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Preface

For the past ten years or more, students at the Harvard Law School have been conducting the Harvard Student Legislative Research Bureau. As the title indicates, this has been a student activity. It has received the fostering interest and care of the Law School administration and Faculty. But the work has been done by students, on their own responsibility.

Year by year, the work has grown and developed. The members of the Harvard Student Legislative Research Bureau undertake research and legislative drafting at the request of legislators, state and Federal, governmental agencies, and charitable groups. In connection with this work they have not only prepared drafts of statutes but have also prepared extensive memoranda showing the present state of the law, and bringing together legislative solutions which have already been adopted in efforts to deal with the problems.

On various occasions, some of these drafts made by members of the Bureau have been gathered together and published in mimeographed form. This has been done both as a means of making the work available to others, and for the purpose of building up a collection in the Bureau's offices of the various statutory drafts which have been made over the years.

The interest on the part of the student members of the Bureau has been great, and the work done by the Bureau has steadily matured. The time has come when it appears that some of the work done by the Bureau, and other thought in the field of legislation, should be made available in more formal and permanent form.

Thus, the *Harvard Journal on Legislation* makes its first appearance. It is, for the present, a more modest undertaking than the *Harvard Law Review*, since there will be only two issues of the *Journal* in the year. It hopes, however, to measure up to the standard set by the *Law Review*. And, as in the case of the *Law Review*, and all other student organizations at the Harvard Law School, it will be edited and conducted by students, who will be members of the Harvard Student Legislative Research Bureau in the School.

As in the present issue, the plan is to have one or more articles on legislative matters, written by members of the Faculty, or by others, either in academic life, in private practice, or in governmental work. For this purpose, articles are solicited, and contributions should be sent to the Harvard Student Legislative Research Bureau at the Harvard Law School for consideration.

In addition, the *Journal* will print selected examples of the work done by students of the Bureau in drafting statutes, together with the memoranda prepared to accompany these statutes. It is hoped that, over the years, the publication of these drafts will provide a substantial library of carefully worked out legislative solutions to problems of current concern, and that the *Journal* will become one of the places which is looked to by those, all over the country, who are concerned with legislative drafting, and are seeking a guide to the legislative thought and precedents in any area.

It will, no doubt, take some time for the *Journal* to become seasoned, and there will surely be some experimentation. It is hoped that it may prove to be not only a contribution to legal education, but also to the better understanding of legislation and legislative drafting problems. The students who are launching the *Journal* have great enthusiasm for it. It is hoped that what they start now, and what their successors carry on, may grow sturdily and become a constructive and helpful influence in the development of the law.

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The Diseases of Legislative Language

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In this article Professor Dickerson examines some of the most basic problems facing the legislative draftsman in his attempt to obtain clarity in statutes. He discusses the "diseases" of ambiguity, over-vagueness, over-precision, over- and under-generality and obesity, and distinguishes them from useful devices with which they are often confused.

INTRODUCTION

THE IMPORTANCE of clarity to statutes needs little urging. Clarity is important not only to the substance of the legislative message but to its adequacy as a means of transmission. A statute is a communication and thus subject to the principles applicable to communications.

What are the chances of achieving legislative clarity? The inadequacies of language are cause for misgivings, but hardly general despair. It is unfortunate that legal writers tend to express an overly pessimistic view of language in general,[1] even to the point of apparent defeatism toward language as an instrument for controlling human behavior. Some have even come close to saying that words are empty vessels into which the court may pour any appropriate judicial meaning.[2] Whether these writers are talking about language in general or only its trouble areas is not always clear.

The courts' and litigants' normal preoccupation with sick or uncertain language might lead to the belief that all language is as inherently weak and inadequate as the particular fragments of statutory language that are scrutinized in legal opinions. While even momentary reflection should dispel such a notion, the pre-

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[1] *E.g.*, "an inexact, clumsy tool," Miller, *Statutory Language and the Purposive Use of Ambiguity*, 42 Va. L. Rev. 23 (1956).

[2] "Words in legal documents . . . mean, in the first instance, what the person to whom they are addressed makes them mean." Curtis, *It's Your Law* 65 (1954). "[A]fter all, it is only words that the legislature utters; it is for the courts to say what those words mean . . . . [A]ll the Law is judge-made law. . . . The courts put life into the dead words of the statute." Gray, *The Nature and Sources of Law* 124–125 (2d ed. 1921). Who puts life into the dead words of the court?

occupation has fostered an unwholesome depreciation of what language can be made to accomplish.

The professional legislative draftsman knows better. Despite what the courts have done with and to the language of statutes, he knows that it is worth his and the legislature's while to take every reasonable step to make the legislative message clear. At the same time, the job of writing a clear statute remains formidable. For the most part this is due to several important, and largely curable, diseases of language.

The Major Diseases of Language

A. Ambiguity.

Perhaps the most serious disease of language is ambiguity in the traditional sense of equivocation. Language is equivocal when it has "different significations equally appropriate" or is "capable of double interpretation," [3] that is, has two or more competing thrusts. A good example is the word "residence," which unless particular context resolves the doubt can refer equally to the place where a person has his abode for an extended period, or to the place that the law considers to be his permanent home, whether or not it is his place of abode.

To avoid the so-called "one word one meaning" fallacy, it is commonly assumed that all words are ambiguous in the equivocation sense because almost every word is used in various senses and thus has more than one meaning.[4] Does the existence of multiple dictionary meanings make a word equivocal and therefore ambiguous? The answer lies in the difference between an ambiguous word and a group of homonyms.

Groups of homonyms are easily confused with ambiguous words, because both have multiple thrusts of meaning. But the two are not the same.[5] On the one hand, the intended sense of a word designating a bundle of homonyms is almost inevitably revealed in use, whatever the peculiarities of context. The homonym's capacity for sense sifting is built in and automatic. Examples of these multi-purpose words abound: "If the bear escapes, the

[3] III *Oxford English Dictionary* E263 (1933).

[4] *E.g.*, Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 Colum. L. Rev. 1259, 1263 (1947); Waismann, "Language Strata," *Essays on Logic and Language* 2d Series, 11 (Flew ed. 1953).

[5] On this difference, see Stebbing, *A Modern Introduction to Logic* 21 (6th ed. 1948); Dickerson, *Legislative Drafting* 62 n.3 (1954).

owner shall bear the cost." "If he can, the buyer shall return the empty can." This kind of multiplicity of meanings, often considered a defect of language, may actually be a benefit. At least, it makes possible an economy of symbols.

With the ambiguous word, on the other hand, the uncertainties of alternative reference are not resolved by mere use in context. In the statement, "His rights depend on his residence," it is not clear whether they depend on place of abode or on legal home. That, clothed in its broadest context, the uncertainty may in fact be resolved (as where the word "residence" appears in a divorce statute in which for jurisdictional reasons it seems probable that the legislature intended to refer to legal home) does not turn an otherwise ambiguous word into an innocuous bundle of homonyms. Intermediate are families of use patterns that, while related, are individually identifiable.

Whereas homonyms present no significant danger, the ambiguous word carries the threat, in specific use, of competitive thrusts of meaning that are almost never desirable or justifiable. Because of its potential for deception or confusion, the draftsman should not use an ambiguous word in a context that does not clearly resolve the ambiguity. Indeed, he should avoid the ambiguous word (e.g., "residence") whenever his intended meaning (e.g., legal home) may be adequately expressed by an unambiguous word (e.g., "domicile"). References to the "purposive use of ambiguity," sometimes found in legal literature, are usually directed to the purposive uses of vagueness or generality,[6] discussed below.

Because the line between homonyms and ambiguity depends on their respective potentials for deception and confusion in use, differences in degree sometimes make it hard to tell on which side of the line a particular word falls. But mere naming is not the important thing. What is important is that the draftsman determine whether, in the particular context, there is likely to be a significant uncertainty of reference. If there is, he should resolve it by using another word or by taking the precaution of adjusting the context or adding explanatory language.

The ambiguities discussed so far are called "semantic ambiguities." [7] Their uncertainties of meaning, not inevitably resolved by context, are traceable to the multiplicities of dictionary meanings,

[6] *E.g.*, Miller, *supra* note 1, at 39.

[7] On the detection and resolution of semantic ambiguities, see MacKaye, *The Logic of Language*, ch. 5 (1939).

which exist independently of context. That their evils are felt, nevertheless, only in specific context makes it desirable to distinguish them from a second kind of ambiguity.

By far the most prevalent kind of ambiguity is syntactic ambiguity. Syntactic ambiguities are uncertainties of modification or reference within the particular statute.[8] Simple examples include squinting modifiers ("The trustee shall require him promptly to repay the loan") [9] and modifiers preceding or following a series ("charitable corporations or institutions performing educational functions").[10] These are usually ambiguities in the original etymological sense of alternatives limited to two.

A third, and likewise prevalent, kind of ambiguity is contextual ambiguity. Even when the words and syntax of a statute are unequivocal, it may still be uncertain which of two or more alternatives was intended. An internal contextual ambiguity may result, for example, from an internal inconsistency: when one provision plainly contradicts another, which is intended to prevail? Contextual ambiguities may also be external. Thus, a statute may bear a similarly ambiguous relationship to another statute with which it is inconsistent.

Perhaps the most troublesome contextual ambiguity, and one of the most frequent, is the uncertainty whether a particular implication arises. This is often true of "negative" or "reverse" implications,[11] covered by the maxim *expressio unius est exclusio alterius.* Sometimes the maxim applies and sometimes it does not, and whether it does or does not depends largely on context. Unfortunately, context tends in its particulars to be unique, and therefore does not always supply a clear answer. Even so, a person who has

[8] On the detection and resolution of syntactic ambiguities, see Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents,* 66 Yale L.J. 833 (1957); *Interpretation of California Pimping Statute,* 60S M.U.L.L. 114 (1960); Montrose, *Mock Turtle: A Problem in Adjectival Ambiguity,* 59D M.U.L.L. 28 (1959). "Circuit and isomer diagrams may make explicit the ambiguity involved, but they do not assist in the resolution of the ambiguity . . . . Allen considers that the arrow diagram is a procedure 'for the systematic detection of such syntactic ambiguity' . . . . It is submitted, however, that the construction of a diagram is possible only after the ambiguity has been detected. It is of course true, as Allen has pointed out, that the attempt to construct a diagram helps in the discovery of an ambiguity." Montrose, *Syntactic (Formerly Amphibolous) Ambiguity,* 62J M.U.L.L. 65, 69, 70 n.R3 (1962).

[9] Does "promptly" modify "require" or "repay"?

[10] Does "charitable" modify "institutions"? (Or, does "performing educational functions" modify "corporations"?).

[11] This is also called "coimplication." Allen, *supra* note 8, at 840.

watched the currents and eddies of usage develops an eye for these things. The ascertainment of implied meaning, like that of express meaning, is largely the recognition of familiar language patterns and use situations.

For semantic and syntactic ambiguities, it is important to remember that their characterization as such normally depends on their demonstrated potentiality for giving trouble in particular uses rather than on their producing an actual ambiguity in a particular instance. As with some unesteemed kinds of women, classification is by established reputation rather than by specific performance. Thus, the word "residence," taken in isolation, is properly classed as "ambiguous," even though in a particular context the notion of domicile clearly emerges. Similarly, a squinting modifier may be syntactically ambiguous in the isolation of a particular phrase or sentence, but unambiguous in its broadest context. Because the typical reader usually sees the details of a statute before he feels its total impact, what first appears to be an ambiguity may disappear on a more careful, comprehensive reading. If so, the ambiguity is apparent rather than actual. If not, the ambiguity is actual and can be resolved only by judicial fiat; that is, by an act of judicial law making.

The difference between apparent ambiguity and actual ambiguity is important. The draftsman's highest responsibility is to see that the final text, when read in its proper context,[12] contains no unresolved ambiguity. It is also highly desirable, though not so critical, that he see that the effectiveness of the statute is not impaired by unnecessary uncertainties of reference that, although resolvable, risk misreading at the hands of unperceptive courts or, at best, require time and effort to resolve. It is also desirable that he avoid the needless use of terms and configurations of syntax that, whatever their immediate impact, are known to carry the general risk of real or apparent ambiguity.

Fortunately, once an actual, apparent, or potential ambiguity has been recognized, it can almost always be avoided or minimized. Beyond human fallibility, there is no reason why a legal instrument need be ambiguous. Although ambiguity is ipso facto bad, it is also avoidable.

[12] In view of the common practice of relying on even the shabbiest aspects of internal legislative history to condition or supplement express statutory meaning, it should be emphasized that under general communication principles, context properly includes only those aspects of total environment that are available to both legislature and legislative audience.

B. Over-vagueness and over-precision.

It is unfortunate that many lawyers persist in using the word "ambiguity" to include vagueness.[13] To subsume both concepts under the same name tends to imply that there is no difference between them or that their differences are legally unimportant. Ambiguity is a disease of language, whereas vagueness, which is sometimes a disease, is often a positive benefit.[14] With at least this significant difference between the two concepts, it is helpful to refer to them by different names.

Whereas "ambiguity" in its classical sense refers to equivocation, "vagueness" refers to the degree to which, independently of equivocation, language is uncertain in its respective applications to a number of particulars.[15] Whereas the uncertainty of ambiguity is central, with an "either-or" challenge, the uncertainty of vagueness lies in marginal questions of degree. This uncertainty is said to result from the "open texture of concepts." [16]

Language can be ambiguous without being vague. If in a mortgage statute, for example, it is not clear whether the word "he" in a particular provision refers to the mortgagor or the mortgagee, the reference is ambiguous without being in the slightest degree vague or imprecise. Conversely, language can be vague without being ambiguous. An example is the word "red."

Most words that denote classes or categories (these words include most of the words of which statutes are composed) have elements of vagueness. Terms such as "near" and "intentional" have wide margins of uncertainty, whereas terms such as "male" and "natural child" have narrow ones. A few terms of general reference, such as "the first day of the calendar month," have no significant margins of uncertainty. Most non-vague terms, on the other hand, are terms of unique reference, such as "the current President of the United States."

As with ambiguity, vagueness may be semantic in that it attaches by uncertain usage to particular words and phrases, as in the examples just given, or it may be contextual. Contextual vague-

[13] *E.g.*, Jones, *Extrinsic Aids in the Federal Courts*, 25 Iowa L. Rev. 737, 739 (1940).

[14] Curtis, *op. cit. supra* note 2, at 59–67; Dickerson, *Some Jurisprudential Implications of Electronic Data Processing*, 28 Law & Contemp. Prob. 53, 62 (1963).

[15] For the interesting development of a "vagueness profile," see Black, *Language and Philosophy* 25–58 (1949).

[16] Waismann, "Verifiability," *Essays on Logic and Language* 117, 120 (Flew ed. 1951).

ness, which likewise is either internal or external, arises, for example, where one relevant provision prevails generally over another but the extent of prevalence remains uncertain. Similarly, where it is clear from context that an express grant of authority is intended to be exclusive and thus to carry a negative implication, it is likely to remain uncertain how far the implied withholding of authority to act extends in the broad reaches beyond the express coverage of the statute.

Unlike ambiguity, vagueness is often desirable.[17] How desirable it may be in a particular instance depends on whether and how far the legislative client believes it desirable to leave the resolution of uncertainties to those who will administer and enforce the statute. (This is apparently what the advocates of "purposive ambiguity" have been trying, inartistically, to say.) [18] Fortunately, through a careful choice of terms and definitions and a partial control of context, the legislative draftsman has wide control over the areas and degrees of vagueness. Even though he may be unable to avoid it altogether, he can usually reduce it to the point where the residual uncertainties are no longer significant for the legislative client's purpose. Ideally, the legislative draftsman should try to make the statute no more nor less vague than is indicated by his client's desire to leave the resolution of uncertainties of meaning to the discretion of those who will administer or officially interpret the statute.

Leaving more uncertainties (and the discretion to resolve them) than the client wishes to entrust to the persons who will administer or officially interpret the statute — that is, creating more vagueness than the substantive policies of the legislature call for — is the language disease of over-vagueness. And what about a statute that is *less* vague than those policies call for? Here we have the disease of under-vagueness, more conventionally known as "over-precision."

Although the competent legislative draftsman almost always tries to achieve the greatest possible clarity, this is not the same as saying that he almost always tries to achieve the greatest possible precision. The optimum clarity for the legislative draftsman is language that achieves a degree of precision commensurate with the definiteness of the legislature's objectives.[19]

[17] Curtis, *op. cit. supra* note 2, at 59–67; Dickerson, *supra* note 14.

[18] *E.g.*, Miller, *supra* note 1, at 39.

[19] "[H]is words should be as flexible, as elastic, indeed as vague, as the future is uncertain and unpredictable. . . . A lawyer's words should be no more precise

Over-precision and over-particularity not only needlessly circumscribe the actions of those who are affected by the statute but make it harder to read, understand, and administer. The draftsman not only should avoid introducing unnecessary complexities of his own, but should weigh the appropriateness of taking up with his legislative client the substantive policy question whether the legislature will best serve its objectives by pressing matters of apparently unnecessary detail. Over-precision tends especially to afflict old statutes that have been amended many times.

C. Over-generality and under-generality.

A third concept, often confused with vagueness and sometimes even with ambiguity, is that of generality. A term is "general" when it is not limited to a unique referent and thus can denote more than one. It would be hard to imagine a statute that did not contain at least one general term.

The confusion of generality with ambiguity[20] is most likely to occur with respect to heterogeneous classes that include different referents that it is often useful to distinguish. For example, the general term "grandmother" is not ambiguous merely because it includes a paternal grandmother as well as a maternal one. Similarly for the general term "brother-in-law," which includes both a wife's or husband's brother and a sister's husband. The difference between such hetero-generality and ambiguity is that the former permits simultaneous reference, whereas the latter permits only alternative reference. Which is present usually depends on the context in which the term is used. In the sentence, "A grandmother sometimes has heavy responsibilities," the word "grandmother" is general. In the sentence, "My grandmother sometimes has heavy responsibilities," it may well be ambiguous, if both grandmothers are living.

Generality, like vagueness, is not necessarily a disease of language. It is an indispensable tool of communication. The diseases, rather, are over-generality and under-generality. The classes denoted in a statute should be neither broader nor narrower than those appropriate to carrying out the legislature's objectives. Thus,

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than his client's control of the future is both practicable and desirable." Curtis, *op. cit. supra* note 2, at 64.

