhood Councils and their relations with city agencies. An Appeals Board is formed as a quasi-judicial regulatory unit intended to resolve disputes as a result of the delegation of powers to neighborhoods under this plan. An Ombudsman will perform a parallel function for central-

ized city services by hearing and resolving claims of violation of citizens' legal rights by city agencies.

A. *An Overview*

The Department of Community Affairs (DCA) is designed to perform the following functions:

1. It will symbolize the Mayor's intention to give new emphasis to community development and self-government by neighborhood residents;

2. It will have a central urban action task force division which will process complaints referred by the urban task force standing committees of the Neighborhood Councils;

3. A division of the DCA will gather information on the activities of Neighborhood Councils and prepare a periodic report on their achievements and failings; this division will further be charged with making recommendations for change in the operation of the system here outlined;

4. The DCA is charged with responsibility for auditing accounts of the Neighborhood Councils and their partner agencies to insure that allocational requests are being fulfilled and operating expenses are being properly appropriated;

5. The DCA is charged with the responsibility for manning election outreach campaigns and for reporting on electoral patterns, particularly those resulting from outreach activity, council actions, or the system of cumulative voting;

6. Through its office of model cities and community development the DCA will coordinate the administration of federal programs in the neighborhoods of New York City;

7. The department will provide the expert staff which will help both the Neighborhood Councils and the line departments adjust to the Neighborhood Service Choice System. Most important in this respect, it will aid in the formulation and undertake a review of:

(a) Formulae which will divide agency resources between centralized and delegate allocational decisions;

(b) Formulae which will determine how delegated service resources are allocated among neighborhoods;

(c) The minority rights standards which will be associated with each allocational or operational power the Neighborhood Councils may assume.

The DCA is empowered to revise these formulae or standards if it finds them inappropriate or inadequate.

B. *Functions*

The operation of the department may be described in greater detail as follows:

1. *Emphasizing Mayor's Interest.* — The Mayor will appoint an Administrator of the Department of Community Affairs who will assume a position in the Super-Cabinet. The DCA will draw together a number of city officials engaged in community development and community planning and open for them the greater opportunities that this plan implies.

2. *Urban Task Force.*[36] — The successful operation of the urban action task force system is recognized by the creation of a separate division of the Department of Community Affairs.

The Neighborhood Councils or individuals within the Council areas may have complaints about city agencies that should not be referred either to the Ombudsman or to the DC Board. These complaints, which would often be channeled up through the local action task forces serving as standing committees of the Neighborhood Councils, will be processed at a central complaint center run by this division. This division will attempt to utilize its position and the support of the Mayor to help citizens obtain services from city agencies.

3. *Information-Gathering and Report.* — The staff of this division will be responsible for keeping complete records on the activities of the various Neighborhood Councils. (The councils would also have a record keeping obligation.) This division should convey information from one council to the next as it might be deemed relevant and helpful. In a periodic report to the Mayor, the staff will evaluate the information it has gathered in light of the goals of this plan, and make recommendations for improving the system in operation.

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36 The City Hall Plan would lodge the powers of the Urban Task Force in the newly created "community boards."

4. *Auditing.* — The staff of the DCA in conjunction with the Bureau of the Budget will audit the accounts of the Neighborhood Councils and their partner agencies to be certain that resource expenditures matched the allocations requested by Neighborhood Councils. This auditing function might involve spot field checks as well as examination of records.

The auditing division will also be responsible for insuring that allocational formulae distributing resources between Neighborhood Council districts are applied fairly on the basis of accurate data. It will be this department's responsibility to see that as the characteristics of a community change, its share of the resources under a predetermined allocational formula change accordingly. This is obviously a sensitive and critical function. Neighborhood Councils will be empowered to present any information which they believe relevant to this judgment before the auditing decision.

5. *Election Outreach.* — All elections in the Neighborhood Council scheme will be conducted by the Board of Elections at the request of the Appeals Board. The Department of Community Affairs will have an outreach section to stimulate community awareness and support of the electoral process. It will direct a mailing to all voters of a brief autobiography and a campaign statement prepared by each candidate for council office. It may arrange district campaign meetings at which all candidates will be given an opportunity to speak. It may conduct voting drives, and provide instruction in the use of the cumulative voting method.

This unit will also have an evaluation section in order to assess the significance of election patterns in different council districts and elections.

6. *Office of Model Cities and Community Development.* — This unit of the DCA would assume responsibility for functions now carried out by the community development agency and the model cities committee in the anti-poverty area. This office would:

(a) Serve as staff to the council against poverty;

(b) Keep records of federal funds expended by the Neighborhood Councils and their delegate agencies;

(c) Evaluate those federal programs run by the councils and the agencies. Make recommendations to the council against poverty;

(d) Provide a pool of technical expertise to Neighborhood Councils for the effective administration and planning of federally funded programs;

(e) Distribute monies to Neighborhood Councils on a "fair share" basis. Approve contracts where necessary.

In the Model Cities area, this office would:

(a) Review activities of the city departments and administrations executing the model cities program and establish policy guidelines for the conduct of such activities within the model cities areas;

(b) Allocate available financial resources for the planning, development and operation of such a program and approve the final program as developed in each Neighborhood Council area;

(c) Administer the model cities budget, including city allocations and any resources made available by federal or state governments or private agencies;

(d) Advise the Mayor, the city council and the Board of Estimate on the progress of the program.

The policy embodied in this union of OEO and model cities activities is in keeping with the 1969 HUD-OEO agreement which stipulated that duplication of effort and staff commanded by city demonstration agencies and community action agencies should be reduced where possible.

The office will also have responsibility for effecting the transition between the current model cities local committees and community corporations and the Neighborhood Councils.

7. *Assessment of Allocation Formulae and Minority Rights Standards.*[37] — A plan which asks neighborhoods to distribute a limited pool of resources in the face of keenly felt needs is sure to elicit curiosity about why resources are so limited. Because the avenues for expansion of revenue are no greater under this plan than they have been in the past, we may expect councils to turn from fruitless demands for more money for the entire system to challenges of their limited allocation of the pie. When this cry is raised it is inconceivable that the distribution of departmental re-

37 This process, discussed in general terms here, is more specifically illustrated in Appendix B.

sources between neighborhoods can be made on an *ad hoc* basis as it now is. Some sophisticated and equitable formulae will have to be developed, justifying a rational distribution of service resources based on neighborhood need. The following process is suggested for the evolution of these formulae:

The legislation enacting this plan should specify the criteria for acceptable formulae. A commitment to basing allocation on need rather than per capita equity should, for example, be written into legislation. It is a policy decision too far-reaching in its implications to be left to unguided administrators.

Using this and similar legislative criteria as guidelines, each agency involved in this plan shall frame a distribution formula for each of its services. It is the critical responsibility of the Department of Community Affairs to review, and where desirable, to revise these formulae to maximize the equity and efficiency of the city's operations. As noted below, a DCA allocation formula could be challenged before the Appeals Board, and disallowed or itself revised if it were found "arbitrary or capricious." Subject only to this constraint, the DCA thus assumes one of the most critical roles in the neighborhood choice system.

In the same manner, and on the same basis, the DCA is given responsibility for reviewing, and where necessary revising, the minority rights standards which will constrain a Neighborhood Council in its allocational decisions. These are also subject to challenge before the Appeals Board as described below.

This division of the DCA is further charged with the obligation of overseeing the division of departmental resources between services that remain centrally directed and those where allocational or operational decisions are in the hands of the Neighborhood Council. The DCA will use its staff of experts to be certain that agencies will not "hide" resources that should be subject to neighborhood control.

This division shall also perform the mechanical function of sorting Neighborhood Council allocational preferences so as to mirror image preference match-ups as described above. Where such match-ups are discovered, it will work with the agencies concerned to facilitate the shifts of manpower and equipment that might be required between districts.

VI. The Appeals Board

A. *Role*

The Appeals Board is designed to stand outside both the structure of municipal departments responsible to the Mayor and the system of Neighborhood Councils responsible to their electorates. It will operate within the new governmental system as the authority of first resort by whom disputes will be resolved, injuries righted, and uncertainties and frictions, which will inevitably arise, reduced. The unprecedented nature of this plan has made it advisable that legislation be framed in terms maximizing operational flexibility. The board stands as umpire of the new system, not only adjudicating the actions of players, but also reviewing and elaborating the rules by which they shall be judged.

B. *Power To Compel Compliance*

Should any council disregard a board prohibition, the board may order the Department of Community Affairs, a relevant agency, or the Bureau of the Budget to suspend the allocation of funds supporting the council action. In such situations these funds will be re-allocated to centrally directed services performed in the area.

Should any council, agency, or individual disregard a board order or prohibition, the board may request a writ of mandamus or an injunction from the Appellate Division of the courts of New York State. The requested writ or injunction will be awarded if the board has not exceeded its authority in issuing the order or prohibition.

C. *Scope of Authority*

The board will be empowered to act in the following situations:

(a) It may reject allocation formulas designed by the agencies and the DCA if it finds them arbitrary and capricious. (These terms will be interpreted as having the same meanings as they are given in the courts of New York State).

(b) It may prohibit operational departures from these formulae.

(c) The board may review minimum standards established

by the DCA and modify them where it finds they are so low as to endanger the health or welfare of city residents (whether within or outside the neighborhood that might minimize services). Should the DCA fail to establish minimum standards, the board shall formulate standards which will remain in effect until the Mayor acts.

(d) The board will prohibit violations of minimum standards or Neighborhood Council decisions not providing equal protection to all residents or to those who work in the council district.

(e) The board will have the power to prohibit or regulate the conduct of Neighborhood Council hearings where these are shown to be malicious in intent or unnecessarily harrassing in form.

(f) The board is empowered to prohibit any Neighborhood Council action which exceeds the authority delegated under this plan.

These powers can be brought into play at the request of a citizen who is injured or will be injured should the board not act. On receiving a complaint from a citizen subject to injury, the board staff will investigate; if it finds the complaint to be possibly well founded, it will direct a hearing examiner to conduct public hearings. Hearings will be announced at least ten days before their first session. Parties directly affected by the question at issue will be given an opportunity to testify. In addition, the hearing examiner may solicit the testimony of any individual who he believes can be of assistance in the board's deliberations. Specific rules of evidence and procedure in the hearing will be promulgated by the Appeals Board. At the conclusion of these hearings the examiner will provide the board and the public with an opinion on the merits of the complaint along with a written record of the hearings.

On the basis of that record and a consideration of the examiner's opinion, the board may employ its powers as described above. In no case will board action or failure to act prohibit subsequent recourse to those remedies at law which exist apart from this plan.

In addition to assuming the preceding six quasi-judicial responsibilities, the Appeals Board is authorized to entertain requests

from city officials at the district superintendent level or higher, asking to modify Neighborhood Council operational plans that are unfeasible or that make inequitable or unusually burdensome demands on city employees. After hearings, but before it rules on these requests, the board will meet jointly with the Neighborhood Council in question to discuss possible modifications satisfactory to city officials. On the basis of this meeting, the hearing examiner's recommendation, and the hearing transcripts the Board may order a modification in the Neighborhood Council's plans or refuse the employee's request.

In considering these and any other requests, the board may offer its services as an arbiter for the disputants. If accepted by both parties as an arbiter, a hearing examiner may hand down a binding decision.

The board will also oversee the conduct of Neighborhood Council elections, recall votes, and referenda, considering charges of fraud or violation of regulations as a court of first resort. The board will process electoral complaints in the same manner as it handles charges of violation of minority rights, except that electoral inquiries (including the requisite public hearing) may be initiated by the board staff without receipt of a citizen complaint. A board examiner may be dispatched to the scene of elections prior to voting. Where it finds violations, the board will be empowered to declare as null and void Neighborhood Council elections and referenda, or portions thereof.

As a final responsibility, the Board is charged with approving or disapproving petitions for modification of the territory of a Neighborhood Council's operation. Principally, such petitions are expected to be of two sorts:

1. Two or more councils may petition the board to assume responsibility for facilities normally subject to council control but not delegated to any one council at the outset of this plan because they were of concern to more than one neighborhood district. Such facilities might include, for example, parks serving residents of two or more DPDs.

The board will review such petitions to see if they have been endorsed by a majority of each council significantly affected by the facility's use and that they embody a description of plans for the

operation of that facility or indicate staff arrangements by which such plans will be evolved. If the petitions are found suitable on both these counts, the board will grant responsibility for the facility to the councils concerned and instruct the DCA to increase their resource allocation accordingly.

The arrangement of joint control will automatically end with the expiration of the terms of the participating councils, but may be renewed by the DC Board if a majority of members of each of the succeeding councils request that joint control be continued.

2. One year after the initiation of this plan the board may receive requests for modification of boundaries, creation of additional districts, or combination of districts into larger entities. Such requests will be in the form of petitions from one hundred or more citizens within the area wishing to change its status.

On receipt of such a petition, the board will solicit the opinions of existing councils affected by the proposed change, and hold public hearings to determine if the proposed change is acceptable. In deciding whether or not to implement a request for boundary modification, the board will use the following criteria:

(a) District boundaries should not separate cohesive local neighborhoods;

(b) District boundaries must take account of topography and such permanent use of land as parks and expressways;

(c) Districts will not have unusual contours or isolated land pockets;

(d) No district may contain more than 300,000 residents;

(e) So that all districts will be large enough to assume the necessary responsibilities for this plan, it is strongly assumed that each district must have at least 75,000 residents.

Should the board find, on the basis of these hearings, that these criteria are met, a referendum will be authorized within the area subject to change in status. If more than 15% of the area's residents participate in such a referendum, its outcome will be decided by a majority vote. If, however, the proposed alteration in boundaries involves an addition to an existing CPD area, the council of that area must approve the addition by a two-thirds vote. If less than 15% of those eligible to vote in such a referendum fail to do

so, the proposed boundary alteration will be considered as having failed.

D. *Structure*

The board assuming these powers will be composed of six members and a chairman, appointed to staggered three-year terms by the city council on nomination by the Mayor. Members, who may hold other jobs subject to the approval of the Board of Ethics, will be paid $10,000 a year, except for the chairman, who will receive $35,000 per year.

The work of the board will be supported by an administrative staff and a group of hearing examiners. These will be civil service positions, filled at the discretion of the board.

VII. The Ombudsman

So far, we have seen that this plan enhances the position of the Urban Task Force as an avenue for securing action on citizen grievances about the conduct of city operations not affected by Neighborhood Council decision (*e.g.*, health and fire). It also creates a Neighborhood Council to permit citizen influence over essential services that affect a resident and his community. In addition, it forms an Appeals Board to protect the resident against arbitrariness in the operation of the Neighborhood Council system. As the fourth and final institutional innovation, we propose the creation of an Ombudsman empowered to order an agency to conform with his findings about a citizen's unambiguous legal rights.[38]

By the creation of this office we hope to avoid a distasteful irony: the creation of government more responsive in policy and in treating what might be called public grievances, but no less plodding or even intransigent in reacting to claims of "private right." The Ombudsman is charged with promptly considering and acting on such claims when the claimant has tried and failed to secure agency reaction.

Salaried at $35,000 per year, the Ombudsman will be associated

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38 On the role of an Ombudsman see generally, W. Gellhorn, Ombudsman and Others: Citizens' Protectors in Nine Countries (1966), and Comment, *An Ombudsman in New York?*, 27 Albany L. Rev. 84 (1963).

with the Department of Community Affairs merely for purposes of bookkeeping and assigning office space; otherwise, he will be independent of any city administration. Equipped with a staff capable of investigating and resolving claims submitted to his office, he will have the authority to resolve claims of legal right, but not of privilege or agency discretion. His existence will not be interpreted as a bar to any remedies that the citizen may secure in the courts.

APPENDIX A

A Hypothetical History of the First Two Years of A Neighborhood Council For District A

Though six candidates came forward with the one hundred signatures necessary to be placed on the Neighborhood Council ballot, the area's largest political club regards the Neighborhood Council plan as unwise and fields a Line 1 "No" vote large enough to reject the plan for the area.

During the following nine months, neighborhood residents, aware of boundary definitions and modifications in city services in districts around them continue to discuss the plan. While city services continue as usual, a neighborhood budget showing the amount and mix of services in the area is prepared and published by BOB and DCA. Ensuing discussion, often in forums provided by church and interest groups, stimulates both a sense of "neighborhood" and a feeling that the community should organize to secure at least a higher budget allocation from the city, if not to vary the mix of neighborhood services. The possibility is also discussed that block grants might be provided, but only to a Neighborhood Council.

A petition bearing the required five hundred signatures reopens the electoral process nine months after the first vote, and this time the Line 1 vote is affirmative, in part because the organized political clubs fear arousing hostility by active opposition, in part because they now feel they may return successful candidates to the Neighborhood Council. The organized parties do, in fact, return two candidates, but the system of voting also results in the election

of a church leader active in securing endorsement of the scheme, and of a representative of a 30% ethnic minority not assimilated in party politics.

In the lull before the new budgetary cycle begins, the council initiates hearings "on the range of city services within the neighborhood," commenting that it wants to bring glaring wrongs to public attention and to assess neighborhood grievances before altering the service mix. The series of hearings tends to be rather more like a neighborhood complaint forum than an "investigation" into the state of services. Sanitation is considered, for example, for twenty hours of hearings, during most of which residents complain of irregularities in the thrice weekly pick-up, excessive noise and spillage during collection, and unswept streets. The District Sanitation Superintendent, called last to answer these charges, argues that such failings are rare and presently unavoidable, but if he had more men they could be totally eliminated. He urges an increment of ten percent or 25 new men, at an estimated cost of a quarter of a million dollars. The police and parks administrators also answer complaints by pleading for more men, though the park maintenance district superintendent adds that a particularly complained-about facility can be cleaned if the council wishes to reduce manpower at other sites.

The council takes little action on these complaints before the budgetary cycle begins, and therefore engenders both criticism and cynicism in the community. It does assign manpower to the untended park (which lies in the portion of the district populated by the majority ethnic community), drawing from resources otherwise distributed throughout the neighborhood. This provokes complaints from the minority area. A minority group demonstration, charging that this may be the first in a series of inequities, protests at city hall and is referred to the Appeals Board. Before a board hearing examiner, a group representative demands redress of a violation of equal protection safeguards. The board finds no such violation, basing its opinion on the hearing examiner's finding that the council had shown that greater user benefit could reasonably be expected from improving maintenance in this than in any other park, and that resources to maintain the park were equitably drawn from throughout the area.

During its first months, the council also redirects the allocation of housing and sanitation inspectors' time to concentrate on particularly offensive areas; initiates steps to establish a subsidiary housing authority; and negotiates an arrangement with a university to undertake a neighborhood survey recording residents' priorities and checking census and housing authority figures — these last in the hope of securing independently collected data supporting a claim to greater budgetary allocations from the city. The council will pay $5,000 toward the cost of this survey, the university absorbing the rest of the cost.

On its first budget round, the council demands greater support from the city, but it appears to act more with an eye to the elections at the end of the year than with any hope of success. The resource pool assigned to the neighborhood is reallocated by the council to increase sanitation services by five percent, while decreasing the police allocation by two percent and reducing funding for full-time park recreational personnel (who will be hired by the Neighborhood Council). This allocation is in turn modified by the DCA, which allows only a lesser reduction in parks recreational personnel because city-wide requests would have reduced recreational personnel below the existing number.

The council pairs community corporation funds with the budget for hiring seasonal recreational personnel to form a major summer recreational program. Community corporation funds are further employed to hire supplementary non-professional library assistants to keep reading centers open on Saturdays and Sundays. Meeting facilities in these library centers are utilized in the summer recreational program. In an experiment, the district council orders assistants not to open libraries until noon while keeping them open three hours later. Overtime is paid accordingly.

Five thousand dollars is also drawn from community corporation funds to initiate the university study. Federal manpower funds are requested to have the university train unemployed neighborhood residents as survey interviewers.

The police precinct commander, when asked to decrease the number of patrolmen assigned to fixed posts, refuses, referring the matter to the police commissioner and officials of the Patrolmen's Benevolent Assocation. The commissioner supports the

precinct commander, and the council takes the dispute to the Appeals Board, alleging that added scooter patrol in the area would retain the basic manpower allocation and that the shift is therefore an appropriate matter for council jurisdiction. The council loses.

The subsidiary housing authority is notified of budgeted capital expenditures for new unit construction and is asked to choose sites, sponsors and design for this housing. The authority receives an operating budget to enable it to undertake these tasks. After its staff has surveyed possibilities, the neighborhood authority initiates hearings, inviting public consideration of the alternatives.

Simultaneously, tenant associations of existing housing projects begin allocating maintenance funds as they see fit, and a housing committee of the Neighborhood Council assumes the power of labeling local housing "dilapidated" and in need of emergency repair. Repairs will be performed by centralized city squads and billed to the landlords concerned. If the necessity of these repairs is successfully challenged in court, the Neighborhood Council would have to bear the costs.

A group of women in one of the tenant associations brings its proposal for a day-care center to the council, which has been given permission to give approval of physical sites. The council approves two potential sites, but the Department of Social Services rejects both as requiring too much renovation, and assigns a third site to the group. The council protests to the Appeals Board, which rules that the department may overrule the council's approvals but must give the group another chance to find an appropriate site.

As the Neighborhood Council assumed these responsibilities demands for greater resources grew. Shortly before Neighborhood Council terms expired, the two city councilmen who sat on the Neighborhood Council for District A introduced a bill "to extend federal revenue sharing to the neighborhoods." It delegated 20% of all city receipts under the federal plan to the Neighborhood Councils in the form of block grants. The councilmen anticipate that these grants will average about $100,000 per council in the first years of revenue sharing, and will rise to three-quarters of a million dollars per council by 1976.

On the eve of the Neighborhood Council's second election con-

test, it was apparent that the problems of the future revolved around use of this block grant, distribution of seasonal park employment, selection of housing sites, and allocation of services as between ethnic groups.

APPENDIX B

An Example of the Relations Between the Neighborhood Council And an Operating Agency: Sanitation

Operating responsibility for sanitation services will remain with the Sanitation Department under this plan; but the basic decision about the mixture of services will be made by the Neighborhood Council.

Under the proposed plan the following functions performed by the Sanitation Department will be subject to an annual allocation decision[39] by the Neighborhood Council:

1. Refuse Collection
2. Collection of Detachable Containers
3. Bulk Collection
4. Power Sweeping of City Streets
5. Manual Cleaning of City Streets
6. Flushing City Streets (watering them down).

The sum of financial resources which may be redistributed between these services will be determined as follows:

1. The Sanitation Department will inform the DCA of the proportion of its resources which it intends to devote to these services on a city-wide basis during the next fiscal year. (The remainder of its resources will be devoted to the centrally controlled services such as snow removal.) The DCA will approve this division or substitute some other, which will form the sum of the resources available to Neighborhood Councils throughout the city.

