LEGAL PROBLEMS AFFECTING OLDER AMERICANS

HEARING

BEFORE THE

SPECIAL COMMITTEE ON AGING

UNITED STATES SENATE

NINETY-FIRST CONGRESS

SECOND SESSION

ST. LOUIS, MO.

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LEGAL PROBLEMS AFFECTING OLDER AMERICANS

TUESDAY, AUGUST 11, 1970

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
St. Louis, Mo.

The special committee met, pursuant to call, at 2:30 p.m., in Stouffers Riverfront Inn, St. Louis, Mo., Hon. Harrison A. Williams, Jr., of New Jersey, presiding.

Present: Senators Williams of New Jersey and Jennings Randolph of West Virginia.

Also present: William E. Oriol, staff director; David Affeldt, counsel; John Guy Miller, minority staff director; Thomas Patton, minority professional staff; and Peggy Fecik, assistant clerk.

STATEMENT BY SENATOR HARRISON A. WILLIAMS, CHAIRMAN

Senator WILLIAMS. Good afternoon, ladies and gentlemen.

Briefly, as I understand it, this is an American Bar Association annual meeting first with the Senate special committee hearing being made a part of the proceedings.

I would like to say a word about this Special Senate Committee on Aging. It is a special committee, as a matter of fact, it is the only special committee in the Senate. It grew out of a subcommittee of the Labor Committee dealing with the situations of older people. It was found in 1961 that really the problems were broader than just the legislative work of one substantive committee, so it was created as a special committee. We listen, study, learn and report and our findings are, of course, made available to the legislative committees. I think we have furnished many fine ideas to many committees. Senator Randolph is chairman of the Public Works Committee, and I think out of our deliberations we have a lot to say to the legislative committees, such as the Public Works Committee and many others.

I certainly want to extend our thanks to the American Bar Association for making it possible for the Senate Committee on Aging to conduct this hearing.

Mr. Kalcheim, the chairman of your Section Committee on Legal Problems of the Aging, deserves special praise. He has given this committee a splendid podium for raising issues that should be of concern to every American, no matter what his age.

The major issue, of course, is that Americans should be served by government and not thrown into confusion by government. For the elderly, service by government is especially important. When retirement begins many adjustments must be made. Not the least of these

is understanding the many rules relating to such programs as social security, Medicare, Medicaid, railroad retirement, and many others. Good, honest efforts are made by many government representatives to help people understand what is due them under these programs. There is no doubt about that. These officials we all commend.

Baffling Problems

Much as we would like to think that all is well between older Americans and government, we have to face these facts. These facts arrive at the office of the Committee on Aging in the form of letters from men and women who find themselves baffled or angry about problems that arise and programs that are meant to serve them. These facts, many of them, are presented in the working paper that has been published by our committee and I believe has been made available generally here.

We read there about couples who are turned out of their homes because relocation laws are not implemented.

We read about a blind man who is struggling alone on inadequate Social Security benefits because he didn't know until a legal advocate told him that he was entitled to $4,600 in back benefits.

We read about elderly people who are kept in mental institutions simply because there is no other place for them.

We read entirely too much about involuntary, inappropriate commitment to those institutions in the first place.

What can be done to fight these and other problems. We are here today to begin a search for answers.

One answer can be found among the elderly themselves. Once they have the facts, they will act. I would like to give you one example.

A 75-year-old part-time employee of our committee had a good idea one day. He saw that older persons, especially widows, were having great difficulty in filling out income tax forms. He got in touch with the Internal Revenue Service and suggested special training programs. Once given instructions, elderly persons could help other elderly individuals. The idea caught on. The Internal Revenue Service is organizing training programs of this kind throughout the country.

The commitee went a few steps beyond that this year. We called the Internal Revenue Service into a hearing and asked them to explain how on earth they could make the income tax forms so complicated, especially the retirement credit instruction sheet. We received a promise that the form would be simplified next year, and I am happy to say they said it would be simplified for all age groups.

What we need, obviously, is responsiveness in other Government programs as well, and we will get it if we insist on it.

I would like to close by thanking the National Council of Senior Citizens for its contribution to today's proceedings. The council is a sponsor of a legal services and research program which is funded by the Office of Economic Opportunity. Mr. David Marlin of the LRSE staff arranged for the working paper that I referred to earlier. They have provided us with the springboard we need for today's discussion and tomorrow's solutions. We will hear more from LRSE representatives shortly.

Without objection, it is ordered that the working paper "Legal Problems Affecting Older Americans", be printed as an appendix to this hearing.

(See appendix 1, p. 41.)

In a moment we will call the American Bar Association representatives and they will be introduced in a moment by Mr. Kalcheim.

Before I turn to you, I would like to turn to my good friend, my colleague, Senator Jennings Randolph.

STATEMENT BY SENATOR JENNINGS RANDOLPH

Senator RANDOLPH. Good afternoon, ladies and gentlemen.

It is a privilege for me to join Senator Harrison Williams, the knowledgeable chairman of our Special Committee on Aging, meeting here in St. Louis with those of you who are intensely interested in the problems of the aged.

I would like to bear down on one point mentioned by Senator Williams. That is the matter of relocation of people who are displaced by the loss of property, either housing or places of business, because of public works developments. As chairman of the Public Works Committee of the Senate, I do want to give particular stress to a point of Chairman Williams on the matter of relocation.

In the 1968 Federal Aid Highway Act we recognized the need to write into highway legislation safeguards for people who are to be relocated. Senator Williams knows, and other Members of the Senate and House know, that we cannot, today, develop a road without first assuring that the people who are displaced have the approximate housing or better housing than they had at the time of the new road location. This is something entirely new, never being written into highway legislation in the past.

THE TOTAL CONCEPT

We are concerned, not with just laying another mile of cement or asphalt, but with the highway in its total concept on the American people.

In the urban development programs of the United States, we work mostly in our highway efforts with the housing agencies within the Department of Housing and Urban Development. There is a very earnest desire, I think, to recognize that we have to counsel with people before the fact, not after the fact. As Chairman Williams knows, there was a time when a road was laid and then the people complained. Now the people are a part of the process of determining the route which must only receive final approval at the Federal level. The real decisions are made by a political subdivision within a State or city, and so people are a part of the process today of our public works programs.

I wanted, Mr. Chairman, to stress these matters because of your mention of the very serious situation which often affects large segments of our people and, naturally, those are not the younger people of our society. These are the people who have lived at one location for a long while. They are very much a part of that community or section of a city and they have the well springs of a long life there that they look

back to, so, particularly, the elderly are concerned with dislocation. This is a very real problem and we are attempting, not within one committee and its jurisdiction, but within several committees, highlighting, I think, the work of the Special Committee on Aging, in addressing ourselves to the matters of considerable concern to a growing group of people in the United States.

I think, Mr. Chairman, for me to say more would be improper at this point, even though it is difficult for a Senator to call it quits.

I am very grateful; thank you very much.

Senator WILLIAMS. Thank you very much, Senator.

We will now turn to Mr. Norman Kalcheim, chairman of the Section Committee on Legal Problems of the Aging.

STATEMENT OF NORMAN J. KALCHEIM, PHILADELPHIA, PA., CHAIRMAN, SECTION COMMITTEE ON LEGAL PROBLEMS OF THE AGING, ABA

Mr. KALCHEIM. Thank you, Senator Williams.

With your permission and permission of Senator Randolph, we will proceed with the part of the ABA program, the committee on problems of the aging, of which I am chairman.

Before I forget I want to thank the committee for the opportunity of joining with them in presenting the legal problems of the aging, and I am grateful that we can participate with them in this part of the program.

"Whence cometh my help," the title of these proceedings, comes from an old Hebrew prayer, which goes on, "mine help cometh from the Lord." Well, there is also a saying, "the Lord helps those who help themselves." Today our subject covers those who may not be able to help themselves, the 20 million aged persons who need some form of help, legal, social, and economic. And the Lord in good time may help them, but the lords to whom we can presently turn are the lords of legislation—our local, State and Federal legislatures, supplemented, assisted, and guided by the lawyers of this Nation.

Let me say at the outset that the recommendations made here by the panelists are their personal observations, and not to be considered as policy or recommendation of the American Bar Association, or our family law section, except where specifically so stated. In the broad context of policy, however, I must emphasize the role of the American Bar Association and the family law section in fostering, supporting and active advocacy of humanitarian legislation inspired by a professional awareness of the needs of all underprivileged, handicapped, and deprived persons in our Nation. Today, as in the past, the lawyer has been deeply involved in fashioning the quality of the society in which we live.

An increasing percentage of our growing population consists of old people, as medical advances enable more people to live to old age. Fifty years ago, the average American's life expectancy was 48 years. Today, it is about 70, and in the year 2000 it will be 82. In this year of 1970, it has been estimated that our population over 65 has reached 20 million, over 10 percent of our population. Two-thirds of those over 65 own their own homes, which, in itself, can constitute an appreciable management problem when competence begins to fail.

The Permanent Minority

All of us eventually will become a member of this permanent minority. We cannot be integrated in this melting-pot Nation. We do not have the many advantages given seniority in civil service, by union contracts or in the Congress. Unless we have unusually large resources, the latter days are full of economic, medical, social, and legal problems, albeit the existence of a social security program, pension plans and old age assistance, Medicare and Medicaid.

The question is whether Government will fulfill its role in income, health, and housing. We expect it will as a social institution carry out democracy's promise. It must include the aging in its social policy and provide protective services for all with diminished resources and high health risks. A glance at the committees of the family law section will show its concern with not merely the legal problems of the child, of the mismated, but with the concomitant social problems. So with the problems—legal and social of the aging. In the last 20 years, the efforts of the legal profession in combination with the social scientist has produced new attitudes as to children, juveniles, their rights and social prerogatives, and now we are striving to give this same attention to the expanding aged population, so as to provide the whole family the protective needs of a viable democracy.

Relevance: A Topic for All Ages

Everything is geared to the young today. There is need for balance. We all can't be Pablo Cassels, a Picasso, or Stokowski, but we all have some contribution to life—even after 65. Youth today talks constantly of doing things which are "relevant." Relevance is a topic of all ages. The basic question for all is what kind of a human being am I going to be? What is to be our social credo for the rest of the 20th century? What values do human beings want to live by? Perhaps the aged group in this country is being set adrift on an ice float as with the aged Eskimo who is no longer contributing to the family structure. Is it not time to look back to some of the older civilizations—the Chinese, the Indian, where the aged were revered and respected—and yes, even catered to? The time is ripe to round out our democratic civilization, to eliminate the manifold discriminations, practices in job continuance, licensing, insurance—all based on arbitrarily designed rules based on the image of the productivity of the aged. In our own profession, and in the other professions—medicine, architecture, the arts, the sciences, no lines are drawn because of age.

But it is not enough to develop the rhetoric of our concern, we must also develop the implements which will adequately reflect this concern. I will have, at the end of our part of the program, a series of committee recommendations—some approved by the family law section, some being presented for approval, but all representing our committee's concern over the problems of the so-called golden years.

Grow old along with me!
The best is yet to be,
The last of life, for which the first was made;
Our times are in his hand
Who saith, "A whole I planned,
Youth shows but half; trust God; see all, nor be afraid!"

So, still within this life
Though lifted o'er its strife,
Let me discern, compare, pronounce at last,
"This rage was right i' the main
That acquiesence vain:
The future I may face now I have proved the Past."

—From "Rabbi Ben Ezra," by Robert Browning.

Thank you, Mr. Chairman, and at this point I would like to have this report copied into the record, the second annual report of the committee on legal problems of the aging of family law section, American Bar Association, which was prepared for the annual meeting of the section in St. Louis, Mo.

Senator WILLIAMS. Very well, it will go into the record at this point.

SECOND ANNUAL REPORT OF THE COMMITTEE ON LEGAL PROBLEMS OF THE AGING OF FAMILY LAW SECTION OF AMERICAN BAR ASSOCIATION—JUNE, 1970

1. COMMITTEE CHARGE

The Committee on Legal Problems of the Aging was created by the Council of the Family Law Section, January, 1969. This new Committee was charged to: "develop projects and objectives in the form of recommendations for proposed legislation, statements of policy, etc., all of which should receive circulation and action amongst our profession."

2. COMMITTEE MEMBERS

The members of the committee under the chairmanship of Norman J. Kalcheim of Philadelphia consist of the following:

Prof. George J. Alexander, Associate Dean, College of Law, Syracuse University, Syracuse, N.Y. 13210.

Alfred Berman, Esq., 80 Pine St., New York, N.Y.

Prof. Henry H. Foster, Jr., N.Y. University Law School. New York, N.Y. 10003.

Doris Jonas Freed, Esq., 3 East 69th St., New York, N.Y. 10021.

Joseph S. Iseman, Esq., 345 Park Ave., New York, N.Y. 10022.

Edward J. Krill, Esq., 1312 Massachusetts Ave. N.W., Washington, D.C. 20005.

Maxine T. McConnell, Esq., 301 N. Market St., Dallas, Tex. 75202.

Francis J. Morrissey, Jr., Esq., 1424 Walnut St., Philadelphia, Pa. 19102.

Esther Polen, Esq., 1401 Walnut St., Philadelphia, Pa. 19102.

Benjamin M. Reinhardt, Esq., 6842 Van Nuys Blvd., Suite 501, Van Nuys, Calif. 91402.

Karl Zukerman, Esq., Vice Chairman, N.Y.C. Department Social Services, 66 Leonard St., New York, N.Y. 10013.

Chairman:

Norman J. Kalcheim, Esq., 1730 Land Title Building, Philadelphia, Pa. 19110.

3. MEETINGS

The Committee held five meetings; September 26, 1969; November 7, 1969; January 23, 1970; March 19, 1970, and May 11, 1970. The first and last meetings were held in Philadelphia, and the other three were held in New York City. Minutes of all five meetings have been submitted to the Section Chairman and officers.

In addition, the Chairman attended as an observer:

(a) An annual meeting of the National Association of Retired Persons. in Washington, D.C., at the direction of the Chairman of the Family Law Section, on October 26, 27, 28, 1969.

(b) The mid-winter meeting of the Family Law Section in Atlanta on February 21, 1970, at which time a mid-year report was submitted covering the activities of the committee for the first half of this period.

4. RESUME OF MEETING ACTIVITIES

At the September 26, 1969, meeting, three subjects were discussed:

(a) The issue of mandatory retirement age 65 under pension agreements were discussed, and it was agreed to raise a fundamental question and

discuss possible legislation to eliminate mandatory requirements. A study is to be made of this situation by Karl Zukerman to determine the extent to which persons over 65 are deprived of the right to work after age 65.

(b) Detailed discussion of a proposed panel of speakers on the subject of legal problems of the aging for the 1970 Annual Meeting of the Family Law Section, ABA, in St. Louis.

(c) The committee recommended the compilation of a review of current laws and cases on legal problems of the aging by a subcommittee being composed of Doris Jonas Freed and Professors Foster and Alexander.

(d) Committee recommended that the law schools be requested to make part of their curriculum emphasis on legal problems of the aging.

MEETING OF NOVEMBER 7, 1969

(a) A discussion of Article V of the Uniform Probate Code approved by ABA, and its effect on the recommendations made by this committee last year (see recommendation 3) that persons who are subject to committal to a mental facility or to a determination of incompetence shall be provided with counsel.

(b) A discussion of recommendation No. 1 in the 1969 report of this committee, to wit, that there is discrimination by auto insurance companies, State Insurance Commissioners, and licensing agencies, with respect to insurances and licenses of persons over 65. It was recommended that conclusions on such discrimination and the position of the Family Law Section against such discrimination be circulated to all State Insurance Commissions instead of going through the House of Delegates. This would avoid the necessity of the House of Delegates taking a position on this recommendation, and would merely reflect the thinking of the Family Law Section on this subject and constitute information rather than recommendation.

MEETING OF JANUARY 23, 1970

The Committee finalized the panel for the Family Law Section at the St. Louis Convention, and prepared the subjects to be discussed by the panelists; to wit, by Professor Alexander, "Economic Problems of the Aging," with emphasis on the need, or lack of need, for guardians, conservators, or court appointed supervisors of the property of the aged; Owen T. Armstrong, "Basic day-to-day Legal Problems of the Aged." It was agreed that the title of the program would be, "Whence Cometh My Help?" The Chairman of this Committee is to prepare a preamble statement covering the purposes of the Committee and to introduce the panelists. The meeting is to be in conjunction with, and part of a Senate Subcommittee Hearing under the Chairmanship of Senator Harrison Williams, of New Jersey, on August 11th, at 2:30 p.m., at Stouffer's River Front Inn in St. Louis, Missouri.

It was agreed that the committee, in addition to the panelists, were to make recommendations to the Senate Subcommittee on the Aging, which recommendations were not to be considered approved by either the Family Law Section or the ABA, but principally to point up areas of concern with respect to legal problems of the aging, such areas being as follows:

(*a*) Tax exemptions; rent controls; employment discriminations; mandatory age 65 requirements under retirement and pension plans; mental health problems of the elderly, including decent institutional facilities and supervision thereof; consumer protection; proper hearing procedures on Social Security claims with mandatory requirements for appeal; support for legislation permitting class consumer suits; uniform State Laws on guardianship and committal proceedings, and on legislation pertaining to mental health.

The committee prepared a list of short range projects and long range projects, which will be referred to in the conclusions hereinafter set forth.

MEETING OF MARCH 19, 1970

Formal approval of the Section Chairman was given to the format for the St. Louis meeting. The Committee members who were attending the St. Louis meeting were urged to prepare recommendations to be presented to the Senate Subcommittee, and then only in their individual capacity, and that committee members also be prepared with questions to ask the panel speakers. Finally, there was a discussion of the specific areas on which recommendations would be made for the Annual Report.

MEETING OF MAY 11, 1970

Most of this meeting was concerned with Article V of the Uniform Probate Code, and then only with respect to that part of Article V which defines incompetency. After lengthy discussion. Article V was approved especially since it provided for a continuing Power of Attorney as a tool for the aged, but some reservation was made with respect to lack of freedom of choice on the part of the alleged incompetent when in certain cases the question of competency may be a "battle of the experts." However, the final conclusion was as follows:

The committee endorsed Article V subject to the following caveat: "As to Part III of Article V, we endorse the due process involved, but reserve to later decision, following the study of the incompetency proceedings, our approval for all the conditions included in Article V, especially since it provides for proceedings to be initiated by any person interested in his welfare to become the guardian." While this was accepted, it was pointed out that a large number of incompetency proceedings should not be encumbered by inhibitions against individuals who are interested in the person when there are only small assets involved, as the courts usually pick a bank or trust company as guardian when large assets are involved so as to preserve the estate of the incompetent and prevent designing persons from acquiring the estate.

5. SHORT-RANGE PROGRAMS FOR THE COMMITTEE

The following short-range programs were agreed upon for future activity by the Committee:

(*a*) Examine the extent of Legal Aid for the elderly in both the urban and rural areas.

(*b*) Examine the legislation in existence to supervise the small estates of the elderly with a minimum of costs.

(*c*) Continue examination of the various aspects of disability of the elderly with respect to incompetence statutes, so as to provide guides for legislation. Included would be the personal and property rights of the elderly as they may be affected by incompetency proceedings, and an examination of the proposed New York Conservatorship Law and the California Public Guardians Act.

6. LONG-RANGE PROGRAMS

(*a*) Continuing review of curent laws, procedures and cases concerning problems of the aging.

(*b*) Upon establishing a liaison with National Commissioners on Uniform State Laws, the committee to examine all drafts proposed Uniform Acts to assure protection of the interests of the aging and provisions for due process.

(*c*) From time to time, make recommendations in changes of procedure of substantive law relating to legal problems of the aging.

(*d*) Examine and make recommendations in all areas where tax exemptions for the elderly are proposed.

(*e*) Promote the grants, Federal and State, of funds for Law School research in legal problems of the aging.

7. RECOMMENDATIONS

(1) That the Family Law Section and/or the Committee on the Aging continue to publicize the discrimination against the elderly, and that active steps be taken for the Amendment of 81 Stat. 607 (29 U.S. Code Ann. 631) so as to eliminate any reference to age 65 in the Federal Act on Discrimination in Employment.

(2) Repeat the recommendations in the previous Annual Report calling attention to a study of the University of Denver College of Law, which indicated arbitrary practices and attitudes regarding licensing and insuring older persons. The Committee recommends that, instead of proceeding through the House of Delegates, the Family Law Section and the Committee on the Aging call this condition to the attention of all Insurance Commissioners and Licenses Commissioners, as well as to the Senate Committee on Aging.

(3) The Committee recommends to the Family Law Section that it support the Tydings-Eckhardt Bill (Senate Bill 1980) which would allow class actions where consumer claims are involved, and that it was against the Bill S–3201,

proposed by the Administration, which would permit such class action, but only after the Department of Justice had brought successful action against a business for one of eleven deceptive or fraudulent practices outlined in the Bill. Such actions are now largely barred by requirements for a minimum claim of $10 Thousand and diversity of citizenship. A recent Supreme Court Decision also bars the totaling of individual claims to reach the $10 Thousand minimum.

(4) A recommendation that there be legislation which would prevent pension agreements from requiring mandatory retirement at age 65, since this conflicts with a person's right to work after age 65, and forces early retirement without option on the part of the retiree. In any event, some built-in determination as to whether the retiree is capable of continuing should be provided for if the person over 65 desires to continue to work, rather than the general requirement for mandatory retirement in most pension plans.

(5) The committee recommends a thorough examination of administrative and appeal provisions under both the Social Security Act and Old Age Pensions, and particularly payments under the Medicare provisions of Social Security, so as to avoid arbitrary discrimination determination without opportunity for a hearing or an appeal.

(6) Recommend that Family Law Section have a liaison representative with the National Commissioners on Uniform State Laws, so that all proposed Uniform Laws, especially dealing with guardianship, committal, mental health, may take into consideration the legal problems of the aged on these and other areas in which the National Commissioners are preparing uniform legislation.

(7) That the Family Law Section recommend to all of the Law Schools that in all courses in Family Law there be a specific area of training for the student in the legal problems of the aging, so as to assure competency in handling the property and personal rights of the elderly; and to obtain the concern of the Law Schools in legislation related to protective legal services for the aging.

SPECIAL RECOMMENDATION

The Commissioner on the Aging, in Washington, has requested the Chairman to obtain the help of our committee in preparing a series of monographs to be put together in a single document covering the various elements of the legal problems of the aging for use by the technical committees of the White House Conference on the Aging in 1971. Approval of the Family Law Section for this project is requested.

Mr. KALCHEIM. Mr. Chairman, I would like to introduce the first of our panelists, Professor, and soon to be dean of the Santa Clara Law School in California, and now the vice dean of the law school of Syracuse University.

I consider him an engaging young law professor, and they seem to be going west where the action seems to be, or at least starting on the college campuses.

He already has a two-page list of published writings. More recently he has been concentrating on incompetency proceedings, the abuses arising where there is to be property management of the aging, the right to be left alone where property is involved.

Always the question remains, how do we balance the need of the person and property of the aged against the rationality, the future interests of his family, protection from designing persons, preservation of the aged persons' resources to assure his proper maintenance and health.

His recommendation may be charting a new path or testing if such proceedings are fashioned in the primary interest of the individual aged person. He may raise more questions than we can answer. His paper will add to the continuing service which lawyers and the public must have in the protection of not only the property of the aged but in their well-being and basic rights.

STATEMENT OF GEORGE J. ALEXANDER, PROFESSOR OF LAW, UNIVERSITY OF SYRACUSE LAW SCHOOL (NEWLY APPOINTED DEAN OF THE SANTA CLARA, CALIF., LAW SCHOOL)

Mr. ALEXANDER. I wish my own mother and father were here to hear that introduction. My father would have been so proud and my mother would not have believed it.

Senator Williams and Senator Randolph, it is a deep honor to be here. Although I had anticipated addressing myself to the question whether limiting a law professor to present any topic does not constitute cruel and unusual punishment, I hope to summarize my prepared statement as well as a copy of an article already filed with the committee. I intend to file a copy of another article before the closing of this hearing.

I am going to address myself, if I may, to a very limited aspect of the large range of deprivations to which the aged and the minority of our society are subject. Senator Williams has cataloged the full spectrum, but I want to talk about only one problem of this group, the least militant minority in the country that needs the greatest amount of support, the problem of being deprived of the right to manage property through incompetency proceedings.

INCOMPETENCY PROCEEDING

Last year after a survey of the legislation and case reports dealing with incompetency I developed a thesis which can be stated, as follows: Incompetency procedures—do not seem to make sense; in theory, property management is taken over by a surrogate in the ward's interest. When he is aged and rarely restored to competency what interest he might have in not being allowed the use of his wealth is extremely unclear.

Much clearer in the reported cases are instances of gross overreaching on the part of the guardian, both to benefit himself as the legatee and sometimes to benefit himself during the lifetime of his charge. It seems more appropriate to view the question of how the law should intervene, not as a question of maximizing the benefits of the aging, but of minimizing to the extent possible the deprivation of the civil liberties by removing their right to control their property.

From this perspective, I think the question one might better ask, in whose interest is the surrogate manager, in fact, appointed? It is doubtless true that courts could find people who could better manage the property of the aged than they themselves, but this is merely another application that in society there are always people who can manage property better than others. That is not true of the aged. A person may obtain for himself a manager of his property. Where a manager is involuntarily chosen for him, I think we have reason to be skeptical of the benefit that is to be derived by a potential ward. One can reject the answer also given to other cases. Once a surrogate of the reserve of property is obtained the aged are rarely restored to competency once found incompetent. Although his wealth may increase, unless he retains a power to spend his money to maximize his own enjoyment, the ward's affluence would hardly be likely to be received by him as a benefit.

Many of the aged suffer merely from memory loss and lack of familiarity with legal process, without having lost their judgment concerning their personal goals. A provision which allows their entire ability to manage property to be deprived seems a gross over-reaction to the problem.

Adverse Interest

Now, obviously the wards of the aged are not the only people concerned with their wealth. Those who are potential beneficiaries of the ward's affluence take a natural interest in their waste. What is important in their interest, however, is that it is an interest adverse to the interest of the aged. The proceedings which presently focus on benefits to the ward inadequately and inarticulately deal with that interest. In consequence, beneficiaries themselves are in a cynical position premised on the benefit to the object of the proceedings rather than candidly to themselves. Unfortunately when the underlying self-interest of the petitioner is probed he appears in a very bad light in court. Where this issue is not probed, potential beneficiaries were determined from the perspective of benefiting the beneficiaries interest rather than the wards'.

Would a better probe be to ascertain the legitimate interest of the others, and to project themselves in law, rather than circuitously holding incompetency proceedings, which is not the answer.

The same apparently bizarre spending habits would seem much more objectionable when they defer funds from a destitute wife, merely the extravagance of a person who has decided merely to become self-indulgent, who might otherwise benefit on his demise.

I should point out that the law has already established a number of such procedures, although I can't go into detail about them now. Once society has identified those who may legitimately benefit, it would seem a salutory change in the focus to allow them to bring a direct action in preference to an incompetency proceeding addressed against the ward. At what moment is mental acuity lacking if he, in fact, squanders funds, which society believes should first meet his obligations, to those near to him. This squandering of money to our creditors, our spouses, would seem far more reprehensible, fully capable of more circumspect behavior. I wrote a paper a year ago, having views of presenting reported cases and statutes near real life, and I ended it by suggesting that field study of actual practice might lend initial insight. I had no idea how much would be learned.

Syracuse and Cornell Studies

This summer a research came from Syracuse University and Cornell which are studies of incompetency procedures in central New York. The report is not completed, but I can mention a few of the findings that that report will support. Undoubtedly, the single most important finding is that pure incompetency infrequently exists in the study group, and we have no reason to believe that it exists in any greater degree anywhere in the United States.

The incompetency proceeding was developed as a means of determining inability to function in a specific capacity. It is separate from sanity or dangerous mental illness in that everybody recognizes that

a person may have difficulty in managing his property without needing psychiatric care, and that a person may well be in need of care though still managing his property. Even a person involuntarily committed to a mental institution remains competent to manage his property, and in no step does the finding of incompetency alone automatically lead to self-commitment. Yet in the almost 600 cases studied this summer, very few people in the entire population studied who were declared incompetent did not manage to spend at least a portion of their time in a psychiatric ward. The conclusion is obvious. Not only is a person found to be incompetent bound to be deprived of his right to manage his property, but he is very likely to lose his liberty in the process.

Little Protection in Incompetency Proceedings

A second finding in the workings is that procedures for a declaration of incompetence are structured in the manner that it affords little protection to a person. In all of the cases studied there was not one single case in which an appeal was brought in a finding of incompetence. This fact becomes less startling when one realizes that the proceeding, though adversary in theory, is not really so in fact. Medical testimony is not questioned. In fact, the attorney for the ward, who seldom is paid out of the ward's estate, is usually paid a very small fee. The attorney for the petitioner who seeks to have the person declared incompetent and whose salary is also paid out of the estate of the ward is paid a far more handsome fee.

I have some horrible examples of that which I must skip over. The average petitioner's attorney fees came to $1,341 for bringing the largely uncontested proceedings to declare the person incompetent. One man got $12,000 for his services. The average guardian's fee, on the other hand, as contrasted to that, was $268. He is the man who is supposed to be looking out for the ward. Since concern for the ward's finances is a stated reason for the proceeding, incompetency proceedings are extremely curious. One case illustrates this about as well as anything. A woman who was declared incompetent had her guardian, as the first act after the declaration of incompetency, return to the husband a disputed $12,000 which he claimed had been improperly taken from him. The record does not disclose that the guardian put the husband to his proof as to her owing him $12,000 or even as to the amount that was owed. Nonetheless, a lawyer charged $1,096 for this service alone, plus $1,660 for hiring another lawyer. While I am not quite sure what was said to be mentally wrong with the woman, had she been sane, I would have been very happy to say that you would have to be out of your mind for paying $2,168 for the services involved in giving her husband $12,000.

"Curious Method of Suing for Debt"

Most suits were brought by State hospitals. The largest number of petitions in the study group were State hospitals. Not only does this curious method of suing for debt do great violence, but the hospital, like all other petitioners, with the exception of the veteran's petitions, charged the ward for services against them. I should say in respect to them that they did at the bargain rate of only $25 which, compared to other petitioners, was very cheap. The deprivation of

rights of people declared incompetent are horrendous, and I can only suggest to those of you who care to pursue this to read the article. I can't go into detail now.

The other program that I can only briefly sketch is the standard for incompetence. When I wrote the original article I theoretized that the standard for incompetence, like the standard for mental illness, was probably too vague to be dependent. Absolutely nothing in this study has changed my mind. I should say candidly that most of the reported cases neither proved nor disproved the theories. The petitions, the testimony is stated in conclusions, and there is neither question nor rebuttal, so all I can do is point to a couple of cases.

Consider the man who was committed in large part because he accused his wife of infidelity. That is why he was said to be mentally ill. He obtained the divorce when his wife bore a child while he was still committed.

Another man was committed because he accused his niece of stealing his diamond ring. The diamond ring did not appear in the State accounting.

Another man was committed after having been declared incompetent because he accused his son of stealing from him. He was declared incompetent, and guess who became his guardian? His son.

Suffice it to say, the study has persuaded me more than ever that the aged must be protected from proceedings like those presently used.

In the articles I have written and filed with the committee, I have made a few moderate proposals. I hope for the Senate to finance additional work, and I implore the State legislatures to examine the mentality of present practices.

Thank you very much.

Senator WILLIAMS. Thank you.

Mr. KALCHEIM. I told you he was going to test some of the procedures that we lawyers operate under, and that he may be charting new paths or new points for examination. The legal profession, I must add, is always examining its position. We listen to the professors and argue with them and sometimes change our position at the suggestion of the professors. I think you have had some worthwhile observations on this, on the difficulties of this very complex problem of determining when a person should be declared incompetent.

Mr. Alexander has a paper which would, I feel, be of great value to the committee, if it could be made a part of this record.

Senator WILLIAMS. It will be incorporated in the record.

(The document referred to follows:)

COMMENTS OF GEORGE J. ALEXANDER

Gentlemen: Although I spoke earlier of a field which I have studied, I would like now to speak, as a citizen, of a field in which I have little knowledge and begrudge the knowledge I have had to acquire. If my own experience is at all typical, the procedures used in determining medicare benefits for the elderly are in serious need of revision.

When my father died, I became the executor of his estate. It is a very modest estate and his widow is, I would guess, the type of person that medicare benefits were primarily designed to benefit. She depends, for her support on the funds in the estate. The medical payments during my father's terminal illness were a substantial drain on its funds. Her attempt at reimbursement for nursing services, which I later undertook, show how frustrating such efforts can be.

The following narrative comes from a decision of a Hearing Examiner of the Social Security Administration.

"The claimant's father, Walter Alexander, the deceased wage earner herein, was hospitalized in the Parkway Hospital, Forest Hills, New York, on January 3, 1969. He remained an inpatient at the hospital until his death on February 2, 1969.

