The Colonial Lawyer is published at the Marshall-Wythe School of Law of the College of William and Mary. The opinions expressed are those of the writers and do not necessarily reflect the position of the school.

EDITORIALS

AN INTRODUCTION

Welcome to The Colonial Lawyer. For those readers meeting it for the first time, perhaps a note of introduction is in order. First as a newspaper, and since 1969 as a magazine, the Lawyer has served Marshall-Wythe as a forum for student thought on the law school and the law. For the past year the Lawyer has been, as it were, "on vacation." Now it is back.

Diversity is the objective of the Lawyer, and the contents of this issue exemplify that goal. Two articles follow an environmental vein. The first, a guest article by Mr. Denis Brion, traces the development of the 1972 Federal Water Pollution Control Act Amendments. Mr. Brion, who this year joined the faculty of Marshall-Wythe, is the present president of the Virginia State Water Control Board, a body that has been unusually visible to the public eye this year because of its responsibility to investigate first the Kepone scandal and later the Great Chesapeake Bay Oil spill.

Also on the environmental side, John L. Carver, the Secretary-Treasurer of The Environmental Law Group at Marshall-Wythe and the editor-in-chief of that organization's publication The Environmental Practice News, examines the possibility of "Thermal Efficiency Standards For Buildings."

Three articles in this issue have in common a concern for the problems that arise when law attempts to deal with morality. Ingrid Hillinger considers the problems of "The Duty to Rescue," while R. Gregory Barton takes a fresh look at "The Morality of Suicide." Mark Horoschak, in his turn, contributes a study on "Positive Eugenics and the Law."

On a practical note, Kathleen Nixon's article: "Semi-Student Bargaining" delves into the timely issue of the rights of graduate teaching assistants and medical interns and residents to bargain collectively for higher pay.

Finally, on the lighter side, Jane Bedno finds poetry in the justice that defines women's "place" under the law.

We think you will find it interesting.

CHANGES

With this issue, The Colonial Lawyer begins a new chapter in its history. While outwardly little changed from past issues, internally the Lawyer has undergone a
concerned with the change view it with mixed emotions. We believe that it may be a great step forward for the publication. but our hopes are tempered by the knowledge that no such drastic reorganization should ever have been necessary.

There is an ennui in this school that sometimes threatens even the most viable organizations. Time and again those students attempting to organize some ambitious project for the benefit of the school at large find themselves hamstrung by the lack of support from their fellows. Be the effort a one-time speaker presentation or a continuing project such as the Lawyer, it is crippled by this disinterest.

In 1975 a staffing crisis nearly terminated The Colonial Lawyer. In an effort to save it, members of four special interest groups: The Environmental Law Group The Black American Law Students Association (BALSA), The Mary and William Society and The International Law Society joined to serve as the Lawyer’s staff. Consequently, this magazine is now operated under an agreement that allows these groups to use it as their voice and as a vehicle for articles concerning their particular spheres of interest.

This is not to say that The Colonial Lawyer does not remain a basically independent publication. Essentially there is now a quid pro quo arrangement whereby these groups will provide active support for the Lawyer in return for an opportunity to express their views through it. Otherwise the magazine’s content is determined by its editor and staff who may not necessarily be affiliated with any of these groups.

We feel that, through service as a voice of these interest groups at Marshall-Wythe, The Colonial Lawyer is embarking upon a new path of service. Nevertheless, we cannot but be saddened by the knowledge that it was not a voluntary decision that led to this move, but rather an effort of desperation to save the Lawyer from dying of indifference.

The virtue of a magazine like the Lawyer is that it serves as a forum for many diverse themes and forms of expression. Neither day-to-day topicality nor stringent technicality need restrict its format. For the reader, perhaps more than any other law school publication a magazine serves as a window into the thoughts of his fellow students. We of The Colonial Lawyer staff hope that our publication’s “vacations” are over and that, in the future, the student body of Marshall-Wythe will support it and wield it as a valuable tool of expression.

—Terry N. Grinnalds

THE DEMISE OF ACTIVISM:
BAD NEWS FOR THE ENVIRONMENT

Unheralded, unannounced, and without warning, events have transpired which bode ill for the future of the campaign for a quality environment for America. Subtle subjective indicators lead to the conclusion that the environmental movement is in danger of foundering.

It is becoming increasingly apparent that environmental enthusiasm has abated. In the early days of the "new environmental awareness," groups proliferated. It was "in" and fashionable to talk about the environment. People who did not know what "environment" meant flocked to the "Earth Day" demonstrations. There was an environmental frenzy which promised not only new legislation, but also attitudinal changes among the public at large. During this period, the concern with the quality of life seemed to blossom, and the environmental movement had basically a positive image.

Today, however, it is not "in" to be environmentally active. The zealous emotionalism of earlier days (which may have led to some abuses by conservationists) has been supplanted by "ho hum" establishment procedures for the protection of the environment. Today those not working through establishment channels are suspect and, by-in-large, are cast in a negative light. The remaining activists are considered radical rabblerousers who lie in wait to oppose any or everything.

The large industrial polluters, who were the villains in the early days of the environmental crusade, have successfully changed their images. Currently in all forms of media, we see a succession of advertisements which remind the American public what Exxon, General Motors, or some other corporate giant is doing to protect the environment. Power companies, oil companies and others have successfully portrayed environmental activists as being anti-affluence, anti-American (the American ethic is based on growth), and anti-progress. The miseries of the recent recession are even portrayed as evidence of the danger of environmental negativism! This coup by industrial, expansionist, "anti-environmental" forces is now driving activism to near extinction.

What remains after activism has lost its popularity are those of us who continue to fight the long tedious legal battles against almost insurmountable odds. The corporate forces now command legions of highly paid and well-financed lobby and public relations campaign. Through such efforts, the "anti-environmentalists" have either neutralized public opinion or have swung it to their side. At best today one can hope that the public is only apathetic.

In the face of all this Madison Avenue professionalism, the uncoordinated, ill-financed forces of the environmentalists have little spirit or morale left. Activism is dying, and the environmental movement is foundering. Activism must not die. Those who in these times doggedly wage unpopular battles recognize that, while activism has its excesses and is sometimes even counter-productive, its spark is what keeps the environmental movement vital.

—John L. Carver
AN INTERIM ASSESSMENT OF
THE
1972 FEDERAL WATER POLLUTION
CONTROL ACT AMENDMENTS

Denis J. Brion

It is becoming a part of the conventional wisdom that the national legislative process has undergone substantial degeneration—under the typical pattern, Congress creates, with considerable fanfare, an ambitious federal program in order to cure one or another of the social ills which plague our times. Next comes a ritual bill-signing ceremony during which the President intones that this particular program is the most significant of our generation. There then follows a period during which, again with the attention of the news media, prominent individuals are appointed to the top positions in the new bureaucracy. This phase is inevitably followed by the setting in of a long period of bureaucratic routine, under which the program continues because of its momentum, with expanding funding but with no real impact on the problem for which the program was created. To the average citizen, the whole process seems to be one of cumulation—new programs are constantly being created, old programs continue, no program seems to solve anything, and the burden of government seems ever to increase. It has reached the point that the traditional conservative battle cry against big government is now being echoed in the opposing camps. Edmund Muskie, for instance, is now wondering whether the largeness of government is hampering the ability of government to do its job. And Edmund Brown, Jr., is past the stage of wondering; he is actively advocating a reduction in the size of government.

The purpose of this article is not to examine the nature of this trend, nor is it to comment on the efficiency of the political process. Rather it is to assess, however briefly within the context of this new conventional wisdom, the nature of one ambitious federal program, its impact nationwide as well as in Virginia, and some of its prospects.

A. A Brief Description of the 1972 Amendments

In October, 1972, Congress enacted the Federal Water Pollution Control Act Amendments, a comprehensive rewriting and expansion of an existing federal pollution abatement statute. These amendments, commonly referred to by their Public Law number, PL 92-500, set ultimate goals for achieving the cleanup of America's watercourses. By July 1, 1977, industrial discharges must be treated by treatment works using "the best practicable control technology currently available," and municipal sewage treatment works must be capable of "secondary treatment." By July 1, 1983, industrial waste treatment works must be capable of "the best available technology economically achievable," and municipal sewage treatment works must achieve "the best practicable waste treatment technology."

What all this euphonious language is intended to mean is that, by July 1, 1983, "an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" is to be achieved; and, by 1985, "the national goal that the discharge of pollutants into the navigable waters be eliminated" is to be achieved. In brief, these goals represent a truly ambitious commitment to reversing the generations-long process of the degradation of the waterways of America—an enterprise worthy in comparison to the most grandiose government programs that have been initiated in the two centuries of our republic.

The mechanisms of PL 92-500 are as complex as the intent is massive. The heart of the enactment is the National Pollutant Discharge Elimination System (NPDES), which sets up a regulatory mechanism based on the concept of federal-state cooperation. Under NPDES, all persons who potentially might discharge pollutants must obtain a discharge permit; "persons" includes both private entities, such as industries, and
public entities, such as municipalities. The NPDES permits are issued under direct regulatory programs established and carried out by the individual states. However, these individual programs are approved in advance by the federal Environmental Protection Agency (EPA), and the substantive content of the programs is controlled by regulations promulgated by EPA. The authority of EPA to issue these various regulations and guidelines creates for that agency a role of setting standards, in which it establishes tolerable levels of various kinds of pollutants, treatment standards, levels of quality for receiving waters, and procedural requirements. And, because EPA must approve the individual state programs and is empowered to withdraw this approval, EPA also fills the role of overseer.

Other hardly less important provisions of PL 92-500 provide for a comprehensive scheme of state planning carried out under federal guidelines and assisted by federal grant funds; for substantial research and development to be conducted by EPA in waste treatment technology; and for a broad enforcement scheme. The complex scheme of planning includes river basin plans, which are to describe present water quality conditions and to project future conditions and treatment requirements; management plans, which are to establish the means by which these treatment requirements are to be met; and a more sophisticated level of planning for the purpose of defining and establishing means to abate less obvious but no less important forms of pollution such as storm water runoff from urban areas, siltation from land areas disturbed by development, and runoff of nutrient-laden waters from heavily-fertilized agricultural lands. The enforcement scheme of PL 92-500 is carried out primarily by the individual states, but the EPA has broad residual authority to step into any faltering state process; and a relatively generous citizen suit provision is also included.

If the heart of PL 92-500 is NPDES, the prime mover is the federal fund granting process under which EPA provides 75% of the costs of public sewage treatment works. PL 92-500 authorized a total of $18 billion for such purposes, spread over fiscal years 1972, 1973, and 1974; and despite a delay because of a presidential impoundment of a large portion of the funds (which impoundment was struck down by the courts), the money has been made available and will soon be substantially spent.

These funds are parceled out in a complicated procedure under which the individual states are required to adopt a rating system for assessing priorities of potential fund recipients, followed by a three-stage process under which the various projects, once selected for funding, are moved from inception through the design phase to completion.

Finally, PL 92-500 established a "National Study Commission," charged with the duty to make a full and complete investigation and study of all of the technological aspects of achieving, and all aspects of the total economic, social, and environmental effects of achieving or not achieving, the effluent limitations and goals set forth for 1983 in... this Act.

Thus, the National Study Commission was charged with the duty to make its report by September, 1975, in order to permit "mid-course corrections." PL 92-500 carries with it no irrebuttable presumption that it is the end-all; rather, a mechanism is instead established to compare goals with performance and to reassess the wisdom of continued pursuit of those goals.

