University of Miami Law Review

Volume 31 | Number 1 Article 7

10-1-1976

Access to Health Care Services for the Poor: Existing Programs and Limitations

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ACCESS TO HEALTH CARE SERVICES FOR THE POOR: EXISTING PROGRAMS AND LIMITATIONS

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Contending that rising health care costs have severely limited the poor's access to hospitals, the author examines and discloses the shortcomings of Medicare, Medicaid, the Hill-Burton Act, and section 501(c)(3) of the Internal Revenue Code. Finding these to be inadequate, the obligation to the poor under state tax exemptions for "charitable" institutions is explored using Florida as a model. The author finds that these, too, have not provided a solution due to a lack of enforcement, ambiguity, and the absence of defining regulations. The article concludes with recommended changes.

I. INTRODUCTION

Aggravated by the spiralling cost of medical services in recent years,[1] financial barriers to access to health care have become a problem of serious magnitude.[2] These increased costs have directly hindered the access of the poor[3] to the nation's mainstream hospital

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1. During the third quarter of 1974, the annual price increase in the medical care component of the Consumer Price Index was 18.6 percent, compared with 12.4 percent for the Index generally. [Nov. 1974] CONSUMER PRICE INDEX DETAILED REPORT 9. More specifically, the cost of an average hospital day has jumped from $16 in 1950 to $101 in 1973. Feldstein, *The Medical Economy*, SCI. AM., Sept. 1973, at 154.

2. The concerns of many Americans about high costs and unequal accessibility to health care services have resulted in growing pressure for federal intervention in the health care industry to assure a basic right to uniform, minimum health care. This interest is reflected in numerous legislative proposals in Congress in support of national health insurance. Kennedy, *Preface: Public Concern and Federal Intervention in the Health Care Industry*, 70 NW. U.L. REV. 1 (1975).

3. The question of who the "poor" really are is a complex one, with no clear-cut answer. Definitions vary with each governmental agency offering free services to the "poor." The Office of Economic Opportunity (OEO) Income Poverty Guidelines, 45 C.F.R. § 1060.2-4 (1975) define the "indigent" as follows:

system, and specifically to private, nonprofit hospitals. Outpatient services for indigents, as well as free inpatient services, that were

3. (Cont.)

Family Size	Monthly Income	Yearly Income
1	$215	$2590
2	284	3410
3	352	4230
4	420	5050
5	489	5870
6	557	6690
7	626	7510

(These figures are for 1975.) Eligibility for free legal representation by Legal Services of Greater Miami, Inc., is determined on the basis of 1973 OEO guidelines, 37 Fed. Reg. 26109 (1972):

Family Size	Monthly Income	Yearly Income
1	$175	$2100
2	227	2725
3	288	3450
4	350	4200
5	410	4925
6	463	5550
7	518	6200
8	570	6850
9	623	7475
10	675	8100

Eligibility for free legal representation by the Public Defender's Office of Dade County, Florida, is determined on the basis of "solvency" as defined by FLA. STAT. § 27.52 (1975):

> (b) The following facts shall be prima facie evidence of solvency:
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> . . . .
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> 2. If the defendant has no dependents and his gross income exceeds $75 per week; the income limit shall be increased by $10 per week for each of the first two dependents of the defendant and by $5 per week for each dependent beyond the first two . . . .

In Florida, the eligibility criteria for uncompensated medical services pursuant to the Hill-Burton Act (*see* section II, B *infra*) are based upon the following factors:

> (1) The health and medical care insurance coverage, personal or family income, size of the patient's family, and other financial obligations and resources of the patient or the family in relation to the reasonable cost of the services shall be considered in determining persons, otherwise self-supporting but unable to pay the full charge.
>
> (2) Office of Economic Opportunity Income Poverty Guidelines, which will be the basis of uncompensated services for persons unable to pay.

The definition of "poor" for the purpose of providing free or below cost medical care should be broad enough to include not only the "indigent," but the "medically indigent" as well—those persons who are unable to pay the costs of necessary medical care, regardless of whether they fall within the OEO income poverty guidelines. This definition is supported by the Hill-Burton Act, which provides that the criteria for identifying persons unable to pay for services "shall include persons who are otherwise self-supporting but unable to pay the full charge for needed [medical] services." 42 C.F.R. § 53.111(g)(1) (1975).

previously provided by these nonprofit hospitals have been largely eliminated or reduced.[4] This diminution in the delivery of health care was specifically recognized by the Supreme Court in *Memorial Hospital v. Maricopa County*.[5] Noting the "astronomical costs of hospitalization which bear so heavily on the resources of most Americans," the Court observed that "[t]he financial pressures under which private nonprofit hospitals operate have already led many of them to turn away patients who cannot pay or to severely limit the number of indigents they will admit."[6]

Concomitant with the reduction of services supplied by private, nonprofit hospitals, the public hospitals[7] (which are often the main or sole health facilities open to the poor) have become overcrowded, understaffed, underfinanced, and underequipped, and are consequently inadequate to meet the demands of the poor.[8] As a result, it is essential to examine other avenues of access to health care for the poor and their effectiveness in closing this gap between the supply and demand for services which has been created by rising costs. Presently, there are several such avenues of access, including Medicare, Medicaid, the Hill-Burton Act, and section 501(c)(3) of the Internal Revenue Code. The first part of this article will explore these approaches and their inadequacies in meeting this need for health care. The second part will focus on Florida's tax exemption statutes for "charitable" institutions, and the cases interpreting them, as the source of a specific obligation of Florida's private nonprofit hospitals to provide health care services to "those unable to pay."

II. Approaches to Closing the Gap Between Supply and Demand in Health Care

A. *Medicare and Medicaid*

In response to the health care crisis, the federal government

4. *See* Rose, *The Internal Revenue Service's "Contribution" to the Health Problems of the Poor*, 21 Cath. U.L. Rev. 35 (1971); Schwartz & Rose, *Opening the Doors of the Nonprofit Hospital to the Poor*, 7 Clearinghouse Rev. 655 (1974).

5. 415 U.S. 250 (1974).

6. *Id.* at 265.

7. "Public" hospitals are those hospitals directly supported by state and county funds and administered by the state or county.

8. *See* authorities cited in note 4 *supra*.

adopted Medicare[9] and Medicaid[10] in 1965. Although these programs meet the health needs of the poor to some degree, they have been inadequate to fully ameliorate the situation:

> Whereas the "mainstream" of health care during the 1950s and early 1960s was progressive and represented by research-oriented medical centers, public hospitals became the "dumping ground" for the medically indigent and had come to be identified with a dual standard of health care delivery. The passage of Medicare and Medicaid legislation in the mid-1960s was expected to unify the dual system. Unfortunately the private sector has not absorbed its proportionate share of the sick poor.[11]

Moreover, there are many gaps in the coverage of the federal programs. The primary limitation of the Medicare program[12] is that it principally covers persons over age 65.[13] Additional limitations are imposed in the form of: (1) a maximum number of days covered by Medicare per "spell of illness";[14] (2) cost-sharing devices such as deductibles, co-insurance, and premiums which shift a portion of the burden of payment to the Medicare recipient;[15] and (3) numerous exclusions from coverage.[16]

The effectiveness of the Medicaid program[17] is significantly lim-

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9. 42 U.S.C. §§ 1395 *et seq.* (1970).

10. *Id.* §§ 1396 *et seq.*

11. HOSPITALS, July 1, 1970, at 54. HOSPITALS is the official publication of the American Hospital Association.

12. For a full discussion of Medicare see Butler, *An Advocate's Guide to the Medicare Program*, 8 CLEARINGHOUSE REV. 831 (1975).

13. Also covered are those persons under age 65 who have been entitled to old-age, survivors, and disability insurance benefits under Title II of the Social Security Act for 24 consecutive months or more. 42 U.S.C. § 1395(c) (Supp. V, 1975). In addition, a special exception has been made for persons under age 65 who are either fully or currently insured under Social Security, and who are medically determined to have chronic renal disease and require hemodialysis or renal transplantation for such disease. 42 U.S.C. § 414(b) (1970); *id.* § 426(e) (Supp. V, 1975).

14. 42 U.S.C. § 1395d(a) (1970).

15. *Id.* § 1395e.

16. *See id.* 1395y(a). Exclusions include expenses incurred for: (1) routine physical checkups; (2) eyeglasses or eye examinations for the purpose of prescribing, fitting, or changing eyeglasses; (3) hearing aids or examinations therefor; (4) immunizations; (5) custodial care; (6) the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth; (7) treatment of flat foot conditions; and (8) personal comfort items. A broad exclusion is for expenses for services "which are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member." *Id.* § 1395y(a)(1).