2. The Sanitation Department will recommend an allocational formula to the DCA. This might stipulate, for example, that a neighborhood would receive resources for collection in the same

39 Though made once a year, this allocation may take account of seasonal variations in service needs. A council may budget, for example, for more refuse collections in the coming summer than in the winter.

proportion that its garbage-ton miles per unit of population bore to the city-wide average of garbage-ton miles per unit of population. This or another formula would be reviewed by the DCA to see if it conformed as closely as possible to the criteria for formulae suggested in the legislation enacting this plan.

3. The approved allocation formula would be used by the Sanitation Department and auditing division of the DCA to determine the dollar credit to be placed at the disposal of the Neighborhood Council.

4. This dollar credit would be reduced by the cost of maintaining minimum standards of performance for the delegated services. Minimum standards would be established by the Sanitation Department and DCA according to the same procedure as allocational formulae were confirmed. The approved minimum standard might, for example, require one household refuse collection per week. It might have been derived from calculation of the fly breeding cycle and districts, the population density and fire and health hazard.

The remaining dollar credit could be distributed between sanitation services any way a council pleased. Studies of sample districts in the city show that residents in an area the size of a Neighborhood Council district could, if they so desired, divert 600% more resources into bulk collection and 300% more resources into street sweeping by reducing the number of household collections by 33%. A council might also choose to reduce the number of household collections while increasing police, park, or library services as discussed in the hypothetical history presented in Appendix A. To achieve this transfer of resources, the DCA would need to discover a mirror-image preference.

In reallocating the mix of sanitation services a district would not be troubled by the need to discover a mirror-image preference district. Its manpower used for household collection could easily be transferred to bulk collection or sweeping. Nor is it likely that equipment shortages would be a problem, as there is a surplus of equipment in most areas of sanitation work. Where equipment was a limiting factor, the Neighborhood Council staff and the DCA could explore the possibilities of double shifting with the district superintendent.

NOTES

THE MASSACHUSETTS "NO-FAULT" AUTOMOBILE INSURANCE LAW: AN ANALYSIS AND PROPOSED REVISION

Introduction

Recently Massachusetts became the first state to adopt a "no-fault" automobile insurance law[1] with the enactment of the Massachusetts Personal Injury Protection Act of 1970.[2] The law, which took effect on January 1, 1971, is largely based on the personal injury provisions of the Basic Protection Automobile Insurance Plan[3] developed jointly by Professors Robert Keeton and Jeffery O'Connell. Since its introduction, the Keeton-O'Connell plan has attracted a good deal of attention and controversy, sparking a nationwide debate on automobile insurance reform.[4]

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1 The Canadian Province of Saskatchewan in 1946 enacted a law providing compulsory low-level personal injury coverage for compensation in cases of death, medical expense and loss of income arising from automobile accidents. The Saskatchewan Governmental Insurance Office (SGIO) pays the basic benefits without regard to fault on a schedule similar to that of a workmen's compensation plan made for pain and suffering. The Saskatchewan act does not, as a general rule, eliminate tort claims, but it does reduce tort recovery by the amount of accident insurance benefits the injured party is entitled to receive. AUTOMOBILE ACCIDENT INSURANCE ACT, SASK. REV. STAT. ch. 409 (1965).

Puerto Rico enacted a similar law in 1968 providing that persons injured in automobile accidents, regardless of fault, would receive compensation financed through automobile registration fees. P.R. LAWS ANN., tit. 9, §§ 2051-2065 (Supp. 1968).

2 MASS. GEN. LAWS ANN. ch. 90, §§ 34A, D, M, N; ch. 175 §§ 22E-H, 113B-C; ch. 231, § 6D (Supp. 1971); Act of August 13, 1970, ch. 670 [hereinafter cited as Act].

3 R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965), see especially at 273-339 [hereinafter cited as BASIC PROTECTION].

4 *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS (1970); N.Y.S. INS. DEP'T, AUTOMOBILE INSURANCE — FOR WHOSE BENEFIT? (1970) [hereinafter cited as N.Y.S. INS. DEP'T REPORT]; AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL SUBCOMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATION (1968) (this report includes a detailed cost study); Blum & Kalven, *A Stopgap Plan for Compensating Auto Accident Victims*, 1968 INS. L.J. 661 (1968); King, *The Insurance Industry and Compensation Plans*, 43 N.Y.U. L. REV. 1137 (1968); Kuhn, *In Defense of the Tort System*, 73 CASE & COM., No. 1, at 15 (1968); W. ROAKOS, AUTOMOBILE IDENTIFICATION PROPOSALS — A COMPENDIUM (1968); CONN. INS. DEP'T, A PROGRAM FOR AUTOMOBILE INSURANCE AND ACCIDENT BENEFITS REFORM (1968) (commonly known as the Cotter Proposal, after the Commissioner of Insurance under whose auspices it was released); Blum &

Until the effective date of the act, Massachusetts had operated under a negligence system of automobile liability insurance. That system was adapted to the requirements of tort law and in theory paid nothing to persons injured in automobile accidents if the liability or "fault" of the tortfeasor was not established or if the injured party was also at fault. If the injured party did succeed in establishing the liability of the tortfeasor, payment was usually made to him by a liability insurer on behalf of the tortfeasor. Those victims who could not prove another party "at fault" were often left to bear much of the accidental loss that could have been paid through automobile insurance.[5]

The negligence system provided only a partial and incomplete system of reparation for automotive injuries. The system was inequitable in distributing not only the costs of automobile accidents but also benefits of the liability insurance system. On the one hand it tended to heavily overpay claimants with minor or even trivial injuries in order to avoid the risk of litigation.[6] The adversary system of trial and settlement, on the other hand, often

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Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967); Sargent, *Disaster Walks in the Guise of Social Reform*, 3 TRIAL, No. 6 at 24 (1967); Brainard, *Is Equity of Insurance Being Sacrificed?*, 3 TRIAL, No. 6, at 38 (1967); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); INSTITUTE OF CONTINUING EDUCATION, PROTECTION FOR THE TRAFFIC VICTIM: THE KEETON-O'CONNELL PLAN AND ITS CRITICS (1967); 1967 U. ILL. L.F. (1967) (this entire issue was devoted to an evaluation and critique of the Keeton-O'Connell Plan); Knepper, *Alimony for Accident Victims?*, 15 DEFENSE L.J. 513 (1966); Pub. L. No. 90-313, 82 Stat. 126 (1968) (This law authorized a comprehensive survey of the automobile insurance and compensation system throughout the United States. Selected phases of this total study, principally commissioned to persons and institutions outside of the Department of Transportation, have been published since early 1970 under the auspices of the Department of Transportation, Automobile and Compensation Study).

5 *See* F. HARMAYNE, AUTOMOBILE BASIC PROTECTION COSTS EVALUATED 7 (1968); N.Y.S. INS. DEP'T REPORT n. 25.

6 *See, e.g.*, COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913, 914 (1962); A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & A. BOMBAUGH, AUTOMOBILE COSTS AND PAYMENTS — STUDIES IN THE ECONOMICS OF INJURY REPARATIONS (1964) [This study relied primarily on a field survey of Michigan automobile accidents, hereinafter cited as MICHIGAN STUDY]; STAFF OF THE AUTOMOBILE INSURANCE AND COMPENSATION STUDY, U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS, Vol. I, at 56-61 (July 1970) [hereinafter cited as TRANSPORTATION DEP'T STUDY]. *See also* BASIC PROTECTION 36; N.Y.S. INS. DEP'T REPORT 25-29, especially nn. 41-46.

resulted in a seriously injured person recovering substantially less than his total economic losses.

Furthermore, the system was cumbersome and slow in delivering those payments that it did make. For example, a survey of court congestion in Massachusetts made at the time when the old system was still in effect showed delays of 32 months before coming to trial in such metropolitan areas as Suffolk (Boston) and Middlesex (Cambridge) Counties.[7] Although only a small fraction of cases were ever tried,[8] payments in non-litigated cases were subject to bargaining and had to await similarly lengthly determinations of fact. A recent survey of automobile personal injury claim closings made at the request of the U.S. Department of Transportation (DOT)[9] shows that half of all automobile liability claims were settled less than six months after the accident but that half of the loss dollars involved in all claims were not settled until more than a year had elapsed.[10]

In lower and middle income groups, these delays created serious economic hardships. Insurance companies often used the threat of litigation to pressure claimants into accepting settlements far below what they could have received had their case gone to trial. Delays also frequently increased the overall costs of the system by making it difficult for injured persons to obtain proper medical care and rehabilitation at the time needed.[11]

The old system thus was inefficient and expensive. Computations based on recent studies have shown that of the premium dollar collected nationwide for automobile bodily injury liability insurance, only 14½ cents is paid to victims in compensation for out-of-pocket losses not already compensated from other sources.[12]

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7 INSTITUTE OF JUDICIAL ADMINISTRATION, STATE TRIAL COURTS OF GENERAL JURISDICTION — PERSONAL INJURY JURY CASES 4 (Calendar Status Study, 1964), *cited in* BASIC PROTECTION 14.

8 H. ZEISEL, H. KLAVEN, & B. BUCHHOLZ, DELAY IN THE COURT 105 (1959); N.Y.S. INS. DEP'T REPORT 23, n.33.

9 TRANSPORTATION DEP'T STUDY iii.

10 *Id.* 84.

11 N.Y.S. INS. DEP'T REPORT 32-33.

12 R. Keeton, *Compensation Systems — The Search for a Viable Alternative to Negligence Law* 259 in 1970 Supplement to W. SEAVY, P. KEETON & R. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS (2d ed. 1964). These calculations were later independently confirmed in N.Y.S. INS. DEP'T REPORT 34-35, see especially n.59.

Even the additional net payments to victims for other items — 8 cents for out-of-pocket losses already compensated from other sources and 21½ cents for payments for something other than economic losses paid in theory for "pain and suffering" or for "general damages" — bring the net sum that victims receive to only 44 cents of the premium dollar.[13] Of the remaining 56 cents of the premium dollar that covers automobile insurance operating costs, 33 cents is for general overhead while 23 cents is expended for claims administration costs.[14] These figures are in sharp contrast to the nearly 70 cents on the premium dollar paid out to workmen's compensation claimants[15] and the nearly 82 cents paid out to claimants under private life, health and nonoccupational accident insurance.[16] The differences are due in a large part to the relatively complex determination of fault and valuation of noneconomic damages, such as pain and suffering, that cannot be measured objectively. In addition, much of the premium, as noted above, pays for such items as lawyer's fees and other legal costs, and the selling, financing and administering of automobile liability insurance. The old system also encouraged routine exaggeration of claims and even outright fraud with respect to both damages and issues of negligence. The cynical attitude toward the law thus created seriously undermined the integrity of the courts.

Much of the criticism of the traditional insurance system is based on the premise that negligence is in fact an impractical and unrealistic criterion of liability in a large percentage of automobile accident cases. Modern technological changes, such as high speed automobiles, especially in bad weather or on bad roads or super highways, have made it increasingly difficult to determine which party was "at fault," if indeed any party was.

This Note will briefly review the legislative history of the new Massachusetts "no-fault" law and then will analyze its provisions. Frequently the Note will advocate changes in the act. Portions of the act have been redrafted to incorporate the suggestions made

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13 N.Y.S. INS. DEP'T REPORT 35-36.
14 *Id.* 34-35.
15 MICHIGAN STUDY 43-61, see especially table at 59.
16 *Id.*

in this Note. This Revised Draft can be found in Appendix B. Selected sections of the act itself have been reprinted in Appendix A.

I. The Keeton-O'Connell Plan as a Model

The Keeton-O'Connell Basic Protection Plan[17] replaces much of the old system with a new "no-fault" system. It requires that every car owner purchase Basic Protection Insurance, a form of loss insurance payable directly to the insured for bodily injuries without regard to fault. The plan provides for a simplified two-party claims procedure under which the injured party ordinarily claims directly against his own basic insurance company rather than against the tortfeasor or his insurance company. Benefits of up to $10,000 per person and $100,000 per accident to reimburse net out-of-pocket loss are then payable on a monthly basis as losses accrue. Net out-of-pocket losses include all reasonable medical and related expenses incurred and earnings loss[18] minus all collateral sources of indemnification available, including wage continuation programs and medical payments coverage.

The basic protection insured is made exempt from tort liability for the first $5,000 of damages previously recoverable for pain and suffering and for the first $10,000 previously recoverable for bodily injury. The old negligence system and its attendant three-party claims procedure still apply to amounts above those made exempt under the plan. Finally additional types and increased amounts of coverage are available on an optional basis to supplement the compulsory basic protection insurance.

The Keeton-O'Connell plan was primarily a response to the serious shortcomings of the old negligence system.[19] The objectives of the plan's "no-fault" system looked beyond the interests of those who operated and probably benefitted the most from the old negligence system — the insurance companies, lawyers, insurance agents, adjusters and regulators — to include the interests of acci-

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17 See note 3 *supra*.

18 "Earnings loss" is defined in the text at section III A 4b. It includes replacement services which are discussed in detail in section III A 4c.

19 Basic Protection 1.

dent victims, automobile insurance consumers and the general public.

Using this broad perspective, several objectives that should govern an ideal "no-fault" automobile insurance system can be articulated. An ideal system should adequately compensate all automobile accident victims. It should be inexpensive to the consumer (i.e., premiums should be low) and yet be efficient so as to provide accident victims with a high percentage return of insurance premiums in benefits. Under an ideal system, the cost of accidents should be borne by motorists who, as a group, benefit most directly from their automobiles, rather than by the public as a whole; such full internalization of accident costs to the activity of motoring would require elimination of other sources of compensation available for automobile victims. Though the insurance consumer will not be able to reap the rewards of double recovery for his automotive injuries under an ideal system, he will not be burdened by paying double premiums for overlapping coverage he may carry under other types of insurance. The non-motoring public should not have to bear part of the cost of his accident through their contributions to his other, non-automobile insurance sources of compensation. The internalization of costs suggested is both a matter of sound economic resource allocation and elementary fairness to the non-motoring public.

An ideal "no-fault" system should pay benefits promptly and periodically. Payments should be stable, predictable and reliable as opposed to the almost haphazard manner in which payments are made under the negligence system. Furthermore, the method of determining payment should be geared to mass operation rather than the old case-by-case method. In addition, the rules of an ideal system should be clear and straightforward so as not to encourage the exaggeration, fraud and other anti-social behavior that the old negligence system often invited.

II. Legislative History of the Act

At the time of the passage of the act, Massachusetts was ripe for reforming the old automobile insurance system. Massachusetts was one of the three states in which no automobile could be reg-

istered unless it was covered by tort liability insurance or by a substitute form of security.[20] Compulsory insurance, as that form of coverage was known, did not extend to property damage.

In addition, Massachusetts motorists were paying the highest average premiums in the country for private passenger car bodily injury liability insurance[21] and the third highest average premiums in the country for private passenger car property damage liability insurance.[22] The state also had the highest average frequency of claims in the country for both bodily injury and property damages.[23]

Despite the high premiums, Massachusetts motorists did not receive complete coverage, since a motorist might not have been able to recover from another party either because of the principles of tort law or because of the inequities in the bargaining and settlement process under the old system. However, it was the soaring costs of compulsory insurance premiums,[24] that more than anything else outraged Massachusetts motorists and set the stage for automobile insurance reform.

"No-fault" automobile insurance bills were introduced in both the 1967 and 1968 sessions of the Massachusetts legislature. On both occasions the bills passed in the House of Representatives but were defeated in the Senate. Opposition to the "no-fault" insurance reform arose at that time primarily from two sources. First, trial lawyers feared the loss of fees for automobile accident cases. They underwrote a large scale public campaign co-ordinated by the Massachusetts chapter of the American Trial Lawyer's Association to defeat the bills. Second, certain segments of the automobile insurance industry itself feared a downward readjustment of the profitable fixed premium rates under which they operated. Furthermore, since 1965, Governor John Volpe, while opposed to the existing compulsory insurance, had sponsored his own so-called Financial Responsibility Plan of automobile liability insur-

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20 MASS. GEN. LAWS ANN., ch.90 § 1A (1969). The other states are New York and North Carolina. *See* N.Y. VEHICLE AND TRAFFIC LAW § 312. (McKinney 1970); N.C. GEN. STAT. §§ 20-309 (Supp. 1969).

21 Data received from the Insurance Information Institute, 50 Beacon Street, Boston, Mass. 02108.

22 *Id.*

23 *Id.*

24 *See* BASIC PROTECTION 71.

ance supplemented by an Unsatisfied Claim and Judgment Fund.[25]

Governor Francis A. Sargent, who succeeded Volpe, supported the concept of "no-fault" automobile insurance reform. A "no-fault" automobile insurance bill, drafted by representatives of the Massachusetts Association of Insurance Agents and Brokers, no doubt with some help from industry sources, who had apparently reversed their previous position was introduced into the Massachusetts Senate early in 1970. It was modified somewhat in consultations with members of the governor's staff and others. The bill eventually passed the Democratically-controlled legislature but not before several amendments were added that were apparently designed to sabotage the Republican governor's entire reform plan. The amendments, which included an across-the-board rate reduction and an automatic renewal provision, were vigorously opposed by the insurance industry and several major companies threatened, after the passage of the bill and pending the governor's signature, to discontinue writing automobile insurance in the state if the bill became law with the objectionable amendments included.[26]

The Trial Lawyer's Association by this time had mounted an

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25 *See, e.g.*, H.R. Doc. No. 3629, 92d Gen. Ct., 2d Sess. (Mass. 1966), S. Doc. No. 1030, 93d Gen. Ct., 2d Sess. (Mass. 1968).

Governor Volpe's proposal, which never became law, was closely patterned after New Jersey's Motor Vehicle Security-Responsibility Law and Unsatisfied Claim and Judgment Act. See N.J. STAT. ANN. §§ 39:6-23 to 91(1961).

26 Boston Globe, Aug. 14, 1970, at 1, col. 5.

One of the amendments that the insurance companies objected to extended to all forms of coverage, including optional property damage and physical damage coverage, the 15 percent rate reduction in compulsory insurance rates proposed in the original bill.

See Act § 6, ch. 670, [1970] Mass. Acts. and Resolves 529, 533-34. Property damage insures a motorist against the liability that he may incur for damage to another's automobile or property in the event of an accident. Physical damage is an umbrella term that includes fire, theft, comprehensive and collision insurance. It insures the motorist against damage to his own car regardless of who is at fault. These types of coverage were not compulsory under the old system or the new law. The act merely required that they be made available as options to all policy-holders and in no way changed or structured the kind of coverage they provided. This amendment was objectionable to insurance companies because they would be required to cut their rates for such optional coverage without any other change in the operation of these coverages.

Another amendment would have required insurance companies, with few exceptions, to automatically renew all coverages for policyholders and would have denied them the right to cancel present coverages regardless of the insured's driving record.

intensive lobbying effort that had apparently succeeded in making the final version of the bill an unacceptable package. Nevertheless, on August 13, 1970, Governor Sargent, sensing that a "no-fault" automobile insurance bill would not be passed again if he sent this version back, signed the bill into law.[27]

Within two weeks of the passage of the act, however, the legislature, under pressure from the governor, the insurance companies, and a public fearful of the termination of automobile insurance in the state, repealed the objectionable section of the act requiring the automatic renewal of all automobile coverages and replaced it with renewal provisions more limited in scope.[28] Later in the year, the Supreme Judicial Court, the highest court in Massachusetts, overturned certain of the rate reductions,[29] declaring them to be "confiscatory" and therefore "unconstitutional."[30] The final version of the act reduced compulsory premium rates for the calendar year 1971 by 15 percent.[31] Apparently, the expected savings to insurance companies in legal, administrative and investigative costs were thought to justify the reduction.

III. Operative Provisions of the Act

A. *Coverage: Section 2*

1. Generally

Section 2 of the Massachusetts Personal Injury Protection Act of 1970 makes additions to the customary Massachusetts automobile insurance coverage required by pre-existing law as a prereq-

27 The fact that the gubernatorial election was approaching may have influenced the decision. Governor Sargent signed the bill in front of a prime time television audience stating that he "would not submit to threats of blackmail by the [insurance] industry." See Boston Globe, Aug. 14, 1970 at 1, col. 5.

28 Act of August 24, 1970, ch. 744 [1970] Mass. Acts & Resolves 610. These provisions are now found in the Mass. Gen. Laws Ann. ch. 175 §§ 22E-H (Supp. 1971). Generally, they make renewal mandatory only for drivers 65 or older who have no record of moving traffic violations and for other drivers who maintain a similarly safe driving record continually for at least two consecutive years beginning Sept. 1, 1970. Insurance companies can refuse to renew policies of other drivers not qualifying for mandatory renewal but only on the condition that they accept an additional assigned risk for each such refusal.

29 Aetna Casualty and Surety Co. v. Commissioner of Insurance, —— Mass. ——, 263 N.E.2d 698 (1970).

30 *Id.* at 703.

31 Act § 6, [1970] Mass. Acts & Resolves 529, 533-534.

uisite to registering an automobile in the state. The new coverage is compulsory and is called "personal injury protection" (PIP) coverage. It provides, in the case of injuries sustained as a result of an accident, for payment of (1) expenses incurred for medical and related services, (2) a portion of lost wages not otherwise compensated, and (3) expenses actually incurred for replacement services, i.e., non-income producing services others are paid to perform for the family in place of the injured person. Benefits for "injury to or death of any one person" are payable under the compulsory PIP coverage up to a maximum of $2,000 "without regard to negligence or gross negligence or fault of any kind."[32] There is no apparent limit on the total amount of benefits payable to different persons for bodily injuries resulting from any one accident. PIP pays no benefits nor does it affect claims for property damage caused by the insured vehicle or for physical damage caused to it by fire, theft or accident. The Keeton-O'Connell plan, by way of contrast, provides benefits under its compulsory coverage up to a maximum of $10,000 per person with a limit of $100,000 for any one accident.[33] In addition, the plan requires policyholders to purchase liability coverage for damage to property other than the insured vehicle and one of three forms of optional collision coverage on their own car.[34] The Revised Draft raises the maximum amount of benefits payable under compulsory coverage to $10,000, a figure suggested by the Keeton-O'Connell plan.[35] This amount is proposed as a figure that would presently cover a significant majority of automobile accident claims, both in terms of absolute numbers and in terms of percentage of total economic loss suffered by all claimants.

Data released in the DOT study[36] revealed that automobile liability claimants who sustained economic losses of $1,500 or less and $2,500 or less represented cumulatively 93.1 percent and 96.3 percent respectively of all such claimants.[37] However, they sus-

32 Act, § 2; MASS. GEN. LAWS ANN. ch.90, § 34A (Supp. 1971).
33 BASIC PROTECTION 283.
34 Keeton & O'Connell, *Alternative Paths Toward Non-Fault Insurance*, 71 COLUM. L. REV. — (1971), H.R. Doc. No. 387, 95th Gen. Ct., 1st. Sess. (Mass. 1971).
35 See note 33 *supra*.
36 See TRANSPORTATION DEP'T STUDY.
37 *Id.* 30, 49-50.

tained only 42.8 percent and 54.3 percent of all economic losses sustained by automobile liability claimants to date of their damage settlement with the insurance companies.[38] Claimants with economic losses up to $10,000 represented 99.5 percent of all claimants but sustained only 84 percent of all economic losses to date of settlement.[39]

These figures show that although the act's $2,000 compulsory coverage provides benefits for all but approximately 5 percent of accident victims, those victims who are not completely covered by compulsory PIP suffered about 50 percent of the total economic losses sustained by all claimants as a result of automobile accidents. The act now largely denies the protection of "no-fault" insurance to those with large claims. Ironically it was this group that fared most poorly under the old liability insurance system and most needed the protection of "no-fault" insurance.