"Thereafter, the expenses of the deceased wage earner's hospitalization, with the exception of the cost of nursing services received by him, were paid to the hospital, under the provisions of Title XVIII of the Social Security Act, as amended. An application was thereafter filed by the wage earner's widow, for reimbursement for the payment for nursing services received by the wage earner during his hospitalization. The application was filed with Group Health Insurance, Inc., of New York City, which denied the application on February 27, 1969. On March 14, 1969, the wage earner's widow requested reconsideration, and, on March 31, 1969, Group Health Insurance again denied the application, on the ground that the nursing services received by the wage earner were rendered by private-duty nurses, and that the expenses therefore were specifically excluded from coverage under the provisions of the Act. The cost of the nursing services is shown to have been $670.

"Thereafter, the claimant became executor of the estate of the deceased wage earner and assumed the claim. He reapplied for reimbursement for the cost of the nursing services received by the deceased wage earner to the Group Health Insurance, Inc., on April 10, 1969. He received no acknowledgment or answer until May 7, 1969, when Group Health Insurance, having twice previously denied the claim, informed him that it was not the appropriate intermediary for the claim and directed the claimant to United Medical Services, Inc. On May 20, 1969, the claimant submitted the claim to the United Medical Services, Inc. The claim was denied on June 6, 1969. On June 12, 1969, the claimant requested reconsideration and, on August 8, 1969, the claim was again denied by United Medical Services. On August 8, 1969, the claimant submitted a letter to the Social Security Administration, in which he indicated that he desired a hearing. He filed a formal request for hearing on September 12, 1969. The claimant's request for hearing was interpreted as a request for reconsideration and referred to the Reimbursement Branch of the Bureau of Hospital Insurance of the Social Security Administration. On January 22, 1970, the latter agency issued a Reconsideration Determination, denying the claim. On February 9, 1970, the claimant submitted a letter to the Administration, which reads as follows: "Although I have already done so once, I again formally request a hearing before a Hearing Examiner.

The record indicates that, after the claimant filed his original request for hearing, the matter was referred to a third intermediary, Associated Hospital Service of New York. On November 14, 1969, that intermediary addressed a letter to the claimant, which reads in part as follows:

> Your recent inquiry concerning reconsideration of payment for hospital benefits is being developed. We are making every effort to expedite the completion of your claim.
>
> Due to circumstances involved, however, it will take us some time to obtain the necessary information from various sources in order to make a complete review of your case.

On November 18, 1969 Associated Hospital Service submitted a letter to the claimant which reads, in part, as follows:

> We contacted Mrs. Smith of the Insurance Department of the Parkway Hospital, she informed us that since the group of private duty nurses were not employed by the hospital nor their salary reimbursed by the Hospital, the nurses are considered as private duty nurses. Therefore it is determined that the charges for the service of the private duty nurses during the period in question are not payable by the Health Insurance Program.

In accordance with the request of the claimant, a hearing was duly held before the undersigned Hearing Examiner on April 15, 1970, at Syracuse, New York. The claimant appeared personally and testified in support of the cla'm (The Hearing Examiner then determined the disputed issue in favor of the estate and then added:)

At the hearing, the claimant stated that the denial of his claim, as well as the manner in which it was handled, indicated a serious abuse in the administration of the Hospital Insurance Program. He pointed out that he had been referred to three different intermediaries and that the claim had been pending for more than a year. He pointed out further that he had been referred back and forth

from office to office and that at one point he had received a telephone call informing him that he should withdraw his claim because it was "misguided". He stated that, if he had been representing a client, he would long since have abandoned the claim, because the value of the professional time which he had to spend on the claim far exceeded the amount involved. In the opinion of the Hearing Examiner, there is much merit in the claimant's assertions. In addition, the record indicates that the adverse determination in this case rested solely upon the assertion of the hospital, without reference to any of the actual facts involved. The third intermediary denied the application, following a telephone call with a representative of the hospital and based solely upon such telephone call. As pointed out by the claimant, the practice of the hospital in this case would appear to constitute an abuse of the hospital insurance program.

Because the claimant is an attorney and the executor of his father's estate, he persisted in the prosecution of this claim. *Other claimants, who are without funds or the benefit of legal advice, are no doubt being denied benefits to which they are entitled under the law,* (emphasis added) by reason of the apparently unlawful policy of the Parkway Hospital. As indicated above, the hospital hires these nurses and has hired them on a regular and continuing basis. They provide services not for particular patients but for all patients in the particular ward, which the hospital chooses not to call an intensive care unit. The fact that the hospital required the patients to pay the nurses is of no significance. The hospital might just as well have required patients to pay the daily wages of the janitors, cooks, and other employees. Accordingly, the Hearing Examiner respectfully recommends that the Bureau of Hearings and Appeals bring this case to the attention of the Bureau of Hospital Insurance, so that a precedent may be set for the future determination of claims for nursing services rendered under similar circumstances in the Parkway Hospital and in other hospitals participating in the Hospital Insurance Program."

Thus, on May 14, 1970, almost one and a half years after the claim was filed, it was allowed by the fourth official to consider it. On July 15, 1970, the Appeals Council notified me that it had decided "on its own motion" to review the decision in Washington, D.C. I have no idea as to what the issue on review is to be, when the appeal will be heard or what the rules governing the appeal are. Also, I do not understand how a private claimant is supposed to be able to afford such a continued process of litigation with the federal government. My letter of July 18 to the Appeals Council, asking these questions, had neither been answered or acknowledged by August 4 when I prepared this comment.

I respectfully urge this committee to review the administrative procedures used in determining medicare claims to determine whether improvements would not lead to more equitable solutions. I am confident that unless changes are made denials of claims, justified or not, will be final. If "apparently unlawful" practices cannot be challenged more effectively, they cannot be checked.

Mr. KALCHEIM. Our next panelist is also a young man, a member of a well-known St. Louis law firm, and engaged in meeting the day-to-day legal problems of the aged. He is on the firing line. He meets and attempts to solve the daily problems that we practicing lawyers face with our aging clients. From him you will hear other aspects of incompetency proceedings, other tools to smooth the way for maintenance and care of the aged and their property, and children's responsibility in the care of parents.

Are the tools fashioned by lawyers and legislatures sufficient for present day needs? Are there better ways of handling the type of problems Mr. Armstrong will discuss? Is our advice and use of present procedures maintaining the dignity of the individual who has aged? Do they minimize litigation and disputes?

I am sure Mr. Armstrong will add to your knowledge, not only of the variety of problems relating to the aged, but of the concern he has, and we have, for preserving the tranquility of the family and family life.

STATEMENT OF OWEN T. ARMSTRONG, PARTNER, LOWENHAUPT, CHASNOFF, FREEMAN & HOLLAND, ST. LOUIS, MO.

Mr. ARMSTRONG. Thank you, Norman.

I think Professor Alexander has put me on the spot as a representative of lawyers who deal with the day-to-day legal problems of the aging. It seems I have the burden of showing how we earn these thousands of dollars in fees that Professor Alexander was talking about. Of course, such fees are not within my experience, but I have no doubt that the statistics are authentic. They must be based on practice in New York or California, or somewhere besides St. Louis.

Actually to place the topic in perspective, in the context of the ABA treatment, it occurs to me that in the light of recent developments, sociological and legal, the emergence of the pill, artificial insemination, more liberal abortion laws, and most recently, the women's lib, it may be that Mr. Kalcheim's committee on legal problems of the aged, may become known as the last surviving committee of the family law section.

I suppose the largest problem of the aging is the fact that there are so many of us. We are all aging and we are all concerned with the various problems that have been outlined in the talks up to this point.

The case history I will recite represents not so much my own experience but an experience of the law firm with which I have been associated for the past 20 years.

The statistics Mr. Kalcheim mentioned, the fact that there are 20 million people over 65, or about 10 percent of the population, is proof enough that representation of the older or elderly person is an increasingly significant part of any lawyer's practice.

In the day-to-day experiences we encounter situations like these: A 67-year-old man suffers a severe coronary, but is back at work in 4 months. On the other hand, a 65-year-old man looks and feels like 50, yet must retire under a company rule; a couple in their 70's are planning a 6-month trip abroad; or a 90-year-old lady is slowly becoming senile. All of them have legal problems. The legal profession ought not to overlook the growing field these problems represent and the necessity for developing new knowledge and solutions to deal with them.

MORE DELICATE LEGAL PROBLEMS

In addressing ourselves to the problems of the older or elderly clients, we must distinguish between the two classifications, an older person, say 65, and an elderly client who may be 85 or even 90. Both the Internal Revenue Code and the usual corporate policy treat 65 as the dividing line between middle and old age. At this stage the typical legal problems are economic and financial, and the lawyer deals with the older person himself. He may be concerned with social security or pension benefits, income tax matters or estate planning. The situation of the elderly person often involves a more delicate problem. The decisions to be made are quite personal in nature and commonly involve consultation with relatives. This presents a serious challenge to the lawyer's sense of professional responsibility. He may not, under standards of legal ethics, dilute loyalty to his client by the desires of the third persons, however closely related. Thus, sup-

pose the members of the family seek the lawyer's assistance in having a relative adjudicated incompetent. The elderly person's interests may be diametrically opposed to those of his family. It is the lawyer's duty to identify which individual is his client and suggest that the adverse party seek other counsel so that he wouldn't be representing the conflicting interest.

Equally important in advising with respect to the elderly is to draw the proper line between mental incapacity and mere advanced age. The problem arises in a number of ways. Does the individual have the capacity to execute a power of attorney, a deed, will or trust? Does he meet the statutory test of incompetence in a particular jurisdiction for purposes of appointment of a guardian? This is for a court to decide, but the lawyer's recommendation on the matter of seeking an appointment is often decisive.

Non compos mentis is generally defined as a condition approximating total and positive incompetence. It denotes a person entirely destitute of memory and understanding. Dotage or senility, on the other hand, is that feebleness of mental faculties which proceeds from old age. It does not necessarily mean that the person suffering therefrom is non compos mentis. Clearly, old age is not non compos mentis, nor does old age alone justify appointment of a guardian, but it is well settled that weakness of mind resulting from old age may assume such form and be of such character as to justify appointment of a guardian to handle the affairs of the person so afflicted.

Those are all generalities. I could mention very briefly a number of cases, but it occurs to me that it may be more useful and interesting to outline at somewhat greater length a single case history which more or less typifies the whole problem area.

Hypothetical Case

Consider the case of a widow whom we shall call Mrs. Jones. Her husband died in 1950 when Mrs. Jones was 70 years old. She inherited a rather substantial estate—this was not the problem. On advice of her lawyer Mrs. Jones created a revocable living trust, naming a corporate trustee. She transferred the bulk of her assets to the trust, including all of her investment securities, but not including her residence or household furnishings. The trust instrument contained the usual provisions: The trustee was directed to pay Mrs. Jones the income during her lifetime, plus such payments out of principal as he might direct; there was an incapacity or disability clause, permitting the trustee in such event to make payments to others for grantor's benefit; the remainder went to relatives and a favorite charity; and, of course, Mrs. Jones reserved the right to revoke or amend the trust.

Mrs. Jones had no children or other descendants. Her closest relative was a young sister, married to a man we shall call Smith. Mrs. Jones executed a will in conjuction with the trust, leaving her household goods to sister Smith, again omitting to mention the residence, and giving the residue of her estate to the trustee of the revocable trust.

Thus far the case history may sound like a rather elementary estate plan, but problems soon began to emerge in the case of Mrs. Jones. She continued to live in her family residence with a close friend who was both companion and housekeeper. In 1965, at age 85, Mrs. Jones,

acting on her lawyer's advice, executed a power of attorney in favor of brother-in-law Smith, primarily so that he could receive and manage the income payments from the trust. A short time later, desiring to provide for her companion, Mrs. Jones, still alert, executed a codicil bequeathing all her U.S. saving bonds.

At this point, which was in 1968, Mrs. Jones had reached the advanced age of 88. She fell and sustained a severe head bruise. In the next few months both the companion and sister Smith noticed that Mrs. Jones suffered increasingly frequent lapses of memory and displayed other signs of mental weakness, but she remained clear on other occasions.

Early in 1969, Mrs. Jones fell again and broke her hip. At this point, after careful deliberation, sister Smith and Mr. Smith, her husband, decided to move Mrs. Jones to a nursing home.

This development, in conjunction with Mrs. Jones now dubious mental competence and legal capacity, precipitated a number of distinct problems for the family and their lawyer. One problem was how to handle the contractual arrangements and payments for Mrs. Jones care at the nursing home.

The second problem was how to make adequate financial payment to the companion who had been living with and attending Mrs. Jones for the past 20 years.

The third problem was how to dispose of the residence which had never been disposed of in the trust or in the will.

Mrs. Jones lawyer conferred with the Smiths and with the corporate trustee of the revocable trust. No consideration was given to seeking court appointment of a guardian, for the reason, among others, that most of Mrs. Jones' assets were already in the trust in the custody of the trustee.

As to the nursing home arrangements, the trust contained the disability clause which permitted the trustee to take care of the nursing home payments.

As to providing for the companion, Mr. Smith, the brother-in-law, in his capacity as attorney-in-fact, had been receiving the trust income for Mrs. Jones. He used the excess of this income, over that which was needed for her care, to invest in additional Government bonds which, of course, then passed to the housekeeper under the codicil that Mrs. Jones had executed earlier.

Finally as to the problem of how to deal with the residence when Mrs. Jones moved to the nursing home, the lawyer considered two alternatives. One was a sale by Smith acting under his power of attorney. The lawyer, however, was concerned that the power of attorney might be questioned at a later date when Smith would wish to complete the sale, because of the rule of law that such a power of attorney is deemed to be revoked when the principal, the person who gives the power, becomes incapacitated.

The second alternative was to rely on the revocable trust once more, to accept additional property from the grantor and to sell the trust assets.

At this time, although Mrs. Jones mental capacity was generally uncertain, she did enjoy periods of clarity. The attorney, therefore, ultimately recommended to Mrs. Jones that she execute a deed conveying the residence to the corporate trustee. In this way her subse-

quent incapacity would not prevent a sale. The property was later sold by the trustee and the proceeds of sale were added to the trust corpus.

Based upon the lessons learned from the case history of Mrs. Jones, along with many other cases within the experience of our law firm, I don't hesitate to endorse the recommendations contained in the first annual report of the committee on legal problems of the aging of the ABA family law section. Day-to-day problems indicate the need for new legislation, and it is a very acute need indeed.

I am particularly concerned because of these experiences with the need for a new power of attorney law. Also I agree it is important to adopt a uniform State guardianship law that has the same definition of incompetency in all jurisdictions.

Legal Counsel for Incompetency Proceedings

Perhaps most important is the recommendation that in all proceedings in the determination of incompetence, the alleged incompetent person should be provided with legal counsel.

I would add the suggestion that provision for a permanent staff of "public defenders" might well prove more satisfactory than ad hoc appointment of counsel by the court to protect the interest of the alleged incompetent, because very often the attorney in such a case is not in a position to give the careful study that the matter deserves.

Mr. Kalcheim. Thank you, Mr. Armstrong.

I have, and I will do it as quickly as possible, a series of recommendations.

In connection with the reference to the power of attorney and the necessity for counsel in all cases involving petitions for the appointment of guardians, I call attention to the fact that the Uniform Probate Act adopted by the American Bar Association, and hopefully it will be adopted by all of the States, does contain in article V a provision for the continuation of the power of attorney beyond the point where the person is declared incompetent and does not disqualify or terminate or void that power of attorney. Secondly, it also provides in very strong language the necessity for counsel being appointed for the ward or the alleged incompetent.

Recommendations

Let me briefly go over the recommendations which I have submitted to the committee in writing, and I believe you will be interested in them. I will read them quickly.

We are against the continuing discrimination in employment which is allowed against persons over 65 under the U.S. statutes covering discrimination in employment because of age, and because the act makes the limitation of ages 40 to 65, we believe the top age of 65 should be eliminated.

The second thing is the elimination of mandatory retirement at age 65 under pension agreements. We believe this is important because written into most pension agreements is the mandatory retirement at 60 or 65. This deprives the person involved of continuing employment. It deprives the State of the skills of this person and is unnecessary as a means of determining whether a person should continue to work.

Discrimination in licensing and insurance, we adopt the recommendation in the report of the law school of the University of Denver, which calls attention to the fact that there is blatant discrimination in obtaining insurance and driver's license over 65. The statistics they have prepared in support of their position indicate that the over 65 person is a much better insurance risk for insurance, that the incidence of accidents is the lowest in all classes and, therefore, we think publicity should be given to this fact and that licensing commissioners in the various States and the insurance companies should be urged and requested to set up fairer arrangements with respect to all insurance and eliminate the discrimination.

Thirdly, we want to support certain bills that are now in Congress to permit class action in consumer suits, because we think that the large and growing population of older people is an important segment of the consumer public, and that the action proposed by Senate bill 1980 would allow direct class action by consumer, rather than waiting under another bill for the Attorney General to complete his proceedings where he charges consumer fraud, et cetera. Many of these proceedings take 3 or 4 years, and under that act he cannot proceed until the Attorney General has obtained the judgment.

We are proposing additional tax relief for the elderly to eliminate the over 65 $600 exemption and the 10-percent standard deduction, and replace it with the special $2,300 for single persons and $4,000 for married people to be applied to lower and middle-income elderly, regardless of the sources of their income. This will be reduced to those of the higher income bracket beginning at $5,600 for single people and $11,200 for married people. This is based on the assumption that those of higher income, the gradual reduction accomplished by reducing the approved special exemption by $100 over $5,600, or $11,200 level, but not below one-third of any social security or any other pension agreement. It also provides that social security retirement benefits will no longer be excluded from income and will thus be included in the calculation of the income set above. Assuming the inclusion of social security income, 90 percent of the present social security recipients would continue to remain untaxed and there would be a reduction in taxes for an additional 5 percent who have other unearned income.

We also recommend that there also be an in depth examination of the Appeal Provisions Act of pension provisions so as to protect the individuals involved so that full consideration is given to the position to be determined in the appeal.

Thank you, Mr. Chairman.

Senator WILLIAMS. Thank you very much, Mr. Alexander and Mr. Armstrong.

I propose that we go to our other panel and we will have a general discussion afterward.

We will turn to our members of the legal research and services for the elderly program.

We have Mr. Morris Goldings, Mr. Borsody, and Mr. Stanton Price.

Have you chosen a chairman?

Mr. GOLDINGS. I think the correct order is outlined on our list of witnesses.

Senator WILLIAMS. All right, we will hear from you, Mr. Goldings. If you will, please describe your activity and, of course, who you are and where you are from.

STATEMENT OF MORRIS M. GOLDINGS, COUNSEL, COUNCIL OF ELDERS, ROXBURY, MASS.

Mr. GOLDINGS. Senator Williams, Senator Randolph, and members, my name is Morris M. Goldings of Boston, Mass.

I have the honor of testifying here today as a representative of the legal research and services for the elderly projects sponsored by the National Council of Senior Citizens for the U.S. Office of Economic Opportunity. I am also here to describe, with specific examples, some of the varied work being done by the 12 projects throughout the country. Later in my statement I will describe the project with which I am most familiar, that involving my firm in Boston. At the outset, however, I will comment more generally on features of the elderly legal project which may be of particular interest to your committee.

This project had its origin in a grant by the Office of Economic Opportunity to the National Council of Senior Citizens. The stated purpose of the grant was simple enough, to provide legal research and services for the elderly. Carrying out its responsibility, however, the National Council recognized and indeed took advantage of the variety of problems and circumstances which involve the elderly across the country. Thus 12 subprojects were authorized; and simply to state their location gives a good indication of the geographical distribution, the urban-rural mix, and the various other factors which make generalizations such as I am about to give as treacherous in this field as in so many others: New York City; San Francisco; Boston; Albuquerque; Santa Monica; the Bronx; Morehead, Ky.; Miami Beach; Ann Arbor; Bluefield, W. Va.; and Atlanta. If this listing sounds like a Walt Whitman piece, it is not a coincidence, as I am sure this committee which has held so many notable local and regional hearings will recognize.

The original thinking was, obviously, that although many of the problems, both legal and economic, which the elderly population is facing in the United States today require solutions in Washington and in the State capitals, nevertheless, the solutions are no better than the clarity with which the problems are recognized. The National Council, just as this committee, correctly found that it had to leave Washington and leave the State capitals, quite literally, from time to time to recognize these problems and to test solutions.

LAW REFORM PROJECTS

A major theme of the project has been the identification, development, and administration of what must be described as "law reform" projects as distinguished from what have been the traditional "legal aid" functions. As I, at least, understand it, a law reform project is one which addresses itself to a problem either of litigation, administrative procedures, or legislation which has broad applicability. It involves a legal issue which has what lawyers ominously call precedential value beyond the individual case or controversy to which it is specifically addressed. I think it is well to distinguish this type of project from the equally necessary and unfortunately overburdened legal aid and legal assistance work which is going on throughout the country under other sponsorship. In making this distinction, let me be clear that there is the usual gray area with which lawyers are congenitally

burdened. You are all familiar with many notable cases which have reached our highest courts from modest, unpretentious beginnings in private law offices, legal aid offices, and Government agencies. The function of law reform, in one aspect at any rate, is to continue and to enhance this remarkable ability of our legal system to pick out a Gideon—and yes, even an Escobedo and a Miranda—for a certain kind of fame if not fortune. And it is at least one aspect of the work of this project to do so in the context of civil forums for the benefit of our elderly constituencies, whether these forums be a Social Security office, a State legislative committee, a public utilities hearing room, or courts at any level.

With this general description of the scope of the National Council's legal project for the elderly, I would like to turn to some of the specific work which the projects have done and here I am speaking from my personal involvement in Boston and from my association with the other projects as a member of the National Advisory Board for the project.

Three Roles

I would divide the work of the projects into three broad categories.

First, our elderly clients brought to us cases of bad administration of existing Federal, State, and local programs. These cases had to be handled as any law cases are. We must assemble a set of facts; present them to a forum, be it an original administrative agency, an appellate agency, or ultimately a court; and resolve the matter by settlement or by a decision. For want of a better word, I would call this the litigative feature of the legal research and services program.

Second, under existing law in many States and under Federal law, we have found opportunities for improving elderly economic and social conditions by representing the elderly in traditionally available but hitherto unused forums. The goal is to make the elderly into a vocal interest group as impressive to the rest of the community and to agencies of government as other interest groups which are more obviously identifiable, such as business, labor and, may I add, the youth and women. This use of legal research and services is similar to that employed by consumer groups, but is specially addressed to elderly issues. Utility rates and special utility services are examples of this part of administrative law.

Third, where existing statutes were inadequate, notably on the State level in many jurisdictions, the legal research and services program has been available for drafting, filing and, indeed, lobbying of legislation in State houses, city councils, and other local legislative bodies to provide new programs, improvement of old programs, increases in benefit levels, and the elimination of antiquated and inefficient procedures having their origin in statutes and ordinances or at least most likely to be eliminated by new enactments.

With respect to the area of court litigation, the legal services project has benefited greatly by the availability as a resource of the Center for Legal Problems of the Elderly at Columbia University Center on Social Welfare Policy and Law. There an enterprising staff of attorneys has acquired and maintained an expertise in the area of poverty law at which I, as a private practitioner, continually marvel. The exquisite distinctions which can be woven by interested lawyers from subsections

of the regulations relating to medicare and medicaid would leave the antitrust lawyer and most sophisticated tax lawyers at the starting gate. A representative of that project, Mr. Borsody, will speak for it, so I will move to other areas in which the Boston project has been involved.

Telephone Rate Reduction

With respect to the use of existing administrative procedures, I will describe briefly a petition which we filed before the Massachusetts Department of Public Utilities on behalf of the elderly in the Boston's model city groups, but actually representing the elderly in the entire area served by what we call the Mother Bell, the New England Telephone & Telegraph Co., in a recent case. In that case, the New England Telephone & Telegraph Co. sought large increases in phone rates, including the basic rate for residences in the Boston area. The Council of Elders under the legal research program was the only nongovernmental agency to file as an intervener for consumer interests. It not only opposed the rate increase, but made what was frankly described as a novel and, indeed, in some areas described as a radical proposal, a basic rate reduction of 50 percent for persons 62 years of age or older who are telephone subscribers and who do not share their subscription with more than one other person below the age of 62.

Let me mention that last year Massachusetts enacted a statute providing for a half rate reduction for the elderly, regardless of means, on public transportation in the metropolitan area. The transportation company is a public company, to be sure, and the New England Bell is a private facility, but we had that degree of precedent before us.

The telephone company opposed the introduction of evidence on this issue, evidence which took the form of both economic data and personal testimony by elderly individuals. The commission ruled that the evidence was admissible, a ruling without precedent in our jurisdiction and, indeed, contrary to precedent in other jurisdictions. I wish we could report that the commission ordered the 50 percent rate for the elderly, but it did not. The commission's decision on the elder's petition was, however, notable because it specifically cited supposed inability under existing legislation to make such an order and added a suggestion that if new authorizing legislation is to be forthcoming, it include a means test. Interestingly, the telephone company never questioned the constitutionality of this proposal, and the avenue is rather obviously open for the enactment of enabling legislation. Indeed, the legislation had already been filed on behalf of our Council of Elders some months before in anticipation of this type of ruling and is presently pending in the Massachusetts general court. In the same public utilities decision, we can report the department of public utilities severely cut the proposed general increase for residential phones and as a result, the elderly, together with all other consumers, will benefit from that decision. I have given this one specific example, but others could be added in the area of representation before public agencies in the establishment of regulations for rental housing, the licensing of nursing homes, and the improvement of Medicare and Medicaid procedures. In legal terms, this feature of the legal research and services project constitutes the elderly as a "party in interest" with the standing to petition, to present evidence, to cross-examine the

evidence of others, to win a case, and, yes, to lose one, but in one word, to be heard, both in the technical sense and more broadly.

I have already alluded to the third major part of the project, that of drafting legislation, that is, the right of free legislative petition.

Any person can introduce a bill, or many bills, by a certain date in December for consideration by the Massachusetts Legislature in its next session beginning in January. It is traditional for these bills to be filed by a member of the branch, but it is not actually necessary for that to be done. Many a Massachusetts legislator on the eve of filing has had a constituent or nonconstituent come up with "oddball legislation" and file it and he uses the marking words "By Request" and it gets in the hopper.

Full "Pass Along" and Reduced Fares

We filed on behalf of our elderly project in the past year 12 significant pieces of legislation which have had full public hearings, often attended by large numbers of our constituents, and received full consideration, including an enactment into law in several cases. We drafted and saw adopted State legislation passing along the entire social security increase voted last year by the Congress, and not only the $4 required as a minimum by the Federal law, to persons who are recipients of both social security and old-age assistance, so that the cruel result of a social security increase being eaten up by a decrease in old-age assistance would not occur in Massachusetts. We were active in the enactment of the legislation requiring reduced fare for the elderly in public transportation in the Boston metropolitan area, legislation which is being used as a model in other jurisdictions and on which were were able to do through a rather massive lobbying job. In this connection, let me mention, and I am sure it needs only brief reference, that the elderly are a remarkably able and available force to demonstrate on a person-to-person basis their interest in every proper manner by appearing at hearings, visiting State capitols, and acting and reacting at elections. In short, they are excellent lobbyists and have become respected as such in Massachusetts.

The legal projects have found no simple solutions to the problems of aging. It is, however, fair to say that they have demonstrated that the law, and particularly those attuned to notions of law reform as I described at the outset, are available in various aspects to assist and lead in problem solving with the help of Government and its economic resources. And this is, after all, the highest calling of both law and government.

Lay Advocates

I think it is appropriate to comment, particularly as we are meeting here in conjunction with the American Bar Association convention, on the role of organized bar in relationship to these projects. I think I can speak personally in that regard because I am a member of the association and a partner in a private law firm. In this connection, I was particularly interested and involved in the use of nonlawyers, persons whom we refer to as the lay advocates, with respect to various aspects of our projects. They do not appear in courts, but they do appear to assist our clients in administrative proceedings with the ap-

proval of the agencies involved. They work under the supervision of an attorney in their general responsibilities; they have been trained in matters of confidentiality as aides to the attorney; and their use has been carefully screened by our office to be sure that the traditional notions of the unauthorized practice of law were not being violated. The simple facts are that they are not doing the work of lawyers because there are not enough lawyers trained or available to represent the large numbers of persons in the advocacy situations in which the elderly require assistance. Indeed, they do better than many lawyers would, not only because they are elderly and naturally owe and receive the respect which is due them as such, but because they have that additional advantage of knowing at first hand the type of problem on which they are advocating. The life of the law is indeed more experience than logic, and our program has been proving it daily. This is not the place to engage in an extended discussion on the use of so-called paraprofessionals and its implications for the future and for other areas of poverty law and law in general. Let it suffice to say that in our project in Boston, we recognized our responsibilities in the employment of lay advocates and they have been markedly successful in the administrative and legislative fields in which they have been active.

In conclusion I would like to add that I, as an attorney, and my law firm took on the elderly project in one sense as another client on a fee-paying basis, indeed with a retainer in the traditional sense of that word. We represent the project and the individuals whom the project is assisting with the same degree of professional attention and responsibility which we give to any corporate or individual client. It may seem peculiar to some that the elderly, as a group, should use the services of a private law firm. One may recall, sitting as we are in Missouri, that Harry Truman's view of the Presidency was that he was the only person, he and his Vice President, elected by the entire country and so he represented each individual who did not have a special interest to speak to him in Washington. This is a fine and noble view of the Presidency, but as the chairman of the Section Committee noted, we can all use help, and in this complicated age where the economics of the thirties and, indeed, the economics of the fifties no longer lead to obvious solutions, the problems of elderly Americans demand and justify the best talents which every discipline, including the law, can give.

The matters to which I have referred are primarily the problems of the elderly poor but the erosion of wealth which has occurred in the last year and a half in this present economy obviously expands that category. May I suggest that one must undertake his own definition of that term and work on the basis of such a definition. Studies which this committee has made in the past with respect to European experience indicate that one of the most significant issues is not necessarily the amount of money that a person has, but the diminution from his previous levels of wealth and earning power. I think that to a group of lawyers this has real meaning, so that rather than simply the problems of the elderly poor these issues are truly relevant to the vast majority of elderly Americans.

Those participating in the Legal Research have participated with a sense of commitment. We hope that the elderly, and I know that the law will be better off for that participation.

Thank you very much.
Senator WILLIAMS. Thank you very much.
We will now hear from Mr. Borsody.

STATEMENT OF ROBERT BORSODY, SENIOR ATTORNEY, LEGAL SERVICES FOR THE ELDERLY POOR, CENTER ON SOCIAL WELFARE POLICY AND LAW, COLUMBIA UNIVERSITY, NEW YORK, N.Y.

Mr. BORSODY. My name is Robert P. Borsody. I am a staff attorney at the Legal Services for the Elderly Poor Project of the Center on Social Welfare Policy and Law at Columbia University.

The Center is an OEO-funded back-up and research center for legal services programs providing expertise in welfare law. The project deals with legal problems relevant to the elderly poor.

Since I have been granted permission to include in the record my extended remarks which are a summary of a working paper that has been prepared by our project for the latest publication of the committee, I think I can be fairly brief, and just discuss some of the high spots and give you a few examples. These will be things which we think will need further research, study, and action by ourselves, among others. In many cases we can't propose any solutions right now.

HEARING PROCEDURES AND JUDICIAL REVIEW OF HEARINGS

A prior hearing; that is, a fair hearing before benefits may be terminated or reduced, is essential for the protection of persons receiving benefits under any program. Recently the Supreme Court recognized the severe injury and hardship suffered by people whose categorical assistance grants are wrongfully terminated and it imposed the requirement of a hearing before such terminations could be allowed. This case was *Goldberg* v. *Kelley*, which the attorneys at the welfare center worked on. Since old age and disability beneficiaries may suffer the same severe injury and hardship upon termination, we think that prior hearing should be mandatory in title II programs. The Columbia Center in conjunction with the Kentucky Mountain Legal Rights Association now has a suit pending to correct this abuse.

Another thing that should be interesting to the assembled group here is the authority lacking in the categorical assistance programs, for payment by public agencies of all of the attorneys' fees incurred by claimants in conjunction with hearings, and subsequent judicial review. This results in substantial numbers of people who are unable to retain counsel at hearings and usually don't request hearings because they don't have attorneys to represent them.

Benefit levels in OASDI. This is something that is in the news a good deal, because it is something that affects millions of OASDI recipients. We think that all future OASDI increases should be passed along in full to recipients of categorical assistance. At present as OASDI goes up the categorical assistance payments go down; as a result they don't get any more money. These OASDI increases are given as an offset to increases in cost of living for people who need it most.

We have another case pending with you, Morris.

Mr. GOLDINGS. It is the *Gainville* v. *Finch* case.

Mr. BORSODY. That is aimed at the retirement test in OASDI.

Mr. GOLDINGS. On September 17 we will have the judge determine whether we leave the court immediately or after an opinion. It is up before a three-judge hearing on September 17.

Mr. BORSODY. The 1-year limitation on the amount of retroactive benefits is a particularly harmful thing that we have been trying to get at. It harms those who deserve the least to suffer; people who are usually disabled in some way and suffering from incompetency. The OASDI administration should be able to do something about this, because they have records and computer systems and there is no reason for this 1-year statute of limitation. We have a case planned where we will be asking the court to upset this.

RELATIVE RESPONSIBILITY

A lot of States have, as a condition for receipt of categorical assistance, a duty imposed by the State laws on relatives of recipients to be liable for any benefits that are extended to the recipients. These are the so-called relative responsibility laws. They have the effect of deterring potential elderly applicants from applying for aid because they feel that the authorities will go after their children and the children will be economically harmed. Therefore, they never apply. The Federal law should be amended to require the States to eliminate such provisions under grant-in-aid programs.