This somewhat long summary of PL 92-500 is actually only a simplified overview—the print of the Act covers eighty-nine prolix pages, and it is one of the most complex pieces of legislation ever to come out of Congress at one time.

B. The Interim Report of the National Study Commission

The obvious question, of course, is whether such a monstrosity can really work. The staff report of the National Study Commission was issued in November, 1975, and the recommendations of the Commission became available in March, 1976. The findings of the Commission are interesting. On a nationwide basis, the
commission found that publicly owned sewage treatment works will not meet the July 1, 1977, deadline for secondary treatment, primarily because not enough federal grant funds have been made available. The Commission estimates that an additional eleven years and $118.5 billion in 75% federal grants will be required. Similarly, the July 1, 1977, goal for industrial discharges will not be met, but the industries are expected to meet this goal much sooner—by 1980—than the 1988 completion date for public treatment works. Moreover, the report concludes that there has already been noticeable improvement, generally, in water quality conditions.

C. Progress in Virginia under PL 92-500

In Virginia, for a variety of reasons, the institutional ingredients have long existed for taking advantage of the initiatives available under PL 92-500. In 1946, more than a generation ago, Virginia established one of the first water pollution regulatory agencies, for the ironic purpose of attracting more industry to the Commonwealth. With a relatively vigorous response to PL 92-500, Virginia has been able to obtain a total of $496 million of the authorized grant funds for municipal treatment facility construction:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Grant Amount</th>
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<tbody>
<tr>
<td>Fiscal Year 1973</td>
<td>$58 million</td>
</tr>
<tr>
<td>Fiscal Year 1974</td>
<td>$88 million</td>
</tr>
<tr>
<td>Fiscal Year 1975</td>
<td>$99 million</td>
</tr>
<tr>
<td>Fiscal Year 1976</td>
<td>$251 million</td>
</tr>
</tbody>
</table>

Since the federal grant pays for 75% of project cost, the total project value initiated in Virginia under PL 92-500 is $661 million, a not insubstantial public works investment by any measure, and a prodigious undertaking for an environmental endeavor. Nor is this the only impressive feature that can be offered. In terms of physical facilities in place, these funds will represent the initial construction or improvement of municipal treatment works with a combined total capacity of approximately 390 million gallons per day (MGD). Stated differently, using a rule of thumb of 90 gallons of sewage per day generated per capita and a total Virginia population of about 5 million, these funds have a direct impact on the waste of 89% of Virginia's population. This figure is even more substantial when it is considered that a certain portion of the population is too dispersed to be served by centralized facilities.

The types of facilities being provided under these projects cover a broad spectrum of treatment techniques and treatment capacity. They range from a simple central septic system for the tiny Roanoke Valley community of Boones Mill to advanced, most-sophisticated-in-the-country tertiary treatment plants at Roanoke, Charlottesville, Winchester, Waynesboro, Alexandria, Arlington, eastern Fairfax County, and Prince William County. The largest of these tertiary plants will have a capacity of 54 MGD and the combined total capacity of 214 MGD, a capability to meet increasing loads, and three entirely new facilities are in various stages of planning. The total capacity for the Hampton Roads area facilities will be 180 MGD.

Of course, the large-scale projects in Virginia's urban areas are the most visible, but the important point is that the treatment requirements and stream standards imposed under NPDES affect all of the Commonwealth, not just the urban concentrations. Thus, on a per capita basis, the requirements are substantially uniform, and the resident of a small community will feel the impact of PL 92-500 just as much as the resident of the large city.

What is the nature of this impact? The first aspect is obviously financial. The $496 million is not "free", since it comes from the taxpayer's pocket, although there is some reason to believe that Virginia has wangled a bit of a "subsidy". In terms of size and population, Virginia is an "average" state and would thus have expected to receive about 1/50, or $360 million, of the $18 billion authorized by PL 92-500. The $486 million actually received thus can be looked on as containing a 38% bonus. But, from another point of view, this federal largess is also not free since these treatment systems will not run themselves; for the indefinite future, they will demand funds for operation and maintenance that will have a permanent effect on the utility bills of the average citizen.

If the cost of this program is substantial, what of the benefits? The statistics available to date indicate:

a. from December 1972 to December 1975, the allowable total flow discharge from Virginia's major municipal sewage treatment plants (defined as those with a capacity of 2 MGD or more) as increased from 345 MGD to 424 MGD, a 23% increase; and

b. in the same period, the total pollutant discharge from these facilities has decreased from 165,000 pounds of BOD per day (a technical measure of pollutant
quantity) to 120,000 pounds of BOD per day, a 27% decrease. The performance in this same period for Virginia's major industrial treatment plants shows similar improvement.

While a 27% decrease in pollutant load is solid progress but still not all that spectacular, it should be noted that only about 5% of the projects funded by PL 92-500 have been completed; and, while much of this improvement could also be attributed to more vigorous enforcement of Virginia's water pollution abatement program, there is little question that the financial, as opposed to regulatory, aspects of PL 92-500 are beginning to take effect. It is projected that, when the projects funded by the $496 million federal grants are completed in 1979, the pollutant discharge from Virginia's major sewerage treatment plants will be some 90,000 pounds of BOD per day, a reduction of 45% from December 1972, even though the permitted flow will be 600 MGD, a 74% increase over the same period.

Finally, if the pollutant load being discharged into Virginia's waters is decreasing, what will be the effect on the quality of Virginia's waters—which, after all, is the whole point of the pollution abatement exercise? The information and projections now available assuming a continuing federal grant program, indicate this:

<table>
<thead>
<tr>
<th>Year</th>
<th>Stream-miles not meeting quality criteria</th>
<th>% of total Virginia stream miles</th>
</tr>
</thead>
<tbody>
<tr>
<td>1974</td>
<td>2033</td>
<td>8.4%</td>
</tr>
<tr>
<td>1977</td>
<td>1435</td>
<td>5.3%</td>
</tr>
<tr>
<td>1983</td>
<td>96</td>
<td>0.4%</td>
</tr>
</tbody>
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These figures are particularly significant since the process of setting water quality criteria for the streams of Virginia is a continuing one, and the tendency over time is for these standards to become more stringent. Thus, Virginia's waters are on their way to being cleansed.

D. The Future of PL 92-500

The National Study Commission has concluded that the 1977, 1983 and 1984 goals of PL 92-500 cannot be met on time. In Virginia alone, there is another $1 billion worth of municipal projects that must be funded if these goals are to be met. And much further work must also be done in abating non-point-discharges and toxic pollution. Unfortunately, the fiscal authorizations under PL 92-500 have run out, and the President's current budget requests provide for no additional funds. At this writing there is substantial sentiment within Congress to continue the grant program, but it is too early to tell how much might be provided, if anything.

The ultimate question, one beyond the scope of this paper to argue, is whether the program is worth continuing. It is interesting to note that the National Study Commission has massive-sounding funding requirements to meet the affordable goals of PL 92-500, if they are affordable. For instance, for industrial discharges to meet the 1983 requirements, the annual rate of inflation for the price of the product of this industry will be 0.37%—of itself, an acceptable amount. Similarly, approximately $120 billion will be required in additional funds to meet the goals for municipal treatment works. But when this is spread out over the eleven years which will realistically be needed, the financial requirements come to only 0.9% of the annual GNP—again, an affordable figure of itself.

The answer to this ultimate question will of course be determined by many complex factors, including the state of the economy, shifting public priorities as natural resources dwindle, the continued social will to reallocate wealth, and the durability of the environmental ethic. But, at least the mechanisms have been set up and are working to assess, on a continuing basis, the rationale for, and progress of this massive undertaking. Whether or not the commitment to the goals of PL 92-500 will be continued will be a significant development, but it is already significant that PL 92-500, whatever it achieves in the area of water quality, is teaching us how to evaluate and utilize governmental programs in a much more sophisticated way.
A man must love his gentle mate,
Support her, feed her, care for her;¹
For God created female's state,
Not to compete², but to defer³;
And, though now become a person⁴,
Benign rules still protect a lass⁵;
Suspect not her special classification,⁶
That courtly E.R.A.'s yet to pass⁷.
Firm male justice rules the nation
With wisdom, force, and verbiage⁸;
The hand that rocked the cradle's passion
Is due to a faulty hormonal gauge⁹.

² Goesaert v. Cleary, 335 U.S. 464, 467 (1949).
⁶ Frontiero v. Richardson, 441 U.S. 677 (1973)
Any student of the law will undoubtedly remember the 1928 tort case Osterlind v. Hill, 263 Mass. 73, 160 N.E. 301 (1928) where defendant, an amusement park employee, rented a canoe to a Mr. Hill, knowing that he was intoxicated and clearly incapable of safe navigation. Mr. Hill paddled out a bit and then inadvertently upset the boat. He clung to the overturned shell for half an hour, all the while uttering loud cries for help. There were boats available for a rescue attempt. Defendant, a peculiarly endearing type, smoked a cigarette on the dock as Hill drowned before him. In an apparently incomprehensible ruling, the court held that the defendant was under no legal duty to go to his aid. A 1966 case, Handiboe v. McCarthy, 114 Ca. App. 541, 151 S.E. 2d 905 (1966), similarly held that a servant was under no duty to rescue a small child drowning in his master’s swimming pool.
In my Torts class, there was a visible reaction of horror to these unsavory cases. Our moral sensibilities were deeply offended. Almost instinctively we turned to the legal system. "There ought to be a law", we cried. Nor were we alone. Such noted legal commentators as Dean Prosser and Dean Pound have joined in condemning this, to them, obvious moral obtuseness in the law.

Prosser, considering as well the case of *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959), where the Pennsylvania Supreme Court found no legal responsibility upon a defendant for challenging deceased to jump a wide, dangerous ditch, has commented that "it would be hard to find a more unappetizing trio of decisions." W. PROSSER, LAW OF TORTS 340 (4th ed. 1971). He has argued that the results of these decisions derive from an "historical reluctance to countenance non-feasance as a basis of liability." W. PROSSER, supra, at 340. Pound suggests that they represent an atavistic remnant of nineteenth century jurisprudence which manfully tried to separate legal principles from moral ones R. POUND, LAW AND MORALS 71-88 passim (2d ed. 1926).

It is arguable, however, that the legal system's failure to impose an active duty of rescue is perhaps not so reprehensible as may first appear. In fact, it can be at least partially explained in terms of contemporary moral, legal and practical considerations. Obvious moral failings are not necessarily cured by a reflexive dumping of the problem into the legal system's collective lap. At times, there surely must be non-legal solutions to a problem which are preferable to legal alternatives. The question is: is this such a time or should there be a legal duty to rescue?

Modern thinking would have no quarrel with Prosser if, in fact, old notions of non-feasance accounted for the absence of such a duty. The individual who is harmed because someone failed to act is no less injured than the individual who experiences an active assault. If the duty to rescue were rationalized away upon this basis, and this basis alone, it would represent a moral and legal abdication of societal responsibility. A further analysis of the problem, however, shows that the absence of such a duty derives from more than this archaic distinction. Pound's blithe explanation does not do justice to the complexity of the problem. Modern courts do not always blindly defer to past legal traditions when there is an obvious and compelling reason to depart therefrom. No—if modern courts fail to recognize an active duty to rescue, there must be other considerations which also come into play.