The $10,000 figure suggested here is not presented as a permanent one. Any compulsory coverage figure could be flexible and subject to constant legislative review in order to keep up with contemporary loss and expense figures, especially in view of the dramatic increases in medical costs in recent years. Indeed, it might be preferable for the legislature to delegate the authority to determine this amount, subject to appropriate guidelines, to the Commissioner of Insurance.

The Revised Draft does not provide unlimited benefits for economic loss as was suggested in the New York State Insurance Department's report.[40] Implementing such a suggestion would likely

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38 *Id.*

39 A word of caution about these statistics is appropriate. Claimants who received no payment at all from the insurance companies were not included in the survey figure. Other studies have shown that one-half to one-quarter of all persons suffering bodily injury in automobile accidents received nothing via the tort route. *See e.g.*, N.Y.S. INS. DEP'T REPORT 18; BASIC PROTECTION 34-61, especially at 61. Inclusion of those claimants not compensated by liability insurance would have tended to decrease the percentage of claimants with very large claims. In addition, the economic loss figures used in the survey covered approximately the same items compensated under PIP but did not include loss of future earnings and were computed only to the date of settlement with the insurance companies. The inclusion of lost future earnings would have tended to increase the proportion of claimants with very large claims. Despite these distortions, the statistics from the DOT study clearly show that the act's maximum $2,000 compulsory PIP coverage is inadequate. TRANSPORTATION DEP'T STUDY 27, 30, 50.

40 N.Y.S. INS. DEP'T REPORT 85-86.

raise the cost of PIP premiums extensively since unlimited benefits would have to be paid in cases of very substantial loss. The Revised Draft, by setting what is seen to be a reasonably complete upper current limit of $10,000 for compulsory PIP coverage, has attempted to strike a balance between the objectives of minimizing premium cost and maximizing the "no-fault" coverage available.[41] A tort action to recover bodily injury damages in excess of $10,000 ($2,000 under the act) and additional PIP coverage unlimited in amount[42] are available under the Revised Draft as alternate methods of recovery for persons sustaining losses above $10,000 who cannot recover under compulsory PIP coverage.

2. Persons Covered

The PIP provisions of a motor vehicle liability policy[43] cover the named insured on the policy, members of his household, any "authorized" operator or passenger of the insured's vehicle and any pedestrian struck by the vehicle against injuries resulting from the operation of the vehicle. The provision limiting coverage to "authorized" operators or passengers apparently was included to bar recovery by thieves, other unauthorized occupants of the insured vehicle, and persons injured while attempting unauthorized entry of the vehicle. In addition, the act specifically includes "guest occupant[s]" who were excluded from coverage under the old compulsory insurance. This type of PIP coverage will be referred to in this Note as "primary vehicle" coverage.

The act limits coverage to injuries caused by accident "while in or upon, or while entering into or alighting from"[44] the insured vehicle. Since the act does not use the "[injury] arising out of the ownership, operation, maintenance, control, or use of [a] motor vehicle" terminology used in the pre-existing compulsory insurance[45] in section 2, it has been suggested that compulsory

41 There are, in addition, political considerations for limiting the recovery of benefits under PIP. "No-fault" automobile insurance is a reform, radical to some, that is likely to be opposed by groups having vested interests. Some of those groups are suggested above in the text following note 19.

42 See Revised Draft § 9. *See also* section III J of this Note.

43 The term used for the policy combining bodily injury liability insurance and personal injury protection. See MASS. GEN. LAWS ANN., ch. 90, § 34A (Supp. 1971).

44 Act of Aug. 13, 1970, § 2, MASS. GEN. LAWS ANN., ch. 90, § 34A (Supp. 1971).

45 See MASS. GEN. LAWS ANN., ch. 90, § 34A (1969).

PIP does not cover persons injured while loading, unloading, repairing or otherwise "using" the insured vehicle.[46] It can be argued, on the other hand, that any person so injured while legally using the car should be entitled to recover PIP benefits since he would have been injured while "upon" the insured vehicle. Though the meaning of the term "upon" as used in the act may not be entirely clear, it seems reasonable to suggest that it means more than being physically on top of the insured vehicle. However, in order to avoid any possible misinterpretation, the Revised Draft clarifies the reach of compulsory PIP benefits by covering injuries "arising out of the ownership, operation, maintenance or use" of the insured vehicle.[47]

Section 2 of the act also entitles the named insured and members of his household to PIP benefits under the insured's policy in any case in which injury occurred to one of them while a passenger in, or when struck as a pedestrian by, a vehicle not having PIP coverage unless they recover against the driver or owner of that vehicle in tort.[48] This type of PIP coverage will be referred to in this Note as "other vehicle" coverage. It is open to the same objection against limited coverage that the "primary vehicle" coverage might be.[49] The Revised Draft, therefore, broadens its coverage in the same way that it broadened the "primary vehicle" coverage.[50]

Since a motor vehicle liability policy that includes PIP provisions is a prerequisite to registering an automobile in Massachusetts,[51] "other vehicle" coverage can apply only to persons injured while a passenger in or when struck as a pedestrian by an out-of-state vehicle or Massachusetts registered vehicle whose PIP coverage had been cancelled or voided for some reason such as nonpayment of premiums. It is fairly clear that in these situations

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46 See Kenney & McCarthy, *"No-Fault" in Massachusetts: Chapter 670, Acts of 1970—A Synopsis and Analysis*, 55 MASS. L.Q. 23, 27 (1970) [hereinafter cited as Kenney & McCarthy].

47 Revised Draft § 2. The same phrase is used in connection with the compulsory liability coverage, MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1971), and with the assigned claims plan in section 4 of the act, MASS. GEN. LAWS ANN. ch. 90, § 34N (Supp. 1971).

48 Act § 2, MASS. GEN. LAWS ANN., ch. 90 § 34A (Supp. 1971).

49 See text *supra* following note 39.

50 Revised Draft § 2.

51 MASS. GEN. LAWS ANN., ch. 90 § 1A (1969).

the injured person has to collect PIP benefits under his own "other vehicle" coverage since he cannot collect under "primary vehicle" coverage for injuries resulting from the operation of a vehicle not having PIP coverage. If, however, a PIP covered vehicle is struck by another vehicle not carrying PIP coverage and one or more of the persons injured is covered under a PIP policy on another vehicle, they must make their claim under the "primary vehicle" coverage of the car in which they were injured and cannot make a claim under the "other vehicle" coverage on their own cars. Claims under a PIP insured's "other vehicle" coverage is available only if he cannot make a claim under another vehicle's "primary vehicle" coverage.

3. Persons Excluded from Coverage

Persons entitled to workmen's compensation benefits are excluded from PIP "primary vehicle" coverage as are persons whose injuries are intentionally caused.[52] Although these exclusions are not mentioned in the paragraph outlining "other vehicle"coverage,[53] it seems clear that the intention of the act was to exclude them from all PIP coverage.[54] It would hardly make sense to exclude a person whose injuries are intentionally caused from "primary vehicle" coverage and yet let him recover if "other vehicle" coverage is applicable. The same can be said for persons entitled to workmen's compensation payments or benefits.

Although the act may have neglected to do so, "no-fault" provisions of the insurance policies which are actually being written, modeled on the Basic Liability Form,[55] exclude non-Massachusetts residents who sustain bodily injury as pedestrians struck by an insured vehicle *outside* of Massachusetts.[56] This exclusion seems rational on policy grounds since non-resident pedestrians

52 *See* Act § 2, MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1971).

53 *Id.*

54 *But see* Kenney & McCarthy 30.

55 STANDARD PROVISIONS FOR MASSACHUSETTS MOTOR VEHICLE POLICY (Effective January 1, 1971) [hereinafter referred to as BASIC LIABILITY FORM]. The Standard Provisions were drawn up by the staff of the Massachusetts Automobile Rating and Accident Prevention Bureau working with nine of the leading automobile insurance companies in the state. The provisions have been approved by the Commissioner of Insurance for use throughout the state. Copies are available through his office or through the Bureau's, 66 Batterymarch Street, Boston, Mass. 02110.

56 BASIC LIABILITY FORM 4.

do not pay the costs of PIP and have no reasonable expectation that they are under its coverage. Non-resident passengers riding in PIP insured vehicles, on the other hand, whether in or out of the state, may be said to have such a reasonable expectation. Yet this distinction is not supported by any specific language in the act. There is, therefore, a serious question as to its validity, notwithstanding its sound economic policy basis. The Revised Draft avoids the problem by specifically excluding non-resident pedestrians not injured in Massachusetts from PIP coverage.

Under section 2 of the act, insurers can deny PIP benefits to persons who contributed to their own injury by operating an automobile in Massachusetts while under the influence of alcohol or narcotic drugs or while committing a felony or avoiding lawful apprehension or arrest. They can also exclude persons who specifically intend to cause injury or damage to themselves or to others. Strangely enough, the act does not seem to make these exclusions applicable to injuries arising from the operation of an automobile out of the state which would be covered,[57] if it carried PIP. The Basic Liability Form, on the other hand, does seem to make these exclusions regardless of where the accident took place.[58] As will be seen later, the Basic Liability Form also clearly expands the scope of PIP coverage to apply to out-of-state accidents.[59] Perhaps the explanation lies in the fact that this geographical expansion of PIP coverage was made by an administrative ruling not contemplated by the act. Thus, the act's failure to apply these exclusions to all injuries is understandable. However, there seems to be no reason for not having those exclusions apply to accidents occurring outside of Massachusetts as well. The Revised Draft, therefore, permits such drivers involved in out-of-state accidents to be excluded.[60]

The act's exclusion of drivers under the influence of alcohol or narcotics also seems too narrow. Hallucinogenic drugs, for example, can impair a driver's ability just as much as narcotics or alcohol. It may not be possible to include such drugs in the term "narcotic drugs," because the act itself specifically refers to "nar-

57 *See* Act, § 2, MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1971).
58 See BASIC LIABILITY FORM 4.
59 See text, *infra*, at III A 5.
60 Revised Draft § 2.

cotic or hallucinogenic drugs" in section 7, which allows for increases in premiums for persons convicted of driving under their influence. The Revised Draft, therefore, also authorizes insurers to exclude drivers under the influence of hallucinogenic drugs from PIP benefits.

4. Extent of Benefits Provided

a. *Medical and Related Expenses.* — As noted above, PIP coverage provides payment for expenses incurred for medical and related services. "Related services" include, in the words of the act, "surgical, x-ray, and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services."[61] To be recoverable, the medical and related expenses must be "reasonable" and "necessary."[62]

In addition, only those expenses actually incurred within two years from the date of the accident are recoverable.[63] This last provision was apparently added for at least two reasons. First, by allowing insurance companies to close their books on a case after a specific period of time, administrative costs are reduced. In theory, this should be reflected in reductions of insurance premiums. Second, as time goes on, it becomes difficult, especially in the case of an older person or of someone already in poor health, to prove that the additional medical and related services are connected with the automobile injury rather than with other causes.

On the other hand, limiting benefits to losses and expenses incurred within any specific period after the accident will necessarily deny some persons full and adequate compensation under PIP. Persons whose period of recovery exceeds two years, during which time they require medical and related services will be denied recovery under the act during that period. Because of this possibility the New York State Insurance Department report has suggested that "no-fault" medical benefits should be "unlimited in scope and amount."[64] Implementing such a suggestion would probably raise the cost of PIP premiums since in some cases the

61 Act § 2, MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1971).
62 *Id.*
63 *Id.*
64 N.Y.S. INS. DEP'T REPORT 87.

benefits paid would be quite substantial. Since few motorists are likely to incur automobile injuries that extend beyond two years, it is suggested that the same argument for balancing cost against coverage factors that was advanced earlier in favor of limiting compulsory benefits to $10,000 applies here as well.

This lack of coverage is not as serious a problem as it might seem. The injured motorist still has a tort action available for medical and related expenses incurred after two years and may have some non-PIP medical coverage available, so he does not necessarily have to cover those expenses out of his own pocket. Therefore, in an attempt to balance all these factors, the Revised Draft raises the act's two year limitation on recovery of medical and related expenses to three years.[65] This is not a magic number but rather tries to balance the inadequacy of the act's two year limit and the improprieties of raising that limit much further.

The act has a "collateral source" rule for medical and related expenses requiring PIP payment for them even though they are also covered by Blue Cross, Blue Shield, sickness and accident insurance or some other form of medical payments coverage (collectively referred to in this Note as "medical coverage" or "medical insurance"). There is no such "collateral source" rule for PIP benefits if workmen's compensation payments are available. This means that persons who are covered by PIP and who purchase overlapping medical coverage would be recovering more than their actual loss. The Revised Draft, therefore, reduces the amount of PIP benefits recoverable by the payments and benefits the injured person is entitled to receive under his medical coverage.[66]

If a person injured in an automobile accident incurs medical expenses of $1,500, all of which are recoverable under his own medical coverage, he can collect $1,500 from his PIP coverage and another $1,500 from his medical payments coverage under this act for a total of $3,000. If only $1,000 was recoverable under his medical coverage, his total recovery would be $2,500. But under the provisions of the Revised Draft, he would collect only $1,500 in both cases; his medical coverage with no PIP benefits in the

65 Revised Draft § 2.
66 *Id.*

first example and $500 of PIP in the second. The structure of the Revised Draft is designed to provide the injured person with full recovery (assuming that it falls within the overall dollar limit), and no more.[67]

If a "no overlap" rule is adopted in PIP for medical payments, as suggested here, it is hoped that medical insurers will exclude from their own coverage amounts payable under PIP provisions for medical and related expenses and will reduce their premiums accordingly both for persons covered and not covered by PIP. These premium savings can be expected because the general pool of funds from which payments to medical insurance claimants are made will no longer have to pay claims covered by PIP. The pool requirements, therefore, will be smaller and medical insurance policyholders should benefit from that reduction by being charged lower premiums. In addition, persons covered by PIP who also carry medical insurance should be given even further reductions because they would, in effect, be purchasing medical insurance with an exclusion for the amounts recoverable under PIP. Although less money would be going into the medical insurance pool as a result of this arrangement, it would not be inequitable since the pool would be paying out less money in benefits too.

Adding a "no overlap" rule in PIP medical coverage is also suggested in order to minimize the difficulties of policyholders in choosing the exact amount of medical coverage they need. If medical and related expenses are not automatically excluded from private medical coverage, the burden of deciding whether to take such an exclusion (assuming there is also no deductible available under PIP, as has been suggested below) falls directly on the policyholder, who will have to decide between double coverage (and double premiums) or no coverage at all.

Yet, it would be rather simple for medical insurers to write up such an exclusion by looking at the provisions of the act and of the Basic Liability Form, including provisions for additional coverages thereunder, if their policyholder had purchased any. There is only one act and one Basic Liability Form, so they will not have to continuously examine a multitude of papers. Evaluating the amount excluded for such a policyholder should present

67 See *id.*

no problem either, because they would know exactly what expenses and losses their policy would no longer cover by simply referring to the act and the Basic Liability Form.

b. *Loss of Earnings.* — PIP also provides for recovery of salary, wages or other equivalent earned income[68] "actually lost" by persons employed or self-employed at the time of the accident. In addition, injured persons unemployed at the time of the accident can recover for their loss of earning power. However, PIP apparently does not provide for recovery of interest, dividends, rentals, other unearned income or for recovery of loss of business profits.

Maximum recovery of weekly wage loss is limited in section 2 of the act to an amount equivalent to 75 percent of the injured person's average weekly wage for the year immediately preceding the accident.[69] It has been suggested that recovery of loss of earnings power for a person unemployed at the time of the accident is not limited by this rule.[70] The same commentator also has suggested that such person's measure of loss is not restricted to his last year's wages or earning power but rather reflects his present net worth.[71] These interpretations, if accepted, might mean that a person unemployed at the time of the accident could fare better under the act than a similar person working at the time of the accident. Despite the obviously poor drafting of the applicable provisions that make this interpretation possible, reading such an interpretation into the act would be highly unreasonable. Rather, the provision should be read to apply the 75 percent limit on maximum wage loss recovery to all persons whether employed, self-employed or unemployed at the time of the accident. To avoid any possible misinterpretation, the Revised Draft has been drafted to explicitly so provide.[72]

For example, if a person who had earned $10,000 in the year prior to his accident but was unemployed at the time of the

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68 Including fees, commissions, tips and net earnings from self employment as that last phrase is defined in INT. REV. CODE of 1954, § 1402(a).

69 How the "average weekly wage" is to be determined is ambiguous. Does it mean one-fifty-second on the total previous year's earnings or the amounts earned divided by the number of weeks actually worked? If the injured party was not employed for the whole year, the two methods would reach different results.

70 Kenney & McCarthy 34.

71 *Id.* 35.

72 Revised Draft § 2.

accident had his earning capacity reduced as a result of the accident so that he could earn no more than $6,000 a year thereafter, he should be entitled to recover up to 75 percent of the difference between $6,000 and $10,000, or $3,000 per year under PIP. Under the act if he were only covered by compulsory PIP, his total recovery would be, of course, limited to $2,000. If he were under the Revised Draft scheme, he would be entitled to recover greater PIP benefits to compensate for his loss of earning power since the maximum total recovery limit suggested thereunder is $10,000. Furthermore, if he purchased additional PIP coverage he would also be entitled to recover greater earning power loss benefits as long as his total PIP benefits were within the limits of that additional coverage.

PIP wage loss benefits are further limited by amounts a person is entitled to recover under any type of wage continuation program. Those amounts are deducted in order to arrive at a net recovery figure for wages or earning power "actually lost." As a result, PIP pays as loss of earning benefits only the difference between the amounts a person is entitled to receive under a wage continuation program and the amount equivalent to 75 percent of his previous year's wages subject to the $2,000 limit on benefits.

This limitation is illustrated by the following example. A person who earned $10,000 in wages the previous year is out of work for a year as a result of an automobile accident. If he has been paid $4,000 as sick leave, he would be entitled to $3,500 under PIP. This figure is calculated by subtracting the $4,000 amount received under the sick leave program from 75 percent of his previous year's $10,000 wages, or $7,500. If the injured person is not entitled to any payments during his absence from work, he could collect the full $7,500 as PIP benefits.

The 75 percent figure was apparently reached by generally following the Keeton-O'Connell plan's recommendations that recovery for loss of earnings[73] be limited to net loss only. Since insurance benefits are not treated as taxable income,[74] it was felt reasonable and fair to adjust the claimant's recovery for loss of earnings to reflect the income tax advantages incident to such

73 See BASIC PROTECTION 278.

74 See INT. REV. CODE of 1954, §§ 101(a)(1), 104, 105.

non-taxable payments.[75] This is an abrupt departure from traditional tort law where taxes are not considered in assessing damages.[76] As a matter of administrative convenience, the value of this tax advantage was taken to equal 15 percent of the loss of earnings, subject always to proof of the lower value by the claimant.[77] The remaining 10 percent of work loss was chosen as a deductible in order to reduce the temptation on the part of wage earners and housewives to malinger beyond the genuine period of their disability while providing nearly full reimbursement of wages lost by a genuinely disabled victim.[78]

The act, by limiting recovery of loss of earnings to a flat maximum of 75 percent of the previous year's average weekly wage, arrives at a somewhat different and possibly less fair figure.[79] First, the act does not allow a claimant the opportunity to prove a lower value of the tax advantage to him and thus get a recovery more in line with his tax status.[80] The Revised Draft, therefore, has recommended that such flexibility be introduced in the provision for recovery of loss of earnings.[81] But it also deducts 10 percent off the top of such loss to discourage malingering. Thus the maximum recovery is limited to 90 percent of wage loss. Secondly, there is no deduction applicable to the expenses incurred for replacement services in order to discourage housewives from malingering. If there is an exclusion designed to discourage wage earners from malingering beyond any period of genuine disability, it is submitted, a similar exclusion should apply to expenses incurred for replacement services that would still provide nearly full reimbursement for those expenses incurred as a result of a genuinely disabled housewife. The Revised Draft, therefore, applies a 10 percent exclusion to amounts reimbursable under PIP for payments actually made for replacement services.[82]

The 25 percent not recoverable under PIP is still subject to a tort suit since there is no exemption from tort liability for damages not

75 See BASIC PROTECTION 278.
76 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 429.1 (3d ed. 1968).
77 See BASIC PROTECTION 278.
78 See BASIC PROTECTION 282.
79 Act § 2, MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1971).
80 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 429.1 (3d ed. 1968).
81 Revised Draft § 2.
82. *Id.*

recoverable under PIP. This might create a serious problem because a residual tort suit for the remaining 25 percent would be available in every case involving wage loss. If a substantial number of claimants actually decide to prosecute these claims in court, the objectives of reducing court congestion and eliminating many of the other failings of the tort system through PIP could be seriously undermined.

However, there would seem to be little likelihood that there will be many additional tort suits brought for such wage losses under the act. Data from the DOT study revealed that approximately 95 percent of all automobile liability claimants incurred economic losses to date of settlement of less than $2,000.[83] Further, data from the study revealed that the average wage loss amounted to about 40 percent of the economic losses suffered by all such claimants in loss categories of $2,000 and below.[84] These statistics indicate that the residual tort claims of 95 percent of PIP claimants would be for less than $200.[85] It is not likely that this amount will encourage many suits.

Higher losses, besides having higher proportions of wage loss in relation to medical expense and other losses,[86] would naturally have higher residual claims. However, such claims would have been brought into court anyway because of the overall $2,000 recovery limit of the act. Thus the 75 percent limitation on wage loss recovery will not "add" to court congestion on losses of this amount.

Admittedly residual tort suits for wage loss will be more of a problem if the Revised Draft's increase in compulsory coverage to $10,000 is accepted. To the extent that such an increase is an attempt to keep even more cases out of court, the availability of residual tort claims may defeat that objective. A $10,000 accident

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83 TRANSPORTATION DEP'T STUDY 30, 50.

84 *Id.* 29.

85 This figure is calculated as follows: Wage loss equals 40 percent of the total loss ($2,000), or $800. Twenty-five percent of the wage loss ($200) is not compensated by PIP. The DOT study also indicates that nearly 72 percent of all PIP claimants will have residual tort claims of less than $30 under the act. This figure is arrived at by multiplying the $500 maximum loss figure in the lowest DOT study loss category by the 27.2 percent average wage loss for claimants in that category and by multiplying that product by the 25 percent residual tort figure. *Id.* 30, 50.