Most States have unrealistic income and asset levels for categorical assistance applicants. Elderly persons who have worked throughout their lives and with social security retirement benefits inadequate to support them are ineligible for categorical assistance unless they agree to place a lien for the value of assistance received on their home, to assign life insurance policies, and to assign the value of burial insurance or prepaid funeral contracts. A system which poses such harsh choices for our elderly, failing to recognize the noneconomic value and attachment elderly persons have for certain of their resources, must be altered to make it more sensitive to the human factors that make a burial contract valued at $300 very different from $300 in a bank account.

NURSING HOME PROBLEMS

Nursing homes as extended care facilities under Medicare presently have a 100-day limitation placed on the days of care which will be reimbursed by the Federal Government in all of the State plans. We feel that the time limitation on reimbursement will have the effect of providing care for those who need it least at the expense of those who truly need extended care. The reason for this is that nursing homes prefer to take short-term cases, as opposed to severely ill who will require treatment in excess of 100 days. Given effective utilization review of patient needs, which is required in Medicaid, there should be no arbitrary limitation on the number of days of the skilled nursing service.

We think Medicaid coverage should be extended to all persons receiving disability benefits. Their medical expenses exceed twice that of nondisabled persons in the same age category.

Another point, States may now provide Medicaid coverage to the so-called medically needy. This is a group whose income is sufficient for daily living, but not sufficient to cover their medical needs. This coverage should be mandatory for people of 65 or over.

Provision should also be made in Medicaid for persons whose expenses for medical care reduce their income to within the limitation for coverage for welfare recipients. There are 24 States that now provide coverage only for people actually receiving welfare benefits, the so-called categorically needy. After this hearing I am going on to Denver to work on a case which will try to rectify this, based on one of those obscure little sections, 1902(a)(17)(D) of title 19. We maintain that this section requires those 24 States to give medical assistance, through Medicaid, to those who may not be eligible for welfare because of overincome but who have medical expenses that reduce their income below the welfare level. That way everyone with real, provable medical needs will get medical assistance the way congress intended.

Let's see, what else? Involuntary commitment? I think that has been covered pretty well.

I have just attempted to highlight, often without offering solutions, problems now facing the elderly in Government programs and to suggest areas which deserve further study. The solution for these problems may be costly, but our elderly citizens are entitled to security and well being in their final years.

Let us now turn to Stan and see what we can find out about HOWSE.

(Prepared statement of Mr. Borsody follows:)

PREPARED STATEMENT OF ROBERT P. BORSODY

My name is Robert P. Borsody. I am Senior Staff Attorney of the Legal Services for the Elderly Poor Project of the Columbia Center on Social Welfare Policy and Law at Columbia University.

The Center is an OEO-funded back-up and research center for legal services programs providing expertise in welfare law. The Project deals with all legal problems relevant to the elderly.

I will discuss government benefit programs affecting the elderly, including OASDI, categorical assistance, Medicare and Medicaid. Emphasis will be placed on problems which require legislative remedy and on areas which require further study and research.

I. HEARING PROCEDURES

A. Prior hearing

I will first discuss the procedural problems relating to hearings and the judicial review of decisions made at hearings. Prior hearing—that is, a fair hearing before benefits may be terminated or reduced in amount—are essential for the protection of persons receiving benefits under any of these programs. The Supreme Court recently recognized the severe injury and hardship suffered by persons whose categorical assistance grants are wrongfully terminated and imposed the requirement of a hearing prior to such terminations. Since old age and disability beneficiaries may suffer the same severe injury and hardship upon termination, prior hearings should be mandatory in Title II programs. The Columbia Center in conjunction with the Kentucky Mountain Legal Rights Association presently has a suit pending to correct this abuse.

B. Medicare

A patient should be able to obtain both administrative and judicial review, in Medicare hearings, regardless of the amount in controversy in the same manner as Social Security determinations.

At the present time beneficiaries under Part A of Medicare receive administrative review only if the amount in controversy is $100 or more. Judicial

review may be had under Part A only if the amount in controversy is $1,000 or more. Part B does not provide any administrative hearings or judicial review for questions of payments due. There is only a "fair hearing" procedure undertaken by the carrier.

Since the fair hearing procedure under Part B is by the carrier which made the determination in the first place, there should be detailed Congressional study of the meaningfulness of such "fair" hearings. It must be recognized that carriers have a built-in conflict of interest. On the one hand their performance is rated by the Social Security Administration and they are under pressure to make correct and consistent determinations. Fair hearing reversals are an indication of the incorrectness of their initial determinations and thus cast doubt on their efficiency under the program. Since the carrier is a private body there is no compulsory process and no testimony under oath at such hearings.

C. Disability

In disability hearings there must be an opportunity for a claimant to request an independent medical examination, paid for by HEW. This is an indispensable aspect of an adequate hearing, for the cost of obtaining medical evidence is often beyond the means of disabled persons.

Furthermore, in all OASDI and categorical assistance hearings decisions based purely on hearsay evidence should not be permitted. Without some protection against the admission of hearsay, the claimant is faced with a situation in which a decision against him may be rendered without ever having a chance to confront or cross-examine any of the persons responsible for the evidence on which the decision is based.

The inadequacy of the present structure of hearings is illustrated by the high reversal rate at every level of review. Hearing examiners, in the fiscal year 1969, reversed 40% of disability denials made by the Social Security Administration. 29% of the retirement denials by the SSA were subsequently reversed at the hearing level. The Appeals Council, in turn, reversed 9% and 14% of the disability and retirement hearing determinations respectively. That the program has long had difficulty in providing an adequate hearing procedure is indicated by the fact that from the period of July, 1955 through March, 1970, 49% of the decisions made in disability hearings which were later appealed to the District Courts were reversed or allowed by the Appeals Council on remand.

D. Attorneys' fees

Authority is lacking in both categorical assistance programs and OASDI for payment by public agencies of the attorneys' fees incurred by claimants in conjunction with hearings and subsequent judicial review. This results in substantial numbers of claimants who are unable to retain counsel at hearings and do not even request hearings because they lack counsel.

II. BENEFIT LEVELS

A. OASDI increases

All future OASDI benefits increases should require that the full amount of the increase be made available to recipients of categorical assistance. Since OASDI increases are given to offset the increased cost of living permitting reduction of categorical assistance vitiates the purpose of the increase for those who need it the most.

B. Wage base and retirement test

The present method of financing OASDI is regressive. The program should at least partially be financed by general federal revenues. Additionally, the taxable wage base should be increased.

The retirement test should be eliminated as it presently exists. If it is felt necessary to maintain such a test then all income should be considered for purposes of this test. There is no basis for differentiating between earned and unearned income for purposes of providing a decent standard of living to retired elderly persons.

C. Retroactive benefits

The one-year limitation on the amount of retroactive benefits harms those who deserve the least to suffer—poor and less-informed workers. Careful examination of methods of record keeping by the Social Security Administration in

OASDI should enable the keeping of records which would allow payment of full retroactive benefits.

D. Family maximum benefits

The present family maximum in OASDI should be eliminated. Social Security is a program designed not only to prevent loss of income, but also to provide a decent standard of living for family members. Thus, wives, widows, and children are eligible for benefits. However, the family maximum makes this little but a sham. The maximum is approximately one and one-half times the primary insurance amount, *i.e.*, sufficient to cover two persons. This is a totally unwarranted discrimination against larger families.

E. Relatives' responsibility

Many states, as a condition for receipt of categorical assistsance, impose a duty to support prospective recipients upon relatives. This has the effect of deterring potential elderly applicants from applying for aid because of fear and embarrassment that they will be forced to turn to their adult children for support and that their children will be economically harmed. Further, the state manages to reduce its costs by reducing the amount of its grants. Federal law should be amended to completely eliminate such provisions under grant-in-aid programs.

F. Income eligibility for categorical assistance

All states have unrealistic income and asset levels for categorical assistance applicants. Elderly persons, who have worked throughout their lives, and with Social Security retirement benefits inadequate to support them, are ineligible for categorical assistance unless they agree to place a lien for the value of assistance received on their home, to assign life insurance policies, and to assign the value of burial insurance or prepaid funeral contracts. A system which poses such harsh choices for our elderly, failing to recognize the non-economic value and attachment elderly persons have for certain of their resources, must be altered to make it more sensitive to the human factors that make a burial contract valued at $300 very different from $300 in a bank account.

III. MEDICARE AND MEDICAID

A. Nursing homes under medicare

Nursing homes as extended care facilities under Medicare, presently have a 100 day limitation placed on the days of care which will be reimbursed.

We feel, and study may show, that the time limitations on reimbursement have the effect of providing care for those who often need it the least at the expense of those who truly need extended care. Nursing homes prefer to take short term patients who will be released within the 100 day period as opposed to the severely ill who will require treatment in excess of 100 days. Given effective utilization review of patient needs there should be no arbitrary limitation on the number of days of skilled nursing service.

Hearings would also determine whether informal sanctions are now imposed on those persons who complain about the quality of care and treatment in nursing homes. We suspect that sanctions in the form of poor treatment, transfers from semi-private to ward accommodations, and discharge to public institutions are commonly imposed on those who complain. Hearings should also examine the inadequacy of treatment and services provided by nursing homes. Daily recreational activities other than television viewing are rarely provided.

Perhaps the most pressing problem in the Medicare program is the retroactive denial of payment for services for those persons who have been certified as eligible for extended care services. In this situation the patient acts innocently in relying upon his doctor's certification that he is eligible for extended care services. Then at some later date, often extended because of lax administrative practices, he is notified that reimbursement will not be provided. The patient is then personally responsible for bills incurred and in most cases is forced to withdraw from the extended care facility because he has no means to pay subsequently incurred charges.

B. Desirable changes in coverage of medicare

Medicare coverage should be extended to pay for self-administered drugs, presently the largest uncovered health expenditure of the aged. Intermediate care facilities are now provided under Medicaid but not under Medicare. The result

is that doctors who in good faith feel that their patients require intermediate care facilities, but not necessarily skilled nursing services, are often forced to order skilled nursing services because they know that Medicare will pay for the latter and not the former. There are obvious potential savings to Medicare by proving intermediate care coverage. Homemaker services should also be provided. The same problem, of doctors having to order skilled nursing care, rather than homemaker services, because of their patients' financial need, is present.

C. Medicaid coverage

Medicare coverage should be extended to all persons receiving disability benefits. Their medical expenses exceed twice that of non-disabled persons in the same age category. States *may* now provide Medicaid coverage to the medically needy, a group of persons whose income is sufficient for daily living, but not to cover their medical needs. This category should be made *mandatory* for persons aged 65 and over, whose needs for medical protection are not contested.

Provision should also be made in Medicaid whereby persons, whose expenses for medical care reduce their income to within the limitations for coverage by Medicaid, are thereafter eligible for Medicaid benefits.

It is a common practice in many states to require institutionalized Medicaid recipients to pay over all of their income to the Welfare Department. The Department then gives a pittance (e.g., $15 per month) to the recipient to meet his "clothing and personal needs." This should clearly be eliminated since many patients are short-term patients. Without more funds available they are subject to lose their apartments and default on other kinds of continuing payments, *e.g.*, insurance.

IV. INVOLUNTARY COMMITMENT FOR THE AGED

State mental hospitals are used to warehouse vast numbers of aged senile persons until they die. Commitment laws should be examined and/or changed to prevent the inclusion of senility as a basis for commitment. It is clear that many elderly are physically infirm so as to require institutional help. However, this may best be satisfied in "halfway" houses, rest homes, or by homemaker services. At a minimum a full panoply of procedural safeguards must be used to prevent arbitrary and unnecessary commitment.

Conclusion

I have attempted to highlight, often without offering solutions, problems now facing the elderly in government programs and suggested areas which deserve further study. The solution for these problems may be costly, but our elderly citizens are entitled to security and well being in their final years.

Senator WILLIAMS. We will now hear from Mr. Stanton Price of the Housing Opportunities for the West Side Elderly, Santa Monica, Calif.

STATEMENT OF STANTON J. PRICE, DIRECTING ATTORNEY, HOUSING OPPORTUNITIES FOR THE WEST SIDE ELDERLY, SANTA MONICA, CALIF.

Mr. PRICE. Senators Williams and Randolph, good afternoon and good evening.

I am Stanton Price. I am the directing attorney for HOWSE, Housing Opportunities for the West Side Elderly. We are part of the University of Southern California, a subagency of the U.S.C. law school. We are located in Santa Monica, and we were originally funded to deal with the problems of Santa Monica. We expanded our operations because housing problems tend to be regional rather than parochial, so we represent client groups in both the West Side and East Side of Los Angeles, although we still work heavily in the Venice and Ocean Park area of West Los Angeles.

The East and West Side areas in which we work are very similar, although they have striking racial and ethnic differences. East Los

Angeles is primarily Chicano and West Los Angeles is primarily anglo, very heavily Jewish. Those areas are very, very poor. Both areas are made up of little white frame bungalows built after World War I, occupied by people who have stayed there through the years. Both areas are being challenged by a variety of forces which can be lumped under the heading of development.

Property Tax: Regressive in the Extreme

In dealing with these areas certain specific types of problems affecting the elderly in the housing field have become clear. Perhaps the most serious problems for people who are homeowners is the property tax. I have examined that problem at some length in the working paper and I would like to point out here that the average low income elderly couple in Los Angeles County pays two times as great a percentage of its income toward property tax as the average upper income couple. This means, of course, that the property tax is very seriously regressive and the burden is placed upon the elderly person. A poor couple living in a bungalow will pay $500 to $800 a year in property taxes. On the other hand, a much more affluent couple living in, let's say, a $75,000 house in Beverly Hills may be paying only a thousand dollars a year property taxes. You can see that the burden is much greater on the poor person than on the affluent person when it comes to property taxes, even though the burden is great on everyone.

Our project has finally come to the conclusion that the corporate tax as the primary revenue source for municipalities and local government is a very bad thing, and as long as the property tax remains the primary revenue source for local government, they will continue to exact a very heavy burden on the elderly.

We are recommending that the Senate special subcommittee join other interested Senators in pushing for Federal revenue sharing so that the burden of finance of local government will be shifted to the income tax which, despite its problem, is basically a much fairer way of raising revenue. However, we are very much opposed to President Nixon's proposal. This proposal, first of all, disburses a very small amount of money to local government. Secondly, it is geared to the local government's own revenue earning capacities. Consequently, under the Nixon proposal, Beverly Hills which has relatively few social problems, will be receiving half a million dollars, whereas, a town like Compton, which has three times the population of Beverly Hills, and which is very much an elderly town with a tremendous number of social problems, will be receiving $150,000. We think a much more equitable revenue sharing proposal can be worked out.

Code Enforcement

The next major problem that faces the elderly is that of code enforcement. Often this is not so much a matter of the house that the elderly person lives in being unsafe, but rather that the house does not conform to recent changes in zoning and setback requirements so that the house constitutes a nonconforming use. Many houses were built right up to the property line though at the time they were built the law required a 10-foot setback. Often this has gone unchallenged for 40 or 50 years. Now Los Angeles is in the middle of a massive

program of code enforcement and people are given notices that they have to eliminate this nonconforming use. This is clearly impossible for the elderly. They cannot afford to pay for a loan, they cannot get a loan because the banks will not loan money to elderly people who are living on a fixed income, and banks will not loan money to homeowners in certain parts of the city of Los Angeles, particularly East and the poorer parts of West Los Angeles. These people are faced with a serious problem. It is possible for the city to work out an arrangement, although this is totally discretionary, for a life tenancy, under the circumstances.

Life tenancy would enable the elderly couple to live in the house and the city would enforce the code upon termination of the tenancy, either by death of the owner or sale of that particular house.

We would like to see these life tenancy provisions be made mandatory upon cities through the workable program, which sets out the Federal requirements that the cities have to live up to in order to receive Federal money for urban renewal. This brings up another problem, and that is urban renewal.

Urban Renewal

Old areas are the favorite site for urban renewal, and old areas, of course, generally contain old people. One of the Los Angeles councilmen said at a council meeting that Los Angeles' chief problem is old people in old houses, and he is going to figure out a way to eliminate both. He is now facing a recall petition. He expressed what a great number of city officials do feel, that old people living in old houses is not a good thing for a city. Consequently, we have in Los Angeles a vast number of federally funded renewal programs. The programs themselves are not really bad. In fact, if used properly they would benefit the elderly. The problem is that somewhere between the statement of congressional intent and the drafting of statutes, and the actual working out at the local level, something very important is lost.

There are any number of congressional guidelines embodied in the statutes, which in most cases will adequately protect the rights of old people. However, HUD does not enforce its own regulations, by and large, and in most cities local government does a poor job of enforcement. Consequently, all of the good relocation requirements, requirements that housing be replaced on a 1-to-1 basis, are not followed. What is needed here are ways in which elderly people can go to court and vindicate the rights which Congress has given them. What is needed is a formal procedure whereby elderly people can file complaints with HUD when the city is tearing down their property and not complying with relocation requirements.

Next there is a problem of funding the 235 and 236 program. Right now the funding is not adequate. Currently there is a 2-year waiting list in FHA for 235 or 236 housing, and old people can't wait that long. Several clients have already died. Congress has set beautiful goals, but Congress has not bothered to fund the programs to reach these goals.

There are other problems, too, but I think I have summed up the major problems that have come to me in a year's practice of representing the elderly.

Thank you.

Senator WILLIAMS. Thank you very much, Mr. Price, and all the panelists.

(Subsequent to the hearing the following letter was received from the witness:)

WESTERN CENTER ON LAW AND POVERTY,
HOUSING AND THE ELDERLY PROJECT,
Santa Monica, Calif., September 18, 1970.

DEAR SENATOR WILLIAMS: I wish to thank you for the opportunity you have afforded me to expand on my remarks at the St. Louis hearings. * * *

One of the best statements of the precarious legal position of citizens adversely affected by decisions of the Department of Housing and Urban Development or local planning and housing agencies is that contained in a recent article published in the Hastings Law Journal: "Judicial Enforcement of the Housing and Urban Development Acts." The authors of this article are Stephen F. Ronfeldt, Esq. and Denis J. Clifford, Esq. With the permission of the Committee I would like to incorporate this article into my testimony.*

In passing, let me note that I do not agree with statements to be found on page 319 of the article regarding elderly housing. The authors seem to underestimate the proportion of the elderly among the poor in general as well as the amount of poverty among the elderly. And, too, the implication that enough public housing for the elderly already exists is simply untrue. The need of the elderly for decent housing remains extremely great.

It should be noted, however, that the authors' remarks do point up the need for a separately funded 202 program for the senior citizen population of this country. The present policy of putting the elderly in competition with other groups for 236 housing forces advocates of multi-family housing into the position of the authors.

In any event, the article remains a fairly comprehensive statement of the difficulties of challenging decisions made by HUD and local agencies operating under HUD loans and grants when these decisions are not in accord with federal law and regulation.

Not all of the problems raised in the article presently exist in every jurisdiction. Certain decisions handed down since the publication of the article have broadened considerably the rules pertaining to standing. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970); *North City Area Wide Council v. Romney*, Civ. No. 18,466 (3rd Cir. July 14, 1970); *Coalition for United Community Action v. Romney*, Civ. No. 69–C–1626 (N.D.Ill. April 6, 1970). The problem of obtaining jurisdiction also seems to have lessened. See e.g. *Tenants and Owners in Opposition to Redevelopment (TOOR) v. HUD*, Civ. No. C–69–324 (N.D. Cal. April 29, 1970), and the cases cited above.

Of course, it must be borne in mind that *North City Area Wide, Coalition* and *TOOR* are not binding on other courts. In the great bulk of the circuits the questions posed in "Judicial Enforcement" remain open and vexing.

Before proceeding further it should be emphasized that agency failure to follow federal regulations poses a serious threat to the elderly. The *TOOR* case, cited above, will illustrate this.

TOOR concerns the Yerba Buena Redevelopment Project of the City of San Francisco. The project site covers several square blocks south of Market Street and had about three thousand residents. Almost all of the residents were elderly.

Section 1455 (c) (1) of Title 42, USC, declares that the loan and grant contract under which the defendants in the case were proceeding requires: "a feasible method for the temporary relocation of individuals and families displaced from the urban renewal area. . . ." Section 1455 (c) (2) provides that as a condition to further federal assistance the "Secretary [of HUD] shall require, within a reasonable time prior to actual displacement, satisfactory assurance" that adequate relocation housing is available.

Adequate relocation housing was not available. The vacancy rate in San Francisco for the time, of housing suitable for the elderly residents of the site, was close to zero. There was a waiting list for public housing in the City equal to the total number of said housing units. Virtually the only housing the City's

*Retained in committee files.

relocation agency offered the Yerba Buena residents was in the Tenderloin area. In many cases this housing had not been inspected by agency personnel, in all cases was more expensive than Yerba Buena housing, and in any event was thoroughly unsuitable because of the high crime rate prevailing in the Tenderloin.

The assurances the City provided the Secretary in accordance with Sec. 1455 (c) (2) were completely inadequate. The City, in attempting to show the availability of housing, made use of the "turnover" concept, which use was improper under federal regulations, counted public housing units, despite the extensive waiting list, made use of other units which the City had already committed to displacees from other urban projects and used obsolete vacancy rate figures. The City even acknowledged that it had not inspected the units in which it was intending to relocate Yerba Buena displacees. Despite the gaps in the City's assurances, until the plaintiff's obtained their federal court injunction, HUD had allowed the City's assurances and the project to go unchallenged.

It is interesting to note that following the issuance of the injunction the City agreed to submit the matter to binding arbitration. The arbitrator ordered the City to build 2000 new units.

While a problem as complex as the judicial enforcement of housing and development statutes and regulations cannot be easily resolved, it is submitted that some relatively simple amendments to the Administrative Procedure Act (codified at scattered sections throughout 5 U.S.C.) would provide some answers. Sec. 553 should be amended expressly to apply to loans, grants, benefits, contracts or workable program certification issued by HUD. Where the submission of data by interested persons raises factual questions, the Secretary shall be required to hold hearings in accordance with Secs. 556 and 557.

Further, decisions regarding the above matters should be expressly made reviewable by statute so as to come under the purview of Sections 704 and 706 of 5 U.S.C.

It is hoped that subjecting HUD and the local housing and development agencies to the full, searching scrutiny of an administrative procedure and of judicial review would go a considerable way toward insuring that the programs decreed by Congress for the benefit of low income people be carried out as Congress intended.

Respectfully submitted.

STANTON J. PRICE, *Director.*

Senator WILLIAMS. We had scheduled at this time a roundtable discussion among the panelist members and staff of the committee. I will say that has become impossible because we are under a very strict directive to be out of here so that this room can be made available for the next activity. We must be out of here at 4:30.

We would like to reserve the right, Senator Randolph and I, to submit questions in writing for your replies, gentlemen, if we might do that, and we will have for our permanent record this hearing, which has been magnificent. We have heard from this wealth of experience and wisdom of the various concerned committees, and I thought in our remaining time those of you who have participated here silently might now want to be part of the proceedings and address any questions or observations to members of the committee or to the panelists.

Mr. GOLDINGS. One question has come up here, if I can answer it briefly.

It is from Maury Blomek of Reader's Digest on the public conservators bill, referring to pages 47 and 48 in the working paper. That is a bill to establish in Massachusetts the office of a public conservator for small estates, analogous to public administration, after death, of small estates with various restrictions and limitations that I won't go into because of the time restriction.

The legislature has the bill filed and it is our belief that it will not pass, although our legislature is still in session. It will probably go to the judicial council which is a body established to review matters

dealing with the courts, including the probate court, as we call them in Massachusetts, and hopefully will be coming up for a vote next year.

Illinois has a public conservator system. The statute is quite different, but the notion is the same.

Mr. KALCHEIM. California has a public guardian, so called.

Senator WILLIAMS. Are there any other questions for our panel?

Mr. KASKOWITZ. I have a general question. It doesn't have anything to do with the specific legal problems, but I wonder—this is directed to both of the young men over here, as well as to Mr. Alexander—to what degree law schools do produce a breed of attorneys similar to the gentlemen here on the right? To what degree is the curriculum designed to produce this type of lawyer? How is it, I would like to ask one person here to answer, that you entered into this kind of activity?

Senator WILLIAMS. This is an improvement of the breed, though, generally.

Mr. KASKOWITZ. It is very nice.

Mr. GOLDINGS. I am an "old fogy." I was admitted to the bar 10 years ago this year. This places me in the "old fogy" category. I don't know the admission dates of my two colleagues. I don't think law school is supposed to prepare students for any particular area in law. Without being facetious, the answer to your question is, how does one get into it? Similar to how one gets into any area in the law, it is through experience and reference.

I got involved with the elderly through the youth, interestingly. We did a redraft of the public welfare laws of Massachusetts for a private charitable organization, and it passed. Inevitably I got into the categorical areas not only of AFDC and problems of that nature, but the elderly. Public service law is here to stay; it is "working within the system," in the terms we hear about so often. I think, from interviewing new people applying for positions as associates in our firm, the law schools and so-called eastern establishment law schools are willy-nilly preparing people through specific courses. But I think it is more a reflection of the time and lawyers have traditionally responded to these problems. The names are different, but the players remain the same.

All I can say, it is for those of you who share the questioner's concern or inquiry, you ought to come back to the Halls of Ivy and really blow your mind.

Mr. KALCHEIM. May I add, the Committee on Legal Problems of Aging has made a recommendation this year that all the law schools in their courses on family law emphasize specific areas of training for the students in legal problems of the aging, the property and personal rights of the elderly, and to obtain the concern of the law schools in legislation relating to legal services for the aging.

Senator WILLIAMS. Mr. Reeves.

STATEMENT OF GEORGE REEVES, PRESIDENT, OLDER ADULTS SPECIAL ISSUES SOCIETY

Mr. REEVES. I am George Reeves, president of the Older Adults Special Issues Society. We use the acronym OASIS, and we represent the 20 million who are the object of your concern and solicitude.

Due to the lateness of the hour, I can only allude to the fact that you have really covered the total spectrum, very nearly the total spectrum of the problems of the aged, but one that I am particularly interested in is one that has been covered to some extent, the matter of incompetence in incompetency proceedings. In addition to being a representative of 20 million, I am also a qualified professional social worker, and until I reached my 80th birthday, I worked full time. Since then I have been working only half time, but it does give me particular perspective on the problems of the aged because I worked for the Cardinal Ritter Institute which serves the aged who are ill. I am very much in contact with all the problems that we have to meet in this connection.

I had occasion to institute proceedings for a finding of incompetency in cases where the aged person had outlived all of his relatives and interested people, and yet was in need of protective service. This matter of protective service is something which in our own State laws is very much neglected. There is a laconism there that is simply not covered. If a person has plenty of money in an estate, there is no lack of persons to push the matter and to secure whatever assistance he may need, but particularly in the case of an indigent who may need protective service, there is no such provision.

The agency I work for would be in a position in many cases to offer a type of protective service administered by professional social workers. We social workers are pretty much part of that silent minority that nobody hears about, but I assure you that professional competency is assured by the right kind of training in the accolade National Association Academy of Certified Social Workers, and we are fully cognizant of our responsibility and would take real care of the aged persons who might be entrusted to us to look after.

This is the resource that you lawyers apparently know nothing about or, at least, it hasn't been mentioned here. But I assure you that there is a very considerable body of competent social workers who are not on the make or they wouldn't be social workers. They are fully competent through their professional training and experience to handle the problems involved in this sort of thing.

I wish it were not so late, because there are other things I would like to say about many of the questions that have been raised, but I am quite sure that the problems are being handled by competent hands. And we do want to assure you of our appreciation for your interest in our problems.

STATEMENT OF MRS. ARENDY CLARK, KINLOCK, MO.

Mrs. CLARK. Would you mind if a lady joined you for a minute?

Senator WILLIAMS. Tell us who you are.

Mrs. CLARK. I am Arendy Clark from Kinlock, Mo. I work with the senior citizens, and I am quite interested in them. If I were not, I would not be here.

I think this is one of the finest programs that has been developed for senior citizens. The aged people need someone to take care of them. So many of them have children that have turned their backs on them, and you go to their homes and they are standing there with outstretched arms for some love and affection, and I am so happy to say

that each of you lawyers have spoke so beautifully. I wish the time would allow us to have a longer session so many people could hear what can be done for the aged. You are very beautiful lawyers.

Thank you.

Senator WILLIAMS. I think that is the note that we can close on.

Mr. REEVES. The program is our senior age program being administered by OASIS. It is a grant conceived from our labor. So you know more about it, we have 62 senior aides who are employed under this grant which is being administered by the organization of OASIS, and this is one of our very splendid, excellent workers. [Applause.]

A VOICE. Wonder why we didn't come up with a uniform probate law recommendation.

Mr. KALCHEIM. We did come up with it, our committee did. We originally wanted a model power of attorney act, and then we found that the new uniform probate code contained all of the provisions that we were interested in, and it continued the power of attorney beyond the point of incompetency and provides all of the protection that the alleged incompetent would need, in the sense that a lawyer must be provided for, the same as for juveniles today.

Senator RANDOLPH. Mr. Chairman, I am not an advocate nor do I serve as an advertisement in bringing to your attention what I think is one of the most outstanding motion pictures that will be presented in the coming months and years. I have just seen a preview of a movie called "I Never Sang for My Father." The principal actor is Melvin Douglas, and the cast is a very splendid one. The story concerns the problem of children as they work with their parents who have become older, and the adjustments that are necessary.

Not often would I say a good word for any motion picture, but I do say it for this one. Check it out in the weeks and months ahead and see it. It will be most worthwhile.

A VOICE. Since there is no uniform incompetency law, is there any State that has progressive legislation that could be modeled for the purpose of legislative action along that line?

Mr. KALCHEIM. New York State is in the process of revising what they call a conservatorship law. There has been a lot of discussion pro and con, and I think out of it will come a model conservatorship law. They call it conservatorship in New York, conservatorship not only of property but of the personal rights of the individual. There is no State at this time that we presently consider as a perfect type of thing, but this is one of the areas in which the lawyers are working for the benefit of the older population of our community.

Mr. ALEXANDER. On this point, the California legislation is, in my view, considerably more progressive on this point than the New York proposal or New York law.

A VOICE. The District of Columbia has a good conservatorship passed, of course, by Congress.

Senator WILLIAMS. I believe we will have to conclude at this point.

Our thanks to all of our panelists and to all of you for being here.

Bill, will you make an announcement where we can be reached if anyone would like to reach our committee.

Mr. ORIOL. There may be some in the audience that have additional statements. If you care to have the statement entered as part of the hearing record, mail it to the U.S. Senate Special Committee on

Aging, room G–233, New Senate Office Building, Washington, D.C. 20510.

Senator WILLIAMS. Thank you.

Senator RANDOLPH. I want only 30 seconds to say that I think the criticism of Congress in not funding legislation is a very valid criticism, not only in this field but in so many fields in which we legislate. We often think it is easy to pass a bill. We don't realize that we have to back it up with dollars, and I doubt whether we would pass bills so quickly, if we realized the cost of many of them. But once Congress has placed its stamp of approval on legislation, it should be gracious enough to back it with the dollars necessary to make it work.

Senator WILLIAMS. Thank you.

(Whereupon, at 4:30 p.m., the committee adjourned.)

APPENDIXES

Appendix 1

LEGAL PROBLEMS AFFECTING OLDER AMERICANS

A WORKING PAPER

(Prepared for the Special Committee on Aging, United States Senate, August 1970)

(Prepared by Legal Research and Services for the Elderly, National Council of Senior Citizens, Inc.)

LETTER OF TRANSMITTAL

JULY 16, 1970.

Hon. HARRISON A. WILLIAMS, Jr.,
Chairman, Special Committee on Aging,
U.S. Senate, Washington, D.C.

DEAR SENATOR WILLIAMS: In response to your request we take pleasure in submitting this report on some of the legal problems affecting the elderly.

For nearly 2 years the National Council of Senior Citizens has sponsored a research-demonstration program funded by a grant from the Office of Economic Opportunity. We have worked on 12 projects in ten cities throughout the country. Eleven of the projects have conducted research and provided services in specific problem areas. One project has provided research and technical assistance.

The objective has been identification of legal issues affecting the elderly poor and the development of solutions. A long-range goal has been to demonstrate how OEO-funded legal programs and the private bar can better serve the 20 million Americans over 65 and the millions more who are approaching that age. In particular, we seek to serve those who are not only aged but have the disadvantage of being poor.

LRSE projects have been active in the areas of health care, housing, advocacy training, probate reform, protective services, economic development, and Federal benefit programs.

This report has been prepared by our LRSE staff with special papers from some of the lawyers working on demonstration projects. Their views do not necessarily reflect the views of the National Council of Senior Citizens.

We are indebted to the Office of Economic Opportunity for furnishing us this opportunity to examine the issues, to involve some of the finest legal talent in the country, and to develop plans for legal reform. We are grateful for the interest of the U.S. Senate Special Committee on Aging and hope that this report—though limited to just a few of the areas in which we have been working—will contribute to increased concern regarding the legal problems of the elderly.

Sincerely,

WILLIAM R. HUTTON,
Executive Director,
National Council of Senior Citizens.