A starting point must be a consideration of the relationship between our moral and legal systems. Do we, even in theory, expect our legal system to encompass wholly our ethical system? Certainly we know that, in fact, one is not the mirror image of the other. Laws are not always the state's version of moral precepts although there are obvious and numerous overlaps. "Thou shalt not kill" appears in the legal code as a prohibition against killing with the added promise of state retribution should its law be violated. But the state, in regulating relationships between people, also must necessarily deal with situations devoid of moral content. Rules governing contractual relationships property relationships, allocation of risk, etc. have frequently developed without the aid of moral guidelines. So, too, there are moral rules which exist without the benefit of state sanction. Selflessness, the golden rule, the duty to honor one's parents have not found legal translation to date.

For many of us, this lack of identity is welcomed, for one man's morality may well be another man's sin. Who is to decide which moral precepts shall have the force of law? Should those believing abortion to be immoral have access to state sanctioning power to impose their beliefs upon those who believe differently, or has the legal system wisely left some matters to the realm of moral persuasion alone? Contrary to Pound's insinuation that attempts to separate law and morals hark back to Neanderthalic times, POUND, supra, at 77), many modern thinkers applaud this trend, at least with respect to laws regulating sexual mores. Many feel that consenting adults should be free to determine their own conduct and moral standards without state interference. This demonstrates at the very least that there is some danger in assuming that the legal and moral systems should be ultimately coterminous.

This conclusion does not necessarily resolve our problem as to a duty to rescue. That morality and the legal system sometimes cover areas unto themselves does not mean that a duty to rescue should not find expression in both. Is there any justification for this glaring omission? There is. It is the intervention of practical considerations which accounts for the law's apparent callousness. At its most fundamental level, the duty to rescue defies sound legislation.
It should be noted that those clamoring for the imposition of such a duty are addressing themselves only to the situation where rescue would be danger-free for the rescuer. The law recognizes that it cannot command an individual to risk, gratuitously, his own life to save another. (It is interesting to note, however, that our moral system does ask this of us. Such acts are lauded as truly heroic, wholly selfless in fact the ultimate moral act; for what more can a society exact from an individual than his life?) While imposing a legal duty to rescue would not be difficult in the above-mentioned cases, the ramifications of such a duty would be perplexing in two regards: one—how far does this duty extend; and two—what standards are we to establish to determine whether or not any danger is present?

It is impossible to delineate rationally the outer limits of this duty. Should each friend or casual acquaintance of the individual who smokes be held ultimately liable for his death from lung cancer? What about the alcoholic who sits next to you at work? We cannot dismiss these possibilities by saying that the individuals consciously choose to kill themselves and that the duty, therefore, does not extend to them. Few would ever suggest that we should say to the man about to leap from the ninth story, “Be my guest.”

In addition, is it reasonably possible to limit liability to an ascertainable group? What about the boulder in the middle of the road which hundreds of people pass by during the daytime which becomes a fatal obstacle that night? If we find one passerby, can we fairly hold him and only him responsible for the death that ensued?

What standards should be used to determine whether the would-be rescuer was in danger? Should there be an objective standard (e.g., reasonable apprehension of fear) or a subjective one? Delineation of such a standard would seem to present enormous difficulties. Consider the Genovese death several years ago where a large group of New Yorkers watched and listened to a young woman being murdered below their windows when help was only a phone call away. Afterwards, people said that they had not wished to get involved. Involvement for them probably meant becoming the next victim, an irrational fear perhaps, but a very real one to many living in urban America. In the Genovese case, should the actual on-lookers alone have been condemned? Should not the city have borne part of the responsibility? If New Yorkers had felt that they would have been protected, perhaps they would have been less reluctant to become “involved.”

If we assume that the duty to rescue presents serious legislative obstacles, can we content ourselves in its absence, or should we risk the unknown and attempt to legislate anyway? Let us return to our defendant who so calmly smoked his cigarette while another human being begged for help to save his life. Let us keep in mind that the same moral sensitivity which is so shocked by defendant’s inaction also recoils from the idea of punishment of “criminals” because it does little to resolve the problem of crime. What kind of man is our defendant canoe keeper? Certainly not someone we would care to dine with. Can we suppose that a legal sanction would motivate this obviously callous, if not sick, individual to act? (We no longer believe that laws forbidding murder in fact prevent murders.) Perhaps legislation would make us feel better, e.g. “if one amongst us be that indifferent, know ye that he shall pay”? But what would a law against indifference accomplish? Aren’t we, in fact, saying, how could anyone, with no danger to himself, not rescue another? But this is just the point. Those who would not rescue under such circumstances are, more likely than not, sick, highly anti-social individuals who are in need of mental help rather than legal directives.
Should we draft a law which would essentially address itself to this small, rather unusual class of people, and which well may not have any affect on it at all?

Clearly, priorities must be considered. One author compares the law to a vigilant sheep dog. He points out:

> many middle-class Americans feel secure enough from personal aggression that they forget the wolves around them and demand that their sheep dog act more like a solicitous veterinarian. Perhaps he should: nevertheless, statistics and case histories of violent crime indicate that our society still needs canine teeth in guard to protect it—not against the passive indifference of the passer-by but against the active assault of the robbers, rapists and murderers." EDMOND CAHN, THE MORAL DECISION (1955).

If we assume that criminal laws do affect behaviour, and that the imposition of a duty to rescue would save lives, then perhaps the question is one of selectivity. Obviously, any legal code cannot cover all instances of injury to another. Are the circumstances here such as to warrant a law or are there other acts, more destructive of the social fabric, which occur more frequently and thereby demand priority treatment? In the last analysis, one might conclude that the situations where there is no danger—real or imagined—are infrequent and therefore not totally deserving of legal sanction. On the other hand, one life saved is probably reason enough for a law.

Casting aside practical considerations, one must finally ask philosophically what such legislation would do to us as moral beings. Mr. Cahn provides a valuable insight as he discusses an episode from Fielding’s Joseph Andrews (CAHN, supra, at 187-91). Joseph had been set upon by thieves and stripped of all possessions, including his clothes. A stagecoach passed by and, at first, none of the passengers expressed the slightest inclination to help.

> Afterwards, people said that they had not wanted to get involved.

The coachmen wanted a fare, the woman passenger was offended by his nakedness, and an elderly passenger was afraid of being robbed. “However, it happened that one of the unsympathetic passengers was a young lawyer, a very cautious lawyer at that. He warned the others that if Joseph should die, they might be proved to have been the last in his company and might be called to account for his death.” (Supra, at 188). Fear of prosecution rather than any moral impulse finally convinced the passengers to take Joseph in.

As Cahn points out, the passengers’ initial decision not to let Joseph in was unenlightened selfishness while their ultimate decision to let him ride with them was merely enlightened selfishness. Any attempt to impose a legal sanction may curb behaviour such as with the Fielding story but it will not elevate man’s morality. It will provide one more instance of doing something because it is required by law rather than by an individual’s moral dictates. In a sense, it robs the individual of his moral satisfaction—it takes the fun out of being moral. On the other hand, it would surely be ridiculous to sacrifice lives for the sake of any moral gratification. The question is really, would such a law save lives? Would Mr. Canoe Keeper have behaved any differently if there had been a law on the books?

On further reflection, the question of imposing a legal duty to rescue is more difficult than it would first appear. The absence of the legal duty does not automatically make the common law immoral or amoral. Rather, it could show that the law is, above all else, practical and it would prefer to remain silent rather than to speak badly. Perhaps the law has deferred to other social mechanisms recognizing that law alone cannot solve all human problems or achieve all desired social objectives. Can we really say that in making this choice, the law was unwise?
POSITIVE EUGENICS
AND THE LAW

Mark Horoschak

The term "eugenics" was coined by Sir Francis Galton in 1883 to denote the study and manipulation of factors that improve hereditary qualities. The goal of negative eugenics is the diminution of inferior genetic qualities. Positive eugenics, on the other hand, entails the propagation of superior genes.

Initially, interest in eugenics centered on the negative aspect of the science, that is the reduction of totally dependent individuals who are born into the world only to suffer and be cared for by society. The negative eugenics movement reached its zenith in the early twentieth century when organizations like the International Eugenics Congress were formed to combat genetic degeneration. The Congress favored premarital syphilis tests, incest prohibitions, antimiscegenation laws and sterilization statutes. To a large degree the Congress succeeded in achieving its goals. The Wasserman test was instituted, incest and antimiscegenation laws were enacted, and statutes providing for the sterilization of mental defectives and criminals became commonplace. The Congress, however, was a casualty of the Second World War. The horrible experience of the Nazi Rassenhygiene resulted in a distaste for genetic experimentation shared by scientist and layman alike.

The realities of our modern age have rekindled interest in genetic engineering. Genes are chemical substances that are not completely stable. Mutations may occur from chemical imbalances or radiation during the reproductive process. Radioactive fallout from nuclear testing, medical X-rays and chemical additives in food are largely responsible for the increased "genetic load" and, hence, the increased rate of mutation. Today about one child in twenty is born with a discernible genetic defect. Still others die before birth because of the disruptive impact mutations have on genetic coordination.

Recognition of the implications of the genetic load problem has prompted research in the area of positive eugenics. The most recent developments in this field are collectively known as cloning. The term "cloning," which means "cutting," is a botanical term that refers to a type of asexual reproduction that is characterized by the creation of individuals that are derived from a single parent and genetically identical to that parent. The cloning process may be divided into two stages. Enucleation involves the removal of the nucleus from a female egg (a sex cell is "haploid," containing only one set of chromosomes). The second stage, known as re-nucleation calls for replacement of the egg nucleus by the nucleus from an adult body cell (a "diploid cell," having both sets of chromosomes) of the prospective parent. Cloning experimentation on plant and lower forms of animal life has been successful in reproducing genetically identical progeny.

THE CASE FOR BANNING HUMAN GENETIC EXPERIMENTATION

As of the time of this writing, a considerable furor has arisen in the academic community over the question of whether to commence human cloning experimentation. Prominent men of science: Dr. Leon Kass, the executive secretary of the Committee for the Life Sciences and Social Policy of the National Academy of Sciences, Dr. James D. Watson, the Nobel laureate molecular biologist, and prominent theologian Professor Paul Ramsey have urged a total prohibition of human cloning.
In support of this proposal, they have raised several serious scientific objections. One objection is that the identification of genetically superior persons to be the subjects of a positive eugenics program is exceedingly difficult. A person with superior genes may exhibit qualities associated with inferior genetic stock because of poor diet, limited education, or lack of adequate medical care. Furthermore, at present, scientists suffer from vast gaps of knowledge with respect to the effects of genetic manipulation. Traits useless to one generation may be essential to a succeeding generation. The fate of the human race would be determined by myopic scientific controls. Similarly, scientists are uncertain as to the interactions of genes. Most traits are polygenic. Thus, the desirable genotype chosen for replication might carry with it undesirable side traits.

Perhaps the most serious indictment of such a program is that clonal decisions would not rest on valid scientific grounds independent of the social and philosophical biases of the controllers. A classic example of the interjection of philosophical bias in the gene selection process is the disparity between the 1935 and 1959 lists of ideal genotypes compiled by Professor H. J. Muller, a prominent geneticist. In 1935 Professor Muller was an avowed Marxist. Not surprisingly, Marx and Lenin were listed as desirable genotypes to be propagated. By 1959 his political views had mellowed. This change was reflected in his revised list, which omitted Marx and Lenin and included Lincoln and Descartes.

