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Massachusetts Drug Addiction Act:

Legislative History and Comparative Analysis

WILLIAM J. CURRAN*

In 1963, Massachusetts followed New York and California, in the adoption of a new approach to the problem of drug addiction. Rather than the traditional emphasis on drying up the source of drugs, the new program aims at the treatment and rehabilitation of the drug addict. Professor Curran presents a comprehensive analysis of the Massachusetts act in light of the earlier legislation and discusses some of the particular skills required in the drafting of such legislation.

> In all ancient cults impurity or uncleanliness was considered a contagious disease: whoever touched an "unclean" person became unclean himself and was not admitted to the temple without having undergone purification rites. . . .
>
> Hence society, endeavoring to protect itself, made its sick members the immediate object of legislation.
>
> SIGERIST, *Civilization and Disease*

AMONG THE last to be admitted to the temple are drug addicts. Though they may be sick, as defined by some, they are generally considered by the public to be among the most impure and unclean in our society today. More than any other disease, narcotic drug addiction is immersed in criminal punishment. The narcotics control laws on the federal and state levels provide the severest criminal-sentence provisions in our laws with the possible exception of murder.[1] Most addicts begin the habit with narcotics obtained or distributed illegally. The exceptions are those relatively small number of persons called "medically addicted," *i.e.*,

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[1] "The chart and notes [Appendix B] show the almost unanimous trend toward increasing the severity of penalties in all the states. Maximum sentences of forty or more years as well as an increasing number of life sentences are sprinkled through the provisions [of state laws]. Death penalties have been added for sale to minors. Nearly half the states have some limitation on suspension, probation, or parole which applies specifically to narcotics violations." Eldridge, *Narcotics and the Law* at 65 (1962).

those whose addiction is induced after prolonged use of narcotics as an analgesic (pain-killer) under legal prescription from a physician.[2] After becoming addicted, however, it is virtually impossible for any addict to obtain narcotics legally. Even the instruments used for injection of the drugs are usually obtained and held by him illegally.[3] The cost of supporting an average "habit" is so great (estimated in New York City in 1962 at $20–$25 *per day*),[4] that nearly all addicts must resort to crime to get the money to buy drugs. It would seem also that eventually most drug addicts seek out other addicts as friends and companions, for mutual support against the "straight" world.[5] The final step in this process was blocked in 1962 by the United States Supreme Court, however, when a statute making the addiction itself a crime was declared unconstitutional as a cruel and unusual punishment for a condition which is essentially a disease.[6] At the time, nineteen states had passed such legislation.[7]

It is estimated that there are between 45,000 and 100,000 drug addicts in this country.[8] Their geographic distribution is uneven. They are located largely in a few metropolitan centers which are ports of entry for the drugs and at the same time concentration points for economically deprived, minority-group populations. In 1962, the Federal Bureau of Narcotics reported that known addicts in the United States resided as follows: 46.4% in New York State (mainly in New York City); 15.6% in California (mainly in the Los Angeles–San Diego area); 14.8% in Illinois (nearly all in

[2] See Felix, *An Appraisal of the Personality Types of the Addict*, 100 Am.J. Psych. 462, 463 (1944); Rayport, *Experience in the Management of Patients Medically Addicted to Narcotics*, 156 J.A.M.A. 684 (1954). For the classic study in the field, see Kolb, *Types and Characteristics of Drug Addicts*, 9 Mental Hygiene 300 (1925). For a personal account of the effects of medical addiction in a well-known radio personality, see Stern (with Fraley), *Taste of Ashes* (1959).

[3] For example, Mass. Ann. Laws ch. 94, § 211 (Supp. 1963) makes illegal the possession by a private person of a hypodermic syringe, hypodermic needle, or any instrument adapted for the administration of narcotic drugs by subcutaneous injection except under written prescription from a physician. The prescription can be issued for a year's period, and may be renewed for one additional year.

[4] Mental Health Monograph 2, Public Health Service Publication No. 1021, *Narcotic Drug Addiction* at 7 (1963).

[5] Fictional accounts of this "addict society" have become best sellers, see Algren, *Man With the Golden Arm* (1949); Burroughs, *Naked Lunch* (1959); Lee, *Junkie* (1953). See also De Quincy, *Confessions of an English Opium-Eater* (1821).

[6] Robinson v. California, 370 U.S. 660 (1962).

[7] For a summary of the state laws, see Eldridge, *Narcotics and the Law* at 149–193 (1962).

[8] *The President's Advisory Commission on Narcotic and Drug Abuse* at 4 (Final Report 1963).

Chicago); 3.8% in Michigan (nearly all in Detroit); and 19.4% in all other states.[9]

Much of the difficulty in this area of the law in past years has been in the confusion of legislative and regulatory measures for the control of *trafficking* in drugs with measures against the resultant *addiction* to the drugs. The Federal Narcotics Bureau has done an effective job in the first area. This has been its primary concern since the establishment of the agency in 1930. It is only in very recent years that renewed attention has been given to the second area, the proper handling of the persons addicted to drugs, no matter how they got that way.

The New Approach in California and New York

As noted earlier, California and New York experience the great bulk of the problem in narcotics in this country, both in numbers of addicts and in trafficking. It was after much frustration with the methods *solely* of severe criminal enforcement that these two states recently enacted comprehensive new legislation intended to provide treatment and rehabilitation for drug addicts *even where they are charged with crime.* The California legislation was the first, enacted in June, 1961.[10] The New York law, called the Metcalf-Volker Act,[11] followed quickly in March, 1962.

The basic purpose behind both laws is to provide for a special method of hospital commitment under security for drug addicts with an after-care, out-patient, rehabilitation program included as an essential part of the total system. In addition to entering the hospital voluntarily, addicts can be committed from the criminal courts. In California, such commitments are authorized only after conviction.[12] In New York, commitments are provided after charges are brought, but before any trial on the merits.[13] In both states, successful completion of the program of rehabilitation can be a substitute for a criminal sentence.

Public health authorities and the medical profession supported the legislative efforts in California and New York. These groups have traditionally fought against harsh criminal penalties as the only answer to the addiction problem. In the past, however, they

[9] U.S. Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1962,* at 18.
[10] Cal. Pen. Code §§ 6400–6555.
[11] N.Y. Mental Hygiene Law §§ 200–216.
[12] Cal. Pen. Code. §§ 6450, 6451.
[13] N.Y. Mental Hygiene Law §§ 211, 212.

have consistently lost in battles with the law-enforcement agencies to reduce penalties and allow distribution of narcotic drugs on a sustaining basis to confirmed addicts.[14] The argument against the medical groups has depended heavily on the lack of adequate treatment methods for "curing" addiction. On this premise, the law enforcement agencies have asserted that stopping the illegal traffic in drugs is the best means of preventing addiction. This, they point out, is in the best traditions of "preventive medicine." Until recent years, the medical groups have been forced to admit the deficiencies in treatment methods.[15] Most often cited has been the dismal experience with persons discharged from the federal addiction hospitals at Lexington, Kentucky, and Fort Worth, Texas. A study of persons discharged to New York City indicated that more than 90% became re-addicted within six months of discharge.[16] None of the patients released from these institutions received out-patient care, or help, or counsel of any kind after discharge.