[20] "If therefore a group of events is described in a statute, there must be at least two which will fit that description, and since events are unique, any description of a group is almost by definition ambiguous." Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863, 868 (1930).

unless context reaches the intended result, the legislative draftsman should be careful not to say "crime" when he means felony. And conversely.

Generality is more easily confused with vagueness than with ambiguity.[21] That most general terms are also vague in their marginal applications makes it easy to overlook that the leeway permitted by vagueness is not the same as the leeway permitted by generality. The word "many," for example, is both vague and general. So also the word "automobile." The generality of the latter is exemplified by its capacity for simultaneously covering both Fords and Chevrolets without a tinge of uncertainty. Its vagueness is exemplified by the uncertainty whether it covers three-wheeled Messerschmitts, which bear a strong resemblance also to motorcycles.

The most important difference between ambiguous or vague language and general language is that ambiguity and vagueness constitute uncertainties of meaning, whereas mere generality does not. As a means of granting leeway to those who will administer or officially interpret the statute, it is preferable (where there is a choice) for the draftsman to rely on the generality of language rather than its vagueness, simply because, other factors remaining neutral, certainty is normally preferable to uncertainty. Vagueness, on the other hand, is a proper (though second-choice) vehicle for granting leeway where the legislative client's uncertainty as to specific results is matched by the marginal uncertainty in the language and context of the statute.

Although the legislative draftsman cannot eliminate vagueness entirely, there is no inherent reason why he cannot find in the resources of current language a degree of generality substantially coextensive with the sweep of substantive policy that the statute is intended to express.

D. Obesity.

Obesity, another major disease of language in statutes, is not a matter of size but of fat. It consists of prolixity, circumlocution, avoidable redundancy,[22] and other unnecessary language. Obesity

[21] "Russell's definition of vagueness . . . as constituted by a one-many relation between symbolizing systems is held to confuse vagueness with generality . . . . The finite area of the field of application is a sign of its *generality*, while its vagueness is indicated by the finite area and lack of specification of its boundary." Black, *op. cit. supra* note 15, at 29, 31.

[22] Some redundancy is unavoidable, because it is built into the language. See Cherry, *On Human Communication* 115, 185 (1957).

is a disease because it impedes rather than facilitates understanding. As Johnson has said of wills, "Prolixity is much like obesity: in order to achieve a cure, each mouthful must be watched." [23]

No word or phrase should be used in a statute unless there is good reason for including it. If none appears, it should be eliminated. Every word should pay its own way.

How Full the Cure?

It is sometimes said that every statute should be drafted so that no one reading it in bad faith could possibly misunderstand it. This made good sense so long as courts were generally antagonistic or unfriendly to draftsmen. However, as Conard has pointed out,[24] the climate in which statutes are judicially examined has greatly changed. Today, it may be assumed that courts make an honest, generally unprejudiced attempt to extract the meaning of a statute as it would be read by a typical member of the legislative audience to which it is addressed. This means that the draftsman's main problem is to say what he means according to the standards of communication prevalent in the relevant speech community.

This means also that a legislative draftsman need not go to extremes to reduce the risk that his statute will be misread. He is entitled to rely on the normal ways of reading language, even in the face of minority, competing usages. The law now accepts, for the most part, the normal presupposition of communication that language has been used in its usual sense. This presupposition is generally valid, in and out of the law, because usage is what makes language.

If there is an evenly poised doubt whether the language will be read one way or another, the legislative draftsman should be sure that he tips the scales toward the meaning that he intends to convey. If the doubt is unevenly poised and the draftsman considers that there is a significant possibility that his language will be misread by the typical reader, he should try to remove the uncertainty or reduce it to relative insignificance. In such matters there are few rules of thumb. There is no substitute for the judgment of an experienced draftsman sensitive to the nuances of text and context. In any event, an editorial point of view is essential. The draftsman must have a feeling for how specific language hits the eye of a reader who has no access to the subjective intent of the

[23] Johnson, *A Draftsman's Handbook for Wills and Trust Agreements* 9 (1961).
[24] Conard, *New Ways to Write Laws*, 56 Yale L.J. 458, 468 (1947).

draftsman except through the statute and its shared environment.

It is sometimes said that a legislative draftsman should leave nothing to implication. Nonsense. No communication can operate without leaving part of the total communication to implication. Implication is merely the meaning that context adds to express (dictionary) meaning. The draftsman is entitled, therefore, to rely on any normal implication that attaches to the features of the legislative message that he has made express. The only reservation here is that implications, like express language, should be made as clear as reasonably possible without prolixity. Implications can be ambiguous or vague. In general, they are subject to the same diseases, and respond to most of the same cures, as express language.

Although for the most part the legislative draftsman can safely rely on the same probabilities of meaning as the writer of non-legal documents, areas remain where the courts read statutes with an unfriendly bias. An example is the criminal statute, which courts are said to interpret "strictly." Although this kind of law making may be a justifiable exercise of the judicial power, it can hardly be classed as legislative communication. Similarly for other instances of "strict construction." The draftsman should know when he is dealing with such an area so that he may know when to take the added precautions of expressness that those areas require.

The legislative draftsman does not seek absolute clarity. He seeks the greatest practicable degree of clarity, not involving an inordinate expenditure of words, that gets the legislative message across to the typical member of the legislative audience and to the skeptical reader in those situations in which courts want to be doubly sure that a probable result of some severity was actually intended. If he can do this, the draftsman has successfully overcome the diseases and limitations of legislative language. In most cases, it is not only possible but practicable.

The New California Governmental Tort Liability Statutes

JAMES A. COBEY*

In 1961 the California Supreme Court held that the doctrine of sovereign immunity would no longer protect governmental entities from civil liability for their torts. This led to a series of statutes, by which the California Legislature attempted to deal with the problems created by this basic shift from a principle of immunity to one of liability. Senator Cobey examines the major features of this legislation, compares it with prior California law and with the results reached in other states, and points out some problems left unsolved.

THE ANCIENT doctrine of sovereign immunity — epitomized in the maxim, "The king can do no wrong" — was dealt a mortal blow by the California Supreme Court in 1961 in *Muskopf v. Corning Hosp. Dist.*[1] In 1963 the California Legislature, acting on the recommendation of the California Law Revision Commission, enacted legislation which substantially affirmed the action of the court, but retained immunity in certain areas where there were valid policy considerations in its favor.[2] This article will sketch briefly the status of sovereign immunity prior to the *Muskopf* decision, point out the problems created by that decision, discuss the legislation designed to solve these problems, and mention problems left unsolved.

SOVEREIGN IMMUNITY IN CALIFORNIA BEFORE 1961

Before 1961, the nonstatutory California law relating to the liability of governmental entities was as follows: The state and local governmental entities were not liable for torts committed in the course of their "governmental" activities, but they were liable to the same extent as a private person for torts committed in the course of their "proprietary" activities. Public entities were also liable for the damages caused by nuisances they created, and, because of the constitutional prohibition against the taking or dam-

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[1] 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

[2] Cal. Stats. 1963, ch. 1681. See also Cal. Stats. 1963, chs. 1682–1686, 1715 and 2029.

aging of property by government without just compensation, public entities were liable for taking or damaging property for public use – the liability referred to as "inverse condemnation." [3]

Against this background of decisional law must be placed the statutory law relating to governmental liability and immunity. Extensive legislation had been enacted expressing a variety of conflicting policies. Some statutes imposed liability; others created broad immunities. Some statutes applied to but one entity; others applied to many. In some instances statutes expressing conflicting policies overlapped.

The principal statutory liabilities were: All governmental entities were liable for damages caused by the negligent operation of motor vehicles by a public employee within the scope of his employment; [4] cities, counties and school districts were liable for dangerous conditions of public property caused by the negligence of the public entity; [5] school districts were liable for their own negligence and the negligence of their personnel; [6] a number of public entities were required to pay judgments against certain of their personnel; [7] and cities and counties were liable for property damage caused by riots.[8]

The Effect of Judicial Abrogation of Sovereign Immunity

The many statutes relating to the liability of public entities had been written under the assumption that the underlying rule was immunity, not liability. Then in 1961 came the *Muskopf* decision, which held that the doctrine of sovereign immunity would no longer protect governmental entities in California from civil liability for their torts, i.e., that the underlying rule is now liability. It became impossible to predict with any degree of confidence what meaning would be given to the statutes based on the earlier assumption. Were they limitations on liability? Their words did not so indicate. Or did they provide a ground of liability in addition to the newly recognized common law basis for liability?

At the same time that *Muskopf* was decided, the California Supreme Court also decided *Lipman v. Brisbane Elementary*

[3] For an exhaustive discussion, see Cal. Law Revision Comm'n, "A Study Relating to Sovereign Immunity," 5 *Reports, Rec. & Studies* 1 (1963).

[4] Cal. Vehicle Code § 17001.

[5] Cal. Gov't. Code § 53051.

[6] Cal. Educ. Code § 903.

[7] See, *e.g.*, Cal. Gov't. Code §§ 2002.5 and 61633; Cal. Water Code §§ 22730, 31090, 35755, and 60202.

[8] Cal. Gov't. Code §§ 50140–50145.

School District.[9] In contrast to the law relating to public entities, the California law relating to public employees has always been that they are liable for their torts unless a statute grants immunity. As a major exception to this rule of liability, the courts held that public employees are not liable for their discretionary acts within the scope of their authority. In *Lipman,* the Supreme Court reaffirmed these rules; but in a dictum that consternated the governmental bodies in the State, the Court stated that the doctrine of discretionary immunity would not necessarily protect a public entity in the same situations in which it protects public employees. Many public officials expressed fears that judges and juries in tort actions would be reviewing policy decisions made by politically responsible officials. The Law Revision Commission received reports indicating that some claims for damages were actually presented based on the negligent failure of a city to enact an ordinance of a particular character.

Problems were created not only by the uncertainties arising from the judicial abrogation of sovereign immunity, but by the fact of liability itself. California has many small public entities – e.g. lighting districts, police protection districts, fire protection districts, and water maintenance districts. Some of these districts have a total assessed valuation of less than $500 and are therefore without capacity to pay tort judgments. Many other bodies of more substantial size would similarly experience financial ruin if called upon to pay large tort judgments. Hence, the Legislature had to provide the means to meet the financial obligations of expanded tort liability.

The Legislative Solution

The *Muskopf* decision was handed down while the Legislature was in session but it became quickly evident that there would not be sufficient time to study the problems created by the decision, and to reach a sound legislative solution.

In 1957, the Legislature had authorized the California Law Revision Commission to undertake a study to determine whether the doctrine of sovereign immunity should be revised or abolished. Recognizing that the Law Revision Commission would soon be in a position to provide answers to many of the questions raised by legislators following the 1961 decision, the Legislature enacted Chapter 1404 of the Statutes of 1961. As construed by the Cali-

[9] 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961).

fornia Supreme Court,[10] this Act provided that until the 91st day after the end of the 1963 legislative session there could be no recoveries on causes of action to which sovereign immunity would have been a defense prior to *Muskopf*. Actions could be commenced, however, and pretrial and discovery procedures begun. With respect to causes of action arising after the date of *Muskopf*, Chapter 1404 required compliance with the applicable claims statutes but tolled the running of the statute of limitations until 91 days after the 1963 legislative session.

While the Law Revision Commission was studying the legal problems involved, the Senate Fact Finding Committee on Judiciary undertook to determine the potential financial impact of the abolition of sovereign immunity. The Committee's report analyzed the situation of California governmental bodies and the experience of the United States under the Federal Tort Claims Act, as well as that of New York and other selected states under their governmental liability legislation.[11]

As a result of its study, the Law Revision Commission approved and submitted to the Legislature seven recommendations dealing with the most urgent problems in the field.[12] At the 1963 session of the Legislature, nine bills were introduced to effectuate the Commission's recommendations.[13] Eight of these were enacted in a form leaving unchanged the basic legislative scheme recommended by the Commission.[14] The principal effect of the legisla-

[10] Corning Hosp. Dist. v. Superior Court, 57 Cal. 2d 488, 370 P.2d 325, 20 Cal. Rptr. 621 (1962).

[11] California Senate Fact Finding Committee on Judiciary, "Seventh Progress Report to the Legislature: Part 1 — Governmental Tort Liability" (1963).

[12] Cal. Law Revision Comm'n, "Recommendation Relating to Sovereign Immunity: Number 1 — Tort Liability of Public Entities and Public Employees;" "___: Number 2 — Claims, Actions and Judgments Against Public Entities and Public Employees;" "___: Number 3 — Insurance Coverage for Public Entities and Public Employees;" "___: Number 4 — Defense of Public Employees;" "___: Number 5 — Liability of Public Entities for Ownership and Operation of Motor Vehicles;" "___: Number 6 — Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers;" "___: Number 7 — Amendments and Repeals of Inconsistent Special Statutes." 4 *Reports, Rec. & Studies* at 801, 1001, 1201, 1301, 1401, 1501, and 1601 (1963). See Cal. Law Revision Comm'n, "A Study Relating to Sovereign Immunity." 5 *Reports, Rec. & Studies* 1 (1963).

[13] Cal. Senate Bills Nos. 42, 43, 44, 45, 46, 47, 483, 484, and 499 (1963 Regular Session). For material pertinent to the changes made by various legislative committees after the bills were introduced, see the special legislative committee reports on Senate Bills Nos. 42 (tort liability) and 43 (claims, actions and judgments against public entities and public employees), found in 1963 Senate Daily J. 1884–95 (Regular Session), 1963 Assembly Daily J. 5439–41 (Regular Session), and 1963 Senate Daily J. 192–96 (First Extraordinary Session).

[14] Cal. Stats. 1963, chs. 1681–1686, 1715 and 2029.

tion was to make governmental entities generally liable for the torts of their servants.

The new California statute provides that a public entity is immune from tort liability unless a statute can be found imposing liability in the particular case.[15] New York takes an opposite approach, generally making public entities liable unless a statute or court decision restricts liability.[16] The Law Revision Commission concluded that a New York type statute imposing liability with specified exceptions would provide the governing bodies of public entities with little basis upon which to budget the payment of claims and judgments. By inviting actions on theories not yet tested in the courts, the New York solution expands the amount of litigation, and increases the expense to the public units. Moreover, the cost of insurance under such a statute would no doubt be greater than under the new California statute, since insurance companies would demand premiums appropriately increased to account for additional risk exposure in the indefinite area of liability that exists under a statute imposing liability with specified exceptions.

The most important of the new California provisions states that a public entity is liable for the tort of its employee acting within the scope of his employment to the extent that the employee is personally liable. Except as provided in special statutes imposing liability, the immunities of public employees from liability also protect the employing public entities.[17] This provision incorporates a known body of liability law[18] — the law relating to the liability of public employees — and makes it applicable to governmental entities. In some cases where the law relating to liability of public employees was uncertain, specific provisions were included in the statute indicating whether or not liability exists.

The most important immunity enjoyed by public employees is the immunity from liability for discretionary acts. This court-made immunity has been made statutory to preclude its abrogation by the courts.[19] Some authorities have argued that this immunity is

[15] Cal. Gov't. Code § 815.
[16] N.Y. Ct. Cl. Act § 8.
[17] Cal. Gov't. Code § 815.2.
[18] At least, sufficiently known to permit insurance companies to write and public entities to procure liability insurance to cover the risk at reasonable rates. See Senate Fact Finding Committee on Judiciary, "Seventh Progress Report to the Legislature: Part 1 — Governmental Tort Liability," 1–3 (1963).
[19] Cal. Gov't. Code § 820.2.

granted public *employees* so that the fear of financial loss will not impair their zeal in the performance of their functions; hence, its application to public *entities* is inappropriate.[20] The Law Revision Commission concluded, however, that the discretionary immunity also performs the more important function of preserving an appropriate separation of powers in a democratic government. Certain decisions of public officials should be reviewed by only the electorate. If these decisions were reviewed in tort suits for damages, ultimate decision-making authority would be taken from those persons who are politically responsible for the decisions and given to judges and juries who are not politically responsible for them.

Under the new statute, the public employee is no longer required to assume personally, to the exclusion of his employer, the liability risks created by his public employment, for his employer, in almost every case, is subject to the same risks.[21] The statute provides public entities with immunity from liability under many circumstances; but in almost every such case, the public employee also is immune so that the public employee is not again required to assume personally the liability risks of governmental enterprise. Thus, as a general rule, the public entity — not its employee — is ultimately financially responsible for tort damages under the statute. Of course, the entity has a right of indemnification where the employee is guilty of actual fraud, corruption or actual malice; [22] and a public employee — but not a public entity — may be liable for punitive or exemplary damages[23] or for damages for an injury to or by a prisoner or mental patient.[24]

The Commission realized, of course, that all governmental liability cannot be based solely on respondeat superior. Governmental entities have duties that are imposed on the entity itself, breach of which should result in liability. Accordingly, the legislation provides that if a public entity fails to exercise reasonable diligence to comply with standards of safety prescribed by law, it

[20] See, *e.g.*, Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 229–30, 359 P.2d 465, 467, 11 Cal. Rptr. 97, 99 (1961).

[21] Cal. Gov't. Code § 815.2 (public entity directly liable for negligent or wrongful act or omission of its employee in cases where employee personally liable); Cal. Gov't. Code §§ 825–825.6 (public entity required to pay judgments, compromises and settlements of claims against its employees).

[22] Cal. Gov't. Code § 825.6.

[23] Cal. Gov't. Code § 818. See also Cal. Gov't. Code § 825.

[24] Cal. Gov't. Code §§ 844.6 and 854.8. *But see* Cal. Gov't. Code §§ 845.4, 845.6, 855 and 855.2.

is liable for the resulting damages whether the public employees involved would have been liable or immune.[25] In addition, public entities are directly liable for breach of their obligations as occupiers of land, whether or not the public employees involved would have been liable.[26]

The foregoing are the principal features of the new legislation. The remainder of the legislation spells out the underlying policies in considerable detail. This paper will not include a discussion of each of the many provisions of the new statute, but set forth below are some of the more important ones.