17. For a full discussion of Medicaid see Butler, *The Medicaid Program: Current Statutory Requirements and Judicial Interpretations*, 8 CLEARINGHOUSE REV. 7 (1974).

ited since the only persons to whom participating states are statutorily compelled to provide services are the "categorically needy."[18] This group includes recipients of benefits under the state's plan for Aid to Families with Dependent Children (AFDC)[19] and recipients of Supplemental Security Income benefits (SSI).[20] Restrictive eligibility requirements[21] for these programs therefore severely limit the class of persons able to benefit from the Medicaid program. For example, single persons and intact family units are ineligible for AFDC in Florida and are thus excluded from Medicaid coverage despite their poverty (unless eligible for SSI). In fact, nationwide only 59 percent of those individuals defined as "poor" by the United States Department of Health, Education, and Welfare (HEW) receive Medicaid coverage.[22] Furthermore, many states, including Florida, have chosen not to participate in the optional Medicaid

18. "Categorically needy" individuals include those who qualify as recipients under a state plan falling within 42 U.S.C. § 1396a(a)(10)(A) (1970) and those who are mandatorily eligible for Medicaid assistance. *See* Butler, *supra* note 17, at 8-9.

19. *See* 42 U.S.C. §§ 601 *et seq.* (1970).

20. *See id.* §§ 1381 *et seq.*

21. AFDC in Florida is available to families with dependent children under age 18 and an absent or disabled parent whose income (after certain deductions) is less than the following need standards:

Family Size	Need Standard
1	$111
2	150
3	195
4	230
5	265
6	300

(Add $30 for each additional person over 6.)

STATE OF FLORIDA ASSISTANCE PAYMENTS MANUAL, Department of Health and Rehabilitative Services, Social and Economic Services Program (SES).

Medicaid is also available to children of ages 18-21 who would be otherwise eligible for AFDC but for their age, as well as to foster children in the custody of SES. In January 1976, 244,009 persons received AFDC payments in the State of Florida. SSI is available pursuant to 42 U.S.C. § 1381a (1970) to those persons who are either blind, over 65, or permanently and totally disabled, and whose income and resources are within the guidelines set forth in 42 U.S.C. § 1382(a) (Supp. V, 1975). To be within these latter statutory guidelines, an individual must have: (1) an income less than $1752 per year if without an eligible spouse, and resources less than $2250 if living with a spouse or $1500 if not living with a spouse; and (2) an income less than $2628 per year if with an eligible spouse, and resources less than $2250 (these figures are combined income and resources of both the individual and spouse).

22. In Florida, only 27 percent of those persons defined as "poor" by HEW receive Medicaid coverage. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, SUBCOMM. ON HEALTH AND THE ENVIRONMENT, DATA ON THE MEDICAID PROGRAM: ELIGIBILITY, SERVICES, EXPENDITURES FISCAL YEARS 1966-76 43 (Jan. 1976).

program which provides benefits for the "categorically related medically needy."[23]

Satisfaction of the health care needs of the poor through the Medicaid program is limited further by its scope of coverage.[24] Additionally, the states have the discretion to limit the amount, duration, and scope of all services provided under the Medicaid program, as long as the services covered are sufficient to "reasonably achieve their purpose."[25] On its face, this standard is difficult to apply. In practice it means that the state's discretion has no defined limits. As yet, there have been no cases in which a court has examined the adequacy of amount, scope, or duration of Medicaid services.[26]

As the costs of Medicaid have become increasingly burdensome upon the states in recent years,[27] many states, and especially Florida, have exercised their discretion to limit the amount, duration, and scope of services by effecting "cutbacks" which further limit the already restricted availability of medical services to Medicaid recipients. Such "cutbacks" include: limiting or eliminating optional services; restricting the amount or duration of mandatory services; imposing burdensome prior authorization procedures to discourage treatment; freezing or reducing provider reimbursement levels; imposing cost-sharing obligations; and restricting eligibility.[28]

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23. The "categorically related medically needy" are persons who otherwise meet the AFDC or SSI eligibility standards, but whose income or resources are slightly greater than that allowed by the eligibility criteria. Such persons are considered eligible for Medicaid if their income, reduced by their medical expenses, falls below the "medically needy" eligibility level set by the state. 42 U.S.C. § 1396a(a)(10)(C) (Supp. V, 1975). Congress has set the maximum medically needy income level at 133 1/3 percent of the AFDC payment level. 42 U.S.C. § 1396b(f)(1)(B)(i) (1970).

24. 42 U.S.C. § 1396a(a)(13)(B) (1970). Mandatory services which the state must provide are listed in 42 U.S.C. §§ 1396d(a)(1)-(5) (1970), *as amended*, (Supp. V, 1975). Optional services which the state is not required to provide are listed in 42 U.S.C. §§ 1396d(a)(6)-(16), *as amended*, (Supp. V, 1975). The optional services include private nursing services, clinical services, dental services, physical therapy, drugs, intermediate care facility services, mental hospital services for persons over 65, prosthetic devices, eyeglasses, and hearing aids.

25. 45 C.F.R. § 249.10(a)(5) (1975).

26. Two cases have been settled: Carr v. Bonin, No. 72-2738 (E.D. La., May 5, 1972); Powers v. Lackey, Clearinghouse No. 8906 (N.D. Ga.).

27. Medicaid costs increased from under $2 billion in 1965 to over $10 billion in 1975. Although this increase is mainly attributable to inflation in the costs of services, the states have chosen to reduce the number of eligible recipients and to impede access to services, rather than to attempt to control the costs of the services. Mullen & Fredenburg, *Coping with Medicaid Cutbacks*, 9 CLEARINGHOUSE REV. 392 (1975).

28. Florida's "cutbacks" include: (1) reduction of the maximum amount of covered inpatient hospitalization care from 45 to 30 days per year, with no hospitalization for surgery

Finally, the unavailability and inaccessibility of Medicaid providers (particularly physicians) represent severe problems for Medicaid recipients. Low reimbursement rates and burdensome administrative procedures are prime factors in deterring provider participation.[29]

B. *The Hill-Burton Act*

Due to the inadequacies of the Medicare and Medicaid programs, alternate routes have been utilized to provide health care services to the poor. One such avenue is the enforcement of the legal obligations of the hospital-grantees of federal construction money under the Hill-Burton Act.[30] Under this Act, federal construction money is given to nonprofit hospitals in exchange for their assurance that:

> (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area . . . [the "community service" obligation]; and (2) there will be made available in the facility or portion thereof to be constructed or modernized a reasonable volume of services to persons unable to pay therefore . . . [the "free service" obligation].[31]

Although these obligations remained ignored and unenforced for almost 25 years, recently the Act and its obligations have been revitalized through a series of lawsuits.[32] Thus, in *Cook v. Ochsner Foundation Hospital*[33] the obligation to participate in the Medicaid program has been construed to be included in the "community service" obligation of the Hill-Burton grantees:

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which can be "safely" postponed; (2) reduction of outpatient hospitalization care from $200 to $50 per year; (3) reduction in physician fees; (4) elimination of dental care for adults; (5) limitation on dental care under the EPSDT screening program for children under 18 to only "essential" dental care, and a maximum of $125 for such care per year; (6) elimination of optometric services; (7) elimination of prosthetic devices, including eyeglasses, hearing aids, dentures, and artificial limbs; and (8) maximum of $20 per month for prescription drugs, with burdensome administrative procedures if a greater amount is required.

29. *See* Butler, *supra* note 17.

30. 42 U.S.C. § 291c(e) (1970); 42 C.F.R. §§ 53.111, .113 (1975).

31. *Id.* § 291c(e)(1).

32. For a full discussion of the history of the Hill-Burton Act and its revitalization see Rose, *Federal Regulation of Services to the Poor Under the Hill-Burton Act: Realities and Pitfalls*, 70 Nw. U.L. REV. 168 (1975).

33. 61 F.R.D. 354 (E.D. La. 1972).

> The exclusion of persons covered by the Medicaid Program . . . constitutes a denial of service to persons in the territorial area, and consequently a violation of the "community service" obligation of the defendant hospitals.[34]

In response to this ruling, HEW promulgated regulations mandating participation in the Medicaid program by all Hill-Burton hospitals:[35]

> In order to comply with its community service assurance an applicant must:
>
> (2)(i) Make arrangements, if eligible to do so, for reimbursement for services with: . . . (B) Those Federal governmental third-party programs, such as Medicare and Medicaid, to the extent that the applicant is entitled to reimbursement at reasonable cost . . . .

A 20-year limitation for mandatory Medicaid participation was added by HEW,[36] but the *Cook* court invalidated that provision in subsequent litigation.[37]

The enforcement of the "community service" obligation of Hill-Burton grantees to participate in the Medicaid program would greatly increase the number of Medicaid provider hospitals in the private sector, and thereby increase the access of the poor to that sector. As non-compliance is currently widespread,[38] such enforcement would facilitate this desired result.