A significant change in attitudes, however, has resulted from efforts to institute after-care programs to help drug addict patients after discharge. These programs have had some success. The most well known to date has been a follow-up casework program for parolees in New York City. It involved personal and family counselling and assistance with employment placement and schooling. In a group of 344 parolees under the age of thirty-four with no prior criminal records before a conviction on a narcotics charge, 45% had not returned to drugs three years after being paroled.[17] With this still meager evidence, the public health and medical forces enthusiastically placed their support behind a locally-based hospital commitment plan with a built-in required -

[14] This position has been taken and maintained by the Federal Narcotics Bureau in spite of a Supreme Court opinion which could be interpreted to the contrary. See Linder v. United States, 268 U.S. 5 (1924). This case held that federal legislation cannot control the legitimate practice of medicine which is a matter for the individual states. For an argument that this case should be interpreted to restrain the Narcotics Bureau in its activities against physicians, see King, *The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick*, 62 Yale L.J. 736 (1953).

[15] See particularly the conclusions reached by the American Medical Association's Council on Mental Health, *Report on Drug Addiction*, 165 J.A.M.A. at 1707–13, 1834–41, 1968–74 (1957).

[16] Hunt & Odoroff, *Follow-up Study of Narcotics Drug Addicts After Hospitalization*, 77 Public Health Rep. 41 (1962).

[17] New York Division of Parole, *An Experiment in Supervision of Paroled Offenders Addicted to Narcotics* (1962) (available solely from the Division of Parole).

period of follow-up care and counselling in the community.[18] On the political level, however, hard fighting remained. In California, the subject became an important issue in the gubernatorial campaign of 1962. The New York legislation also received extensive attention and newspaper publicity. In both states there were many controversies over what types of addicts with what types of criminal records would be eligible for the programs. There were also battles over what public agencies would administer the program. Eventually, the bills were passed and signed by the governors.

The remainder of this paper is a study of how Massachusetts with a much less serious problem of drug addiction became the third state to adopt such far-reaching legislation. A comparison of the actual provisions of the law of all three states will also be offered.

Background on Massachusetts

A. *The Previous Law.*

Massachusetts has a full complement of narcotic drug control laws, many with severe penalties for their violation.[19] The program is administered by the Drug Control Section of the Bureau of Food and Drugs in the Department of Public Health.

In addition to the criminal penalties, there has been a method of "civil commitment" for drug addicts in the laws of the commonwealth dating back to 1885. This is section 62 of chapter 123 of the General Laws, the chapter concerned with mental hospital commitments. It applies to alcoholics as well as to persons addicted to "narcotics, habit forming sedatives or stimulants" and requires commitment for a two-year period with no after-care or parole. Commitment may be directed by the court to the state correctional institution at Bridgewater for males, to the state correctional institution at Framingham for females, to any state mental hospital designated by the commissioner of mental health, to the McLean Hospital, or to any other private, state-licensed mental hospital. It is not clear in the statutes who may initiate the court petition for commitment under section 62. The extremely confusing system of cross-references in chapter 123, which is used for section 62

[18] New York Academy of Medicine, *Report on Drug Addiction–II*, 39 Bulletin of the N.Y. Acad. Med., 2nd Ser., 417 (1963).

[19] Mass. Ann. Laws ch. 94, §§ 197–217E (Supp. 1963); see summary of the laws in Eldridge, *Narcotics and the Law* at 165–166 (1962).

commitments as well as for most others,[20] makes interpretation very difficult. It is clear, however, that no commitment may be made under section 62 without the certification of two physicians that in their opinion the person being committed is a drug addict within the meaning of the statute.[21]

There is also a procedure for temporary observational hospitalization of a drug addict under Massachusetts law.[22] This provision is much clearer than section 62 in regard to the persons who may initiate the proceedings.[23] It is a liberal provision allowing hospitalization without medical certification at the discretion of the superintendent of the institution.

Lastly, drug addicts may be admitted as voluntary patients to any institution to which commitments may be made under section 62 of chapter 123.[24] Voluntary patients must be allowed to leave the institution at any time they desire unless the superintendent makes application for indefinite commitment under section 62.

B. *The Problems of Addiction in Massachusetts.*

The number of addicts and the narcotics-law violations in Massachusetts are small in comparison to those in California and New York. According to the Bureau of Narcotics, there were 363 known addicts in the state in 1961 of which 48 were newly reported in that year.[25] Estimates of actual numbers of addicts ranged from about 800 up to as many as 5000, however, according to state officials responsible for the control of narcotics traffic.[26]

[20] For example, see section 68 of the same chapter, chapter 123, which reads as follows: "The provisions relative to the commitment of insane persons to an institution for the mentally ill shall, unless it is otherwise expressly provided in this chapter, apply to and govern commitments under sections sixty-two to sixty-five, inclusive, or any of them, except that when an allegation of mental condition is required it shall be specifically alleged that a person who is committed under said sections is an alcoholic or is so addicted to the intemperate use of narcotics or stimulants as to have lost the power of self-control."

[21] In addition to section 62, see sections 50, 51, and 53 of chapter 123 which are the general provisions on medical and psychiatric certification.

[22] Mass. Gen. Laws Ann ch. 123, § 80 (Supp. 1963).

[23] Admission may be requested by "any person, or, on his behalf, by any physician, by a member of the board of health or a police officer of a town, by an agent of the institutions department of Boston, by a member of the state police, or by the wife, husband or guardian of such person, or, in the case of an unmarried person having no guardian, by his next of kin."

[24] Mass. Gen. Laws Ann. ch. 123, § 86 (Supp. 1963).

[25] U.S. Bureau of Narcotics, *Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1961,* at 60.

[26] Mass. Dept. of Public Health, *A Tentative Plan for the Establishment of a Demonstration Program for the Treatment of Persons Addicted to the Use of*

In 1960, the last year for which statistics were available, when the legislation discussed herein was before the legislature, 272 arrests were made for state narcotics-law violations.[27]

It was important also to determine the numbers of drug addicts in the institutions of the state. A survey conducted by the Department of Public Health in December, 1962, and January, 1963, reported that there were approximately 125 persons per year who were under care as addicts under the commitment laws at the state correctional institutions and mental hospitals.[28] Some 80 to 100 prisoners at the state correctional institution at Walpole (a high-security prison) were known to be drug addicts.[29] There were some 25 to 50 addicts at any one time at the Deer Island House of Correction, Suffolk County.[30] Also, there were 33 patients from Massachusetts under hospitalization at the federal narcotic addiction hospital at Lexington, Kentucky, during 1961.[31]

The survey indicated that care in all the institutions was limited to the handling of withdrawal symptoms. In 1963, there were no after-care programs and no research was being conducted concerning drug addiction. At Walpole Prison, addicts could take advantage of a voluntary psychotherapy program made available to all prisoners. It was indicated that a small number of addicts were in group therapy at Walpole in 1963.

The above statistics provide a summary of the drug-addict "population" in Massachusetts up to 1963. These figures are approximations and an attempt has been made here to "reconcile" them with each other. The actual figures are a hopeless confusion from multiple sources. Much of the trouble seemed to lie in the fact that no one agency had the responsibility for gathering general statistics on the subject and there was very little coordination of information among the many agencies active in the field.

The Legislative Program

A. *Early Bills on the Subject.*

From 1958 to 1963, various bills were submitted to the Massachusetts legislature proposing plans for new treatment programs

Narcotic Drugs in the Commonwealth of Massachusetts 1 (Jan. 28, 1963). (In multilith, unpublished.)

[27] Mass. Dept. of Correction, *Statistical Reports of the Commissioner of Correction for the Year Ended December 31, 1960,* Table 53 (1962).

[28] *Op. cit. supra* note 26.