The statute provides specific guides to liability or immunity in the major areas of potential liability: dangerous conditions of property,[27] police and correctional activities,[28] fire protection,[29] and medical, hospital and public health activities.[30] These guides constitute a legislative effort to profit from the experiences of California's local entities with liability under the former Public Liability Act[31] relating to dangerous conditions of public property, of New York under the Court of Claims Act's general waiver of immunity, and of the federal government under the Federal Tort Claims Act. Thus, for example, some immunities created by the New York courts are given statutory recognition in the California legislation so that prolonged litigation will not be required to determine whether the California courts will also recognize the immunities.

A number of specific immunities that appear in the new legislation are based on the view that adjudicative or legislative decisions of public officers should not be reviewed in tort actions for damages. Thus, there can be no liability for adopting or failing to adopt any statute, ordinance or regulation;[32] and there can be no liability for granting or refusing to grant, revoking or refusing to revoke, or suspending or refusing to suspend, any license or similar authorization.[33]

[25] Cal. Gov't. Code § 815.6. See also Cal. Gov't. Code § 855 (liability for failure to meet minimum standards for equipment, personnel, or facilities of public medical facility).

[26] Cal. Gov't. Code §§ 830–840.6.

[27] Cal. Gov't. Code §§ 830–840.6.

[28] Cal. Gov't. Code §§ 844–846.

[29] Cal. Gov't. Code §§ 850–850.8.

[30] Cal. Gov't. Code §§ 854–856.4.

[31] Cal. Gov't. Code §§ 53050 *et seq.*, applicable only to cities, counties and school districts, which was repealed by the new tort liability act.

[32] Cal. Gov't. Code §§ 818.2 (public entities) and 821 (public employees).

[33] Cal. Gov't. Code §§ 818.4 (public entities) and 821.2 (public employees).

Other immunities are based on the similar premise that the discretion of policy-making officials should not be reviewed in tort actions for damages. Thus, for example, there is no liability for failure to enforce the law,[34] and the pre-existing court-created immunity for malicious prosecution is continued in statutory form.[35]

Certain provisions of the legislation are designed to eliminate what might be called "third-party" claims against public entities — claims against a public entity because it has not prevented one person from negligently or wrongfully injuring another. The immunity from liability for failure to enforce the law is based in part on this principle. So, too, is the immunity from liability for failure of a public employee to make an adequate inspection of private property to determine its compliance with health and safety requirements.[36] As a result of court decisions, there is immunity from most of this type of liability in New York.[37] The underlying principle is that the government should not become an insurer of the health and safety of the public whenever it undertakes a program to make that health and safety more secure. Tort liability would constitute too great a deterrent to the institution of new health and safety programs. The public is greatly benefited by such programs, but an individual citizen should not be able to claim that it is the government that has harmed him when such a program has not done all that it might have done. For example, there is immunity for failure to make adequate public health examination.[38] Therefore, a public entity can set up a cancer detection clinic without considering the deterring force that liability for each negligently undiscovered cancer would have. Immunities for failure to provide adequate police[39] or fire protection[40] flow from this same principle.

A large part of the new legislation deals with the liability of public entities as occupiers of land.[41] The new law rejects the com-

[34] Cal. Gov't. Code §§ 818.2 (public entities) and 821 (public employees). See also Cal. Gov't. Code § 846 (failure to arrest or to retain arrested person in custody).

[35] Cal. Gov't. Code § 821.6.

[36] Cal. Gov't. Code §§ 818.6 (public entities) and 821.4 (public employees).

[37] See Herzog, *Liability of the State of New York for "Purely Governmental" Functions*, 10 Syracuse L. Rev. 30 (1958).

[38] Cal. Gov't. Code §§ 855.4 (failure to promote the public health of the community by preventing or controlling the communication of disease within the community) and 855.6 (failure to make adequate physical or mental examination unless examination for purpose of treatment).

[39] Cal. Gov't. Code §§ 845 and 845.2.

[40] Cal. Gov't. Code §§ 850, 850.2 and 850.4.

[41] Cal. Gov't. Code §§ 830–840.6.

mon law notion that the injured person's right to recover depends on his status as an invitee, licensee, or trespasser. Liability is based on the failure of the public landowner to take reasonable precautions after it knows or has reason to know that its property is in such a condition that it creates a substantial risk of harm to persons who will foreseeably use the property with due care.

Again, specific immunities have been provided to keep public liability within ascertainable limits. Thus, the plan or design of a public improvement cannot be a basis of liability unless the court can find that no reasonable person could have approved it.[42] So that public entities will not have to expend public funds in inspecting and improving remote and unimproved property, immunity has been granted for injuries caused by the condition of such property.[43]

An important feature of the new legislation is its requirement that public entities pay judgments recovered against public employees for acts or omissions in the scope of their employment.[44] The liability of public employees was imposed upon public entities, not only so that public entities might be subject to risks of liability under a known body of law, but also so that public employees might not be required to bear personally the risks of liability created by governmental activities. To avoid frustration of this principle, public entities are required to pay judgments against their employees. Before the obligation attaches in a particular case, however, the employee involved is required to tender to the public entity the defense of the action.

In addition to the provisions dealing with substantitive liability, the 1963 California legislation contains provisions dealing with the administrative and fiscal problems arising from governmental tort liability.

In 1959, the California Legislature enacted a series of bills providing for a uniform claims presentation procedure for all local public entities in the state.[45] The new procedure superseded over

[42] Cal. Gov't. Code § 830.6.

[43] Cal. Gov't. Code §§ 831.2 and 831.6. See also Cal. Gov't. Code §§ 831.4. (recreational access roads, and hiking, riding, fishing and hunting trails) and 831.8 (reservoirs, canals, conduits and drains).

[44] Cal. Gov't Code §§ 825–825.6. Public entities also are required to defend actions brought against public employees. Cal. Gov't. Code §§ 995–996.6. See Cal. Law Revision Comm'n, "Recommendation Relating to Sovereign Immunity: Number 4 — Defense of Public Employees." 4 *Reports, Rec. & Studies* 1301 (1963).

[45] The basic claims statutes enacted in 1959 were Cal. Gov't. Code §§ 600–655 (State), 700–730 (local public entities) and 800–803 (public officers and employees).

170 separate procedures found in a variety of statutes, ordinances and charters, but the procedure for presenting a claim to the state was retained without substantive change.[46]

The Law Revision Commission, during its study of sovereign immunity, took another look at the claims statutes. Upon its recommendation,[47] the 1963 Legislature enacted a single claims presentation procedure for both the state and local governmental units. Although the 1959 legislation removed most of the procedural defects in the pre-existing claims laws, the Commission discovered that in some cases the claims statutes still provided a technical trap which deprived persons of their meritorious causes of action even though the appropriate public entity knew that the accident had taken place and that the injured person was claiming damages. The 1963 legislation corrected this defect. Generally, tort claims must be presented within 100 days after the accrual of the cause of action.[48] But a claim may be presented after the initial 100 days and up to one year after the accrual of the cause of action if the claimant shows either that he was under a disability during the initial 100 days or that he failed to present his claim within 100 days because of mistake, surprise, inadvertence, or excusable neglect, and that the public entity was not prejudiced by the delay in presentation.[49]

The new legislation facilitates administrative handling of claims by permitting public entities to establish claims boards[50] or to appoint claims officers who may be delegated authority to settle claims.[51]

No action may be commenced against a public entity until a claim has been rejected in whole or in part.[52] Actions are tried in the courts under the same procedure applicable to litigation between private parties.[53] However, in order to provide public entities and their employees with some protection against "crank" suits, the legislation permits a public body to require a plaintiff to file an undertaking to secure payment of costs.[54] The minimum amount of the undertaking is $100, and the minimum costs that may be

[46] Cal. Gov't. Code §§ 600–655.
[47] Cal. Law Revision Comm'n, "Recommendation Relating to Sovereign Immunity: Number 2 – Claims, Actions and Judgments Against Public Entities and Public Employees." 4 *Reports, Rec. & Studies 1001* (1963).
[48] Cal. Gov't. Code § 911.2.
[49] Cal. Gov't. Code §§ 911.4–912.2.
[50] Cal. Gov't. Code § 935.2.
[51] Cal. Gov't. Code §§ 935.4, 935.6, 948 and 949.
[52] Cal. Gov't. Code § 945.4.
[53] Cal. Gov't. Code § 945.2.
[54] Cal. Gov't. Code § 947. See also Cal. Gov't. Code § 951.

awarded are $50. The court may require the undertaking to be in excess of $100 upon a showing of good cause by the governmental entity.

The new legislation also contains provisions designed to insure that public bodies will pay judgments recovered against them, and to provide them with the capacity to pay tort judgments without disruptive financial consequences. Local public entities are required to levy taxes or otherwise provide for revenues sufficient to pay any outstanding judgments.[55] However, a judgment may be paid in installments over a period of up to 10 years if immediate payment will cause undue hardship.[56] When authorized by their voters, local bodies may issue bonds payable over 40 years to raise funds to pay tort judgments.[57] All entities have the authority to insure their liabilities and to enter into group liability insurance plans with other public entities.[58]

Unresolved Problems

The 1963 legislation provides ascertainable guides to liability or immunity of public entities and provides these bodies with means to meet their responsibilities without disruptive financial consequences. Lack of time, however, precluded legislative solution of all the related problems.

Although the new legislation provides public entities with the means to meet their financial obligations, it does not require them to use these means. If a small entity fails to insure, its continued existence will be threatened by the imposition of tort liability; and if its operations cause injury, the person injured will be unable to obtain the compensation justly due. In the future, consideration may have to be given to some kind of program to require such entities to carry the maximum insurance their financial resources can support and to provide for the assumption of excess liabilities by larger entities, groups of entities, or the State.

The 1963 legislation is based in large part on the principle of respondeat superior, yet in a few cases it may be extremely difficult to ascertain just who an employee's employer is. For example, the district attorney is elected at the county level, and the county pays his salary, but he prosecutes criminals in the name of the

[55] Cal. Gov't. Code §§ 970–970.4.
[56] Cal. Gov't. Code § 970.6.
[57] Cal. Gov't. Code §§ 975–978.8.
[58] Cal. Gov't. Code §§ 989–991.2 and 11007.4.

people of the State. Judges of the superior courts are elected at the county level, but their salaries are paid in part by the counties and in part by the State; they administer State law; and the courts are State courts, not county courts. Under the new legislation, it will be necessary to determine whether such officers are county or State officers. In the future, it may be necessary to provide legislative guides for determining what entity is the responsible superior for a particular employee.

The legislation of 1963 does not permit the imposition on public entities of absolute liability for extra-hazardous activities. There was insufficient time to consider whether damages should be awarded to persons who are injured without fault or whose property is damaged without fault because of operations of government undertaken to protect the lives and property of the public.[59] As an illustration, should an innocent bystander struck by a policeman's bullet receive compensation—or should his compensation depend on whether the policeman shot at a criminal carefully or negligently? Should the owner of a house receive compensation when his house is destroyed to prevent the spread of a fire?

Also, the 1963 provisions deal only with monetary relief. Nonmonetary relief is still to be considered by the Legislature.

All these remaining problems eventually will require study. Any legislation as long and complex as the 1963 governmental liability measures is bound to show defects as its provisions are used. The 1963 legislation is a major improvement in the law of California, but work still remains to be done before the interests of injured persons and the interests of the public at large are completely and properly resolved.

[59] Cal. Stats. 1963, ch. 1684, enacted upon recommendation of the California Law Revision Commission, provides workmen's compensation benefits to persons required or requested to assist law enforcement or fire control officers. See Cal. Law Revision Comm'n, "Recommendation Relating to Sovereign Immunity: Number 6—Workmen's Compensation Benefits for Persons Assisting Law Enforcement or Fire Control Officers." 4 *Reports, Rec. & Studies* 1501 (1963).

A Model State Wrongful Death Act

DAVID R. ANDERSON*

In this article, Mr. Anderson briefly examines the status of state Wrongful Death Acts in the United States and finds them inadequate, in a state of neglect, and in need of greater uniformity. He detects a trend in both the legislatures and courts toward a liberalization of awards in the wrongful death action. In accord with this, Mr. Anderson proposes a model act which creates a cause of action designed to compensate survivors of the decedent for both tangible and intangible injuries, to prohibit punitive damages, and to provide mandatory guidelines for computing awards.

MANY OF THE wrongful death acts now in force in the United States reveal serious neglect. Only a handful list the specific injuries considered to be compensable in a wrongful death action, (*e.g.*, loss of the care and attention of a spouse), and none require court or jury to consider such factors as the decedent's life expectancy or take-home pay in computing the size of an award once fault has been established.[1]

Furthermore, the statutes now in force are so dissimilar that they seem to invite uniform treatment to neutralize the role of accident situs as a factor in the recovery.[2]

The proposed act is drafted to correct inadequacies found in existing laws, and also to promote unification efforts by serving as a model for adoption in all states.

As matters now stand, the states do not even agree on the

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[1] Not all courts permit the use of such tools. For example, the Louisiana Supreme Court forbids them on the ground that pecuniary loss resulting from wrongful death cannot be scientifically measured. McFarland v. Illinois Cent. R.R., 241 La. 15, 26; 127 So. 2d 183, 187 (1961) *modifying* 122 So. 2d 845 (La. Ct. App. 1960).

[2] For example, whether an airplane falls in Arkansas, Oklahoma, Kansas, or Missouri may determine whether the survivors of the crash victims are entitled to recover for the full range of resulting injuries, Ark. Stat. § 27–909 (1962 Replacement Vol.), only for their lost support, La Prelle v. Cessna Aircraft Co., 85 F. Supp. 182, 185 (D. Kan. 1949) (construing Okla. Stat. Ann. tit. 12, § 1053 (1961)), or only for a maximum of $25,000 regardless of their actual tangible and intangible losses, Kan. Gen. Stat. Ann. § 60–3203 (Supp. 1961); Mo. Rev. Stat. § 537.090 (Supp. 1962).

function of the wrongful death action. In addition, they disagree on the elements of damage that should be included, the persons entitled to share in the recovery, the manner of apportioning awards among the survivors, and on the question of where to place limits on recovery.

While most states agree that the wrongful death action should compensate the survivors for their losses, several provide that losses suffered by the estate furnish the measure of recovery. Furthermore, two states consider the action punitive in nature and measure the recovery, not by the losses involved, but by the defendant's fault. One state in four still limits recovery by imposing dollar ceilings (ranging from $20,000 to $35,000 with some lower limits imposed in special circumstances) on the maximum awards allowed regardless of loss.

Existing laws recognize a wide variety of injuries as proper elements of damage. A few allow the jury to consider the full range of interests and relationships injured by the wrongful death. Survivors in these states are entitled to compensation for the money and services, training and guidance, love and affection, companionship and protection that they would have received from the decedent but for the wrongful death. Survivors in these states may also recover for the grief caused them by the death. Another small group allow the survivors to recover as well for the decedent's pecuniary losses and pain and suffering. At the other end of the scale are states that allow the survivors to recover only their pecuniary losses—*i.e.*, lost support and services. Such a formula usually bars recovery for the death of an infant, or adult person who, for one reason or another, had not contributed either money or services to his survivors. Between these extremes are the states that allow recovery for lost companionship, guidance and the like, but not for love and affection or grief.

Rules for determining who may benefit from a wrongful death recovery, and to what extent, are equally varied. Some states apportion awards as if they were part of an intestate estate, regardless of the fact that a survivor's intestate share of the award may not match the actual loss suffered, the yardstick often used to measure the award in the first place. Others provide that the court or jury shall have discretion to divide the award among the survivors as they see fit. Varying weight is also given to the fact of dependency in apportioning awards. Thus some states permit actual dependents (other than immediate family members) to share only if neither spouse or minor children survive.

There are other differences in existing law. For example, in the face of legislative failure to provide that the recovery for losses of future support be reduced to present value, courts have taken different attitudes toward the problem. Some actually prohibit the practice[3] or fail to insist on it.[4] Other courts require its reduction to present value, but differ on the rate at which the award should be discounted.[5]

Other anomalies result from legislative failure to spell out tools for calculating awards. For example, in Mississippi, parents recovering for the wrongful death of a son collected a sum that represented his net earnings for his life expectancy, notwithstanding the fact that in the normal course of events they would predecease him.[6] In another instance, the Mississippi court upheld an award of $90,000 for the benefit of the parents, brother and sister of a 14-year old girl which apparently included the value of her lost earnings, despite the fact that there was no evidence of her earning power, or any indication of a reduction to present value.[7]

Recent Developments

These inadequacies have not all gone unnoticed or unattended. Amendments have removed dollar ceilings on recovery in five states since 1948, compared to only one such change in the 35 years before 1948. In addition, amendments or new versions of wrongful death acts adopted in six states since 1947 have added the specific elements of damage like lost companionship and guidance that may be included in the wrongful death action.[8]

This trend is not unique to the legislatures. Carefully considered opinions by trial court judges—as in the *Meehan* case[9]—furnish precedents for calculating awards by reference to such tools as net earnings after business, personal and tax expenses, working life expectancy and even fluctuations in the cost of living index.

The proposed model act reflects this trend toward tailoring re-

[3] Andrus v. White, 101 So. 2d 7, 12 (La. Ct. App. 1958).

[4] *Cf.* Mode v. Barnett, 361 S.W.2d 525 (Ark. 1962).

[5] Compare Meehan v. Central R.R. of N.J., 181 F. Supp. 594 (S.D.N.Y. 1960) with Strahan v. Webb, 231 Ark. 426, 330 S.W.2d 291 (1959).

[6] Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955) (the opinion writer found this illogical, *Id.* at 243, 80 So. 2d at 21-22).

[7] Sandifer Oil Co. v Dew, 220 Miss. 609, 71 So. 2d 752 (1954).

[8] *E.g.*, Hawaii Rev. Laws § 246.2 (1955) amending Hawaii Rev. Laws, § 10486 (1945).

[9] Meehan v. Central R.R. of N.J., 181 F. Supp. 594 (S.D.N.Y. 1960).

coveries more carefully to actual losses. In many instances provisions already in use served as guides for the model act. Other model act provisions were drafted to supplement this purpose. To some extent these provisions represent innovations.