The danger of changing societal values affecting clonal decisions is as much an ethical consideration as scientific. In the absence of a detailed proposal for an institutionalized framework, it is difficult to discuss the question of democratic control and safeguards against abuse. Certainly the benevolence of Professor Muller is no guarantee against abuse by a state subject to changing ideals and tastes.

Cloning would have a devastating impact on the Anglo-American concept of individuality. The sanctity of individuality finds expression in the Declaration of Independence:

> In democratic societies there is a fundamental belief in the uniqueness of the individual, his basic dignity and worth as a human being, and in the need to maintain social processes that safeguard his sacred individuality.

Genetic fabrication is a form of determinism. Societal pressures would likely deprive the clonant of personal autonomy by channeling all his energies in a predetermined course. For example, a young Einstein clonant would be "encouraged" to study mathematics and physics. This denial of free will to the clonant might also lead to widespread self-degradation. Cloning technology is capable of destroying the intuitive sense of individuality. Consequently, a clonant would tend to perceive himself less a human being than a manufactured product. In short, cloning might cause a substantial erosion of human dignity.

While the quintessential scientific question is "Can man play God?", the paramount ethical concern is "Should man play God?" The question is easier to answer in the affirmative when we envision a genetic engineering program improving human intellectual skills and generally enhancing the quality of life. It stands to reason, however, that everyone cannot be Einstein or a Beethoven. Nor would the controllers opt for such a society, for the delegation of the menial but necessary tasks of society to gifted clonants would arouse their rebellious instincts. It follows that the controllers would have to clone a certain percentage of mediocre or inferior human beings as well as geniuses. Whether one man should so preordain another's fate is a question of deep religious and ethical significance.
It must be concluded that these justifications are not sufficient to deprive the individual of civil liberties."

CONSTITUTIONAL OBJECTIONS

Let us suppose Congress enacted legislation creating a compulsory positive eugenics program. The constitutionality of such legislation could be challenged on several possible grounds.

The right of privacy is implicitly recognized in the First, Fourth, Fifth, and Ninth Amendments. Specifically, the right to control one's reproductive functions has been held to fall within the "penumbra" of the First Amendment guarantees. In *Skinner v. Oklahoma* the Supreme Court struck down a statute providing for sterilization of habitual criminals on the ground that the statute violated the Equal Protection Clause of the Fourteenth Amendment. The Court stated:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.

In *Griswold v. Connecticut* the Court asserted that the fundamental right of marital privacy was within the "penumbra" of the First Amendment. *Eisenstadt v. Baird* extended this penumbra to envelope sexual intercourse in general. The right of privacy in heterosexual matters, however, is not absolute. As noted by the Court in *Roe v. Wade* a statute impinging upon the reproductive capacity will be upheld if it is representative of a "compelling state interest." In addition, the statute must be narrowly drawn to achieve the state's purpose; that is, there should not be a less onerous alternative for implementing the legislative goal.

Clearly a statute regulating the fundamental right of procreation would be violative of the First Amendment unless a compelling justification for the imposition of genetic controls were shown. One author has suggested that the reduction of human suffering would qualify as a state interest sufficient to justify a deprivation of fundamental rights. Not all would find this interest "compelling." Initially it would be necessary to try to balance the suffering caused by the deprivation of the right to have children against the possible sufferings of a child who may be born with a genetic disease. Then it would be necessary to address the question of whether life for a child with a genetic disease or defect is preferable to no life at all. In the case of sickle-cell anemia, for example, the state interest in preventing procreation by afflicted parents is particularly weak since the child has only a twenty five per cent chance of inheriting the disease.

A second possibility might be the recognition of a governmental economic interest in preventing the birth of children with genetic diseases and defects; but it cannot be said with any certainty that the government will bear the costs of their care. A direct economic interest of the government would exist only insofar as the prospective parents might be impoverished; but a statute denying a couple the right to procreate solely because of indigency would violate the Equal Protection Clause.

Still another proposed justification is that a statute instituting a compulsory positive eugenics program would safeguard public health and welfare. However, as mentioned previously, no adequate scientific basis for the imposition of genetic controls has yet been demonstrated. We simply have not guaranteed that the incidence of inferior genes would be reduced without deleterious side effects. Also, absent adequate scientific bases for the controls, the program would inevitably be administered on the basis of half baked medical notions and socio-political theories. It must be concluded that these justifications also are not sufficiently compelling to deprive the individual of fundamental civil liberties.

Arguably, positive eugenics statutes would violate the Equal Protection Clause of the Fourteenth Amendment. It appears clear that when the state dictates what kind of people will be produced it has created classes of people who are not equal. Such a statutory discrimination will be upheld under the Equal Protection Clause only where rationally founded. The denial of a particular class of the right to reproduce because "their kind" are not needed at the time might well be considered patently unreasonable.
A statute creating a compulsory positive eugenics program would likely contravene the Thirteenth Amendment. The Thirteenth Amendment has been described by one commentator as the "constitutional repository of our notions of free will and personal autonomy..." Genetic determinism would be incompatible with our conception of free will and would impair the individual's internal autonomy, thereby deleteriously affecting external autonomy—that is, the exercise of one's civil liberties. The designation of genotypic inferiority would create a "badge of slavery;" the denial of eugenic technology to a designated class would constitute an unconstitutional form of oppression. This expansive view of the Thirteenth Amendment beyond dejure enslavement is consistent with a recent interpretation of the amendment in *Jones v. Alfred Mayer Co.*, where the Supreme Court upheld a federal statute prohibiting housing discrimination on the ground that such discrimination in our modern society was a "badge or incident of slavery."

The *Griswold-Eisenstadt-Wade* trilogy is not necessarily applicable to the case of positive eugenics. *Griswold* may be distinguished in that a positive eugenics program (cloining or *in vitro* fertilization, for example) may not involve marital rights but rather the rights of one parent. Similarly, while *Eisenstadt* protects the right to have sex without children, it does not consider the question of children without sex. *Wade* merely stands for the proposition that a woman has a right to have autonomy over her body. *Wade* is clearly inappropriate to *in vitro* births. Furthermore, the right of privacy arguably is counterbalanced by our time-honored tradition of academic freedom. In *Griswold* Justice Douglas argued that the First Amendment is sufficiently broad to protect "freedom of inquiry, freedom of thought, and freedom to teach...indeed, the freedom of the entire university community." A total prohibition of eugenics experimentation would violate this fundamental freedom of academic inquiry.

Moreover, the denial of equal protection argument is specious. Admittedly, legislation which denied benefits and imposed burdens on the basis of race was irrational because race is unrelated to a person's ability to perform, his contributions to society or any other quality which would justify the discrimination. Eugenics legislation, however, would be rational to the extent that fundamental rights of persons would be abridged only to prevent their passing deleterious genes to future generations. A eugenics statute designed to filter out undesirable genes would, on its face, no more constitute a denial of equal protection than would the denial of a driver's license by reason of the operator's physical deformities. The Supreme Court has upheld negative eugenics legislation on the ground that the state interest in controlling genetic diseases justifies the statutory discrimination. In *Buck v. Bell* the Court upheld a Virginia statute providing for the sterilization, in state supported institutions, of inmates who were adjudged to have had a
hereditary form of insanity or imbecility. The petitioner was a feebleminded woman in a state institution, daughter of another feebleminded inmate and the mother of an illegitimate feebleminded child. Speaking for the majority, Justice Holmes declared:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . Three generations of imbeciles are enough.

The *Buck* rationale that the state may exercise its police power to promote public health and welfare may be applicable in the case of a positive eugenics statute.

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**EUGENICS CONTROL LEGISLATION**

Several authorities have suggested that a positive eugenics program should be made available to the public on a voluntary basis. Surely a voluntary program would obviate both the constitutional barrier of the fundamental right to procreate and opposition from those in the religious community who believe that procreation is the highest form of love. A financial incentive in the form of greater tax deductions for participants has been urged, but while greater tax deductions might induce the rich to participate in the program, they would fail in being any incentive for the poor. In the final analysis, most Americans are probably not prepared to voluntarily change their attitudes toward reproduction. "It is doubtful that a discriminatory program would be voluntarily accepted by those against whom it discriminated." In short, a voluntary program would be inconsistent, uneven and largely ineffectual in operation.

A desirable alternative to either a complete ban on human genetic experimentation or a voluntary eugenics program is limited governmental control of eugenics research. Governmental intervention into the area of scientific research and experimentation could be justified on the ground that misdirected applications of positive eugenics would constitute a serious and imminent danger to the public health and morals. Such an interest, if adequately shown, has long been recognized by the courts as sufficiently compelling to permit social controls. Thus, in *Jacobson v. Massachusetts* the Supreme Court held that a compulsory vaccination law was a reasonable regulation established to protect public health and safety and, therefore, not in derogation of due process rights.

One commentator has concluded that "the law must react before it is placed in the position of having to accept genetic engineering rather than to choose." The problem, however, is not simply resolved by passing legislation providing for controls on scientific research. A compelling state interest for legislating social control must be shown. A mere possibility of genetic disaster, a danger not "imminent," may not be a sufficient justification for research controls. Sadly enough, it might be only after a genetic mishap that a state interest would become sufficiently compelling for control legislation to withstand the scrutiny of the courts.

In the interim, funding policies may indeed channel eugenics research and development. The percentage of research funds from private origins has steadily declined in the past decade. It has been estimated that, since 1966, 59 per cent of all medical research grants were federal in origin. The allocation of these massive funds is an effective method of curtailing "undesirable" research. The drawback of this method, however, is the lack of any official accountability for manifest abuses of discretion.
PROPOSED SOLUTION

With some reservations it is submitted that the only effective solution to the problem of anticipating and channeling developments in genetic engineering is the creation of a federal eugenics control board.28 The board would be interdisciplinary in character, comprised of scientists, lawyers, theologians, philosophers, social scientists and laymen. Terms of office would be so staggered as to prevent manipulation of the board by an incumbent political faction. Its function would be to consider and determine standards for the denial of procreation and for genetic experimentation. Specific rulings would be reviewable by federal district courts.

An administrative agency has the inherent advantages of expertise and permanence. Rigid statutory mandates are inadequate in dealing with the rapidly expanding field of genetics. Ultimately, the effectiveness of such a board depends on whether the scientific community is willing to cooperate in the venture. If scientists perceive the board as a cumbersome bureaucracy stifling academic inquiry, or if in fact it is, the possibility of controlling positive eugenics research and experimentation will be greatly diminished.

FOOTNOTES

3. Id.
7. Id. at 541.
8. 381 U.S. 479 (1965).
11. Shapiro v. Thompson, 394 U.S. 618 (1969), required that a compelling state interest be shown in order to justify an intrusion into a fundamental right.
12. 410 U.S. at 165.
13. See Vukowich, supra note 4, at 208.
18. "No title of nobility shall be granted by the United States ..." U.S. CONST. art I, §9, cl. 8.
19. 381 U.S. 479, 482 (1965), See also Keyishian v. Board of Regents, 385 U.S. 589 (1967).
21. 274 U.S. at 207.
23. See Vukowich, supra, note 4, at 206.
27. Id. at 626.
28. Congress could pass legislation creating a eugenics control board by virtue of its commerce powers. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1924), and research would only have to meet the "close and substantial relationship" to interstate commerce test. NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).
30. Burger, Reflections on Law and Experimental Medicine, 15 U.C.L.A. L. REV. 436, 441 (1968). Chief Justice Burger has also stressed: "Obviously there are certain genetic drawbacks to letting people reproduce themselves indiscriminately; but absent some specific disqualification where medicine can predict certain tragic consequences of a union between certain genetic types, ordinary mortals will continue to mate on an emotional rather than a scientific plane."
The Morality of Suicide

R. Gregory Barton

A pilot alone in a large plane experiences a complete engine malfunction over a heavily populated area. Instead of bailing out to safety and possibly allowing the plane to kill many people, he remains in the plane and steers it into neighboring mountains, killing himself. A man with a large family discovers that he has a long-term illness that will require exorbitant medical care. Lacking medical insurance, or appropriate life insurance, the man kills himself rather than subjecting his family to possible financial ruin.