[29] *Ibid.* [30] *Ibid.* [31] *Ibid.*

for drug addicts. The first, in 1958, proposed establishing a special program in the Lemuel Shattuck Hospital which is operated by the Department of Public Health.[32] The legislature did not pass the bill but directed the department to make a study of the subject and to report its recommendations to the legislature.[33] In 1960, the Department of Public Health submitted its report and suggested legislation.[34] The department proposed establishing a small demonstration treatment program at another of its institutions at Tewksbury. The out-patient portion of the program would be handled by its Division of Alcoholism which would be changed to a Division of Alcoholism and Drug Addiction. The bill passed the House of Representatives but failed in the Senate. Another bill[35] with less detailed provisions was defeated in 1961. In 1962, an almost identical bill[36] was submitted. This time, however, it received greater public attention. At the public hearing on the bill, some compelling testimony was given by the parents of youthful addicts. The bill passed in the House, but it again was defeated in the Senate. Much of the reason for defeat was attributed to the Senate Counsel's opinion given at second reading that the bill conflicted with provisions of section 62 of chapter 123 of the General Laws, described earlier. At this point, the bill was sent for further study to a special legislative commission which had been set up to investigate the administration of the Department of Mental Health.[37] This commission studied the subject in the very short recess of 1962 and reported in 1963 that the subject should be studied further before being enacted, particularly in regard to interdepartmental responsibilities.[38]

In 1963, the Department of Public Health re-submitted the bill which it had been sponsoring for three years.[39] It was only slightly revised in an attempt to avoid conflict with section 62. It provided that an addict who "has become so addicted to intemperate use of drugs that he has lost the power of self-control" would *not* be covered by the bill. These addicts would be left to section 62 and the Department of Mental Health. The limitation did not make sense to anyone who knew anything about narcotics addic-

[32] House No. 1430 (1958).
[33] Resolves of 1958, ch. 145. The order to study was continued in the next year.
[34] House No. 3315 (1960).
[35] House No. 2460 (1961).
[36] House No. 1143 (1962).
[37] Resolves of 1962, ch. 130.
[38] Senate No. 645 (1963).
[39] House No. 73 (1963).

tion. It would have made the program under the Department of Public Health meaningless. This attempted "redrafting" only served to point up the fact that this bill, which was not professionally drafted and had failed for three consecutive years to pass technical inspection by the Senate Counsel, would not stand up this year either. Something needed to be done if Massachusetts was to get a new program for drug addiction. The legislative committee which had heard these bills indicated it wanted the departments concerned to come up with something worthwhile.

B. *Preparing the New Bill.*

The Department of Public Health took the initiative and organized a meeting with the members of the Joint Legislative Committee on Public Health and the commissioners of the three departments most concerned with the problem of drug addiction; *i.e.*, the Department of Correction, which had prisoner-addicts and civilly committed addicts at Bridgewater and Framingham; the Department of Mental Health which had a number of addicts in its institutions; and the Department of Public Health. As a result of this meeting, it was decided that perhaps a new administrative technique was needed. It was suggested that a separate "board, or commission" composed of all three commissioners might best carry out the program. This suggestion broke the log-jam. The Commissioner of Public Health was asked to act as chairman, provide professional aid to the group, devise a program, and draft legislation. The author of this article, who had been legal counsel for the Special Commission to which an earlier drug addiction bill was assigned for study,[40] was retained to draft the new legislation.

There was a very short deadline on the preparation of this new bill which was to be submitted in substitution for House Number 73. The redraft, a completely new bill, was submitted in time, but the legislative committee decided that the new proposal was too radical a departure from the earlier bill to come under the substitution rule. It was now too late to submit new bills to the 1963 session. It was decided, therefore, to ask Governor Endicott Peabody to submit the bill under a Special Message to the Legislature which can bring a bill before the General Court at any time. The Governor agreed to review the bill and after a very thorough

[40] Senate No. 645 (1963), *The Special Commission to Investigate and Study the Administration of the Department of Mental Health and Certain Laws Relative Thereto.*

examination in his office, particularly in regard to the civil rights of addicts subject to civil commitment, the Governor approved and submitted the bill to the legislature essentially as it was drafted for the three commissioners.[41] This bill passed through both houses of the legislature and was signed into law by the Governor on December 19, 1963.[42]

Provisions of the Law

A. *The New Board.*

In Massachusetts, the program is placed under a newly created Drug Addiction Rehabilitation Board composed of the Commissioners of Public Health, Mental Health, and Correction. The Commissioner of Public Health is designated as chairman. As noted earlier, this device broke through the fixed positions of the separate departments and enabled them to cooperate in setting up the new program.

In California the program is placed under the Department of Correction which might give the treatment and rehabilitation program the appearance of a continued punitive approach. In New York the program is under the Department of Mental Health which could imply another stigma, that of "insanity."

The new Massachusetts board was placed in the Department of Public Health for housekeeping purposes, but it is specifically "in no manner subject to its control." [43] This is a common drafting technique in Massachusetts. The state constitution limits the state government to twenty "departments." New agencies are thus often placed under a department, but not subject to its control. For a small agency this has the advantage of making available administrative assistance in personnel, budgeting, and purchasing which would otherwise be much heavier overhead items if the agency had to operate alone.

The board is given authority to establish a program of treatment and rehabilitation for drug addicts and to coordinate the services and activities of other departments and agencies of the commonwealth in this area. It is also authorized to appoint an

[41] The bill received a number: House No. 3646 (1963). After going through the Senate Committee on Ways and Means where it was amended it received a new number: Senate 1027. It was in this manner that it passed both houses.

[42] Mass. Acts of 1963, ch. 763.

[43] Mass. Acts of 1963, ch. 763, § 1. Placed in the General Laws as chapter 17, § 12.

administrator for the program "who shall serve at the pleasure of the board." [44] This language keeps the appointment from coming under the commonwealth's civil service system. It was felt that a more qualified person could be obtained in this way, since Massachusetts civil service laws do not allow the setting of specific educational requirements for positions. The administrator is directed to act as executive for the board, and, under the supervision of the board, "to plan, stimulate, support, and develop educational and research programs on the causes of drug addiction, and on its prevention, control and diagnosis." [45]

The statute also provides the salary for the administrator at $14,000 per year. This was a calculated risk for the draftsman and the commissioners. It was felt that the salary should be high enough to attract a qualified person. If it were left to the legislature and the state administration to set the salary, it was thought that the salary would not be set very high. However, if a figure were put in the bill, the legislature could reduce it. After enactment, the administrator would have to go back to the legislature itself to get any raises, a notoriously difficult situation for any administrator. The chance was taken. The salary, a high one by Massachusetts standards, was written in to get the program off to a good start. The figure of $14,000 per year was left untouched by the legislature.

B. *Placement in the General Laws.*

The next question to be decided was where in the General Laws to place the new program. Earlier bills had proposed that the new provisions be added in chapter 94, which is concerned with food and drug laws, *i.e.*, regulatory programs. The civil commitment statutes for mental health and correction are in chapter 123. The Department of Mental Health generally considers the latter chapter its domain. It seemed to the draftsman that neither of these chapters was advisable for the new interdepartmental program. It was decided to place the new law in an entirely new chapter after the general chapter on the Department of Public Health, chapter 111, and just before chapter 112, the chapter concerned with professional and occupational licensing of persons such as physicians, nurses, dentists, and laboratory technicians. The chapter is listed as chapter 111A and is entitled *Drug Addiction Rehabilitation.*

[44] Mass. Gen. Laws Ann. ch. 17, § 12 (Supp. 1963).
[45] *Ibid.*

C. *The Rehabilitation Center.*

It was determined that the program would be modeled on the California and New York systems, but adapted to the much smaller number of addicts which could be expected to be serviced in Massachusetts. There are excellent clinical medical facilities in the Boston area and well-qualified professional staffs. Flexibility was therefore written into the law[46] to allow the board and administrator to locate the treatment center, a unit which probably would not exceed twenty-five beds, in either a public facility or a private hospital, as long as proper security could be provided to prevent escape of patients and the smuggling in of contraband.