PREFACE

". . . the only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and as people strong enough and well enough informed to maintain its sovereign control over its government."

—Franklin Delano Roosevelt.

Law is one instrument by which government serves humanity. If, however, law is misconstrued or mismanaged, it becomes tyrant instead of servant.

Few would argue with the sentiments expressed above. And yet, every member of the Congress of the United States receives complaints daily from citizens who say that fundamental rights, or benefits due them under law, are denied to them.

"Due process" may be subverted. "Equal protection" may be out of reach.

An applicant for public housing, for example, may find himself passed over in favor of others who have not waited as long. An immigrant, trying to become a citizen, may believe he is capriciously denied that status. An older person, forced to retire because of ill health, may feel that investigators invade his privacy unnecessarily to determine old age assistance eligibility. Neighborhood residents in a renewal site may argue that the letter and the spirit of relocation statutes are overriden by Federal or local officials. A veteran, seriously ill, may write in utter desperation, not knowing that help can be had at a nearby Veterans' Administration office.

We in Congress do our best when complaints are valid. We devote much time and effort to "case work."

But even as we do, we may be painfully aware that we are helping only the most articulate and persistent persons in need of help.

We know that for each letter we receive, hundreds or thousands of other persons may face similar problems.

But they do not write. They accept injustice or do not even know that injustice exists. Statutes defy interpretation. Officials sometimes seem to have answers ready even before questions are asked. "You can't fight city hall" is a common saying, even yet. How on earth, then, can the average citizen fight a Federal establishment which—despite the honest and often valiant work of public servants throughout government—often gives the appearance of bureaucratic unresponsiveness.

To that question, there can be only one response. Citizens *must* maintain control of those meant to serve them, *and government itself should strengthen such control:*

—By providing facts to the public.

—By impartial and sensitive implementation of the law.
—By submitting to review or appeal when responsibly challenged.

Older Americans, in particular, stand in need of fair, sympathetic treatment in their dealings with government.

Retirement, after all, can be the most difficult adjustment made in a lifetime.

Not only must the retiree live on an income averaging less than half for those still in the work force, he must define new roles for himself in life. And, even though he may rarely have dealt with government agencies before—except to pay taxes—he now finds himself personally involved in intricate and sometimes baffling encounters with Federal programs. He may spend hours in a Social Security office trying to understand "technicalities" which could deny him precious dollars every month. Paperwork under Medicare and Medicaid may be incomprehensible or onerous. If he is one of the two million Americans dependent upon Old Age Assistance, the welfare office may seem to be a forbidding citadel rather than a headquarters for service and understanding.

Stubborn misconceptions about the elderly and their needs also have their effect. The Columbia Center for Legal Problems of the Elderly[1] has criticized the "mistaken and aggressive steps that the government and public agencies take which deprive the elderly of freedom of choice and action."

Under that category, the Center gives these examples:

> People are often put into hospitals, hospitals which often resemble jails. People have committees appointed for them to run their money affairs . . . There is often a bias in favor of institutions rather than individual attention in the home. Actual treatment inside institutions often is merely preservation of life rather than a proper way to make people enjoy an active and fulfilling period of time.

Implicit in this critique is recognition of the widespread—and perhaps subconscious—attitude that the retiree "has lived his lifetime," and that priority should be placed elsewhere. Morally indefensible as this notion is, it is also unrealistic. More Americans are spending more years in retirement. They are not satisfied with old cliches and a welfare image. Their retirement years should not be wasted or blighted. Those years are a national asset of great value to *all* people in this land.

Aging, even before retirement, can bring citizens into contact with government. They may futilely protest alleged violations of the Age Discrimination in Employment Act. They may question pension plan rulings. They may wish to challenge policies which force early retirement upon them. They may be so-called "older workers"—men and women past age 45—who seek retraining when jobs are wiped out. They may seek disability payments long before their sixty-fifth birthdays.

Oftentimes, the citizen may exhaust whatever appeals there may be to regulatory justice. He may then take the case to court. And there, he may encounter other complexities.

[1] See Appendix C, p. 57, for additional details on the Center.

Perhaps most elderly persons in the United States today escape such difficulties. If perplexity arises, they can receive valuable assistance in many a Social Security office and in other agencies. We can hope that more problems are resolved than are not.

But there is far too much evidence that large numbers of older Americans suffer needless anxiety, deprivation and injustice simply because they do not know what help is available to them, or because of wrong-headed decisions made arbitrarily by representatives of government.

That evidence has been provided in part at hearings before this Committee and other units of the Congress. Another source of information was established 2 years ago when the Office of Economic Opportunity established a Legal Research and Services for the Elderly program under the sponsorship of the National Council of Senior Citizens.

Project directors for LRSE are the major contributors to this document. Carefully, they have informed the Committee that they do not yet have all the documentation or experience needed for final conclusions on many of the issues discussed on the following pages. Their recommendations do not necessarily reflect the views of this committee.

But from their experience thus far, there is much to be learned. They and their associates must sometimes play the role of gadfly, but more often they are fact-finders who explore the confrontation of people and government in problem areas.

The Senate Committee on Aging is grateful to the National Council, the OEO, the LRSE directors, and to the authors of individual papers. They have made it possible for the Committee to publish a document which should receive careful attention at several levels:

—Congress should consider new laws, or the revision of old laws to help overcome difficulties described in this study.

—Federal, State, and local administrators of any program with the elderly should heed the factual evidence and suggestions which follow.

—Members of the legal profession will find much useful information which will be of use for them as advocates for aging and aged Americans.

—And finally, individual citizens of all ages should ask themselves: Have they unwittingly contributed to the problem simply by not caring about what happens to "the old folks?"

This introductory statement would be incomplete without mention of the fact that the American Bar Association has established a Section Committee on Legal Problems of the Aging. Under the chairmanship of Norman J. Kalcheim of Philadelphia, the ABA Committee is cooperating with the Senate Committee on Aging in arrangements for a hearing to be conducted during the ABA national convention in St. Louis, Missouri, on August 11, 1970.

There, LRSE and ABA representatives will discuss issues raised in this study, as well as others.

This study, and the hearing—it is hoped—will result in greater understanding and responsiveness among lawmakers, government administrators and those who, in the private practice of law—bear formidable responsibilities in daily struggles for principle and justice

Without such responsiveness, there would be little left for us but to bemoan the growth of bureaucracy and the inevitability of injustice.

Our nation—after almost 200 years of existence, with the prospect of abundance and genuine fulfillment in the lives of its citizens within view, despite present tragedies and disruptions—is far too mature to accept defeatism as a way of life. But if we let one person's rights be trampled, we as a people have suffered a defeat. No nation can afford such defeats. No people should be asked to bear them.

HARRISON A. WILLIAMS, Jr.,
Chairman, U.S. Senate Special Committee on Aging.

CONTENTS

INTRODUCTION

(By DAVID H. MARLIN*)

Attention to legal problems of the poor has dramatically increased in recent years with the creation in 1964 of the Legal Services Division of the Office of Economic Opportunity. More than 250 programs have been funded in every State to establish neighborhood law offices convenient to potential clientele. The services are free to those whose low income prevents them from retaining counsel to represent their interests.

Historically, legal assistance furnished by bar association referrals, legal aid agencies, and private practitioners most frequently dealt with problems on a case-by-case basis. OEO, however, has emphasized law reform. The latter undertaking requires the development of legal strategy embracing administrative agency negotiations, litigation, and legislative reform. The targets are "institutions," governmental and private, that unfairly, unnecessarily, and inequitably prevent the poor from improving their circumstances.

Law reform representation is not uncommon to lawyers. Law firms throughout the country, for example, provide specialized skills for the intricate and significant interests of large corporations, many of which operate worldwide. The experience of legal service programs demonstrates that the poor have multiple legal problems. They are entitled, in our system of justice, to the same qualified and thorough representation.

The elderly comprise nearly one in three of all the poor but have received only a tiny fraction of legal services proportionate to their numbers. There are many reasons for this, the chief ones reflecting the timidity and withdrawal that often characterize the elderly and the lack of knowledge and interest in the aged that characterize young lawyers. In fact, the American Bar Association recently established its first committee dealing exclusively with problems of the elderly.

Legal Research and Services for the Elderly was established in July 1968 under the sponsorship of the National Council of Senior Citizens. The grant was funded by the Older Persons Program of the Office of Economic Opportunity to be administered jointly with the Legal Services component. Twelve subgrants were made for the first year of operations. Programs have operated this past year in New York City; Boston; Atlanta; Miami Beach; Morehead, Ky.; Bluefield, W. Va.; Ann Arbor, Mich.; Albuquerque; San Francisco; and Los Angeles.

Legal Research and Services for the Elderly has begun or assisted in approximately 50 lawsuits in its first year ranging over issues in

*University of Michigan (B.A. 1950, LL.B. 1957); private law practice, Danbury, Conn.; trial attorney, U.S. Department of Justice, Civil Rights Division; Assistant General Counsel, U.S. Commission on Civil Rights; deputy director for law reform and education, Neighborhood Legal Services Project, Washington, D.C.; counsel to Personal Rights and Preamble Committee, Maryland Constitutional Convention; associate director, Legal Research and Services for the Elderly.

Social Security retirement benefits, Social Security disability benefits, old-age assistance, health care and treatment, conservatorships, guardianships, private and public housing, consumer fraud, mental commitment, private pension plans, and economic development. Research has been conducted in the administration of small estates. State Medicaid and consumer education pamphlets have been published.

The chapters that follow were selected to illustrate the scope and objectives of the program.

OLDER AMERICANS IN NEED OF HELP: SOME "CASE STUDIES"

Older Americans do not become different persons when they stop daily work and become full-time or part-time retirees. But, in later years, they may face entirely new problems caused in one way or another by Federal programs meant to be of service to them.

Here, from the records of the Legal Research and Services for the Elderly projects,[1] are a few examples of such problems, together with illustrations of what can be done when trained and responsive personnel are on hand to provide help:

Blind Man Recovers $4,600 in Back Payments.—Many potential recipients of Federal benefits never receive needed assistance, since they are completely unaware of the existence of helpful programs.

Such was the case for a blind Massachusetts man, who was living on Social Security as his sole source of income.

With the help of a legal advocate, he was certified by the Massachusetts Commission on the Blind for assistance under the Aid for the Blind program. His advocate also successfully contended that the client should be entitled to back payments. Recently the elderly blind man received a check for $4,600 in overdue payments. Now, he is in a much better position to pay his rent and discharge his other financial obligations.

Coping with Benefit Programs.—Legal Research for Appalachian Elderly in Bluefield, West Virginia, is attempting to provide essential facts to help elderly clients "maneuver through the different benefit programs . . . to maximize on the benefits they are legally entitled to."

They give this description of the problem:

> Persons in need of medical assistance in many cases may be well advised to minimize or not even apply for Social Security benefits in order to preserve public assistance eligibility and their medical care that is participation in Medicaid. Other needy people do not receive food stamps because they quite understandably will not "spend down" or secrete assets in excess of the maximum assets for food stamp eligibility. Many elderly and disabled persons do not understand the Social Security workmen's compensation offset or the earnings test and do not apply for workmen's compensation or do not work for fear of losing existing benefits.

Individual agencies, such as the Social Security Administration, issue publications meant to assist the elderly, but there is little refer-

[1] See appendix C, p. 57, for additional details on LRSE and the work of projects in the field.

ence to interrelationships among programs. Appalachian project directors are preparing their own booklets, but they also suggest enactment of "legislation which coordinates different benefit programs and takes the burden off the low income elderly person of (1) understanding the complexities of the law and (2) manipulating within those complexities."

Hope for New Housing.—Santa Monica has nearly 20,000 older persons who—despite the generally beautiful seaside setting of that community—for the most part live in old, and expensive apartments. Years of talk about new housing had led to no tangible results. But, within recent months, HOWSE (Housing Opportunities for the Westside Elderly) attorneys have worked with local businessmen and others to establish a nonprofit housing foundation to construct a 200-unit apartment for older persons. HOWSE also surveyed 4,000 elderly residents to obtain government-required data on the numbers and income of the elderly. HOWSE, in its role as counsel for the foundation, helped secure a $31,000 grant from Urban America, Inc., as seed money for the apartment complex. Without HOWSE, there would be little hope for new housing urgently needed by the older Americans of Santa Monica.

Food Assistance for the Needy Aged.—Enactment of the 15 percent increase in Social Security benefits last December—though welcomed by the Nation's elderly—posed certain problems for persons receiving some form of public assistance.

In Georgia many aged persons discovered that they had become ineligible for surplus food because the Social Security raise pushed their total income above the maximum qualifying level, as established by the State Department of Family and Children's Services.

At the urging of GALA (Golden Age Legal Aid) attorneys, the department agreed to raise the income limitations by $5 for single persons and by a proportionately larger amount for families—enabling 3,000 low-income elderly to receive badly needed food.

Retroactive Disability Benefits for Elderly Widow.—An elderly Georgia widow is back on the road to financial recovery because of successful litigation filed by GALA project attorneys.

In her previous attempt to be certified for Social Security disability benefits, the client's request had been denied by the Appeals Council in the Social Security Administration.

GALA lawyers were not only able to make the widow eligible for future disability benefits but also were successful in recovering retroactive payments for 21 months. These benefits resulted in several hundred dollars for the needy client and helped to pay some of her overdue bills.

No Telephone, No Teeth.—Boston welfare officials denied an elderly welfare recipient's request for false teeth, for no apparent reason. An LRSE legal advocate dug into the case and among other arguments, pointed out that denial of teeth might actually increase public expenditures in the long run. Health can give way among toothless elders; a stay in a nursing home could cost far more than the cost of the dental work. In addition, many older persons become withdrawn and depressed about their appearance when teeth are gone.

Two months passed. The legal advocate prevailed, and then took one more step. He argued successfully for a special telephone allotment.

Finally, the client was hired as an "extra" in a television production. He received about $200 for four days work.

Chance Meeting Helps Public Assistance Recipients.—Today two elderly women in Massachusetts are receiving additional old age assistance payments because of a chance meeting with a legal advocate from the Council of Elders project.

The legal advocate met the applicants at the Welfare Department shortly after their claims had been denied by their social worker.

Within 30 minutes the advocate was successful in having their requests approved. He also argued successfully that their monthly old age assistance payments should be increased from $85 to $114, because they were on special diets. Other urgently needed assistance was also obtained, including special allotments for clothing, a new bed, and a surplus food card.

Further conversation with the social worker revealed that the women might also be eligible for disability assistance. At the request of the advocate, the clients' hospital forwarded copies of their medical records. Now both receive disability benefits, and their financial position has improved markedly.

Protection Against Deception.—Senior citizens are often lured into renting apartments because of advertised luxuries, such as furnished air conditioning units or refrigerators. But, many have been disappointed after discovering that these comforts are in poor repair or do not work.

In May the Miami Beach City Council passed legislation to strengthen the city's housing code and to protect the aged from this deceptive practice. An amendment—drafted with the help of legal services attorneys—will require landlords to maintain furnished refrigerators and air conditioning units in proper condition for their renters.

Now older tenants—as well as younger persons—can be more assured that advertised luxuries in apartments will be operational.

Making Use of Medicaid.—Benefit programs are of little help to applicants if technical language confuses them beyond comprehension. Particularly disadvantaged are non-English speaking persons.

In January the Columbia Center prepared a concise, readable booklet—*Your Right to Medicaid*—to explain the New York Medicaid law to eligible applicants and administrators of the program. Approximately 5,000 copies have been printed for distribution and have helped many formerly confused individuals. In addition, the booklet is being translated into Spanish for the large number of Spanish-speaking persons in New York City.

The Center has also offered assistance to other persons who wish to prepare pamphlets explaining the Medicaid programs in their States.

Lengthy Residence Requirements Invalidated.—Another service provided by LRSE attorneys is to assist legal services and private lawyers representing the elderly poor.

For example, the Columbia Center has aided attorneys in four different States in challenging the constitutionality of lengthy residence requirements—ranging from 10 to 25 years—to be eligible for old age and other public assistance benefits.

One such case involves an elderly Arizona woman who has been

denied benefits under the Aid for the Permanently and Totally Disabled program, even though she has resided in the State for 13 years. An amicus curiae brief was filed by the Center before a three-judge panel in the Federal District Court. In May the Court ruled in favor of the plaintiff, stating that the Arizona 15-year residency requirement violates the equal protection clause of the Fourteenth Amendment.

Rent Control Litigation.—Prohibitive property taxes and rising rents have placed many aged persons in a "no-man's land" with regard to housing.

In Miami Beach several senior citizens organizations began an intensive drive for rent control legislation to protect persons living on limited, fixed incomes. LRSE attorneys represented these groups in hearings before the City Council. Last fall the Council adopted a rent control ordinance, as drafted by project lawyers.

This ordinance, however, was later voided because the Council failed to have the required number of readings for formal enactment of the legislation.

In February the City adopted an identical ordinance, but its validity is being challenged. LRSE is providing assistance to the City of Miami Beach in the appellate proceedings.

Involuntary Transfer of Aged Mental Patients.—LRSE attorneys for the Columbia Center and the Washington office have filed an amicus curiae memorandum in a Washington, D.C. case with potentially far-reaching implications for the Nation's elderly.

The suit challenges the constitutionality of the District statute permitting involuntary transfer of patients committed to St. Elizabeth's Hospital to previous jurisdictions because they did not reside in Washington for one year prior to commitment. This class action is particularly important for elderly geriatric patients because their occupancy in mental hospitals is substantially larger than for all other age groups.

Geriatric patients in mental hospitals now occupy about one out of every five hospital beds of all descriptions in the country. In the amicus memorandum, LRSE lawyers emphasized, "These persons are the principal victims of laws unconstitutionally depriving mentally ill persons of their legal rights."

CHAPTER ONE

THE "RIGHT" TO FEDERAL BENEFIT PROGRAMS

(By James A. Kraus and Mark A. Wurm *)

The social welfare policy of the United States is a product of our rapid industrialization and the periodic depressions that ravaged the country's economic stability. The Social Security Act of 1935, the foundation of Federal support, was enacted to provide a defense against economic insecurity as well as benefits and services to the needy.

President Franklin D. Roosevelt described the Act as:

> A cornerstone in a structure which is being built, but is by no means complete—a structure intended to lessen the force of possible future depressions, to act as a protection to future administrations of the government against the necessity of going deeply into debt to furnish relief to the needy—a law to flatten out the peaks and valleys of deflation and of inflation—in other words, a law that will take care of human needs and at the same time provide for the United States an economic structure of vastly greater soundness.

Today, Social Security payments exceed $30 billion a year, about four percent of the Gross National Product. The release each month of billions of dollars to millions of beneficiaries has a significant impact on the nation's economy.

Health insurance for the elderly was added in 1965. Medicare expenditures are estimated today at $7 billion annually, a meaningful cushion to the health costs of old age.

Public assistance for the aged, blind and disabled was incorporated into the Act as a Federal-State cooperative grant-in-aid program based on a means test. Unlike the Social Security trust fund, welfare grants are funded from general revenues. The administration of public assistance, which has differed substantially from State to State, has precipitated numerous challenges by OEO-funded lawyers.

Federal benefit programs—though designed to aid elderly individuals—frequently produce a myriad of complex legal problems which completely overwhelm the untrained layman. Oftentimes their legal and equitable needs receive inadequate attention because of

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The views of the authors do not necessarily reflect the policy of the Center on Social Welfare Policy and Law, Columbia University.

the difficulty in obtaining competent counsel to represent their interest. Too often their legal problems become bogged down in a legal morass of lengthy delays and intricate procedures.

I. THE BENEFIT PROGRAM: PURPOSES

Old-Age, Survivors, and Disability Insurance (OASDI), commonly referred to as Social Security, is provided for in Title II of the Social Security Act. OASDI pays monthly benefits to retired and disabled workers, their dependents, and to the survivors of deceased workers. Qualification for benefits is conditioned on a worker having attained the required number of quarters of coverage—a calendar quarter in which he was paid a sufficient amount to have the payroll tax, which supports the programs, deducted from his wages. The amount of benefits received monthly depends on the average monthly earnings of an eligible worker during a period of years provided for in the Act. Eligibility for retirement benefits requires attainment of at least age sixty-two, the filing of an application, and sufficient quarters of coverage. OASDI is administered directly by the Federal government.

Veterans' benefits are provided to disabled veterans, their dependents, and to the survivors of veterans. The program is federally administered and financed.

Old-Age Assistance (OAA), Aid to the Blind (AB), and Aid to the Permanently and Totally Disabled (APTD), are adult categorical assistance programs, provided for in Title I, Title X, and Title XIV, respectively, of the Social Security Act. The Social Security Act contains minimum Federal requirements for each of these programs which States must comply with in order to continue receiving Federal funds to partially cover State expenditures. Administration is carried out by each participating State; consequently, eligibility requirements, benefit levels, and other aspects of the programs vary widely from State to State. OAA provides grants to elderly persons who have insufficient income to satisfy their needs, as established by the State in which they live. AB and APTD provide the same for blind persons and those found to be permanently and totally disabled.

The Medicare program is described in chapter two, but it will be apparent that many of the considerations discussed in this chapter are applicable to Medicare as well.

II. THE RIGHT TO A HEARING

The first question to be considered is the procedural problem relating to hearings and judicial review of decisions made by those administering the programs. With few exceptions, these difficulties could be corrected through the issuance of regulations by HEW without the need for Congressional action. As will be seen in other sections of this chapter, the structure of hearings, and the degree to which specific provisions are present for the procedures to be followed, vary from program to program.

The components of an adquate administrative hearing are usually listed as follows:

—Adequate notice, describing the right to a hearing, rights at that

hearing, the nature of the hearing, and matters to be considered at the hearing;
—Opportunity to appear, be represented by legal counsel of one's choice and to have an impartial decision-maker;
—Opportunity to examine opposing evidence prior to the hearing and adequate time to prepare for the hearing;
—The right to testify and present evidence, and to confront and cross-examine adverse witnesses; and
—A prompt and written decision.

Provision for these elements should reflect a special awareness of the persons who often request hearings in benefit programs. They are unlikely to be highly educated, to be represented by counsel, and to have more than a superficial understanding of the procedures or substance involved in an administrative hearing.

The present situation with regard to hearings in the categorical assistance programs is controlled by a fair hearing regulation which recently became operative.[1] Many of the above listed components are required by the regulation. Lacking is the right to examine adverse evidence prior to the hearing. Judicial review is left to procedures provided by each participating State.

OASDI hearings, which include Medicare hearings, are distinguishable from categorical assistance hearings. The Federal regulations dictating the structure of OASDI hearings contain most of the above listed safeguards, except that prompt decisions are not required.[2] The practice in most areas is to allow claimants access to adverse written evidence prior to the date of the hearing. Judicial review is provided for in United States district courts.[3]

Medicare hearings are the same as OASDI hearings for Part A of Medicare and for questions of entitlement under Part B.[4] Lacking are hearings, except as conducted by a carrier, for questions of amount under Part B, and judicial review of claims of less than $1,000 and of all questions of amount under Part B.[5]

Veterans' benefits are not subject to administrative review hearings and judicial review is expressly excluded by statute.[6]

A. Timing of Hearings

Prior hearings—that is a fair hearing before benefits may be terminated or reduced in amount—are essential for the protection of persons receiving benefits under any of these programs. The Supreme Court of the United States recently recognized the severe injury and hardship suffered by persons whose categorical assistance grants are wrongfully terminated. The recent HEW regulation, mentioned above, extends to all categorical assistance recipients the right to continued benefits until a fair hearing is held, when one is requested because of a termination or reduction of assistance.[7]

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[1] 45 C.F.R. § 205.10.
[2] Social Security Act § 205 (b) and § 205 (d); 20 C.F.R. § 404.901 *et seq.*
[3] Social Security Act § 205 (g).
[4] Social Security Act § 1869.
[5] See also Chapter Two for administrative and judicial review under Part A and Part B of Medicare.
[6] 38 U.S.C. § 211; *Milliken v. Gleason*, 332 F. 2d 122 (1st Cir. 1964), cert. denied 379 U.S. 1002 (1965).
[7] 45 C.F.R. § 205.10 (a) (5).

This practice should be made mandatory for OASDI. Beneficiaries of these programs are often as dependent upon such benefits, and suffer as severe deprivation when wrongfully denied them as recipients of categorical assistance. Although we too often think of OASDI as supplemental income for elderly persons, one-fourth of the couples on the OASDI rolls and two-fifths of the nonmarried depended on OASDI for almost their entire support in 1967.[8]

B. Attorney's Fees

Perhaps as important as the procedural protection afforded by a satisfactory hearing and prior hearing is provision for representation by legal counsel of one's choice. Both the categorical assistance programs and OASDI assure claimants the right to be represented at hearings by legal counsel or other representatives.[9]

But authority is lacking in both categorical assistance programs and OASDI for payment by a public agency of the attorneys' fees incurred by the claimants for services provided in conjunction with hearings and subsequent judicial review. This results in substantial numbers of claimants who are unable to retain counsel at hearings and who do not even request hearings because they never receive informed opinions as to the likelihood of success should they request a hearing. Numerous persons are thereby denied their rights to benefits even though a recent study concluded that 64 percent of disability denials were reversed at hearings in 1966–67.[10]

A large number of approaches could be used. The most innocuous and least expensive would simply be to require State welfare offices and local Social Security offices to inform applicants, in writing, along with any denial, termination, or reduction of grants, of the nearest legal aid, legal services or other office from which legal counsel can be obtained without cost. This could now be done by local offices as a matter of policy without any addition to current Federal regulations.

A more beneficial approach would be the provision, either directly, or by payment to legal counsel chosen by claimants, of legal representatives.

The present method of remunerating legal counsel for OASDI hearings and subsequent judicial review illustrates many of the contending factors which arise when attorneys are paid by claimants. Attorneys are now limited to a maximum fee, regardless of the extent of quality of their work, of 25 percent of the total past-due benefits recovered at a hearing or a subsequent court appeal.[11] Obviously in many cases attorneys are not adequately compensated, and more important, are extremely hesitant to represent cliamants in hearings where the amount of past-due benefits is small, where the likelihood of success is questionable, or where the foreseeability of a subsequent court appeal threatens. Another less rarely considered drawback to the present system, is the hardship placed on claimants whose attorneys, even though compensation is set by the Secretary or judge in each case, have the tendency to wait until large sums of past-due benefits have

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[8] Bixby, *Income of People Aged 65 and Older: Overview from 1968 Survey of the Aged*, Social Security Bulletin, Vol. 33, No. 4, April 1970, p. 3.
[9] 45 C.F.R. §205.10(a)(2)(iii). Social Security Act §206(a); 20 C.F.R. §401.971–73.
[10] Viles, *The Social Security Administration Versus the Lawyers . . . And Poor People Too*, 39 Miss. L.J. 370, 395 (1968).
[11] Social Security Act §206.

accumulated, knowing that the Secretary or judge will be more lenient in approving larger attorneys' fees the greater the amount of the recovered benefit. A countervailing aim in limiting attorneys' fees to 25 percent of past-due benefits recovered is to protect OASDI benefits against dilution by the deduction of excessive attorneys' fees. The result of this conflict is that claimants have the most difficulty in obtaining legal representation in those cases where it is most needed—complicated, lengthy and difficult cases.

We would propose that Federal funds be made available to pay attorneys' fees in cases where the Secretary and/or a court sets attorneys' fees at more than 25 percent of the past-due benefits. Also needed are Federal funds to pay attorneys' fees in those cases which involve small amounts in past-due benefits, insufficient to provide adequate compensation for an attorney who is limited to one-fourth their amount.

Little can be gained by forcing a claimant to either proceed to a hearing without legal representation because one-fourth his past-due benefits are insufficient to compensate an attorney, to have to suffer until he has accumulated sufficient past-due benefits to attract an attorney, or to face a hearing alone because his claim is too difficult to justify an attorney's time at the contingent rate of 25 percent of his past-due benefits.

Provision of free legal counsel, to all claimants, at all categorical assistance and OASDI hearings and court appeals, deserves further study, and should be the ultimate goal. The lack of legal representation at many hearings, by itself, speaks loudly for provision of legal counsel to claimants. Certainly this is so where the benefits are the claimants' sole means of support.

C. Evidence at Hearings

Analogous to the problem of free legal representation is the expense incurred in gathering evidence in disability hearings. The opportunity to have an independent medical examination made, and paid for by HEW, at the request of a claimant in a disability hearing, is an indispensable aspect of an adequate hearing. There is little point in providing procedural safeguards at the hearing level if indigent persons are unable, in disability cases, to obtain the very evidence which forms the essence of their case.

Furthermore, in all OASDI and categorical assistance hearings beneficiaries and recipients must be protected against decisions based purely on hearsay evidence submitted by HEW. Hearsay evidence, inadmissable at a court of law, is admissable at such administrative hearings, and its admission can result in the denial of the rights to confront and cross-examine adverse witnesses. A claimant should be afforded the opportunity to question adverse witnesses, especially doctors in disability hearings. At present, HEW fails to produce doctors to substantiate their reports, and hearing examiners refuse to issue subpoenas to compel their attendance at disability hearings. Without some protection against the admission of hearsay, the claimant is faced with a situation in which a decision against him may be rendered without his ever having a chance to question any of those persons responsible for the evidence on which the decision is based.

D. Decisions

There is a stunning lack of uniformity and consistency in the decisions rendered by Social Security Administration officers and hearing examiners in various sections of the country in OASDI cases. The same is true of categorical assistance cases, but these can be partially explained by differences in State laws upon which most of these decisions are founded.

But in OASDI, a national program, uniformity of application of the laws and regulations, and consistent decisions should be an accomplished part of the program. Pressure from above is needed to ensure that local offices uniformly apply the laws and regulations throughout the country. Hearing examiners would benefit from additional publication of hearing decisions from other sections of the country, as would those persons who represent claimants. The quarterly publication of selected, abridged decisions presently available is insufficient to keep examiners and claimants apprised of the decisional trends at the hearing level.

III. WHEN ONE BENEFIT REDUCES ANOTHER

The interrelationship of these programs poses a number of questions of basic fairness which are often overlooked by elderly persons and groups representing them. Most pressing of these is the corresponding reduction in the amounts paid by many private pensions, annuities, OAA, and veterans' pensions as OASDI benefits increase. OASDI benefits were increased 15 per cent retroactive to January 1970, in response to recognition by Congress of the toll that inflation has taken on the real income received by the elderly. Yet, this increase is partially lost to those who are in the most severe need of it—those who are so poor that their income from OASDI is not sufficient to enable them to survive without receiving OAA or veterans' benefits.

Congress partially recognized the problem in requiring States to maintain previous OAA grants so that at least $4 of the monthly increase in OASDI benefits must be received by OAA recipients before OAA grants can be reduced. Veterans' benefits also are decreased in such a way as to allow recipients to retain some of their OASDI increases, resulting in some increase in their total incomes.

The need to recognize the extreme hardship caused by recent inflation to persons on fixed incomes, who are already receiving OAA or Veterans' benefits as additions to their inadequate OASDI benefits, was not satisfactorily remedied by Congress. Steps must be taken to ensure that future OASDI increases are retained by those who are in the most need of them, those who are so poor that they must receive income from other public sources in order to survive.

The same considerations apply to private pensions and annuities. Although the trend is to make the amount received from private sources independent of any future increases in OASDI, the need is still present to press for elimination of such dependency in all private pensions and annuities. Employers, unions, employees, insurance companies, and other sources of retirement income, should be capable of more accurately foreseeing the future, so that realistic programs, which are independent of changes in OASDI levels, can be formulated.

A. Offsets Against Disability Payments

The Social Security Act provides for an offset of workmen's compensation benefits against disability benefits, resulting in the receipt of less than the total of disability and workmen's compensation payments an individual would normally be entitled to.[12] This offset is mandatory regardless of the basis for an award of workmen's compensation, even if the basis of the award is independent of the reason the recipient is considered disabled. The only requirement for offset is receipt of both payments in the same month. The difficulties often presented by this system are obvious. An individual, previously earning a wage sufficient to support himself and his family, can suffer two separate catastrophes entitling him to both workmen's compensation and disability. Yet because of the offset he is precluded from receiving benefits approaching his previous wage level. He suffers, as well as his family, often for circumstances beyond his control. Some recognition is needed so that sources of income from other Federal—or State—established programs received by disability and other OASDI beneficiaries are not automatically suspect and "taken" from individual recipients. Each program was created for specific purposes and with specific goals, and an individual who qualifies for more than one should not be penalized by another. Disability benefits are not offset against income received from private sources. A disabled worker, with millions of dollars invested in the stock market, would not have his quarterly dividends offset against his disability payments. Those who qualify for payments from both workmen's compensation and disability should have the same privilege.[13]

Efforts should also be made to examine the possible ill effects of OASDI maximum family benefits. There seems to be no justification for penalizing large families, whose needs per person do not diminish with the number of family members.