The act does not provide answers to all the questions in the area. However, it does attempt to meet the major problems. As such it is intended as a basic working draft for state legislative committees that are considering wrongful death law revision. It was shaped to occupy a middle ground between statutes that allow practically unlimited recovery and statutes that come close to denying meaningful recovery altogether. This middle path was chosen in hopes of making it acceptable to the greatest possible number of states and thereby to achieve a substantial degree of uniformity among state wrongful death acts.

Following the draft act itself there is a section by section analysis. These comments are intended to explain the reasons for each provision and to serve as part of the legislative history of the law, if enacted.

Proposal for a Model

STATE WRONGFUL DEATH ACT

SECTION 1. *Declaration of Policy.*

It is the policy of this state that the loss that results when wrongful death occurs should be shifted from the survivors of the decedent to the wrongdoer.

It is recognized that wrongful death, in addition to depriving survivors of the support and services of the deceased, injures other relationships by depriving the survivors of the decedent's affection, companionship and protection. This act creates a cause of action to compensate survivors for both these tangible and intangible injuries and provides mandatory guidelines for computing awards.

The cause of action provided is intended to be remedial, not punitive, in nature. For this reason no punitive damages may be granted in an action provided by this act.

The provisions of this act shall be construed liberally for the accomplishment of the above purposes.

SECTION 2. *Definitions.*

(A) *Contributions for support.* The term "support" embraces payments to a survivor for non-essentials as well as payments for nec-

essaries, and includes contributions in kind of farm or home produced goods or produce, as well as money contributions.

(B) *Earnings.* "Earnings" as used in section 5 shall include salary, business income, pension benefits and income from life estates, but does not include income from investments, royalties and the like that will continue after the decedent's death.

(C) *Survivors.* The "survivors" of a decedent shall include the spouse, minor child or children, parent of a minor child, illegitimate children who are wholly or partly dependent on the deceased for support, parent of an illegitimate child who makes substantial contributions to the child's support, and any other blood or legal relative wholly or partly dependent on the deceased for support or services.

SECTION 3. *Liability for wrongful death.*

Whenever death is caused by wrongful act, neglect or default, the decedent's survivors may maintain an action in damages for the injuries sustained because of the death against the person or corporation responsible for the death.

If there are no survivors, the action may be maintained by the decedent's estate.

The wrongdoer's personal representative shall be the party defendant in the event of the wrongdoer's death either before or after the action is commenced.

SECTION 4. *Parties entitled to bring action; joinder; statutes of limitations.*

(A) The action shall be brought by the decedent's survivors in the following order of preference:

(1) by the surviving spouse,
(2) by the oldest surviving unmarried minor child,
(3) by the father – in the event of the death of an unmarried minor child,
(4) by the mother, in the event of the death of an unmarried minor child, if the father is dead or has deserted,
(5) by any other blood or legal relative wholly or partly dependent on the decedent;

provided, that regardless of which of the foregoing beneficiaries bring the action, it shall be for the use and benefit of all potential beneficiaries enumerated in this subsection.

Such beneficiaries must be named and described in the plaintiff's pleadings in order to have their losses considered as elements of damage.

A beneficiary shall not be disqualified because he is not a citizen or resident of the United States.

(B) Failure of the preferred plaintiff to bring the action within 30 days of a written request to do so made by another beneficiary shall entitle the party next in order to bring the suit; *provided,* that in the last 30 days allowed for bringing such an action any beneficiary may institute the action.

(C) If none of the foregoing survive the decedent or institute the action, the action may be brought by and in the name of the personal representative of the deceased.

(D) There shall be only one recovery under this chapter, and if separate suits are brought to recover damages for wrongful death of the same decedent, the suits may be joined on the motion of any party, beneficiary or by the court having jurisdiction.

(E) An action under this chapter must be brought within two years of the death of the deceased.

SECTION 5. *Elements of damage.*

Within the limitations stated, the trier may give such damages as it deems fair and just for the following injuries resulting from the wrongful death to the survivors and/or the estate.

(A) *Lost contributions for support.* Any person enumerated in section 4(A) is entitled to recover for lost contributions to his support resulting from the wrongful death, as follows:

(1) *Past losses:* The full value, plus interest, of lost contributions to support, from the time of the injury causing the wrongful death, to the time of judgment.

(2) *Future losses:* The present value of future support payments. In computing the amount of such losses, the trier shall consider that the total amount the decedent would have had available annually for all support contributions would have been his gross earnings, adjusted for likely increases and decreases over his working life expectancy, less such fixed expenses as taxes and personal maintenance. In fixing a survivor's share of the total amount available, the court shall consider the survivor's place in the decedent's household and/or his relation to the decedent.

In computing the duration of such future losses, the trier shall be guided by the joint life expectancies of the decedent and the survivor, the working life expectancy of the decedent, and the fact that the obligation to support a healthy child ends upon the child's attaining his majority, graduation from college, marriage or leaving home.

The present value of the recovery for future lost support (and services – see section 5(B)) shall be determined by multiplying the amount the survivor could reasonably expect to receive annually times the years of his expectancy. The resulting sum shall then be discounted

at an interest rate which the average untrained investor might obtain on the principal. Having reduced this sum to its present value, the trier shall then add an amount to compensate the survivor for income taxes the survivor will have to pay on the interest earned by his share of the recovery.

(B) *Lost services.* In the event of the wrongful death of husband or wife, the surviving spouse may recover an amount equal to the cost of hiring help to perform the household services customarily performed by the decedent. In addition, in the event of the wrongful death of the mother, the father, or if the father is dead or deserted, the oldest child under 18 years of age, may recover an amount equal to the reasonable cost of hiring a woman of the mother's general educational and domestic ability to live in the home and care for the children until the youngest is 18 years old. In the event of the wrongful death of any other person, the survivor may recover the value of the cost of hiring help to perform the household services customarily performed by the deceased for the survivor.

The award for services rendered up to the time of the trial shall be an amount equal to the sum paid or owed by the survivor for such services, plus interest. The award for the future loss of services shall be the present value of the cost of such services for the likely duration of such services to be computed by the process specified by section 5(A)(2).

(C) *Loss of father's instruction and guidance.* In recognition of the fact that most fathers provide training and guidance for their children, the mother, or, if none, the oldest child under 18, may recover up to $1,500 a year, per child, to age 18, for such partial substitutes as tutorial services, driving lessons, summer camping trips and the like provide. The amount of the award shall be computed in the same manner as an award for lost services.

(Alternative)

[(C) *Loss of father's instruction and guidance.* In recognition of the fact that most fathers provide training and guidance for their children, the mother, or, if none, the oldest child under 18, may recover an amount equal to the cost of hiring a part-time male teacher to provide such general training and guidance as he would expect a father to provide his children. The amount of the award shall be computed in the same manner as an award for lost services, *provided,* that where no such teacher is available, an equivalent sum may be recovered to pay for such partial substitutes for the lost father as tutorial services, driving lessons, and summer camping trips and the like provide.]

(D) *Death of a viable, unborn child.* The mother, or father if the mother does not survive, may recover all the medical expenses related

to her pregnancy and to its termination when the termination is caused by the wrongful death of a viable, unborn child.

In addition, the plaintiff may recover not more than an additional $1,000, in lieu of damages under all other sub-sections of this section except section 5(G). No other recovery shall be available for such wrongful death under this chapter.

(E) *Lost companionship, affection, and protection.* If the decedent was the spouse, or unmarried minor child of a beneficiary, or the parent of an unmarried beneficiary under 18 years of age, the jury may award an additional sum not exceeding $5,000 for the loss of the decedent's companionship, affection and/or protection where there has also been an award under section 5(A) (B) or (C), or a sum not exceeding $10,000 if no damages are sought under sections 5(A) (B) or (C). In measuring the extent of such loss, the trier may consider the mental anguish caused the survivor by the wrongful death. When more than one beneficiary stands in a relation to the decedent described by this subsection, each is entitled to share in the sum recovered under this section, and the trier may apportion the award as it sees fit.

(Alternative)

[(E) *Death of a child.* In cases of the death of a child, the parents may elect to seek recovery under subsections (A) and (B) of this section, or to proceed under this subsection. If this subsection is elected, the damages shall be that amount which would reimburse the parents for the reasonable cost of raising the child to the time of his death.]

(F) *Expenses of last illness and burial.* Any survivor who has paid for any reasonable medical or hospital bill in connection with injuries causing the wrongful death may recover these payments, plus interest. There shall be a presumption that bills actually paid are reasonable.

Any survivor who has paid for any reasonable funeral or burial expense of the deceased may recover an amount equal to reasonable interest on such expense for a period measured by the normal life expectancy of the decedent immediately prior to his death; but, in no event shall recovery exceed funeral and burial expenses actually paid by the survivor. There shall be a presumption that funeral and burial expenses actually paid up to $1,500.00 are reasonable.

(G) *Reasonable Attorney Fees.* In the trier's discretion, the court shall award the plaintiff his attorney's fee, not to exceed ___% [35% suggested] of the first $10,000 recovered and ___% [25% suggested] of any recovery in excess of $10,000 under the other subsections of this section; *provided,* that such fee shall be the sole fee payable; and *provided further,* that no such fee shall be awarded if the amount recovered does not exceed by 10% the final settlement offer made in writing by the

defendant to the plaintiff within six months of the wrongful death for the injuries under the other subsections of this section.

(The following subsection is intended for consideration and adoption only in those states that do not have a comparable provision in effect.)

[(H) *Loss to the estate.* The plaintiff designated in section 4 or, if none survives, the personal representative of the deceased, may recover on behalf of the decedent's estate a sum equal to the excess of the decedent's gross earnings over his gross expenses for all purposes except the enrichment of his estate and payments for child support and/or alimony due under a valid decree. The award for such losses from the time of the injury causing death to the trial shall be their full value, plus interest. The award for future losses shall be the present value of the sum which is equal to such excess multiplied by the years of the decedent's normal life expectancy.

If the expenses of the decedent's last illness, funeral and burial have become charges against the estate, they may be recovered by or on behalf of, the personal representative in the manner specified in section 5(F).

The total sum so recovered shall be available to satisfy the debts, legacies and bequests of the estate. Any excess shall be distributed as personalty to the decedent's heirs as if by intestacy.]

SECTION 6. *Lien or trust for benefit of minors.*

All or part of any amounts awarded under sections 5(A) (B) (C) or (E) for the benefit of a minor child or children may be set aside by the court for the protection of such children after consideration of the age of such children, the amount involved, the capacity and integrity of the surviving spouse and any other facts the court has or may receive. The amount so set aside may be impressed with the creation of a lien in favor of such children or otherwise protected as the circumstances may warrant.

SECTION 7. *Effect of prior actions or judgments.*

The fact that the decedent during his lifetime instituted an action for his injuries growing out of the incident that caused his death shall not bar the action created by this chapter if the action had not been settled or reduced to judgment by the time of his death. If such an action was reduced to judgment or settled within two years before the date of the wrongful death, the survivors may bring an action to recover for their loss of maternal or paternal care, companionship, affection and protection as provided by sections 5(B) (C) and (E) if no cause of action for these elements of damage arose to the survivors as a result of the decedent's injuries.

No cause of action shall be granted by this chapter if the deceased's own right to bring an action for personal injuries lapsed during his life-

time for failure to prosecute as provided in _____. [Fill in number of section providing statute of limitations in tort actions for personal injuries.]

SECTION 8. *Effect of death of a survivor.*

The death of a person otherwise entitled to recover under this chapter between the time of death of the decedent and the time suit is brought, shall not bar his right to recover, and the right to bring the action shall pass to the person next entitled. The death of such a person after the wrongful death but before judgment shall have the following effects on his own claim: (A) His share of the recovery under sections 5(A), (B) and (C) shall be computed by reference to his date of death, and shall be for the benefit of his estate; (B) such estate shall not be entitled to recover any amount under section 5(E), and only such amounts as would otherwise be due under sections 5(D), (F) and (G).

ANALYSIS OF THE ACT BY SECTIONS

SECTION 1. *Declaration of Policy.*

This section is intended to outline the scope of the cause of action created, and to articulate the major goals of the draft act.

In addition, it contains the operative language denying punitive damages. Punitive damages are rejected because they are not related to the losses suffered by the survivors and because many judgments today are paid, not by the tortfeasor, but by his insurer or principal, thus dulling if not eliminating the retributive effect and exemplary value of such an award.

SECTION 2. *Definitions.*

Subsection (A). Contributions for support.

The term is rather broadly defined to foreclose the contention that recovery for lost support should be limited to an amount equal to the deceased's minimum legal obligation to support certain dependents. As such, it is intended to implement the statutory purpose of providing full compensation for provable money losses.

The contributions-in-kind clause is to protect survivors of farmers and others who have low cash incomes, but who tend

to be self-sufficient because they raise or produce much of what they consume.

Subsection (B). Earnings.

Investment income and royalties, etc. are excluded from earnings to eliminate the possibility of bonus recoveries. For example, it is possible that the wrongful death may deprive a survivor of support payments made to him out of such funds if they are not continued by the terms of the decedent's will. Without this section, it would be open to the survivor deprived of support payments from such a source to argue that the defendant should be liable for his loss. However, by good estate planning the decedent can assure that the survivor's support from these sources will not be prematurely diminished. Therefore, it seems equitable that the defendant should not be required to guarantee the survivor against such a loss.

Subsection (C). Survivors.

The principal purpose of this definition is to relate eligibility for benefits to losses suffered. "Survivors" is defined so that immediate family members, who are presumed to receive support from the decedent, may bring the action without a showing of dependency. A parent of a minor child is included in this presumption. Furthermore, the definition includes in the act's protection any other relative who is in fact dependent on the deceased.

The dependency test is intended to exclude relatives outside the immediate family who, although they may have received occasional gifts from the decedent, could not claim a firm expectation of continued support.

The dependency test is not intended to eliminate as beneficiaries those relatives who receive regular contributions of support (money or services), no matter how large or small.

SECTION 3. *Liability for wrongful death.*

This section creates a right of action for wrongful death in favor of the decedent's survivors, and, alternatively, of his estate. By favoring the survivors over the estate, this section emphasizes the statutory scheme of measuring damages by their losses, rather than by the decedent's losses. This choice also recognizes that the personal representative, if charged with bringing the action, may be faced with the conflicting duties of preserving the estate and

diligently prosecuting the death action out of estate funds.

Unlike most vesting section, e.g. Alaska Stat. § 13.20.340(a) (1962), section 3 does not require the deceased to die possessed of a cause of action for personal injuries as a prerequisite of a suit by the survivors for the wrongful death. Under the more common provision, a prior judgment in the personal injury action or the running of the applicable statute of limitations serve to bar the death action. Section 3, together with section 7, modify this rule by allowing the survivors to sue for losses of maternal or paternal care and guidance (sections 5(B) and (C)) and companionship (section 5(E)) provided that the wrongful death occurs within two years of the settlement or judgment in the personal injury case, except where such losses are proper elements of the injury action (section 7). This modification of existing law recognizes that the survivors' losses are separate and distinct from those suffered by the decedent and his estate, and that the right to recover for them should not be extinguished by a judgment in an action which does not allow compensation for such injuries.

However, section 7 does contain a provision which bars the death action if the decedent's right of action for injuries lapsed during his lifetime. This provision and the provision barring the additional action by the survivors in cases where the wrongful death follows the injury judgment by more than two years are designed to allow the defendant a chance to close his books on the accident within a reasonable time. They also recognize that difficult problems of proof on the issue of what caused death may arise as the cut off date for bringing the action becomes more and more remote from the date of the accident.

In cases where there has been an injury action judgment, the draft act bars recovery for lost support contributions. This is done on the ground that the defendant should not have to match the personal injury award in the death action because the decedent failed to provide that the support contributions he was making during his life from the injury award should continue in the event of his death.

By allowing the action to be brought against the personal representative of the tortfeasor, section 3 incorporates the universal rule that the action does not abate on the death of the defendant.

Section 3 is not intended to modify existing Workmen's Compensation programs, and, unlike Fla. Stat. Ann § 768.01(2) (Supp. 1962) and Miss. Code Ann. § 1453 (1956), does not extend the right of action to actions *ex contractu.*

SECTION 4. *Parties entitled to bring action; joinder; statutes of limitations.*

Subsection(A).

This subsection arranges the possible plaintiffs in order of their likely interest in bringing such an action.

Subsection (A) also provides that failure to initiate the suit will not bar a beneficiary from sharing in the recovery if the action is successfully prosecuted by another beneficiary. The words "use and benefit" are intended to impose fiduciary responsibilities on the plaintiff for the benefit of other beneficiaries and thus to protect the non-moving survivors' interest in the action. Much the same result is accomplished today by provisions in existing acts that make the decedent's personal representative (the usual death action plaintiff) a trustee of the action and fund for the benefit of the survivors.

Non-citizen beneficiaries were specifically included to prevent the assertion of a defense based on the fact that a survivor lives in another country, a fact which seems to go more to the degree of loss involved than to the question whether there was any loss at all.

Subsection (B).

This 30-day provision is added to protect the right of more remote survivors to have the action prosecuted when, for whatever reasons, the preferred plaintiff elects not to institute the action.

Subsection (C).

Expressly vesting the deceased's personal representative with an alternative, but not concurrent right to bring the action, is intended to complete the implementation of section 3 which provides that the death action may be brought by survivors, or, alternatively, by the estate.

Subsection (D).

The one-recovery rule and the joinder provision are inserted as restatements of existing protections for the parties litigant and as reflections of draft act policy against double recoveries. This subsection is complemented by the provisions in subsection (A) dealing with the right of all beneficiaries to share in the recovery and the duties of the plaintiff toward the other survivors.

Subsection (E).

This provision adopts the majority rule allowing the survivors two years from date of death in which to bring the death action.

To avoid the issue raised in *Kuzma v. Peoples Trust & Sav. Bank*, 132 Ind. App. 184, 176 N.E.2d 134 (1961), it is intended that this section control regardless of possible conflicts with limitations provisions in other laws.

SECTION 5. *Elements of damage.*

The primary purposes of this section are to eliminate all existing dollar limits on recovery for lost support contributions and services, and to provide a scheme for computing such losses that will protect the defendant from paying a judgment which is larger than the amount the survivors would have received from the decedent had he lived.