D. *Who is a "Drug Addict"?*

The Massachusetts legislation takes greater pains than the California and New York laws in defining "drug addict" for the purposes of the treatment and rehabilitation program. The Massachusetts law provides that a drug addict is "a person who is so dependent upon narcotic drugs that he loses his powers of self control and is thereby a danger to himself and to the public." [47] This language clearly allows use of the police powers for involuntary commitment.[48] New York defines "drug addict" as a person "dependent upon" [49] narcotic drugs with no further qualification. The New York definition excludes persons who receive narcotics by lawful prescriptions from physicians. It also excludes persons who may be addicted to barbiturates, cannabis, or cocaine. California defines "narcotic addict" as any person "who is addicted to the unlawful use of any narcotic. . ." [50] It would seem that both New York and California may be attempting to exempt the "medically addicted," as defined earlier in this article, from coverage in this program. This distinction is difficult to make in practice. Addiction is physiological and psychological. These states seem to be attempting to make a distinction between "good" and "bad" addicts. In Massachusetts no such distinction is made. Any addict will be covered, no matter how he got his habit or how he sustained it.

[46] Mass. Gen. Laws Ann. ch. 111A, § 2 (Supp. 1963).
[47] Mass. Gen. Laws Ann. ch. 111A, § 1 (Supp. 1963).
[48] See Simon v. Craft, 182 U.S. 427 (1901); Robinson v. California, 370 U.S. 660 (1962); Look v. Dean, 108 Mass. 116 (1871); Curran, *Hospitalization of the Mentally Ill,* 3 N.C.L. Rev. 274 (1952); Ross, *Commitment of the Mentally Ill: Problems of Law and Policy,* 57 Mich. L. Rev. 945 (1959).
[49] N.Y. Mental Hygiene Law § 209.
[50] Cal. Pen. Code § 6407.

California allows commitment of persons "who by reason of repeated use of narcotics are in imminent danger of becoming addicted." [51] This provision broadens the potential coverage of the law considerably. It makes it an easier task for a physician to certify that a person he has examined is eligible for commitment and can "get off" on his criminal charges. If the physician finds some evidence of drug use, or is told by the person he is a "user," but the physician isn't entirely convinced the person is an addict, the physician may find it difficult *not* to certify the person as in "imminent danger" of becoming one. In Massachusetts, this broad coverage was specifically rejected in the drafting stages. It was intended to keep the Massachusetts program small and selective in the early years. There were also some doubts about the constitutionality of involuntarily committing a person who is only "in imminent danger" of becoming an addict.[52]

E. *Commitment from the Criminal Courts.*

As a matter of law, the most radical departure in the programs of all three states is the substitution of treatment and rehabilitation for a criminal sentence. It was this section of the Massachusetts law which was the most controversial.

In the drafting stages, the New York method was chosen over the California, *i.e.*, certain classes of addicts could be committed to the rehabilitation program before actual trial on the merits. If the addict completed the rehabilitation program successfully, the entire proceeding could be dismissed and no criminal record would be made against the defendant.

At a public hearing on the bill, however, this section was opposed by the Federal Narcotics Bureau's regional office and by some local law-enforcement agencies. The Narcotics Bureau official indicated that he favored the California system of not allowing commitment until *after* conviction. He asserted that to allow commitment before trial would hamstring the law-enforcement agencies who had conducted the criminal investigation and had prepared the case for prosecution. Evidence would have to be impounded and witnesses kept available for long periods of time. It is noteworthy that the Bureau official had just two months

[51] Cal. Pen. Code §§ 6399, 6450, 6451.

[52] In an earlier drafting assignment by the author in Massachusetts, a similar position was taken in regard to the compulsory commitment of recalcitrant tuberculosis patients. Language which would have authorized commitment of "suspected cases of tuberculosis" was rejected. Only proved, active cases of tuberculosis are covered in the law. See Mass. Gen. Laws Ann. ch. 111, § 94C (1958).

before been transferred to the Boston office from California and was accustomed to the system in that state. We had very little information about the New York procedures which had been in effect only a short time when the hearing on the Massachusetts bill was held.

As a result of this opposition, the legislative committee requested of the sponsors of the bill that an effort be made to accommodate these objections. A compromise was agreed upon by which the before-trial commitments would be kept for first offenders (with no criminal record of any kind) but all other commitments to treatment and rehabilitation would take place only after conviction on the charges.[53] This seemed a good accommodation. It is first offenders who are most apt to receive leniency from the courts and they are probably also the best risks for the rehabilitation program.

The second matter of controversy in this procedure concerns the method of determining the circumstances under which the completion of the treatment and rehabilitation program will substitute for the criminal penalty.

Commitment in California is for a period of up to ten years. If an addict has been free of drug use for three consecutive years while on out-patient status, and has otherwise complied with the conditions of his release, he may be certified by the Director of Corrections to a newly-created Narcotic Addict Evaluation Board. This board of three members is appointed by the governor and would seem to function like a parole board. If the evaluation board "concurs in the opinion of the Director," [54] it *may* recommend to the court the discharge of the person from the rehabilitation program. The court *may* then dismiss the original criminal charges. If the charges are not dismissed and the person is convicted, the time served in the rehabilitation program must be credited on the sentence.

In New York, where the commitment cannot exceed three years, no discretion is left with the judge. Dismissal of the criminal charges is required after the rehabilitation is completed. If the offense charged was a misdemeanor, it is automatically dismissed after the person is under commitment for one year. For felonies, the charges are dismissed automatically after the person has been under treatment and rehabilitation for the entire three years.[55]

[53] Mass. Gen. Laws Ann. ch. 111A, § 6 (Supp. 1963).
[54] Cal. Pen. Code § 6520.
[55] N.Y. Mental Hygiene Law § 213, para. 4.

Certification by the Commissioner of Mental Hygiene is required only to the effect that the person "has been subject to inpatient or aftercare supervision throughout that period." [56] The commissioner is *not* required to certify that the person was drug-free for a given period of time as in California. He does not have to certify that the person has been rehabilitated. Yet, the criminal charges are *automatically* dismissed. Only by interpretation from another paragraph of the same section can it be implied that the person did perform well in the program. By this paragraph, the commission can send an addict back to court to stand trial if it is found by the commissioner that the person "cannot be further treated as a medical problem because of his apparent incorrigibility, or nonresponsiveness to medical treatment." [57] If an addict "makes it" through the three years without being sent back to court under this provision, it may be implied that he has completed the program to the satisfaction of the commissioner. It should be noted also that the commissioner is authorized to certify a person to the court for dismissal of the charges *before* the maximum period of three years is completed. He need merely certify that the discharge "is warranted in the judgment of the commissioner by the former addict's condition." [58] Again, on this certification, dismissal of the criminal charges is mandatory upon the court.

In summary, the New York provisions on this very important issue are considerably more liberal than those of California. Dismissal of the criminal charges is mandatory in each situation and the standards for successful completion of the rehabilitation program are loosely stated. California sets a specific standard for "success," *i.e.*, three years of drug-free conduct outside the hospital. It imposes a "board" between the administrator and court. Even with this standard, California provides for the judge to exercise his discretion concerning whether the case is to be dismissed.