HEW also has established presumptive compliance guidelines for fulfillment of the "free service" obligation:[39]

> An applicant which, for a fiscal year, (1) budgets for the support of, and makes available on request, uncompensated services at a level not less than the lesser of 3 percent of operating costs or 10 percent of all Federal assistance provided to or on behalf of the applicant under the Act, or (2) certifies that it will not exclude any person from admission on the ground that such person is unable to pay for needed services and that it will make available to each person so admitted services provided by the facility with-

34. *Id.* at 361.

35. 42 C.F.R. § 53.113(d)(2) (1975).

36. 42 C.F.R. § 53.113(a) (1975).

37. Cook v. Ochsner Foundation Hosp., (unreported opinion) (E.D. La., March 12, 1975).

38. *See* note 46 *infra* and accompanying text.

39. This obligation is limited to 20 years from the opening of the facility or the portion thereof receiving the grant. 42 C.F.R. § 53.111(a) (1975).

> out charge or at a charge below reasonable cost which does not exceed any such person's ability to pay therefore . . . shall be deemed in presumptive compliance with its assurance.[40]

These guidelines have been criticized as unfair to poor people and inconsistent with the underlying policy of the Act.[41] Initially, it may be noted that these guidelines (which are inordinately low) were set as a maximum by HEW. Thus, a state's Hill-Burton agency may not require that a larger volume of free care be provided by any hospital, although it may have the financial ability to do so.[42] Furthermore, the hospital grantee may choose freely from among the presumptive compliance options, without regard to equity. As a result, a hospital which is financially able to elect the "open door" option (whereby no one would be turned away from admission for financial reasons) may legally choose one of the significantly less demanding options.

In computing the amount of free service provided, the court in *Corum v. Beth Israel Medical Center*[43] held that bad debts are not to be included:

> [T]he only services for which the statutory assurance is received are those provided to persons who are "unable", not merely unwilling to pay. Bad debts incurred by the hospitals from persons not covered by the statute are an expense of operating which they must bear themselves.[44]

HEW acquiesced in this court decision by issuing a policy memorandum[45] requiring determination of eligibility for free care prior to the rendition of services. This requirement necessarily precludes the inclusion of bad debts as free care because persons determined to be eligible therefore cannot be billed, except for "informational" purposes.

The "prior determination" requirement has additional significance for the poor. Most hospitals require preadmission deposits, which act as an effective barrier to the admission of indigents who usually do not have adequate funds for such deposits. Enforced

40. 42 C.F.R. § 53.111(d) (1975).

41. Rose, *The Hill-Burton Act—The Interim Regulation and Service to the Poor: A Study in Public Interest Litigation*, 6 CLEARINGHOUSE REV. 309 (1972).

42. *See id.* at 312-13.

43. 373 F. Supp. 550 (S.D.N.Y. 1974).

44. *Id.* at 557.

45. 40 Fed. Reg. 10686 (1975).

compliance with the "prior determination" requirement by Hill-Burton grantees would eliminate the preadmission deposit requisite for those persons qualifying for free care. Thus, access of the poor to private hospitals would be increased.

The existence of these unequivocal obligations of Hill-Burton grantees would seem to make the Hill-Burton Act a potentially powerful tool for the poor in gaining access to health care services. In reality, however, the Hill-Burton Act has not been effective and has not served the poor in the manner in which it was intended. A 1972 American Hospital Association survey of approximately 187 nonprofit Hill-Burton hospitals taken at the request of HEW demonstrated that approximately 70 percent of the facilities had not met the presumptive compliance guidelines at that time.[46]

The effectiveness of the Act has been severely limited by several factors: (1) the existing hospital system whereby patients are normally admitted only upon the orders of private physicians, to whom the poor are unlikely to have access; (2) interpretations of the regulations which constrict the amount of services rendered to the poor under the Act; (3) lack of enforcement by state Hill-Burton agencies which are charged with this responsibility;[47] (4) inadequate notice to the poor of the availability of free services, and no affirmative outreach efforts by the hospitals; and (5) HEW's refusal to effectively administer the Act.[48]

Accordingly, the Hill-Burton Act remains an unfulfilled promise of health care for the poor. The National Health Planning and Resources Development Act of 1974[49] may have an ameliorative effect. This law was enacted with the objective of strengthening health regulatory and area planning programs, including Hill-Burton, and shifts many enforcement responsibilities to the federal government.[50] However, as final regulations implementing the new enforcement scheme are not scheduled for publication until June 2, 1976—1½ years after the signing of the Act—no immediate changes in Hill-Burton are forthcoming.[51]

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46. *See* Comment, *Provision of Free Medical Services by Hill-Burton Hospitals*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 351, 352 (1973).

47. *See* 42 U.S.C. § 291d (1970).

48. Rose, *supra* note 32, at 194-200.

49. 42 U.S.C. §§ 300k *et seq.* (Supp. V, 1975). For a full discussion of the Act see Schneider & Wing, *The National Health Planning and Resources Development Act of 1974: Implications for the Poor*, 9 CLEARINGHOUSE REV. 683 (1976).

50. *See* Schneider & Wing, *supra* note 49.

51. *Id.*

C. *Section 501(c)(3) of the Internal Revenue Code*

An alternate, and perhaps more viable, avenue of access for the poor to private, nonprofit hospitals is through the enforcement of the hospitals' obligations arising pursuant to their tax exempt status under section 501(c)(3) of the Internal Revenue Code.[52] Hospitals as a class have never been expressly categorized as tax exempt organizations. They have achieved such status only by qualifying as "charitable" organizations under section 501(c)(3). Section 501 provides in part:

> (a) Exemption from Taxation—An organization described in subsection (c) . . . shall be exempt from taxation under this subtitle . . . .
>
> . . . .
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> (c)(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for . . . charitable . . . purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . .[53]

In addition, contributions to such tax-exempt charitable organizations are deductible for purposes of computing federal income tax[54] and estate and gift taxes.[55]

Tax exempt status under section 501(c)(3) is, therefore, financially advantageous to hospitals. Not only are the hospitals' tax dollars saved, but philanthropy is also encouraged because of the tax deductions available to contributors, thus generating additional revenues for the hospitals. The question which logically follows is what is the *quid pro quo* for such status—what obligations are imposed upon section 501(c)(3) hospitals in order to compensate the federal government for the tax dollars lost as a result of the hospitals' tax exempt status?

On its face, section 501(c)(3) gives no definition of "charitable" purposes. This has been left both to the courts and to the Commissioner of Internal Revenue, who has the authority to promulgate rules and regulations necessary to implement the statute.[56]

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52. INT. REV. CODE OF 1954, § 501(c)(3). For a full discussion of § 501(c)(3) see Rose, *The Internal Revenue Service's "Contribution" to the Health Problems of the Poor*, 21 CATH. U.L. REV. 35 (1971).

53. INT. REV. CODE OF 1954, §§ 501(a), (c)(3).

54. *Id.* §§ 170(a)-(c).

55. *Id.* §§ 2055(a)(2), 2106(a)(2)(A)(ii), 2522 (a)(2).

56. *Id.* § 7805(a).

The Commissioner's rulings set forth the official policy of the Internal Revenue Service (IRS) and are designed to guide taxpayers, the interested public, and IRS officials in tax matters.[57]

The long-standing judicial interpretation of the application of "charitable" to hospitals under the Internal Revenue Code required that they serve persons unable to pay.[58] This position was "codified" by the IRS in 1956 by Revenue Ruling 56-185, which specifically required that a qualifying hospital:

> *Must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay.* It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay . . . . *It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered.*[59]

In 1969, the IRS revised its long-standing position and issued Revenue Ruling 69-545, which provides that a hospital will qualify as exempt under section 501(c)(3):

> By operating an emergency room open to all persons and by providing hospital care for all those persons in the community able to pay the cost thereof either directly or through third party reimbursement . . . .[60]

Relying on the law of charitable trusts,[61] the revenue ruling further acknowledged that providing hospital care on a nonprofit basis for

57. Eastern Kentucky Welfare Rights Org. v. Shultz, 370 F. Supp. 325, 327 & n.10 (D.D.C. 1973), *cert. granted*, 421 U.S. 975 (1975), *citing* Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 757, 763 (1965).

58. Commissioner v. Battle Creek, Inc., 126 F.2d 405 (5th Cir. 1942); Intercity Hosp. Ass'n v. Squire, 56 F. Supp. 472 (W.D. Wash. 1944); Sonora Community Hosp., 46 T.C. 519 (1966); Lorain Ave. Clinic, 31 T.C. 141 (1958); Cranley, 20 CCH Tax Ct. Mem. 20 (1961); Davis Hosp., Inc., 4 CCH Tax Ct. Mem. 312 (1945); Goldsby King Memorial Hosp., 3 CCH Tax Ct. Mem. 693 (1944). *See also* Harding Hosp., Inc. v. United States, 358 F. Supp. 805 (S.D. Ohio 1973); Olney, 17 CCH Tax Ct. Mem. 982 (1958); Bromberg, *The Charitable Hospital*, 20 CATH. U.L. REV. 237 (1970).