In time of war, a secret agent is captured by the enemy. Fully aware that torture and truth serums will cause him to reveal information extremely damaging to the cause he believes in, he kills himself. In primitive tribes, old men voluntarily leave the tribe and starve or freeze to death in times of famine so that younger members of the tribe can survive.

Suicide is regarded by contemporary Western man with instinctive horror and dread, primarily because it intransigently rejects our deeply-held impulses of self-preservation. We conceive of suicide in tragic terms, the victim being one who must have acted in a moment of deep despair and great irrationality if not insanity. The suicide troubles and appalls us because his action squarely contradicts our conviction that life must be worth living. For these reasons suicide is presently viewed as a serious social problem and contemporary concern with suicide primarily focuses on its prevalence and prevention.

However, suicide may also be viewed in a moral context: For centuries man has debated over whether or not the intentional killing of oneself may be morally justified. This debate has been recently intensified by the rapid development of modern medicine which, in greatly prolonging the duration of human life, has perhaps made the idea of suicide more attractive to those facing years of grave illness or debilitating old age. Let us attempt to examine suicide from an historic and philosophic perspective to analyze the legal and moral issues raised by the concept of self-destruction.

HISTORICAL PERSPECTIVE

Societal responses to the act of self-destruction in the past have ranged from outright condemnation as absolute sin on the one hand, to acceptance and incorporation into the social and moral code on the other. As a form of human behavior, suicide apparently is as old as man himself. Anthropological studies have established that suicide has been practiced for thousands of years in primitive and historic societies.

During the time of the ancient Greeks and Romans, suicide, although never actually encouraged, nevertheless was often considered socially acceptable. Honor suicides to avoid capture and humiliation by the enemy were apparently frequent and approved of by contemporaries. On the Greek island of Keos, persons over sixty years of age were expected to poison themselves with hemlock when it was obvious that they were no longer socially useful or productive. Furthermore, certain schools of philosophers such as the Epicureans and the Roman Stoics advocated suicide as a reasonable exercise of human freedom.

Suicide was not originally condemned by the establishment of the new religion, Christianity. In fact, suicide may have been fairly common among early Christians since it appeared to provide a quick route to the afterlife of eternal bliss. The eventual Christian doctrine on suicide was originally formulated by St. Augustine (354-430) in The City of God. Augustine condemned suicide on three grounds: that it violated the commandment “Thou shalt not kill”, that it precluded any opportunity for repentance, and that it was a cowardly act.

Thomas Aquinas (1225-1274) enlarged upon Augustine’s views by condemning suicide because it was detrimental to the community and because it usurped God’s prerogative to determine man’s fate. This Augustine-Aquinas position on suicide remains to this day that of Christianity. Intentional self-destruction is a sin because it is a violation of the fifth commandment, a usurpation of God’s prerogative, and a social wrong.

With the gradual emergence of the Renaissance there developed challenges to the orthodox Christian views on the sinfulness of suicide. In 1516, Sir Thomas Moore in Utopia recommended suicide for those suffering from incurable and painful diseases. In the early seventeenth century, John Donne published Biathanatos, a com-
prehensive defense of suicide designed to prove that self-destruction was not incompatible with the laws of reason or of God. In the eighteenth century, Voltaire, Montesquieu and Hume all at some time in their careers defended the act of suicide. In the nineteenth century, Schopenhauer vigorously advocated suicide since life was similar to an unpleasant dream, the sooner ended the better. As a gross generalization, one may state that a number of contemporary writers have relegated suicide to a question of personal choice that requires no moral justification.

In certain non-Western societies, suicide has not traditionally been regarded as a moral wrong or sin. For example, in Japan and India, voluntary self-destruction (homicide or settee in the respective countries) was once viewed as a somewhat honorable act, often available to the nobility as a means to remove the stigma for past misdeeds. In certain Eskimo civilizations, aged members were expected to voluntarily leave camp and freeze to death so that others could exist within available food supplies.

Thus, even a cursory examination of suicide as practiced in the past reveals that by no means have all people considered suicide as an absolute moral wrong. In contrast to the Christian condemnation of suicide, some societies have accepted and even approved of the act of intentional self-destruction.

LEGAL PERSPECTIVE

In accordance with religious condemnation of suicide, the English common law subjected the person who of sound mind took his own life to severe post-mortem penalties. First, the suicide was declared to be guilty of a felony. Next, the suicide was subject to civil penalties which included forfeiture of land and goods to the Crown. Finally, as Blackstone reports in his Commentaries (Oxford: IV, 190), the suicide was buried not in the churchyard, but in the highway with a stake driven through the body. The last practice was a pagan tradition to keep the ghost from returning to earth. Blackstone’s presentation of the reasons behind the common law condemnation of suicide is instructive as to the importance of religious considerations.

And also the law of England wisely and religiously considers that no man hath a power to destroy life, but by commission from God, the author of it; and as the suicide is guilty of double offence, one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uninvited for; the other temporal, against the King, who hath an interest in the preservation of all his subjects, the law has therefore ranked it among the highest crimes, making it a peculiar species committed on one’s self. (Commentaries: IV, 189).

Since suicide was a felony at common law, an attempt to commit suicide was a misdemeanor. Also, one who encouraged and assisted another to commit suicide was guilty of a felony, as a principal if he was present at the act which caused death, and as an accessory before the fact if he was not present when the suicide was committed. Thus, at common law, if two entered into a suicide pact and only one was successful, the other would be guilty of murder.

Present English law still classifies suicide as a felony although no forfeiture of goods nor ignominious burial are involved. The major legal effect is the avoidance of life insurance policies on the principle that a man may not profit by his own criminal act. Attempted suicide is still viewed as a common law misdemeanor and aiding and abetting suicide will result in severe criminal penalties.

Unlike other areas of the common law, the English rules on suicide were not generally adopted in the United States. In 1660, Massachusetts passed a statute prescribing a Christian burial for suicides and decreeing that they should be buried in the highway with a cartload of stones on the grave as a mark of infamy. However, the statute was not adopted in other states and was eventually repealed.

The present law on suicide in the United States has many points of conflict and confusion. In the majority of the states, suicide is not a crime, while a small minority of states such as New Jersey still classify suicide as a felony. In the case of attempted suicide, the majority rule is that it is not criminal, although a minority classify it as a misdemeanor. Since a majority of states do not make
suicide criminal, then theoretically aiding and abetting it should not be either; but the majority of states have avoided this logical conclusion by making the assistance of a suicide a separate criminal offense. In fact, in some states, aiding, abetting or inciting a suicide may be murder in the first degree.

In evaluating Anglo-American law on suicide, one is impressed most of all with the basic irrelevance of the criminal law to the subject. It is obvious that making suicide a criminal offense serves no social purpose whatsoever, since a man soon deceased could not possibly be deterred by the threat of penal measures. In the case of attempted suicide, having the law promise to punish the potential suicide if he should fail in his attempt may only serve the purpose of insuring that the person genuinely intending to end his own life will do a good job of it. Thus, it appears absurd to talk in terms of deterrence in relation to suicide or attempted suicide since it is inconceivable that a potential suicide or attempted suicide would seriously consider the possibilities of criminal punishment.

The only other possible argument for the retention of the crime of attempted suicide is that it may enable medical treatment to be given to the attempter. However, there are obviously ways of insuring that needy people receive medical attention other than first making them criminals. Furthermore, this paper will not discuss the causes of suicide, recent studies have refuted past contentions that all suicides are insane and have found, that in fact, only a very small percentage of suicides are caused by insanity.

Moreover, a substantial number of suicides may be called "rational suicides" since the competent individual involved carefully weighs the attractiveness of life and death and opts for the latter. In such situations, medical treatment would not appear to be extremely helpful.

Thus, the criminal law is basically irrelevant in regard to the potential suicide, since criminalizing the acts of suicide or attempted suicide serves no real social purpose. However, in regard to the criminalizing of the acts of aiding, abetting or inciting a suicide, the law may be relevant. The individual assisting a suicide, if he is not also attempting to commit suicide as part of a suicide pact, obviously plans to survive the suicide and hence deterrence may be a factor. Assuming there is a social interest in the life of the individual, the legal system is justified in making assistance of a suicide a crime since it may prevent a suicide that would otherwise be committed. However, outside this limited area of assistance of a suicide, the law appears to be basically irrelevant to the concept of self-destruction.

MORAL PERSPECTIVE

In examining suicide from a moral perspective, it appears impossible to generalize categorically on the morality of the act of intentional self-destruction. While in the past certain theologians and philosophers such as St. Augustine and Immanuel Kant have posited that suicide in all circumstances is morally wrong, it would appear that, upon careful consideration, such an absolute position would today have to be qualified by even the most adamant moral critic of suicide.

In each of the deaths described at the beginning of this article, there are acts of suicide or intentional self-destruction. However, it would appear that few of us would characterize all these actions as morally wrong. In fact, regardless of the wisdom of the specific acts involved, most of us would probably characterize at least several of them as heroic self-sacrifices to save others. Thus, it is impossible to stereotype all suicides categorically as immoral actions.

Acknowledging that suicide may not always be morally wrong, may one state that it is morally wrong for an individual to take his own life for reasons of his own personal welfare? Putting aside religious considerations, the morality of an act would seem to be determined by its social consequences. Suppose an individual without acquaintances or family drowns himself in the middle of the ocean. The action is so far removed from society that there is no problem of a social nuisance, and actually no one else is affected at all since no one knew of either the man or his suicide. One may argue that society has lost a potently useful citizen and in fact this appears to have been Blackstone's "temporal" reason for denouncing suicide. However, in these days of overpopulation such a contention would appear frivolous. The action may realistically be viewed as void of significant social consequences and for this reason a morally neutral action. In other words, since the individual's action has neither hurt nor harmed anyone else, his suicide would not necessarily appear to be morally wrong.

Perhaps the best generalization that can be made concerning the morality of suicide is that intentional self-destruction is not justified when made for personal reasons and where the act adversely affects third persons. For example, suppose a supporter of a large family decides that because of the tensions and frustrations of modern society he will kill himself. However, by killing himself he voids his life insurance policies and leaves his dependents totally without financial support. Moreover, he leaves his friends and family with deep and permanent feelings of sorrow, pain, guilt and even embarrassment. Here the suicide may be viewed as a selfish and immoral act. For the purpose of permanently relieving his anxieties, the individual has directly caused others serious financial and emotional problems. Thus, the argument that suicide is morally wrong when it is committed for personal reasons and when it adversely affects other people may have some logic to it. Still, even this generalization may fall in certain circumstances, and an appropriate area in which to examine this proposition is that of euthanatic suicide.