The elements of damage recognized by this section are intended to be the only ones which may be included in an action pursuant to this chapter.

Subsection (A). Lost contributions for support.

This subsection provides survivors the right to recover for their actual money losses caused by the wrongful death. The rather detailed formula provided for calculating the award incorporates the view that money losses, future as well as past, can be calculated with enough precision to require the attempt to be accurate.

Subsection (B). Lost services.

Generally, this subsection provides a recovery equal to the cost of hiring a person to perform the services formerly provided without charge by the decedent. It also deals expressly with two more limited problems: the loss of a mother's unique services, and the period during which the services (especially those of a child) might have been expected to continue but for the death.

The provision recognizes that the mother's services include a great deal of responsibility for raising her children and that adequate compensation for the injury caused by the mother's death must include a sum sufficient to hire a "substitute mother," that is, a woman whose training and ability is on a par with that of the decedent.

The stipulation that pretrial damages for lost services not exceed the sum actually paid is intended to apply in all cases including those involving the loss of a mother. The provision is intended to protect the defendant against paying an award for services which were not actually rendered or which were ren-

dered without charge as where other relatives care for children following the mother's death.

The provision that the award for prospective lost services should be measured in part by reference to the "likely duration" of such services, is primarily intended to allow a parent to show that it was more probable than not that a child's services would continue beyond the date of the child's majority.

Subsection (C). Loss of father's instruction and guidance.

This subsection is intended to complement the provision in 5(B) which provides a remedy in the case of the mother's death.

The dollar limit on the recovery is set at $1,500 a year, per child, to age 18, about equal to the highest award found to date for this element of damage. *Rogow v. United States,* 173 F. Supp. 547 (S.D.N.Y. 1959) ($1,420). See also *Meehan v. Central R.R. of N.J.,* 181 F. Supp. 594 (S.D.N.Y. 1960) ($1,200).

The alternative provision is offered for use in the eight states that have constitutional provisions prohibiting passage of laws imposing statutory ceilings on dollar recoveries. Ariz. Const. art. 2, § 31; Ark. Const. art. 5, § 32; Ky. Const. § 54; N.Y. Const. art. 1, § 16; Ohio Const. art. 1, § 19(a); Okla. Const. art. 23, § 7; Utah Const. art. XVI, § 5; Wyo. Const. art. 10, § 4, art. 9, § 4.

Because the legislatures and courts in these states tend to regard the prohibition as barring only those limits expressed in terms of dollars, and as not reaching such limiting phrases as "pecuniary injuries," *cf. Missouri, O. & G. Ry. v. Lee,* 73 Okla. 165, 175 Pac. 367 (1918), it is thought that the attempt to control the size of the award by specifying a "part time" teacher is constitutional.

Subsection (D). Death of a viable, unborn child.

The purpose of this section is to resolve the split in the decisions over whether or not to recognize this injury as an element of damage in wrongful death. Compare *Hale v. Manion,* 368 P.2d 1 (Kan. 1962) (allowing recovery under the death act) with *Drabbels v. Skelly Oil Co.,* 155 Neb. 17, 50 N.W.2d 229 (1951) (disallowing recovery).

An arbitrary limit on the maximum recovery for non-medical expenses is imposed because of the highly speculative nature of the injury. It should be noted that it is intended to reimburse the parents for all medical expenses related to the pregnancy, as well as to its termination — a replacement cost idea.

The last paragraph should be omitted in states which have constitutional prohibitions against setting dollar limits.

Subsection (E). Lost companionship, affection and protection.

This section restates what has become a fairly common provision for compensating such losses despite the difficulty in calculating a dollar value for the loss.

However, it places two important limitations on such recoveries. It limits the class that may recover for these losses to a surviving spouse, and/or children, or the parents of children under 18. This is an attempt to increase the likelihood that such an award will be made only in cases where the lost companionship is a serious injury.

It also imposes a $5,000 limit on the recovery to prevent the award for these losses from becoming a means to compensate the survivors for other injuries.

The subsection also provides that the dollar limit on recovery may be increased to $10,000 in those cases where no sum is claimed for loss of support, services or a father's guidance. In this way the statute recognizes that the death of a non-wage earner, especially a child, which causes serious intangible injuries, but no dollar loss, should be compensated. The leading case for this proposition in child death cases is *Wycko v. Gnodtke,* 361 Mich. 331, 105 N.W.2d 118 (1960).

The upper limit of $10,000 is chosen because it was felt that any higher limit would be excessive in view of the speculative nature of the injury and the special tug on the jury's sympathy likely to result in child death cases. For example, see *Sandifer Oil Co. v. Dew,* 220 Miss. 609, 71 So. 2d 752 (1954) ($90,000 award for death of 14-year old girl who was not a wage earner).

The alternative section, intended only for adoption by the eight states whose constitutions bar dollar limits seeks to prevent child death recoveries in those states from becoming excessive by providing a specific standard – cost of raising the child – for measuring such losses.

Subsection (F). Expenses of last illness and burial.

This provision is part of the scheme to shift the wrongful death losses from the survivors to the wrongdoer. Medical and hospital bills which result from injuries causing the wrongful death and paid by any survivor are recoverable to the extent reasonable. However, because wrongful death only hastens funeral and burial

expenses, it is provided that recovery for such expenses be limited to reasonable cost of meeting these expenses ahead of schedule. Interest costs thus allowable are limited to actual funeral and burial cost to defeat bonus recoveries in the case of the wrongful death of younger persons.

The statute creates a presumption that funeral and burial expenses up to $1,500, if actually incurred, are reasonable. It is hoped that this attempt to define cost but not to limit recovery will not violate existing constitutional prohibitions against dollar ceilings.

Subsection (G). Reasonable attorney fees.

There are two reasons for this innovation. First, the suspicion that juries currently add a sum to awards for such items as lost support or companionship to help pay the plaintiff's attorney fee and thereby to protect the underlying award from being depleted by the fee. *Cf.* Jaffe, *Damages for Personal Injury*, 18 Law & Contemp. Prob. 218, 234–35 (1953); Griswold, *Two Branches of the Same Stream*, Harvard L.S. Bull., Feb. 1963, pp. 4, 6. Not only does this practice tend to blur the distinctions between the different elements of injury and thus make review more difficult, it has the effect of requiring the plaintiff to pay the attorney a fee on his fee. For if an award for an attorney's fee is disguised as a solatium, the attorney is entitled to a percentage of that part of the award as well as of the underlying award where there is a contingent fee contract. This seems unnecessarily hard on plaintiffs and of no advantage to defendants.

Second, the statutory scheme (section 5(A)) requires the trier to deduct the decedent's expenses in reaching a determination of the amount that would have been available for support contributions but for the wrongful death. This represents an attempt to match the support element of the award with the amount that would actually have come to the survivors as support. Since the death action attorney fee was not one of the decedent's expenses, it seems unfair to the survivors to deduct the fee from the amount awarded them for lost support.

To prevent this provision from encouraging litigation of dubious claims, two safeguards are provided. The first gives the trier discretion to approve the award or not, just as he chooses. In addition, the act provides that the fee shall not be awarded if the plaintiff, after rejecting a bona fide settlement offer, fails to win

a judgment (not including attorney fees) at least 10% greater than the proferred settlement.

While it is provided that the trier shall determine whether or not the plaintiff may recover his attorney's fee, the provision makes it the court's duty to determine how much be awarded within the limits specified. Although specific limits are suggested, the final decision on what the limits should be has been left to the states as a matter of local practice. It is not believed that this feature will detract from the uniformity which this chapter seeks to achieve.

The Federal Tort Claims Act, 28 U.S.C. § 2678, (1950) is an example of a statute which sets statutory limits on the attorney fee payable. But that act, unlike this one, provides that the fee "be paid out of but not in addition to the amount of the judgment," a factor that may account for its lower limits.

Subsection (H). Loss to the estate. (Optional)

This subsection is intended for adoption only in states which do not provide the estate a right of action for its injuries.

The provision rounds out the death action recovery by allowing the estate to sue for its expectancy and thereby to protect creditors, legatees and others who have important interests at stake. Protection is also offered the children or wife of a former marriage in whose favor valid support or alimony decrees exist by specifying that such payments shall be considered part of the "excess" so that the estate's recovery will be large enough to allow it to continue the payments.

Limiting the estate's damages to the so-called "excess" – the decedent's gross earnings less his gross expenses – is intended to protect the defendant from having to pay twice for the same injuries. *Rohlfing v. Moses Akiona, Ltd.*, 369 P.2d 96, 103-04 (Hawaii 1961) discusses the "excess" concept and the reasons for its use.

Last illness, funeral and burial expenses are to be computed in the same manner as provided in section 5(F).

SECTION 6. *Lien or trust for benefit of minors.*

This provision is added to allow courts to prevent judgments for the benefit of minors from being wasted. It was felt desirable to include the safeguard in light of the fact that such awards may be substantial, and because proper management of a large

lump sum recovery may not be within the skills of the surviving parent.

This provision is separate from and in addition to the fiduciary duties placed on the death action plaintiff by section 4(A).

SECTION 7. *Effect of prior actions or judgments.*

(This section, which supplements section 3, is commented on at pp. 20-22 *supra.*)

SECTION 8. *Effect of death of a survivor.*

This section spells out the effect that a survivor's death has on the right to bring the action, as well as on the individual survivor's right to share in the recovery. Its principal feature limits the deceased survivor's recovery under sections 5(A), (B) and (C) to the pro rata share of the recovery that accrued between the date of the wrongful death and the death of the survivor.

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1963-1964

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An Act to Authorize the Search of Vehicles

This act was drafted in 1961 for submission to the South Carolina Legislature. The memorandum prepared to accompany the act has been revised slightly to take account of developments in the law since that time, but no alteration of the act itself has been required

The major problem in preparing the act was to determine what limits the United States Constitution places on the search of vehicles without a warrant. Section 1 of the act deals with this problem, and the solution which it proposes is one which might be considered for adoption by any state. Most of the memorandum discusses Section 1 in light of the United States Consitution, although there is also a discussion of the effect of the South Carolina Constitution.

Sections 2 and 3 provide definitions for Section 1, and are concerned to a large degree with the law of South Carolina. Sections 4 and 5 are of general applicability.

SECTION 1. *Power to Search Without a Warrant.*

(A) *Search Incident to Arrest.*

Any law enforcement officer may, without a search warrant, search any vehicle incident to a lawful arrest of any occupant, provided that such search extends no further than the officer reasonably deems necessary:

(1) to prevent escape of the occupant arrested, or

(2) to protect himself from harm, or

(3) to obtain any article intended for use or which is being or has been used as a means of committing, or is the product of, the crime for which the occupant is arrested, and such officer may, upon such search, seize any articles he reasonably deems necessary to carry out the purposes of the search as defined in paragraphs (1), (2) and (3).

Should such search or seizure disclose to the officer facts which would authorize him to arrest any occupant for any crime in addition to that for which the original arrest was made, the officer may arrest such occupant, if he has not already done so, and may search and seize incident to that arrest to the extent provided in this subsection A.

(B) *Search Not Incident to Arrest.*

Any law enforcement officer may, without a search warrant, upon probable cause to believe that a moving vehicle (or any vehicle which reasonably appears about to be moved so that it would be impracticable to obtain a search warrant) contains

(1) any contraband article or article otherwise subject to seizure under the criminal law of this state, or

(2) any article which was taken in violation of the criminal law of this state, or

(3) any article intended for use or which is being or has been used as a means of committing a crime under the law of this state, stop and search such vehicle, provided that such search extends no further than the officer reasonably deems necessary to discover such article. Should such search or seizure give the officer probable cause to believe that such vehicle contains any such article other than that for which the original search or seizure was made, he may search to the same extent and may seize such article.

SECTION 2. *"Law Enforcement Officer" Defined.*

For purposes of Section 1, "law enforcement officer" means any public official who has statutory authority to arrest, or any person who is given by statute the power of such official to arrest; except that it does not mean

(1) a person acting pursuant to statutory authority to make a citizen's arrest, or

(2) for purposes of Section 1, Subsection (B), employees of steam railroads or electric railways.

SECTION 3. *"Lawful Arrest" Defined.*

For purposes of Section 1, Subsection (A), a "lawful arrest" is an arrest made

(1) pursuant to statutory authority to arrest, or

(2) pursuant to the common law authority of a police officer to arrest.

SECTION 4. *"Vehicle" Defined.*

For purposes of Section 1, "vehicle" means every device in, upon or by which any person or property is or may be transported or drawn.

SECTION 5. *Construction.*

This article shall not be construed to limit any right of search or seizure of any person, building, area or article otherwise lawful under the statutes or common law of this state.

MEMORANDUM

Comment to Section 1.

Section 1 deals with two separate but related situations: (1) a search and seizure, without a warrant, of a vehicle incident to a valid arrest (Subsection (A)), and (2) a search and seizure, without a warrant, of a vehicle upon probable cause to believe the vehicle contains some article which is subject to seizure

(Subsection (B)). Since each of these situations raises different constitutional questions, they are discussed separately.

A. *Constitutionality of Subsection (A).*

1. *Effect of the Federal Constitution.*

The recent case of *Mapp v. Ohio,* 367 U.S. 643 (1961), reaffirmed the doctrine that the Fourteenth Amendment protects persons from unreasonable searches and seizures by state action and held, overruling *Wolf v. Colorado,* 338 U.S. 25 (1949), that a state may not, in a criminal prosecution, use evidence which was gathered by an unreasonable search or seizure. *Mapp* further implies that the limits of what is "unreasonable" under the Fourteenth Amendment are the same as those under the Fourth Amendment. See *Ker v. California,* 374 U.S. 23 (1963). Therefore, the federal precedents of what is an unconstitutional search and seizure under the Fourth Amendment are directly applicable to state action governed by the Fourteenth Amendment.

While it is settled that a search incident to a valid arrest, at least for most crimes, is permissible, see *Jones v. United States,* 357 U.S. 493 (1958), the Supreme Court has said that although "some authority to search follows from [arrest] . . . such searches turn upon the reasonableness under all the circumstances." *Rabinowitz v. United States,* 339 U.S. 56, 65–66 (1950). *But see Wong Sun v. United States,* 371 U.S. 471, 480 n.8 (1963). This suggests that there are some limits, even to a search incident to a valid arrest, although what those limits are is open to conjecture.

The most serious constitutional problem arises when a search is made incident to a valid arrest for a minor crime, such as a traffic violation, where the need for a search seems minimal. The Supreme Court has not considered this problem, and state courts have divided about evenly as to whether or not such a search violated their laws or constitutions. Approving the search were *Arthur v. State,* 227 Ind. 493, 86 N.E.2d 698 (1949); *Edmonds v. Commonwealth,* 287 S.W.2d 445 (Ky. 1956); *State v. Dietz,* 136 Wash. 228, 239 Pac. 386 (1925). *But see State v. Michaels,* 60 Wash. 2d 638, 374 P.2d 989 (1962) (unlawful search; arrest a pretext for search). Forbidding a search were *Courington v. State,* 74 So. 2d 652 (Fla. 1954); *People v. Winkle,* 358 Mich. 551, 100 N.W.2d 309 (1960)(dictum); *Brinegar v. State,* 97 Okla. Crim. 299, 262 P.2d 464 (1953); *Elliott v. State,* 173 Tenn. 203, 116 S.W.2d 1009 (1938). The prohibition may be narrow:

Edwards v. State, 319 P.2d 1021 (Okla. 1957) (search for weapons); *Sanders v. State,* 341 P.2d 643 (Okla. 1959) ("dangerous characters"); *Barnard v. State,* 337 P.2d 768 (Okla.) (1959) (drunken driving); *Church v. State,* 206 Tenn. 336, 333 S.W.2d 799 (1960) (drunken driving; search of trunk). A recent Minnesota dictum, relying on the United States Constitution, places that state in the no-search group. *State v. Harris,* 121 N.W.2d 327, 333 (Minn. 1963).

The Committee believes that the statute is constitutional. Paragraphs (1), (2) and (3) limit the extent of the search. Because these limits are defined in terms of the purposes behind the rule allowing such searches, the effect of the limits should eliminate the constitutional problems of a search incident to arrest for a traffic violation. See discussion below on the operation of the statute.

2. *Effect of the South Carolina Constitution.*

The case law interpreting the search and seizure provision of the South Carolina Constitution casts little light on either the validity of a search incident to an arrest or the validity of a search upon probable cause to believe a car contains contraband. Therefore, both these problems are discussed together in this section of the memorandum.

Article 1, section 16, guarantees freedom from unreasonable searches and seizures, in language identical to the Fourth Amendment of the Federal Constitution. The few cases which have interpreted this section, however, cast some doubt on the extent to which a search may be made without a warrant under the state constitution. The Committee believes, nevertheless, that a search incident to a valid arrest would be constitutional.

In *State v. Quinn,* 111 S.C. 174, 97 S.E. 62 (1918) two police officers approached a car they had been following and which had stopped at a railroad crossing, saw illegal liquor in the back seat, and without a warrant reached into the car and pulled more liquor from the floor of the front seat. The court upheld the seizure. The court distinguished between searches and seizures: a search implies some force, apparently some instrusive physical attempt to discover, whereas here the illegality was apparent and, therefore, there was no search. No warrant is needed for a *seizure,* the court said, where the contraband is apparent, *but* "the Constitution . . . prohibits any search save upon a warrant." 111 S.C. at 180, 97 S.E. at 63–64 (1918) (dictum).

Quinn was followed by *State v. Kanellos,* 124 S.C. 514, 117 S.E. 640 (1923). There the court, neglecting to state any facts, held that the case came within the *Quinn* decision, presumably meaning that there was a seizure but no search. But then the court used some very confusing language. First it said, contrary to the *Quinn* language, "It is not necessary in all cases, for the officers making a *search* and seizure to have a warrant." 124 S.C. at 518, 117 S.E. at 641 (1923). (Emphasis supplied). In the next sentence it quoted the *Quinn* language that all searches require warrants.

In *State v. Maes,* 127 S.C. 397, 120 S.E. 576 (1923) the court held that no search warrant was necessary where the officer saw the defendant commit an offense and arrested him.