86 *Id.* 29.

may leave $1,250 in uncompensated wage loss.[87] Such amounts may well be worth suing for, even if all other losses are compensated. However, it should be noted that this difficulty arises largely because of the discrepancy between the concept advanced here of compensating only for net losses (i.e., taking tax advantages into account) and the traditional tort concept of compensating the victim for his gross losses.

Even though an employed person is not entitled to payments for net lost earnings under PIP coverage because he is being paid under a wage continuation program, it is possible that he may still recover those lost PIP benefits later. If within one year following the receipt of the last PIP benefit, that person loses wages because he cannot work for any reason whatsoever, and if he is not then entitled to recover wage continuation benefits because they were exhausted as a result of his earlier automobile accident, the act allows such person to recover PIP benefits up to the amount he would have been able to recover at the time of the accident had he not received wage continuation benefits at that time.

The following example will illustrate the way this system would work. Assume a person who is earning $200 per week in the year immediately preceding the accident was injured in an automobile accident that disabled him for four weeks. If he was entitled to $100 per week in wage continuation benefits during the period of his disability, he would be entitled to only $200 in PIP benefits. This figure is calculated by subtracting the $400 he was entitled to under the wage continuation program over four weeks, from $600 (75 percent of his weekly wage for that period). If, within one year after the accident, he is disabled in an industrial accident that keeps him out of work for four months and cannot recover some wage continuation benefits because they were exhausted at the time of his earlier automobile accident, he would be entitled to recover that $400 of lost PIP wage benefits not collected earlier under his PIP coverage.

Greater efficiency, however, could be achieved if wage continu-

87 This figure is calculated by multiplying the Revised Draft's $10,000 maximum compulsory coverage limit by the 50 percent average wage loss and then multiplying that product by the 25 percent residual tort figure.

ation programs excluded the coverage available to the employee under PIP. This would be to the advantage of all wage continuation claimants and their employers since it would lower the cost of wage continuation programs. In addition, this suggested exclusion would contribute to the objective of full internalization of automobile accident cost under the "no-fault" insurance system. Thus, if as a result of an automobile accident a person is disabled from work and then is later disabled for some other unrelated cause, he would be entitled to recover the previously uncollected PIP lost wage benefits up to 75 percent of the net wages lost as a result of that earlier automobile accident. Despite the advantages of a system such as this, the Revised Draft retains the act's structure because of the expected difficulties in changing the present form of countless wage continuation plans.[88]

Finally, there is the question of whether recovery of PIP wage loss benefits should be limited as to time. Although the wording of the act in section 2 is laborious, it is fairly clear that the act does not deny payment of PIP wage loss benefits beyond two years from the date of the accident as it does for recovery of medical and related expense. An argument can be made that a time limitation upon wage loss benefits should be imposed. Such a limitation in coverage would undoubtedly result in PIP cost savings and a corresponding reduction in premiums. On the other hand, it would result in unfairness to wage loss claimants who are permanently disabled either partially or entirely. For example, it seems quite unfair to deprive a person who lost his arm as a result of an accident of wage or earning power loss benefits after a limited period of time. Moreover, the act already places limitations on the total benefits recoverable. The claimant is limited to $2,000 total recovery under the compulsory coverage of the act and to $10,000 under the Revised Draft. Within these limits, even a permanently disabled person, unless his disability is very slight, is not likely to continue recovering PIP benefits for a lifetime. Furthermore, there seem to be far fewer problems of proof for disabilities than there are for showing that medical and related expenses are "necessary" or really connected with the automobile

88 Revised Draft § 2.

injury. The Revised Draft, therefore, does not limit PIP wage loss benefits as to time.

c. *Recovery of Non-Income Producing Expenses.* — Finally, PIP provides payments for expenses "in fact" incurred for replacement services that are, in the words of the act, "made to others, not members of the injured person's household and reasonably incurred in obtaining from those others ordinary and necessary services in lieu of those that had he not been injured, the injured person would have performed not for income but for the benefit of himself and/or members of his household."[89] This provision was obviously intended to cover expenses such as those incurred by a family in hiring outside help for housekeeping or child care while the mother, for example, is in the hospital or otherwise incapable of performing these services.

The Revised Draft excludes 10 percent of expenses incurred for such non-income producing services from the amounts of loss recoverable under PIP.[90] As noted earlier, this deductible is a feature of the Keeton-O'Connell plan. It is designed to reduce the likelihood that the guaranteed nature of PIP benefits will induce malingering while still providing nearly full benefits for a genuinely disabled accident victim. If malingering turns out to be a greater problem than originally perceived the percentage exclusion for both housewives and wage earners should be raised.

5. Geographical Coverage

The geographical scope of the act is somewhat unclear because section 2 includes no specific geographical limitation. Thus, in order to determine the geographical scope of the act it is necessary to look not only at the act itself but also at the pre-existing Massachusetts insurance law which the act amends.

In the absence of any specific limitation in section 2, it is submitted that no geographical limitation at all should be read into the general coverage of the act. There is no substantial policy reason in favor of such a limitation on the scope of PIP coverage. There is, however, a strong argument against such a limitation in

89 Act § 2, MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1971).
90 Revised Draft § 2.

that it would require Masachusetts motorists to go to the inconvenience and expense of purchasing additional out-of-state insurance coverage.

The broader interpretation has, in fact, been accepted by the Basic Liability Form which makes the motor vehicle liability policy, except for the liability and uninsured motorist coverage, applicable "only to accidents which occur and to loss sustained during the policy period, while the motor vehicle is within the United States of America, its territories or possessions, or Canada,[91] or is being transported between ports thereof."[92] In addition, the Basic Liability Form excludes "any pedestrian not a legal resident of Massachusetts, who sustains bodily injury through being struck by the insured motor vehicle outside the commonwealth" from the coverage of the act.[93] This exclusion, approved by the Commissioner of Insurance, is not supported by any language in the act. Nevertheless, it does serve to emphasize and exemplify the insurance companies' and the Commissioner's interpretation of the act's geographical coverage. If coverage did not extend beyond the commonwealth, this provision would be entirely unnecessary since a non-resident pedestrian struck by an insured motor vehicle outside of Massachusetts would already be excluded from the coverage of the act.

Admittedly, however, it must be recognized that an argument can be made that the provisions of the act apply only in Massachusetts. Moreover, even if one accepts the proposition that the act is limited in geographical scope to Massachusetts there still remain other issues with respect to geographical scope which must be settled.

Section 2 of the act adds the definition of "personal injury protection" to section 34A of chapter 90 of the General Laws. The latter section, the compulsory liability coverage section, limits the

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91 As with other forms of traditional automobile insurance coverage, PIP coverage extends to Canada as well as the whole United States because the legal systems in the two countries are similar. However, they do not extend beyond those countries because legal systems elsewhere are different and difficult to work with. Furthermore, most Massachusetts motorists are not likely to drive often or be involved in accidents outside of North America so there is little need to add greater geographical coverage.

92 BASIC LIABILITY FORM 12.

93 *Id.* 4.

"motor vehicles liability policy" required of every automobile under pre-existing law in order to obtain a registration certificate[94] to injuries arising out of the operation of the insured vehicle "upon the ways of the Commonwealth or to any place therein to which the public has right of access."[95] Thus it can be argued that since PIP coverage is now part of compulsory coverage by virtue of the act and since section 2 of the act added to rather than amended it, the same geographical limitation should apply. Accepting this argument, however, involves reading something into the language of section 2 which is not and should not be there.

It has been suggested that the geographical scope of all PIP coverage can be found in section 4 of the act, adding sections 34M and 34N to chapter 90 of the General Laws. The first paragraph of new section 34M, it is argued, contains an

> affirmative statement that the "no-fault" benefits "are granted in lieu of damages otherwise recoverable by the injured person in tort as a result of an accident occurring *within this Commonwealth.*" Since in this "positive" statement the limitation to the ways of the Commonwealth and places of public access is notably absent, the import of the language seems to relate [with certain exceptions] to accidents occurring *anywhere* within the Commonwealth.[96]

The difference between the "ways of the commonwealth" and "anywhere within the commonwealth" is that the latter also includes such places as private driveways and roads. Under the old liability system a limited cost savings resulted from the fact that compulsory insurance did not compensate persons injured in automobile accidents occuring in such places. There seems to have been, however, no rational policy reason for excluding that limited group of liability claimants from compulsory insurance recovery benefits. The cost savings could not have been very great since it is not likely that a significant number of accidents involving large losses occurred on private roads or driveways. It is suggested, therefore, in view of the slight cost savings and the apparent lack of some other good policy reason for making the distinction, that

94 MASS. GEN. LAWS ANN. ch. 90, § 1A (1969).
95 *Id.* § 34A.
96 Kenney & McCarthy 25-26.

PIP coverage at a minimum should apply anywhere within the commonwealth.

6. Deductible Provisions: Section 4

According to section 4 of the act, a person purchasing the required motor vehicle liability policy may, at his option, obtain a deductible endorsement on that policy applicable to himself alone or to himself and to members of his household. The deductibles allowed are in amounts of either $250, $500, $1,000, or $2,000. The Commissioner of Insurance is empowered to regulate the deductibles after appropriate hearings. Presumably, such an election will effect a premium savings for policyholders.

The deductible reduces the amount of PIP benefits due the insured or members of his household in the event of their injury in an automobile accident. It does not, however, affect the claims of non-household members who may be riding in the insured's car or those pedestrians struck by the insured vehicle. It also affects neither the tort liability exemption granted to the other driver,[97] nor any claims for automobile property and physical damage. Finally, it also has no bearing on whether or not the $500 of medical expenses requirement needed to support a tort action for pain and suffering under section 5 of the act[98] is met.

Like all deductibles, this one is a form of self-insurance in the sense that it places the risk of loss upon the policyholder and others to whom it is applicable rather than spreading it among all the policyholders. The deductibles were apparently included in the act to allow the policyholders who are also covered by medical coverage the option of avoiding double payment for similar coverage.

As was argued earlier, if policyholders are entitled to be paid under their medical coverage, they should not be entitled to recover those medical and related expenses already compensated for under PIP.[99] This suggestion, which has been incorporated into the Revised Draft,[100] eliminates the overlapping coverage for

97 See section III B of this Note.
98 See section III C of this Note.
99 See text *supra* preceding note 66.
100 Revised Draft § 2.

medical and related expenses. Of course, policyholders in such a position should have their PIP premiums reduced accordingly because of their reduced coverage. There would then be no need to make available to policyholders PIP deductibles to avoid unnecessary double premiums.

B. *Exemption from Tort Liability: Section 4*

To complement the payment of benefits regardless of fault, section 4 of the act provides for a partial elimination of tort actions to the extent of PIP benefits. After providing that PIP benefits are granted in lieu of damages otherwise recoverable, the section lists the conditions for and the limitations on the tort exemption. First, the exemption is granted only to a person who would himself be covered by PIP if injured in an automobile accident and to "any person or organization legally responsible for his acts or omissions" (apparently regardless of PIP coverage).[101] This eliminates out-of-state drivers or Massachusetts drivers whose PIP coverage was for some reason revoked or voided. Secondly, the exemption applies only if the injured person is entitled to recover benefits under PIP (and does not fall into one of the categories excluded under section 2 of the act) or from the insurer assigned. The tort exemption also bears a direct relation to the amount of PIP benefits the injured party is entitled to recover (disregarding the deductible).[102] Above that amount, the tort claim is preserved. Finally, the tort exemption does not apply to accidents occurring outside of Massachusetts[103] and, of course, does not apply to claims for automobile property or physical damage.

Under these requirements, if the injured person is not entitled to recover PIP benefits, either because he is entitled to workmen's compensation benefits or for some other reason, he can still maintain a tort action to the full extent of his injuries otherwise allowable by law regardless of the tortfeasor's own PIP coverage. The injured party can also always maintain a tort action for the 25 percent of wage loss which he is not entitled to recover under PIP by virtue of the limitation in section 2. However, as explained

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101 Act § 4, MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1971).
102 *Id.*
103 *Id.*

earlier, he is not likely to pursue this tort action other than in cases of very substantial loss. If the tortfeasor is not entitled to PIP benefits, either because his vehicle is registered out-of-state or because he has been denied benefits under section 2, an action in tort can be maintained against him to the full extent of the injury caused. Also, if the accident occurs outside of Massachusetts, either party can maintain an action in tort against the other, even if the accident involved two or more fully covered Massachusetts motorists. Finally, a PIP insurer paying benefits may, under traditional subrogation rights, bring a tort action against any person responsible for the damages to the policyholder who is not exempt from such liability under section 4. Matters still subject to tort law under the act and their implications will be considered more fully below.

Since the amount of the tort exemption is directly related to the amount of PIP benefits that the injured person is entitled to recover, the maximum exemption is ordinarily $2,000 under the act ($10,000 under the Revised Draft). However, under the Revised Draft, if the injured person had elected to purchase additional PIP coverage, the tortfeasor's exemption would be increased to an amount equal to the total PIP benefits the injured person is entitled to receive, ignoring any deductible.

C. *Pain and Suffering: Section 5*

Section 5 of the act limits an injured person's recovery of tort damages for pain and suffering to situations where (a) "reasonable and necessary" expenses incurred for his medical and related services exceed $500, (b) the automobile injury causes his death, or (c) the injury consists in whole or in part of his sustaining a fracture, loss of a body member, permanent or serious disfigurement, or loss of sight or hearing.[104] The Keeton-O'Connell plan, by way of contrast, allows a tort action for pain and suffering only if damages for pain and suffering would exceed $5,000.[105]

The act operates more objectively than the Keeton-O'Connell plan in the sense that it eliminates tort actions for pain and suffering unless at least one of three extrinsically identifiable conditions

104 Act § 5, MASS GEN. LAWS ANN., ch. 231, § 6D (Supp. 1971).
105 BASIC PROTECTION 274-75.

exist. In that respect, it is preferable to the Keeton-O'Connell cutoff below a certain level of damages, a subjective standard that is dependent on a jury's admittedly imperfect assessment of the financial value of the injured party's pain and suffering. The Revised Draft adopts a more objective standard and grants tortfeasors an exemption against all forms of liability unless one of two objectively identifiable conditions is present: (1) the injury must cause death or (2) the sum of the injured party's expenses and loss reimbursible by PIP must exceed $5,000.[106]

The objections to unlimited tort actions for pain and suffering are administrative ones: the difficulty of determining the extent of pain and suffering due to the automobile injury, the difficulty of placing an objective dollar value on it, the high incidence of fraud and exaggeration, and the fact that these complex questions take a disproportionate amount of the time of already overburdened courts. On the other hand, it must be recognized that the pain and suffering of a victim is a real element of damages in an automobile accident notwithstanding the problems of verification and objective evaluation. Damages for pain and suffering should not be abolished entirely just because of the administrative difficulties inherent in determining and evaluating it.

The way the act structures tort liability for pain and suffering, however, contains at least three major defects. First, tort actions for pain and suffering are retained in far too many cases by the low medical and related expense limit and because of the several specific injury provisions which allow these actions to be maintained regardless of medical expense or other loss. Maintaining such a low limit may very well encourage people with relatively minor injuries to exaggerate them in order to run up $500 in medical and related expenses. Thus allowing pain and suffering actions at such a relatively low limit will keep many of these unnecessary cases in the courts.

Second, the uneven manner in which the exemption from tort liability for pain and suffering applies raises the constitutional question of whether all tortfeasors are being afforded equal protection of the law. What difference does it make to the tortfeasor whether his victim suffers one kind of injury or another? What

106 Revised Draft § 5.

distinctive characteristic singles out certain kinds of injuries for the exemption from tort liability? It could be argued, perhaps, that a valid distinction exists between nonpermanent injuries, such as whiplash, and permanent injuries, such as the loss of a limb. However, section 5 also allows such a tort action if the injury consists of a fracture. Once one begins to include nonpermanent injuries, it becomes harder to draw the line in an effort to prevent the fraud and exaggeration that were prevalent in pain and suffering actions in the past.

This, then, brings us back to the question of why an exemption from tort liability for pain and suffering should be granted in favor of one tortfeasor and not in favor of another, assuming they both had medical and related expenses of less than $500. The Keeton-O'Connell plan largely, if not entirely, eliminates this constitutional problem by treating all tortfeasors who cause the same amount of damages alike, except those who cause death. The Revised Draft closely follows this approach. However, its equal treatment is based on the amount of PIP benefits the injured party is entitled to recover so it may vary slightly according to the medical expense–wage loss mix involved for what would otherwise be equal damages. The two year limit on recovery of medical and related expenses and the 75 percent maximum recovery limit on wage loss are the cause of the variations in PIP benefits. However, the difference between individual claimants with the same injuries and earning capacities is expected to be so small so as not to create any constitutional equal protection problems.

Third, the structure of the act's tort action exemption might have unwittingly left the door open, contrary to the probable intention of the act, to a tort action for inconvenience or for general compensation for an injury that otherwise meets the standards that bar a tort action for pain and suffering. Such an interpretation is possible because of the peculiar structure of the act which first grants benefits "in lieu of tort damages otherwise recoverable." However, the act then goes on to exempt tortfeasors from liability in the second paragraph of section 4 to the extent that the injured parties are entitled to benefits, i.e., for out-of-pocket loss. Still later, in section 5 it exempts tortfeasors from liability for pain and suffering unless certain conditions are met.

Thus, the act leaves itself open to an interpretation that it did not intend to exempt the tortfeasor from a tort action for inconvenience or for general compensation.

The Revised Draft allows tort actions only if the injured person's economic loss covering the type of items reimbursable by PIP insurance exceeds $5,000 or if the injury results in death. Payments that the injured person is entitled to under a wage continuation plan or under non-PIP medical insurance are not deducted in computing that $5,000. For ease of administration, no deductions to take account of tax advantages or possible malingering are made from gross wage loss either. The Revised Draft's standard is more inclusive than the act's despite the fact that the former's dollar requirement is considerably higher. This results from the fact that the act includes only medical and related expenses in its pain and suffering tort exemption provision while the Revised Draft also includes wage loss and the cost of replacement services. Hopefully, the Revised Draft strikes a better balance than the act between the administrative difficulties inherent in pain and suffering actions and the reality of these factors as an element in automobile accident damages.

Moreover, the Revised Draft provides additional coverage for pain, suffering and inconvenience available at the policyholder's option. Any policyholder purchasing such a coverage would automatically be entitled to be paid for the pain, suffering and inconvenience he presumptively incurred as a result of an injury received in an automobile accident. He would be paid according to a specific workmen's compensation-type of schedule that correlates the payment with the nature of the injury. Payment under such a schedule would eliminate much of the exaggeration and fraud that was involved in past pain and suffering actions where the valuation of the damages was left to a judge or jury. It was felt that this coverage should not be made compulsory since it pays for non-out-of-pocket expenses which motorists could sustain without becoming a financial burden on others or on the public.

D. *Matters Still Subject to Suit*

The most important types of tort actions for recovery of damages arising out of motor vehicle accidents that may still be brought under the act include:

1. All property and physical damage claims.[107]
2. The 25 percent of wage loss not covered by section 2.
3. The balance of medical and related expenses, wage loss, payments made to others for replacement services, to the extent that they exceed, singly or in combination, the PIP limit.
4. Recovery of expenses incurred for medical and related services needed more than two years from the date of the accident.
5. Actions for pain and suffering to the extent that they are allowed by section 5.
6. Recovery of all damages for accidents occurring outside of Massachusetts.
7. Recovery of damages for pain and suffering in suits against persons not covered by PIP (primarily non-Massachusetts residents).
8. Suits by injured persons excluded from recovering PIP benefits under the policy covering their own car because of the provisions of section 2.

In addition, the unpaid party has a contract action available against the insurer if his PIP benefits remain unpaid for more than thirty days.[108] To discourage insurers from attempting to pressure claimants into an inadequate lump sum settlement, an interest charge on the amounts recoverable after thirty days has been suggested in the Revised Draft.[109]

Finally, there are the problems of causation and damages which, though not specifically mentioned as a problem in the act, will likely continue to be matters of dispute and possible litigation between claimants and insurance companies. It is almost certain that court and legal costs will be reduced under the act and that similarly many of the problems discussed in section I will be diminished or eliminated entirely because "fault" determination would be irrelevant in most accidents. However, the problems of whether and how much of the damages claimed in fact resulted from an automobile accident will still remain even under a "no-fault" system. Unless the insurance system is willing to pay all

107 See note 26 *supra*, for a full definition of these terms.
108 Act § 4, MASS. GEN. LAWS ANN., ch. 90, § 34M (Supp. 1971).
109 Revised Draft § 4.

claims without question and unless its subscribers are willing to bear the additional costs created thereby, disputes over the ocurrence of an accident and the extent of damages it caused will have to be resolved before benefits can be paid. Thus, insurance companies will continue to have some administrative and investigative costs on these matters. Also, court and legal costs, as well as other problems incident to litigation, will not be eleminated entirely even for items covered by the act.

To a certain extent, the problem of excessive and fraudulent claims for damages will also be present under the "no-fault" system since it is not necessary to show that anyone else was at fault in order to recover under the act. This problem may be particularly troublesome where the injury is claimed to have resulted from a one car accident where there are no police reports or disinterested witnesses available. The act's requirements that claimants submit to physical examinations by physicians selected by the insurer as often as may reasonably be required and that they assist the insurer to obtain medical reports and other information needed to determine the amounts due[110] were obviously designed in part to reduce fraudulent and excessive claims. The act makes noncooperation of the claimant in these and other matters a defense to the insurer in any suit for PIP benefits.[111] Assessing court costs against a losing claimant might serve as an additional deterrent against such claims. But it must be recognized that the elimination of "fault" determinations in most accidents under the act will not necessarily eliminate all the additional costs in the insurance system that reduced the percentage return on the insurance premium dollar under the old system.

E. *Payment of Benefits: Section 4*

With one exception, PIP benefits are due and payable "as loss accrues" upon receipt by the insurer of "reasonable proof of the fact and amount of expenses and loss incurred."[112] The old negligence system had often been charged with being too slow in delivering payments. The insurance companies' required investi-

110 Act § 4, MASS. GEN. LAWS ANN., ch. 90, § 34M (Supp. 1971).
111 *Id.*
112 *Id.*

gations of "fault" and court suits were often necessary when the parties disagreed either on the issue of fault or on the extent of damages. Frequent litigation extended the damage settlement process and the ultimate time of payment to the accident victim. Especially in cases of serious injury, the accident victim under that system often suffered severe economic hardship when his medical and hospital bills mounted up during the delay. If he had insufficient or no medical payments coverage and could not work, he was often forced to deplete his savings. It was in such situations involving serious injury, mounting medical costs and depleted savings, that insurance companies often used their bargaining position to the fullest to pressure a claimant into accepting a smaller settlement than he would have obtained in court.