59. Rev. Rul. 56-185, 1956-1 CUM. BULL. 202 (emphasis added).

60. Rev. Rul. 69-545, 1969-2 CUM. BULL. 117.

61. RESTATEMENT (SECOND) TRUSTS § 368, comment (b), § 372, comments (b)-(c) (1957); 4 A. SCOTT, THE LAW OF TRUSTS, §§ 368, 372.2 (3d ed. 1967).

members of the community is a "charitable" purpose in the legal sense of the term, stating:

> The promotion of health . . . is one of the purposes in the general law of charity that is deemed beneficial to the community as a whole even though the class of beneficiaries eligible to receive a direct benefit from its activities does not include all members of the community, such as indigent members of the community, provided that the class is not so small that its relief is not of benefit to the community.

Revenue Ruling 69-545 thus removes the prior obligation of hospitals to provide free services to those unable to pay in order to qualify as "charitable": "Revenue Ruling 56-185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost." The poor are not totally ignored, however, as a hospital seeking exemption under section 501(c)(3) is obligated to participate in Medicare and Medicaid, and also to operate an emergency room open to all persons regardless of their ability to pay for services. Thus, the effect of Revenue Ruling 69-545 is to limit the access of the poor to free care by section 501(c)(3) hospitals to three routes—Medicare, Medicaid, and emergency room services. The wisdom of the health policy of the current revenue ruling is questionable since it enlarges the already existing gulf between health care services available to the rich and those available to the poor.[62]

The validity of Revenue Ruling 69-545 was challenged in *Eastern Kentucky Welfare Rights Organization v. Simon*[63] on two grounds: (1) that the ruling was an *ultra vires* action by the Commissioner, as it "legislated" a critical change in tax policy without appropriate authority; and (2) that even if not *ultra vires*, the requirements of the Administrative Procedure Act[64] were illegally circumvented. Not reaching the second ground, the court held, *inter alia*, that the sweeping policy change embodied in Revenue Ruling 69-545 was unjustified and without support in relevant judicial, legislative, or administrative history, and that reliance on the principles of trust law was misplaced. The court stated:

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62. Rose, *The Internal Revenue Service's "Contribution" to the Health Problems of the Poor*, 21 CATH. U.L. REV. 35 (1971).

63. 370 F. Supp. 325, 328-29 (D.D.C. 1973), *rev'd*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated and remanded*, 44 U.S.L.W. 4724 (U.S. June 1, 1976).

64. 5 U.S.C. § 500 (1970).

> [R]evenue Ruling 69-545 was improperly promulgated and is without effect inasmuch as it allows private nonprofit hospitals to qualify as charities under the Internal Revenue Code of 1954 without requiring the hospitals to offer special financial consideration to persons unable to pay.[65]

On appeal, the district court ruling was reversed.[66] The appellate court concluded that Revenue Ruling 69-545 with its broad interpretation of "charitable" was not inconsistent with section 501(c)(3) and that modification of the prior ruling was authorized:

> While it is true that in the past Congress and the federal courts have conditioned a hospital's charitable status on the level of free or below cost care that it provided for indigents, there is no authority for the conclusion that the determination of "charitable" status was always to be so limited . . . .[67]

Thus, the validity of Revenue Ruling 69-545 was upheld.

On certiorari, the United States Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court with instructions to dismiss the complaint on the grounds that the Eastern Kentucky Welfare Rights Organization had failed to establish standing.[68] Thus, Revenue Ruling 69-545 remains in effect, and the obligations imposed upon hospitals with section 501(c)(3) status are limited to participation in Medicare and Medicaid and the operation of an emergency room open to all persons regardless of their ability to pay for services.[69]

III. Florida's Tax Exemption Statutes

In light of the insufficiencies of Medicare and Medicaid, the lack of enforcement and ineffectiveness of the Hill-Burton Act, and limited obligations imposed by section 501(c)(3) status, other avenues of access to health care services for the poor must be explored. Specifically, the obligation to serve the poor arising under state laws granting tax exemptions to "charitable" institutions merits attention. An examination of Florida law will serve as a model.

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65. 370 F. Supp. at 338.

66. 506 F.2d 1278 (D.C. Cir. 1974).

67. *Id.* at 1287-88.

68. 44 U.S.L.W. 4724 (U.S. June 1, 1976).

69. This decision has a significant impact upon the duty of nonprofit charitable hospitals in Florida to provide free services to the poor, as § 501(c)(3) is intertwined with several of Florida's tax exemption statutes.

Florida law does not exempt hospitals[70] from taxation per se. As under federal law, tax exempt status may be obtained by hospitals only through qualification as nonprofit, charitable institutions. The criteria for determination of "nonprofit" status and "charitable" status are different, and the question of whether or not a hospital is a charitable institution requires close analysis.

The Florida Constitution[71] authorizes tax exemption for property to the extent that it is used predominantly for charitable purposes.[72] No definition of "charitable purposes" is given. The legislature is vested with the power to enact general laws providing tax exemption,[73] and to set forth criteria which must be met in order to qualify for the exemption.[74] Thus, in effect, the legislature has the power to define "charitable purposes."

The power of the legislature is limited, however, since the legislative definition of charitable must bear a "reasonable relationship . . . [to] . . . the specifically described exemption and one of the purposes which the Constitution requires to be served."[75] Accordingly, the legislature has enacted several statutes providing tax exemption for property used for charitable purposes, including exemptions from the real and personal property tax,[76] intangible personal property tax,[77] corporate income tax,[78] unemployment compensation

70. A "hospital" is defined by FLA. STAT. § 196.012(7) (1975) as an institution which possesses a valid license granted under Chapter 395, Florida Statutes, on January 1 of the year for which exemption from ad valorem taxation is requested. This is the only tax exemption statute defining "hospital."

71. FLA. CONST. art. VII, § 3(a) (1968) provides that: "Such portions of property as are used predominantly for . . . charitable purposes may be exempted by general law from taxation."

72. The 1885 Florida Constitution contained two separate provisions (with separate criteria) authorizing exemption from taxation for property used for charitable purposes. This created considerable confusion. For an historical background of these two provisions see Note, *The "Public Purpose" and "Charitable" Tax Exemption in Florida: A Judicial Morass*, 19 U. FLA. L. REV. 330 (1966). Article VII, § 3(a) of the 1968 Constitution consolidates the two provisions of the former constitution, with significant changes in language. For an analysis of the new provision see Note, *Property Tax Exemptions under Article VII, Section 3(a) of the Florida Constitution of 1968*, 21 U. FLA. L. REV. 641 (1969).

73. FLA. CONST. art. VII, § 3(a) (1968).

74. *See* FLA. STAT. § 196.196(1)(a)-(b) (1975) for the criteria for qualifying for the charitable purpose exemption.

75. Jasper v. Mease Manor, Inc., 208 So. 2d 821, 825 (Fla. 1968); *accord*, Presbyterian Homes of the Synod v. Wood, 297 So. 2d 556, 558 (Fla. 1974); Lummus v. Florida Adirondack School, 168 So. 232 (Fla. 1936).

76. FLA. STAT. § 196.012(1) (1975).

77. *Id.* § 199.031.

78. *Id.* § 220.13(6)(h).

law,[79] sales and use tax,[80] occupational license tax,[81] and charitable funds act registration fee.[82] Pursuant to Florida Statutes section 196.012(1) (1975), property which is used predominantly[83] or exclusively[84] for a charitable purpose is exempt from Florida's real and personal property (ad valorem) tax. An additional requirement under section 196.195 (4) of the Florida Statutes (1975) is the nonprofit status of the applicant property owner.[85]

"Charitable purpose" is defined in Florida Statutes section 196.012(6) (1975) as: [A] function or service which is of such a community service that its discontinuance could result in the allocation of public funds for the continuance of the function or service. This definition is extremely broad and vague, and if taken literally could reasonably apply to almost every function or service. The definition is refined when read in conjunction with section 196.196(1)(b), which provides:

> In the determination of whether an applicant is actually using all or a portion of its property predominantly for a charitable . . . purpose, the following criteria shall be applied: . . . the extent to which services are provided to persons at a charge that is equal to or less than the cost of providing such services.[86]

This focus on the charge for services indicates a legislative policy to promote, through the granting of charitable tax-exempt status, the provision of services to persons unable to pay all or a portion of the cost of such services.

Furthermore, in determining the extent of tax exemption to be granted specifically to a hospital, section 196.197(7) provides that:

> [P]roperty used for the treatment of private outpatients shall not be deemed to be serving an exempt purpose and shall not be exempt from taxation. Hospital emergency rooms, hospital clini-

79. *Id.* § 443.03(5)(*l*)(9).

80. *Id.* § 212.08(7)(a).

81. *Id.* §§ 205.022(7), .192.

82. *Id.* § 496.04.

83. "Predominant use of property" means property used for exempt purposes in excess of 50 percent but less than exclusive. FLA. STAT. § 196.012(3) (1975).