The Massachusetts provisions on this subject are less elaborate than either New York or California. No special evaluation board is established as in California. Commitment is for a two-year period which can be extended by the court to three years. At the end of the commitment, the interdepartmental board itself must report the person back to the court and certify "whether the defendant completed the program of rehabilitation and whether he cooperated with the [rehabilitation] center and obeyed the orders

[56] N.Y. Mental Hygiene Law § 213, para. 4.
[57] N.Y. Mental Hygiene Law § 213, para. 5.
[58] N.Y. Mental Hygiene Law § 213, para. 4.

and conditions imposed on him during his commitment." [59] Upon receiving this report, "the court shall thereupon dispose of the criminal charges and, in so doing, may consider the report of the board." [60] The meaning of this last sentence is not entirely clear. It does not specifically give the judge authority to dismiss the proceedings without further trial where there was no finding previously, or to discharge the case without further imposition of sentence where the defendant was previously convicted. This could be an important issue, particularly if the crime for which the defendant was convicted carries a specific minimum sentence. The court could assert that this law does not extend the discretion of the court to allow a discharge of the defendant, even if he has served a full two or three years in the rehabilitation program.

These provisions of the Massachusetts law concerning the action of the judge were written into the bill by the Office of the Senate Counsel on third reading of the bill in the Senate. It will be recalled that it was the Senate Counsel who had stopped and effectively prevented passage of drug addiction rehabilitation bills in two previous years. This time, he passed the bills on through, but suggested this change in language in regard to the action of the judge. The bill had spelled out the action which could be taken by the judge, in his discretion, including dismissal of the case.[61] It was the opinion of counsel that statutes cannot affect the discretion of the judge in sentencing in criminal cases. On that ground, he struck out the provisions in the bill and substituted the language quoted in the previous paragraph. The Massachusetts legislature concurred in his suggested amendment. This was the only substantive change made by the Senate Counsel in the bill which eventually became law.

[59] Mass. Gen. Laws Ann. ch. 111A, § 6 (Supp. 1963).

[60] *Ibid.*

[61] The language struck out was as follows: "At the end of the commitment period, the board shall report to the criminal court on whether the defendant has completed the program to the satisfaction of the board in regard to his clinical progress and in regard to necessary co-operation with the orders and conditions imposed on him during his commitment. If the report indicates that the defendant has not completed the program in the above manner, the criminal charges against him may be reopened or, if the defendant was committed after a finding of guilty, sentence shall be imposed. Should the defendant be found guilty on any of these charges, the period spent and the manner of compliance with orders and conditions imposed at the center may be considered by the judge in imposing sentence. If, however, the report indicates the defendant has completed the program under the commitment, the judge may, in his discretion act as follows: where the defendant was committed without a finding of guilty, the case may be dismissed or otherwise disposed of without further proceedings; where the defendant was committed after a finding

F. *Addicts Excluded Under Criminal Provisions.*

Not all "drug addicts" can take advantage of the rehabilitation program as a substitute for a criminal sentence. Both California and New York limit coverage to certain groups and the Massachusetts legislation adopted this policy. The exclusions in Massachusetts are as follows:[62]

(1) Addicts who have been committed to the program on three previous occasions.

(2) Addicts who have been convicted on two or more occasions of a felony.

(3) Addicts who are then before the court on a charge of a crime allegedly committed while on bail pending trial on a felony. (This exclusion is intended to prevent defendants from avoiding a trial on a felony by getting "shot up with narcotics" while on bail, getting arrested, and pleading they are addicts.)

(4) Addicts who are charged with possession of narcotics where the amount of narcotics alleged in the charges is "so substantially greater than would be necessary to supply the defendant's own narcotic habit that he appears to be primarily involved in illegally trafficking in drugs for profit rather than seeking money solely to help support his own narcotic habit." [63] (Great care was taken in drafting the language of this exclusion. It is a very important provision, particularly for the law-enforcement agencies. It is often said that nearly all confirmed addicts do some "pushing" of drugs. To exclude all addicts who are charged with "possession," or are alleged to have pushed some drugs, would have cut the eligible group severely. Yet, for the commercial traffickers, the out of claiming to be addicts could not be made too easy to assert.)

(5) The court is given the discretion to refuse the rehabilitation program to any addict if in the opinion of the court "it is not in the interest of justice." [64]

These exclusions are basically similar to those in New York. In California, the original legislation excluded addicts who had previously committed serious crimes against the person and per-

of conviction, the case may be filed, placed on probation, or otherwise disposed of." House No. 3646 (1963).

[62] Mass. Gen. Laws Ann. ch. 111A, § 7 (Supp. 1963).

[63] *Ibid.*

[64] *Ibid.*

sons previously convicted of narcotics-law violations where the minimum sentence is "more than five years in state prison." [65] A 1963 amendment allows the judge "in unusual cases wherein the interest of justice would best be served" [66] to allow rehabilitation for addicts in the excluded categories as long as the district attorney and the defendant concur.

From a draftsman's point of view, it is interesting that the phrase "in the interest of justice" is used in these laws to influence the judge's discretion in directly *opposite* ways: in Massachusetts and New York, to further restrict the class of eligible addicts; in California, to remove the restrictions entirely.

G. *Procedure for Determining Addiction.*

Of great importance in actual practice before the courts is the procedure for determining whether or not a defendant is a drug addict and eligible for the treatment and rehabilitation program. The Massachusetts procedure on this issue is similar in many respects to that of New York. In Massachusetts, any defendant under arrest, "who, while in custody, shows symptoms of being a drug addict, or states that he is a drug addict, or any defendant who is charged with a [narcotics-law violation] . . . , and who either requests or does not object to a medical examination to determine if he is a drug addict, shall be given such examination upon order of the court." [67] The examination, not to exceed ten days, is to be conducted by a physician appointed by the court or at a facility of the Department of Mental Health, or at the *rehabilitation center itself* if the director of the center indicates he has accommodations for the defendant. The criminal proceedings are abated during the examination. If the medical report is to the effect that the defendant is a drug addict "and would benefit by treatment" [68] at the rehabilitation center, he is then eligible for commitment in accord with the limitations mentioned earlier.

It is contemplated that most of the examinations will take place at the rehabilitation center. There are few physicians in practice

[65] Cal. Pen. Code § 6452. There may also be a further authority in the judge to limit those defendants eligible for rehabilitation in § 6451 where, in regard to the ordering of proceedings for the determination of whether a defendant is addicted or in imminent danger of becoming addicted, it is asserted that these proceedings are to be held "unless in the opinion of the judge the defendant's record and probation report indicate such a pattern of criminality that he does not constitute a fit subject for commitment under this section."

[66] Calif. Stats. ch. 1704 (1963).

[67] Mass. Gen. Laws Ann. ch. 111A, § 6 (Supp. 1963).

[68] Mass. Gen. Laws Ann. ch. 111A, § 6 (Supp. 1963).

who are experts in identifying drug addicts and even less who can evaluate those who would benefit by treatment. It is far better to have such judgments exercised by those who will have the responsibility for treating the actual patient-defendant. Since the Massachusetts program is to be small and experimental, it seems best that the center choose those patients whom it feels will be the best risks for treatment. Neither New York nor California has written in this feature. The New York law[69] asserts that the examination shall be conducted by "the medical authorities" and shall take place "with all reasonable speed after the transfer of the defendant from police custody into the care of such court, correctional, or other detention official or facility as is customarily charged with care and custody of arrested persons." The language perhaps sounds good to the uninitiated. Actually it is typical "finessing" by a draftsman who either doesn't want to spell out the procedures or doesn't know what they are. Here, the draftsman provided language to authorize transfer of the defendant from the police to a security facility, but he did not provide anything about what medical or psychiatric personnel would do the examination.