The act's low $2,000 compulsory coverage limit unfortunately results in the retention of many of these hardships and abuses in cases where the accident victim's loss is above that amount. In fact, the larger the additional loss, the more likely that hardship or abuse will occur. If the maximum amount of benefits payable under the compulsory minimum PIP coverage were raised, the injured party's need to use his own resources would be alleviated.

Periodic payments are designed to minimize economic hardship and sacrifice during that period of time when beneficiaries would otherwise have had to wait for payment under the negligence system. They also put less pressure on the insured to settle for an inadequate lump sum payment and encourage quick physical and vocational rehabilitation that might otherwise have been delayed for lack of immediate funds. Finally, they relieve the system of the significant cost expended under the old system for predicting and overestimating future loss.

In any case where PIP benefits that are due and payable remain unpaid for more than 30 days, the unpaid injured party has a cause of action in contract against the insurer responsible for the payment.[113] The insurer, however, "may agree to a lump sum [payment] discharging all future liability for such benefits on its own behalf *and on behalf of the insured.*"[114] The words "such

113 *Id.* (emphasis added).
114 *Id.*

benefits" refer back to the PIP benefits mentioned earlier in the same sentence.

The following example illustrates the effect this provision has on the extent of the insured's tort liability. Assume a driver of a Massachusetts-registered vehicle carrying only the compulsory $2,000 PIP coverage is injured in an accident involving another similarly registered car. If he sustains $3,000 damages of the type recoverable under PIP but settles with his insurance company for a lump sum payment of only $1,000, to what extent is the other driver exempt from tort liability? Is he exempt to the extent of $3,000, $2,000 or $1,000? The other driver clearly is not exempt to the extent of the full $3,000 of expenses and loss because of the $2,000 ceiling on compulsory coverage. The tort exemption is applicable only "to the extent that the injured party . . . is entitled to recover" benefits granted by the act.[115] At a minimum, $1,000 of expenses and losses are still recoverable by the injured party via a tort suit.

The likely interpretation of the act is that the insured is exempt to the extent of $2,000, despite the lower amount actually paid to the injured party. Since the injured party is "entitled to recover" up to $2,000 from his insurer by simply presenting evidence of his recoverable losses up to that amount, and presumably would have done so had he not decided to accept a smaller lump sum payment, it is suggested that the other driver is entitled to an exemption of the full $2,000. This interpretation argues that collecting the first $2,000 of loss under the act is a matter to be resolved between the injured party and the insurance company. No claims up to this amount should be brought into court. If the exemption is less than the full $2,000, the courts would still have to resolve the issue of "fault" on claims even below $2,000. The tort exemption would then depend on the actions of the injured party. Arguably, this would seriously undermine one of the most important reforms sought by the act.

Admittedly, however, the argument that the exemption should be only $1,000 is also supportable. As we shall see later, the insurer who pays out PIP benefits under the act has "special subrogation

115 *Id.*

rights," which enable it to recover amounts it has paid from the insurer of the driver who was at fault.[116] This settlement between the two insurers, which is to take place privately or by arbitration under the act, would result in the tortfeasor's insurer paying for the losses of both the injured party and the tortfeasor. Keeping this scheme in mind, it does not appear inconsistent to have the tort exemption apply only to the amounts the injured party's insurer actually paid out. The tortfeasor — or more specifically his insurer — should not escape paying for all the damages regardless of any private arrangements made between the injured party and his insured. Under this interpretation the term "entitled to recover" in the provision quoted above is read to mean the amount the injured party actually recovers under his insurance policy, because the amount he settles upon with his insurer is the amount to which he is "entitled."

This last interpretation, however, is somewhat inconsistent with the special subrogation rights themselves. Those rights are designed to keep litigation over "fault" out of the courts, while this limited reading of the extent of the tort exemption would still result in such matters being argued in the courts. A further distinction, already suggested, is that the special subrogation rights require the tortfeasor's insurer to pay for the losses incurred, while tort liability would subject the driver himself to personal liability. On a practical level, however, this distinction would probably disappear, because the PIP insurer in all probability will also be the driver's liability insurer.

In sum, the exact extent of the tort exemption provided by the act when there is a lump sum settlement of under $2,000 still remains unclear. There is statutory language and policy arguments supporting both views suggested above, and the Basic Liability Form does not help to resolve this matter, as it does with a number of other ambiguous sections in the act.

Besides this confusion there is another major objection to permitting lump sum settlements under the act. Insurers may be tempted to use the opportunity to force claimants into inadequate settlements as they have done in the past. Injured persons may, for a variety of reasons, need cash right away and be willing to

116 See *id.* See also section III G of this Note.

bargain away periodic payments for an immediate lump sum payment. This temptation is increased by the fact that there is no administrative or judicial supervision or approval of lump sum settlement called for under the act. By way of contrast, workmen's compensation law in Massachusetts requires that the Industrial Accident Board approve all lump sum settlements. Under PIP, however, it would seem more rational still that lump sum settlements be prohibited altogether. The Revised Draft accomplishes this simply by not including any provision for such payments. This change also avoids problems concerning the extent of the tort exemption.

There is one exception to the requirement benefits be paid periodically as loss accrues. In the second paragraph of new section 34M, the act says:

> if any person claiming or entitled to benefits under personal injury protection provisions of a policy . . . insuring a vehicle registered in this commonwealth brings, in such a case, an action in tort against the owner or person responsible for the operation of such vehicle, amounts otherwise due such a person under the provisions of section thirty-four A shall not become due and payable until a settlement is reached or a final judgment is rendered in such a case and the amounts then due shall be reduced to that extent that damages for expenses and loss otherwise recoverable as a personal injury protection benefit are included in any such settlement or judgment.[117]

The term "in such a case," used twice in the prior sentence, may refer to the case described in the preceding sentence of the act which says that "[n]o such exemption from tort liability shall apply *in the case of* an accident occurring outside the commonwealth."[118]

As noted earlier, PIP applies to accidents which occur while the insured vehicle is anywhere in the United States or Canada.[119] However, because Massachusetts cannot change the tort law in other states by its own legislation, the exemption from tort liability cannot apply to accidents occurring out-of-state. The pro-

117 Act § 4, MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1971).
118 *Id.* (emphasis added).
119 See BASIC LIABILITY FORM, 12. See also text preceding note 131 *supra*.

vision of the act quoted in the previous paragraph could, therefore, be interpreted as applying only to cases in which a person entitled to PIP benefits under a policy insuring a vehicle registered in Massachusetts is injured while traveling out-of-state. If that person then proceeds to bring a tort action against the person responsible for the operation of the offending car, this interpretation would authorize the insurer to defer payments until settlement or final judgment of the tort action. To the extent that the expenses and loss otherwise subject to PIP coverage are included in the settlement or judgment, the insurer's liability thereunder would be equivalently reduced and may in fact be extinguished.

The provision quoted above, however, can also be read to mean that whenever an injured party brings a tort suit to recover his damages, the insurer can defer making any payments. This interpretation seems more consistent with the probable intent of the original draftsmen who, as noted earlier, represented industry interests. Furthermore, because it is possible for an injured covered by PIP to have a choice between collecting under his policy or via a tort suit even if the accident occurred in Massachusetts, there would seem to be no basis for making a special distinction for accidents occurring out-of-state. Such a choice would be available in Massachusetts, for example, in an accident caused by an out-of-state vehicle. Also, if the tort exemption provision is read to apply only to the extent the injured person has actually received any PIP benefits, it appears that a PIP insured can sue even another PIP insured in tort for the first two thousand dollars of damages. If such a suit is permissible, as the provision under consideration might imply, then the same policy factors would apply whenever an injured party brings suit. This interpretation is supported by the Basic Liability Form which defers payment of PIP benefits in all cases where "any person claiming or entitled to [PIP] benefits . . . brings an action in tort against the owner or person responsible for the operation of *any* vehicle."[120] It is at least arguable that the courts ought to follow this administrative interpretation, made by the insurance commissioner in approving the policy form, because of the obvious ambiguity in the act.[121]

120 BASIC LIABILITY FORM 8 (emphasis added).

121 A third interpretation falls somewhere between the two suggested in the text. It would limit deferral to suits by passengers or pedestrians entitled to PIP

Whether the deferral provision is desirable is not an easy question. It can be argued that there are savings in the administrative costs of the PIP insurance system if claims are disposed of in one action, rather than in a whole series of transactions involving payments to the injured party, exercise of special subrogation rights, and litigation over liability for damages above the amount paid for by PIP. To this extent the deferral provisions seem sensible.

However, there are other considerations which detract from the beneficial impact of this provision. Parties suffering damages of less than $2,000 would be ill advised to bring a tort suit to recover those damages, when the simpler, more expedient "no-fault" PIP route is open to them. Persons with more extensive damages, however, will be faced with a difficult choice: they can either collect the first $2,000 in damages — made in periodic payments — and bring a tort suit afterwards for the remainder, or they can sue for the entire amount immediately and give up the right to current PIP benefits. This is a particularly severe choice for a person with large losses and limited financial resources. Though he needs the periodic payments to cover his losses as they accrue, he also wants to bring his suit as soon as possible, perhaps to avoid statute of limitations problems, or simply to have the liability for the major portion of his damages determined at the earliest possible date.

This choice could have been avoided under the act. Even if the PIP insurer had to make the required periodic payments in such situations, it would still have had the traditional subrogation rights granted in section 4.[122] The insurer would certainly have this protection if the claimant were required to inform the insurer of any such suits. Moreover, it must be noted that the deferral provision itself can only be applied when the insurer knows of such action being taken by the claimant. Finally, it might be argued that there would not be any great additional administrative cost under the system suggested because the tort suit, which is destined to be instituted in any event, would also eliminate the need for any action under the insurer's special subrogation rights. The payment of the periodic benefits provides the protection

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benefits under a policy insuring a Massachusetts vehicle against the owner or person responsible for the operation of that car. Kenney & McCarthy 37.

122 See section III G of this Note.

afforded by the other provisions in the act. For this reason, it is suggested that the allowance of deferral of benefits be dropped entirely.

The Basic Liability Form provides that:

> if the insured has other personal injury protection insurance [applicable to him], the benefits payable under all available policies shall not exceed the highest amount of benefits payable under any one policy (giving full effect to any applicable deductible), considering each to be the only policy available. The [insurance] company shall not be liable for a greater proportion of any amount of benefits claimed than the benefits payable under this policy (giving full effect to any deductible applicable), if there were no other insurance, bear to the total of the benefits payable under this policy and all other policies (giving full effect to any applicable deductibles), considering each to be the only policy available.[123]

It is hard to imagine a way that an insured could have applicable "other personal injury protection insurance." This provision apparently deals with a situation under which the insured would recover, but for the proviso, PIP benefits under two different coverages. But a policyholder can never recover under both "primary" and "other vehicle" coverage if he is riding in a car at the time of the accident. The situation to which this provision would apply apparently is where the insured is a pedestrian struck in the same accident by at least one vehicle not covered by PIP and by one or more PIP covered vehicles. In such a situation, but for the proviso the injured pedestrian, would be entitled to benefits under the "primary vehicle" coverages of all PIP covered automobiles that struck him and under his own "other vehicle" coverage if any of the automobiles that struck him did not carry PIP coverage.

The effect of the provision is to hold the policyholder's insurer and the insurers of those automobiles having PIP coverage severally but not jointly liable for the PIP benefits due the injured person. In other words, each of the insurers is liable only for a proportionate share of the PIP benefits due the policyholder and none has to pay additional benefits if one of them defaults or for some other reason cannot pay his share. However, there is no

123 BASIC LIABILITY FORM 8-9.

specific language in the act authorizing the reduction of an insurance company's liability in such a manner, and perhaps it will be unenforceable for this reason. In any event, it is suggested that insurers should be made jointly and severally liable, as in the normal procedure to assure the policyholder the full recovery to which he is entitled.

Finally, in order to avoid the possible abuses pointed out above, it is suggested that insurers delaying payment of PIP benefits be made to pay a financial penalty. The Revised Draft has provided that the insurer paying benefits after thirty days also must pay a ten percent annual interest charge.[124]

F. *Claims Procedure: Section 4*

The act requires that a claim for PIP benefits be presented to the insurance company "as soon as practicable after the accident occurs from which such claim arises, and in every case, within at least two years from the date of the accident."[125] The claimant must also file "a written description of the nature and extent of injuries sustained, treatment received and contemplated and such other information as may assist [the insurance company] in determining the amount due and payable."[126]

It is not altogether clear that these provisions apply to the injured party's informing the insurer of a tort suit which he personally initiates against an alleged tortfeasor or to his providing a list of the other individuals involved in an accident. This information may be necessary to protect the insurer's subrogation rights. In any event the Basic Liability Form clearly includes these requirements.[127] To avoid any misinterpretation, the Revised Draft does so too.[128]

Section 4 of the act also requires that if benefits for wage loss are claimed under PIP, the injured person must authorize the insurer to obtain details of all wage payments made to him by any employer or otherwise earned by him in the year immediately preceding the date of the accident. In addition, the injured person

124 Revised Draft § 4.
125 Act § 4, MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1971).
126 *Id.*
127 BASIC LIABILITY FORM 8.
128 Revised Draft § 4.

must authorize the insurer to make any "reasonable necessary investigation" to determine the existence of a wage continuation program that could serve to reduce, in part or in whole, the wage loss claim. Finally, the injured person must submit to physical examinations by physicians selected by the insurance company "as may be reasonably required" and "shall do all things necessary to enable the insurer to obtain medical reports and other needed information to assist in determining the amounts due."[129]

This latter provision clearly furnishes the insurance company with a useful tool to deter fraudulent claims and malingering. Yet by its vagueness, it could also leave the way open to much litigation, or at least dispute and delay in settling claims, over its meaning and application. Such delays would be especially undesirable if used to pressure claimants into accepting lump sum settlements below their actual losses. Because no specific standards could be found that would apply with equal fairness to both the claimant and the insurance company in all cases, it seems more reasonable that, in the absence of a significant number of reported abuses, reliance could be placed on the general "reasonably required"[130] standard and on the effective enforcement of that provision by the Commissioner of Insurance and the courts. If, in actual experience, the insurance companies do abuse their right to require the claimant to submit to physical examination, it would seem appropriate that specific standards as to the time, place, frequency, and scope of examination be incorporated into the act, even though they may not apply to every case with equal fairness. It may even be appropriate under the act's current formulation to put the burden of proof as to reasonableness on the insurers. Allocating the burden in this way would make it harder for abuse under this provision to occur in borderline situations.

G. *Insurer's Subrogation Rights: Section 4*

Under section 4 of the act, a PIP insurer retains full subrogation rights in one form or another. First, an insurer paying PIP benefits is "subrogated to that exact extent to the rights of any party it pays and may bring an action in tort" against any responsible

129 Act § 4, MASS. GEN. LAWS ANN., ch. 90, § 34M (Supp. 1971).
130 *Id.*

party not exempt from liability under this same section.[131] The Basic Liability Form contains a trust agreement which spells out these traditional subrogation rights in more detail.[132] It states that if a person who has received PIP benefits, through the exercise of any legal rights he might have, obtains any recovery from another party which covers the damages which those PIP benefits compensated, then the PIP insurer is entitled to recover those amounts. In addition, the PIP beneficiary is expected to protect ("hold in trust") all rights of recovery he might have for the benefit of the insurer. Finally, upon written request from the insurer, the beneficiary is expected to take "such action as may be necessary or appropriate to recover such payments . . . from such other person." The company can designate the representative who will handle the action.[133]

Secondly, a PIP insurer also has special subrogation rights created by the act. The act entitles the insurer to recover for *all* expense it incurred on account of PIP benefits from the liability insurer of the responsible party who, but for the exemption from tort liability provided in the act, would have been liable in tort for the damages compensated by the insurer's PIP benefits.[134] The amounts recoverable include, in addition to the net amount of benefits paid out, its cost of processing claims for benefits and the expense of enforcing its special subrogation rights. However, the PIP insurer can not recover under its special subrogation rights unless the exempt tortfeasor would have in fact been held at fault had the case gone to court.[135]

Special subrogation rights, therefore, bring up the question of "fault" all over again and seem to retain many of the investigative and administrative expenses that "no-fault" insurance was designed to eliminate. Needless to say, this "fault" question will often be difficult to resolve in the absence of actual litigation and will continuously be a matter of dispute between the insurers involved. The act provides that such disagreements as to "fault" (and other matters which bear on whether the PIP insurer is

131 *Id.*
132 BASIC LIABILITY FORM 8.
133 *Id.*
134 Act § 4, MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1971).
135 *See id.*

entitled to recover expenses from another insurer) should be resolved by agreement between the involved insurers and, failing that, by arbitration. Litigation of "fault" in court is thus precluded. The act has been criticized as not really abrogating the "fault" concept but rather, to the extent that it is applicable, merely transferring it "from the traditional parties and forum to a matter for determination between the insurers."[136] In practice, it is unlikely that the insurers involved will voluntarily agree on whether or not the exempt tortfeasor was "at fault" in the traditional sense, so they will initially have to work out special subrogation rights through an abritration procedure. Eventually, the costs of arbitration and investigations should turn insurers away from these procedures and towards setting up formulae for allocating the costs of PIP benefits in each case. Should this occur, then special subrogation rights, included in the act as a concession to the "fault" principle, will have resulted in truly spreading out the costs of automobile accidents to all drivers. Insurance companies will share the costs of all PIP benefits paid by means of the expected special subrogation claims formula and premiums will be adjusted accordingly so that the policyholders will also share in the costs. In this way, the important objective of internalization of automobile accidents costs to the motoring public will be accomplished through the "no-fault" system.

H. *Assigned Claims Plan: Section 4*

Section 4 of the act directs PIP insurers to organize and maintain an assigned claims plan which will provide PIP benefits to any Massachusetts resident injured in an automoblie accident occurring in the state if no PIP benefits are otherwise available to him. These injured parties will be assigned to the various insurers writing PIP policies according to "the approved regulations of operation."[137]

The plan was designed primarily to cover Massachusetts residents not insured under any policy providing PIP benefits for injuries caused by out-of-state or hit-and-run vehicles.[138] Ordi-

136 Kenney & McCarthy 47.

137 Act § 4, MASS. GEN. LAWS ANN., ch. 90, § 34N (Supp. 1971).

138 The tort claim of such an injured party is not subject to the act's exemption from tort liability, since neither he nor the tortfeasor have PIP coverage. However, the injured party's pain and suffering claim may be subject to the ex-

narily, a Massachusetts resident injured in an accident involving a non-Massachusetts registered vehicle or a hit-and-run car will be able to recover either under the "primary vehicle" coverage of the car in which he is riding or, if injured as a pedestrian or riding in an out-of-state car, under the "other vehicle" coverage of his own car.

If in either of the latter two situations neither the injured person nor any member of his family owns a car, there is no policy under which he can proceed to collect PIP benefits. He must then proceed under a tort claim against the driver of the other car. However, if the other driver is insolvent as is often the case, he may be left holding a worthless judgment. Furthermore, if the driver in a hit-and-run accident cannot be found, he will not even have that much.

The assigned claims plan was designed to provide PIP benefits in this kind of case. It assures that *all* Massachusetts residents are able to recover under PIP for injuries sustained as a result of an automobile accident in Massachusetts, thus filling the gap between "primary" and "other vehicle" coverage.

Once a claim is assigned to an insurer under this plan, both the claimant and the insurer have the same rights and obligations to each other as though a policy providing PIP benefits actually existed between them.[139] This is especially important as to the insurer's traditional subrogation rights. Furthermore, the assigned insurer paying PIP benefits is entitled to bring a tort action against the non-exempt tortfeasor to recover the amounts paid out. Finally, as the Basic Liability Form seems to suggest, if the injured party himself brings a tort action against the owner or driver of the vehicle involved in the accident in which he is injured his PIP benefits will be deferred until a settlement is reached or final judgment is rendered and then reduced to that extent.

I. *Merit Rating Plan*

Section 7 of the act establishes a merit rating plan effective January 1, 1972. Under this plan, the Commissioner of Insurance, when fixing the premium charges to be used in connection with

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emption in § 5 of the act which seems to apply to any accident occurring in the state regardless of eligibility for PIP benefits.

139 Act § 4, MASS. GEN. LAWS ANN., ch. 90, § 34N (Supp. 1971).

the compulsory motor vehicle liability policies,[140] is also directed to establish "reasonable" surcharges, above the premiums otherwise due, for each conviction for a moving traffic violation committed within a specific period by the policyholder or by any other member of his household authorized to drive the insured vehicle. The Commissioner is also directed to establish "reasonable" discounts to be applied when neither the policyholder nor any other PIP covered driver residing in his household has been the driver of a vehicle involved within a specific period in a reportable automobile accident.[141] In the absence of a finding otherwise by the Commissioner, based on data accumulated during the operation of plan, the act itself establishes some presumptive surcharges and discounts. The statutory surcharges for each of various convictions are as follows: (1) driving under the influence of intoxicating liquor or a narcotic or hallucinogenic drug, 100 percent; (2) speeding, 20 percent; (3) other moving violations, 10 percent. A presumptive discount of 2 percent is provided for each year without a reportable accident.[142]

Despite these incentives and penalties the merit rating plan will probably not have a significant impact on the driving habits of Massachusetts motorists. First, apart from the absence of a surcharge, there is only a slight reward given for being a good driver, a 2 percent discount in the compulsory insurance premium.[143] Secondly, there is often no penalty for causing an accident or even a number of accidents, because the merit rating surcharges are tied to convictions for moving traffic violations and not to accidents. As long as the motorist is not convicted of a moving violation incident to the accident (which is often the case), he does not suffer the penalty of an insurance premium surcharge. Finally, if the already existing deterrents of fear of injury to one's self or one's passengers, of fear of criminal fines for violating traffic laws and of fear of loss of one's license to drive do not make drivers safety conscious, the merit rating plan can't be expected to have much effect either.[144]

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140 Act § 7, MASS. GEN. LAWS ANN., ch. 175, § 113B (Supp. 1971).
141 *Id.*
142 *Id.*
143 *Id.*
144 No consideration is given here to the effect no-fault insurance itself may

J. *Mandatory Additional Coverage Option: The Revised Draft*

The Revised Draft requires that PIP insurers offer policyholders the additional PIP coverage "unlimited in amount"[145] and also offer additional coverage for pain, suffering and inconvenience not otherwise recoverable because of the provisions of section 4 under a schedule to be established by the Commissioner.

As explained earlier, the objectives of optional unlimited additional PIP coverage is to provide automobile accident victims with full coverage for those drivers who are willing to pay for it. The idea of having compulsory PIP coverage provide full compensation for losses and expenses resulting from automobile accidents was rejected because it would raise the costs of PIP premiums to an unacceptable level. Under unlimited compulsory PIP coverage, premiums would have to reflect the actuarial risk of loss of income by persons at different income levels. Since persons with similar driving records would be paying the same premiums (exclusive of possible territorial differences and variances) under unlimited PIP coverage, persons in lower income brackets would, in effect, be subsidizing the loss of the earnings portion of the coverage for persons in higher income brackets.