84. "Exclusive use of property" means property used 100 percent for exempt purposes. FLA. STAT. § 196.012(2) (1975).

85. The criteria for determining nonprofit status are contained in FLA. STAT. § 196.195(2) (1975), including "[t]he reasonableness of charges made by the applicant for any services rendered by it in relation to the value of those services. . . ."

86. FLA. STAT. § 196.196(1)(b) (1975).

> cal facilities, and other hospital property or facilities which are leased to a nonprofit corporation which provides direct services to patients in a nonprofit or public hospital . . . are excluded and shall be exempt from taxation.[87]

The distinction drawn between "the treatment of private outpatients" and the provision of "direct services to patients in a nonprofit or public hospital" places further emphasis upon a hospital's provision of services to persons unable to pay for such services as a focal point in determining whether or not a charitable purpose is served. The implication of the language is that a private hospital serving only private, paying patients is not a charitable institution without more. Thus, a hospital does not per se serve a charitable purpose.[88]

Alternatively, a hospital will receive an exemption from ad valorem taxation under Florida Statutes section 196.197(6) (1975) if it is a nonprofit Florida corporation which is exempt from federal income taxation under the provisions of section 501(c)(3) of the Internal Revenue Code.[89] This alternate route to tax exemption is significant, as it obviates the necessity of meeting the definition of "charitable" under the Florida statute (other than the requirement of nonprofit status), and instead shifts the focus of the inquiry to the definition of "charitable" under the Internal Revenue Code.[90]

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87. *Id.* § 196.197(7).

88. This interpretation is supported by Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176 (Fla. 2d Dist. 1965). *See* note 129 *infra* and accompanying text.

89. *See* notes 52-55 *supra* and accompanying text. Note that an organization exempt under § 501(c)(4) of the Internal Revenue Code of 1954 does not meet the criteria of FLA. STAT. § 196.197(6). OP. ATT'Y GEN. 072-253 (Aug. 9, 1972). Section 501(c)(4) provides exemption for:

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable . . . purposes.

90. The ad valorem tax exemption statute refers only to the Internal Revenue Code provision. It is not specifically stated whether or not the legislature intended to incorporate the Revenue Rulings of the Commissioner of Internal Revenue or judicial interpretations of such rulings into the statute. However, as Revenue Rulings are necessary to implement the Internal Revenue Code provision and, in addition, represent the official policy of the Internal Revenue Service (*See* note 57 *supra* and accompanying text), the implication is that all Revenue Rulings were intended to be incorporated. Otherwise the statute can have no meaning. It follows that judicial interpretations of Revenue Rulings are also incorporated, thus giving added significance to the Supreme Court's ruling in the *Eastern Kentucky Welfare Rights Org.* case.

Thus, a hospital seeking exemption from ad valorem taxation is relieved of the obligation to provide free or below cost services if it is exempt under section 501(c)(3).

It is interesting to note that exemption from ad valorem taxation was denied to a home for the aged in *Haines v. St. Petersburg Methodist Home, Inc.*[91] despite tax exempt status under section 501(c)(3). The applicable Florida statute in effect, section 192.06(3) (1961), provided exemption from ad valorem taxation for:

> Such property of . . . charitable . . . institutions within this state, as shall actually be occupied and used by them for the purpose for which they have been or may be organized . . . provided, further, that *the above stated limitation* against the rental of more than seventy-five per cent of the floor space of any such building or property *shall not apply to rooms or beds rented . . . to patients in any hospital . . . which has been exempt from the payment of taxes to the United States upon the income derived from the operation of such hospital . . . .*[92]

In rejecting section 501(c)(3) status as a basis for exemption from Florida ad valorem taxation, the court distinguished the focus of tax exemption, under section 501(c)(3) from that of the ad valorem tax exemption, and stated:

> Under the Federal Internal Revenue Code, income tax exemption does not depend so much upon how the applicant makes its money or how it uses its property as upon how it is currently spending the money it makes . . . . It cannot be emphasized too strongly that a dedicated charitable use of the property, with availability to the public, is a condition to property tax immunity on this ground. A minor or incidental use for charitable purposes is not enough.[93]

Note that § 501.204(2) of the Florida Deceptive and Unfair Trade Practices Law specifically states:

> [D]ue consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to S. 5(a)(1) of the Federal Trade Commission Act. . . .

Such a provision in the Florida ad valorem tax exemption statute would eliminate the necessity of making an "implication" as to the incorporation of Revenue Rulings and judicial interpretations.

91. 173 So. 2d 176 (Fla. 2d Dist. 1965).

92. FLA. STAT. § 192.06(3) (1965), *as amended*, FLA. STAT. § 192.06(3) (1975) (emphasis added).

93. 173 So. 2d at 183 (citations omitted).

Emphasizing the lack of charity cases in the home for the aged, the court denied an ad valorem tax exemption.

The statute was amended, effective January 1, 1966, to treat homes for the aged similarly to hospitals by precluding the application of the 75 percent rental limitation to homes for the aged as well. The legislature thus ignored the *Haines* court's interpretation of the relationship between section 501(c)(3) status and ad valorem tax exemption for charitable institutions.

Pursuant to Florida Statutes section 199.072(2)(a) (1975), intangible personal property owned by nonprofit charitable institutions is exempt from Florida's Intangible Personal Property Tax. Section 199.072(2)(b)(3)[94] provides:

> "Charitable institutions" shall mean only nonprofit corporations operating physical facilities in Florida at which are provided charitable services, a reasonable percentage of which shall be without cost to those unable to pay, and those institutions qualified as charitable under Section 501(c)(3), United States Internal Revenue Code, 1954.

The requirement that a reasonable percentage of services be provided "without cost to those unable to pay" indicates a legislative concern for the provision of free services to the poor. Moreover, the statute specifically requires that the exemption provision containing the definition of "charitable institutions" shall be strictly defined, limited, and applied.[95] However, "reasonable percentage" is nowhere defined, either by statute or administrative regulation.

The statute recognizes "those institutions qualified as charitable under section 501(c)(3)" of the Internal Revenue Code as "charitable institutions." The legislative intent here is ambiguous due to the use of the word "and." If section 501(c)(3) status is an alternate route to exemption, independent of the other requirements of Florida Statutes section 199.072(2)(b)(3) (1975), then a hospital seeking exemption is freed of the obligation to provide a reasonable percentage of free services to "those unable to pay" if it is exempt under section 501(c)(3). A second possible interpretation is that the re-

94. This statute was enacted July 1, 1971, prior to the enactment on December 31, 1971, of FLA. STAT. § 196.012(6) (1975), which contains the broad definition of "charitable purposes" for purposes of the ad valorem tax exemption. The later enactment does not appear to undermine the earlier enactment.

95. FLA. STAT. § 199.072 (1975).

quirement of provision of free services applies to section 501(c)(3) institutions as well.

The more reasonable interpretation appears to be that qualification as a charitable institution under section 501(c)(3) is an alternate route to exemption, especially in light of the exemption from ad valorem taxation for section 501(c)(3) corporations. As such, the definition of "charitable" under section 501(c)(3) is controlling for purposes of exemption from the intangible personal property tax.

Pursuant to section 220.13(2)(h) of the Florida Statutes, all income of a section 501(c)(3) corporation, except unrealized business taxable income, is exempt from Florida's corporate income tax. No definition of "charitable" is given within the statute itself—sole reliance is placed upon the definition of "charitable" under section 501(c)(3). Again, this Florida tax incorporates by reference the federal income tax standard for charitable exemption. Reliance upon the definition of "charitable" under federal income tax law appears reasonable in this context, as it is likely that the rationale for exemption from state income tax is analagous to that of exemption from federal income tax.

Florida Statutes section 443.03(5)(1)(9) (1975) provides that organizations organized and operated exclusively for "charitable purposes" are exempt from Florida's unemployment compensation law if "no part of the net earnings . . . inures to the benefit of any private shareholder or individual." No definition of "charitable purpose" is given. Organizations exempt under section 501(c)(3) of the Internal Revenue Code are also exempt from Florida's unemployment compensation law pursuant to Florida Statutes section 443.03(5)(1)(11.a.) (1975). This section incorporates by reference the definition of "charitable" under the Internal Revenue Code. It would appear that the former exemption is for non-corporations and the latter for corporations.[96]

Exemptions from the Florida sales, use, and other transactions tax, and the Florida occupational license tax are granted to charitable institutions, pursuant to sections 212.08(7)(a) and 205.022(7) of

96. The exemption does not apply, however, to charitable organizations with § 501(c)(3) status which had:

> [f]our or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time. FLA. STAT. § 443.03(5)(c) (1975).

the Florida Statutes (1975). "Charitable institutions" are defined under both statutes as: "Only nonprofit corporations operating physical facilities in [Florida] at which are provided charitable services, a reasonable percentage of which shall be without cost to those unable to pay."[97] The sales and use tax further stipulates that the provisions authorizing the exemption shall be strictly defined, limited, and applied.[98] Again, no definition of "reasonable percentage" is provided either by statute or administrative regulation.