The result of these cases seems to be either that (1) a warrant is needed for all searches except those made where the arresting officer saw the crime committed, or (2) a warrant is not needed where the officer saw the crime committed and perhaps in some other undefined instances. The Committee believes that, since in all three cases the contraband material was apparent (except for the liquor found below the front seat in *Quinn*), the first formulation is more accurate. This would seem to preclude a search without a warrant unless the officer saw a crime committed or saw contraband.

The Committee believes, however, that this strict view would not be followed today. First, these cases were decided before *Carroll v. United States,* 267 U.S. 132 (1925) in which the Supreme Court first enunciated the doctrine that federal officers without a warrant could stop and search a car upon probable cause to believe the car contained contraband. *Carroll* was followed in *Brinegar v. United States,* 338 U.S. 160 (1949), and its doctrine has been adopted in many states which have constitutional provisions similar or identical to that of South Carolina. See Note, *Evidence — Requirements For Search of Automobile Without a Search Warrant,* 22 Ga. B.J. 549 (1960). Similarly, the doctrine that a search incident to a valid arrest is permissible has been widely followed in both the federal and state courts. See Note, *Search and Seizure — Search of an Automobile Without a Warrant,* 43 Ky. L.J. 163 (1959). Second, there are other South Carolina statutes permitting seizures of contraband material without a warrant. See, *e.g., S.C. Code* § 4-109 (1962) (contraband alcohol). Third, the need for relaxing the requirement of a warrant with respect to an automobile which could easily be moved

beyond range of seizure before a warrant could be issued seems necessary to effective law enforcement.

In light of these considerations, it seems very doubtful that the South Carolina Court would hold either a search incident to arrest or upon probable cause unconstitutional.

B. *Operation of Subsection (A).*

This subsection sets forth the conditions under which a vehicle may be searched without a warrant incident to a lawful arrest. It limits this right of search to a criminal arrest because (1) the Committee interpreted the project request to exclude a search incident to a civil arrest, and (2) the purposes behind the doctrine authorizing such a search do not ordinarily apply to a civil arrest.

The term "occupant" has been left to judicial elaboration, rather than statutory definition, because of the many different factual situations which may arise. Also, the statute leaves the question of when an arrest takes place to the common law of arrest, because (1) the purpose of this subsection is to define the extent of a permissible search once an arrest has been made, not to define the extent of a permissible arrest, and (2) that question involves many factual combinations which are better dealt with on a case by case basis.

The crux of this subsection is the clause (hereinafter called the "proviso") embodying paragraphs (1), (2) and (3) which articulate the purposes behind the doctrine authorizing a search incident to an arrest. See Note, *Search and Seizure—Search Incident to Arrest for Traffic Violations,* 1959 Wis. L. Rev. 347; Note, *Search and Seizure — Search of an Automobile Without a Warrant,* 43 Ky. L.J. 163 (1959). The proviso attempts to strike a balance between the need of law enforcement officers to search for valid purposes and the need to guard against the risk of indiscriminate searches. The proviso has three advantages. First, it ties the search to those purposes. Second, it gives the arresting officer a guide as to when and how far he may search. Third, it gives the court objective criteria by which to determine whether a search was reasonable.

Paragraphs (1) and (2) are largely self-explanatory. They cover such activity as searching for a gun if the officer has reason to believe that there is one within the arrestee's reach in the vehicle. The language in paragraph (3) is taken largely from Rule 41 of the Federal Rules of Criminal Procedure, which authorizes federal searches under warrant. Paragraph (3) authorizes search for and

seizure of such things as murder weapons, burglar's tools, stolen property and anything to which the stolen property has been converted. The language "intended for use" is used to cover the seizure of articles about to be, but not yet, used in continuing crimes. For example, a person who has been engaged in a not yet consummated fraudulent scheme to obtain money is arrested in his vehicle. A document not yet but about to be used in the scheme would be subject to seizure.

The Committee contemplated extending paragraph (3) of both subsections (A) and (B) to include searching for and seizure of mere *evidence* of the crime, as distinguished from articles which are its product or are used in its commission. This, however, may well be unconstitutional under the Fourth Amendment. It seems clear that mere evidence may not, under the Fourth Amendment, be seized pursuant to a search warrant. *Gouled v. United States,* 255 U.S. 298 (1921). See Comment, *Limitations on Seizure of "Evidentiary" Objects — A Rule in Search of a Reason,* 20 U. Chi. L. Rev. 319 (1953). The same rule would appear applicable to the search contemplated by subsection (B) — based on probable cause without a search warrant. Although it might be argued that a search incident to arrest should be treated differently, the Supreme Court has treated them alike: "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized." *Harris v. United States,* 331 U.S. 145, 154 (1947) (dictum). In that light, there is a serious doubt whether mere evidence may be seized in a search incident to arrest, under the Fourteenth Amendment.

The effect of the proviso is two-fold. First, it serves generally to limit the right of search to arrests for certain crimes only. For example, if a person were arrested for a minor traffic violation, such as improper passing, in the absence of special circumstances bringing into play (1) or (2), there would be no right of search since none of the purposes would be served thereby. On the other hand, if the arrest were for a serious crime, any combination of the three purposes would be served by a search. Second, the proviso defines the permissible extent of the search. For example, if a person were arrested for stealing a large radio, the search would extend to the trunk because it might contain the radio, which would be the product of the crime for which the person was arrested. But the

search could hardly be held to extend to tearing apart the upholstery. On the other hand, if a person were arrested for illegally transporting liquor, the search would extend to the upholstery.

Similarly, what may be seized is defined in terms of the valid purposes for which the search is made.

A possible objection to the proviso and the clause defining what may be seized is that they are too vague to guide the law enforcement officer who normally must act with little time for reflection. This is important because the Federal Constitution now requires the exclusion of illegally seized evidence from state criminal prosecutions. *Mapp v. Ohio*, 367 U.S. 643 (1961). Also, although there are no South Carolina cases in point, an arresting officer would probably be civilly liable to one whose car he searched in violation of the proviso, on any one of three theories: (1) infringement of the right of privacy, 138 A.L.R. 97 (1942); Grant, *Circumventing the Fourth Amendment*, 14 So. Cal. L. Rev. 359, 365 (1941); (2) analogy to a sheriff's statutory liability for illegal arrest, S.C. Code § 53–219 (1962); (3) the common law doctrine of civil liability for violations of statutes passed to protect a particular class of persons, *Berdos v. Tremont and Suffolk Mills*, 209 Mass. 489, 95 N.E. 876 (1911) (child labor law).

There are two answers to this objection. First, the standards used are not more vague than most common law tort standards, the violation of which subjects one to civil liability. Second, the proviso is more desirable than either of the two following feasible alternatives.

One alternative is to permit a search and seizure incident to an arrest for any crime. But there is some doubt as to whether this would be constitutional, under either the federal or state constitution, as applied to arrests for such crimes as traffic violations. The Committee believes that since the effect of the proviso is to limit searches incident to arrests for minor crimes, any constitutional objections are met. Furthermore, allowing searches without warrants incident to arrest for any crime would in some cases involve a departure from the purposes of the rule. Also, this alternative would remove the statutory guide to the officer and the court afforded by the proviso.

The other alternative is to list all those crimes arrest for which would authorize a search. The main objection to this is that it would substitute an arbitrary rigidity for the flexibility afforded by the proviso, in an area where flexibility is needed. It would also involve making many arbitrary choices on the basis of little more

than speculation as to whether a particular crime will necessitate a search, and would mean that whenever a new crime is created such an arbitrary choice would have to be made in deciding whether to amend this act to allow a search incident to arrest for the new crime.

The second sentence in the section is aimed at particular situations which arguably would not be covered by the statute otherwise. Suppose a police officer arrests a driver of a car who, he reasonably believes, committed burglary. While searching the car for evidence of the burglary, he discovers articles which reasonably lead him to believe that there are contraband narcotics in the car. Arguably, under a literal interpretation of the proviso and without the second sentence, he could not search further for the narcotics because this further search would not be for articles connected with the crime for which the occupant was arrested, namely burglary.

The other situation which the second sentence covers is where the officer arrests one occupant and in the course of his search discovers articles incriminating another occupant. The sentence permits him to arrest the other occupant and search further incident to that arrest.

C. *Constitutionality of Subsection (B).*

In 1925 the Supreme Court of the United States created a new exception to the general requirement that searches are not to be conducted without a warrant: "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. The seizure in such a proceeding comes before the arrest. . . ." *Carroll v. United States,* 267 U.S. 132, 158-59 (1925). Before *Carroll,* a search had to be either under warrant or incident to a valid arrest. After *Carroll,* it could also be upon probable cause to believe that an automobile contained something seizable. This decision showed a realization on the part of the Court that the mobility of automobiles had introduced a new element into the definition of reasonable searches and seizures.

The validity of such a search, without a warrant and not incident to an arrest, turned upon the showing of two indispensable elements: probable cause to believe that the automobile contains that which is subject to seizure, and the impracticability of obtaining a warrant. In explaining probable cause the Court said:

"On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of a circumstance known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." *Id.* at 149. But probable cause alone was not enough; the search was allowed without a warrant only because of the impracticability of obtaining one before the automobile would be beyond the reach of the officer. "In cases where the securing of a warrant is reasonably practicable, it must be used. . . . In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause." *Id.* at 156.

Although the *Carroll* doctrine has been severely criticized, see Black, *Critique of the Carroll Case,* 29 Col. L. Rev. 1068 (1929), its essential rationale has been frequently reaffirmed, and, in the opinion of the Committee, is still valid in present day constitutional considerations of search and seizure. It is often wise to be skeptical of precedents dating from prohibition times; due to the exigencies of the era, many things were allowed which are of doubtful applicability in the present time. *Carroll,* however, does not seem to have suffered such a fate. The doctrine was expressly reaffirmed many years later in *Brinegar v. United States,* 338 U.S. 160 (1949), and its proposition that searches of automobiles are to be accorded treatment different from that of a dwelling house has been frequently recognized. *Johnson v. United States,* 333 U.S. 10, 14 (1948); *Henry v. United States,* 361 U.S. 98, 104 (1959). In addition, it has been adopted in some states both judicially and by statute. In Washington it was applied to an airplane, *State v. Kinnear,* 162 Wash. 214, 298 Pac. 449 (1931), and the Florida Legislature has enacted the full text of the *Carroll* opinion itself. Fla. Stat. § 933.19 (1949). See also *Pettit v. State,* 207 Ind. 478, 188 N.E. 784 (1934).

Two recent cases, however, seem to have created some confusion about the present day vitality of the *Carroll* approach. *Henry v. United States, supra; Rios v. United States,* 364 U.S. 253 (1960). The Committee believes, however, that these cases can be satisfactorily reconciled with *Carroll* on the following analysis.

In *Henry* the confusion arises because of the rather substantial similarity to *Carroll* in the sequence of events. Federal agents who were investigating a theft of an interstate shipment of whiskey had some slight suspicion of the implication of the two defendants

in the theft. From a distance, the officers watched the defendants park their car in an alley and load it with cartons of an unknown nature. The defendants drove off, then later returned; when they set off on their second trip, the agents followed and waved the car to a stop. The following search revealed not whiskey, but stolen radios. The defendants were then formally arrested, tried, and convicted. The Supreme Court reversed, holding that the search was unreasonable because before the car was stopped there was no probable cause to believe that the defendants had committed a crime. "On the record there was far from enough evidence against him to justify a magistrate in issuing a warrant." *Henry v. United States, supra* 103. Further, the Court specifically recognized *Carroll* and held it inapplicable to the present facts in saying: "The fact that the suspects were in an automobile was not enough. *Carroll v. United States* . . . liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause." *Id.* at 104. At this point the case seems clear: the Court found that there was no probable cause before the car was stopped and that, therefore, the search was unlawful. The difficulty arises, however, in the fact that the Court did not treat the case as one having the same time sequence as in *Carroll.* In *Henry,* even though there was no formal placing under arrest and despite the fact that the officers began the search *immediately* after stopping the car, the Court held that the arrest took place when the federal agents stopped the car: "That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete." *Id.* at 103. Although this statement casts no disrepute on the *Carroll* doctrine itself, it seems to render moot the whole idea of a search based on probable cause without being incident to an arrest. If the Court takes its statement seriously and applies it with a liberal hand, it is difficult to conceive of a situation where a car is stopped and searched that the occupants will not be "interrupted" or "their liberty of movement" restricted.

Of course, this is not to say that every time a car is stopped, it would constitute an arrest. As pointed out in *Rios v. United States,* 364 U.S. 253 (1960), a car may be stopped for purposes of routine interrogation and the occupants may be momentarily detained without the necessity for an arrest or probable cause of any kind. A typical example of this would be the ordinary inspection of a driv-

er's license or a warning of a burned out tail light. It is only when the car is stopped for more than a routine interrogation, *e.g.*, for purposes of search, that the *Henry* doctrine will be applicable. In such a case, if it is held that the arrest always takes place at the time the car is stopped, by hypothesis, any search which follows will necessarily be incident to an arrest. This, as was said before, would seem to render moot the *Carroll* rationale.

The Committee believes, however, that *Henry* can be reconciled with *Carroll*, and that the *Carroll* doctrine would still be applicable in some situations where *Henry* would not.

First, and most important, since the Court properly found in *Henry* that there was no probable cause to arrest, there was no need to discuss the further question of whether there was probable cause to search under the *Carroll* rationale. In short, the two questions — probable cause to arrest and probable cause to stop — were the same question. Second, there is the factor that the prosecution in *Henry* conceded that the arrest took place when the car was stopped. Third, the Court was careful in *Henry* to limit the decision as to time of arrest to the case before them: "That is our view on the facts of this particular case. . . . The arrest, for purposes of this case, was complete." *Henry v. United States*, 361 U.S. 98, 103 (1959). Fourth, the Court specifically recognized the *Carroll* rationale and in so doing made no limiting or narrowing remarks which it often uses to indicate indirectly disapproval of a precedent. Although this is merely negative evidence, it takes an added vigor here in view of the factual similarity between *Carroll* and *Henry*. Fifth, even assuming that the Supreme Court in *Henry* is exhibiting a tendency to rely on the doctrine of search incident to arrest rather than the *Carroll* doctrine, it is doubtful that such a tendency would have the status of a constitutional rule. Although the provisions of the Fourth Amendment prohibiting "unreasonable . . . seizures" would be determinative in deciding whether an interference with an individual constituted an arrest, it seems that such interference with the individual under the *Carroll* doctrine would in many cases be no greater than that involved in a search of a building pursuant to a search warrant. In both cases it is clear that the occupants will be "interrupted" or their "liberty of movement" restricted to a certain extent. Yet searches of building carried out pursuant to a warrant are specifically authorized by the Fourth Amendment and it is clear that no question of arrest is involved. Since *Carroll* merely dispensed with the need for a search warrant in certain cases on grounds of impracticability, the other

considerations, including the question of arrest, would appear to be substantially similar. Thus, it seems unlikely that it would be any more unconstitutional reasonably to search a car without arresting the occupant than it is similarly to search a building. The Committee, therefore, believes that the *Carroll* doctrine is still constitutionally sound, and also may safely be applied to the case, contemplated by subsection (B), where the vehicle is not moving but is about to be moved. For here the same reason — impracticability of obtaining a warrant before the vehicle is beyond the officer's reach — is present.

Moreover, *Carroll* remains applicable in some situations where *Henry* is not. For example, a police officer sees a person hire a taxi to transport contraband liquor. The officer knows that the taxi driver is innocent of knowledge of this because the package is disguised, and the guilty person does not enter the taxi but stays behind or drives off in another direction. Probably the officer could not arrest the taxi driver, so *Henry* would be inapplicable. But under *Carroll* he would be permitted to stop the taxi and seize the contraband. Or perhaps there is contraband in a vehicle driven by someone who is immune from arrest, such as a diplomat. See discussion below on subsection (B) for further examples.

Thus, the fact that the *Carroll* rationale, embodied in subsection (B), covers situations not covered by subsection (A) is one reason for including it in the statute. Another reason is that hinging the permissibility of a search on an arrest might force an officer unnecessarily to cause a citizen great inconvenience in order to ensure the legality of a search. At common law generally once an arrest is made, the officer must bring the person before a magistrate; he cannot undo the arrest himself because from the moment of arrest, the arrestee is considered to be in the custody of the court. 1 Alexander, *Law of Arrest,* § 153 (1949). It is easy to see that this requirement, if rigorously adhered to, could create great hardship where the arrestee is clearly innocent and the officer realizes he made a reasonable mistake. For this reason some jurisdictions treat this as an exception to the general rule and permit the officer to release the arrestee. Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201, 254 (1940). Arguably, then, under the general rule, if an officer with probable cause to believe an occupant was carrying contraband in his automobile, stopped the car, arrested the occupant, and searched unsuccessfully, he would still have to bring the arrestee before a magistrate or the arrest and thus the search would be invalid. It is apparently undecided in South Carolina whether

the general rule or the exception is the law. Therefore, if South Carolina follows the general rule, subsection (B) would permit searches in such situations without the onerous requirement of bringing the admittedly innocent person before a magistrate in order to legalize the search.

In *Rios v. United States,* 364 U.S. 253 (1960), another perplexing factual situation arose. Two Los Angeles policemen were in a neighborhood having a reputation for narcotics when the defendant came out of a building and hurried to a waiting taxi. The policemen followed and when the cab stopped for a traffic light, they got out of their car and approached on foot to its opposite sides. There was conflicting testimony from the policemen, the defendant, and the taxi driver as to the exact sequence of the following events but the result was that the defendant was discovered to have narcotics in his possession and was arrested. Again, the Court considered the question as one pertaining to the validity of search incident to arrest but, because of the conflicting testimony, remanded the case to determine when the arrest took place according to California law. See *Johnson v. United States,* 333 U.S. 10 (1948) and *United States v. DiRe,* 332 U.S. 581 (1948). The Court indicated that the question of the time of arrest turned on the officers' motives when they walked over to the taxi; if they intended only a routine interrogation and a momentary detention, the arrest did not take place at that time. If, however, they intended to interrupt him and to restrict his liberty of movement, the arrest was complete at that moment and invalid for lack of probable cause: "Yet under no possible view of the circumstances revealed in the testimony . . . could it be said that there existed probable cause for an arrest at the time the officers decided to alight from their car and approach the taxi in which the petitioner was riding." *Rios v. United States, supra* at 261. The only way in which the search could have been valid was if the arrest did not take place until, in their positions at the sides of the taxi, the defendant's conduct gave the officers probable cause to arrest him for possession of narcotics.