"Euthanatic suicide", or "active euthanasia" stands for the intentional self-destruction of individuals suffering from an incurable disease or facing impending death who choose suicide rather than endure extended suffering. Euthanatic suicide is really suicide to escape a miserable life.
The moral problems raised by euthanatic suicide are easily resolved if everyone involved agrees that the individual should be encouraged to take his own life. For example, if the family and friends of the gravely-ill individual decide that he should be allowed to commit suicide rather than face extended and unnecessary agony, it would be difficult to characterize the suicide as a moral wrong. However, difficulties will arise if the euthanatic suicide will adversely affect third persons, and merely by characterizing the death as suicide may trouble and embarrass next of kin and close acquaintances.

In such situations, it appears that the moral problem can only be resolved by a difficult balancing process. On the one hand, it is true that an euthanatic suicide may have moral consequences in that third parties can be adversely affected. On the other hand, an euthanatic suicide may save the individual from an extremely painful and miserable death. In some circumstances, the individual may feel that it is morally required for him to endure this painful death. He may know that suicide would void insurance policies his family desperately requires, or that suicide would cause irreparable emotional damage to his family. On the other hand, there may be circumstances in which euthanatic suicide would not appear to categorically be a moral wrong. If serious financial considerations are not relevant, and if the feelings and dispositions of friends and family would be only marginally affected, the euthanatic suicide would cause grievous social consequences. In certain circumstances then, even when third parties are adversely affected it would be difficult to characterize the euthanatic suicide as morally wrong when a great deal of agony and suffering may be avoided. Resolution of the moral issue will depend upon the specific circumstances involved.

Very similar to, and perhaps included in, the concept of euthanatic suicide is intentional self-destruction to avoid debilitating old age. In this situation, the individual involved may have led a happy and productive life; but with the oncoming of old age and its corresponding severe limitations, the individual may wish to die in peace and with dignity. Such feelings may be more common today as, with rapid development of medical technology, people may be kept alive longer than they really desire.

A much-publicized example of such a suicide was that of Dr. and Mrs. Henry P. Van Dusen in early 1975. Dr. Van Dusen, the former president of Union Theological School, and his wife swallowed overdoses of sleeping pills in an effort to carry out a suicide pact. In a suicide note, the Van Dusens explained that they had entered a pact rather than face the prospect of old age. At the time of her death, Mrs. Van Dusen was lame because of an arthritic condition, and Dr. Van Dusen had been rendered virtually speechless and inactive because of a stroke suffered years earlier.

Otherwise, the Van Dusens were not in such poor health as to be facing impending death. However, both the Van Dusens had been vigorous scholars, and their recent physical handicaps had totally deprived them of the useful and active lives to which they had become accustomed. With only the prospect of slow deterioration for the future, they decided they would die together rather than face enfeebling old age.

As with any suicide, a suicide to avoid debilitating old age such as the Van Dusens does not appear to be morally wrong if there are no significant social consequences. If the suicide does not adversely affect anyone else, then it is difficult to see why the act is wrong in itself. On the other hand, if the suicide does somewhat injure third persons, it appears that again a balancing process is required to weigh the benefits sought by the suicide against the supposed adverse effects suffered by third parties. As with euthanatic suicide, there does appear to be some legitimacy and justification for suicide to avoid debilitating old age. It is natural for one to wish to die in dignity; many people accustomed to active useful lives would not relish the idea of years of a demeaning and meaningless existence as one merely a burden upon others. Perhaps in certain situations these considerations would outweigh any slight discomfort or embarrassment suffered by friends or family of the suicide. The moral evaluation must be determined upon consideration of the specific circumstances involved.

Man's attitudes on suicide have varied drastically over the centuries, usually according to socio-cultural factors. The concept of intentional self-destruction has been categorically condemned on the one hand, and accepted and approved of as part of a social code on the other. Perhaps only two basic conclusions can be reached concerning suicide: First of all, because of its extreme and permanent characteristics, suicide does not appear, to be effectively subject to man's legal systems. Second, because of its complexity, suicide does not appear to be effectively subject to moral generalizations. The morality of suicide can only be judged in specific factual situations after careful consideration of the personal reasons and social consequences involved.

**FOOTNOTES**

Recent expansion in public sector employment has been accompanied by increased collective bargaining. This surge in unionization has resulted from management's failure, through its dogged adherence to an absolutist management ethic, to perceive employees' changing economic and attitudinal needs. This failure, coupled with recent legislative enactments recognizing public sector bargaining rights, has fostered union growth and is assuring its institutional legitimacy.

Accompanying this growth in public sector unionization have been the efforts by individuals not traditionally regarded as employees to improve their status by collective bargaining. Graduate Assistants, Medical Interns and Residents, in particular, although enjoying a dual "student employee" status, have sought collective representation as a means of improving their professional and economic standing. To date, employer reception to such bargaining has generally been hostile on the bases that Assistants, Residents and Interns are not "employees" as defined in state public employment laws, or if "employees," they lack a sufficient community of interest to warrant independent organization or inclusion in faculty or hospital bargaining units. Management's consistent and adamant opposition, however, has not successfully checked bargaining attempts. Assistants and Interns are increasingly unionizing as their numbers and disaffection with management grow.

Graduate Assistants, Medical Interns and Residents exist in substantial numbers both absolutely and relative to university and hospital staffs. At the University of Wisconsin there are now more than 1,800 Teaching Assistants, while the Universities of Indiana and Michigan respectively have 1,700 and 2,200 Graduate Teaching and Research Assistants. These numbers are steadily increasing as is the proportion of Graduate Assistants to faculty members. At Fordham University there are now 150 Assistants to 501 instructors and Adelphi University has 125 Assistants to a staff of 338. The size of Intern and Resident classes is likewise substantial. At a recent medical conference in Washington, D.C. attendant spokesmen represented 18,000 of the nation's 56,000 Interns and Residents, indicating their national strength. Comparatively, their numbers are equally significant, as is evidenced by the University of Michigan Hospital Center where 650 Interns, Residents and Post-Doctoral Fellows compare with 300 staff physicians. These numbers of Graduate Assistants, Medical Interns and Residents indicate their extent of use by management as well as potential bargaining strength. However, numbers alone do not dictate degree of unionization. Much of the current impetus behind Assistant, Intern and Resident collective bargaining stems from increased numbers coupled with imbalances among these individuals' academic qualifications, assigned duties and professional status.
GRADUATE ASSISTANT UNREST

The graduate Assistantship is a university program designed to attract top doctoral candidates by providing them stipends and free or reduced tuition. Universities' use of this program increases with undergraduate class size, education costs and emphasis on teaching as an aspect of graduate development. Therefore, when increased enrollment necessitates additional teachers, the Assistants, commanding a mere $2,650 per year, are seen as an inexpensive and eager source of manpower. Their eagerness stems from probable interest in college teaching careers and the belief that graduate teaching experience will bolster their chances in a dwindling job market. On these bases it is not surprising that at some universities virtually every underclassman has Graduate Assistant instructors or discussion leaders.

In return for their modest compensation Graduate Assistants are expected to provide substantial and significant services. Educators differ as to the exact nature of such services, with some contending Assistants should not teach but merely aid the university educational community. Ideally this may be desirable, but in actuality the Assistants often bear the full burden of instruction. As expressed by educator Harold Taylor in Students Without Teachers: The Crisis in the University: "The fact that they (Assistants) do not yet possess teaching credentials and higher degrees cannot disguise the fact that they are already functioning as teachers regardless of faculty status . . . " As teachers, the Assistants have a quasi-professional interest in the facets of educational policy which affect their activities. However, as most universities characterize them exclusively as students, they have no input into the educational process.

In addition to teaching, Assistants are typically assigned the less desirable tasks of recording class attendance, grading daily assignments and preparing laboratory experiments. The impact of these onerous assignments on the highly qualified Assistants has been great. As powerfully described by W. M. Wise:

"I must report that, with a handful of exceptions, the morale of these Teaching Assistants is low. They believe they are being exploited by their institutions to meet the press of expanding undergraduate enrollments. They report they get little help from senior faculty members on the teaching problems they encounter. They seldom report that they are treated as young colleagues by members of the regular faculty; instead, more frequently they report feeling that they are treated as individuals of low status employed to do the work that no one else wants to do."

Unable to reconcile their considerable talent and teaching responsibilities with menial chores, low pay and lack of professional legitimacy, Graduate Assistants are increasingly unionizing.

GRADUATE ASSISTANT BARGAINING

Already Assistants at three major universities are collectively bargaining through representative associations. In 1971 the Teaching Assistants’ Association at the University of Wisconsin gained recognition as the exclusive negotiating representative of its Graduate Assistants. In April, 1974 the University of Michigan Teaching Assistants overwhelmingly selected the Graduate Employees Organization as the exclusive agent for that University’s 1,600 Teaching Assistants. Teaching Assistant bargaining has also become a reality at the University of California at Berkeley. The fact that Assistants at these schools have successfully bargained while others have failed reflects the misunderstanding of the Assistants’ legal status as ‘’employees’’ under state public employment laws. This misunderstanding is also jeopardizing Intern and Resident bargaining attempts which increase with their numbers and growing dissatisfaction with hospital management.

INTERN AND RESIDENT DISSATISFACTION

Hospitals offer Internships and Residencies to highly qualified medical school graduates to provide new physicians with clinical experience and the opportunity to develop specialized expertise. In return for this sponsorship, the Interns and Residents provide the hospitals with valuable medical services in such areas as emergency room treatment, surgical assistance and outpatient care. The extent of these medical services is great, as Interns and Residents devote 75 to 90 per cent of their working time to providing patient care. With the remaining period of classroom or seminar training always subordinate to the medical needs of their patients.

In spite of their excellent academic credentials and the professional level of medical services they provide, Interns and Residents characteristically suffer from inadequate pay and poor working conditions. Interns and Residents average between $10,000 and $14,000 per year, which is modest in light of their hours of work which often exceed 100 per week. The physical rigors of these long work days are further compounded by what Interns and Residents protest are inadequate equipment and support personnel. Increasingly convinced that their compensation is not commensurate with their training and responsibilities and that improper scheduling and inadequate hospital facilities impair effective medical treatment, Residents and Interns have sought relief in collective bargaining.
INTERN AND RESIDENT BARGAINING

To date, several of these bargaining attempts have been successful. Since 1972 the Committee of Interns and Residents has bargained for those individuals at New York City Hospital. In 1973 the Intern and Resident Association at the University of Michigan Medical Center was recognized as the exclusive representative of that hospital’s Interns, Residents and Post-Doctoral Fellows.

In May, 1975, the Interns and Residents at Chicago’s Cook County Hospital voted 419 to 4 in favor of representation by the Cook County Housestaff Association. Finally, during an October, 1975 Conference of the Physicians National Housestaff Association in Washington, D.C., representatives of 18,000 Residents and Interns voted overwhelmingly to convert their professional organization into a bargaining union. In spite of these numerous successes, Intern and Resident unionization continues to draw strong management opposition for the same reasons as bargaining by Graduate Assistants: Interns and Residents are regarded as students, not employees, and therefore cannot collectively bargain.