This narrow definition indicates a legislative intent that to qualify as charitable, an institution (including a hospital) must provide free services to the poor. It is significant that the prior occupational license tax exemption statute, which was repealed, defined "charitable purpose" as:

> [T]he activities of a person, individual, corporation or organization conducted for the benefit of an indefinite number of persons to bring them under the influence of education or religion, relieve them from disease, suffering or constraint, assist them in establishing themselves in life, or to erect or maintain public works.[99]

No reference was made to the provision of free services to the poor. The same law which repealed this broad definition of "charitable"[100] also created the current statute, which contains the narrow definition of "charitable" requiring the provision of free services to the poor. No reference is made to section 501(c)(3) in either statute, and thus the definition of "charitable" under the Florida Statutes stands alone as the sole criterion for purposes of exemption from the sales and use tax and the occupational license tax. There is no apparent reason for the different treatment of these tax exemption statutes by the legislature with respect to the incorporation by reference of section 501(c)(3).

An additional definition of "charitable" is contained in the Charitable Funds Act.[101] Florida Statutes section 496.03(1) (1975), a provision of the Charitable Funds Act, requires that:

> Every charitable organization which intends to solicit contributions within this state, or have funds solicited on its behalf, shall,

97. FLA. STAT. § 205.022(7)(c) (1975).
98. FLA. STAT. § 212.08(7)(c) (1975).
99. Laws of Fla. ch. 67-433, § 1 (1967).
100. It was repealed by Laws of Fla. ch. 72-306, § 1 (1972).
101. FLA. STAT. ch. 496 (1975).

> prior to any solicitation, file a registration statement with the Department of State upon forms prescribed by it.

"Charitable organization" is defined in Florida Statutes section 496.02(1)(a) (1975) as:

> [A] group which is or holds itself out to be a benevolent, educational, voluntary health, philanthropic, humane, patriotic, religious or eleemosynary organization or any person who solicits or obtains contributions solicited from the public for charitable purposes . . . .

No specific mention is made of hospitals in this context. However, pursuant to section 496.04(1) of the Florida Statutes (1975):

> The following charitable organizations shall be exempt from the registration fee provisions of this chapter:
>
> . . . .
>
> (d) Any organization organized solely to operate a hospital licensed under Chapter 395.

One interpretation of this provision is that a hospital is per se a charitable organization for purposes of the Charitable Funds Act. A second interpretation is that if the hospital is a charitable organization, it is exempt from the registration fee under the Act. When read in conjunction with the definition of "charitable organization" in section 496.02(1)(a), it appears that, in order to qualify as a "charitable organization," a hospital must be a "voluntary health" organization. However, no definition of "voluntary health" organization is contained in the statute.

The foregoing examination of the varying definitions of "charitable institution" within the Florida Statutes reveals two major underlying concepts. The first is that under certain statutes, any corporation which qualifies as charitable under section 501(c)(3) of the Internal Revenue Code and which is therefore exempt from federal income taxation automatically qualifies as charitable for purposes of exemption from state taxation, with no further requirements. This concept is reflected in Florida's ad valorem tax, intangible personal property tax, corporate income tax, and unemployment compensation law.[102]

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102. Only the ad valorem tax exemption is also available to institutions which are not corporations. Such institutions must meet the definition of "charitable" contained in the statute in order to qualify for exemption.

Thus the legislature has, in effect, largely delegated its authority to define "charitable" to the federal government for the purposes of these statutes by adopting section 501(c)(3) as the standard to be used. Such delegation is constitutional since the legislature has the power to approve and adopt the provisions of federal statutes and all of the administrative rules made by a federal administrative body that are in existence and effect at the time the legislature acts.[103] Revenue Ruling 69-545 was in existence and in effect at the time section (c)(3) was adopted as the standard by the Florida legislature, thus presenting no delegation problem.[104]

However, a state statute cannot adopt in advance a future and unknown federal act or regulation.[105] Therefore, future revenue rulings under section 501(c)(3) will present a potential delegation problem. In addition, Florida Statutes section 220.03(3) (1975) of the corporate income tax code appears to be unconstitutional at present:

> On or after January 1, 1972, when expressly authorized by law, any amendment to the Internal Revenue Code shall be given effect under this code in such manner and for such periods as are prescribed in the Internal Revenue Code, to the same extent as if such amendment had been adopted by the legislature of this state.

No case has challenged the constitutionality of this statute as yet.

The second concept which emerges is that in order to qualify as a charitable institution and thereby be exempt from taxation, a corporation must provide free services to "those unable to pay." This is the clear mandate of both the sales and use tax and the occupational license tax.

The existence within the Florida statutory tax scheme of these two divergent concepts of the definition of "charitable" results in

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103. Florida Indus. Comm. v. State *ex rel.* Orange State Oil Co., 21 So. 2d 599 (Fla. 1945).

104. The Florida Supreme Court recently upheld a similar delegation under the "Little FTC" Act (*see* note 90 *supra*) as constitutional, stating that requirements in the law as to following federal decisions under the FTC Act apply only to decisions in effect when the Florida Act was adopted. Department of Legal Affairs v. Rogers, S.C.No. 47,502 (Feb. 25, 1976).

105. Presbyterian Homes of the Synod v. Wood, 297 So. 2d 556 (Fla. 1974); State v. Camil, 279 So. 2d 832 (Fla. 1973); Freimuth v. State, 272 So. 2d 473 (Fla. 1972); Florida Indus. Comm. v. Peninsular Life Ins. Co., 10 So. 2d 793 (Fla. 1942); Hutchins v. Mayo, 197 So. 495 (Fla. 1940).

the imposition of separate obligations upon tax exempt hospitals. Those hospitals which are tax exempt based solely on their section 501(c)(3) status have concomitant obligations which are defined under the Internal Revenue Code.[106] Those hospitals which are tax exempt based solely upon the Florida definition of charitable have the specific obligation to provide a reasonable percentage of their services without cost to "those unable to pay." And those hospitals which have tax exemptions under both concepts would appear to have dual obligations, those under section 501(c)(3) as well as the provision of a reasonable percentage of services without cost to "those unable to pay." This lack of uniformity creates some confusion, both in the state's administration and enforcement of the tax exemptions under these statutes and in the hospitals' understanding and fulfillment of their obligations arising from their tax exempt status.

Legislative concern for provision of medical services to the poor is not evidenced solely in Florida's tax exemption statutes. Florida Statutes section 401.45(1) (1975) specifically requires the provision of emergency care to all persons needing it:

> No person shall be denied treatment for any emergency medical condition which will deteriorate from a failure to provide such treatment at any hospital licensed under Chapter 395 that operates an emergency department providing emergency treatment to the public.

Thus, the poor have a statutory right to access to emergency care in Florida. The hospital's duty to provide such care is enforced by the imposition of sanctions under Florida Statutes section 401.41(1) (1975), which provides that a violation of section 401.45 (1) is a misdemeanor of the second degree, punishable by imprisonment not exceeding 60 days and/or a fine of $500.00.[107] The emergency care statute was enacted in 1973.

It is significant that, also in 1973, the chapter of the Florida Statutes entitled "Hospital Service for the Indigent" was repealed.[108] This chapter provided for extensive hospital services for the "medically indigent," defined as "a person in this state who is

106. *See* notes 58-62 *supra* and accompanying text.

107. FLA. STAT. §§ 775.082- .083 (1975).

108. The Florida Legislature passed Fla. Laws 1973, ch. 73-333, § 111, *repealing* FLA. STAT. §§ 401 *et seq.* (1972).

unable to provide himself with necessary services incident to illness, injury, or disability as prescribed and ordered by a physician."[109] This program was supported by state and county funds. There is no legislative history to explain why this chapter was repealed, but it is possible that the financial burden on the state and the counties was too great to continue the program. Thus, the legislature imposed upon the hospitals the duty to treat all emergency patients under section 401.45(1). Possibly the legislature believed that this new duty, in conjunction with the existing duty of hospitals to treat the poor pursuant to the various charitable tax exemption statutes, would fill the vacuum created by the repeal of the chapter and adequately provide for medical services for the poor.

The legislature's failure to include within the tax-exemption statutes clear and definite standards to be applied in determining whether or not an institution meets the definition of charitable for purposes of tax exemption has forced the courts, in determining the tax exempt status of institutions seeking such status, to proceed on an ad hoc basis. Nevertheless, a definition of charitable has emerged from these judicial interpretations of the tax exemption statutes and the Florida Constitution.[110] This definition requires tax exempt hospitals to provide free medical services to the poor.