Considering *Carroll, Henry* and *Rios* together, the following conclusions seem justified: in order to search a moving vehicle upon probable cause to believe that the contents therein are subject to seizure, the probable cause must exist *before the automobile is stopped.* Thus, when a car is stopped for routine interrogation of an occupant, probable cause to believe that the contents

are subject to seizure which arises thereafter will not be sufficient justification for a search. But where the car is stationary but is about to be moved, it may be searched if the officer has probable cause before he approaches it. Also, if an officer casually passes a car which is parked but about to be moved, looks into the car, and thereby gains probable cause, he may search and seize. However, where a car is stopped for momentary interrogation of the occupant without probable cause of any kind, if thereafter probable cause arises, the occupant must be *arrested* and the car searched incident to the arrest. Thus, in *Rios,* because of the absence of probable cause when the officers took their positions, the further issue of search based on probable cause was foreclosed.

The Committee, therefore, feels that subsection (B) has a sound constitutional basis as well as being a necessary and reasonable device for practical and effective law enforcement.

D. *Operation of Subsection (B).*

The purpose of this subsection is to permit officers to seize articles which they could ordinarily seize by warrant, where it is impracticable to obtain a warrant. In many cases this subsection will overlap subsection (A). But, as was noted in 1, B of the Memorandum, there may be situations where an arrest is not feasible but seizure of the goods is necessary. The case of a taxi commissioned to deliver a package was mentioned above. Another example is where an officer has reason to believe that, in violation of S.C. Code § 58–613 (1962), explosives are being carried in a passenger railroad train which is about to move. He may not have time to secure a warrant and an arrest may not be feasible. Yet he should be able to seize the explosives. Paragraph (1) would permit him to do so.

The meaning of "probable cause" has been left to judicial elaboration, since so many varied factual situations may arise. "Probable cause" is the constitutional standard set by both the Federal and South Carolina Constitutions. The theory of this subsection is that whenever a vehicle may be searched or its contents seized with a warrant, it may be searched or its contents seized without a warrant where there is probable cause and when securing a warrant would be impracticable.

Paragraph (1) authorizes the seizure of such things as contraband liquor (S.C. Code § 4-109), faulty weights or measures (S.C. Code § 66-154), explosives in passenger trains (S.C. Code § 54-

304), and concealed shipwrecked goods (S.C. Code § 54-304). Along with paragraph (2), it also authorizes the seizure of what is referred to in subsection (A) (3) as the "product" of crimes.

Paragraph (2) authorizes the seizure of any stolen, embezzled, or otherwise criminally taken articles. The phrase "taken in violation of the criminal law" is used to cover all the differently labeled appropriative crimes in the South Carolina statutes.

Paragraph (3) authorizes the seizure of articles used or about to be used in the commission of crimes, such as guns. This language, like that of subsection (A) (3), is taken almost verbatim from Rule 41 of the Federal Rules of Criminal Procedure, which authorizes federal searches under warrant. Again, the theory is that what in a vehicle may be seized under warrant may be seized without warrant upon probable cause where securing a warrant is impracticable.

The proviso in the first sentence serves much the same function as the proviso in subsection A. It limits the extent of the search. Similarly, the second sentence serves much the same function as the second sentence in subsection A. It permits an officer, in search of one illegal article, who discovers facts giving him probable cause to believe there is some other illegal article in the vehicle, to search further for such article.

Comment to Section 2.

This section defines who may search. This right is given to public officials with statutory authority to arrest. The phrase "public official" is used in order to include persons such as mayors and councilmen, who have powers of arrest but might not otherwise be thought of as police or law enforcement officers. See, *e.g.*, S.C. Code § 15-909 (1962). The phrase "or any person who is given by statute the power of such official to arrest" is included in order to cover such persons as deputy sheriffs for amusement parks (S.C. Code § 53-131) who arguably might not be held to be "public officials," and railroad agents (who have power of arrest — S.C. Code § 58–1221) who would not ordinarily be thought of as "public officials."

Railroad agents are not given power to search under subsection (B), however. While they may sometimes need power to search incident to an arrest in order to protect themselves (see Section 1 (A) (2)), the Committee felt that they should not be given power to search when they make no arrest. Since their powers of arrest are very limited (S.C. Code § 58-1221), they should not be given a

power of search disproportionate to their need and to their power of arrest.

In should be noted that only *officials* with statutory authority to arrest may search. Private citizens are excluded. It is felt that the right of search should be limited to certain persons. Only public officials are given this right, for two reasons: (1) they are more likely than private citizens to be able to use discretion in deciding how far to search, thus staying within the bounds set by Section 1, and (2) many of them will be bonded, ensuring some compensation for one whose vehicle is searched unreasonably.

It is unclear what right of search a private citizen now has. If there is such a right, it is preserved by section 5.

Comment to Section 3.

Paragraph (2) is included because police officers in South Carolina retain their common law arrest powers. See *State v. Byrd*, 72 S.C. 104, 51 S.E. 542 (1905). It should be noted that whereas section 2 limits the right of search to those with *statutory* authority as officials to arrest, section 3 provides that an arrest is lawful even if not made pursuant to a statute. The reason for this distinction is that, having designated who may search, the Committee believes those persons should not be limited to searching incident to a statutory authority to arrest, if their common law arrest powers are greater.

Comment to Section 4.

This definition of vehicle is that used in S.C. Code § § 46-2 and 46-211, modified to include railroad trains, and devices moved by human power, and airplanes and boats. A broad definition is used, rather than specifying particular kinds of vehicles, in order to anticipate the inventions of new, as yet unknown vehicles. It may be argued that with respect to a vehicle such as a railroad train, the statute would authorize a search throughout the train and might be subject to criticism as too broad a grant of power. This objection, however, is answered by the limitations embodied in section 1.

Comment to Section 5.

The purpose of this section is simply to make clear that this act is aimed to broaden powers and not to limit or reduce them.

A Conflict-of-Interests Act

This statute was originally drafted for California and Alaska. In revising it for publication in the Journal *several changes were made so that the Act would be more generally applicable. The Act is not nearly so comprehensive as some statutes which have been suggested, but the aim was to draft an adequate set of standards and sanctions which would not be too drastic for general acceptance.*

Conflict-of-interests legislation has a long history. In its earliest days it found expression in the statutes prohibiting bribery. As society became more complex and the forms of conflicts of interests became more diverse, other statutes were enacted. They prohibited, for example, the participation by government officials in transactions in which they were interested parties. See Cal. Gov't. Code § 1090. Many of the situations could be handled under the common law of fiduciaries. See Holmes, *The Federal Conflict of Interests Statutes and the Fiduciary Principle,* 14 Vand. L. Rev. 1485 (1961).

The consequence of these developments was a situation in which the conduct of government officials was governed by a variety of scattered statutes and judicial decisions. There was confusion as to just what conduct was proper and what was improper. Commentators urged a thoroughgoing revision and consolidation of existing law. See, *e.g.,* McElwain & Vorenberg, *The Federal Conflict of Interests Statutes,* 65 Harv. L. Rev. 955 (1952).

In the 1950's the Association of the Bar of the City of New York undertook a study which resulted in the publication in 1960 of a book, *Conflict of Interests and Federal Service,* surveying the policies involved and proposing a statute to deal with the problem in the federal government.

Meanwhile, studies were also being conducted in several states. Massachusetts in 1962 enacted a comprehensive statute dealing with conflicts of interests. Mass. Gen. Laws Ann. ch. 268A. It is primarily a criminal statute but does contain a code of ethics in section 23. This statute reflects two common ways which legislatures have used to deal with the problem, viz. the criminal sanction method (for which the prohibited conduct must be precisely defined) and the non-sanction method (where the language defining the conduct is broad and often not compulsory in tone). The present draft is designed to come between these methods by

providing fairly definite, though somewhat flexible, rules of conduct that can be enforced by non-criminal sanctions, most of which deprive the employee of some of the benefits of his job.

This is not a new concept. A similar plan has been used in New York. N.Y. Pub. Officers Law § 74. There the rules of conduct are called a code of ethics, but the meaning of the code may be particularized in opinions of the Attorney General. If an employee violates the code, either the Attorney General or the Advisory Committee on Ethical Standards may recommend to the authority who has power over the employee that he be dismissed or otherwise disciplined. Also, the report of the Bar Association of the City of New York, referred to above, indicates that criminal provisions are not suited to the more subtle kinds of conflict-of-interests problems and urges that administrative measures be used. See *Conflict of Interests and Federal Service* 189-93, 244-47.

The administrative approach was adopted principally because of the following two considerations:

(1) Often criminal conflict-of-interests statutes have not been enforced, because they are found to be too harsh. When the law thus goes unenforced, violation of the law may become accepted conduct. On the other hand, a less severe sanction might be more readily applied and in the end do more to upgrade the moral level of government than the more severe criminal penalty.

(2) Moreover, conflict-of-interests problems – putting aside serious violations like accepting bribes – are problems of keeping an honest and efficient public service, problems which are best handled by those who hire, fire, and discipline employees.

In drafting a conflict-of-interests statute it is easy to become overzealous and to forget the impact which a broad restriction may have. A well-drawn statute should prohibit conflicts of interests which are most damaging to the standards of good government and yet not prohibit so much that competent people will be discouraged from serving. For example, a state would be hurt more than helped by a statute which in effect barred experts from serving on advisory boards. Therefore, the scope of the Act has been limited in certain areas where broad prohibitions would do more harm than good. For example, provisions have been made for special employees, restrictions on former employees have been drawn within definite limits, and personal representation before an agency has been treated differently from mere assistance.

The Committee has tried to make the substantive sections of the Act as clear as possible in order that they can be understood by

employees as well as judges. Particular questions can be answered in advisory opinions by the Attorney General. The summary of these opinions and of cases which arise will give fuller meaning to the bare words of the Act. It is the theory of this Act that when employees know what conduct is expected of them in specific situations and know that they will not be alone in their effort to comply, they will do what is expected of them; then government work will be carried on more fairly and efficiently, and the people will have more confidence in their government.

AN ACT: (1) establishing standards of conduct for state legislators and employees in situations where personal interests conflict with public interests, and (2) providing for the enforcement of these standards.

PART I. STANDARDS.

SECTION 1. *Gifts.*

No employee or legislator shall request or receive a gift or loan for himself or another if:

(A) it tends to influence him in the discharge of his official duties, or

(B) he recently has been, or is now, or in the near future may be, involved in any official action directly affecting the donor or lender. This subsection shall not apply in the case of:

(1) an occasional non-pecuniary gift, insignificant in value;

(2) an award publicly presented in recognition of public service;

(3) a commercially reasonable loan made in the ordinary course of business by an institution authorized by the laws of this State to engage in the making of such loans; or

(4) a political campaign contribution, provided that such gift or loan is actually used in a political campaign of the recipient employee or legislator.

SECTION 2. *Disqualification.*

(A) An employee shall disqualify himself from participating in any official action directly affecting a business:

(1) in which he has a substantial financial interest, or

(2) by which a firm of which he is a member associate has been engaged as legal counsel in a matter directly related to such action.

(B) If the public interest so requires, the Governor may make an exception from this section for an employee, by expressing the exception and the reasons for it in writing. The exception shall be

effective when the employee files this writing with the Attorney General in the manner provided for disclosures in section 8 of this Act.

SECTION 3. *Acquiring financial interests.*

No employee shall acquire a financial interest at a time when he believes or has reason to believe that it will be directly affected by his official actions or by official actions of the agency of which he is an employee.

SECTION 4. *Assisting in transactions involving the state.*

(A) No legislator or employee shall receive or agree to receive compensation for representing or assisting any person or business in any transaction involving the state.

No legislator or employee shall assist any person or business in a representative capacity, whether with or without compensation, in any transaction involving the state.

(B) In lieu of subsection (A) the following provision shall apply with respect to special employees:

No special employee shall assist any person or business, whether with or without compensation, on matters in which he participated as an employee, nor shall he assist any person or business in a representative capacity, whether with or without compensation, on any matter before the agency or department of which he is an employee.

(C) Nothing in this section shall be taken to prohibit a legislator or employee from representing or assisting a person or business in any matter before an administrator or judicial body of the state when the matter involves a claim by such person or business against another person or business and is not of direct concern to the state. Nor shall this section be taken to prohibit any assistance which is part of the official duties of the employee or legislator.

SECTION 5. *Confidential information.*

No legislator or employee shall use confidential information acquired by virtue of his state employment for his or another's private gain.

PART II. PROHIBITION OF CERTAIN STATE CONTRACTS.

SECTION 6. *Contracts involving employees.*

A state agency shall not enter into any contract with an employee of the agency or with a business in which such employee has a controlling interest, involving services or property of a value in excess of $1,000 unless the contract is made after public notice and competitive bidding, provided that this section shall not apply to a contract of official employment with the state.

SECTION 7. *Contracts involving former employees.*

(A) A state agency shall not enter into a contract with, nor take any action favorably affecting, any person or business which is represented personally in the matter by a person who has been an employee of the agency within the preceding year.

(B) A state agency shall not enter into a contract with, nor take any action favorably affecting, any person or business which is assisted in the transaction by a former state employee who participated, while in state employment, personally and substantially in the matter with which such contract or action is directly concerned.

PART III. DISCLOSURES.

SECTION 8. *Requirement of disclosures.*

(A) Every employee who has a financial interest which he believes or has reason to believe may be substantially affected by actions of the agency by which he is employed shall disclose the precise nature and value of such interest. The disclosures shall be made to the Attorney General before entering state employment, and again during every January thereafter.

(B) Every legislator who has a financial interest exceeding $10,000 in a business which is subject to regulation by the state shall disclose the precise nature and value of such interest. The disclosures shall be made at the same time as those prescribed for employees by subsection (A) of this section.

(C) The information on the disclosures, except for the valuations attributed to the reported interests, shall be made available by the Attorney General for inspection to any citizen of this state. The valuations shall be treated as confidential.

(D) Except for legislators or employees removable only by impeachment, the filing of disclosures pursuant to this section shall be a condition of entering upon and continuing in state employment.

(Optional) [PART IV. POLITICAL SUBDIVISIONS.

SECTION 9. *Political subdivisions.*

This Act is an act of general operation and shall apply to employees of political subdivisions of this state.

However, any political subdivision may adopt an ordinance designating a local official to receive the disclosures and to enforce this statute as it affects local employees. The ordinance may also designate a local

official to make exceptions for local employees in cases where the public interest so requires, provided that such exceptions and the reasons for them be made a matter of public record.

Such an ordinance duly passed shall be effective to give the designated officials power to act.]

Part V. Administration and Enforcement.

Section 10. *Enforcement by Attorney General; powers and duties.*

The enforcement of this Act is hereby entrusted to the Attorney General. He shall have the following powers and duties:

(A) He shall prescribe a form for the disclosures required by section 8 of this Act and shall establish an orderly procedure for implementing the requirements of that section;

(B) To ensure that the standards established by this Act are being observed, he shall review the disclosures, make periodic inspections of state agencies, and investigate stiuations which come to his attention;

(C) He shall render advisory opinions to any employee who seeks advice as to whether the facts in a particular case would constitue a violation of the standards. Such opinion until amended or revoked shall be binding on the Attorney General in any subsequent complaint concerning the employee who sought the opinion and acted on it in good faith, unless material facts were omitted or misstated in the request for advisory opinion;

(D) He shall file formal complaints with the proper authority when he has determined that there is sufficient cause and shall carry the burden of proof in attempting to support the complaint; and

(E) He shall publish yearly summaries of decisions on questions raised by complaints or by requests for advisory opinions. He may make sufficient deletions to prevent disclosing the identity of persons in the decisions or opinions.

Section 11. *Procedure to be followed by the Attorney General.*

(A) *With respect to legislators and employees removable only by impeachment.* When the Attorney General determines that there is sufficient cause to file a complaint against a legislator or an employee removable only by impeachment, he shall refer the matter to the appropriate house of the Legislature. If within thirty days after such referral, the Legislature has neither formally declared that the charges contained in the complaint are not substantial nor instituted hearings on the complaint, the Attorney General shall make public the nature of the charges, but he shall make clear that the merits of the charges have

never been formally determined. Days during which the Legislature is not in session shall not be included in determining the thirty-day-period.

(B) *With respect to others than legislators and employees removable only by impeachment.* If the Attorney General determines that sufficient cause exists for filing a complaint against an employee other than a legislator or an employee removable only by impeachment, he shall file a complaint with the Civil Service Board, or, if the Civil Service Board does not have jurisdiction, with the authority having the power to discipline the employee. The complaint must contain a statement of the facts alleged to constitute the violation. A hearing shall be in accordance with the Administrative Procedure Act. It shall be private and no record of the proceedings shall be released to the public prior to its conclusion.

If it is found that no violation has occurred, the Board or authority shall not make the record of the proceedings public. But if it is found that a violation has occurred, the Board or authority may make its findings and the record of the proceedings public, taking into account the seriousness of the offense.

This subsection shall not prevent the Attorney General from reporting decisions in the yearly summaries required in section 10(E).

SECTION 12. *Sanctions.*

In addition to any other powers the Civil Service Board or disciplinary authority may have to discipline employees, the Board or authority may reprimand, put on probation, demote, suspend, or discharge an employee found to have violated the standards of this Act.

Also, if the violation involves section 3 of this Act, the Board or authority shall order the violator to relinquish the prohibited interest or employment or resign his public employment. If the offense involves action taken in violation of sections 2, 4, 6 or 7 of this Act, the action shall be voidable on behalf of the state. The Attorney General shall decide whether to avoid the transaction, taking into account the interest of third parties who may be damaged thereby.

PART VI. DEFINITIONS.

SECTION 13. *Definitions.*

In this Act the following words and phrases shall have the following meanings:

(A) *"Business"* means a corporation, a partnership, a sole proprietorship, or any other individual or organization carrying on a business.

(B) *"Confidential information"* means information which by law or practice is not available to the public.

(C) *"Controlling interest"* means an interest which is sufficient in

fact to control, whether the interest be greater or less than fifty per cent.