IV. EFFECT OF INADEQUATE BENEFIT LEVELS

An understanding of the plight of many elderly persons, even after the recent increases in OASDI, can be gained from a consideration of the inadequacy of OASDI benefits. When we focus on the plight of elderly persons we are dealing with a significant number of persons; for, as pointed out earlier:

—One-fourth of the couples on the OASDI rolls and two-fifths of the nonmarried were dependent on OASDHI for almost their entire support in 1967.
—Half of the widows receiving OASDHI had total incomes below $1,300 and only one in sixteen had as much as $4,000.
—Ten percent received some cash support from local welfare agencies.
—More than one-fifth of all OASDHI couples had incomes less than $2,000 in 1967.[14]

[12] Social Security Act §224 (a).
[13] Under present law the combined Social Security and workmen's compensation payments for a disabled worker and his family cannot exceed 80 percent of the worker's average earnings before he became disabled. H.R. 17550 (the House-passed Social Security Amendments) would permit combined benefits equaling 100 percent of the worker's average earnings.
[14] Bixby, *supra*, n 8, at p. 3.

—The average Social Security benefit of a couple retiring in 1950 met half the Bureau of Labor Statistics budget cost, but in 1967 it met less than one-third.[15]

—In 1966 there were 2.1 million aged women living alone with income less than the Social Security Administration's poverty index.[16]

—Half the older people living alone or with nonrelatives in 1967 had incomes no larger than $1,480, and one in four had income of $1,000 or less.[17]

This is in spite of special circumstances which often necessitate proportionately greater income for the elderly as opposed to younger, larger family units. The elderly often have the same housing and utility needs as larger families. Supply will many times force a single adult to live in an apartment large enough for a small family, yet he pays the same rent as the family, while he receives less aid than a small family. Although his food costs are lower than a small family's, elderly persons more often must pay to have food delivered, or are only physically capable of shopping in small nearby stores where prices are higher than larger stores more easily reached by the young.

And, of course, the medical and drug expenses of the elderly exceed those of the young. Categorical assistance programs, and OASDI too often fail to envision the needs of the elderly poor in terms of family units, often composed of a single person. Recognition of their needs in terms of family units would lead to a more realistic setting of benefit levels.

The inadequacy of categorical assistance benefits has been pointed out too often for further discussion here. In addition to raising the general level of benefits, special attention should be placed on providing funeral benefits, homemaker services, nursing services, grants for recreation, and transportation—recognizing the particular needs of elderly persons.

V. WAGE BASE AND RETIREMENT TEST

A number of more specific changes in the structure of OASDI deserve mentioning at this juncture. The payroll tax, with its present restrictions of the taxable wage base at $7,800, forms an extremely regressive method of financing. Part of the program should be financed by general revenues and a more equitable tax structure. The working class person, just able to support his family on a salary of approximately $7,800 pays tax on every dollar he earns, while persons earning in excess of $7,800, regardless of their income, pay OASDI taxes only on $7,800, a lower proportionate tax on their total income than the poorest wage earner. OASDI should be viewed as the primary source of income for most of the elderly, and as a method for providing a decent standard of living for those who have contributed to our society for many years as workers. As such some redistribution of income, from the more fortunate to the less, as well as the obvious transfer of income from working generations to retired generations, should be accepted as part of our commitment to provide for the elderly poor. To the extent

[15] Special Committee on Aging, United States Senate, *Economics of Aging: Toward a Full Share in Abundance*, Ninety-First Congress, U.S. Government Printing Office, 1969, pt. 1, p. 155.
[16] *Ibid.*, p. 163.
[17] *Ibid.*, p. 187.

that the wage base is increased and the present gradations between benefit levels maintained, the regressive nature of the present payroll taxing scheme is reduced. It is noteworthy that the OASDI amendments recently passed by the House of Representatives would increase the taxable wage base from $7,800 to $9,000.

Another amendment would increase the retirement test from $1,680 to $2,000. This is the amount of earned income a person may have annually without having a decrease in his retirement benefits.

Ideally the retirement test should be eliminated. But liberalization of the retirement test is desirable as it encourages elderly persons to continue working without the loss of benefits. The result would be an increase in the total income of those elderly persons whose earned income exceeds the retirement test, permitting them greater self-sufficiency. The dignity provided elderly persons in being able to retain jobs without being penalized for earning more than an artificially low retirement income, as well as the values to our economy in the retention of many of its most skilled and knowledgeable employees, who now succumb to the pressure to limit their earnings, would be immeasureable.

It can be argued that the test should be retained at a more reasonable level, not eliminated, for elimination would (1) Defeat the aim of OASDI to protect against loss of earnings, as opposed to merely paying an annuity to persons who reach a certain age, (2) Benefit those who need it the least, those capable and healthy enough to earn substantial amounts after the normal retirement age of most.

Other possible innovations might entail some inclusion in the retirement test of income sources other than earned income. Inclusion of only earned income for purposes of the retirement test tends to penalize some of the poorest of the elderly, those who lack income from other sources and must continue working after the normal retirement age. Increasing the retirement test, while including other income sources, would more evenly spread the burden of the test among those who not only work but also those who have income from other sources as well. A sliding scale could be adopted so that those who worked and received unearned income from other sources would be placed on an equal footing with those who had only earned income. After all, retirement benefits seek to provide income to the elderly, not to more favorably reward those who have accumulated enough to provide themselves with enough unearned income after retirement so that they do not have to work.

Consideration should also be given to having the retirement test increase at least at the rate that the cost of living rises.

Only a brief comment need be made concerning the preferences given women in computing average earnings for purposes of determining the primary insurance amount in OASDI. Fewer earnings years are considered for women. This has the effect of increasing their average earnings over those of a man who has the same earnings record. The approach seems aimed at compensating women for the various forms of employment discrimination which in turn are reflected in their having earned less than their male counterparts. As women

acquire a more equal place in our labor market these preferences should be re-examined.[18]

VI RETROACTIVE BENEFITS

OASDI now provides a one-year limitation on the amount of retroactive benefits, measured from the date of application.[19] It is suggested that this one year period be lengthened. The usual reasons given for limiting retroactive claims—such as the difficulty of obtaining evidence, harassment by one party of another over a stale claim, and the desire for a final decision after a number of years—do not exist in most OASDI cases. The claimant has the burden of establishing entitlement in all cases, so little harm is encountered by allowing him to attempt to establish his entitlement after the one-year period. Delay and harassment are less important factors since HEW is always the other party.

The one-year limitation harms those who deserve the least to suffer—the poor, less informed worker with limited education, who does not know of his legal right to OASDI, and who is less likely to come into contact with persons who will inform him of his rights. At least retirement benefits should be paid retroactively to the date of first entitlement. Careful examination of methods of record keeping by the Social Security Administration, with the advent of computer technology, should enable the keeping of records which would allow payment of full retroactive benefits.

Related to the ability of the Social Security Administration to keep adequate records of persons entitled to retirement benefits is the requirement that an application be filed by the potential recipient before benefits are granted.[20] The Social Security Administration should aim to maintain a procedure which would enable it to notify persons of their eligibility when they reach the age of 62, and again at age 65 if they decline to begin receiving benefits at age 62. Obviously there are tremendous difficulties in tracing persons, but since payments coming into the fund are continually credited to individuals' accounts, records, at least of places of employment, could be used to notify working persons of their entitlement at age 62.

Related to the question of a hearing prior to the termination or reduction of categorical assistance or OASDI benefits, is the need for interim payments from the date of initial application for categorical assistance or OASDI to the eventual approval of the application. This is crucial in circumstances where the individual is in extreme need and has no other resources. It is especially equitable in those cases where it is reasonably certain that the applicant's claim will be approved, and the time lapse between application and approval is necessitated by the practical difficulties of obtaining evidence of the applicant's age, quarters of covered employment, and benefit amounts.

Most States already provide emergency assistance from the date of application to the time eligibility is determined, for categorical aid applicants in dire need; but similar temporary assistance is not part of

[18] H.R. 17550, passed by the House of Representatives on May 21, 1970, provides an age-62 computation point for men (the same as for women), instead of the present 65 year requirement.
[19] Social Security Act § 202 (j) (1).
[20] Social Security Act §202 (a) (3).

OASDI or veterans' benefits. At the very least, OASDI should provide temporary assistance to those applicants suffering extreme hardship when the reason for delay in the processing of the application is a matter within the exclusive control—such as checking whether an individual has sufficient quarters of coverage to be fully insured—of the Social Security Administration.

VII DEFINITION OF "DISABILITY"

"Disability" for purposes of OASDI is defined as an "inability to engage in any substantial, gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." [21] The Social Security Administration chooses to define the law strictly and persuaded Congress to adopt restrictive amendments in 1967 and 1968 to modify the impact of relatively liberal court decisions.[22] The most obnoxious of these amendments demands that a disabled beneficiary be *unable* to do not only his previous work but also "any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." [23] It is inconceivable to demand that a man, especially a disabled man, move himself and his family away from familiar surroundings and long-time friends, to take a far away menial job, for which he is barely qualified by reason of his disability. Some Courts have recognized this.[24] The statute should be amended to reflect this reality.

> Although it is true that some disability beneficiaries could or should be rehabilitated by agencies established for that purpose, the facilities and capabilities of the agencies are often inadequate for the task. While some disability claimants could obtain light but remunerative work if they resided elsewhere in the nation, they do not reside elsewhere. It is unreasonable to expect that they will move elsewhere, and there are few facilities for expediting their relocation. Although some disability beneficiaries could do some work if they would overcome the neuroses or their lack of motivation, in fact the problems of their minds and emotions are not of their deliberate manufacture, control, or removal; and while some disability claimants should look to unemployment compensation for assistance, it is also true that unemployment compensation is seldom available to the long-term unemployed who are the least desirable employees. This list of factors and its endless continuation deserves the con-

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[21] Social Security Act § 223 (d)(1)(A).

[22] Viles, *supra*, n. 10, at p. 371.

[23] Social Security Act § 223(d)(2)(A). The job can be anywhere in the country so long as it exists in "significant numbers either in the region where such individual lives or in several regions of the country."

[24] See *e.g.*, *Wimmer* v. *Celebrezze*, 355 F.2d 289 (4th Cir. 1966) and cases cited (the employment must be within a reasonably accessible labor market). See for many cases, Annotation, "Necessity and Sufficiency of Showing that Substantial Gainful Activity Is Available to Disability Claimants Under Federal Social Security Act" 22 A.L.R. 3rd 440 (1968) (does not take account of the 1969 amendments), *Reyes Robes* v. *Gardner*, 287 F. Supp. 220 (D. Puerto Rico 1968) (detailed investigation rev'd sub. nom. 409 F.2d 84 1st Cir. 1969).

sideration of any Congress undertaking to redefine the meaning of disability.[25]

These are the kind of "common sense" concerns which should lie behind such "remedial social legislation" as the disability benefit laws. Congress must be persuaded that this is a charitable and rich country which can afford to share its wealth with the unfortunate victims of our highly technical industrial complex and therefore can and must be liberal with disability (as well as welfare) benefits.

VIII. A "VESTED RIGHT?"

In *Flemming* v. *Nestor*,[26] the Supreme Court held that Social Security benefits "cannot properly be considered to reach the order of an accrued property right." Further, in holding that the loss of benefits was not a punishment and hence not a bill of attainder, the Court held that "[h]ere the sanction is the mere denial of a non-contractual governmental benefit. No affirmative disability or restraint is imposed. . . ." Nestor had been a member of the Communist Party from 1933 to 1939.

In response to this decision a prominent law professor wrote:

> When all is said and done about stripping the social insurances of their supposed insurance attributes, this much remains, however, to be said: the beneficiary does make a financial contribution, whether correctly called a premium or a tax, which is regularly and observably deducted from his wages. From this he gains a feeling of personal involvement, the belief that his contribution is directly traceable to the benefit and a strong sense that he has a right to it. Whatever may be the strictly logical and legal significance of the contribution, it is a political, social, and psychological fact of the utmost importance, both in terms of the continually increasing benefits and the willingness to pay for them, and in terms of popular mass demand that the worst features of public assistance be avoided.[27]

The frustration of expectations was certainly a major element in the injustice of the *Nestor* decision—how many people (including Nestor) change their patterns of saving and insurance in reliance upon anticipated Social Security? [28] Yet the result of *Nestor* and the cases following it [29] is that Congress may at any time change the program to the detriment of expectant beneficiaries. Social Security is too important to people who have relied upon it to be subject to arbitrary Congressional defeasance. Program flexibility surely does not justify the drastic injustice which befell Nestor. The Act could be amended so that "rights vest" at age 45 or 50 (of course benefits may be thereafter increased, just not reduced). This would work a compromise between the need for flexibility and the necessity not to

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[25] Viles, supra note 10 at page 403-404. A number of bills have been introduced to change the requirements for disability benefits. For example, S.3100—introduced by Senator Harrison Williams—would provide coverage if a worker would be unable to engage in any substantial activity (by reason of a medically determinable physical or mental impairment) in his regular work or in any other work in which he had engaged with any regularity in the recent past.

[26] 363 U.S. 603 (1960).

[27] Ten Broek, "The Disabled and Welfare," 54 Calif. L. Rev. 809, 821 (1966).

[28] See O'Neil, "Unconstitutional Conditions: Welfare Benefits with Strings Attached", 54 Calif. L. Rev. 443, 470 (1966).

[29] *e.g. Stoupe v. Jones*, 284 F.2d 240 (D.C. Cir. 1960) (disability annuity pursuant to §6 of the 1930 Civil Service Retirement Act was cut off by a 1956 amendment).

frustrate the just expectations of the workers involved. If cut off or otherwise detrimentally affected at or before 45 or 50, workers would still have time to purchase their own retirement insurance.

The Court in *Nestor* did note that the "interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Kelly* v. *Goldberg*[30] exemplifies the importance of this recognition of extent of interest. There, categorical assistance, rather than OASDI, was involved. The court held that due process requires a hearing *before* termination of welfare benefits. "The extend to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'. . . ." Quoting Professor Reich, who emphasizes that "such sources of security . . . (social security and welfare among them) are no longer regarded as luxuries or gratuities; to the recipients they are essentials," the Court states that "it may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' " As mentioned earlier, in the area of veterans' benefits due process has been dominated by the gratuity facade, and judicial review of administrators' decisions is precluded.[31]

The new Family Assistance Plan proposes to preclude review of factual determinations. And Senator Ribicoff's amendments to that Act, which propose the federalization of the adult assistance programs, Aid to the Aged, Blind, and Disabled, include a section denying court review of factual determinations.

Judicial review corrects arbitrary decisions. The prospect of it keeps administrators in line.[32] When important interests are at stake, there should and must be a right to resort to the courts.

We conclude that the notion of privilege in the context of social welfare benefits, upon which people rely so heavily, is a perversion of thought and of language. If the courts persist in making use, to whatever extent, of this out-dated concept, it is essential that the legislature preclude such arbitrary defeasance of vested rights.

IX. RELATIVES' RESPONSIBILITY

The proposed welfare reform legislation, the Family Assistance Plan, provides that in determining need for aid to the aged, blind and disabled, "the state agency may not consider the financial responsibility of any individual for any applicant or recepient unless the applicant or recipient is the individual's spouse or the individual's child who is under the age of twenty-one or is blind or severely disabled." Today relative responsibility provisions are widespread.[33]

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[30] 397 U.S. 254 (1970).

[31] See Reich, "The New Property", 73 Yale L. J. 733 (1964); Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues". 74 Yale L. J. 1245 (1965).

[32] See Berger, "Administrative Arbitrariness and Judicial Review", 65 Colum. L. Rev. 55 (1965).

[33] They are so common and lengthy that the Department of Health, Education, and Welfare survey omits them. "Because of complexity and length, provisions relating to the responsibility of relatives to support are not included." U.S. Dept. of Health, Educ. & Welfare, Soc. Sec. Admins., Bur. of Fam. Serv., Pub. Assis. Rep. No. 50, Characteristics of State Public Assistance Plans Under the Social Security Act 6 (1967). Statutes in all fifty states and the District of Columbia render one or more private individuals responsible for cost of support and care of inmates of state hospitals. Comment. 39 N.Y.U. L. Rev. 858 (1964). Other welfare statutes commonly require contribution from relatives. See, *e.g.*, New Jersey Rev. Stat. 44: 1-140 (Cum Supp. 1969): "The father, grandfather, mother, grandmother, children, and husband or wife, severally and respectively, of a poor, old, blind, lame, or impotent person or other poor person or child not able to work, shall, if of sufficient ability, at his or their charge and expense, relieve and maintain the poor person or child . . . ." See Mandelker, "Family Responsibility Under the American Poor Laws", 54 Michigan L. Rev. 497, 607 (1956).

Federal law should be amended to completely eliminate such provisions. The model should be *Department of Mental Hygiene* v. *Kirchner*,[34] where the California Supreme Court held that a statute requiring an adult child to pay the State mental hospital expenses of her mother was a denial of the equal protection of the laws.

The practical reasons justifying the elimination of the laws have been pointed out:

> The motive was that long maintained by a large body of social work opinion that liability of relatives creates and increases family dissension and controversy, weakens and destroys family ties at the very time and in the very circumstances where they are most needed, imposes an undue burden upon the poor (for such the relatives almost always are) and is therefore socially undesirable, financially unproductive, and administratively unfeasible.[35]

On a more philosophical level:

> The economics of distress are intricately bound up with social and psychological factors in the environment. Accordingly, the principal cause of dependency is not individual, but social, a need for protection arising from the complexities of modern society and the imperfections of a rapidly advancing economy. Since a major cause of poverty is social, over which the individual has no control, relief is a proper charge against the total economy.
>
> Welfare, like education, or the provision of police and fire protection, is a basic public function benefiting all who live in the community. Questions as to who derives special benefits—the mentally gifted from education, the person who is protected against criminal assault by the police, the person whose home is saved from the flames by firemen, the recipient of welfare grants and services, let alone his relatives—are irrelevant.[36]

In this light, even the reform provision of the Family Assistance Plan must be found wanting.

X. INCOME ELIGIBILITY FOR CATEGORICAL ASSISTANCE

A particularly onerous burden placed on the elderly by the categorical assistance programs deserves mentioning. Eligibility requirements for these programs necessarily include limitations on the amount of income that applicants may have in order to receive assistance. Although recipients may retain some reserves, income limitations are placed at irrationally low levels and are applied to forms of income which are especially sacred to the elderly.

Elderly persons, who have worked throughout their lives, but find Social Security retirement benefits inadequate to support them, are ineligible for categorical assistance unless they agree to place a lien,

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[34] 60 Cal 2d 716, 36 Cal Rptr 488, 388 P2d 720 (1964); vacated and remanded, 380 US 194 (1965); clarified per curium 62 Cal 2d 586, 43 Cal Rptr 329, 400 P2d 321 (1965).

[35] Ten Broek, "California's Dual System of Family Law: Its Origin, Development, and Present Status," 17 Stan. L. Rev. 614, 645–646 (1965).

[36] *Id.* at 642.

for the value of assistance received, on the modest home which they had struggled to meet payments on for years. They are also forced to assign life insurance policies, no matter how small in amount, to State welfare departments as a condition of receiving aid. Burial insurance or prepaid funeral and burial contracts must also be assigned. There are of course other income restrictions, such as on the value of automobiles and the amount of personal savings that applicants may have.

The most strongly felt objection is to the nature of such income limitations and the tragic choice they place in the lap of many elderly persons. A person after having spent the bulk of his lifetime paying for a modest home, for a minimal life insurance policy, the proceeds of which are meant for his surviving spouse or children, and for his funeral and burial, is forced to relinquish these things in return for enough assistance to survive the few years he has left. A system which poses such harsh choices on our elderly, failing to recognize the non-economic value and attachment elderly persons have for certain of their resources, needs some alteration to make it more sensitive to the human factors that make a burial contract valued at $300 very different from $300 in a bank account.

Recovery of categorical assistance payments from individuals should be eliminated. Although the *Kirchner* rationale would seem to extend to individual responsibility, the California court indicated that such responsibility provisions were acceptable. In *Snell* v. *Wyman*,[37] New York State's provision for recovery from the estate of a deceased person who had received welfare [38] was upheld against constitutional attack. The decision treated welfare law as just one more aspect of the law of economic regulation of business. However, as should be obvious to anyone, welfare law is vitally different. The dramatic difference is that welfare law deals with the basic needs of impoverished human beings, a difference which justifies not imposing individual liability on welfare recipients for repayment of benefits received.

A social benefit is derived from welfare and a State's attempt to finance it by recovery from recipients defeats the very purpose and goals of welfare legislation. At the point where a recipient is economically self-sufficient, welfare legislation has accomplished its goal and recovery can only discourage the recipient from attaining self-sufficiency.

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[37] *Snell v. Wyman*, 281 F. Supp. 853 (S.D.N.Y. 1968), aff'd, 393 U.S. 323 (1969).
[38] N.Y. Soc. Welfare Law §§ 104 thru 104-a (McKinney 1966).

CHAPTER TWO

THE "RIGHT" TO HIGH QUALITY HEALTH CARE

(By James A. Kraus and Mark A. Wurm*)

I. MEDICARE

In 1965—after a struggle spanning three decades—the historic Medicare law was signed into law.

For millions of older Americans, Medicare brought peace of mind. But, for other aged persons, Medicare lead to administrative and legal controversies which remain unresolved today.

A. Coverage Under Medicare

Part A hospital insurance benefits are available to persons eligible for Social Security, or Railroad Retirement benefits. Inpatient hospital services are covered for up to 90 days in any spell of illness. There is also an additional lifetime reserve of 60 days. There is a $52 deductible for each spell of illness plus co-insurance of $13 for each day after the 60th and through the 90th day. Psychiatric hospital services are limited to 190 days during a person's lifetime.

Post-hospital extended care (i.e., skilled nursing services) is covered for up to 100 days in any spell of illness. The patient must have been hospitalized for at least 3 days and transferred within 14 days to the extended care facility. There is co-insurance of ⅛ of the hospital deductible for each day after the 20th and through the 100th day.

Post-hospital home health services are covered for up to 100 visits within one year after the beginning of a spell of illness and before the beginning of another spell of illness. There is no deductible or co-insurance requirement. These services are nursing care, physical or occupational therapy, medical social services, and medical supplies other than drugs.

Part B supplementary medical insurance is available to anyone 65 or over who elects to enroll and pay monthly premiums. There is an annual deductible and 20 percent co-insurance.

Physicians' services are covered. This includes surgery and home, office, and institutional calls.

Other health services are also covered, including administered drugs and outpatient hospital diagnostic services incident to physician

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The view of the authors do not necessarily reflect the policy of the Center on Social Welfare Policy and Law, Columbia University.

services. Diagnostic X-rays and laboratory tests are covered. Isotope and X-ray therapy, rentable medical equipment, prosthetic devices and ambulance services are covered.

Outpatient physical therapy services are covered. Home health services for up to 100 visits in a calendar year are covered without the need for prior hospitalization.

B. Retroactive Denial of Benefits

Problem.—A patient on the advice and order of a doctor is placed in an extended care facility (ECF). Subsequently, the Social Security Administration or its agent, the fiscal intermediary, determines that the services rendered were not medically necessary, were custodial and thus not covered. Reimbursement is denied and the patient is liable to the ECF, (or other provider of services) for services rendered.

It is obvious that a patient acts innocently and cannot but rely on what medical experts (doctor and ECF) tell him. The patient ought to be protected.

1. **The doctor is required to certify the medical necessity of services provided. This should be conclusive as against the patient, exempting him from liability.**

It is not an undue burden for the ECF because there is an instructional manual and SS letters to guide it.

2. **There are always marginal cases. To prevent the ECF from risk in these cases there should be automatic eligibility for a short period (e.g., one week, upon transfer from a hospital to an ECF). This has been recommended.[1] There presently exists a method for speedy determination in questionable cases.[2]**
3. **Retroactive denial often results from lax administrative practice. The ECF should be required to get an initial determination of eligibility. If the intermediary delays, neither the patient nor the ECF should be penalized by a denial of benefits.**

Intermediary performance is poor. Average processing time for bills is 12.1 days. Even more significant, an average of 12.9 percent of all bills are kept pending by intermediaries for 30 days or more. Five intermediaries had 50 percent or more of their bills outstanding and the high was an intermediary with 92.3 percent of its bills outstanding for 30 days or more. The cost of this outrage is presently assessed against patients. [3]

C. Unresolved Litigational Problems of Retroactive Denial of Benefits

Given a denial of benefits, a provider sends a bill for services to the patient. A patient, upon denial, may contest the determination. He files for reconsideration before SSA, and if denied, he may request a hearing.

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[1] Medicare and Medicaid Staff Report, Senate Finance Committee, p. 111 (February, 1970). In addition, H.R. 17550 would authorize the Secretary of HEW to establish specific periods of time during which a patient would be presumed to require services in a nursing home.

[2] Intermediary Letter No. 328, Bureau of Health Insurance, SSA (June, 1968). This procedure appears to be haphazardly invoked.

[3] Medicare and Medicaid, pp. 115–116.

It is unclear whether a provider may sue a patient on a bill before a final administrative determination or whether his contract with SSA prevents this.

Generally a Social Security recipient will not have the liquid assets to pay a major medical expense, He then suffers the very thing Medicare is designed to prevent: financial catastrophe. He must either use all his savings or sell his home, etc. If afterwards SSA makes payment, it will not make him whole again. Therefore, providers should not be allowed to collect against a patient until a final determination by SSA.

D. Administrative and Judicial Review of Part A and B Determinations

A patient has a right to administrative review of an intermediary's decision under Part A (Hospital Insurance) only if the amount in controversy is $100 or more, Judicial review may be had only if the amount is $1,000 or more.[4]

A patient should be able to obtain administrative and judicial review regardless of the amount in controversy. Social Security determinations are reviewable without regard to amount. There already exists staff for Social Security and disability hearings with sufficient expertise, including medical, to handle Medicare determinations. Medical costs are such an important aspect of the elderly's concern that they should be provided this protection.

There is no administrative or judicial review of amount of benefit determinations under Part B (Supplementary Medical Insurance). Rather there is a "fair hearing" procedure undertaken by the carrier (which made the original determination).[5]

Delegating final decision-making power to a private body, the carrier, in the operation of a governmental program is both novel and potentially dangerous. No other government benefit program is run this way. It runs contrary to a basic tenet of American government: public accountability.

It may have been thought that carriers had sufficient expertise to adequately administer the program. Yet SSA has never made a determination of the efficiency of carriers and has automatically renewed their contracts. The carriers refuse to give SSA requested, pertinent data.[6] Their performance in processing bills, errors made and complaints handled is discouraging.[7]

The fair hearing procedure is not adequate. Because the carrier is a private body, there is no compulsory process and no testimony under oath.

E. Desirable Changes in Coverage of Medicare

1. DRUGS

The largest health expenditure of the aged (left uncovered by Medicare) that they must presently pay for is drugs.[8] Medicare at

[4] 42 U.S.C. § 1395ff.
[5] 20 C.F.R. § 405.801 *et seq.*
[6] Medicare and Medicaid, pp. 117-120.
[7] See Appendix, from Medicare and Medicaid, Appendix H, p. 281 ff.
[8] Robert B. Ball, Commissioner of Social Security, Hearings, Senate Special Committee on Aging, 91st Cong., 1st Sess., p. 24 (April 29-30, 1969).

present only covers drugs used within the hospital or given by a doctor in his office which cannot be self-administered. Coverage ought to be expanded to all prescribed drugs.

2. INTERMEDIATE CARE FACILITIES

Medicaid was amended to provide for intermediate care facilities for persons who needed physical help and assistance beyond what is available in old age homes or from homemaker agencies, but less than skilled nursing services. It was estimated that some 50 percent of persons on OAA, AB, APTD who were in nursing homes only need the level of care in intermediate care facilities.[9]

It should be obvious that this type of care is needed by persons eligible for Medicare, but it is unavailable to them. It is arguable that doctors, acting in their patients' interests, will order skilled nursing services rather than no services at all. To avoid this result and satisfy a real need, Medicare should be expanded to cover this service.

3. SKILLED NURSING SERVICES

There is a limitation on the number of days of skilled nursing service available under Medicare and one consequence is that the aged in the most need of the service do not receive it or only inadequately. Extended care facilities would prefer to admit those they are confident may be released within the coverage period, and these persons are preferentially admitted.

While this is difficult to ascertain it is thought by some that the severely ill or those who will not be well enough to be released are dumped on public chronic care institutions. Another indication is the denial of coverage by SSA of numbers of aged admitted to extended care facilities. Given effective utilization review of patient needs and the alternative of an intermediate care facility there should be no arbitrary limitation on number of days of skilled nursing service.

4. HOMEMAKER SERVICES

Many patients need assistance during a recuperative period not at the level of skilled nursing services but of homemaker services at home. If this benefit were available it might be used as an alternative to institutional care in an ECF. This has been recommended.[10]

II. MEDICAID

Medicaid—enacted in 1965—is designed to provide medical assistance for low-income people of all ages.

Recently the program has come under increasing fire because of rising costs, complaints about "cheating", and bureaucratic red tape. In addition, a number of legal problems have arisen, causing difficulty for the poor and especially the elderly poor.

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[9] Medicare and Medicaid, Staff Report, Senate Finance Committee, pp. 97–98 (February, 1970).

[10] Medicare and Medicaid, p. 111. In addition, H.R. 13139 and S. 3333 would entitle Medicare coverage for services performed by "home maintenance workers" or "household aides."

A. Changes in Mandatory Coverage

At the present time a State's Medicaid program must include only (1) all persons receiving categorical assistance, (2) all persons otherwise eligible for categorical assistance except those who do not meet certain State requirements prohibited by Federal law in Medicaid. A State may include the "medically needy" corresponding to categorical assistance, categories whose income is sufficient for daily living, but not for medical care.

This category should be made mandatory for persons 65 and over. This would "blanket-in" nearly all aged with medical protection, the need for which is not contested.

B. Place Medicaid on an Administrative Parity With Medicare

Medicare and Medicaid for the aged are designed to achieve the same ends: competent medical services for the group and prevention of economic catastrope from illness. The differences primarily derive from financing the systems. The guiding principle for changes in Medicaid should be similarity with Medicare.

The recommendations in the staff report of the Senate Finance Committee should not be effected.[11] Rigid fee schedules should not be used. The same factors must be determined for medical services under Medicaid as under Medicare. Thus the manner of repayment must be the same. Fee schedules for only one of the programs have the practical effect of limiting availability of medical providers.

There should never be a requirement of prior approval of the use of medical services. It has the practical effect of deterring necessary services. Medical providers and physicians are recognized as the necessary parties to determine medical needs of their patients in Medicare and the same responsibility must be afforded medical providers under Medicaid. While prior approval may be thought necessary to curb overutilization, there is no data on whether there is in fact overutilization, only that medical programs are more costly than estimated. Most of this is because of increases in cost of services, not overutilization and prior approval as a way to curb costs only penalizes patients without doing anything to correct the problem of increasing costs.

A patient should not be required to designate a primary physician. There is no demonstrable problem of doctor shopping. In fact, the problem is that most medical providers refuse to serve Medicaid patients. Further, it is a declared object of this legislation to permit patients choice in their medical providers and this requirement would as a practical matter vitiate choice of providers.

III. INVOLUNTARY COMMITMENT OF THE AGED

State mental hospitals are used to warehouse vast numbers of aged senile persons until they die. Most of these persons are not mentally ill. Rather they are physically infirm or senile, suffering from confusion and temporary memory loss. Placement in mental hospitals with little

[11] *Id.* at 127-29.

or no activity or stimulation leads only to further deterioration. But appropriate facilities do not exist, and it is cheaper in money terms to use mental hospitals.

In the District of Columbia, Judge Bazelon has forged a line of legal reasoning that provides the legal underpinning to eliminate this inhumane condition. When the State intercedes in a person's life to place him in a therapeutic environment for his own self interest, the *quid pro quo* is the State's obligation to provide treatment. In order that this be more than a hollow sham the treatment must be based on individual needs and adequate in light of those needs.

Unfortunately, actual experience does not live up to legal theory. No institution has been ordered to upgrade its services. No adequate alternate facilities exist.

Involuntary commitment procedures in various States must be changed. Some States still permit *ex parte* commitment. Notice to the alleged mentally ill person is often dispensed with. Counsel is not generally provided. Hearings may be discretionary or summary. Jury trial is rare. After commitment few States provide for periodic review of continued illness. Commitment is often determinative of incompetence and committees to handle property are appointed.

A full panoply of procedural safeguards must be used to prevent arbitrary and unnecessary commitment. This requires mandatory notice, availability of counsel and a full evidentiary hearing. There must be periodic review. Substantively, the law must be changed to prevent classification of senility (or its euphemistic medical equivalents) as mental illness for purposes of commitment to mental hospitals. Geriatric equivalents of half-way houses should be established.

There is no dispute that many committed elderly need help. They need physical assistance with daily living needs which can only be provided institutionally. They need organized activity. But it has been demonstrated beyond cavil that mental hospitals do not and cannot provide this treatment.

CHAPTER THREE

THE STRUGGLE FOR ADEQUATE SHELTER

(By Stanton J. Price*)

Adequate housing is a major need of all the poor, but the elderly have special requirements and suffer special disabilities.

Certain trends today reflect the housing dilemma of the aged:

—There is a chronic housing shortage in the United States, especially for the poor.

—This lack of housing causes an increase in rents, although the houses and apartment buildings deteriorate.

—National prosperity and a growing population, coupled with the existence of blighted cities, have fostered urban renewal and redevelopment. The result is forced relocation of the poor homeowner and tenant with increased property taxes for adjoining landowners.