PUBLIC EMPLOYEE LEGISLATION

Whether Interns, Residents and Graduate Assistants are employees with bargaining rights or students without recourse depends on their status under state public employment laws. Examination of public employment legislation discloses that only two states have specific provisions prescribing Intern and Assistant bargaining status. North Carolina has effectively, though undesirably, resolved the controversy through express prohibition of all public employee collective bargaining. At the opposite end of the spectrum, Iowa in 1974 enacted
and has claimed deficiencies on the untaxed stipends. In
for services performed and in accordance with §117 (b)
consider. and of their application to two recent bargain­
tics have been repeatedly undertaken by the Commis­
the taxable consequences of stipends paid to Assistants
essence. the Assistants contend they are students
Graduate Assistants. This selection usually depends on
Attempts to balance “student-employee” characteristics have been repeatedly undertaken by the Commissio­
and Residents as public employees with bargaining rights.24 In the remaining 48 states the status of these
inference the Assistant provides substantial and valuable service for which his stipend compensates him. Another
factor mitigating against Assistant success is the often proportional relationship between his stipend and faculty
pay for equivalent teaching. This relation leads the
Courts to infer that the Assistant is being compensated by his stipend.
There have also been numerous cases involving tax‐
tation of Resident and Intern stipends, with the majority of cases holding stipends taxable since the hospital-student
relationship had all the indicia of an employer-employee relationship.29 “The almost unanimous conclusion of the
courts has been that the Intern or Resident was furnish‐
ing valuable services to the hospital and that payments
received by him were compensatory.” 29
In addition to characterizing Interns, Residents and
Assistants as employees by the taxation of their stipends, Courts have examined additional indicia in resolving the
“student-employee” dichotomy. In Sweet v. Pennsyl­
vania Labor Relations Board, 322 A. 2d 362 (1974) the
Pennsylvania Supreme Court identified characteristic traits of an employer-employee relationship: “... (w)hen a party has a right to select the employee, the power to
discharge him and the right to direct both the work to be done and the manner in which such work will be done . . .” such a relationship exists. As the university and
hospital clearly have such power over the selection, retention and supervision of Assistants, Interns, and
Residents, a strong case for such an employer-employee relationship can be made.
The degree of responsibility accorded the Assistant, Intern and Resident also has bearing on their status as
students or employees. Employers contend that too little responsibility carries the presumption that teaching and
medical ministering by such persons are primarily learning exercises rather than services for which they are paid.
Courts, however, have adopted more flexible standards and find that, where Assistants and Interns have more
than minimal responsibility, arguments holding them “students” for lack of responsibility are largely specious.
Finally, where Assistants, Interns and Resident participate with faculty and hospital staffs in employment
fringe benefits, their case for “employee” status is strengthened. Such benefits include but are not limited
to: accumulation of annual and sick leave, selective service reemployment rights, social security withhold­
ings, and coverage by life insurance, hospitalization, workmen’s compensation and pension plans.
Consolidation of these numerous “employee” characteristics lends considerable credence to the argument
that Assistants, Residents and Interns are employees capable of bargaining under or absent state public
bargaining provisions. Rarely, however, do individuals possess all of these employment elements, which ac‐
counts for the conflicting Court determinations of Intern and Assistant bargaining status. Examination of two
similar Intern and Resident bargaining attempts in states with comprehensive public employment legislation il‐
strate this divergence.

JUDICIAL WEIGHING

Attempts to balance “student-employee” characteristics have been repeatedly undertaken by the Commissio­
on of Internal Revenue and the Courts to determine the taxable consequences of stipends paid to Assistants and
Interns. Traditionally, Graduate Assistants seeking exclusion of stipends from taxable income have argued that under §117 (a) of the Internal Revenue Code such payments are “scholarships” designed to meet educa­
tional expenses, not payment for services rendered. The Commissioner, meanwhile, has ruled these payments are for services performed and in accordance with §117 (b) and has claimed deficiencies on the untaxed stipends. In essence, the Assistants contend they are students receiving study allowances, while the Commissioner argues a taxable employment relation exists between Assistant and university. Recent Tax Court cases resolv­
ing this controversy have heavily favored the Commissio­
er’s position in spite of Assistants’ arguments that “the primary function of the Graduate Assistantship is to enable Graduate students to pursue their Graduate studies” 327 and that their teaching and research duties are primarily personal learning experiences. The Assistants’ repeated failures to sway the Court are largely due to the universities’ procedure for selecting Graduate Assistants. This selection usually depends on the number of unfilled teaching positions rather than the availability of qualified applicants. Therefore, in appointing an Assistant the university is replacing an employee it must otherwise hire. On this basis Courts
MICHIGAN INTERNS BARGAIN

In March, 1970 members of the University of Michigan Intern-Resident Association sought recognition by the University's Regents as bargaining representative for that school's Interns, Residents and Post-Doctoral Fellows. Following rejection of this request on the basis that they were "students," the Association petitioned the Michigan Employment Relations Commission (MERC) for a certification election. In March, 1971 MERC acceded to this request, identifying the University of Michigan as a public employer and the Interns and Residents public employees under the Public Employment Relations Act (PERA). In January, 1972, the Court of Appeals rejected MERC's holding on the basis that as the PERA did not define "employee" to include Interns and Residents, they were presumed to be excluded.

Final resolution of the controversy came in a February, 1973 State Supreme Court hearing of the Regents of the University of Michigan v. Michigan Employment Relations Commission case, 398 Mich. 98, 204 N.W. 2d 218 (1973). In this decision the Court reversed the Court of Appeals verdict and found the Association members were within PERA's "entire public sector of employment" purview. The Michigan Supreme Court based this determination largely on the employment characteristics of the Association members. Pointing to their hospitalization benefits, receipt of W-2 employee withholding forms and regular payment schedule, the Court found that Interns and Residents were employees. In addition, the Court found a strong argument for employment in the loyalty oath required of Interns and Residents prior to their appointment. As this oath was one required by Michigan law of all employees, the Court felt the Regents, in administering it, considered an employer-employee relation existed. Finally, the Court identified the numerous and substantial patient care services performed by Association members during more than three-fourths of their working time as indications of their employment status.

The aftermath of this judicial balancing was that the University of Michigan Intern-Resident Association was determined to be a public employee organization under Michigan's PERA and became exclusive representative of more than 650 Interns, Residents and Post-Doctoral Fellows.

PENNSYLVANIA INTERNS FAIL

In the second case, Wills Eye Hospital v. Pennsylvania Labor Relations Board 15 Pa. 532, 328 A. 2d 539 (1974), Intern and Resident bargaining attempts were less successful. In November, 1971 the Philadelphia Association of Interns and Residents (PAIR) petitioned the Pennsylvania Labor Relations Board (PLRB) for a representative election to certify PAIR as the exclusive bargaining representative of Interns, Residents and Clinical Fellows at Albert Einstein, Temple University, and Wills Eye Hospitals. After initially dismissing the petition in 1972, the PLRB vacated that order and held an election which PAIR won. The Hospitals appealed this certification to the Philadelphia County Court of Common Pleas, which in 1973 supported the PLRB ruling.

In upholding the PLRB ruling, the court found that the individuals concerned enjoyed many incidents of employment, including the devotion of 85-90 per cent of their time to patient care, and the payment of taxes on their stipends. Additionally, Interns and Residents shared in medical, life and malpractice insurance, parking, cafeteria and laundry privileges, and coverage by workmen's compensation. Finding that the Interns and Residents performed services integral to the hospitals' function which could not be terminated without serious disruption, the Court held that they were clearly employees.

In December, 1974, against the weight of convincing PLRB and Common Pleas Court arguments, the Pennsylvania Commonwealth Court in the Wills Eye Hospital case, ruled Interns and Residents were not public employees, thereby stripping PAIR of its representative status. In reversing, the Commonwealth Court held Interns and Residents were "fulfilling educational aspir-
ations in their service at the respective hospitals and that the status of student is incompatible with the status of public employees'.

While PAIR, in February, 1975, obtained an appeal to the Pennsylvania Supreme Court, the chance for reversal is uncertain at best. Moreover, the fact that the recent Commonwealth ruling so authoritatively opposes the Michigan position despite strong case similarities: common employee characteristics of the Interns, comprehensive-yet defined public employment legislation, and approval of bargaining by both states’ labor boards, indicates continued piecemeal judicial determination is inadequate.

CONCLUSION

Numerical growth coupled with a militancy borne of desperation is prompting Graduate Assistant, Intern and Resident bargaining attempts. Tired of working long hours under inadequate conditions for grossly inadequate wages, these student-employees have seized upon unionization as a means of achieving greater professional recognition and economic satisfaction. Against arguments that as students they are precluded from bargaining, Interns and Assistants point to their substantial services, de facto doctor-teacher status and numerous incidents of employment. Employers, recognizing the zeal if not the merit of their claims, continue to hold fast to an absolutist management stance.

This alone may not prevent bargaining, however, as Interns and Assistants, assisted by liberal court construction of vaguely defined public employment laws and farsighted provisions like the Iowa Public Employment Relations Act are realizing the fruition of their bargaining efforts. If this success is to continue, as indeed it must, the current approach of piecemeal judicial determination of bargaining status will not be adequate. The lack of clear standards and equitable results in the court determinations points to the needs for express statutory provisions to ensure the Graduate Assistant, Intern and Resident of much needed relief. Clearly these “students” are also “employees” in need of legislative guidance to ensure their bargaining rights.

FOOTNOTES

1. The prospect of parallel development in the private sector has been halted by a recent National Labor Relations Board (hereinafter N.L.R.B.) decision. In March 1976, the N.L.R.B. ruled that Interns, Residents and Clinical Fellows were students not meeting the employment criterion of the National Labor Relations Act. Cedars-Sinai Medical Center, 21 L.R.R.M. 1341, 223 N.L.R.B., No. 57 (1976).


4. GOVT. EMPLOYEE REL. REP. No. 594, at B-16 (1973) [hereinafter cited as GERR].


6. Id.; Adelphi University, 195 N.L.R.B. No. 107 (1972).


14. Wollen, supra note 1, at 5.


17. GERR No. 531, at B-13 (1973).


24. IOWA PUBL. EMPLOYMENT REL. ACT 4, Par. 11.104 (July 1, 1974).


28. Parr v. United States, 469 F. 2d 1156 (5th Cir. 1972); Woodell v. Commissioner, 321 F.2d 721 (10th Cir. 1963); Sheldon A.E. Rosenthal, 63 T.C. No. 454 (Jan. 13, 1975); Marvin L. Dietrick v. Commissioner, 75-1 USTC Par. 9,485 (Sept. 29, 1974); Steven Michael Weinberg, 64 T.C. No. 74 (Aug. 4, 1975).

29. Robert W. Carroll, 60 T.C. No. 86 (April 23, 1973)


Recent events indicate that thermal efficiency standards for new building construction will become a reality in the not-too-distant future. The United States is currently embarking on a campaign for the judicious and efficient use of our energy resources. The spearhead of this campaign is the Energy Policy and Conservation Act.¹

Included in this new energy act is a provision which urges states to adopt (presumably through the use of the state "police powers" via building codes) energy conservation plans which include thermal efficiency standards for new building construction.² Such standards, if promulgated, could mandate minimum insulation standards and regulate building design and location in order to assure at least minimal thermal efficiency and resultant energy savings. Practically speaking, this means that
it may no longer be permissible to construct a building which is esthetically pleasing to the builder but energy inefficient. In addition, even if the design is satisfactory, the builder may well discover that building costs are drastically increased. Insulation, as well as other construction materials and requirements necessary to build the desired structure in a thermally efficient manner, could cause such increases. Failure to meet the thermal efficiency standards in the applicable building code could result in either the denial of a building permit for construction, or the imposition of fines, or the demolition of a structure. All of this could mean that a home at the price and of the design an average American can afford may become increasingly difficult for many Americans to acquire.