(D) *"Employee"* means any person who has been elected to, appointed to, or nominated for, state office or employment, but excluding legislators and judges.

(E) *"Employment"* means any rendering of services for compensation.

(F) *"Financial interest"* means an interest held by an individual, his spouse, or minor children which is:

(1) An ownership interest in a business,

(2) A creditor interest in an insolvent business, or

(3) An employment, or prospective employment for which negotiations have already begun.

(G) *"Official act"* or *"Official action"* means an official decision, recommendation, approval, disapproval, or other action, which involves the use of discretionary authority, except that the term shall not include an act of the Legislature or an act of general applicability.

(H) *"Special employee"* means one who is appointed or employed to perform special services or temporary duties, with or without compensation, for a total of sixty days or less during any period of 365 days.

(I) *"Standards"* means the conduct required by Part I of this Act.

PART VII. CONSTRUCTION; SEVERABILITY; EFFECTIVE DATE

SECTION 14. *Construction.*

This Act is intended to provide standards of conduct and sanctions for their violation in addition to standards and sanctions already existing, and is not intended to replace any such prior standards and sanctions which are not inconsistent with this Act.

SECTION 15. *Severability.*

The provisions of this Act are severable, and if any of its provisions shall be held unconstitutional or invalid by a court of competent jurisdiction, the decision of the court shall not affect or impair any of the remaining provisions.

SECTION 16. *Effective date.*

This Act shall take effect 90 days after its passage.

MEMORANDUM

SECTION 1. *Gifts.*

This section is more far-reaching than a criminal statute could be. But the Committee felt that because the sanctions for its violation are more flexible and less severe than criminal sanctions, the required standard is both fair to employees and highly desira-

ble in view of the purpose of raising the level of conduct of public servants. The phrase "tends to influence" means that the question is not merely whether an employee has reason to believe that receipt of the gift will actually influence his official actions, but whether he has reason to believe that receipt of the gift will put pressure on him to act other than for proper purposes, even though he can resist the pressure.

This section overlaps bribery statutes and may be used instead of the bribery statute where for some reason criminal sanctions are undesirable. Here the flexibility of this Act's administrative proposals is useful, allowing a minor sanction if it is appropriate to the offense, avoiding the dilemma of a drastic punishment or none at all.

Paragraph (B) is a statement of the situation to which paragraph (A) will most often apply. To understand the scope of paragraph (B) one should bear in mind the narrow definition of "official action" in section 13(G), particularly that an act of the Legislature is not included. Also one should take account of the exceptions to the general prohibition in paragraph (B). These exceptions are not applicable to paragraph (A), being only for the purpose of keeping the particular provisions of paragraph (B) from extending to situations outside of paragraph (A) but not for limiting paragraph (A). Subparagraph (1) refers to gifts not "insignificant in value." Thought was given to applying a specific dollar limit, but this was rejected, because what is "significant" depends on the circumstances. A gift of a Christmas turkey may be significant to some recipients and not to others. More specific standards, where desired, can be developed through opinions of the Attorney General. Subparagraph (2) while exempting many situations which all agree should be exempted, also exempts affairs that are subject to abuse, such as testimonial dinners given for state officials by businesses or persons subject to their regulation. Still, these occasions may have their value, and abuse is partially protected against by the attendant publicity. Subparagraph (3), allowing certain bona fide loans, is an explicit statement of what could be arrived at by construction. Subparagraph (4) might be regarded as a loophole. But it is clear that campaign contributions are an essential part of our political system, and any comprehensive regulation of them is beyond the scope of this statute.

SECTION 2. *Disqualification.*

This section puts the burden on an employee to disqualify him-

self from participating in official actions where his private interests are at stake. It would be no excuse, therefore, that the employee was not disqualified by his superior. The employee is in the best position to know whether he has conflicting interests, and he should have the responsibility of living up to the standards set up by the Act. Only if this sort of responsibility is encouraged can the level of conduct in government be raised.

The section is not so broad as it may appear on first reading. An official who takes part in a decision that affects the interests of a large number of people, including himself (*e.g.*, a decision affecting farmers in general where the official is himself a farmer) or who performs a purely ministerial function does not come within the scope of this section, because his action is not "official action" as defined in section 13(G).

Subsection (B) is a recognition that situations occasionally arise where the state may need the skills of a particular individual, even though his service would violate the general rules of this Act. Therefore, if the Governor determines that the public interest would be served best by utilizing the services of the individual, he may make an exception for him. The flexibility of such a provision is thought preferable to an absolute prohibition, which might be unduly restrictive in a few special cases; and the fact that the exceptions will be available for public inspection will help ensure that they will not be made carelessly.

SECTION 3. *Acquiring financial interests.*

In its first draft this section required an employee who had a financial interest that would interfere with the "overall performance of his duties" to divest himself of this interest and not to acquire new ones. But great difficulty was encountered in defining such an interest and in differentiating it from an interest which could be retained if the employee disqualified himself from decisions relating to it. Instead of either retaining or eliminating the section in toto, a compromise was reached. The part of the section requiring divestiture was eliminated. Reliance is put on the disqualification section, although this cannot completely offset the tendency that an agency might have to award a contract to a firm which a member of the agency owns. Of course, if an employee had to disqualify himself too often, he would not be able to perform his duties satisfactorily, but that can be dealt with like any other case in which an employee is not properly doing his job. But part of the original section was retained, the part prohibiting an

employee from acquiring a financial interest at a time when it would look suspicious to the public and undermine the public confidence. The minor restriction on the employee is outweighed by the elimination of the possible conflict of interests.

SECTION 4. *Assisting in transactions involving the state.*

The theory of this section is that one should not use the knowledge, contacts, and prestige which he has gained as a government employee or legislator unfairly to gain advantage for himself or others in transactions involving the state.

The gist of the first sentence is on receiving or agreeing to receive compensation, thus pointing out that to be affected by this broad state-wide ban, the compensation element must be present. The greater restrictions on services in a representative capacity (as opposed to other assistance) are based on the theory that one can use his influence more if the state agency knows that he is running the show. It is not contemplated that personal appearance before the agency would be necessary; it might be sufficient that the legislator or employee corresponded with the agency as agent or attorney. The restrictions on special employees are not so broad as those on legislators and regular employees, but are limited to matters before the department or agency for which they work. This is because many special employees are used only in an advisory capacity and for a minimal time and to unduly restrict them would make it difficult to obtain expert advice in the future. The exception for assistance in matters not directly concerning the State was made because the conflict-of-interests element was thought less important here than the personal interest of the employee or legislator.

SECTION 5. *Confidential information.*

Like the preceding section this section is based on the theory that a person should not use his public employment for private advantage. As applied here, this means that an employee or legislator should not use information to which he has access because of his job and which is not generally available to the public for his or another's financial gain. The Committee considered including a restriction on using such information in "any unauthorized way," but this seemed too vague, since it in effect said that one should not do what he is not authorized to do. Therefore, this section is limited to information used for private gain.

SECTION 6. *Contracts involving employees.*

Impartiality and fairness to those dealing with the government are the objects of this and the following section. There is a great likelihood that a group will be partial to one of its own members, even if the member has disqualified himself from the particular decision. This is especially true where, because several members of the group have interests which may be affected by group action, there is the possibility of "backscratching."

This section does not entirely eliminate the problem, since it does not apply to contracts involving less than $1,000, nor does it prevent contracts with businesses in which the employee owns less than a controlling interest (although a controlling interest may be less than half, see § 13(C)), nor does it prevent any contracts awarded after public notice and competitive bidding. A fixed dollar threshold — a state might choose a figure consistent with its other rules for competitive bidding — was used for the sake of convenience, since it is not practical to have competitive bidding for everything. The "controlling interest" concept, rather than some more stringent requirement was used both because conflicts of interests are strongest when the employee's interest is a controlling one and because it may be harsh to require a business to forego contracts with the state because a state employee owns a small interest in the business. Even the public bidding requirement does not completely remove the possibility of favoritism; however, it does significantly reduce this possibility without imposing an undue burden on the employee or on contractors.

The prohibition in this and the following section is intended to make clear to the state agency that it has a duty to know the financial interests of its employees and not to enter into prohibited contracts. Sometimes a look at the disclosures filed with the Attorney General pursuant to section 8 will be sufficient to determine an employee's financial interests; sometimes further inquiry will be necessary. Although the principal onus of this section is on the state agency, it would also be improper for an employee to enter into a contract prohibited by this section.

SECTION 7. *Contracts involving former employees.*

It is the hypothesis underlying this section that in a matter requiring the action of a state agency, persons personally represented by former employees of the agency have an advantage over other persons, but that this advantage decreases as the time since the former employee's employment increases. To prevent this ad-

vantage the Act forbids the agency to enter contracts with a person represented personally in the subject matter of the contract by one who has been an employee of the agency within the preceding year. The period of one year, rather than a longer period, was chosen as a concession to the employee's interest. The prohibition is directed at the agency, because the sanctions of this Act, involving as they do the deprivation of some of the benefits of a state job, could not be applied to those who have no state job. A provision allowing the agency to place restrictions on future dealings with the agency of a person who contracted in violation of this section was considered but was rejected in favor of the provision allowing the transaction to be voided. (See § 12.)

Since it is manifestly unfair for a former employee of an agency to use confidential information which he has gained by virtue of his state employment for the benefit of some person in matters before the agency and since this unfairness exists no matter how long the former employee has been separated from his state job, a lifetime prohibition against contracts with persons assisted in any manner by such an employee is created by this section.

SECTION 8. *Requirement of disclosures.*

The disclosure requirement may not be favored by some legislators and employees. Nevertheless, it was felt that state employment or office-holding entails a willingness to bare certain private facts which might be of great importance in determining an individual's qualifications. Therefore, the primary objective of this section is to make these facts available. However, it is also designed to protect the personal interests of employees by requiring that only the most relevant interests be disclosed.

Subsection (A), relating to employees (rather than legislators), requires disclosure of all interests which an employee reasonably believes may be affected by agency's actions. It is important to notice that all actions of the agency fall under the subsection, including those of general applicability. (*Cf.* § 13(G).)

Subsection (B), referring to legislators, is broader than subsection (A) in that disclosure is required as to financial interests which may be regulated by any agency in the state. This is a reflection of the broader powers of legislators. However, this subsection is narrower in that only interests over $10,000 need be disclosed. There are no provisions in the Act barring voting or other official actions of legislators in matters concerning their private interests. Such a bar might do more harm than good, for the con-

stituency of the disqualified legislator would not be represented on that issue. It is hoped that the publicity of a legislator's private interests will help the voters of the district make an intelligent choice of the person who can best represent them.

Subsection (C) provides for publicity of the disclosures; this is necessary if the principle behind disclosure is to work. It was realized, however, that individuals do have valid reasons for not wanting their entire financial picture open to the general public. Thus, a compromise was established, in which the nature of an interest (*e.g.* the name of the company) would be available, while the valuation attributed to it would be available only to the few persons who need it to carry out the tasks assigned to them by this Act.

Subsection (D) puts some teeth in the disclosure requirement by making the filing of the disclosure statement a prerequisite for holding a position with the state. An exception was made for legislators and employees removable only by impeachment. While this exception may not be a constitutional necessity, the Committee thought it best to avoid the problems of enforcing the requirement on such personnel and to rely on political pressures, such as the divulgence by a candidate for office that the incumbent had refused to file a disclosure statement.

(Optional).
[SECTION 9. *Political subdivisions.*

Originally this section provided that political subdivisions could enact ordinances modeled generally after this Act, but with broader exceptions, and that the ordinance when approved would supersede this Act. The theory behind this was that in small towns, conflicts of interest are sometimes unavoidable and that the functioning of local governments would suffer if the statute forced able officials to resign their posts.

However, this provision would be invalid in states which do not have a home rule provision in their constitutions broad enough to cover this sort of delegation. Also, the Committee found that most of the problems arising when the Act is applied in small towns can be handled by a provision giving a local officer power to exempt certain employees when the public interest so requires. The statute itself could designate the official, but because local governments are often not uniform, the power to make the designation was given to the local governments. Since the "law" has been made by the Legislature, only the "administration" being left to subsidiary

powers, no claim of an unconstitutional delegation of legislative power should prevail.

A state may find it desirable to make this provision applicable only to municipalities on the ground that counties in that state are primarily administrative units of the state and need no separate provision.

In states that have a self-executing home rule provision in their constitutions, the state legislature might have no power over local employees. In this case the section could be omitted, and the local governments would have to decide whether they wanted a conflict-of-interests law.]

SECTION 10. *Enforcement by Attorney General: powers and duties.*

As stated in the introduction above, one of the primary decisions facing the Committee was what kind of sanctions should be used. After deciding to use non-criminal sanctions, it was still necessary to select the person or body which would carry out the sanctions. It was initially decided to set up an officer to bring charges under the Act and a commission to hear them. It was thought that this would be preferable to using the attorney general or an existing civil service board because the attorney general might be associated with the prosecution of criminal cases (an association the Committee wanted to avoid) and the civil service board might be unreceptive to the new Act.

However, there was the heavy countervailing desire to avoid administrative complexities and costs created by increasing the number of officers and commissions already functioning in the state. Therefore, the attorney general was selected as the enforcing officer. This office has an established procedure and prestige and while it might be somewhat associated in the public mind with criminal proceedings, this objection was felt to be outweighed by positive considerations. It is also pointed out that some states, *e.g.* New York, already assign duties of a nature involved here to the attorney general. While the Committee felt that it was not generally necessary to expressly grant to the attorney general the power to delegate these duties to his subordinates, in some states where statutes are strictly construed, such an express grant might be necessary.

The duty of rendering advisory opinions should be noted. The rules of conduct are expressed in general terms, and an employee or legislator may be unsure as to what he should do in a particular

situation actually confronting him. This is especially true when the Act is new. It was felt that in such a situation the employee or legislator should be able to receive an advisory opinion. This will be helpful to the individual in the particular situation, but, more important, the advisory opinion should be helpful as future guidance for others. The provision for the publication of cases and advisory opinions is a further effort to carry out this basic idea that as the Act is applied in specific situations, employees and legislators will understand better what is required and will act accordingly.

SECTION 11. *Procedure to be followed by Attorney General.*

The differentiation between legislators and employees is thought advisable even if there are not constitutional limitations on treating them the same. The Legislature should be primarily responsible for disciplining its own members. Some external stimulus may be needed, however, since there is a natural reluctance to discipline one's own peers. Publicity would be a suitable stimulus in this situation, but as a safeguard it was provided that the public notice should make clear that no violation of the standards has been proved, only that a violation has been alleged and that the Legislature has done nothing about it.

With respect to employees, the Committee decided to use the disciplinary bodies already functioning, rather than setting up a new commission. Some of the reasons for this are given in the comment on section 10. A more important reason is that this is in line with our basic theory that conflicts of interest are mostly problems of maintaining an honest and efficient government service and should be handled in the same manner as other problems of this type. Also, using established methods itself promotes an efficient government service by utilizing present capabilities more fully.

Instead of listing the procedures to be used in the hearing, a reference was made to the Administrative Procedures Act. Of course, if there is no established procedure in the state, procedures would have to be spelled out.

The provision for secrecy may be in conflict with the Administrative Procedure Act. If so, the procedure in cases under this statute is intended to be different to that extent. Although there is an aversion to "secret hearings," it should be noticed that the secrecy here is for the protection of the employee. He is not prevented from bringing whomever he wants to the hearing. But

if the hearings were made public, some damage might be done to the employee even though he was exonerated.

However, the Attorney General is not prevented from reporting a case even where the employee is exonerated. And since the Attorney General has discretion to decide whether to delete the employee's name, anonymity is not assured. It was felt that the benefit to other employees in finding out how the law is being defined was more important than the possible harm to the employee involved. If the employee's office and any other peculiar facts which would tend to identify him were deleted from the report of the case, the value of the case as precedent might be reduced. Besides, the likelihood of harm to the employee from being charged with a violation of the Act is not nearly so great when the fact appears in a summary after the proceedings have already been concluded as when the charge is publicized before any hearing is held.

SECTION 12. *Sanctions.*

In devising the sanctions one of the primary aims was to give maximum flexibility. Thus, the range of sanctions was increased and no particular sanction was made mandatory for a particular violation, except for a violation of section 3. Flexibility is desirable, because of the great range of conflicts of interests, which can best be handled if a variety of sanctions are available to meet each particular situation.

Transactions made in violation of the standards were made voidable rather than absolutely void, because persons not involved in the violation might be harmed (as by the loss of funds spent in preparation for the performance of a contract) more than the objective of this Act would be served, especially where it is likely that the transaction was not affected by the violation.

SECTION 13. *Definitions.*

Attention has already been called to the fact that "official act" means an act which involves the use of discretion, but does not include acts of general applicability. This definition is used because it limits the operation of the statute to those areas where conflicts of interest are most prevalent.

"Financial interest" is defined in a broader way than merely ownership by an individual of an interest in a business. It includes the interest of an individual as an employee or prospective employee of a business, since loyalty and desire for promotion make

this a potential conflict-of-interests situation. Also the economic realities of the family unit are recognized by the provision that the financial interests of a person include the financial interest of his spouse and minor children. The definition of "financial interest" here set out does not include all of a person's financial interests, but it is intended to include the more important ones.

The term "employee" does not include legislators and judges. There are special problems in these areas, and it was thought best not to deal generally with them in this statute. When legislators are intended to be covered, they are mentioned expressly.

A provision was made for "special employees" because the State might otherwise be deprived of needed services, and, moreover, broad prohibitions are not justified with respect to persons who by definition spend only a fraction of their time working for the State.

SECTIONS 14-16. *Construction; Severability; Effective date.*

The section on construction was included to make clear that the Act is not intended to be the exclusive authority where conflicts of interests arise. Criminal sanctions may still be appropriate in some situations. Formal or informal rules within state agencies which embody a higher standard than this Act would still remain in force. And so on.

The section on severability is intended to rebut any presumption that the provisions are inseverable, for there are many provisions which could be stricken without defeating the purpose of other provisions.

The ninety-day period between the passage of the Act and the effective date was provided to allow a reasonable time for publication and for employees and legislators to familiarize themselves with the standards set forth in the Act.