—The effect of the above falls most heavily on the elderly poor who have no earning power (or prospects), inadequate government benefits and the burden of skyrocketing costs of illness and infirmity.

—Many elderly wish to be physically integrated into society, not isolated, although advanced age, decreased vigor and receding mobility require accommodation to the housing market.

The Western Center on Law and Poverty in Los Angeles has undertaken on behalf of Legal Research and Services for the Elderly to develop plans to assist the millions of elderly poor confronting serious housing conditions in towns and cities throughout the nation. Located in Santa Monica, the project is called Housing Opportunities for the West Side Elderly (HOWSE).

HOWSE has attempted to explore in depth the impact on the elderly poor of economic, demographic and physical changes in residential neighborhoods. In Santa Monica, Venice and Culver City, where many elderly reside, local governments and real estate interests are intent on attracting a more stable and economically prosperous middle class. These cities are thriving with plans for improvement. Old housing is being demolished and replaced with modern high-rise apartments. The result is that many present long-term homeowners have found themselves financially paralyzed by rising taxes or evicted from their allegedly sub-standard housing because they cannot afford increased rents or because the property has been sold for redevelopment. Their rights and interests are ignored.

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A 1967 report of the Venice Non-Profit Community Development Corporation, for example, states that the future interests of low-income residents are much in doubt. The renewal of Venice, the report continues, calls for an intensive up-grading of the area through the rebuilding of existing structures or their replacement. The elderly have yet to be meaningfully involved in the current rebuilding of Venice. The VNPCDC report finds that little preparation has been made for the inclusion of the elderly in either present or future development plans. Special interest groups, speculators, and even well-meaning public development agencies often force the elderly poor from their life-long homes.

The elderly are generally retired with low fixed incomes. Evidence points to a slow but steady erosion of the holdings of the retired senior citizen with limited or fixed incomes. Through rent increases in new or renovated structures, through the removal of older buildings under code enforcement practices, and a general lack of concern for the consequences of such actions upon residents, increased assessments for community "improvements" often make it impossible for the elderly to maintain a bare subsistence-level standard of living. They cannot always afford the costs of up-grading their homes to present-day standards, nor can they meet higher rents necessitated by improvement costs of their landlords. Thus whether they own or rent, this rise in the cost of living generally requires relocation in less expensive and often more blighted areas.

Because of this activity in Venice, many of the elderly who formerly resided there have begun to relocate in adjacent low income areas of Santa Monica, Culver City and West Los Angeles. These areas typify the housing crisis of the low-income elderly in the United States.

In Venice, along the ocean, much of the housing was built 50 and 60 years ago for summer use and thus not with an eye to permanence. The Building and Safety Department of the City of Los Angeles estimated last year that one-fourth of the housing in Venice is blighted.

In any event, 44.6 percent of the housing was built before 1939 and another 20 percent between 1939 and 1949. This, for Southern California, is old. Between 1961 and 1967 the City Building Inspectors swept through the canal and beach areas. Out of 1,600 structures, 488 were condemned. Most of these structures were torn down and almost none of them have been replaced, giving the area a ravaged Rotterdam 1940 look. Much of what remains is only slightly better than what was torn down.

The Ocean Park area of Santa Monica, immediately to the north of Venice, is similar in its socio-economic makeup to the canal area. The former is, however, denser in population, much cleaner, more attractive and far better kept up than the latter. It is still a predominantly low-income area, with a large number of elderly residents. The forces seeking to change Venice also operate in Ocean Park, which in addition had the aspirations of the City of Santa Monica to contend with. An area along the Ocean about ten square blocks several years ago was condemned by the Community Redevelopment Agency. The City attempted to aid only about 40 percent of the residents, almost all of whom were elderly and tenants. People were told they would have been given priority in the two high-rise apartments which

were subsequently erected on the part of the CRA site. This priority was a meaningless gesture, as rents in the new Santa Monica Shores Towers were about three times what they were in the courts and cottages that formerly filled the site. There is some talk that the CRA is interested in expanding. People in city government talk openly of wanting to get rid of the rest of the old poor people.

I. PROPERTY TAX

Debt servicing aside, the property tax is generally the single most substantial expense of the elderly homeowner. For example, the average owner of a modest, five room bungalow in a low-income section of Los Angeles would have paid approximately $550 in City and County property taxes in 1969 or about $46 a month. Although the budget for the forthcoming fiscal year has not yet been completed for either the City or County, it is estimated that taxes will run about 10 percent higher. And while most tax bills are fairly close to the $550 figure, many elderly people, because of new commercial activity near their homes, find themselves owing $700 or $800 each year.[1] The effect has been to force elderly pensioners to sell the houses they have lived in for decades.[2]

California currently has a Senior Citizens' Property Tax Assistance law (Revenue and Taxation Code § 19501 *et seq.*), enacted in 1967. This law provides "assistance to the claimant based on a percentage of the property tax accrued and paid by the claimant on his homestead. . . ." The assistance is equal to a designated percentage of property taxes paid on the assessed value of the property up to and including $5,000 (Revenue and Taxation Code § 19522). The percentage is set at 95 percent for an income of $1,000 and drops one point for each $25 increase in income. Thus at $2,400 a year, the average income for a couple on Social Security, the percentage would be 39 percent (Revenue and Taxation Code § 19523).

A. Flaws in Tax Assistance Approach

There are now pending before the California legislature several bills to increase and extend the amount of assistance. As an advocate for the elderly we support these bills. But, the tax assistance approach has several serious flaws.

In order to file a claim the taxpayer must present proof that he paid the tax (Revenue and Taxation Code § 19531). Thus the act is of no assistance to the elderly person who finds himself short of money at tax time. Secondly, from the point of view of efficiency, the procedure is much more cumbersome than merely allowing the claimants to take a deduction from his tax bill. Thirdly, the existence of the act is apparently not widely known. Last year, for instance, only 64,000 claimants were paid refunds, the majority of them from Los Angeles County. While the total number of eligible people cannot be known precisely, it would appear to be considerably greater than this.

[1] The above figures are based on telephone conversations the writer had with personnel of the Los Angeles County Assessor's office on June 29, 1970.

[2] Januta: "The Municipal Revenue Crises": 56 *California Law Review* 1525, 1534 (1968). And it should be noted that homeownership among the elderly is widespread in Southern California. According to the 1960 census of persons in the Los Angeles-Orange County area, of persons 60 years old or over 515,439 lived in owner-occupied units, while only 313,877 lived in rental units. Many of these persons are poor. The same census indicates that 263,613 households with a member 60 years old or older had an income of under $3000 a year.

Finally, to the extent that senior citizens are relieved of property taxes, the burden is partially shifted to other poor persons, either directly or indirectly in the form of higher rents.

For the above reasons it is clear that a system of assistance is not the optimum way of dealing with the problem of the tax. Further, the assistance plan does nothing to alleviate the many other deleterious effects of the tax. Much of the recent increase in rents in the Los Angeles area, though not the entirety by any means, can be laid to the recent rise in property taxes. More importantly, the property tax is extremely difficult, if not impossible, to administer equitably. While the amount of a person's income or the sales price of goods are generally clear-cut, ascertainable matters, the value of land is "to a very large extent a matter of opinion" (*Eastern Columbia, Inc.* v. *County of Los Angeles*, 61 Cal. App. 734, 745 (1944)) about which even well intentioned assessors can and do make mistakes. And, assessors are not always well-intentioned. (see e.g. *People* v. *Wolden*, 255 Cal. 2d 798 (1968))

B. Regressive in the Extreme

The tax is regressive in the extreme. Elderly people with lower than average incomes pay a higher than average percentage of their total family income for property taxes. "The percentage of income which California families in the two lowest income groups, under $2000–$2999 annually, pay for property taxes is almost twice that of families in the highest income groups of $10,000 and above.[3]

Another pervasive and undesirable side effect of the tax is that it discourages new construction, remodeling and replacement while encouraging slums.

> The process of blight is induced and hastened to a large degree by high taxes on urban improvements and irrationally drawn tax districts. High taxes on improvements can lead to blight in urban areas by inducing owners not to rebuild or repair their structures, but to invest in securities, machinery etc. or real property in areas of low [sic] taxation outside the urban center. Taxation of business properties in some urban areas at rates up to 20 percent of gross receipts may well induce firms to operate in run down structures rather than invest in rehabilitation which increases property taxes. The ad valorem tax on improvements decreases the incentive to invest in improvements by lowering the marginal revenue generated by each dollar invested in land use in at least two ways. Depending upon the tax rate and the before-tax rate of return on a particular investment, the property tax may prohibit the investment by lowering its overall rate of return below that which could be obtained elsewhere at a comparable risk. On the other hand, the tax may induce less intensive land use by lowering the point at which marginal cost and marginal revenue projections for the investment intersect. This result will obtain where an investor is willing and able to generate a satisfactory rate of return by scaling down his development—reducing his investment. Large financial institutions and similar firms that are "locked in" in the center city are most likely to fill this investor's role.

[3] See the *Municipal Revenue Crisis*, *supra* note 2 at p. 1533.

> The adverse effects of high taxes on improvements in urban areas are even greater when tax rates are low in nearby communities. Lower rates in a nearby community can induce investment in that area rather than in center-city improvements. The significance of variations in tax rates is shown by the fact that the tax differential between an urban location with a full value tax rate of 3 per cent and a suburban site with a 2 percent tax is $10,000 per year on a $1,000,000 investment. Over the life of an investment property this cost can be quite significant.[4]

It seems that not only the investor, who is expected to have an expertise in economic relationships, but even the average homeowner is aware of, and affected by, this negative aspect of the property tax. A member of the San Francisco Redevelopment Agency has testified that:

> . . . we discovered that *very often* when homeowners wanted to make repairs that the feeling was a great deal that the best way to have your home reassessed (and the property tax increased) was to take out a (building, remodeling, or repair) permit, *no matter how small.* Businessmen, likewise, have to decide whether the goodwill created by a new or remodeled building will offset the increased tax cost.[5] (Emphasis added)

C. Inadequate Source of Revenue

Then, too, the need for an expanding tax base has forced and will continue to force many communities to turn their backs on public housing, charitably sponsored nursing homes, nonprofit 236 housing for the elderly, parks, churches and other land uses of benefit to the elderly when these uses take property off the tax rolls. And finally, the property tax is no longer adequate as a source of revenue to supply the services the elderly so badly need.[6]

Although for a long period the property tax—the basic source of revenue for local government [7] remained obscure in its nature and effects,[8] several recent investigations into the problems posed by the tax have been made.[9] These proposals have for the most part concluded that some return of Federal money to the States and/or counties and cities is the only satisfactory resolution of this problem. This return of funds, generally known as Federal revenue sharing, is based on the premise that the Federal income tax is the most efficient and equitable means of raising money, and that this efficiency and equity should be put at the disposal of local government.

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[4] 20 Ad. Law Rev. 328 (1968). And see hearings on Urban America: Goals and Problems before Subcommittee on Urban Affairs of the Joint Economic Committee of the 90th Cong., 1st Session, pp. 90-91 Oct. 2, 1967, in a special reprint for the use of the Joint Economic Committee.

[5] *Municipal Revenue Crisis, supra* note 3 at page 1533.

[6] *See Municipal Revenue Crisis supra* note 3, p. 1539.

[7] For the twelve month period ending June 30, 1967, the property tax accounted for ⅞ of the $29 billion in tax revenue collected by local government. Gillespie, "Urban Affairs—The Property Tax and Urbanization," 21 *Administrative Law Review 319* (1969).

[8] Gillespie, supra at note 7.

[9] Heller, "Revenue Sharing and the City" (1968); Wm. G. Colerme, "Revenue Sharing: Problems and Prospects," 1 Urban Law Review 34 (1969); D. Januta, "The Municipal Revenue Crisis: California Problems and Possibilities," 56 *California Law Review* 1525 (1968). And see sources collected in Turnbull, "Restricted and Unrestricted Federal Grant," 2 *Urban Lawyer* 63 (1970).

Among proponents of revenue sharing, there is still debate concerning:

—Formulas for apportioning the money among the States,
—The extent to which the funds should go to State governments,
—Whether funds should be passed through directly to the cities and counties, and
—The extent and nature of controls and restrictions Congress and the Executive Branch should place on how the money is used.

Although there is widespread agreement that the property tax is inadequate to raise sufficient revenue for local governmental functions, there is still opposition to Federal revenue sharing. Some opponents argue that Federal sharing will further erode State and local governments and cause an unhealthy centralization in Washington. Others oppose revenue sharing because it would limit or eliminate present controls for receipt of Federal categorical aid.

This paper does not purport to be a comprehensive analysis of a problem whose ramification has filled volumes. Rather, the writer simply wishes to direct the attention of the Senate Special Committee on Aging to the heavy burden placed on senior citizens by the present system of local government financing, and the inability of superficial measures such as tax assistance to lighten the burden. The committee in order to protect the elderly must join the search for alternatives to this present inequitable system.

II. THE WORKABLE PROGRAM FOR COMMUNITY IMPROVEMENT

The Workable Program for Community Improvement is a document which a governmental entity must submit to the United States Department of Housing and Urban Development for certification as a prerequisite to certain types of Federal assistance.

The basic requirement for a Workable Program as a prerequisite to Urban Renewal and Neighborhood Development program Federal assistance is set forth in Section 101(c) of the Housing Act of 1949. According to that statute, the Workable Program . . .

> shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life . . . (and shall be directed toward) utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program. . . .[10]

The Secretary of HUD is required by statute to review the Workable Program submitted by each governmental body and to determine "that such program meets the requirements of this subsection and

[10] P.L. 81-171, 63 Stat. 413-414. 42 U.S.C. § 1451.

certifies that the Federal assistance may be made available to such community." [11]

A certification by the Secretary of HUD of a Workable Program is for a two-year period.

The Workable Program requirement is a prerequisite for the following programs:

1. The Urban Renewal Program;
2. The Neighborhood Development Program;
3. The Concentrated Code Enforcement Program;
4. The Interim Assistance for Blighted Areas Program;
5. The Demolition Grant Program;
6. The Community Renewal Program;
7. The General Neighborhood Renewal Plan;
8. Section 312 loans and Section 115 grants;
9. Section 220 FHA mortgage insurance program.

Further, contracts for Urban Renewal and Neighborhood Development Programs cannot be signed unless the Secretary determines that the Workable Program is "of sufficient scope and content to furnish a basis for evaluation of the need for the particular project" and that project "is in accord with the program." [12]

A. Purpose

In discussing the function of a Workable Program, a HUD handbook states:

> The basic purpose of the Workable Program requirement is to ensure that communities desiring to utilize funds for renewal and housing programs understand the array of forces that create slums and blight and are willing to recognize and take the steps within their power to prevent and overcome urban blight.[13]

To that end and under its rulemaking powers HUD promulgated the Workable Program handbook, setting forth the requirements to be followed by the community in its application for certification. The handbook requires that the city show progress in the following four areas:

1. Code adoption and enforcement,
2. Planning and programming,
3. Housing and relocation, and
4. Citizen involvement.

> . . . the application must clearly and specifically describe what the community intends to do during the next certification period in each of the four Workable Program elements. When applying for recertification, the application must also clearly describe what steps the community took in the last period, in order to progress toward meeting the agreed-upon goals and objectives. In developing its "work program" in each of the four elements for the next certification period, the community must also show how the

[11] 42 U.S.C. § 1451(c).
[12] 42 U.S.C. § 1451(e).
[13] The Workable Program for Community Improvement Handbook RHA 7100.1, Chapter 1, para. 2.

proposed activities are related to an analysis of the problems or needs, and to longer-range targets for accomplishment.[14]

A more detailed analysis of the policies, requirements and guidelines will be found in the various chapters of the handbooks. To give but one instance in the application the community must show that the relocation program will:

a. Provide services equal to those required under the urban renewal program, to ensure satisfactory relocation of all persons and businesses displaced. Such services include:
   (1) Prompt handling of authorized relocation payments.
   (2) Establishment of a housing referral system, based upon listing of units which have been inspected and found to be standard.
   (3) Development of a system for assuring, through interviewing, counseling, and referral, that the social and economic needs of those displaced are met.
b. Provide the capability and means for determining the housing needs of those to be displaced during the next certification period by required unit size and rent level or sales price, in relation to the available resources.[15]

For most of its history the Workable Program has been a formality—an ill-prepared and ill-reviewed document that bore little if any relation either to the needs of low-income younger or older people or to what was actually happening in the community under question. HUD did not enforce its own regulations. HUD made no independent investigation of facts and statements contained in the application, nor requested facts and statements regarding allegations of compliance left out altogether.

B. Litigation

The advent of a strong desire on the part of the urban poor to protect their rights has remarkably altered this picture. Beginning in January of this year, citizen groups have filed complaints with HUD charging serious and substantial deficiencies in their community's workable program application and asking that the application in question not be certified.

For example, a complaint was recently filed in Los Angeles on behalf of several elderly and community groups. It alleged that the City did not have:

(1) an adequate program to relocate families to be displaced by governmental action during the two-year certification period,
(2) a program to expand the supply of low- and moderate-income housing, and
(3) adequate citizen participation in the planning and programming of its projects.

The Secretary of HUD agreed with at least some of the allegations in the complaint and refused to grant the city a full two-year certification.

[14] *Ibid.*, chapter 2, para. 2.
[15] *Ibid.*, chapter 6, para. 2.

Applications made by other cities, notably Camden, New Jersey, and Oakland, California, have also been turned down on the basis of charges made by citizens and substantiated by HUD investigation.

Because HUD is now insisting that the workable program requirements mean what they say and that rights granted to poor people by Congress will be, at least to a limited extent, enforced, several civic organizations have suggested that the requirement be abolished.

It is submitted that the abolition of the requirement would be a serious mistake. The workable program is the only document subject to Federal scrutiny in which a community must bring together the totality of its plans for dealing with the problems of blight and slum. Other documents which a city must submit to the Federal government concern only the specific problems of specific limited neighborhoods and are reviewed by HUD on an ad hoc basis, without considering the effect of one particular project on any others.

The planning tool allowing the Federal government to obtain an overview of a community's entire planning program gives protection to the interests of low-income tenants and owners. Only by looking at planning as a whole can the Federal government determine if, in fact, the city's plans will prevent the spread of slums, will expand the supply of low- and moderate-income housing or will work toward any of the other goals Congress has mandated those cities receiving Federal assistance to accomplish.

It is submitted that the elimination of the workable program requirements will enable local governments to ignore the word of Congress and the plight of the poor, and especially the elderly poor.

III. CODE ENFORCEMENT

A city's rigorous enforcements of its buildings and housing codes has generally been regarded as something beneficial to the interests of the poor and underprivileged. And, in fact, many important advances have been made in the past through code enforcement.

> For example, through energetic code enforcement programs, central heating was made a reality for New York City; outdoor water closets were removed in Baltimore; dilapidated backyard sheds and fences were removed in Washington, D.C.[16]

A. A Menace For The Elderly?

But code enforcement has failed to improve standards of maintenance effectively, and for the elderly citizen, code enforcement has become a menace to his well being, comfort and perhaps even his life.

The basics of the problem can be stated very simply. The older person generally owns an older house. Older houses are often in violation of city codes and the older person, being on a fixed income, does not have the resources at his command to make the necessary repairs. In the older person's experience, the arrival of the building inspector is often followed by the loss of his house.

[16] Peter Salsich, Jr., "Housing and the States", 2 *The Urban Lawyer* 40 (1970).

In Los Angeles, to illustrate the problem more fully, upon the completion of an inspection a written report is filed. (Los Angeles Municipal Code (hereafter LAMC) Sec. 96.104). If the Superintendent of Buildings determines that there is probable cause to believe that the building is a substandard or dangerous residential building, he may request that the matter be set for hearing. (LAMC § 96.105) Following notice and hearing, the structure may be ordered to be repaired, if it can reasonably be repaired, vacated if it is in such condition as to make it dangerous to health, morals, safety or general welfare, and demolished if it is 50 percent damaged, decayed or deteriorated. If the owner fails to comply with the order, the department itself may carry it out and assess costs as a tax lien against the property.

It is when the elderly person receives the order to repair or vacate that he is approached by a buyer who offers the now confused and upset senior citizen a price considerably below the property's market value. Often the buyer will give the owner misinformation about the order's legal effect or the owner's right to appeal or in some other way stimulate the owner's sense of panic. In any event, the resultant forced sale is a cause of great heartache to the owner.

Many senior citizens believe that periods of intensive code enforcement are instigated by speculators anxious to buy up property in the enforcement area. It is not chance, many informants have indicated, that brings the buyer hard on the heels of the building inspector. It is further alleged that only the small, elderly and defenseless homeowner is hit by code enforcement and not the owner of apartment units. It should be noted that in at least one other city, St. Louis, similar beliefs prevail among homeowners.[17]

The writer has not yet had the opportunity to undertake a full investigation of the problem. If the charges of fraud and discrimination are correct and provable, then the matter is one for litigation. But the writer believes that the cases brought to his attention could well have been the result of an honestly run code enforcement program and that it is the program itself which may have been the problem.

Assuming that the latter conclusion is correct, the following is proposed:

1. That there be written into the Workable Program the requirement that multi-family units be given priority as objects of code enforcement in the community's program.
2. That no single-family structure owned and occupied by an elderly person be ordered repaired, vacated or demolished unless (a) the building is dangerous to the *physical* health or safety of the occupants or (b) the city can make available to the owner-occupant money from § 115 grants and § 312 loan funds sufficient to cover the full cost of the needed repairs and rehabilitation.
3. That wherever the cost of servicing a loan under § 312 will bring the total cost (including taxes) of maintaining the home to a sum greater than 25 percent of the household income, the city grant the household a property tax deduction equal to the difference between the total cost of maintenance and 25 percent of the household income.

[17] *Ibid.*, p. 45.

IV. ABANDONED BUILDINGS

Recently some attention has been focused on the problem of the abandoned building, lying empty and unusable in the midst of urban areas desperately short of vacant units. While the total of abandoned units is not known with anything like precision, some statistics do exist. It has been estimated that in New York City there are over 38,000 units and in Philadelphia between 16,000 and 18,000 units. In Detroit there are some 13,000 abandoned buildings, while in the Anacostia section of Washington, whole blocks are deserted.[18]

> The forces which have brought about this state of affairs are varied. First, owners are caught in a cost-price squeeze. Buildings simply cannot generate sufficient revenue to make major repairs because their tenants cannot afford the necessary rents. In order to cut their losses, owners cut their services, continuing their disinvestment, by closing their property and ultimately by abandonment. Secondly, rehabilitation capital is almost unattainable and existing mortgages are often unrenewable. Specific factors at work include rising maintenance and rehabilitation costs, high turnover, delayed or forgone payments, increased tenant militancy, and exercise of legitimate legal remedies including rent strikes, theft and vandalism by tenants and addicts, and freeways passing nearby.
>
> Given the increasing age of buildings, rapidly increasing construction costs, growing black-white tension and determination on the part of blacks to control their own environment, there is every reason to believe that the rate of abandonment will continue to rise.[19]

An abandoned building not only means several more units unavailable to meet a desparate need, it is, as well, a serious threat to the heath and safety of the city. For children, the building is an attractive and dangerous nuisance. For criminals and delinquents, it is a convenient meeting place. It is also a site in which a fire could break out unnoticed, a structure from which debris could suddenly topple on to the sidewalk, and a breeding place for rats.

Despite the serious problems posed by these buildings, to date, no city has mounted a coordinated and coherent campaign to deal with them. The failure is both one of civic imagination and civic financing.

It is submitted that the Federal government introduce a program to cope with this problem. Such a program would require the city to turn over the buildings to certain specified types of developers. In return the Federal government would reimburse the city for certain losses in tax revenue it might accordingly suffer.

It is proposed therefore that under such a program:

1. *A legal definition of an abandoned structure be formulated.* One of the threshold problems is that a city cannot deal with an abandoned building as such, but rather can deal with it only in terms of tax delinquency and code enforcement.[20]

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[18] *New York Times*, February 9, 1970, p. 35, Col. 1. Recently, the Housing Committee of the National Urban League announced its intention to launch a nationwide survey of abandoned buildings. 1 Urban League Housing News No. 2, June 1970.

[19] Sheldon L. Schreiberg, "Abandoned Buildings: Tenant Condominiums and Community Redevelopment", 2 *The Urban Lawyer*, 193, (1970).

[20] *Ibid.*

Such a definition would take into account whether the structure was single family, multi-family or commercial, whether it was occupied or not, whether the occupants were paying rent and to whom, the extent of recent repairs and code violations and whether the owner of record could be determined and traced.

2. *A procedure for the location of abandoned buildings be added to the existing code enforcement program and be given priority over other types of code enforcement.* At the present moment unused and cast-aside structures come to the attention of city governments in a random, haphazard way, if at all.

3. *An accelerated procedure be developed whereby the city could secure good and transferable title to the property in question.* It is submitted that the city cannot deal adequately with the problems such buildings pose unless full title can be obtained. In New York and in Los Angeles the city can acquire full title only through in rem proceedings brought after four years of tax delinquency. In actual practice at least six years generally will elapse between the time an owner ceases to exercise control over his property and the time title to it passes to the city. This writer believes that a similar time lag exists in other cities. Given the desperate shortage of housing in most urban areas, low-income people cannot afford to wait while the present tax delinquency procedure grinds its way to completion.[21]

It might be noted that the other existing procedure for dealing with such structures is also not satisfactory. Under normal code enforcement proceedings the city may repair, vacate, or demolish the building and assess its costs as a lien against the property. While this does eliminate the building as a hazard it does nothing to convert the site to productive use. To accomplish this the city must still wait to complete delinquency proceedings.

The accelerated abandonment procedure would follow that used in normal code enforcement matters and will make provision for adequate notice, a full hearing, administrative appeal and judicial review. As in code enforcement proceedings and unlike condemnation actions no compensation will be paid to the former owner.

4. *The structure or site be used in the best interests of the residents of the neighborhood in which it is located.* In most cities, following in rem proceedings, the property is sold at auction to the highest bidder. The city makes no inquiry into what use the new purchaser will make of the property. In New York this is required by State law, in Los Angeles by the Municipal Code. In both cases the city has a justifiable need to satisfy its tax lien and to restore the derelict property to the tax rolls. In any event, there is no evidence that selling to the highest bidder is an effective way of curbing slums, alleviating blight or loosening the present tight housing market.

A program committing the city to using abandoned buildings must set forth guidelines for several interrelated policy decisions.

a. *Type of site use.*—While the discussion up until now has assumed that housing is the most crucial need of low-income areas, it should be noted that there are other needs as well—recreational, educational, medical—whose fulfillment would

[21] The Attorney General of New Jersey has agreed to use the State's powers to condemn abandoned properties in order to avoid the lengthy tax foreclosure process (HUD News, July 1970).

be greatly assisted by free land. It is contemplated, of course, that the transfer would be at no or minimal cost to the recipient.

b. *Type of developer or sponsor.*—The guidelines must keep in mind on the one hand the need for flexibility and experimentation and on the other the need to avoid the opportunities for fraud and favoritism that are potential to a program of this sort. Several possible approaches to the problem are set forth in Schreiberg, "Abandoned Buildings," supra, n. 19, at pp. 193–200. In all cases, of course, rehabilitation or development of housing must result in units available to low- and moderate-income people.

c. *Community access to land.*—Means must be developed to provide notice of the availability of land to the low-income community. Traditional methods, such as advertisements in legal papers, bulletins on the courthouse wall, are not effective in this regard. Cities should be encouraged to advertise in senior citizen newsletters, church publications, black and brown newspapers, as well as to post comprehensible, and, if necessary, multilingual announcements on the site.

d. *Degree of civic ownership retained.*—In a program of this sort, a certain percentage of projects will fail. For this and other reasons it may be necessary to give the developer only a limited interest in the site.

e. *Standards for development and rehabilitation.*—It would be advisable to use the standards already developed for the FHA 235 and 236 programs. Most developments, in fact, will probably be under these programs. In all cases guidelines should insure that the sites do not revert to their delinquency conditions.

5. *A coherent, community-wide plan be developed to coordinate the use of individual sites with each other and with other federally-assisted projects.*—If this program is to be an effective means of rejuvenating neighborhoods, each site cannot be developed on an ad hoc basis. Comprehensive planning is aided by the fact that abandoned buildings tend to cluster together, one deserted building causing an entire block to be abandoned.

6. *The disposition of abandoned building sites be coordinated with the disposition of other civic-owned land not needed for governmental purposes.*—Apart from land acquired after in rem tax delinquency proceedings other parcels of land are from time to time auctioned off by city governments. In selling such land, the responsible city government is generally not required by law to take into account either the community's over-all planning goals or the needs of the low-income residents. Frequently in Los Angeles one city department will sell land at low bid in a neighborhood in which, shortly thereafter another department will buy land at a high condemnation price. This short-sighted lack of policy works a serious waste of scarce civic resources and cuts down on the city's effectiveness in dealing with slums and blight.

It is suggested that as a requirement for participation, cities inventory land under their ownership [22] and make all or a portion of such land which otherwise would be disposed of as surplus property, available for low-income uses under this program.

7. *The Federal Government, through the Department of Housing and Urban Development, reimburse the city for loss of tax revenue resulting from participation in this program.*—It is contemplated that the city will transfer the site to the appropriate developer at no cost. The Federal Government will then transfer to the city an amount equal to the liens due and owing on the site. Additionally, to encourage the city to use great flexibility in making land transfers, to the extent the transfer would decrease the tax the land would otherwise yield, the Government will pay to the city for a ten-year period a sum equal to the difference between the tax revenue actually recovered from the land and the revenue the land would have yielded had it been taxed according to its highest and best usage. This would encourage the city to turn land over to uses for the aged, which are generally tax exempt.

[22] The city of Los Angeles, for instance, does not at this point have an inventory of the land it owns.

CHAPTER FOUR

OPPORTUNITIES FOR ACTION BY STATES

Concerned as it is about the impact of Federal programs on individual older Americans, the Senate Special Committee on Aging recognizes that State governments can take many actions to meet legal needs of the elderly.

The brief recital of several of the legal problems affecting the elderly in housing, Federal benefit programs, and health care hardly exhausts the field. Many knowledgeable persons can describe, for example, the thousands of aged persons warehoused in mental hospitals and in nursing, convalescent, rest, and foster care homes—receiving inadequate or perhaps no medical or psychological treatment.

Others can tell of the refusal of private hospitals or other health care institutions to accept indigent elderly patients even when Medicare and Medicaid eligibility is established; the inadequacy of many municipal hospitals to which the bulk of the poor are referred; the consumer frauds practiced on the elderly by predatory salesmen; the need of supportive services and legal guardians to care for the elderly who should not be institutionalized; and the need for public conservators to manage the meager property of the poor when they become infirm.

Early in the operations of the Legal Research and Services program it became evident that a State legislative program could both substantially benefit the elderly and bring uniformity and cohesion to local policies and practices. In January 1970, all project attorneys met in Washington to discuss State and local legislative needs. In May, a grant was made to the University of Michigan Law School, under the supervision of Prof. William J. Pierce, to draft model statutes and prepare related research. We believe these measures will strengthen State and local capacity to fashion social welfare services and benefits.

Appended to this report is a package of legislation introduced in 1970 to the Massachusetts General Court (the State legislature). It was prepared for the Council of Elders in Roxbury, a Legal Research and Services for the Elderly grantee, by Morris M. Goldings. Mr. Goldings is a partner in Mahoney, McGrath, Atwood, Piper & Goldings, the Boston law firm retained under the grant. A review of these measures will indicate the diversity of legislative problems facing the elderly.

APPENDIX A

MODEL LEGISLATION FOR THE ELDERLY

The following eight bills were submitted to the 1970 session of the Massachusetts General Court by the Council of Elders. With headquarters in Roxbury, the council is comprised of the elderly residents of the Boston model cities area—Roxbury, North Dorchester, and Jamaica Plain. Through a grant from Legal Research and Services for the Elderly, the private law firm of Mahoney, McGrath, Atwood, Piper & Goldings was retained to represent the council.

The Social Security "pass through" bill has been enacted. Approximately 70,000 recipients of old-age assistance were affected. The law excludes $12 of the recent Social Security benefit increase from consideration as "income," preventing a corresponding deduction from the assistance payment.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Authorizing public utilities and common carriers to give free or reduced rate service to the elderly

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

SECTION 1. It is hereby declared that many elderly persons reside in the commonwealth whose annual net income from all sources is less than the amount necessary to enable them to maintain decent living conditions in the inflationary economy presently existing and whose income is fixed in whole or in part so as to be not adjusted to such an economy; that the provision of the services of public utilities, including gas, electric and telephone, at rates reduced from inflationary levels is a necessity of life for such persons so that they may be able to protect themselves from the adversities of old age by continuing to live in private or family units; that the lack of such services at such rates tends to cause an increase and spread of diseases, including communicable and chronic diseases by depriving such persons of ample access to heating, cooking, and emergency medical facilities; that such a condition aggravates those diseases and illnesses peculiar to the elderly, thereby crowding the hospitals and other institutions in the commonwealth with elderly persons under conditions of idleness than inevitable invite senility; that this situation constitutes a menance to the health, safety, welfare and comfort of the inhabitants of the commonwealth; that a public exigency exists which makes the provision of reduced rate services to the elderly by public utilities a public necessity; that the provision of such rates for the purpose of reducing the cost to the commonwealth of their maintenance and care by promoting their health and welfare, thereby prolonging their productivity in the interest of the state and nation, constitutes and hereby is declared to be a public purpose necessary for the preservation of the public convenience.