In California, the court is authorized to order an examination by "a physician or physicians." [70] Also, by the same section, the court may order "that the person be confined pending hearing in a county hospital or other suitable institution."

It should be noted that Massachusetts and New York provide for examination before trial and as soon as possible after the person is in custody. This is certainly advisable for an addict who is then under the influence of narcotics. His withdrawal symptoms, which may begin to appear shortly after he is incarcerated and without drugs, can be treated and an adequate medical examination can be made. In California, where the medical examination can take place only after conviction, the defendant may well be over the acute stages of his withdrawal under "cold turkey," *i.e.*, without medical attention or medication. At this stage, it is also more difficult for the physicians to determine whether or not the defendant is an addict, or is "in imminent danger of becoming addicted" as provided in the California law.[71]

The California law imposes substantially more procedural requirements on the "proceedings" for determination of addiction than is the case in New York or Massachusetts. If the report of the

[69] N.Y. Mental Hygiene Law § 210.
[70] Cal. Pen. Code § 6502.
[71] Cal. Pen. Code. §§ 6399, 6450, 6451.

physicians appointed by the court is to the effect that the person is addicted or is in imminent danger of becoming addicted, the court must "set a time and place of hearing and cause notice thereof to be served on the person." [72] The hearing can be waived by the defendant only by consent of the defendant "expressed in open court." [73] The defendant is entitled to counsel at such hearing and the court is required to furnish counsel if the defendant is financially unable to pay for it.[74] He can also "demand" a trial by jury.[75]

The New York and Massachusetts laws afford a hearing only if specifically requested by the defendant. Neither state provides counsel or allows jury trial of this issue. New York law provides that, besides the medical report, the court may "consider other relevant information that may be brought to its attention concerning the defendant's alleged addiction." [76] It also asserts that where a hearing is held, the court may act on "the preponderance of the credible evidence." [77]

It is difficult to ascertain why California set up so many procedural safeguards for the defendant to contest his commitment. In most cases it would seem that defendants would prefer a short hospitalization and a period of "out-patient care" to a prison term. However, it should be noted that the original California law provided for a commitment from three-years minimum to seven-years maximum and the maximum has since been increased to ten years.[78] In New York and Massachusetts, the commitment cannot exceed three years.

H. *The Rehabilitation Program.*

Of very great importance to the person committed are the length of the commitment and the conditions which must be met within it. These features are also very important to the medical authorities who are seeking to make these programs successful.

As indicated earlier, the California program, the first in the field, is the most stringent and the most rigid of the three. Commitment is for an indefinite period up to seven years with a three-

[72] Cal. Pen. Code § 6504.
[73] Cal. Pen. Code § 6507.
[74] Cal. Pen. Code § 6505.
[75] Cal. Pen. Code § 6508.
[76] N.Y. Mental Hygiene Law §§ 211, 212.
[77] N.Y. Mental Hygiene Law §§ 211, 212.
[78] Cal. Pen. Code § 6521.

year extension allowed to a maximum of ten years.[79] The first six months must be spent in a hospital; then the Director of Corrections can recommend to the Drug Addict Evaluation Authority that the person be placed on out-patient status. The director can recommend to the authority that a person be discharged from the program if he is drug-free on out-patient status for *at least* three consecutive years and has otherwise complied with the conditions of his release. The Authority, if it concurs, then certifies the person back to court for hearing on discharge of his criminal case.

The New York program allows the judge to commit for any period not exceeding three years.[80] As indicated earlier, the New York law is quite liberal in allowing the Commissioner of Mental Health to certify such persons to the courts for discharge at any time during their commitment. No standards are written into the law, such as a required period of drug-free conduct, in application to the commissioner's certification. No minimum period of in-patient hospitalization is required in the New York law.

In Massachusetts, the court is required to make the initial commitment for a fixed period of two years.[81] This period can be extended to three years upon request to the court by the director of the rehabilitation center. With the shorter commitment period of two years selected in Massachusetts, it was thought advisable by the draftsman not to allow discretion to the judges to vary the length of the commitment periods. It is often difficult for the clinical facility to work with patients who have different lengths of commitment. Also, it hurts the morale of the patients themselves, who, like prison inmates, can be counted upon to compare lengths of time they must serve. Like New York, the Massachusetts law does not require a minimum period of in-patient care. The director of the rehabilitation center is allowed discretion to place a person on out-patient care at any time.[82] (Note that in Massachusetts this is a clinical decision at the center by the director without required review either by an "authority" as in California or by the Commissioner of Mental Health as in New York.) However, the person must serve the entire two years of his commitment on out-patient status, no matter how well he is

[79] Cal. Pen. Code § 6521.

[80] N.Y. Mental Hygiene Law § 213.

[81] Mass. Gen. Laws Ann. ch. 111A, §§ 4, 6 (Supp. 1963).

[82] Also in Massachusetts, the director can place the person on full-time out-patient care, or allow him to be away only at night or only during the day. See Mass. Gen. Laws Ann. ch. 111A, § 4 (Supp. 1963).

progressing. This is in contrast to both California and New York which allow certification for discharge prior to the maximum period. Why is Massachusetts more rigid here? First, the commitment period itself is the shortest of the three states. Secondly, it was felt by the medical authorities in Massachusetts that a full two years of supervision should be provided no matter how well the addict was doing *under supervision.* As soon as he is off supervision, it was feared he might relapse. Since so little is yet known about the efficacy of this type of handling for addicts, it was thought best to provide at least minimum supervision for the entire two years. This decision at the drafting stages also, of course, cuts down on the discretion of the officials in the program. It thus limits the pressure they may be placed under by addicts and their lawyers trying to get them out earlier than the maximum commitment. We should imagine that this kind of pressure could be rather severe in California where the discretion is wide (a minimum of three years and a maximum of ten years) and where the number of committed addicts is substantially greater than in Massachusetts.

It is noteworthy also that all three states authorize the use of tests to indicate whether or not a committed addict on out-patient status is drug-free. At present, this generally means injection into the addict of the drug Nalline which, if the reaction is positive, indicates the person has recently taken narcotics.[83]

The addicts on out-patient status probably could not be forced to submit to the test, but refusal to submit could be grounds for immediately revoking their out-patient status or returning them to court to appear on the pending criminal charges. In Massachusetts, which had no previous legislation or decisions on the subject of Nalline use, greater care was taken with the statutory language than perhaps was needed in California or New York. The Massachusetts legislation authorizes as a "condition of release . . . that the person submit to periodic tests, at the [rehabilitation] center or by persons designated by the director, to determine, by means of a drug anti-narcotic in action or otherwise, whether or not the person is free of the use of narcotic drugs." [84]

There are still some doubts expressed by medical authorities in

[83] On the use of Nalline, see Wikler, Fraser, and Isbell, *N-allylnormorphine: Effects of single doses and precipitation of acute "abstinence syndromes" during addiction to morphine, or methadone heroin in man (post-addicts)*, 109 J. Pharmacol. Exp. Ther. 8 (1953).

[84] Mass. Gen. Laws Ann. ch. 111A, § 4 (Supp. 1963).

the field about the advisability of including Nalline testing in a program for rehabilitation of drug addicts. However, for the statutory draftsman, resolving this issue was unnecessary. It was our task merely to place in the statute the authority to use the procedure at the discretion of the clinical officials.