Practically speaking, this means that it may no longer be permissible to construct a building which is aesthetically pleasing to the builder but energy inefficient

The new Energy Policy and Conservation Act places the burden of establishing and monitoring such thermal efficiency standards on the individual states. This is a proper state role in that thermal efficiency standards can best be classified as a "police power" exercise. The best and perhaps only Virginia authority for establishing and enforcing thermal efficiency standards is the Virginia State Board of Housing, which under Va. Code Ann. 36 §97 et. seq. was given authority for the establishment of a uniform statewide building code. Persuant to this legislative mandate, the Virginia State Board of Housing, on January 29, 1973, adopted by reference the Building Officials and Code Administrators, International, Inc. code (hereinafter B.O.C.A.).\textsuperscript{3} The B.O.C.A. code, like most other codes known to this writer, does not in any of its sections make provision for or reference to insulation standards or general thermal efficiency requirements. The absence of such a provision is probably due to traditional theory and precedents for the exercise of the police powers, through which the building code was developed to insure building construction which was consistent with public safety and health.\textsuperscript{4}

Thermal efficiency standards are principally related to a desire to make wise and efficient use of energy resources. Though this desire is laudable, it is not so necessary to protect the public health or safety as to withstand a strict construction of constitutional standards. The case law reveals, however, that there is a substantial precedent, through the liberal definition of the term "welfare," for establishing thermal efficiency standards.

ENFORCEMENT

In a 1949 case, the Washington Supreme Court said that . . .

"The state, in the exercise of its (police) power to enact laws for the general welfare of its people, may enact laws designed to increase the industries of the state . . . and add to its wealth.\textsuperscript{5}"

As the court in this case indicates, it is proper for a state to exercise its "police powers" in order to promote the economic and social advancement of a state.\textsuperscript{6} The stated purposes of the new Energy Policy and Conservation Act are as follows:

Sec. 361. (a) The Congress finds that—

(1) the development and implementation by States of laws, policies, programs, and procedures to conserve and to improve efficiency in the use of energy will have an immediate and substantial effect in reducing the rate of growth of energy demand and in minimizing the adverse social, economic, political, and environmental impacts of increasing energy consumption;

(2) the development and implementation of energy conservation programs by States will most efficiently and effectively minimize any adverse economic or employment impacts of changing patterns of energy use and meet local economic, climatic, geographic, and other unique conditions and requirements of each State; and

(3) the Federal Government has a responsibility to foster and promote comprehensive energy conservation programs and practices by establishing guidelines for such programs and providing overall coordination, technical assistance, and financial support for specific State initiatives in energy conservation.

Clearly the objectives enumerated in this act fall within the scope of the "police power" as discussed in State v. Dexter.\textsuperscript{7}

Conservation of natural resources has long been recognized as a legitimate police power function. In 1957 an Ohio court of appeals stated that "the conservation of natural resources is within the so-called 'police power' of the state."\textsuperscript{8} The Ohio court's opinion clearly follows the dictate of the U.S. Supreme Court in City of Trenton v. New Jersey in which the court held that it is the duty of a state to conserve natural resources.\textsuperscript{9} In 1970 the Mississippi Supreme Court clearly adopted this viewpoint when it held that

There can no longer be any doubt as to the power of the state to regulate and promote the utilization of natural resources subject only to the requirements that such regulations be reasonable and not in contravention of the Constitutional provisions.\textsuperscript{10}
A long line of cases hold that states may exercise the police powers to prevent the waste of their resources. Possibly this line of cases should be distinguished from the issue presently under consideration. The thermal efficiency standard for buildings imposed through the use of state "police power" related to the use of energy resources regardless of the source of their origin of extraction. The line of cases cited, however, if narrowly construed deals only with resources actually extracted within the jurisdiction of the state deciding the case. Hence, it is possible to distinguish this line of cases from thermal efficiency regulation which seeks to regulate the use of resources regardless of the point of extraction.

A more general analysis of the scope of the "police powers," without regard specifically to the regulation of resources, will reveal that the establishment of thermal efficiency standards is within the currently recognized scope of the "police powers". In 1959, the Oklahoma Supreme Court stated that

The term "police power" comprehends the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of the public weal and the protection of the public interest. It is plastic in its nature, and will expand to meet the actual requirements of an advancing civilization and adapt itself to the necessities of moral, sanitary, economic and political conditions. No principle in our system of government will limit the right of government to respond to public need and protect the public welfare.

The limit of a state's exercise of the "police powers" is reached when a regulation transcends public necessity, the courts will have to determine if the enactment in question has for its goal the prevention of some offense or manifest evil which could undermine the preservation of the public health, safety, morals, or general welfare. It is also important to note that the term "general welfare" includes the power of a state to "enact laws designed to increase the industries of the state . . . and add to its welfare."

As can be seen, terms such as "transcends public necessity" and "general welfare" are flexible and have evolved over time to remain responsive to the real or perceived needs of an advancing society. As the federal Energy Policy Conservation Act indicated, our society perceives that there is a need to conserve energy in order to assure the future industry and economic wellbeing of the nation. This legislative determination of the nation's needs will not be lightly disregarded by the Judiciary. The Supreme Court's attitude toward regulations which reflect the needs of society is evident in the following statement. "Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

This is the test of reasonableness the courts will apply to the proposed thermal efficiency standards for buildings, since there seems to be nothing arbitrary about such regulations. They are in the interest of the public and do not transcend the public necessity, as the necessity is apparent. The inescapable conclusion is, therefore, that there will be little or no legal difficulty in establishing thermal efficiency standards for buildings as an exercise of the state "police powers" through the use of building codes.
THE MEANS AND THE ENDS

As a general principle, probably everyone favors wise and efficient energy use. In the abstract, few would dispute the advantage of proper construction and insulation procedures to assure at least minimal levels of thermal efficiency. However, a practical public analysis of the specific legal means necessary to ensure this efficiency, with extrapolation as to the ultimate results, would undoubtedly cause some degree of public consternation.

As has been discussed, there is sufficient legal precedent for the use of building codes to promulgate thermal efficiency standards; but the price for the use of such building code standards may be increased construction costs and resultant reduced availability of affordable housing for low income groups. This apparent disadvantage is mitigated by the fact that those who find it possible to purchase housing, even at increased cost, will be able to heat and cool such structures because of their thermally efficient construction. In the long term, such thermal maintenance cost savings will probably exceed initial construction cost increases.

There is, however, another more important, if less obvious, "price" for the use of building codes for achieving thermal efficiency. As with every new or expanded exercise of the "police powers," there is a direct loss of individual freedom of action. A very strict thermal efficiency standard, enforced through building codes, could mandate that architectural design be regulated. In addition to insulation standards, an architectural design containing large amounts of glass or cathedral ceilings may be suspect. To receive approval for such an architectural design, compromises may become necessary. The owner (builder) may be forced to use only insulated glass with a type of thermal or insulated curtain inside which will reduce heat loss in cold periods, or heat buildup in hot periods. The maintenance of special glass and curtains would have to be monitored, on a continuing basis, through the use of housing codes. One can hypothesize a situation where a building permit would be denied until design revision was made removing all large windows from the north side of a building. An extreme situation could arise where a building permit would be denied for construction of a thermally inefficient building in a location subject to harsh thermal conditions, such as a windswept mountaintop. Certainly a structure could be constructed which would, despite the harsh conditions of the location, be thermally efficient. But what would such a structure look like? Perhaps it would be a squat, windowless structure half-buried in the ground? No doubt such extreme results are unlikely, but they do point out some of the potential problems with using building codes in order to achieve thermally efficient buildings.

An alternative to the building code approach is found in the well-established system of tax incentives and "penalties." It is beyond the scope of this article to elaborate on the precise manner in which this could be accomplished. The major argument against such a system is that the rich could still make inefficient use of energy if they paid the penalty, and that tax methods place the burden of energy conservation on the poor. But, as has been previously indicated, the less affluent would be benefitted economically by achieving thermal efficiency. First, they would receive significant tax savings through compliance. Second, there would be significant financial savings through reduced fuel costs based on reduced consumption effectuated by the construction of a thermally efficient structure.

There is another advantage of the tax method as compared to the "police power" building code method. The tax method can be used to retrofit existing inefficient structures through tax incentives. The code method would be severely restricted in regard to existing structures; political, legal, and constitutional problems would undoubtedly make retrofit infeasible. The building code method would have to grant a "non-conforming use" to existing inefficient structures and be limited to acting only upon future construction (as does the new energy act cited herein).

Perhaps the most attractive feature of the tax incentive method is the possibility of large scale retrofit of existing thermally inefficient structures. This benefit is important because existing housing has a relatively long life expectancy; hence it will not be rapidly replaced by new, efficient structures. Under the building code system, without retrofit potential, it could be 50 to 100 years before a majority of presently existing housing could be
replaced by thermally efficient new construction. Under a tax incentive system, a large percentage of all structures could be made energy efficient within the near future. The percentage of buildings which could be made thermally efficient, and the time frame in which this could be accomplished, would be functions of the benefit derived by the tax incentive and corresponding tax detriment imposed for failing to retrofit.

The future will hold thermal efficiency standards for new buildings, for the promotion of thermal efficiency to save fuel is desirable. The use of the building code to implement thermal efficiency goals is the method most likely to be employed. However, the building code method has the potential for very real problems, the restriction of individual freedom and the lack of retrofit potential being perhaps the most serious. The tax incentive method is less complex, more equitable, economically feasible, and consistent with maximizing fuel savings in the shortest possible period of time. The United States needs to save energy today. To wait 50 years for the presently existing thermally inefficient structures to be replaced by new efficient construction may be to wait too long. By then the resultant energy savings that are the benefit of thermally efficient buildings may have arrived too late to effectively conserve our fuel resources.

FOOTNOTES
2. Id. §6322. Sec. 382. (a) The administrator shall, by rule, within 60 days after the date of enactment of this Act, prescribe guidelines for the preparation of a State energy conservation feasibility report. The Administrator shall invite the Governor of each State to submit, within 3 months after the effective date of such guidelines, a report. Such report shall include—
   (1) an assessment of the feasibility of establishing a State energy conservation goal, which goal shall consist of a reduction, as a result of the implementation of the State energy conservation plan described in this section, of 5 percent or more in the total amount of energy consumed in such State in the year 1980 for the projected energy consumption for such State in the year 1980, and
   (2) a proposal by such State for the development of a State energy conservation plan to achieve such goal.
   (b) The Administrator shall, by rule, within 6 months after the date of enactment of this Act, prescribe guidelines with respect to measures required to be included in, and guidelines for the development, modification and funding of, State energy conservation plans. The administrator shall invite the Governor of each State to submit, within 5 months after the effective date of such guidelines, a report. Such report shall include—
   (1) a proposed State energy conservation plan designed to result in scheduled progress toward, and achievement of, the State energy conservation goal of such State; and
   (2) a detailed description of the requirements, including the estimated cost of implementation and the estimated energy savings, associated with each functional category of energy conservation included in the State energy conservation plan.
   (c) Each proposed State energy conservation plan to be eligible for Federal funds shall include—
   (4) mandatory thermal efficiency standards and insulation requirements for new and renovated buildings (except buildings owned or leased by the United States); and
3. The Uniform Statewide Building Code of Virginia consists of the following:
   4. One and Two Family Dwelling Code, 1971 edition
4. Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power. Yet they merely illustrate the scope of the power and do not delimit it. Application of Kay. 341 P. 2d 284, 286 (Okla., 1959).