PIP benefits should be available in unlimited amounts above $10,000 but only for those policyholders who are willing to pay higher premiums for such coverage. The $10,000 compulsory PIP coverage limit was chosen for the Revised Draft, among other reasons, because it was felt that this figure would cover most, if not all, of the earnings loss of persons in the median income range. On the one hand, a person earning $25,000 per year would, under the Revised Draft, be able to purchase complete coverage under PIP for loss of earnings (assuming his total losses and expenses

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have on the way people will drive. It has been suggested, for example, that it may have a tendency to increase the number of small or minor accidents, because they will be relatively "cheaper" under a no-fault system than under a liability system. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 55-56 (1970). There are a number of difficulties in accepting such an analysis. For example, it is submitted that drivers do not think of themselves as taking chances of becoming involved in accidents in the way they drive. If they do, though, they are more likely to think in terms of the injuries they might suffer (it being virtually impossible to predict whether an accident will be minor or major before it occurs) rather than in terms of the dollar cost involved.

145 Revised Draft § 7.

do not exceed the amounts recoverable under the additional coverage) at additional cost. In the meantime, a person earning $5,000 per year would, under the Revised Draft, be able to have complete coverage (assuming his total losses and expenses do not exceed the amounts recoverable under the compulsory coverage) at no additional cost. This is not an equitable structure since the person who is entitled to more PIP benefits for loss of income is just paying more for that additional coverage.

As pointed out earlier, recovery of damages for pain, suffering, or inconvenience is not objectionable per se, but rather the manner in which these were recoverable under the old negligence system and the consequences that arose therefrom were undesirable. In addition to allowing tort actions for these items under certain conditions,[146] the Revised Draft also requires PIP insurers to offer additional coverage to policyholders, at their option, for such damages.[147] Such benefits are to be payable under a schedule that is tied to the type and extent of disability and injury suffered. Recovery under such a schedule is preferable to an open-ended system of recovery because both the costs and complexities of administration and the opportunities for fraud and exaggeration are reduced. Despite the fact that some tort actions for pain, suffering and inconvenience are still allowed under the Revised Draft, it is hoped that motorists will purchase this additional coverage because of the speed and reliability of payments under that method. Additional coverage for pain and inconvenience was originally recommended by the Keeton-O'Connell Plan.[148]

IV. Damage to Property

As pointed out at the beginning of the previous section, the act does not cover damage to property, including automobiles, or otherwise affect claims for property or physical damage.[149] This omission limits the reform achieved by the act. The omission of property damage in the act was probably one of the compromises made by its sponsors in order to pass the reform measure. Most

146 *Id.* § 5.
147 *Id.* § 7.
148 Basic Protection 285-86.
149 For a full definition of the last two terms, see note 37 *supra.*

of the defects in the old negligence system of automobile liability insurance apply equally to property damage. Since most automobile accidents, especially minor ones, involve only vehicular damage, retaining the old system for property liability claims will continue to keep the courts clogged with such cases, premiums high and continue many of the other faults of the old system.

Any comprehensive system of "no-fault" automobile insurance should, therefore, include in addition to bodily injury coverage, coverage for damage to another's property as well as to the policyholder's own automobile. Although such coverage is strongly recommended by this Note, no attempt was made to include it in the Revised Draft. It is suggested that interested persons look at the recently proposed Keeton-O'Connell Vehicle Protection Insurance Plan,[150] as an example of the type of property damage that might be included in a "no-fault" system. Without going into details of that plan, it is sufficient to note that its authors expect that it will simplify procedures for collecting insurance benefits for damage to cars, give responsible motorists a greater range of choice about property damage insurance than they generally have today and offer substantial savings in premiums to a majority of car owners.[151]

V. Summary and Conclusion

The Massachusetts Personal Injury Protection Act of 1970 established a split system of automobile bodily injury insurance in the state, providing limited no-fault coverage on one level and retaining the traditional fault system on the other. It abolished the fault principle for certain injuries and excluded damages for pain and suffering from the terms of its coverage for less serious injuries. However, it also retained the fault principle and recognized pain and suffering as an appropriate element of recovery in tort for more serious injuries.

A split system of automobile insurance coverage had been proposed by the Keeton-O'Connell Plan, on which the act is

150 See note 34 *supra*.

151 Statement of Robert E. Keeton before the Joint Committee on Insurance, Massachusetts, on Vehicle Insurance, House Bill No. 387 of 1971, Feb. 2, 1971.

largely based. However, both the maximum amount of "no-fault" benefits recoverable under compulsory coverage and the dollar cut-off for allowing tort actions for pain and suffering are considerably higher than in the Keeton-O'Connell Plan under the act. There are also other major and minor differences between the two schemes. Under the act, the personal injury protection insurer paying benefits has regular subrogation rights against a non-exempt tortfeasor and special subrogation rights against an exempt tortfeasor's liability insurer if the tortfeasor "would, except for the exemption from tort liability provided [by the act], be liable for . . . damages in tort" because of the accident.[152] Regular subrogation rights are, of course, preserved under the Keeton-O'Connell plan but the special subrogation rights create an entirely new structure under the act based on the traditional fault concept. The apparent net effect of these special subrogation rights then is to retain the fault principle in most cases and to merely shift it from a matter of dispute between the injured person and the alleged tortfeasor to a matter of determination between their insurers which is to take place out of the courts. This shift alone is likely to help unclog the courts, speed up payments and eliminate many of the criticisms of the old "fault" system. In addition, this shift is likely to have a more far reaching effect in truly spreading out the costs of automobile accidents among all drivers.

Of the several objectives of an ideal "no-fault" automobile insurance system discussed, the act only really meets about half of them, and even there the successes are questionable. The act has reduced the cost of premiums for the calendar year 1971, but it required a specific legislative directive to do so. Whether the costs of PIP premiums can be kept down in future years once the new system is in operation remains to be seen. The cost of premiums is also tied to the question of the overall efficiency of the act's split system. Although the percentage return on the premium dollar in the form of benefits is likely to be higher under PIP since many administrative costs are either reduced or eliminated, an assessment of the new system's efficiency must await some experience under the act. PIP benefits recoverable under the act are

152 Act § 4, MASS. GEN. LAWS ANN., ch. 90, § 34M (Supp. 1971).

required to be paid promptly and periodically, hopefully making them reliable.

The primary criticisms of the act go to its limited scope of compulsory coverage, the totally inadequate structure of its limited tort exemption, and the poor drafting found throughout. The gap in the act that might leave the door open to unrestricted tort actions for inconvenience or for general damages is just one example of the latter. The $2,000 limit on PIP benefits available under the compulsory coverage is inadequate to cover accident victims with large economic losses and expenses and tends to perpetuate the malapportionment of benefits criticized under the old negligence system. In effect, the compulsory coverage under the act is sufficient to fully compensate most accident victims with minor injuries but to only partially compensate those with more serious injuries thus forcing them to look to the already much criticized tort system for the remainder of their uncompensated losses and expenses. The $500 of medical and related expenses and the list of non-fatal injuries and disabilities, any of which are sufficient to maintain a tort action for pain and suffering, make it relatively easy for accident victims who require even a short stay in the hospital or who suffer anything more than a slight injury to bring such actions. Taken together, the $2,000 compulsory PIP benefit limit and the $500 pain and suffering exclusion make the worst possible combination. They inadequately compensate accident victims with more serious injuries while at the same time forcing them and others with less serious injuries to look to the old negligence system for a portion of their bodily injury damage recovery and for recovery of damages for pain and suffering.

Needless to say, this forced return to the old negligence system under the act undermines many of the objectives of "no-fault" insurance. Full and adequate compensation of losses and expenses resulting from automobile accidents will not always be certain if part of the damages have to be recovered under the old negligence system. Many of the administrative, investigative and court costs that lower the efficiency of the negligence system will be retained under the act's split PIP-tort liability system. Payments recoverable under the negligence system will not always be either

prompt, periodic or predictable. Motorists will have to maintain liability insurance since they will still be subject to tort actions for bodily injury damages and for pain and suffering in many instances. Finally, the many automobile injury tort actions still retained by the act will continue to clog the courts and contribute to the numerous problems and inefficiencies resulting from court congestion.

The Revised Draft attempts to improve on the act in several ways. By raising the amount of compulsory minimum PIP coverage to $10,000, the Revised Draft makes a more realistic attempt than the act to cover all minor and many major accidents. It thus significantly limits the number of tort actions needed or allowed for both bodily injury damages and for pain and suffering. It expands the additional coverages available in terms of both type of injury and size of loss. Finally, it attempts to tighten the structure of the act at its weak points. The act allows double recovery of benefits in certain instances and often relies on outside sources to compensate a major part of the loss of automobile accident victims, especially where those losses have been large. The Revised Draft, on the other hand, attempts to internalize as many of the costs of automobile accidents as possible to the people using automobiles without raising their premiums to unacceptable limits. It eliminates all double recovery and relies on PIP to compensate the vast majority of automobile accident losses both in terms of numbers of victims and size of losses.

Though it is far from perfect either in terms of scope, structure or drafting, the act does provide some start for "no-fault" automobile insurance in this country. However, a word of caution is due here. Other states considering adopting "no-fault" automobile insurance plans of their own would do best to avoid copying the Massachusetts act verbatim. Rather it is suggested that a revision along the lines of the Revised Draft be adopted in order to provide better and more complete "no-fault" coverage for motorists as well as for automobile passengers and pedestrians.

*Joseph Rafalowicz**

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APPENDIX A

Excerpts from the Massachusetts Personal Injury Protection Act of 1970

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The first paragraph of section 34A of chapter 90 of the General Laws is hereby amended by striking out, in line 2, as appearing in the Tercentenary Edition, the words "thirty-four J" and inserting in place thereof the following words: — thirty-four N.

SECTION 2. Said section 34A of said chapter 90 is hereby further amended by adding the following paragraphs: —

"Personal injury protection," provisions of a motor vehicle liability policy or motor vehicle liability bond which provide for payment to the named insured in any such motor vehicle liability policy, the obligor of any motor vehicle liability bond, members of the insured's or obligor's household, any authorized operator or passenger of the insured's or obligor's motor vehicle including a guest occupant, and any pedestrian struck by the insured's or obligor's motor vehicle, unless any of the aforesaid is a person entitled to payments or benefits under the provisions of chapter one hundred and fifty-two, of all reasonable expenses incurred within two years from the date of accident for necessary medical, surgical, x-ray, and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services, and in the case of persons employed or self-employed at the time of an accident of any amounts actually lost by reason of inability to work and earn wages or salary or their equivalent, but not other income, that would otherwise have been earned in the normal course of an injured person's employment, and for payments in fact made to others, not members of the injured person's household and reasonably incurred in obtaining from those others ordinary and necessary services in lieu of those that, had he not been injured, the injured person would have performed not for income but for the benefit of himself and/or members of his household, and in the case of persons not employed or self-employed at the time of an accident of any loss by reason of diminution of earning power and for payments in fact made to others, not members of the injured person's household and reasonably incurred in obtaining from those others ordinary and necessary services in lieu of those that, had he not been injured, the injured person would have performed not for income but for the benefit of himself and/or members of his household, as a result of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by accident and not suffered intentionally while in or upon, or while entering into or alighting from, or being struck as a pedestrian by, the insured's or obligor's motor vehicle, without regard to negligence or gross negligence or fault of any kind, to the amount or limit of at least two thousand dollars on account of injury to or death of any one person, except that payments for loss of wages or salary or their equivalent or, in the case of persons not employed, loss by reason of diminution of earning power, shall be limited to amounts actually lost by reason of the accident and further limited (1) in the case of persons entitled to wages or salary of their equivalent under any program for continuation of said wages or salary or their equivalent to an amount that, together with any payments due under such a program, will provide seventy-five per cent of any such person's average weekly wage or salary or its equivalent for the year immediately preceding the accident, or (2) in the case of persons not entitled to wages or salary or their equivalent under any program for continuation of said wages or salary or their equivalent to an amount that will provide seventy

five per cent of any such person's average weekly wage or salary or its equivalent for the year immediately preceding the accident. In any case where amounts paid for loss of wage, salary or their equivalent are reduced as a result of any program for continuation of the same and such reduction produces a subsequent loss, as when the limit of any such program for continuation of wage or salary or their equivalent is exhausted with the result that an injured person cannot recover for a later injury or illness as he would have been entitled to but for such a reduction, such subsequent loss to an amount equalling the reduction in personal injury protection made in accordance with this section shall, if incurred within one year after the receipt of the last benefit provided under this section, be treated as a loss of wages, salary or their equivalent incurred as a result of the injury to which personal injury protection applied.

Personal injury protection shall also provide for payment, to the named insured or obligor and members of their households, all amounts defined in this section in any case where such persons incur such expense or loss as a result of such injury while in, upon, entering into or alighting from, or by being struck as a pedestrian by, a motor vehicle not insured by a policy or bond providing personal injury protection unless such person recovers such expenses or loss in an action of tort. Insurers may exclude a person from personal injury protection benefits if such person's conduct contributed to his injury in any of the following ways while operating a motor vehicle in the commonwealth:

(1) while under the influence of alcohol or a narcotic drug as defined in section one hundred and ninety-seven of chapter ninety-four;

(2) while committing a felony or seeking to avoid lawful apprehension or arrest by a police officer; or

(3) with the specific intent of causing injury or damage to himself or others.

* * *

SECTION 4. Said chapter ninety is hereby further amended by inserting after section 34K the following two sections: —

Section 34M. Every motor vehicle liability policy and every motor vehicle liability bond, as defined in section thirty-four A, issued or executed in this commonwealth shall provide personal injury protection benefits as defined therein except to the extent such defined benefits to an insured or obligor or members of an insured's or obligor's household may be modified, reduced or eliminated by the purchase of the deductible authorized in this section. The benefits due and payable under any motor vehicle liability policy or bond as a result of the provisions therein providing personal injury protection benefits, and any benefits due any person entitled to make claim under the assigned claims plan established in accordance with section thirty-four N, are granted in lieu of damages otherwise recoverable by the injured person or persons in tort as a result of an accident occurring within this commonwealth.

Every owner, registrant, operator or occupant of a motor vehicle to which personal injury protection benefits apply who would otherwise be liable in tort, and any person or organization legally responsible for his acts or omissions, is hereby made exempt from tort liability for damages because of bodily injury, sickness, disease or death arising out of the ownership, operation, maintenance or use of such motor vehicle to the extent that the injured party is, or would be had he or someone for him not purchased a deductible authorized by this section, entitled to recover under those provisions of a motor vehicle liability policy or bond that provide personal injury protection benefits or from the insurer assigned. No such exemption from tort liability shall apply in the case of an accident occurring outside the commonwealth. However, if any person claiming or entitled to benefits under the personal injury protection provisions of a policy or bond insuring a vehicle registered in this commonwealth brings, in such a case, an action in tort against the owner or person responsible for the operation of such a vehicle, amounts otherwise due such a person under the provisions of section thirty four A shall not become

due and payable until a settlement is reached or a final judgment is rendered in such a case and the amounts then due shall be reduced to that extent that damages for expenses and loss otherwise recoverable as a personal injury protection benefit are included in any such settlement or judgment.

Claim for benefits due under the provisions of personal injury protection or from the insurer assigned shall be presented to the company providing such benefits as soon as practicable after the accident occurs from which such claim arises, and in every case, within at least two years from the date of accident, and shall include a written description of the nature and extent of injuries sustained, treatment received and contemplated and such other information as may assist in determining the amount due and payable. If benefits for loss of wage or salary or in the case of the self-employed their equivalent, are claimed the party presenting such a claim shall authorize the insurer to obtain details of all wage or salary payments, or their equivalent, paid to him by any employer in the year immediately preceding the date of accident, or earned by him, and authorize the insurer to make any reasonable necessary investigation as to whether or not such loss may be reduced in whole or in part as a result of any program calling for the continuance of such wage, salary or earnings during absence from work. The injured person shall submit to physical examinations by physicians selected by the insurer as often as may be reasonably required and shall do all things necessary to enable the insurer to obtain medical reports and other needed information to assist in determining the amounts due. Noncooperation of an injured party shall be a defense to the insurer in any suit for benefits authorized by this section and failure of an insurer to pay benefits in the event of such noncooperation shall not in any way affect the exemption from tort liability granted herein.

Personal injury protection benefits and benefits due from an insurer assigned shall be due and payable as loss accrues, upon receipt of reasonable proof of the fact and amount of expenses and loss incurred, but an insurer may agree to a lump sum discharging all future liability for such benefits on its own behalf and on behalf of the insured. In any case where benefits due and payable remain unpaid for more than thirty days, any unpaid party shall be deemed a party to a contract with the insurer responsible for payment and shall therefore have a right to commence an action in contract for payment of amounts therein determined to be due in accordance with the provisions of this chapter.

Any insurer paying benefits in accordance with the provisions of this section shall be subrogated to that exact extent to the rights of any party it pays and may bring an action in tort against any person liable for such damages in tort who is not exempt from said liability as a result of the provisions of this section. Said insurer is also hereby given the right to make claim for all expenses it incurs on account of such payments, including the net amount of benefits paid, costs of processing claims for any such benefits, and the expenses of enforcing this right, against any other insurer providing a motor vehicle liability policy or bond on a motor vehicle registered in this commonwealth, whose owner or operator would, except for the exemption from tort liability provided in this section, be liable for such damages in tort. Determination as to whether any insurer is legally entitled to recover any such expense from another insurer shall be made by agreement between the involved insurers, or, if they fail to agree, by arbitration in accordance with the provisions of the General Laws.

Each insurer providing personal injury protection shall issue to any person purchasing a motor vehicle liability policy or bond, at his option, a policy endorsement, approved as to content by the commissioner of insurance and subject to such other regulations regarding said endorsement as the commissioner may from time to time make after appropriate hearing, which shall provide that there shall be deducted from amounts that would otherwise be or become due to the policyholder alone or to the policyholder and members of his household, as the policyholder elects, an amount of either two hundred and fifty dollars, five hundred dollars, one thousand

dollars or two thousand dollars, again as the policyholder elects, said amount to be deducted from the amounts otherwise due each person subject to the deduction. Any person electing such an endorsement or subject to such an endorsement as a result the policyholder's election shall have no right to claim or to recover any amount so deducted from any owner, registrant, operator or occupant of a motor vehicle or any person or organization legally responsible for any such owner's, registrant's, operator's or occupant's acts or omissions who is made exempt from tort liability by the section.

Amounts deducted from payment in accordance with the provisions of the preceding paragraph shall not have any affect upon the determination of whether or not the reasonable and necessary expenses incurred as a result of any injury exceed or do not exceed five hundred dollars, which determination may affect an injured's person's rights under section six D of chapter two hundred and thirty-one.

Section 34N. Insurers authorized to provide personal injury protection in this commonwealth are hereby directed to organize and maintain an assigned claims plan to provide that any person resident in the commonwealth, other than the owner or registrant of a motor vehicle not insured by a policy or bond providing personal injury protection or a member of such owner or registrant's household, who suffers loss or expense as a result of an injury arising out of the ownership, operation, maintenance or use of a motor vehicle while the motor vehicle is upon the ways of the commonwealth or in any place therein to which the public has a right of access, may obtain personal injury protection benefits through said plan in any case where no personal injury protection benefits are otherwise available to such a person provided that the following shall not be entitled to such benefits:

(1) a person entitled to payments or benefits under the provisions of chapter one hundred and fifty-two, or

(2) a person who is subject to exclusion from personal injury protection benefits by insurers under section thirty-four A of this chapter.

Said plan shall contain such rules and regulations for operation and for the assessment of costs as shall be approved by the commissioner of insurance. Any claim brought through said plan shall be assigned to an insurer in accordance with the approved regulations of operation and that insurer, after such assignment, shall have the same rights and obligations it would have if prior to such assignment it had issued a policy providing personal injury protection applicable to the loss or expenses incurred. Any party accepting such benefits hereunder shall have such rights and obligations as he would have were a policy providing personal injury protection benefits issued to him.

SECTION 5. Chapter 231 of the General Laws is hereby amended by inserting after section 6C the following section: —

Section 6D. In any action of tort brought as a result of bodily injury, sickness or disease, arising out of the ownership, operation, maintenance or use of a motor vehicle within this commonwealth by the defendant, a plaintiff may recover damages for pain and suffering, including mental suffering associated with such injury, sickness or disease, only if the reasonable and necessary expenses incurred in treating such injury, sickness or disease for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral expenses are determined to be in excess of five hundred dollars unless such injury, sickness or disease (1) causes death, or (2) consists in whole or in part of loss of a body member, or (3) consists in whole or in part of permanent and serious disfigurement, or (4) results in such loss of sight or hearing as is described in paragraphs *(a), (b), (c), (d), (e), (f)* and *(g)* of section thirty-six of chapter one hundred and fifty-two or (5) consists of a fracture.

* * *

SECTION 7. Section 113B of chapter 175 of the General Laws, as most recently amended, is hereby further amended by inserting after the first paragraph the following paragraph: —

In fixing and establishing classifications for premium charges to be used in connection with motor vehicle liability policies or bonds for the calendar year nineteen hundred and seventy-two and each calendar year thereafter, the commissioner shall establish reasonable surcharges, above the premium charges otherwise due, for each conviction for a moving violation committed, within the period herein specified, by the policyholder of such a policy, or the obligor of such a bond, or any other driver who resides in the same household as the policyholder or obligor and is included among those authorized to drive any vehicle covered by such policy or bond. The commissioner shall also establish reasonable discounts to be applied when neither the policyholder nor obligor, nor any other driver who resides in his household and is authorized to drive any vehicle covered by such policy or bond, has been the driver of a vehicle involved, within the period herein specified, in an accident required to be reported under the provisions of section twenty-six of chapter ninety. . . . In the absence of a finding otherwise by the commissioner, based on data accumulated under this merit system and such other evidence as the commissioner considers relevant and material, reasonable surcharges and discounts shall be presumed to be the following: for each conviction of driving under the influence of intoxicating liquor or narcotic or hallucinogenic drugs, a surcharge of one hundred per cent; for each conviction of speeding, a surcharge of twenty per cent; for each conviction of any other moving violation, a surcharge of ten per cent; for each full year free of reportable accident involvement, a discount of two per cent.

* * *

SECTION 9. Section 113C of said chapter 175 is hereby amended by striking out the second paragraph, added by section 3 of chapter 643 of the acts of 1968, and inserting in place thereof the following paragraph: —

No company shall be authorized to issue such motor vehicle liability policies or to act as surety upon such motor vehicle liability bonds unless it makes a mandatory offer to issue to any person purchasing such policy or bond at his option, additional coverage, beyond that required by section thirty-four A of chapter ninety, of at least fifteen thousand dollars on account of injury to or death of one person and at least forty thousand dollars on account of any one accident resulting in injury to or death of more than one person, and of the combination of bodily injury liability off the ways of the commonwealth and liability for guest occupants on and off the ways of the commonwealth, of medical coverage, so-called, and of property damage, so-called, to a limit of at least five thousand dollars, of fire and theft coverage, comprehensive coverage and collision coverage, so-called. . . .