I. *Other Procedures.*

In an effort to make the program as flexible as possible, the Massachusetts law makes the rehabilitation center available not only for commitments from the criminal courts, but for probation and parole cases as well.[85] There are provisions also for involuntary civil commitment.[86] The New York and California laws are similar. Only New York has a provision for *voluntary* civil commitment under the new law.[87] It was the opinion of the medical authorities in Massachusetts that voluntary programs, which can be abandoned at any time by the person, just will not work in the rehabilitation of drug addicts. If an addict wished to enter the Massachusetts program, we would suggest he go through the civil commitment procedure under certification by his physicians or the local health department. He would then be required to remain in the program for the full two years.

We have particularly high hopes for the success of probation and parole programs in Massachusetts because of the already-existing services in these areas of the Division of Legal Medicine of the Massachusetts Department of Mental Health. This division's Psychiatric Court Clinic Program operates closely with probation departments in thirteen courts throughout the state. It also offers psychiatric services to the Parole Board of the state. The rehabilitation center for drug addicts should be able to work out a worthwhile program of collaboration with this division.

J. *Administrative Operation of the Program.*

The last feature of these new laws that I have selected for comment may be a bit surprising. It is the uncommon methods used in the acts of all of the states to put the programs in operation. Substantial power is placed in the administrative agencies to determine when the programs will function and to select those situations where they will be utilized. In Massachusetts, the entire system of commitments is held in abeyance "until such time as a re-

[85] Probation: Mass. Gen. Laws Ann. ch. 111A, § 8; parole: § 9 (Supp. 1963).
[86] Mass. Gen. Laws Ann. ch. 111A, § 4 (Supp. 1963).
[87] N.Y. Mental Hygiene Law § 205.

habilitation center is established and in operation to the satisfaction of the [new interdepartmental] board." [88] For individual cases, all three states require that the courts obtain certification from the administrators of the treatment programs that facilities are available for the person. (Note that the law leaves this determination in the hands of the administrator. It is not the court which determines availability.) This is an unusual procedure in commitment laws. In the mental health commitment laws of the various states, involuntary commitments to the state hospitals are ordered by the courts without regard to the availability of facilities.[89] This is one of the reasons for the great overcrowding of these institutions. Apparently, the administrators of these drug-addiction programs are to be given more control over their patient populations. Since these programs are still in the experimental stages, this seems to me one of the wisest decisions made by the draftsmen and legislators in bringing these programs into law.

SOME COMMENTS ON DRAFTING SKILLS

Statutory drafting is a skill. Llewelyn has said that we should be imparting more training in "legal skills" in the law schools and less current information about the law.[90] Perhaps this is so. But if more formal training were to be given in the law schools or afterwards in statutory drafting, we would be required to analyze what would be the components of knowledge, experience, and skill for the particular drafting tasks for which lawyers are consulted or retained. These drug addiction acts might be taken as an example. What are the skills, knowledge, and experience which were important for the draftsman here? I would list them as follows:

1. General statutory drafting experience, particularly with quite large pieces of legislation.
2. A knowledge of the state's commitment and hospitalization laws.
3. A knowledge of the state's criminal law (particularly sentencing procedures) and of its penal system.
4. Experience in working with other professional disciplines.

If the earlier parts of this article are reviewed, the applicability of the above components will be revealed. As to the first requirement, it should be clear that these acts are quite long, with a number of interlocking, interdependent sections. Architecture as

[88] Mass. Gen. Laws Ann. ch. 111A, § 2 (Supp. 1963).
[89] See Lindman and McIntyre, *The Mentally Disabled and the Law* at 17 (1961).
[90] Llewelyn, *The Bramble Bush* at 92 (1951).

well as English composition is involved in preparing such comprehensive legislation. It may be very difficult for the draftsman who is comfortable only with short, remedial-style legislative drafting. There are necessary skills in avoiding too many confusing cross-references in drafting such long, comprehensive acts. The California law suffers some criticism on this ground. Cross-references are used very frequently. There are too many very short sections which seem to hang outside the procedures to which they apply. They should have been written directly into the appropriate sections which described the commitment procedures themselves. Also, the California draftsman used cross-references to the regular mental health commitment laws rather than spelling out his own procedures in the new drug-addiction commitments. This is a confusing method and requires administrators and lawyers to make guesses about what procedures in the mental health laws actually apply, since the statute requires only "substantial compliance" with these procedures. The New York law is quite superior in this regard. Entirely new commitment procedures are established without cross-references. The Massachusetts law is similar to the New York format.

The second and third requirements above should be rather obvious. This new act combines features of commitment and criminal procedure. Not many lawyers have experience with the commitment laws. They are infrequently encountered in the everyday practice of law. More lawyers will have had criminal law experience, but it should be noted that knowledge of penal systems is also necessary here, since rehabilitation is the objective of these programs. The draftsman can acquire the knowledge he lacks in these areas and he can seek consultation in the actual drafting stages. In preparing the Massachusetts legislation, I was more familiar with the commitment procedures than with criminal procedures. I sought consultation on the latter, particularly from Commissioner of Correction George F. McGrath, a former professor of criminal law.

A distinction between these two areas of legislation, commitment and criminal law, should perhaps be noted at this point. The civil commitment laws and the statutes establishing the rehabilitation and treatment programs are addressed mainly to administrative agencies. They are rarely involved in litigation. The criminal procedures and criminal-court commitments under these laws are addressed more to the courts and will involve considerable judicial interpretation. There are different drafting tech-

niques for each of these areas. In the court-related subjects, many procedures need not be spelled out but can be left to judicial application. The technical language of legal procedures is used. In those statutes addressed to administrative agencies, however, more requirements must be included in the statutes. Yet, administrative discretion must be allowed in program development. This is perhaps more the subject of another article, but it bears mention at this point.

Lastly, in a drafting task such as that described in this paper, the lawyer must be able to work effectively and sympathetically with a variety of other professional people. The lawyer's role is that of an advisor. It is these professionals who will have the responsibility for carrying out the program. Therefore, the lawyer should allow them to design its major characteristics. He can be most helpful to them in pointing out the alternatives of legal action which can be utilized to carry out their objectives. He can also serve as a kind of political advisor in regard to what the legislature can be expected to accept from the professionals and enact into law. Care should be taken in this role, however, not to be too conservative and pessimistic. The professionals should be allowed to try new proposals, even if they sound legally somewhat radical to the usually more traditional lawyer. Lastly, the lawyer should not allow all details of the recommendations of the professionals to be "locked" into the statutes with no leeway and opportunity for adjustment and change. The suggestion that administrative rules and regulations can be used for more particular application of the program usually satisfies them that the draftsman is still on their side!

In conclusion, this paper has been designed to provide some background, some history, and some analysis of new legislation which has established a radical departure in handling one of the most disturbing human problems of our time, drug addiction. The legislation involved fresh examination of the purposes of both compulsory commitment and criminal penalties. For the draftsman in Massachusetts, at least, it was an interesting and rewarding opportunity to apply a lawyer's skills.

Territorially Limited Statutes and the Choice-of-law Process

ALAN S. DANSON*

Mr. Danson considers whether statutes should be drafted in universal form, relying on the courts to limit territorial application, or whether such restrictions should be expressly enacted. Judicial delimitation, in view of the growing movement in conflict-of-laws for courts to abandon mechanical rules and to weigh contacts between a transaction and related jurisdictions, can be the more flexible. In areas where greater certainty is needed, legislation, especially that which states alternative bases for statutory application, may be more appropriate.