SEC. 2. Section 15 of chapter 159 of the General Laws, as most recently amended by section 13 of chapter 535 of the acts of 1966, is hereby further amended by adding at the end thereof the following: "nor shall this section or any other provision of law prohibit the giving by any common carrier of free or reduced rate service to an elderly person as defined by the department."

SEC. 3. Section 97 of chapter 164 of the General Laws, as most recently amended by section1 of chapter 615 of the acts of 1963 is hereby further amended by adding at the end of the second paragraph thereof the following: "Any order by the department under this section may direct changes in any schedule so as to result in free or reduced rate service to an elderly person as defined by the department."

SEC. 4. It is hereby declared that this act is intended to complement authority

presently existing in the commonwealth for the approval by the Department of Public Utilities of free or reduced rate service to the elderly as constituting a chartable purpose and nothing in this act shall be interpreted as expressing a legislative finding or intent that the power to give such approval was lacking prior to the effective date of this act.

SEC. 5. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Requiring a reduced rate of at least fifty percent by gas, electric and telephone companies for service to the elderly

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

SECTION 1. It is hereby declared that many elderly persons reside in the commonwealth whose annual net income from all sources is less than the amount necessary to enable them to maintain decent living conditions in the inflationary economy presently existing and whose income is fixed in whole or in part so as to be not adjusted to such an economy; that the provision of the services of public utilities, including gas, electric and telephone, at rates reduced from the inflationary levels is a necessity of life for such persons so that they may be able to protect themselves from the adversities of old age by continuing to live in private or family units; that the lack of such services at such rates tends to cause an increase and spread of diseases, including communicable and chronic diseases, by depriving such persons of ample access to heating, cooking, and emergency medical facilities; that such a condition aggravates those diseases and illnesses peculiar to the elderly, thereby crowding the hospitals and other institutions in the commonwealth with elderly persons under conditions of idleness that inevitably invite senility; that this situation constitutes a menace to the health, safety, welfare and comfort of the inhabitants of the commonwealth; that a public exigency exists which makes the provision of reduced rate services to the elderly by public utilities a public necessity; that the provision of such rates for the purpose of reducing the cost to the commonwealth of their maintenance and care by promoting their health and welfare, thereby prolonging their productivity in the interest of the state and nation, constitutes and hereby is declared to be a public purpose necessary for the preservation of the public convenience.

SEC. 2. Chapter 25 of the General Laws is hereby amended by inserting after section 9 a new section as follows:

"SEC. 9A. The department shall not approve rates or schedules for gas, electric and telephone companies unless such rates or schedules include provisions granting a reduced rate of at least fifty percent to all elderly persons. As used herein the term 'elderly persons' shall mean persons sixty-two years of age or older who are subscribers for gas, electric or telephone service and who do not share such subscription with more than one other person in the same dwelling unit who is less than sixty-two years of age. The department shall adopt and, from time to time, review and, if necessary, modify procedures for the prompt, fair and efficient establishment and maintenance of such reduced rates and schedules by all gas, electric and telephone companies."

SEC. 3. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Requiring the establishment of specialized branch offices of the department of public welfare to administer programs relating to the elderly

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

SECTION 1. Section 5 of chapter 18 of the General Laws, as amended by section 4 of chapter 885 of the acts of 1969, is hereby further amended by adding at the end of the fourth paragraph the following sentences: "One or more branch offices shall be established for the specialized administration of programs under the jurisdiction of the department particularly relating to the elderly and shall be limited to such specialized administration. In establishing branch offices, the commissioner and the state advisory board shall insofar as possible make use of

existing facilities maintained by voluntary or private agencies or organizations and may lease premises and facilities from such agencies or organizations. Any such lease shall not be subject to the provisions of Section ten A of chapter eight."

SEC. 2. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Prohibiting the reduction of old-age assistance on account of increases in social security benefits

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

SECTION 1. Section 1 of chapter 118A of the General Laws, as most recently amended by section 1 of chapter 687 of the acts of 1968, is hereby further amended by adding at the end of the first paragraph the following sentence: "The department shall not reduce the amount of such assistance, or fail to grant or increase such assistance, or reduce budgetary standards on account of any increases in sums received by the aged person from programs administered under the Federal Social Security Act."

SEC. 2. This act shall take effect upon its passage.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Providing for public conservators

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

SECTION 1. The General Laws are hereby amended by inserting after Chapter 194 the following new chapter:

"CHAPTER 194A

"PUBLIC CONSERVATORS

"SECTION 1. There shall be in each county one or more public conservators, not exceeding six each in Middlesex and in Suffolk and five in any other county, appointed by the governor, who shall hold office for five years from the time of their appointment.

"SEC. 2. A public conservator shall give bond for the faithful performance of each estate as to which he is appointed conservator with sufficient sureties or without sureties and in such form as the probate court may order, payable to the commonwealth with conditions substantially as required for a bond of a conservator under section nineteen of chapter two hundred one.

"SEC. 3. A public conservator shall petition the probate court for appointment as conservator of any person who by reason of advanced age, mental weakness, or physical incapacity is inable to properly care for his property and who has no known husband, widow, heirs apparent or presumptive or friend living in the commonwealth at the time of filing the petition who is capable to properly care for the property of such person.

"SEC. 4. Upon the filing of such petition the court shall appoint a time and place for a hearing, and shall cause not less than seven days' notice thereof to be given to the person for whom a conservator is to be appointed, except that the court may for cause shown direct that a shorter notice be given. If the court finds that the welfare of the person requires the immediate appointment of a public conservator, such appointment may be made without notice, in which event notice of not less than seven days shall be given to show cause why the appointment shall be continued or terminated. All notices hereunder shall also be given to the heirs apparent or presumptive of such person, including the husband or wife, if any, and if such person is entitled to any benefit, estate or income paid or payable through the United States Veterans' Administration to such agency, and to the commissioner of public welfare.

"SEC. 5. The petition of a public conservator shall not be granted when the husband, widow or an heir apparent or presumptive of the person, in writing, claims the right of appointment as conservator and files a petition therefor praying for appointment of himself or herself or of some other suitable person, gives the bond required, and satisfies the probate court of the suitability of such appointment. Otherwise, the petition of a public conservator shall be granted if it appears to the probate court to be in the best interests of the person.

"SEC. 6. A public conservator shall have the same powers and duties as a conservator appointed under chapter two hundred one and shall render accounts in the same manner as other conservators.

"SEC. 7. A public conservator may be discharged from an estate by the probate court upon petition of the ward, or otherwise, when it appears that the conservatorship is no longer necessary. The court shall order notice on such petition as it shall deem appropriate.

"SEC. 8. A public conservator shall receive just and reasonable compensation for his services, and reimbursement for expenses actually incurred, in an amount approved by the probate court for such estate, such compensation to be payable out of the treasury of the commonwealth from funds appropriated therefor. In no event shall the compensation or expenses of a public conservator be paid or reimbursed out of the assets of the estate.

"SEC. 9. The probate court in each county shall require every public conservator in such county to render an account of his proceedings under any petitions for appointment at least once a year.

"SEC. 10. A public conservator shall, upon the appointment and qualification of his successor in office, render an account of all estates to the probate court, and, upon a just settlement of each such account, shall pay over and deliver to his successor all money remaining in his hands on such account, and all other property, effects and credits of each ward in his possession or under his control.

"SEC. 11. Upon the death, resignation or removal of a public conservator, the probate court shall issue a warrant to some other public conservator in the same county, requesting him to examine the account of such public conservator relative to the estates subject to his conservatorship, and to return to the probate court a statement of all such estates. Thereupon the court shall appoint the public conservator making the return as successor public conservator of each such estate.

"SEC. 12. This act shall take effect upon its passage."

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Making an appropriation for the special commission relative to the major needs and problems of elderly persons in the commonwealth

Whereas the deferred operation of this act would tend to defeat its purpose, which is to provide funds for the special commission established under chapter eighty-three of the resolves of 1969 for an investigation and study relative to the major needs and problems of elderly persons in the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

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

SECTION 1. To provide for an investigation and study of the major needs and problems of elderly persons in the commonwealth, the state and municipal structures for administering to these problems, and other matters relevant thereto, the sum set forth in section 2 of the act is hereby made available from the General Fund, subject to the provisions of law regulating the disbursement of public funds and the approval thereof and the conditions pertaining to the appropriations in chapter 452 of the acts of nineteen hundred and sixty-nine.

SEC. 2.

GENERAL FUND

State Purposes Appropriation

Legislature

Special Investigations

Item: For an investigation and study relative to the major needs and problems of elderly persons in the commonwealth, the state and municipal structures for administering to these problems and other matters relative thereto as authorized by chapter eighty-three of the resolves of nineteen hundred and sixty-nine, $35,000.

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Requiring the approval by the department of community affairs of forms of leases used in housing for the elderly

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

SECTION 1. Section 40 of chapter 121 B of the General Laws, as inserted by section 1 of chapter 751 of the acts of 1969, is hereby amended by adding at the end thereof the following paragraph:

"(g) No lease, occupancy agreement, or document relating to the tenancy of any elderly person shall be effective unless the precise form of such lease, agreement or document has been approved by the department. The department shall review all forms proposed for use as leases, occupancy agreement or other documents relating to tenancy promptly upon submission to it and shall not approve any form requiring security deposits or any similar deposit of sums for application toward unaccrued rent or other expenses nor shall the department approve any such form it it contains provisions deemed by the commissioner to be inequitable or contrary to public policy having due regard for the conditions of the tenants as elderly persons of low income. The provisions of this section shall apply to all elderly persons of low income residing in any housing within the commonwealth with respect to which any financial assistance has been given by the commonwealth, either directly or indirectly, or as to which the commonwealth has financially assisted the builder, owner or developer in any manner in connection with the construction, operation and maintenance of the said housing, or as to which any city or town of the commonwealth has financially assisted the builder, owner or developer in any manner in connection with the construction operation and maintenance of the said housing."

THE COMMONWEALTH OF MASSACHUSETTS, 1970

AN ACT Providing for the application of meal taxes toward financing programs to improve the nutrition of the elderly and repealing the means test for school lunch programs for the elderly

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

SECTION 1. Notwithstanding any other provision of law, the proceeds of the excise on meals levied under the provisions of chapter sixty-four B of the General Laws shall be paid into the state treasury and credited to the General Fund and shall be used solely toward meeting the expenses under programs presently existing and hereafter authorized for improving the nutrition of the elderly.

SEC. 2. Section 1 of chapter 703 of the acts of 1969 is hereby amended by deleting, from the first sentence of the last paragraph thereof, the words "whose monthly income and liquid assets do not exceed the limitations established for medical assistance for the aged in the commonwealth."

SEC. 3. This act shall take effect upon its passage.

APPENDIX B

LEGAL RESEARCH AND SERVICES FOR THE ELDERLY: WORK THUS FAR

The earliest of the 12 subgrants by LRSE began May 15, 1969. Even in this brief period, the projects have become engaged in a formidable amount of litigation in cases seeking to protect and develop the rights of the elderly poor. The Center on Social Welfare Policy and Law at Columbia University has provided technical assistance to private attorneys and legal services projects throughout the Nation. The following case docket is incomplete but provides an accurate sampling of LRSE's litigation program to date.

CENTER FOR LEGAL PROBLEMS OF THE ELDERLY, CENTER ON SOCIAL WELFARE POLICY AND LAW, NEW YORK, N.Y.

1. Involuntary Commitment and Involuntary Detaining of Assets

a. *Dale v. Hahn* (New York)—Constitutionality of state law authorizing the summary appointment of a committee to manage the financial affairs of a person involuntarily committed to a state mental hospital. Plaintiff is a 68-year old woman committed in 1951 and discharged in 1967. The committee was appointed in 1962 and managed her affairs until one week before she was discharged. Plaintiff managed her own affairs from 1951 to 1962. The suit seeks to prevent deprivation of personal control over property without due process of law—notice, hearing, counsel, trial.

Defendant's motion to dismiss was granted March 27, 1970, by Judge Irving Ben Cooper and plaintiffs application for a three-judge court was denied. The decision seems to rest on the finding that Mrs. Dale did receive notice that a committee was to be appointed and did not request a hearing. Motion for Leave to Appeal *in forma pauperis* is pending. We are assisting New York Civil Liberties Union.

b. *Siegel v. Finch* (Minnesota)—Constitutionality of unilateral determination that a Social Security beneficiary is senile and unable to manage her affairs and the consequent action of suspending benefits until a "representative payee" is selected, both without a prior evidentiary hearing. The Plaintiff is a 73-year-old woman who has been receiving Social Security benefits since she was 62. Basis of suspension benefits was a medical report during the brief entry of Plaintiff into a nursing home. Husband asked to be appointed representative payee but Administrator refused. Legal Aid Society was appointed payee nearly three months later.

After the case was argued on Plaintiff's motion for a declaratory judgment and Defendant's motion to dismiss, HEW agreed to issue regulations requiring prior hearing and reasonable proof before cancelling benefits and appointing another payee. We are assisting Minneapolis Legal Aid Society.

c. *Roark v. Boyle* (Washington, D.C.)—*Amicus curiae* brief filed in U.S. Court of Appeals for the District of Columbia. This is a class action attacking the refusal of the United Mine Workers Welfare and Retirement Fund to pension workers who, although otherwise qualified, did not work their last year of employment in a union mine. Case is being handled by Landis, Cohen and Singman, Washington, D.C. On the brief are LRSE's West Virginia project director and David H. Marlin of the Washington office. The West Virginia project represents many retired miners, their widows and dependents.

d. *Jemison v. Robinson* (Washington, D.C.)—Constitutionality of District statute permitting involuntary transfer of patients committed to St. Elizabeth's

Hospital to previous jurisdiction because they did not reside in D.C. for one year prior to commitment. This class action affects elderly geriatric patients more than any other. *Amicus* memorandum filed before three judge District Court. Case awaiting decision. We are assisting D.C. Legal Aid Agency and Neighborhood Legal Services Project. Also on memorandum is David H. Marlin.

e. *Anderson v. Solomon* (Maryland)—Constitutionality of Maryland statute which permits ex parte involuntary commitments to mental hospitals. No requirement that persons committed without hearings be deemed dangerous to themselves or others. Hearing awaited on motion for preliminary injunction. Assisting Baltimore Legal Aid Society.

f. *Morgan v. United States* (New York)—Damage suit for unconstitutional mental commitment and failure to provide treatment. We are assisting a private attorney.

g. *Bryant v. Battle* (North Carolina)—Suit by doctor against deceased estate for medical services some of which were provided by him while deceased was covered by Medicare. We are assisting a private attorney.

2. Discrimination

a. *Richardson v. Graham* (Arizona); *Gonzales v. Shea* (Colorado); *Rhodes v. Roberts* (Florida); *Leger v. Sailer* (Pennsylvania); *Nikolits v. Bax* (Florida)—Constitutionality of excluding from old age and other public assistance benefits all aliens or those aliens who have not resided within the state for an excessively long time. For example: Arizona—15 years; Florida—20; New Hampshire—10; North Dakota—10; Texas—25. The Center has filed an *amicus curiae* brief in the *Richardson* case, which involves a 64-year old woman, formerly of Mexico, who has been repeatedly denied APTD benefits during her 13-year Arizona residence.

In the *Richardson* case, a three-judge court unanimously held the statute unconstitutional. The decision has been circulated to all attorneys with similar cases. In Arizona, we are assisting the Legal Aid Society of the Pima County Bar Association. The Center is assisting in the other cases listed above, as follows: Colorado, the Legal Aid Society of Metropolitan Denver; Florida, both Law, Inc. of Hillborough County and our project, Legal Services Senior Citizens Center, of Miami Beach; and Pennsylvania, Community Legal Services of Philadelphia. We are also assisting in cases in Texas and New Hampshire. On July 3, 1969, we asked HEW to prescribe regulations prohibiting conditioning all federally-aided public assistance on citizenship and residency.

b. *Negron v. Wallace* (New York)—At issue is the constitutional right to counsel of a person civilly incarcerated (juvenile in this instance) and the reasonableness of certain restrictions placed on that right. Plaintiff was arrested pursuant to a "person in need of supervision" petition and detained in a juvenile center. The court appointed a Legal Aid Society lawyer to represent her. Her previous lawyer was not notified of the arrest. When he found out about the arrest he was denied access to her during a weekend and until he was formally substituted by the Family Court.

U.S. District Judge Murphy held that counsel did have the right of access but that the administrative requirements of operating a civil commitment center permit the imposition of proof of a lawyer-client relationship and the restriction of certain hours for visitation. The reasonableness of the restrictions will be appealed. Motion to proceed *in forma pauperis* is pending. We are assisting CALS.

c. *Santiago v. Charge Account Corporation* (New York)—Constitutionality of a cash deposit or surety bond as a precondition for an indigent to open a default judgment. Secondly, the kinds of personal handicaps that excuse a person from neglect in timely reopening the judgment. The handicaps here are language and illiteracy. The briefs include aging as such an exculpatory handicap.

A petition has been filed with the New York Court of Appeals to modify the remand of the Appellate Division to the Civil Court that removed the preconditions but narrowed the scope of the matter at a rehearing. We are assisting Mobilization for Youth.

d. *Butler v. Jones* (Pennsylvania)—Constitutionality of State Bureau of Vocational Rehabilitation permitting the use of kidney machines only for those who are young and will return to the job market. Plaintiffs are suffering from chronic kidney failure and have been denied hemodialysis treatment previously supplied under a restorative vocational rehabilitation service for handicapped persons.

Case has been argued, briefs filed and decision is awaited. We are assisting Community Legal Services, Philadelphia.

e. *Gonzales v. Goldberg* (New York)—Habeas corpus action by grandfather to gain custody of grandson on his behalf as well as on behalf of his foster daughter, who lives with him and is the child's mother. At issue is the New York practice that permits children to be held by the welfare department without the mother having surrendered the child and without notice, hearing and a finding that the mother is unfit. Petitioner claims his age does not prevent his furnishing suitable home.

Petition filed. Awaiting trial. We are assisting CALS.

f. *In re Morris Albert* (Maryland)—Malpractice suit involving an elderly person's right to be apprised of his physical condition in order to make decisions about operations which would affect his health and life expectancy.

We are assisting a private attorney.

3. Elderly Benefit Programs

a. *Messer v. Finch* (Kentucky)—Constitutionality of arbitrary termination of Social Security disability benefits without a prior evidentiary hearing. Plaintiffs are a husband, wife and seven children (aged 2 to 16) that had been receiving disability insurance payments following the removal of the husband's right lung. He had been a coal miner in Clay County, Kentucky.

Case has been argued and decided unfavorably by a three-judge court. It will be appealed to the Supreme Court. We are assisting Howard Thorkelson, Prestonburg.

b. *Bartley v. Finch* (Kentucky)—Constitutionality of Social Security Act requiring reduction in disability insurance payments to off-set workmen's compensation benefits. Claim is there is a denial of equal protection in that payments are not reduced for persons receiving other forms of compensation for the injury. Plaintiffs are 24 residents of Kentucky.

The case has been argued before a three-judge court. A decision is awaited. We are assisting our project in Morehead, Kentucky that has become co-counsel with attorney Ronald W. May of Pikeville.

c. *Gainville v. Finch* (Massachusetts)—Constitutionality of the income limitation provision of the Social Security Act. Present law restricts outside earned income to $1680 per year without loss of OASDI benefits for persons below the age of 72. The test, brought by seven Plaintiffs who have lost, are losing and will lose benefits, is based on due process and equal protection arguments.

A petition for a three-judge court has been granted. We are assisting the law firm representing the Council of Elders (our Boston project), Mahoney, McGrath, Atwood, Piper and Goldings and the Boston Legal Assistance Project.

d. *In re Angel Matos* (New York)—Right of an applicant for Social Security disability benefits to cross-examine doctors and present medical evidence.

Case was decided favorably in U.S. District Court granting benefits retroactive to May 1967. We were assisting Mobilization For Youth. Now awaiting official HEW approval.

e. *Federici v. Ott* (Massachusetts)—Issue is whether lump sum retroactive Social Security benefits may be attached by a state that has furnished public assistance during the past period. Plaintiff is 65 and relinquished the retroactive benefits under threat of arrest and a law suit.

Argument has been held on cross-motions for summary judgment and decision is awaited. We are assisting the Boston Legal Assistance Project.

f. *Flory v. White* (Ohio)—Issue is the denial of assistance to an applicant because she had a pre-paid burial contract in excess of $400 and insurance in excess of $500. She failed to assign the insurance to adjust the burial agreement.

Mandamus has been denied by the Ohio Supreme Court. We are discussing an appeal.

g. *In re Anthony Russell* (New York)—Issue is the denial of benefits under the Social Security Act for an illegitimate child adopted by a recipient of disability insurance payments. The adoption occurred more than 24 months after applicant's last entitlement to benefits.

A hearing has been held and decision is awaited.

h. *Rothstein v. Wyman* (New York)—Constitutionality of state establishing different level of payments for public assistance based on geographic residence. Claim is that it is an equal protection violation and is contrary to the Social Security Act. Plaintiffs are aged, blind and disabled welfare recipients residing in Nassau and Westchester Counties.

Injunction granted by three-judge court but appealed to U.S. Supreme Court. We assisted throughout the Nassau County Law Services Committee and the Legal Aid Society of Westchester County. We have filed an *amicus curiae* brief

in the U.S. Supreme Court in conjunction with Nassau County. U.S. Supreme Court has remanded the case to the lower court to establish statutory claim. Will participate in filing supplemental brief.

i. *In re Robbins* (New York)—Issue is the retroactive recovery of "over payment" of Social Security benefits because of the income limitation.

Social Security Administration has agreed to pay requested benefits.

j. *In re Lola Howard* (Colorado)—Issue is denial of medicaid benefits because applicant had income above eligibility level although medical expenses will reduce income below that level.

Adverse hearing decision will be appealed.

k. *O'Reilly v. Wyman* (New York)—Constitutionality of a New York statute requiring the medically indigent not on welfare to pay 20 percent of the costs of out-patient care under the State Medicaid program. The attack on the co-insurance law was brought by several elderly plaintiffs as a class action.

A U.S. District Court judge issued a TRO to enjoin implementation of the law until the matter was heard by a three-judge court. That court dissolved the injunction after three months. The state delayed implementation until the regulations were changed so that the harm complained of was eliminated. The Center represented the Plaintiffs directly. We estimate the action of the Center saved $4,500,000 for the medically indigent of New York.

l. *In re Hahn* (New York)—Mrs. Hahn, eligible for Medicare, was a patient in a nursing home for 99 days. Notification was promptly made.

The carrier first requested information for processing her claim 8 days after she left the nursing home and then proceeded to deny payment because "non-covered" services were obstensibly rendered.

Request for reconsideration was made and is awaited. We are preparing for an administrative hearing and, if necessary, for judicial review.

Issues:

(1) Whether certification of medical necessity by the doctor or utilization review team is binding upon the carrier for purposes of determining whether covered services were rendered.

(2) Whether there are any binding time periods within which a determination must be made.

(3) Whether the provider agreement between the nursing home and Social Security prevents the nursing home from charging patients when payment has been denied by Medicare on the basis that non-covered services were rendered.

LEGAL SERVICES SENIOR CITIZENS CENTER, MIAMI BEACH, FLORIDA

1. *City of Miami Beach v. State of Florida.*—This is an action under state law to validate a bond issue of $350,000 voted on November 18, 1969, to purchase land for school purposes. The statute permits unlimited citizen intervention. We represent elderly clients who challenge the requirement that only freeholders (landowners) are allowed to vote. Most South Beach residents, of course, are not property owners.

2. *Nikolits v. Bax.*—Constitutional challenge to state law that conditions eligibility for old age assistance to citizens or aliens who have resided in the United States for at least 20 years. Plaintiff is an 88-year old woman who moved to Florida from Canada nearly five years ago. She is confined to a wheel chair and requires considerable care. The Center on Social Welfare Policy and Law of Columbia University is assisting.

3. *Goldberg v. Dade County.*—Mandamus action by the president of the Inter-Center President's Council of Senior Centers for the County to produce a study of Senior Centers allegedly completed in May, 1968 and to re-instate financial support for them. The purpose of the study was for the County's budget department to evaluate the quality of the centers and consider alternative methods of providing service to the elderly. Plaintiff was a member of the study group and has been denied the report.

4. *Kuntz v. Dade County.*—Constitutional challenge to County ordinance that prohibited residential picketing except when the residence is used as a place of business, or employment involved in a labor dispute, or for a public meeting. Suit was brought by Miami chapter of ACLU. We represented an intervening Plaintiff, Abraham Marcus, who is president of a large senior citizens club and vice-president of the Dade County Council of Senior Citizens. Marcus claimed

he had an immediate plan to picket the homes of Dade County Commissioners who voted to eliminate the Senior Centers hot meals program and who will not support lower bus fares for the elderly.

U.S. District Court Judge William Mehrtens ruled on April 7 that the statute was invalid as "overly broad on its face" as a violation of the First and Fourteenth Amendments.

5. *Dryspiel v. Berkman.*—Constitutionality of a Florida statute authorizing peace warrants be served after a citizen complaint at the discretion of a justice of the peace. Plaintiff allegedly insulted complainants and created a "disturbance." The suit alleges the statute is vague and infringes the right of free speech and expression. A motion to dismiss has been filed on the ground the case is moot because the warrant was vacated after this action was filed.

6. *Linder v. City of Miami Beach*—Suit alleges that a state law creating a two percent "resort tax" is void as its passage was technically faulty. The tax applies to all restaurant meals over 50 cents. Plaintiffs are leaders of the United Senior Citizens for Community Action, Inc. Plaintiffs hope that if the bill is voided the state will either not re-enact it or raise the minimum to $2.00. Case was decided adversely and has been appealed.

7. *Fleetwood Hotel, Inc. v. City of Miami Beach*—On October 15, 1969, the City of Miami Beach enacted a rent control ordinance that would particularly benefit elderly low-income residents. Four landlords brought suit, on behalf of 2,000 Miami Beach landlords, to enjoin the City from implementing the law. A state court judge invalidated the ordinance on May 5, 1970 on grounds that the City was without authority to promulgate rent control, that there was an unlawful delegation of legislative power and that the ordinance conflicted with other provisions of state law. We are assisting Atty. Tobias Simon of Miami, special counsel to the City, in the appeal.

8. *Mourning v. Family Publications, Inc.*—Class action charging that magazine subscriptions were sold in violation of the truth-in-lending law that requires contracts to contain the total amount of charges and fully disclose all terms and conditions. Hearing awaited in Federal court.

9. Two petitions to intervene have been filed. One would permit 27 Beach residents to join in the challenge to recently increased Dade County property tax assessments. The other opposes the attempt now in litigation to divide Miami Beach into six election districts instead of the present at-large elections. Senior citizen clients believe districting would dilute their vote and diminish their influence.

HOUSING OPPORTUNITIES FOR THE WEST SIDE ELDERLY

1. *East Los Angeles Welfare Rights Organization v. City of Los Angeles.*—Administrative complaint filed with the U.S. Department of Housing and Urban Development on behalf of 10 organizations of poor aged and minority city residents. The complaint alleges the Workable Program for Community Improvement submitted by the City is not in compliance with provisions of Federal law governing code enforcement, housing and relocation, planning and programming and citizen participation. Certification of the Workable Program was provisionally approved by HUD in May, but only for six months instead of the normal two-year approval. Further legal action is under consideration. HUD has retained jurisdiction and the City has scheduled public hearings on the Program.

2. *Los Angeles Community Service Organization v. County of Los Angeles.*—This is an administrative complaint filed with HUD, challenging the Workable Program filed by the County. It raises substantially similar issues to the complaint against the City. The County has not yet responded.

3. *Gold v. City of Los Angeles.*—Suit to enjoin the sale of Media Park to private persons. Media Park, located on Culver Boulevard adjacent to the city limits of Culver City, is located in a residential neighborhood substantially inhabited by elderly persons of limited means who use it regularly. Nearly forty years ago a portion of the park was acquired by the City for rights of way to Venice Boulevard. Realignment of the highway will now cause abandonment of that land and the City has decided the Park is "unsuitable" and has proposed that an equivalent plot of land be acquired and dedicated as a public park. The plaintiffs contend the Park is suitable and that the City is proposing to substitute a smaller park in violation of the Los Angeles Charter. Case awaiting trial.

4. *Appel v. City of Los Angeles.*—Suit to prevent the City and County of Los Angeles from imposition of substantial land assessments which would involve the widening and deepening of the Venice Canals, and related improvements. Plaintiffs are tenants, poor and elderly, who live in the affected area. The improvements, amounting to a $20.5 million assessment, would attract expensive high-rise apartments and drive out aged residents. Basis of the suit is that only property owners were permitted to appear at the hearing and that relocation provisions of state law have been ignored. Plaintiffs' motion for partial summary judgment was granted June 19, 1970 with respect to the rights of tenants to appear and vote at a hearing establishing the assessment district.

5. *Lumel v. Poladian.—Amicus curiae* brief filed to invalidate California's "baggage lien law." Enacted in 1876 to give innkeepers the right to detain a guest's baggage until he paid his bill, the law is now applied to urban apartment dwellers. The brief contends this application is an invasion of privacy and the taking of property without due process of law.

6. *Congress of Mexican-American Unity v. Yorty.*—Suit to enjoin further expenditures by HUD and the City of Los Angeles in the East-Northeast Model Cities area brought by 300 Mexican-American organizations and a group of elderly homeowners. Basis of suit is failure of the city to establish a citizens participation structure as required by Federal law. Defendants have not responded as yet.

CALIFORNIA RURAL LEGAL ASSISTANCE

1. *King v. Brian.*—Lawsuit to require the Director of the California Department of Health Care Services to adopt administrative regulations that will permit Medi-Cal (the State Medicaid program) beneficiaries to enroll as regular subscribers in prepayment health care plans. At present California disburses Medi-Cal moneys only on a fee-for-service arrangement. The suit alleges that the California legislature passed a law in 1969 requiring the Director to contract with prepayment organizations in behalf of Medi-Cal beneficiaries and adopt appropriate regulations. In its complaint, CRLA asserts that prepayment health care plans will enhance competition among various organizations to provide quality health care, substantially reduce the cost of health care, improve the quality of medical services rendered under Medi-Cal and substantially reduce the program's administrative costs. A hearing has been postponed pending a negotiated settlement.

2. *Wong v. Brian.*—This action seeks to enjoin the Director of the California Department of Health Care Services from adopting regulations that would eliminate 50,000 medically needy persons from Medi-Cal eligibility. The regulations, which would affect 200,000 persons not on welfare but eligible for certain health benefits, lower the monthly income level and reduce the amount of personal property that may be owned. The suit alleges the proposed changes conflict with Federal and State law and, if adopted, would force those persons excluded from Medi-Cal into becoming public assistance recipients. Hearing scheduled before August 1, 1970, the effective date of the regulation.

3. *Robertson v. Martin.*—Suit to enjoin the promulgation of emergency regulations that would reduce by 50 percent the State payment for attendants of persons who require personal home care services. Salaries would be reduced from $300 to $150 monthly. The effect of the regulations, calculated to save $10 million, would require the institutionalization of thousands of elderly persons in nursing home and county facilities. The State rescinded the regulations following a courthouse conference prior to the suit being filed.

APPENDIX C

LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, SPONSORED BY THE NATIONAL COUNCIL OF SENIOR CITIZENS, FOR THE U.S. OFFICE OF ECONOMIC OPPORTUNITY

STAFF

NATIONAL COUNCIL OF SENIOR CITIZENS

Nelson H. Cruikshank, President
William R. Hutton, Executive Director
Rudolph T. Danstedt, Assistant to the President

LEGAL RESEARCH AND SERVICES FOR THE ELDERLY
1627 K Street, N.W., Washington, D.C. 20006

Robert J. Mozer, Project Director
David H. Marlin, Associate Director
Sara Jane Hardin, Assistant Director
Irene L. Gomberg, Executive Assistant
Enilda P. Angulo, Legal Secretary

CENTER FOR LEGAL PROBLEMS OF THE ELDERLY, CENTER ON SOCIAL WELFARE POLICY AND LAW,

401 West 117th Street,
New York, New York 10027.

Jonathan Weiss, *Project Director.*

Sponsored by Columbia University, this project is the main research and technical assistance resource for LRSE. It is currently assisting in the litigation of more than forty lawsuits designed to protect and expand the legal rights of senior citizens. The issues include commitment procedures, withholding of benefits and pensions, residency requirements as eligibility for public assistance, and the quality and availability of medical care. The Center has also prepared comments concerning health care, public utility rates for the elderly, Social Security, and public assistance. A booklet, "Your Right to Medicaid", has been published in English and is soon to be translated into Spanish. The project co-sponsored with the National Legal Program on Health Problems of the Poor a national conference in Chicago on health care issues.

SAN FRANCISCO LOCAL DEVELOPMENT CORPORATION,

2707 Folsom Street,
San Francisco, California 94110.

Simon Blattner, *Project Director.*

This economic development program in San Francisco concentrated its experience and expertise on assisting the elderly poor to become entrepreneurs. The major effort under the grant concerned the establishment of a wholesale meat business specializing in serving minority-owned grocery stores and restaurants. The work involved market research, operations and financial planning, the institution of an insurance policy to guarantee loan repayment, and the association of a partner.