It is the general rule that all privately owned property is subject to taxation "for the support and efficiency of the government from which the property receives protection."[111] Exemptions from taxation are the exception to this rule, and

> are granted by the sovereign only when and to the extent that it may be deemed *to conserve the general welfare*. Organic and statutory exemptions, *being in the* nature of special privileges or immunities, *should be strictly construed* in order to confine the exemption within the limitations prescribed by the sovereign power; otherwise the lawmaking intent and purpose may be frustrated to the detriment of the public welfare.[112]

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109. Law of June 22, 1961, ch. 61-418, § 2 [1961], Fla. Laws 915 (repealed 1973).

110. The fact that these judicial interpretations have focused primarily upon the ad valorem tax exemption and the Constitution of 1885 neither detracts from the validity of the resulting definition of charitable nor precludes the applicability of that definition to the other tax exemptions.

111. Miami Battlecreek v. Lummus, 140 Fla. 718, 727-28, 192 So. 211, 215 (1939); Lummus v. Florida-Adirondack School, Inc., 123 Fla. 810, 821, 168 So. 232, 237 (1936).

112. Lummus v. Florida-Adirondack School, Inc., 123 Fla. 810, 821-22, 168 So. 232, 237 (1936) (emphasis added), *citing* Amos v. Jacksonville Realty & Mortgage Co., 77 Fla. 403, 81

A principal reason for the rule of strict construction of tax exemption laws is the effect of tax exemptions upon the public interest.[113] To freely allow tax exemptions would place an unjust proportion of the tax burden upon nonexempt property,[114] and inevitably result in the depletion of the sources of revenue from taxation.[115] Accordingly, the pragmatic question of whether the public interest is advanced or retarded by the granting of tax exemptions has been of prime concern to the courts in determining whether or not the legal concept of "a charitable institution entitled to exemption" is fulfilled.

The question which logically arises is whether the public interest is best served by not granting charitable tax exemptions to nonprofit hospitals per se, but rather by granting such exemptions only upon the condition that free services be provided to the poor. Mandatory provision of medical care to the poor by private, tax exempt hospitals would compensate the State to some degree for its loss of tax revenue since the effect of such a requirement would be to partially relieve the burden of the public hospitals,[116] which are clearly inadequate to meet the demands of the poor. Thus the public interest would be advanced. On the other hand, merely granting exemptions to hospitals with no such concomitant service obligation results in State support of private hospitals which deny access to the

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So. 524 (1919) and Rast v. Hulvey, 77 Fla. 74, 80 So. 750 (1919); *accord*, Orange County v. Orlando Osteopathic Hosp., Inc., 66 So. 2d 285 (Fla. 1953); Lummus v. Cushman, 41 So. 2d 895 (Fla. 1949); State *ex rel.* Miller v. Doss, 146 Fla. 852, 2 So. 2d 303 (1941); Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939); Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965); [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 278; [1945-1946] FLA. ATT'Y GEN. BIENNIAL REP. 276.

113. Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 180 n.4 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965).

114. Miami Battlecreek v. Lummus, 140 Fla. 718, 728, 192 So. 211, 216 (1939); Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 185 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965).

115. Jasper v. Mease Manor, Inc., 208 So. 2d 821, 824 n.4 (Fla. 1968); Lummus v. Florida-Adirondack School, Inc., 123 Fla. 810, 827, 168 So. 232, 239 (1936). In Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 180 n.4 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965) the court took judicial notice of the comments of informed lay persons as to the "whittling away" of the state's tax base:

> Florida cannot reach its potential if the tax load is continually piled on fewer and fewer non-exempt properties, but . . . the load would not be excessive if each property bore its fair share of the costs of government.

116. Exemptions are often granted to charities on the ground that they render aid and assistance to those who might otherwise become public charges. [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 278.

poor, accompanied by loss of tax revenues with which to support public hospitals which do serve the poor. This certainly does not advance the public interest since it is, in effect, a public subsidization of private hospitals.

An affirmative answer to this question is further supported by the public policy of the tax exemption laws:

> The fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and the consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens.[117]

A charitable tax exemption therefore requires that the public receive a benefit from, and the state be relieved of a burden by, the recipient of the exemption. The fulfillment of this "benefit-burden" concept by a private hospital receiving a charitable tax exemption would be most advantageous to the public interest if manifested by the provision of free services to the poor, and not merely by the provision of health care to the paying general public.

In those cases requiring judicial interpretation of the constitutional concept of charitable for purposes of tax exemption, the Florida courts, in applying a limited definition of this concept, have focused on the provision of services to the poor.[118] One court has, in fact, specifically rejected as a ground for tax exemption the broader concept of charity as relief extended to the rich as well as the poor,[119]

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117. Miami Battlecreek v. Lummus, 140 Fla. 718, 733, 192 So. 211, 217 (1939); Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 181 n.5 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965). *See also* Dr. William Howard Hay Foundation, Inc. v. Wilcox, 156 Fla. 704, 705, 24 So. 2d 237, 238 (1945) where the court stated: "Exemption of property from taxation is not a favor bestowed for the asking. It is reward offered to the owner who used his property in such a way that material benefits flow to the public." Furthermore, an analogy to the rationale for the tax exemption of institutions serving an educational purpose is appropriate. As public schools were found to be inadequate to furnish all the required educational facilities, it was deemed expedient to encourage the establishment and maintenance of private schools. Tax exemption was considered a fair means to accomplish this. Lummus v. Florida-Adirondack School, Inc., 23 Fla. 810, 827, 168 So. 232, 239 (1936).

118. Jasper v. Mease Manor, Inc., 208 So. 2d 821, 825 (Fla. 1968), *citing* Presbyterian Homes of the Synod v. City of Bradenton, 190 So. 2d 771 (Fla. 1966); Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230 (Fla. 1963); Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965). In addition, the Attorney General has defined charitable purpose in terms of aid and assistance to those unable to procure adequate assistance with their own means. [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 278.

119. *See* Fredericka Home for the Aged v. San Diego County, 35 Cal. 2d 789, 221 P.2d

stating that such a concept was not "consistent with the tenor of Florida law as pronounced by our Florida courts."[120] The court instead adopted the objective concept of charity as denoting gifts to the poor.[121] The judicial definition of charitable thus supports the thesis that the public interest is benefited most by requiring charitable institutions receiving tax exemptions to provide free services to the poor. Indeed, this obligation has been specifically imposed upon tax exempt hospitals[122] by the courts. In all of the cases[123] involving the question of whether a particular hospital qualified as a charitable institution, the exemption was granted based upon close scrutiny of the specific facts and circumstances,[124] which in each case revealed a policy of providing services to persons unable to pay.

In *Miami Battlecreek v. Lummus*,[125] a hospital was held to be charitable where all persons who applied for treatment received it whether they were able to pay or not, and those persons who were unable to pay the full amount of the fixed fees were charged in proportion to their ability to pay. In *Orange County v. Orlando Osteopathic Hospital, Inc.*,[126] the court found a substantial charita-

68 (1950); Fifield Manor v. County of Los Angeles, 188 Cal. App. 2d 1, 10 Cal. Rptr. 242 (Dist. Ct. App. 1961).

120. Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 183 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965). Concern for the provision of services to those unable to pay in order to qualify as charitable is evident in Presbyterian Homes of the Synod v. City of Bradenton, 190 So. 2d 771 (Fla. 1966) (dissent).

121. Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 181 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965). The court rejected a loosely subjective concept of a charitable institution with respect to tax exemption, stating: "[I]t would be an enlargement of constitutional meaning presaging further inequity and deterioration of an ad valorem system that could be redeemed only by ultimate reform through legislative channels." *Id.* at 181 n.6.

122. A blood bank must also provide services "without charge to indigents and those unable to pay for same" in order to receive a charitable tax exemption. [1963-1964] FLA. ATT'Y GEN. BIENNIAL REP. 25.

123. Hungerford Convalescent Hosp. Ass'n v. Osborn, 150 So. 2d 230 (Fla. 1963); Orange County v. Orlando Osteopathic Hosp., Inc., 66 So. 2d 285 (Fla. 1953).

124. Miami Battlecreek v. Lummus, 140 Fla. 718, 192 So. 211 (1939). The facts and circumstances, specifically that 24 percent of the hospital's patients were charity patients, were the basis of an Attorney General opinion in favor of a charitable tax exemption for a hospital. [1949-1950] FLA. ATT'Y GEN. BIENNIAL REP. 224.

125. 140 Fla. 718, 725, 192 So. 211, 214 (1939). Of all patients treated, 64 percent received treatment as charity (without charge), and 12 percent paid only a portion of the prescribed charge. *Id.* at 726, 192 So. at 215.

126. Orange County v. Orlando Osteophathic Hosp., Inc., 66 So. 2d 285, 288 (Fla. 1953). Of the hospital's net revenue, 34.19 percent was devoted to charity patient treatment, not

ble use based upon findings of fact that no patient was denied the use of the facilities or services of the hospital because of inability to pay, and that patients who were unable to pay were given treatment and received the same care and attention as those who were able to pay. A substantial charitable use was also found in *Hungerford Convalescent Hospital Association v. Osborn*,[127] where a hospital had no requirements for admission other than the need of services and the availability of a bed, and charged each patient so admitted on the basis of ability to pay. Provision of free services to the poor is thus a key criterion which the courts use to determine qualification for tax exemption based upon charitable use.