* * *

SECTION 11. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not impair any of the remaining provisions.

APPENDIX B

Revised Draft of Selected Provisions of The Massachusetts Personal Injury Protection Act of 1970

The italicized provisions of this draft are provisions which have been added and do not appear in the act. The order of the sentences in section 2 has been changed and sections 4 and 5 have been changed extensively. Otherwise, the structure of the act has been retained with deletions and additions as indicated.

SECTION 2. The last two paragraphs of section 34A of chapter 90 of the General Laws are hereby amended by striking those paragraphs and inserting in place thereof the following paragraphs: —

"Personal injury protection," provisions of every motor vehicle liability policy

and every motor vehicle liability bond issued and executed in this commonwealth shall provide benefits consistent with this paragraph. Such a policy or bond shall provide for payment of such benefits to the named insured of any motor vehicle liability policy, the obligor of any motor vehicle liability bond, members of the insured's or obligor's household, any authorized operator or passenger of the insured . . . or . . . bonded motor vehicle . . . and any pedestrian struck by the insured . . . or . . . bonded motor vehicle, unless any of the aforesaid is a person entitled to payments or benefits under chapter one hundred and fifty-two [workmen's compensation law] *or is a pedestrian, not a legal resident of the Commonwealth of Massachusetts, who sustains bodily injury as a result of being struck by an insured or bonded vehicle outside said commonwealth.* Such benefits shall reimburse certain expenses and losses, as hereinafter specified, which are caused by an accident and not suffered intentionally, and which are incurred as a result of bodily injury, sickness or disease, including death at any time resulting therefrom, . . . *arising out of the ownership, operation, maintenance, or use of the insured or bonded* motor vehicle or out of being struck as a pedestrian by . . . such vehicle *while that motor vehicle is within the United States of America, its territories or possessions, or Canada,* without regard to negligence or gross negligence or fault of any kind. Such benefits, in addition, shall also be paid to the insured, the obligor, and members of their households, for . . . *such expenses and losses which are caused by accident and not suffered intentionally, and which are incurred* as a result of such injury *arising out of the ownership, operation, maintenance or use of a motor vehicle not insured by a policy or bond providing personal injury protection or out of being struck as a pedestrian by such a* . . . vehicle . . . *while that motor vehicle is within the United States of America, its territories or possessions, or Canada.* Such benefits shall reimburse all reasonable expenses incurred within . . . *three* years from the date of the accident for necessary medical, surgical, x-ray, and dental services including prosthetic devices and necessary ambulance, hospital and professional nursing and funeral services. *In the case of persons entitled to payments or benefits under Blue Cross, and/or Blue Shield, accident and/or sickness insurance or other form of medical coverage, such benefits shall be reduced by such payments or benefits.* In the case of persons employed or self-employed at the time of the accident, *such benefits shall also reimburse* any amounts actually lost by reason of inability to work and earn wages or salary or . . . other income that would otherwise have been earned in the normal course of an injured persons' employment *or self-employment.* In the case of persons not employed or self-employed at the time of the accident, *such benefits shall also reimburse* any loss by reason of diminution of earning power. *In either case, such benefits shall also reimburse up to ninety per cent* payments in fact made to others, not members of the injured person's household, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, had he not been injured, the injured person would have performed not for income but for the benefit of himself and/or members of his household. Such benefits shall be paid to the amount or limit of not less than . . . *ten* thousand dollars on account of injury or death to any one person . . . . Payments for loss of wages or salary or . . . *other income that would otherwise have been earned in the normal course of an injured persons employment or self-employment,* or, in the case of persons not employed, loss by reason of diminution of earning power shall *not* be . . . *greater than the* amounts actually lost by reason of the accident. In the case of persons entitled to . . . *benefits* under any program for continuation of . . . wages or salary or . . . *other income that would otherwise have been earned in the normal course of such persons' employment, personal injury protection benefits shall be further limited* to an amount that, together with any payments due under such a program, will provide seventy-five per cent of such person's average weekly wage or salary or . . . *other income normally earned in the course of such person's employment or of such person's diminution of earning power* for the year immediately preceding

ing the accident. In the case of a person not entitled to . . . *benefits* under any program for continuation of wages or salary or . . . *other income which would have otherwise been earned in normal course of such person's employment, personal protection injury benefits shall be further limited* to an amount that will provide seventy-five percent of such person's average weekly wage or salary or . . . *other income normally earned in the course of such person's employment or of such person's diminution of earning power* for the year immediately preceding the accident. *The value of the income tax advantage incident to the fact that certain of the benefits received because of an injury (whether from personal injury protection or other sources) are not taxable represents fifteen per cent of the twenty-five per cent that is subtracted in arriving at the maximum percentage recovery of salary, wages, other income normally earned in the course of employment or self-employment or diminution of earning power in this paragraph. In no event shall this subtraction because of income tax advantages exceed fifteen per cent of loss of income, and it shall be less than this amount only if the claimant presents the insurer in support of his claim reasonable proof of a lower value of these income tax advantages in his case.*

Insurers may exclude persons from personal injury protection benefits . . . *where* such person's conduct contributed to his injury *and where the injury arises out of his operation of a motor vehicle* in any of the following ways . . . :

(1) while under the influence of . . . *intoxicating liquor* or *of* a narcotic . . . or *hallucinogenic drug;*

(2) while committing a felony or seeking to avoid lawful apprehension or arrest by a police officer; or

(3) with the specific intent of causing injury or damage to himself or *to* others.

* * *

SECTION 4. Said chapter ninety is hereby further amended by striking out sections 34M and 34N and inserting in place thereof after section 34K the following two sections:—

Section 34M. . . . Benefits due and payable under any motor vehicle liability policy or bond as a result of the provisions therein providing personal injury protection, as defined in section thirty-four A of this chapter, and benefits due any person entitled to make a claim under the assigned claims plan established in accordance with section thirty-four N, *to the extent consistent with section 6D of chapter two hundred and thirty-one of the General Laws,* are granted in lieu of damages otherwise recoverable by the injured person in tort as a result of an accident occurring within this commonwealth.

* * *

Claims for benefits due under the provisions of personal injury protection or from the insurer assigned shall be presented to the company providing such benefits as soon as practicable after the accident occurs from which such claim arises, and in every case, within at least two years from the date of the accident, and shall include a written description of the nature and extent of injuries sustained, treatment received and contemplated and such other information as may assist in determining the amount payable. *Claims for such benefits shall also include a written description of the accident and a list of all parties known by the person claiming such benefits to have been involved in the accident.* If benefits for loss of wage or salary . . . *or other income normally earned in the course of an injured person's employment or self-employment* are claimed, the party presenting such a claim shall authorize the insurer to obtain details of all wages or salary *or other income normally earned in the course of an injured person's employment or self-employment,* paid to him by any employer in the year immediately preceding the date of accident, or *net amounts* earned by him, and authorize the insurer to make any reasonable necessary investigation as to whether or not such loss may be reduced in whole or in part as a result of any program calling for the continuation of such wage, salary or earnings during absence from work. *If any injured person*

entitled to benefits under the provisions of personal injury protection or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible for the use of a motor vehicle involved in the accident, the injured person or his legal representative shall forward a copy of the summons and complaint or other process served in connection with such legal action within a reasonable time to the insurance company or bond surety responsible for payment of those benefits. Failure of an injured person to comply with the terms of the previous sentence shall constitute a lack of compliance with the terms of the policy only as to the injured person. The injured person shall submit to physical examinations by physicians selected by the insurer as often as may reasonably be required to enable the insurer to obtain medical reports and other needed information to assist in determining amounts due. Noncooperation of an injured party shall be a defense to the insurer in any suit for benefits authorized by this section and failure to pay benefits in the event of such noncooperation would not in any way affect the exemption from tort liability granted therein.

Personal injury protection benefits and benefits due from an insurer assigned shall be due and payable as loss accrues, upon receipt of reasonable proof of the fact and amount of expenses and loss incurred. . . . In any case where benefits due and payable remain unpaid for more than thirty days, any unpaid party shall be deemed a party to a contract with the insurer responsible for payment and shall therefore have a right to commence action in contract for payment of amounts therein determined to be due in accordance. *The unpaid party shall, in addition to the proceeds of any settlement or judgment that may result from such action, be entitled to ten per cent interest per annum on the amounts it recovers in contract from the insurer responsible for payment, computed from the date the claim was filed until the date of actual payment.*

[Retain the next paragraph as is, adding only the words *"regarding arbitration"* at the end of the paragraph. Delete the last two paragraphs of section 34M.]

* * *

Section 34N. Delete "upon the ways of the commonwealth or in any place therein to which the public has a right of access" and substitute *"within the commonwealth."*

SECTION 5. Chapter 231 of the General Laws is hereby amended by striking out section 6D and inserting in place thereof after section 6C the following section: —

Section 6D. In cases of accidental injury sustained in the commonwealth and arising out of the ownership, maintenance or use of any motor vehicle as to which a personal injury protection policy was in effect, the owner, operator and every other person responsible for the ownership and maintenance or use of such motor vehicle shall have an exemption against all forms of tort liability unless the injury results (i) in death, or (ii) in at least five thousand dollars of certain expenses and losses, as hereinafter specified, which are caused by an accident and not suffered intentionally, and which are incurred as a result of bodily injury, sickness or disease. Such expenses and losses include all reasonable expenses incurred within three years from the date of the accident for necessary medical, surgical, x-ray, and dental services including prosthetic devices and necessary ambulance, hospital, and professional nursing services. In the case of persons employed or self-employed at the time of the accident, such expenses and losses shall also include any amounts actually lost by reason of inability to work and earn wages or salary or other income that would otherwise have been earned in the normal course of the injured person's employment or self-employment. In the case of persons unemployed at the time of the accident, such expenses and losses shall also include the injured person's loss of earning power. In either case, such expenses and losses shall also include all payments in fact made to others, not members of the injured person's household and reasonably incurred in obtaining from those others ordinary and necessary services in lieu of those that, had he not been injured, the injured person would have performed not for income but for the benefit of himself and/or

members of his household. In cases of such accidental injury to which the tort exemption does not apply, there shall be a credit against tort liability to the extent of all benefits payable under any personal injury protection bond or policy or policy applicable to the injury.

* * *

SECTION 9. Section 113C of said chapter 175 is hereby amended by adding, after the second paragraph, the following paragraph: —

In addition, no company shall be authorized to issue such motor vehicle liability policies or to act as a surety upon such motor vehicle liability bond unless it makes a mandatory offer to issue to any person purchasing such a policy or bond, at his option, additional personal injury protection coverage, beyond that required by section thirty-four A of chapter ninety, unlimited in amount on account of injury to or death to one person and additional pain, suffering and inconvenience coverage, so-called, not otherwise recoverable under the provisions of section 6D of Chapter 231 according to a schedule of benefits thereunder to be established by the Commissioner of Insurance. Persons purchasing only the additional coverage provided for in the previous two paragraphs are entitled, nonwithstanding any provisions of thirty four A of chapter ninety of the General Laws to the contrary, to recover benefits under any such coverages while injured as a passenger of or struck as a pedestrian by another motor vehicle to which such coverage does not apply.

PASSPORTS AND TRAVEL: TOWARDS A RATIONAL POLICY OF AREA RESTRICTION ENFORCEMENT

Introduction

On March 15, 1971, the Department of State announced that it was lifting its ban on travel by Americans to Communist China.[1] This decision indicated that travel to Mainland China was no longer considered to seriously "impair the conduct of United States foreign affairs."[2] Whether the decision will have any practical effect on travel to China, however, is open to question in light of the difficulty even authorized travelers have had in obtaining the requisite Chinese visa in the past. Rather it appears more likely that the decision was motivated purely by foreign policy considerations.

Until the ban was lifted, China was one of a few specified communist countries around which the United States, for foreign policy reasons, has endeavored to impose as hermetic a cordon sanitaire as possible. The quarantine on these countries has extended in varying degrees into areas of economic, political, social and cultural intercourse. It also extended into the familiar restrictions prohibiting American citizens from traveling to those countries. Such area restrictions currently apply to Cuba, North Korea and North Vietnam.[3]

The purpose of this Note is (1) to review briefly the state of the government's power to inhibit American nationals from traveling to designated areas as established in statutory provisions and judicial opinions; (2) to evaluate both the efficacy and the logical consistency of the system devised to carry out this policy of "area restrictions;" and (3) to probe the relative advantages and disadvantages that might inhere in a suggested alternative system.

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1 N.Y. Times, Mar. 16, 1971, at 2, col. 1.

2 22 C.F.R. § 51.72(c) (1970).

3 35 Fed. Reg. 15166. The restrictions on the use of passports for travel to Cuba and North Korea are under authority of 22 C.F.R. § 51.72(c), that travel to these areas would "seriously impair the conduct of United States foreign affairs." The restriction relating to North Vietnam is under authority of 22 C.F.R. § 51.72(b), that North Vietnam is "a country where armed hostilities are taking place."

I. The Current State of the Law

The current state of passport law is a function of two variables: the extent of the authority vested in the proper government organ to set limits on travel of American nationals, and the extent of the power to enforce these limits. The Passport Act of 1926 authorizes the President to grant and issue passports.[4] The President has delegated this authority to the Secretary of State.[5]

Section 215 of the Immigration and Nationality Act of 1952[6] provides that restrictions on travel may be imposed by the President during wartime or any national emergency proclaimed by the President.[7] The act also purports to make it a criminal offense to enter or leave the United States without a valid passport during the course of the imposed restrictions.[8]

The Secretary has exercised his delegated powers under the Passport Act to impose restrictions on travel to certain areas, and such area restrictions have been upheld by the Supreme Court as valid exercises of delegated power.[9] The current codification of area restrictions provides that passports shall be invalid for travel to a country or area when the Secretary has determined that such country or area (a) is at war with the United States, (b) is one in which armed hostilities are taking place, or (c) is one to which travel "would seriously impair the conduct of United States foreign affairs."[10] Such determination by the Secretary, however,

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4 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1964).

5 Exec. Order No. 11295, 31 Fed. Reg. 10603, 22 U.S.C. § 211(a) (1964).

6 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1964).

7 8 U.S.C. § 1185(a) (1964).

8 *Id.* § 1185(b). The text of § 1185(b) is as follows:

> After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States, unless he bears a valid passport.

9 Zemel v. Rusk, 381 U.S. 1 (1965); Worthy v. Herter, 270 F.2d 905 (D.C. Cir.), *cert. denied*, 361 U.S. 918 (1959). In the case of restrictions on the travel of a class of persons, however, the Supreme Court held in Kent v. Dulles, 357 U.S. 116 (1958), that it was beyond the delegated powers of the Secretary under the Passport Act of 1926 to deny passports to communists.

10 22 C.F.R. § 51.72 (1970).

does not completely preclude travel to the restricted area, as passports can be specially validated for such travel if it would be in the "national interest of the United States."[11]

The history of the imposition of area restrictions was traced by the majority opinion in *Zemel v. Rusk*.[12] The first instance noted was the State Department's refusal to issue passports without special authorization or exigency for travel to Belgium in 1915 because of the famine there. No passports were issued for travel to Germany and Austria until 1922, and for travel to the Soviet Union until 1923.[13] Later, travel to Ethiopia in 1935, Spain in 1936, China in 1937, and to Europe in September, 1939, was restricted.[14] The *Zemel* opinion also cited restrictions imposed since World War II to various Eastern European countries for varying intervals.[15]

The rationales for permitting any restrictions at all, even area restrictions, fall into two categories. One emphasizes that the restrictions are for the benefit of the traveler, lest he be stranded in an area where normal diplomatic services of the United States government would not be available for his succor. The other stresses that they are imposed to facilitate the exercise of the foreign affairs of the United States: Americans should be restricted from certain areas to avoid embroiling the United States in an embarrassing foreign incident by their presence.[16] Whether restrictions on travel are indeed drawn from these two ostensibly legitimate motives, or whether they are the result of State Depart-

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11 *Id.* § 51.73 (1970). The regulations enumerate the categories of travel considered in the "national interest" as travel by a professional reporter, doctor, or scientist in public health, a scholar, or a representative of the Red Cross. *Id.* § 52.73(b). Further, the Secretary has discretion to determine an application in the national interest if the trip involves the news media, activities in cultural, athletic, commercial, educational, professional or other public affairs, or humanitarian considerations. *Id.* § 51.73(c).

12 381 U.S. 1, 8 (1965).

13 *Id.*

14 *Id.* at 9-10.

15 *Id.* at 10-11.

16 *See generally* Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17, 23 (1956); Salans & Frank, *Passports and Area Restrictions*, 20 STAN. L. REV. 839, 849, 852, 853-4 (1967). It is true that a third rationale could be offered, that presented in Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967) of imposing area restrictions in order to control the movement of the passport. However, it is difficult to see this as a basis for the imposition of the restrictions; rather it goes more to the problem of enforcement of the policy.

ment efforts to protect national domestic security by inhibiting contact of Americans with allegedly negative foreign influences is arguable.

In any event, there is an intimate relationship between the conception of the function of the passport and the conception of the purposes of area restrictions. These conceptions in turn influence the nature of enforcement of area restrictions. If the passport is seen as a document which purports to assure protection abroad of American travelers, then the use of a passport should logically be restricted for travel to areas where such protection could reasonably be afforded. A corollary of this view is that if the traveler is willing to assume the risk of non-protection once he has been notified of the danger of travel to a particular area, no sanctions should be imposed for travel to that area. On the other hand, if area restrictions are seen in more significant terms than a mere warning that normal diplomatic protection will not be forthcoming, but rather as a means of controlling travel for whatever reasons the State Department may have (e.g., foreign affairs, or domestic security), then the function of the passport must also be more crucial — it is a tool to be used by the State Department in directing travel. The corollary of this view is that the traveler should not be permitted to evade the restrictions placed on his travel, and sanctions are therefore appropriate for violations.

There is little argument that the freedom to travel is a basic value. Even though that right is not specifically mentioned in the Constitution, the Supreme Court has indicated that free travel is fraught with constitutional implications and is constitutionally protected. In four of the leading Supreme Court cases and in the leading lower court decision, the courts have observed that the freedom to travel cannot be infringed without due process of law under the fifth amendment.[17] Even further, Justice Douglas in his concurrence in *Aptheker v. Secretary of State*[18] and in his dissent in *Zemel v. Rusk*[19] asserted that freedom to travel is akin to or is within the periphery of the first amendment. The ninth amend-

17 United States v. Laub, 385 U.S. 475, 481 (1967); Zemel v. Rusk, 381 U.S. 1, 14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Kent v. Dulles, 357 U.S. 116, 125, 129 (1958); Lynd v. Rusk, 389 F.2d 940, 945-46 (D.C. Cir. 1967).

18 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

19 381 U.S. 1, 26 (1965) (Douglas, J., dissenting).

ment has also been put forward as a constitutional source for the right to travel.[20] Historical arguments have been marshaled to underscore the importance of a right to travel in the English and American tradition dating as far back as Magna Carta.[21]

Despite these protestations, the Court has refused to grant first amendment status to a right to travel and has insisted that there are valid reasons for restricting freedom of movement. Though it is beyond the delegated powers of the Secretary under the 1926 Passport Act to deny passports to citizens based on their beliefs,[22] the Supreme Court has upheld the power of the Secretary to impose area restrictions, explicitly repudiating the argument that the freedom to travel has equal status with first amendment rights.[23]

Once the validity of area restrictions was upheld, the problem of enforcement had to be confronted. In *United States v. Laub*[24] the Supreme Court held that mere violation of area restrictions did not constitute the criminal act of departing or entering the United States without a valid passport.[25] The Court held there that a passport which had not been specifically validated for travel to Cuba, a restricted area,[26] but was in other respects a valid passport was to be considered a valid passport for purposes of the statute.[27]

The obvious result of *Laub* was to render the State Department policy of area restrictions little more than words of good advice to the traveler. Though the Secretary could impose area restrictions, as long as the traveler held an unexpired passport, he could not be punished for violating the restrictions.

Finally, in *Lynd v. Rusk*, decided the same year as *Laub*, the D.C. Circuit court held that it was within the Secretary's delegated

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20 Comment, *Executive Restriction on Travel: The Passport Cases*, 5 HOUSTON L. REV. 499, 506-07 (1968).

21 Jaffe, *supra* note 16, at 19. *See generally* Ehrlich, *Passports*, 19 STAN. L. REV. 129 (1966); Note, *Criminal Sanctions Against Passport Area-Restriction Violations*, 19 STAN. L. REV. 1369 (1967); Boudin, *The Constitutional Right to Travel*, 56 COLUM. L. REV. 47 (1956).

22 Kent v. Dulles, 357 U.S. 116 (1958).

23 Zemel v. Rusk, 381 U.S. 1, 16 (1965).

24 385 U.S. 475 (1967).

25 8 U.S.C. § 1185(b) (1964).

26 26 Fed. Reg. 492 (1961).

27 385 U.S. 475, 480-81 (1967). Laub had arranged a tour to Cuba for 58 persons.

powers to impose administrative controls to prevent such violations.[28] But it noted that, "[t]aking account of . . . the constitutional dimension of the right to travel, the secretary's power over passports must be construed in such a way as to minimize interference with legitimate travel."[29] Thus, the Passport Act was held to have delegated authority to deny passports when the only travel contemplated is to a restricted area. But if travel to a nonrestricted area is intended as well, a passport cannot be withheld[30] if the traveler gives assurances that he will not use the passport in a restricted area.[31]

These controls were based on the rationale that the passport is a government document, and the Secretary may therefore prevent its movement into undesirable areas. A greater inference of delegation of authority from the Passport Act is not permissible. "In short, we think the Secretary has authority to control the lawful travel of the passport, even though Congress has not given authority to control the travel of the person."[32] While the inability to take along a passport may deter some travelers from going to restricted areas, it will probably not deter, as the *Lynd* court recognized, the most determined travelers from going there.

Thus it might be proper at this point to ask how well the passport system, as worked out by the courts, is structured to carry out the function of preventing American nationals from traveling to designated areas of the world. A study of some not unimaginable hypothetical situations might be illuminating.[33]

a. *A* travels to Cuba, a restricted area since 1961, via Mexico. In going to Mexico, he bears no passport, as none is required for

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28 389 F.2d 940, 947 (D.C. Cir. 1967).

29 *Id.* at 942.

30 *Id.* at 946. "If the sole travel planned by the applicant is to an area reasonably restricted by the Secretary as off limits to passport holders, and hence carries no plenary constitutional protection, congressional approval of the denial of a passport to undertake that travel is fairly inferred. But we see no comparable basis for inferring that Congress has given the Secretary the authority to deny legitimate, constitutionally protected travel, merely because that is a technique which provides greater assurance of hindering travel to designated areas."

31 *Id.* at 943-44, 947-48.