COUNCIL OF ELDERS,

14 John Eliot Square,
Roxbury, Massachusetts 02119.

James Bergman, *Project Director.*

An incorporated organization of the aged residents of the Model Cities area of Boston, the Council of Elders has retained as counsel the private law firm of Mahoney, McGrath, Atwood, Piper and Goldings. The project drafted and submitted to the Massachusetts legislature eight proposed bills, ranging in issue from utility rate reductions to the appointment of public conservators. Last summer, at the request of Senator Moss of the Senate Special Committee on Aging, the project submitted a statement suggesting changes in Model Cities legislation and policy that would facilitate the establishment of similar councils elsewhere. The Council's other accomplishments include obtaining fare reductions for seniors on public transportation, securing police protection from the Boston Housing Authority in public housing projects, and testimony before numerous committees and commissions on the problems of the elderly.

HOUSING OPPORTUNITIES FOR THE WEST SIDE ELDERLY (HOWSE), WESTERN CENTER ON LAW AND POVERTY

309 Santa Monica Boulevard, Suite 403,
Santa Monica, California 90401.

Stanton J. Price, *Project Director.*

Operated by the Western Center on Law and Poverty, this project has specialized in housing problems of the elderly in the Los Angeles area. HOWSE was successful in persuading the Santa Monica City Council to participate in the leased housing program administered by the County of Los Angeles; an administrative complaint has been filed to deny certification by HUD of the Workable Program for Community Improvement submitted by the City of Los Angeles; a lawsuit was filed to prevent a canal assessment that virtually would have eliminated low-cost housing in Venice. HOWSE has also drafted housing legislation and provided assistance to groups active in the construction of federally assisted low-income housing.

RESEARCH AND SERVICES FOR THE ELDERLY

1015 Tijeras Avenue, NW.,
Albuquerque, New Mexico 87103.

Clarence Gailard, *Project Director.*

The purpose of this project sponsored by the Legal Aid Society of Albuquerque has been to furnish legal assistance to the elderly poor in the organization and development of cooperatives, buying clubs, small businesses, and employment opportunities; and to analyze and evaluate the difficulties and prospects of these goals. One of the main accomplishments has been the creation of the Senior Citizens Employment Service, the first of its kind in Albuquerque, with more than 500 elderly residents registered.

SMALL ESTATES ADMINISTRATION FOR THE BRONX AGING (SEABA)

960 Grand Concourse, Bronx, New York 10451.

Professor Edward McGonagle, *Director.*

Under the sponsorship of Fordham Law School and the direction of one of its professors, the project is designed to produce legislative recommendations to reform the administration of small estates so that property is transferred expeditiously and the estate is protected from unjust fees and costs, including the establishment of a minimum under which no charges would be made. The project has a community education office in the Bronx to inform the elderly of probate law and procedure, acquire community views and assist them in arranging their affairs. The project will examine and report on probate practices of all States, with special emphasis on New York.

LEGAL RESEARCH AND SERVICES FOR THE ELDERLY

University P.O.B. 854,
Morehead State University,
Morehead, Kentucky 40351.

Michael Johnson, *Project Director.*

One of two LRSE programs in Appalachia, this project first conducted an intensive survey of elderly residents of Rowan County, Kentucky. The survey revealed that the lack of public transportation prevented senior citizens from applying for and receiving Federal and State benefits to which they were entitled. The local Community Action Agency agreed to furnish free bus service throughout the county two full days each week. The project also has assisted the elderly poor in receiving the benefits of a low-cost loan program to provide materials to enable them to participate in *Operation Mainstream:* it has presented testimony before the Senate Select Committee on Nutrition & Human Needs; and has participated in litigation to improve Federal benefits programs for the elderly. The project is sponsored by the Legal Services Program of the Northeast Kentucky Area Development Council.

LEGAL SERVICES SENIOR CITIZENS CENTER

Suite 309, Harvey Building,
1370 Washington Avenue,
Miami Beach, Florida 33139.

Leonard Helfand, *Senior Attorney.*

Operating in an area heavily populated by the elderly poor, the Miami Beach program has the support of a large community organization base. One of its most significant accomplishments has been the drafting and successful advocacy of a rent control ordinance. The project is currently engaged in litigation to uphold the validity of the ordinance. Other activities include assistance of groups attempting to construct low-cost housing for the elderly; the submission of a public guardianship statute now pending before the state legislature; improvements enacted to the city's Minimum Housing Code; and several law suits, including a challenge to the residency requirements for eligibility to receive old age assistance. This project is sponsored by the Economic Opportunity Legal Services Program in Miami.

LEGISLATIVE RESEARCH CENTER, UNIVERSITY OF MICHIGAN LAW SCHOOL

Ann Arbor, Michigan 48104.

Professor William J. Pierce, *Director.*

This is a newly-funded 10-week program of research and legislative drafting conducted by the Law School. The project is drafting model statutes, which can be tailored to local requirements, with explanatory materials, and legal memoranda which can be converted to state statutes by state legislative drafting services. The issues include housing, Federal benefits, conservatorship and guardianship, and agencies concerned exclusively with the elderly.

LEGAL RESEARCH FOR APPALACHIAN ELDERLY

308 Coal and Coke Building,
Bluefield, West Virginia 24701.

James Haviland, *Project Director.*

Sponsored by the Mercer County Economic Opportunity Corporation, this project, located in a coal-mining district of Appalachia, has concentrated on Social Security disability benefits and effective regulations governing determination of eligibility under the Federal Coal Mine Health & Safety Act of 1969. The West Virginia project, additionally, has submitted comments on proposed hearing and appeals procedures for the State Department of Welfare; begun production of a series of community education booklets (which will include illustrated discussions of the usefulness of lawyers, Social Security, health care, pension rights, and consumer and housing problems); litigated numerous cases involving claims for disability insurance benefits and miners pension benefits; and begun investigation into nursing home care.

SENIOR CITIZENS PROJECT,
CALIFORNIA RURAL LEGAL ASSISTANCE

942 Market Street, Room 606,
San Francisco, California 94102.

Fred J. Hiestand, *Counsel.*

The only LRSE project exclusively concerned with health care and facilities, CRLA has a three-fold focus: litigation, legislation and training elderly community residents to work on behalf of the poor with various health agencies and institutions. The project has sued to require the State of California to authorize Medicaid contracts with pre-paid health insurance plans and to prevent announced reductions in the Medi-Cal program. CRLA has developed an intensive three-month lay advocacy training program which has been completed by its seven aides. The aides have been subsequently placed for employment with social welfare agencies in the San Francisco area. A training manual, based upon the project's experience, has been developed for use by other programs.

GOLDEN AGE LEGAL AID

1070 Washington Street,
Atlanta, Georgia 30315.

Sidney L. Moore, Jr., *Project Director.*

The Atlanta Legal Aid Society, sponsor of Golden Age Legal Aid, has developed a broad program of law reform for adoption by the city council and the state legislature. Proposals range from lower transportation rates at non-rush hours, to revision of the city's housing code, to improvements in the substance and administration of government programs that benefit the elderly. GALA has created successful cooperative grocery stores in several public housing projects and has assisted the organization of several economic development projects.

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Appendix 2

THE AGED AND PROPERTY MANAGEMENT*

A STUDY OF DEHUMANIZATION

(By George J. Alexander, Dean and Professor of Law, University of Santa Clara School of Law, and Travis H. Lewin, Associate Professor of Law and Director, Psychiatric Defense Center, Syracuse University College of Law)

INTRODUCTION

The hypothesis

Pursuant to a grant from the Frederick and Amelia Schimper Foundation of New York City, the Syracuse University College of Law undertook a study of the management of the estates of persons judicially declared to be incompetent and incapable of managing their own affairs. The study was limited to Onondaga and Tompkins Counties in New York, although information was gathered and studied from more universal sources. The study sought to identify the current practice in the administration of the estates of the incompetent and particularly the incompetent aged. The working hypothesis derives from the following thesis stated by Dean George J. Alexander:[1]

"It is important to recognize that however benevolent the intention of those who would seek to substitute other decision makers for the aged, persons deprived of the right to decide for themselves will have lost the fairly basic attribute of citizenship. Consequently, it seems more appropriate to view the question of how the law should intervene not as a question of maximizing benefit to the potential ward but of reducing to a minimum the deprivation of that person's rights. From this perspective one might better ask *in whose interest is a surrogate manager of property appointed?*"

Stated as an imperative, the hypothesis is that the surrogate management of property of the aged incompetent is conducted in the specific interest of some person other than the incompetent.

The applicable New York statutes read as if the primary interest to be protected is that of the incompetent. The New York statute covering jurisdiction over the custody of the person and property of an incompetent provides in part:

The court shall preserve the property of a person it declares incompetent * * * from waste or destruction and, out of the proceeds thereof, provide for the payment of his debts and for the safekeeping, support and maintenance and the education, when required, of the incompetent and his family.[2]

To test the hypothesis and to determine if the intent of the statute was actually being carried out, the research study sought answers to the following questions:

(1) Is the management of the aged's property conducted with a view towards maximizing the incompetent's enjoyment of his property?

(2) Is management of the aged's property carried out primarily with a view to protect the interest of some creditor, heir, next of kin or other person with an identifiable interest in the incompetent's estate?

(3) Is the management of the aged incompetent's property carried out primarily to maximize the size of the estate during the period of incompetency?

[1] Alexander, *Surrogate Management of the Property of the Aged,* 21 Syr. L. Rev. 87, 165 (1969).

[2] N.Y. Mental Hygiene Law § 100 (McKinney Supp. 1969).

*The study was conducted pursuant to a grant from the Frederick and Amelia Schimper Foundation, New York, New York by a research team composed of Edward M. Chikofsky and Leslie H. Wiesenfelder, Third Year Law Students, Syracuse University College of Law, and Douglas Meiklejohn, Third Year Law Student, Cornell University Law School.

(4) Is the incompetent consulted by the estate manager relative to his desires as to estate management?

In addition to the above hypothesis Dean Alexander suggested that the aged suffer merely from memory loss and unfamiliarity with legal processes and do not lose their judgment concerning their personal goals relative to their estate.[3] If this hypothesis proved correct, then an additional question would be raised: Is the present legal process which enables a surrogate to completely seize decision-making authority from the aged an overreaction to the problem? Dr. Alexander suggested that if the hypothesis was confirmed the present laws ought to be amended to provide legal guidance in lieu of autonomous intervention and management of the incompetent's estate.

"A legal assistant would be responsible for reviewing with his charge all major financial transactions which the charge seeks to undertake. He would remind him of prior obligations, legal restrictions and other complications to be anticipated but would be expressly denied the right to substitute his own decision for that of his charge. In effect, he would provide a service that is directly responsive to a weak memory and lack of orientation to the legal framework of commerce without removing the essential right to property disposition from the aged person." [4]

Methodology

The research study was undertaken in three distinct phases. First, a comprehensive search was made of the existing law; second, a field study was conducted primarily to determine the kind of information provided in support of or opposed to incompetency, including the medical and financial basis for incompetency, and to determine the nature of the management of the estate and the treatment afforded the incompetent; and, third, an empirical study was completed in which the research team interviewed trust officers, judges, lawyers, medical supervisors, institutional personnel, state and government officials and hospitalized incompetent patients.

The first portion of the study was undertaken in 1968–1969 and resulted in a published report appearing in the Syracuse Law Review.[5] This study identified and catalogued statutes and case decisions in an effort to determine the doctrinal approach to the management of the property of the aged. The following year, this study was continued, statutes were updated and a bibliography was prepared.

In the second portion of the study the research team sought to determine if the hypothesis developed from a review of the legal authorities was correct. We sought to determine to what extent, if any, the participants in the process were concerned about the actual ability of the incompetents to manage their property. We sought to determine if physicians gave consideration to this as a part of their evaluation and whether the estate managers consulted with the patient or incompetent before making transactions concerning their property. We sought to determine the actual extent to which the incompetent participated in the management of his own estate and shared in the proceeds of the estate.

The field study was conducted by a team of three third-year law students under the direction of the author and in consultation with Dean Alexander. All court files in Tompkins and Onondaga Counties over a ten-year period beginning in 1960 were examined. Five hundred seventy-two files were examined in Onondaga County and forty-two files were studied in Tompkins County. (Because of the limited number of estates, the latter county served only as a basis for comparison with the Onondaga study.) From these files the study team sought to determine three principal factors in the management of estates: (1) the nature of allegations and ultimately proof of the extent to which a physical or mental condition interfered with an individual's ability to manage his estate (in other words, what kind of medical proof is necessary to warrant (a) a hearing on the issue of competency and (b) a judicial finding of incompetency); (2) the roles of the participants in the incompetency process and the extent to which they either act for or against the interests of the incompetent; and (3) the manner in which the incompetent's estate is managed.

Following this examination and a statistical study of the data collected, the research team interviewed a number of the participants in the process seeking to learn the actual function of the various persons who deal with the incompe-

[3] Alexander, *supra* note 1, at 166.
[4] *Id.*
[5] Alexander, *supra* note 1.

tent's estate. The persons interviewed included: (1) attorneys' for the committees; (2) committees; (3) hearing judges; (4) the Onondaga County examiner of accountings; (5) the psychiatrist most frequently called upon to examine for incompetency; (6) the Veteran's Administration through its Regional Attorney and a local Contact Service Officer responsible for the management of a number of veterans' estates; (7) trust officers of three local banks in an effort to determine the nature of the services provided by banks when acting as committees of the property of incompetents; (8) treating psychiatrist at the Marcy State Hospial, Marcy, New York; (9) head psychiatric social worker, Marcy State Hospital, Marcy, New York; (10) financial officer, Marcy State Hospital; and (12) Patient Resource Officer, Utica State Hospital, Utica, New York.

A random selection of files examined in Onondaga County was made and these cases were followed up at Marcy State Hospital by examining hospital records, interviewing hospital and state administrative and medical personnel and, in some cases, by interviewing the patients themselves. Interviews of persons declared incompetent but living outside the confines of an institution were structured with a view to determining the extent to which the incompetency process restricts their normal daily lives. Interviews at state hospials were designed to determine the extent to which the patient believes he is being treated fairly and the extent to which the size of the estate affects the patient's standard of living while at the institution.

An examination of the Onondaga and Tompkins County files led to placing these files in three separate categories in accordance with the nature of the relationship between the petitioner and the incompetent. In addition, each category was broken down into four subcategories. Using the categories described below, the research team was able to delineate some distinctly different approaches to the management of estates. The first and by far the largest group of cases were those in which the petitioner was the State Hospital in which the incompetent was a patient at the time of the petition. Two hundred eighty-two of four hundred nineteen files containing at least a petition and court order were opened on the motion of the State Hospital as petitioner. The second group was made up of cases in which the petitioner was the Veterans Administration with or without a co-petitioner.[6] Of the 419 estates in Onondaga County, 79 were commenced by the Veterans Administration. The final group contained 58 files consisting mainly of cases commenced by citizens, ordinarily with some relationship to the incompetent.[7]

The files were also examined from the standpoint of the committee makeup. Twenty-one point four percent of all files had attorneys appointed as committee of both the person and the property. Of these 88 files, all but 7 involved petitions by one of the State Hospitals. Thus, attorneys were appointed as committees most frequently when the petitioner was the State Hospital. By far the largest class of committees was that containing some kind of relative. Over 53% of all the estates had relatives as committees. Estates with private petitioners had the largest percentage of relatives serving as committees with over 73% of such estates in the hands of private managers, while in 57% of all proceedings initiated by the State Hospital relatives served as committees. Just over 7% of all the estates had individuals serving as committees who had no relationship to the incompetent. Again, the largest percentage of this category of committees occurred in the State Hospital files with 9% of the estates managed by individual nonrelative committees as compared to 2.6% of the estates in Veterans Administration files and 7% of those in files commenced by private persons. In the finel category of committees, 16.7% of all files had banks or trust companies as committees. The Veterans Administration had 60.7% of its estates administered by such corporations. Nineteen point six percent (19.6%) of estates commenced by private petitioners had corporate managers, while only 4.3% of estates formed after the State Hospital petitioned for incompentency had corporate managers.

An indicated in the report, certain broad inferences could be drawn from the study relative to estate management. First, estates of incompetents below the age of 65, whether managed by corporations or by relatives, uniformly increased in value during the period of incompetency. The most consistent increase was in the cases of veterans whose estates were managed by corporations. The specific

[6] Veterans Administration officials advise that the VA normally will use a co-petitioner where a relative or other interested party exists. However, this co-petitioner is merely a nominal party. The initiative in the bringing of the proceeding is almost always with the VA itself.

[7] See Appendix. (Not Printed.)

purpose of estate management appears to be to provide a reasonable estate for the still youthful incompetent while at the same time maintaining him and his dependents with a view to providing the incompetent with some property upon restoration to competency. Since this purpose was generally carried out and since it was obviously in the interest of the incompetent, the process could, in at least one respect, be said to be carrying out in practice the expressed goal of the statute. As the study indicates, however, many of these "incompetents" were given a limited, and in some cases considerable, voice in the management of their estates. As such it was clear that what they needed was legal and financial advice by some person with limited powers of enforcing his recommendations. Declarations of incompetency would seem to be unnecessary in many of these cases.

The most consistent and largest percentage decreases in size of estates occurred in connection with estates formed after the State Hospital commenced proceedings. Almost all of these estates involved persons classified as "aged incompetents" [persons who were either over 65 or who were debilitated because of physical or psychiatric illness or condition or persons near this age who exhibited the so-called symptoms of the senile aged]. In nearly all of these cases, the primary purpose for the proceeding was to secure payment of hospital expenses due to the State,[8] and the estates were either quickly liquidated or were about to be liquidated at the time of the incompetent's death. In no case could a paramount interest of the incompetent be identified either as the reason for opening the file or as a basis on which the estate was managed. Although the group of estates representing private nonlegal, noncorporate petitioners contained the smallest number of files, they were by far the largest in amount. As indicated in the appendix,* 47 estates averaged $78,317 when the files were opened. There was no clear trend of estate management in the case of proceedings commenced by relatives or "friends," but as in the case of proceedings commenced by state hospitals there was no indication that the primary interest being served was that of the incompetent. In many of these estates the committee which was responsible for the day-to-day expenditures on behalf of the incompetent had a distinct and adverse interest in the corpus of the estate.

No cases were found where the court on the motion of a guardian or "friend" of the incompetent or on its own motion took judicial action in order to protect some specific interest of the incompetent. Occasionally the court would act to protect the assets of the estate but ordinarily it was concerned only with the extent of the legitimate interest of the committee or some third person. Usually the court reviewed the financial transactions of the committee only because some other person who had a residual (vested or contingent) interest in the estate made some complaint about management.

By way of summary, except for young veterans if the specific interests of the incompetent were protected it was out of inadvertence and not design.

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[8] Interview with Dr. Heinz G. Cohn, M.D., Deputy Director, Marcy State Hospital, Marcy, New York, July 8, 1970.

*Not printed.

Appendix 3

STATEMENTS FROM INDIVIDUALS AND ORGANIZATIONS

ITEM 1. STATEMENT OF CYRIL F. BRICKFIELD, LEGISLATIVE COUNSEL, NATIONAL RETIRED TEACHERS ASSOCIATION; AMERICAN ASSOCIATION OF RETIRED PERSONS

Mr. Chairman and Members of the Committee, I am Cyril F. Brickfield, Legislative Counsel for the American Association of Retired Persons and The National Retired Teachers Association. Our organizations, as national, nonprofit and nonpartisan associations, with a combined membership of over 2 million older persons, are dedicated to the task of easing the burdens of life for our country's elderly and retired citizens on whose behalf we appear before you today. We hope that by effectively exposing their legitimate needs and by stimulating a response to those needs, that we will, thereby, effectively discharge our responsibility to protect the interests of those incapable of protecting themselves.

We, therefore, welcome this opportunity to offer testimony upon the multifarious legal problems confronting our elderly citizens. They suffer needless anxiety, deprivation and injustice, as a result of a serious lack of adequate legal services, a lack of knowledge as to the proper manner of securing those legal services which are available and the lack of financial resources to retain the aid of competent counsel even when available; this situation must be remedied, if we are ever to secure for our elderly citizens the security they rightly deserve. While comprising nearly one-third of this nation's poor, the elderly have received legal services negligible in proportion to their numbers and wholly inadequate in proportion to their needs; their rights remain largely unprotected; their grievances largely unredressed.

The elderly have endured, most often in silence, continued violation of fundamental rights and arbitrary denial of benefits due under law. The areas of Social Security and Railroad Retirement benefits, disability benefits, Old Age Assistance, health care and treatment, conservatorships, guardianships, public and private housing, consumer fraud, mental commitment, private pension plans, taxes and general economic deprivation provide fertile fields for the germination of complex legal problems whose solution requires competent legal aid.

As a group, the elderly are the least capable of articulating their own needs and bringing them to the attention of the government. The situation is aggravated, of course, by the timidity and withdrawal which characterize the elderly and by the uninterest in the elderly characteristic of lawyers. Yet, it must be remembered that older Americans, under our judicial system, are entitled to the same qualified and thorough legal representation afforded other segments of our population.

Forced to readjust to a mode of living dictated by the diminished income he receives, the retiree, in this country, must also struggle with a variety of overlapping, often poorly integrated Federal and state welfare programs, the technical complexities of which often prevent him from obtaining the maximum number of precious dollars of income to which he is legally entitled. Benefit programs are of little value if their existence is unknown to the otherwise eligible individual, if their technical language is beyond the comprehension of the average unaided recipient, or if the procedural morass through which he must pass requires a degree of patience and mental acuity possessed by few. Obviously, the difficulty and expense of obtaining competent counsel to represent individual interests must be overcome, if the legal and equitable needs of the elderly retiree are ever to receive adequate attention. It is not enough to establish a benefit program; the

individual, as experience has indicated, must be provided with the qualified legal assistance in order that he may obtain that which was intended for his benefit.

I. ADMINISTRATIVE DECISIONS

Decisions made by those administering Social Security, Old Age Assistance, Aid to the Blind, Aid to the Permanently and Totally Disabled and programs providing benefits to veterans and their survivors are ordinarily subject to provisions requiring an opportunity for adequate hearing before benefits received under way of these programs may be terminated or reduced in amount. However, financially unable to retain counsel, many claimants must simply acquiesce in arbitrary administrative decisions, since to avail themselves of the opportunity for a hearing most often requires an understanding of procedural and substantive matters of which they are simply not capable.

Social Security and state welfare offices should be required, at a very minimum, to inform claimants at any time a benefit is denied, terminated or reduced, of the nearest legal services office from which legal aid may be obtained without cost; and if such free legal aid is unavailable in any particular area, the agency itself should be required to provide a qualified lawyer, or the fee necessary for his retention.

The present method of remunerating legal counsel for OASDI hearings and judicial review limits attorneys to a maximum fee of 25% of total past due benefits recovered, regardless of the extent or quality of the attorney's work. Although the policy of preventing undue dilution, by excessive attorney's fees, of recovered past due benefits should be continued, it must be recognized that attorneys will avoid representing claims when the amount of past due benefits is small, the likelihood of success doubtful, or where litigation may be protracted. To remedy this problem, Federal funds should be made available to provide adequate compensation to the attorney in those cases where the 25% maximum is inadequate.

"Little can be gained by forcing a claimant to either proceed to a hearing without legal representation because one-fourth of his past due benefits are insufficient to compensate an attorney, to have to suffer until he has accumulated sufficient past due benefits to attract an attorney, or to face a hearing alone because his claim is too difficult to justify an attorney's time at the contingent rate of 25% of past due benefits." (Legal Problems Affecting Older Americans," Senate's Special Committee on Aging, August, 1970).

Funds also should be made available to those indigent persons to pay the medical expenses incurred incidentally to the gathering of that evidence necessary for their case in disability hearings.

Hearsay evidence, while inadmissable in a court of law, except in limited instances, is fully admissable in administrative hearings; however, its admission should never be allowed to result in a denial of benefits, without the claimant being afforded the opportunity to cross examine adverse witnesses where their hearsay testimony forms the basis upon which the administrative decision turns.

Finally, the lack of conformity in applying the law and regulations in OASDI cases, has resulted in contradictory decisions in similar cases in various parts of the country; this situation, too, must be corrected.

II. INTERRELATION OF BENEFIT PROGRAMS

An increase in OASDI benefits, often results in a reduction in amounts paid by many private pensions, OAA and veteran pension programs, with the result that an individual, receiving benefits under more than one program may be worse off after the OASDI increase than before. This situation, too, must be corrected so that an increase in OASDI benefit levels will always result in a net increase in benefits being received by the individual.

III. INVOLUNTARY COMMITMENT OF THE AGED

The involuntary commitment procedure in various states must be changed (some still permit ex parte commitment) to provide the individual with adequate safeguards. Hearings may often be discretionary or summary and legal counsel is not generally provided; jury trial is rare, and after commitment few states provide for periodic review of continued illness. To prevent arbitrary and unnecessary commitment, provision must be made for mandatory notice, full evidentiary hearing and legal representation.

Moreover, once committed, the individual should be provided with proper medical and psychiatric treatment, based on his needs, and adequate in the light of those needs.

IV. RETROACTIVE BENEFITS AND LEGAL RIGHTS

OASDI now provides a one year limitation on the amount of retroactive benefits measured from the date of application that may be received. The poor, undereducated, less informed worker is often harmed as a result of this requirement, since he is least likely to know of his legal right to OASDI, and least likely to come into contact with someone who will inform him of his rights. In order to overcome this problem, the Social Security Administration should be required by law to notify all persons of their eligibility at age sixty-two and again at age sixty-five, if benefits have not commenced by then.

Also, in the case of OASDI and veterans benefits, there is a need for the making of interim payments, from the date application is made until the date that final disposition is made, to those persons lacking adequate resources.

V. REDEFINING "DISABILITY"

For OASDI purposes, "disability" is defined as "an inability to engage in any substantial, gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." To modify the impact of relatively liberal court decisions, the Social Security Administration prevailed upon Congress to adopt restrictive amendments of which the most flagrant requires that a disabled beneficiary be unable to perform not only his previous occupation but any other kind of substantial gainful activity, regardless of the fact that such opportunity may not exist in his immediate area. A disabled person may, therefore, be required to remove himself and his family from familiar surroundings and friends to take a far away menial job, for which his disability renders him barely qualified.

VI. A VESTED RIGHT TO SOCIAL SECURITY

In the context of social welfare, the concept that the receipt of benefits is a mere privilege, subject to arbitrary change, rather than a right must be changed. Social Security is too important to people who have relied upon it to allow Congress to alter the Social Security Program to the detriment of expectant beneficiaries, lacking vested right to benefits.

VII. ELIMINATION OF RELATIVES' RESPONSIBILITY

Title II of the Family Assistance Act would eliminate relatives' responsibility for those otherwise eligible to receive benefits under any of the adult assistance categories. This shift of the burden of dependence from relatives to the Government constitutes a major and welcome policy change which should be applied to amend other Federal laws, wherever necessary.

VIII. RETROACTIVE DENIAL OF RENEFITS UNDER MEDICARE

Should the Social Security Administration or its agent determine that medical services rendered were not necessary or were only custodial, and, therefore, not covered, reimbursement may be denied to a patient and he may find himself liable to the provider of services, despite the fact that he had been placed in such a facility on the advice or order of a physician. To remedy this problem, doctors should be mandatorily required to certify the medical necessity of the services provided to a patient, who should be exempt from any subsequent liability therefor.

Ordinarily, if benefits are denied, the provider of services usually sends a bill to the patient who may then contest the Social Security Administration's determination by filing for a reconsideration and if this is denied, by requesting a hearing. Since recipients usually lack the cash assets to make an interim payment to the provider of services while the Social Security Administration determines his case, the law should be changed to prevent the provider of services from suing a patient on a bill before the final administrative determination has been made.

Also, present law should be amended to allow a patient to obtain judicial review of his case, regardless of the amount in controversy—as is the case with Social Security determinations.

Part B of Medicare (Supplementary Medical Insurance) provides for a "fair hearing" procedure conducted by the carrier in place of the usual provision for administrative and judicial review. This provision should be changed since this delegation of decision-making power to a private body, as part of the operation of a Government program, denies traditional public accountability; moreover, the past performance of the carriers in the exercise of this delegated power has been wholly inadequate.

IX. ADEQUATE HOUSING AND PROPERTY TAXES

Elderly persons are generally retired and live on relatively fixed incomes. Often, they are unable to meet the costs of up-grading their homes to comply with community standards or to pay the higher rents necessitated by the improvement costs incurred by their landlords. Thus, whether they own their own homes or pay rent, this continued upward rise in their cost of living often results in relocation in less expensive, often blighted areas. To remedy this situation, state and local governments should exempt the elderly or at least the lower income elderly, from the property tax, or at least allow them a deduction or a credit from their state income tax liability for property taxes paid.

The basic tax structure of state and local governments must be changed so as to deemphasize the tax on property as a major source of revenue. The tax discourages new construction and renovation and thereby encourages the growth of slums. High taxes on urban improvements accelerate the process of blight by discouraging owners from rebuilding or repairing their structures, and instead, investing their capital in securities or real property in areas of lower taxation.

Moreover, the need for expanding the tax base, especially for municipalities, discourages communities from providing public housing, charitably sponsored nursing homes, nonprofit 202 housing for the elderly, parks, churches and those uses of property not productive of property tax revenue. Obviously some type fo revenue sharing system must be established whereby the Federal Government will turn back to the states some portion of its tax revenues.

X. THE PROBLEM OF THE BUILDING CODE

Rigorous enforcement of a city's building and housing code generally benefits the interests of the poor, as long as repair costs are not reflected in the form of higher rents.

However, vigorous code enforcement may pose a serious problem for the typical elderly homeowner, who is living on a fixed income. To remedy this problem, municipalities should be prevented from ordering any single family structure owned and occupied by an elderly person, repaired, vacated or demolished, unless it is dangerous to the physical well-being of the occupants, or unless the city first makes available loan funds, sufficient to cover the full cost of needed repairs.

XI. ADEQUATE PROGRAMS OF LEGAL AID

Older Americans are in critical need of free legal services; they are often ill-advised or unadvised as to the legal implications and consequences of their actions. They often fail to provide for someone to handle their legal affairs and property in the event of illness. They fail to draw up wills to govern the disposition of their property at death, or if they do, the lack of adequate legal supervision often results in the production of an invalid will. They are all too often the victims of consumer fraud. The legal problems connected with remarriage or divorce are often neglected, and the considerable advantage of prenuptial agreements overlooked and the effect of remarriage on the validity of a will and social security payments is commonly ignored.

The buying or selling of a home often entails considerable legal problems. One might be better advised to sell for cash in one instance or take out a mortgage in another, depending upon the tax consequences. An attorney's advice here would often prove invaluable.

To provide the legal services needed by the elderly on a scale adequate to those needs, Federal laws should be amended or new legislation passed which would appropriate funds for a national legal aid program designed specifically to reach the elderly. For example, where an area of a city is to be designated a "Model

City," adequate legal service to aid the elderly could be provided as part of that program. Certainly there are a great variety of Federal legislative vehicles which could be amended to supply these necessary legal services.

ITEM 2. LETTER FROM NORMAN J. KALCHEIM, CHAIRMAN, COMMITTEE ON LEGAL PROBLEMS OF THE AGING; TO SENATOR WILLIAMS, DATED SEPT. 10, 1970

AMERICAN BAR ASSOCIATION,
Philadelphia, Pa., September 10, 1970.

Hon. HARRISON A. WILLIAMS, Jr.,
U.S. Senate Special Committee on Aging,
Washington, D.C.

DEAR SENATOR WILLIAMS: We are returning herewith the transcript on which I have made several corrections as noted.

Insofar as our Committee's Second Annual Report is concerned, while it was adopted by the Family Law Section of ABA, this has not become official ABA policy, but rather only the policy of the Family Law Section. Various procedures are set up for obtaining approval of the recommendations of the report by submission to the House of Delegates, etc., so that I cannot at this time say that it has been adopted by the ABA as such. Additional recommendations submitted at the Hearing represent the thinking of the members of my Committee, and may overlap some of the recommendations contained in the Annual Report. Thus, I cannot prepare the preamble you requested in view of the above. I think the recommendations in the form indicated will be just as effective.

As far as my comments on model State laws, I will have to give this some thought, although we have already commented on the Uniform Probate Code Article V as being an essential tool in protecting the legal rights of the aged in any guardianship or commitment proceedings. This is set out in the Annual Report, and I think your Committee could well urge all States to adopt the Uniform Probate Code, which has been approved by the ABA, emphasizing that part of the Code set out in Article V. We are in the process of evaluating several public guardianship statutes. The most progressive is the California Public Guardianship Act. As you will note from the testimony given, there is being offered to the Legislature of Massachusetts a Public Guardianship Act; the District of Columbia has one; but the basic question is the need for a uniform Public Guardianship Act, so that with the mobility of people today, their rights will be essentially the same and will be uniformly protected in guardianship or commitment proceedings wherever they occur in this country.

I may have some other thoughts on some possible State laws which I will convey to you at a later date.

Cordially,

NORMAN J. KALCHEIM,
Chairman, Committee on Legal Problems of the Aging.

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