Not only does entitlement to tax exemption require that the charitable use of property by a hospital include the provision of free services to the poor, but such use also must be more than minor or incidental.[128] Hospitals are not exempt from taxation merely because, as an incident to their operation, they administer medical services to charity patients:

> Hospitals have been exempted where they can show a *prime obligation* to care for those who otherwise would become charges upon society. Conversely when the basic purpose is to administer to those from whom it derives income and who are not indigent or public charges, a hospital has been held a non-exempt enterprise notwithstanding some charity patients may be cared for on a non-obligatory basis.[129]

Thus, the courts have imposed a substantial requirement upon hospitals in exchange for their charitable tax exempt status—they must benefit the public by providing more than a token amount of free services to the poor, thus partially relieving the burden of the state. The dilemma is that, as is so often the case, the requirement imposed by the courts is not enforced because of difficulties associated with administrative implementation.

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including outpatient charity.

127. 150 So. 2d 230, 231 (Fla. 1963).

128. Johnson v. Sparkman, 159 Fla. 276, 279, 31 So. 2d 863, 864 (1947); Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 183 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965); *cf.* State v. Town of N. Miami, 59 So. 2d 779, 784-85 (Fla. 1952).

129. Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 183-84 n.9 (Fla. 2d Dist.), *cert. denied*, 183 So. 2d 211 (Fla. 1965).

IV. CONCLUSION

Analysis of the Florida tax exemption statutes and relevant case law demonstrates that hospitals with charitable tax exemptions must provide free services to the poor. Despite the existence of this mandate, these laws are not an effective source of free service to the poor because of a lack of administrative enforcement, statutory ambiguity, and an absence of rules or regulations specifically defining the obligation.

The use of "reasonable percentage" as the statutory standard for the receipt of tax exemption creates an obvious ambiguity. No definition of "reasonable percentage" is contained in the statute, nor in any administrative rules or regulations. The promulgation of rules and regulations containing specific criteria defining "reasonable percentage," or amendment of the statute to include such criteria, would easily remedy this problem. This approach was followed under the Hill-Burton Act through the adoption of presumptive compliance guidelines.[130] This author would propose the standard of 5 percent of operating costs, minus Medicare and Medicaid reimbursements, as a "reasonable percentage."[131]

The use of the overbroad phrase, "those unable to pay," is a similar problem with respect to eligibility for free care. No rules or regulations or statutory criteria define "those unable to pay." Without further definition, this standard is impracticable to apply. Again, the promulgation of rules or regulations containing specific eligibility criteria, or amendment of the statute to include such criteria, would eliminate the problem. The Hill-Burton Act may serve as a model for reform once again. Pursuant to federal regulations, "the state agency shall set forth in its state plan, subject to approval by the Secretary [of HEW], criteria for identifying persons unable to pay for services . . . ."[132] Thus, specific criteria defining persons entitled to free services under Hill-Burton must be

130. *See* notes 39-41 *supra* and accompanying text. Although substantively insufficient, the fact that some guidelines have been promulgated is commendable.

131. Five percent has been suggested by the National Health Law Program (NHELP), a program specifically devoted to health care concerns of the poor. Schwartz, *Expanding the Quantity of Medical Services Available to the Poor: Suing "Private" Hospitals Under the Internal Revenue Code*, 7 CLEARINGHOUSE REV. 587 (1974). This figure is also supported by interpretations of the Internal Revenue Code of 1954, § 501(c)(3). Rose, *Federal Regulation*, *supra* note 32, at 186 n.105.

132. 42 C.F.R. § 53.111(g) (1974).

established by the states. Similarly, the adoption of income guidelines defining "those unable to pay" under Florida law would make this standard workable. It is suggested that such income guidelines should include the "medically indigent," as well as the "indigent" in the traditional sense,[133] so that the impact of the provision of free services would be broad enough to meet the existing need for health care.

Beyond the lack of clarity in the statutory language, the incorporation by reference of the definition of "charitable" under section 501(c)(3) of the Internal Revenue Code presents serious problems. First, the hospitals receive both federal and state tax exemptions "for the price of one." In addition, assuming that no delegation problem exists,[134] reliance upon section 501(c)(3) creates instability with respect to the obligations of hospitals with charitable tax exemptions under Florida law. Any change in the requirements of section 501(c)(3), either by a revenue ruling or judicial interpretation, effects a corresponding change in the obligations of hospitals exempt under Florida law. Thus, these obligations are in a state of flux, as evidenced by the uncertainty created by *Eastern Kentucky Welfare Rights Organization v. Simon.*[135]

Furthermore, a revision of the requirements of section 501(c)(3) which is inconsistent with the intent of the Florida Legislature and Constitution—that charitable tax exempt institutions provide a reasonable percentage of free care to those unable to pay—is possible, as evidenced by Revenue Ruling 69-545 which eliminates this requirement of free care under section 501(c)(3). It is conceivable as well that the implications of such a change could go unnoticed by the Florida Legislature, thus frustrating the purpose of charitable tax exemptions under Florida law. For example, Revenue Ruling 69-545, which changed the requirements of section 501(c)(3), became effective in 1969. Subsequent thereto, several of the Florida tax exemption statutes were amended, with no change as to reliance upon section 501(c)(3). It is not clear, however, whether the legislature either considered the impact of Revenue Ruling 69-545 upon the Florida tax exemption statutes or was even aware of the new ruling and its effect upon the requirements of section 501(c)(3).

133. *See* note 3 *supra*.

134. *See* notes 103-05 *supra* and accompanying text.

135. 370 F. Supp. 325 (D.D.C. 1973), *rev'd*, 506 F.2d 1278 (D.C. Cir. 1974), *vacated and remanded*, 44 U.S.L.W. 4724 (U.S. June 1, 1976).

Thus, the wisdom of reliance upon section 501(c)(3) is highly questionable.

The absence of enforcement of the obligation to provide free services to the poor is by far the most serious problem. This is evidenced by the private hospitals' undisputed practice of "dumping" patients on the public hospitals and refusing to admit or treat persons without the payment of a preadmission deposit.[136]

In addition, the administration of the sales and use tax is typical of the State's indifference to the tax exempt hospitals' obligation to provide free services to the poor. The focal point for the initial application of this tax is the hospital's nonprofit status. No inquiry is made as to the provision of free services to the poor.[137] In addition, there is no subsequent monitoring of the hospital's compliance with its obligation to serve the poor once the exemption is granted unless a specific complaint is made against the hospital.[138] If a complaint is made, the inquiry made by the sales and use tax department is superficial at best.[139]

Thus, as a practical matter the free care obligation of tax exempt "charitable" hospitals is virtually meaningless to the poor. Furthermore, the State is being deprived of desperately needed tax revenues as a result of "charitable" tax exemptions for hospitals. For example, the State's biggest and most consistent source of income, the sales and use tax, fell $1.3 million short of estimates for March 1976.[140] The sales and use tax exemption of one Dade County hospital alone represents approximately $50,000.00 per year,[141] and there were 26 Dade County hospitals receiving sales and use tax exemptions in 1975.[142] Thus, the State cannot realistically afford to

136. Miami Herald, Jan. 15, 1975, § B, at 1, col. 3; Miami Herald, Jan. 17, 1975, § B, at 2, col. 4; Miami Herald, Aug. 20, 1975, § B, at 1, col. 1.

137. Application for Consumer Certificate of Exemption, Florida Sales and Use Tax, Department of Revenue, State of Florida.

138. Answer to Interrogatory #8 of Plaintiff's 1st Set of Interrogatories to Defendant Hansen, *Silva v. Baptist Hospital*, No. 75-6736.

139. Answer to Plaintiff's Request for Production of Documents to Defendant Hansen, *Silva v. Baptist Hospital*, No. 75-6736.

140. Miami Herald, April 13, 1976, § B, at 2, col. 5. It should be noted that the Sales and Use Tax represented $106.6 million of the total tax collection of $174.1 million for March, 1976.

141. HILL-BURTON COMPLIANCE REPORT of an unnamed hospital for Fiscal Year 1974.

142. Letter from L. Smithling, Exemption Examiner, Sales Tax Bureau, Department of Revenue, State of Florida.

continue to lose tax revenues from "charitable" hospitals without receiving a *quid pro quo*.

At present, the hospitals are the only recipients of any benefit conferred by the charitable tax exemptions. Moreover, this benefit results in an increased burden on the State, without mitigating the health care problems of the poor. This clearly was not the intended result of either the Florida Constitution or Legislature in permitting charitable tax exemptions. Enforcement of the obligations of tax exempt hospitals is necessary if this situation is to be remedied.