32 *Id.* at 947-48.

33 For further examples of similar hypothetical situations, see Note, *Constitutional Law: Resolving Conflict Between the Right to Travel and Implementation of Foreign Policy*, 1966 DUKE L. REV. 233; Note, *Criminal Sanctions Against Passport Area-Restriction Violations*, 19 STAN. L. REV. 1369 (1967).

travel between countries in the Western Hemisphere, with the sole exception of Cuba.[34] If he travels from Mexico to any country not within the Western Hemispheric exception within sixty days of his departure from the United States, he will be criminally liable upon his return for having departed the United States without a passport, a violation of section 1185(b).[35]

b. Traveler *B* takes exactly the same route as *A*, except that he waits in Mexico the requisite sixty days. Though he will not be in criminal violation of any statute, he will have violated an area restriction. Having left his passport behind in the United States, however, he can argue that he never used it in violation of any restriction contained therein.

If *B* returns through a Western hemispheric country, he again will require no passport by statute. Should he return via a country which lies outside the area of the statutory exception, he again will not need to use his passport, as it has been declared unconstitutional for a citizen to "have his fundamental right to have free ingress . . . [to his country] . . . subject to a criminal penalty if he does not have a passport."[36]

This latter situation points up the impotence of the federal regulation making it a criminal offense to use a passport "in violation of the conditions or restrictions therein contained."[37]

c. However, consider traveler *C* who commits the same actions as does *A*, except that in so doing he takes his passport with him. Or consider *D* who travels to France with his passport and leaves it in deposit there before journeying on to Cuba. Perhaps the

34 While 22 C.F.R. § 53.2 (1970) excepts the Western Hemisphere from 8 U.S.C. 1185(b) (1964), it further excepts Cuba from the Western Hemisphere for purposes of passport requirements.

35 22 C.F.R. § 53.2(b) (1970).

36 Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964).

37 18 C.F.R. § 1544 (1970):

> Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or
>
> Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or
>
> Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed—
>
> Shall be fined not more than $2,000 or imprisoned for not more than five years, or both.

government could argue that each has in fact *used* his passport in violation of a restriction by complying with section 1185 to get to intermediary countries, from which they went on to Cuba. But such an expansive reading of the regulation has been precluded by the failure of the court in *Lynd* to hold as criminal a similar use of the passport by the defendant in traveling to Czechoslovakia en route to North Vietnam.

Travelers *C* and *D*, according to *Lynd*, could each have his passport revoked with its return conditioned on an assurance that it will not be used in a restricted area. Indeed *A* and *B* may also have to give similar assurances or face loss of their passports, if they hold any. However, these assurances could be asked only because the State Department has the right to ask them of any passport applicant or holder, not because of any violation of the conditions of the passport by *A* or *B*. But it must be noted that under *Lynd* the State Department is powerless to demand that the person himself refrain from traveling to the restricted region, so long as his passport remains safely behind.[38]

It is not precisely clear what is meant by the assurances *C* and *D* will likely have to give not to "use" the passport in violation of any area restrictions. If the word "use" has as narrow a definition in the assurance as it does in the regulation,[39] then all that will be required is that next time they travel to a restricted area, they leave their passports behind in the intermediate country. The word "use," however, might have a broader meaning than in the regulation, namely, a prohibition on its utilization to leave the United States legally to travel to a nonrestricted area simply to make travel connections there. Perhaps even this application of the word would not prevent *C* or *D* from repeating his act so long as travel to the intermediate country can be predicated on some

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The very problem involves the fact that the entry into restricted areas rarely requires the technical "use" of one's passport, thus rendering § 1544 inapplicable.

38 See text accompanying notes 28-32 *supra*. 22 C.F.R. §§ 51.75-51.105 list the protective provisions that are intended to insure a passport holder due process before revocation. Among them is a provision entitling him to a hearing, thus possibly requiring the State Department to institute a make-shift "board of passport appeals" in the country where the passport holder is located. This and other listed procedures would be difficult to execute in Cuba or North Vietnam. Note, *supra* note 33, at 246, n.68.

39 *Supra* note 37.

motive independent of its role as a transit point. Then the claim that the trip would have been undertaken for other reasons would allow for the defense that the passport was not used solely to get to the restricted area, thus vitiating any force this broader interpretation might have.

This view of the contours of the application of area restrictions reveals how strikingly uneven and confusing it is. Statutes representing considerations of passport policy and area restriction policy converge at various points effecting perplexing results, making the distinction between *A* and *B* turn on the length of their respective stays in Mexico, although each subsequently violates an area restriction. The distinction between *A*, on the one hand, and both *C* and *D*, on the other, turns on the identity of the intermediate country, although all three subsequently travel in violation of area restrictions. Further, because of the strange configuration of the passport policy as expressed in section 1185 and area restriction policy as expressed in various federal regulations, Lynd, who used his passport in order to effect a deliberate violation of restriction contained therein escaped the penalty imposed on *A*, who may never have owned a passport, or owning one, may not have violated its provisions. This result seems clearly inappropriate. United States citizens can easily and repeatedly travel in total violation of travel restrictions, with apparently no measures available to the government to enforce them.

The bizarre world of area restrictions is made even more bewildering by the conscious, if "unofficial," policy of the government to avoid any kind of active enforcement of those rules which do exist. While the rules remain on the books, they do no more than present a facade of active governmental control over the itineraries of U.S. travelers. This is not to say this facade has absolutely no function, for it undoubtedly deters many from making trips to areas which the government prefers them not visit. However, those who are determined to visit these areas soon find that not only are the existent rules easily circumvented, but their violation as a practical matter engenders no punitive consequences. Only a passport stamped with a visa from Cuba is likely to bring prosecution for illegal "use." Proof of violation by other means might be fraught with hearsay problems. And it is almost

impossible to prove that any assurances that might have been demanded were given as deliberate misstatements, in violation of federal regulations.[40] This may have led to governmental reticence to demand such assurances.[41]

II. A Proposal for Reform

The inconsistency and irrationality of the consequences resulting from the application of current law are due in large measure to the current policy of imposing such restrictions indirectly through the vehicle of passport statutes rather than in a more direct fashion. There is confusion at present with regard to the entire purpose of a passport and its intended role in the lives of Americans traveling abroad. Until 1952 it served only as a document of identification with no extraneous rights attached to it.[42] Its bearer could therewith establish his American nationality abroad, which could prove significant in times of danger and emergency in the country in which he found himself. With the 1952 Nationality and Immigration Act, it became an exit permit[43] and the area restriction contained therein became the government's instrument in its attempted policy of excluding various countries from the itineraries of traveling Americans.[44]

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40 18 C.F.R. § 1542 (1970). This regulation makes it a punishable crime knowingly to make a misstatement in one's application for a passport.

41 Telephone interview with Frederic Smith, Jr., Deputy Administrator of the Bureau of Security and Consular Affairs, Mar. 22, 1971.

42 *See, e.g.*, Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692 (1835).

43 One could persuasively argue that section 215 of the Immigration and Nationality Act of 1952 was originally intended to be activated by the President only during time of bona fide war or during a period of national emergency *within the borders of the United States*, at which time a passport for entry or exit would be important. As it is within the purview of the executive and not the judiciary to determine the existence of a national emergency, there is little the courts can do to reverse the current metamorphosis of section 215 into a provision for the control of a traveler's destination. See Comment, *supra* note 20, at 510.

44 Possession of a valid passport does not entitle its bearer to any greater rights to United States governmental assistance in the event of difficulty abroad than does nonpossession of a valid passport. Whether or not an American traveler has violated an area restriction is likewise an irrelevant factor. The President is obligated to come to the assistance of any citizen who "has been unjustly deprived of his liberty by or under the authority of a foreign government." 22 U.S.C. § 1732 (1964). See also 7 U.S. Department of State Foreign Affairs Manual §§ 350-56. For further information regarding the passport and its history, see Z. Chafee, Three Human Rights in the Constitution (1956); Goodman, *Passports in Perspective*, Texas

It would be wise to return the passport to the role it originally played, namely, simply that of identification for Americans abroad. A passport should be issued to any applicant who is not mentally incompetent or a convicted criminal. It should contain no restrictions as to its use, except as to fraud, forgery and similar acts.[45] Assuming area restrictions in and of themselves to be desirable and appropriate, a proposition whose debatable validity is beyond the scope of this Note, it is clear that such restrictions should be utterly divorced from provisions regarding passports. This function of preventing violations, it has been suggested, would be more appropriately carried out by the Justice Department than the State Department.[46] All area restrictions, moreover, should be enforced by means of criminal sanctions to which the American national would be subject upon his return to the United States.[47]

Such an overhaul would at least result in the general, if somewhat abstract, benefit of having the government confront the problem through the application of forthright measures, rather than through indirection and obfuscation. But more concretely,

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L. REV. 221 (1966); Jaffe, *The Right to Travel: The Passport Problem*, 35 FOREIGN AFFAIRS 17 (1956); Note, *Judicial Review of the Right to Travel: A Proposal*, 42 WASH. L. REV. 873 (1967).

45 18 U.S.C. § 1543 provides:

> Forgery or false use of passport.
>
> Whoever falsely makes, forges, counterfeits, mutilates, or alters any passport or instrument purporting to be a passport, with intent that the same may be used; or
>
> Whoever willfully and knowingly uses, or attempts to use, or furnishes to another for use any such false, forged, counterfeited, mutilated, or altered passport or instrument purporting to be a passport, or any passport validly issued which has become void by the occurrence of any condition therein prescribed invalidating the same —
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

46 See Ehrlich, *supra* note 21. Such restrictions would then have to be imposed by Congress, according to the dictum of Lynd v. Rusk, 389 F.2d 940, 948 (D.C. Cir. 1967). The Secretary is presently empowered to impose area restrictions as a result of the delegation by Congress to the executive of the authority to issue passports and regulate their use. Once area restrictions are divorced from passport control, they become *direct* controls on the travel of persons and thereby a direct limitation on the right to travel. This, the court said, only Congress can do.

47 Ehrlich, *supra* note 21. A reorganization plan of comparable thrust was last submitted to the Senate in 1967 by the Johnson Administration. See S. 2766, 90th Cong., 1st Sess. (1967).

such a new approach would, through the immediate imposition of criminal sanctions for a proven violation, serve to deter persons from venturing even once to a restricted area, thus eliminating the numerous loopholes which hamper sincere enforcement today. A structure involving direct area restrictions, moreover, would obviate the problem of discerning the meaning of the word "use" in the regulations, since it would be the individual's personal itinerary, not that of his passport, which would be governed.[48]

Such a reform in the system would not necessarily preclude from traveling to restricted areas those individuals such as journalists, who currently receive special passports specifically validated for travel to those countries from which others are barred. Special permits could still be issued to those persons.

Placing direct prohibitions on travel to restricted areas by United States citizens and imposing criminal sanctions for violation of these restrictions, however, serves to make serious another problem which under the current system is only marginal. While presently Americans who emigrate to restricted areas face the risk of criminal prosecution upon return to the United States only if they traveled in criminal violation of United States law, the reformed structure proposed above results in every such trip being a criminal violation of the law and will technically subject all returning emigrants to criminal prosecution.

Such consequences may arguably be justified in the case of a returning emigrant who intends to re-establish residence in the United States. By seeking to continue to enjoy the benefits of residing in the United States, he should be made to pay the price and should not be allowed to escape this debt simply because he is now technically a citizen of another country. A mere return

48 An alternative penalty might be based on the argument that since a deliberate violation of an area restriction displays a deeper concern for the restricted country than for the United States, such a violater has committed an act in derogation of his citizenship and the appropriate remedy that should obtain is expatriation. While such a sweeping consequence would certainly cause a person to think long and hard before traveling to a restricted area, this route has been blocked by the Supreme Court's decision in Afroyim v. Rusk, 387 U.S. 253 (1967), which established the principle that no American citizen can be deprived of his citizenship without his consent. The circumstances under which a person's consent will be presumed are limited to a few specified situations, all of which are clearly indicative of an intention to transfer allegiance.

visit by such an American emigrant, e.g., a naturalized citizen of Cuba, should not automatically subject him to prosecution for criminal violation of an area restriction.

However, a genuine difficulty arises with regard to prospective emigrés to such restricted areas who change their minds and decide to return to the United States and remain United States citizens before any formal switch of allegiance. Under the suggested reform they will be subject to prosecution just as would citizens whom the statutory provisions are actually intended to deter, namely those whose sole intention in traveling to the restricted area was to visit that country.

If indeed, "the right of expatriation is a right of all people," as Congress declared it to be in 1868,[49] it seems difficult to find a satisfactory rational justification for penalizing those who seek to exercise this right but change their minds before consummation. It seems entirely unreasonable to deter anyone who desires to do so from making his home in some country other than the United States. The right of voluntary expatriation must carry with it the right to experiment with life in another country, irrespective of travel restrictions, free from jeopardy of prosecution should the experiment prove distasteful.[50]

It is suggested further that included in any plan for reform of the area restriction structure and its enforcement should be a significant alteration in the current procedure by which the restrictions themselves are imposed. Assuming the Secretary of State to be the appropriate governmental authority to decide what countries should properly be cordoned off, a questionable proposition,[51] it could be persuasively argued that the regulations should

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49 Act of July 27, 1868, 15 Stat. 223 (1868).

50 We are not at this point considering the possible alternative for a U.S. citizen's relinquishing his citizenship *before* departing the United States. As North Korea and North Vietnam have no official connection with this country and Cuba has only its Mission to the United Nations, relinquishment of citizenship prior to departure for these countries, while obviating the passport problem, would render an individual temporarily stateless, an enormously undesirable circumstance in which to find oneself. Further, to the extent an emigrant can leave the United States and travel to an unrestricted country which does have relations with the proposed country of immigration and there switch allegiance, the U.S. government has still foreclosed the alternative of experiencing living in the restricted country before taking out citizenship there.

51 See note 46 *supra.*

be reorganized to include a category for those countries from which Americans are barred out of concern for their own health and safety.[52] Restrictions imposed on travel to countries in this particular group would be distinguished by the absence of any applicable criminal sanction for their violation. They would serve as warnings regarding the limited character of the United States' capability to provide aid to any American who might experience difficulty there. An American who chooses to go in the face of such an admonition should be viewed as having assumed the risk.[53] Upon his safe return he should not be subject to prosecution.

Clearly, this last proposal could be adopted independently of the rest of the reform program advanced above. The State Department would differentiate between those countries the travel to which would most likely result in an indictment and those which would not. This would serve to strengthen the credibility and consequently the deterrence value of the threat of criminal sanctions as well as rationalize the entire system. Needless to say, none of the nations now on the list could be said to fit under this suggested new rubric, and therefore such an alteration would not have immediate practical impact. Yet its adoption might signal the opening of a new, more functionally oriented era of United States government policy toward enforcement of area restrictions in travel.

III. Conclusion

The United States government may have varying reasons for imposing area restrictions. It is possible that they are merely for "show" and serve no further purpose than the deterrence effect they will have on the overwhelming majority of travelers. If so, it is possible to recognize that no action will be taken against violators except when it is deemed necessary in order to deter other travelers or to impress other governments.[54] The relatively minor

52 See text following note 9 *supra*. This suggestion would probably extend to category (b).

53 While the government can warn the traveler of the limited nature of its capacity to aid him, it cannot totally disclaim responsibility to try to assist him to whatever limited degree possible. See note 44 *supra*.

54 By imposing restrictions on travel to specified areas of the world, the United

sanction of asking for assurances that the passport will not be used in a restricted area — when such assurances are readily given and when such use is in fact unnecessary to enter the forbidden country — can be seen to serve this purpose to the extent they are in fact asked for.

If, on the other hand, area restrictions are thought of in more serious terms, the present scheme of enforcement is demonstrably inadequate to be effective in deterring travelers who decide to go to any of the countries on the list. To make such enforcement more effective, this Note has suggested revising the law to make any such violation subject to criminal sanctions. This would obviously not apply to persons such as journalists who obtained special permission to travel to these areas. The only other exception to this rule would be the American citizen who emigrates to a restricted area with the sincere intention of acquiring citizenship there, and who later returns to the United States, whether or not he has given up his American citizenship and acquired such new nationality.

Samuel Bergman
*Simon B. Posner**

States is able to counter a charge by a foreign government that Americans are abroad working against its interests, *e.g.*, Egyptian claims that American citizens were fighting in the Israeli army in 1967. The United States government can reply that such actions by American citizens do not have government approval and that these citizens are in fact forbidden to travel to the area. It is questionable how effective such a defense would turn out to be if it were well known that these area restrictions in fact are not enforced.

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BOOK REVIEW

THE APPORTIONMENT CASES. By *Richard C. Cortner*.[1] Knoxville: University of Tennessee Press, 1970. Pp. ix, 276. $10.95.

Reviewed by Robert H. Birkby[2]

Professor Cortner, who is Professor of Government at the University of Arizona, describes the course of the litigation that produced *Baker v. Carr*[3] and *Reynolds v. Sims*.[4] He interviewed and corresponded with the principals in both cases and was given access to their files.

In both Tennessee and Alabama, the apportionment battle was fought by what Cortner calls "*ad hoc* litigating coalitions," but there were major differences between the two coalitions. In Tennessee it was bipartisan, politically conservative-to-moderate and drew its members from the old-line, established members of the two parties. Its activities were well-coordinated and all sections of the state were ultimately represented in it. The Alabama coalition, in contrast, was made up primarily of young, liberal, national or "Loyalist" Democrats who did not make a serious effort at coordinating their efforts. The Alabama group was less representative of the whole state, being based primarily in Birmingham and secondarily in Mobile. Professor Cortner's presentation is flawed by his failure to explain why the two coalitions were so different in character.

The Tennesseeans had the harder task when they began to discuss legislative apportionment in late 1954. The history of attempts to attain reapportionment was bleak. Despite a few voices in the legislature, gubernatorial urging and the activities of some interest groups, the state had not been reapportioned since 1901. One member of the group summed up their conclusions about the possibility of legislative activity: "It's just not human nature for a

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2 Associate Professor of Political Science, Vanderbilt University, B.S. 1952, M.A. 1960, University of Colorado; M.A. 1962, Ph.D. 1963, Princeton University.

3 369 U.S. 186 (1962).

4 377 U.S. 533 (1964).

majority of Tennessee's legislators to hold that they are not fairly entitled to their own seats." (P. 37.)

But the prospect of obtaining relief in the courts appeared equally bleak. *Colegrove v. Green*[5] and its progeny seemed to rule out an attack through the federal courts so the state courts were tried first. Since the Tennessee Constitution requires equal population apportionment, this claim was the primary issue advanced instead of a fourteenth amendment claim. After the Tennessee Supreme Court denied relief,[6] two of its justices took the unusual step of discussing the issue with the press. In separate interviews each suggested that reform could be brought about if the people and urban legislative candidates made reapportionment a major issue in the next election. It was, but the legislature refused to even authorize a study of the issue by the legislative council. There was no choice left: relief had to be sought in the federal courts.

After a three-judge court dismissed the complaint in *Baker v. Carr*, Charles Rhyne entered the case to handle the appeal to the Supreme Court. In addition to working on the jurisdictional statement, counsel spent considerable time trying to convince the Solicitor General to enter the case as amicus curiae. During the closing months of the Eisenhower administration, they worked with Republican Congressman B. Carroll Reece who, in turn, attempted to convince Attorney General William G. Rogers of the merits of the Tennessee case. After the change of administration, these efforts continued culminating in a conversation between counsel and Deputy Attorney General Byron R. White and Solicitor General Archibald Cox. The meeting concluded with agreement that the Justice Department would enter the case. In this phase of the litigation, the coalition treated administrative officers in the way any interest group would.

In briefs and oral argument counsel stressed that the federal courts offered the only avenue of relief. Tennessee has no initiative or referendum, and the legislature had consistently refused to act. The legislative process had not been responsive to the plight of underrepresented voters. If the judicial process were equally unresponsive "these people are consigned to second-class citizen-

5 328 U.S. 549 (1946).

6 Kidd v. McCanless, 200 Tenn. 273 (1956), *appeal dismissed* 352 U.S. 920 (1956).

ship for the rest of their lives." (P. 103.) The Court was responsive and returned the problem of granting appropriate relief to the three-judge court, which ultimately allowed an election under an inadequate apportionment while retaining jurisdiction in the event the new legislature failed to act.

The fact situation in Alabama was substantially similar to that in Tennessee—legislative inaction ignoring the state constitution and no reasonable alternative course of action. The suit was filed before the decision in *Baker* was handed down but the three-judge court took no action until after the decision was announced. With the jurisdictional question settled, argument in *Reynolds v. Sims* focussed on the degree of reapportionment that would be required. Several attorneys wanted merely to reapportion in compliance with the state constitution which based the senate on population and the house on geography; while one argued that population equality in both houses was the only base that would satisfy the requirement of the fourteenth amendment. The Governor of Alabama called the legislature into special session while the suit was pending and urged reapportionment. "Let's beat the Federals to the draw," he said, "Let's be masters of our own household." (P. 176.) The legislature did pass limited reapportionment acts and the part pertaining to the house was acceptable to the trial court because it complied with the Alabama Constitution. The court accepted the changes in the senate even though the judges believed it to be invalid. They accepted it in the hopes that a new legislature would do a more complete job.

The question for the plaintiffs became whether to appeal the district court's order since it did not give them what they wanted. For a variety of reasons, including lack of money, it was decided not to appeal. However, two of the defendants decided to appeal which brought forth two cross appeals from the plaintiffs. For decision purposes *Reynolds* was grouped with cases from five other states though the six were argued separately throughout the 1963 Term of Court. The Solicitor General again entered as amicus curiae. The Government brief argued for rationality but did not embrace "one-man, one-vote," but as the last cases were argued the questions by the Justices indicated that they were leaning in that direction. They did enunciate this standard on June 12, 1964, in

what Chief Justice Warren called the most important opinion he had written for the Court. (P. 236.)

After a brief discussion of congressional attacks on the Court for the decision in *Reynolds* and efforts to get an amendment, Professor Cortner draws several conclusions from his richly detailed study. He points out that the Court is the mediator between the dual principles of legitimacy—majority rule and individual rights. Further, a comparison of the degree of compliance with *Reynolds* and the degree of compliance with *Brown v. Board of Education*[7] suggests six factors that condition the Court's power. These are "(1) the nature of the Court's mandate, (2) the responsiveness of the lower courts and their ability to enforce the Court's mandate, (3) the availability of enforcement litigants . . . , (4) the technical ease of the enforcement process, (5) the degree to which enforcement of the mandate depends upon nonjudicial actors, and (6) the relative power of those adversely affected by the Court's action." (P. 257.) And finally, he points out that those who are temporarily or permanently disadvantaged in the electoral, legislative or administrative processes will turn to the judicial process in trying to attain their policy goals.

This is a well-documented, highly readable study of why and how landmark case litigants enter the judicial arena. Lawyers, legislators and political scientists will all profit from reading it.

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7 347 U.S. 483 (1954).