ALTHOUGH it has long been conceded that the much maligned island of Tobago cannot pass a law to bind the rights of the whole world, still legislatures persist in drafting most of their statutes in universal form with no indicated territorial limitations. The problems faced by a court which must decide whether such a universal statute applies to a transaction involving foreign elements are basic conflict-of-laws problems, and virtually every commentator in the conflicts field has seen fit to discuss some aspect of this process of judicial delimitation of the territorial reach of laws.[1] By contrast, little seems to be known, and even less written, about the undisputed power of the legislature to indicate the intended scope of a particular piece of legislation in the text of the legislation itself. This paper will explore the implications of this legislative power from the viewpoint of a legislative draftsman asked by his state legislature to report on the desirability and means of exercising the power in a particular situation.

The basic decision, to legislate territorial limitations or to leave the problem of delimitation to the courts, looks deceptively easy.

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[1] See generally Cavers, *The Conditional Seller's Remedies and The Choice-of-Law Process—Some Notes on "Shanahan,"* 35 N.Y.U.L. Rev. 1126, 1142 (1960); Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227, 254–62 (1958); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 Yale L.J. 1323, 1359 (1960); Ehrenzweig, *Conflict of Laws* 562 (1962); Schreter, *"Quasi-Community Property" in the Conflict of Laws*, 50 Calif. L. Rev. 206, 244 (1962); Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 Calif. L. Rev. 845 (1961).

The courts, it may be argued, are more flexible than the legislature; hence, in areas of the law that are still developing, where flexibility is needed, the job should be left to the courts; and, conversely, where certainty and predictability can be tolerated and are required, the legislature should step in and settle matters. Actually, the problem is far more complex, for even assuming that we decide that flexibility is called for, we cannot decide to leave delimitation to the courts until we are fairly sure how the courts will discharge their duties. The field of conflict-of-laws has changed considerably in the last half century, and the impact of these changes on the process of judicial delimitation must be assessed. Furthermore, assuming that we decide to legislate, we still must decide how we will draft our rules. Form may be significant, and this significance, if any, must be analyzed. Compromise solutions combining legislative certainty and judicial flexibility may be possible, and these too must be considered. Finally, the practical problem of deciding whether a particular area of the law requires territorial codification must be analyzed and some guidelines suggested.

The paper is divided into two parts. The first deals with the judicial background of the problem and attempts to indicate in a general way what the courts are likely to do in this area and how this should affect our decision to legislate or not. The second part deals with the legislative background of the problem and such questions as whether legislation is bound to be restrictive, whether there is any significance in the form of legislation used, and which form should be used. This will be followed by a brief examination of actual legislation in the choice-of-law area where an attempt will be made to apply some of the principles developed in the background examination.

The Judicial Background

Before our legislative draftsman can make an intelligent choice between court and legislature he must know how a court will go about applying universal laws to cases involving foreign elements. Of course, the answer to this question may well depend upon the state in which he is working. While some states, such as California and New York, are in the vanguard of advances in the field of conflict of laws, others still adhere consistently to the "jurisdiction selecting" rules of the Restatement.[2] For purposes of this paper

[2] See Cavers, *Re-Restating the Conflict of Laws: The Chapter on Contracts, XXth Century Comparative and Conflicts Laws* 349 (1961). Wherever reference is made

we will ignore the fifty-state context in which American conflict law appears and will assume instead that the trend in the law, typified by such forward-looking cases as *Auten v. Auten*[3] and *Bernkrant v. Fowler*,[4] soon will be nationwide.[5]

Generally speaking, the present trend in conflict-of-laws today is away from the mechanical "place of making–place of injury" approach and toward an approach characterized by "emphasis rather upon the law of the place 'which has the most significant contacts with the matter in dispute.'" [6] As summed up in the new Restatement currently under consideration: "Each court . . . derives this law [the conflict-of-laws law] from the same sources used for determining all its law: from precedent, from analogy, from legal reason, and from consideration of ethical and social need." [7] Although this general statement of the trend is greatly oversimplified, as the considerable amount of writing on the new methodology will attest, it is adequate for our present purpose, which is to determine the capabilities of the judiciary in conflict cases. At the very least, our legislative draftsman can say, without fear of getting into heated methodological dispute, that the courts today have essentially the same broad powers in conflict cases as they do in other cases and may analyze the state interests and policies involved with respect to the matter in dispute.

This statement of capability takes on more meaning when we compare an old with a new style case. In *Alabama Great Southern R.R. v. Carroll*,[8] for example, the Alabama Supreme Court felt constrained to deny recovery to an employee injured through the negligence of his fellow servants, because Mississippi, the place of injury, did not have an employers' liability act but followed the common law fellow servant rule. Plaintiff in that case argued that the Alabama Employers' Liability Act, which was essentially uni-

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to mechanical rules or "jurisdiction selecting" rules, this indicates the kind of rule that Professor Cavers describes as rules that "make a state the object of the choice without regard to the content of the law that is thereby chosen or its effect on the issue before the forum." Cavers, *op. cit. supra* at 350; see generally Cavers, *A Critique of the Choice of Law Problem*, 47 Harv. L. Rev. 173 (1933).

[3] 308 N.Y. 155, 124 N.E.2d 99 (1954).

[4] 55 Cal. 2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961).

[5] See generally Restatement (Second), Conflict of Laws (currently under revision). The Supreme Court seems to be aware of the new trend in conflict cases. Richards v. United States, 369 U.S. 1, 12–13 (1962).

[6] Auten v. Auten, 308 N.Y. 155, 160, 124 N.E.2d 99, 102 (1954).

[7] Restatement (Second), Conflict of Laws, Introductory Note at 3 (Tent. Draft No. 6, 1960).

[8] 97 Ala. 126, 11 So. 803 (1892).

versal in form, was applicable to the Mississippi injury, but the court rejected this argument and read into the act the requirement that the injury be received in Alabama. The court said:

> The fact which created the right to sue, . . . transpired in the State of Mississippi. . . . [A]nd whether a cause of action arose and existed at all, or not, must in all reason be determined by the law which obtained at the time and place when and where the fact which is relied on to justify a recovery transpired. [The Alabama Employers' Liability Act] had no efficacy beyond the lines of Alabama. It cannot be allowed to operate upon facts occurring in another State, so as to evolve out of them rights and liabilities which do not exist under the law of that state, *which is of course paramount in the premises.* (Emphasis supplied.)[9]

This illustrates judicial delimitation according to the now discredited "vested rights" theory. Mississippi was considered to be "paramount in the premises" solely because it happened to be the place where the injury was sustained and despite the fact that plaintiff and defendant were both Alabama residents, that plaintiff was hired in Alabama and that the negligence which resulted in the injury occurred in Alabama. Being "paramount in the premises," Mississippi law was the point of reference for Alabama, and only if it vested a right in the party injured there could Alabama enforce that right.[10]

In striking contrast to the *Great Southern R.R.* case and illustrative of the new trend in conflict cases is the approach taken by the Minnesota Supreme Court in allowing recovery against a Minnesota tavern operator under the Minnesota Civil Damage Act for injuries sustained in Wisconsin. In *Schmidt v. Driscoll Hotel*[11] the Minnesota statute, which imposed liability on liquor dealers for injuries received after the illegal sale of intoxicating liquor, was universal in form. Wisconsin, the place where the injury occurred, had no civil damage act and would have limited plaintiff to an action against the intoxicated driver of the car in which he was injured. The Minnesota court was thus squarely faced with the task of delimiting the territorial reach of its Civil Damage Act. Defendant argued that section 377 of the Restatement settled the matter along the lines of the *Great Southern R.R.*

[9] *Id.* at 134, 11 So. at 806.

[10] See generally Cavers, *Book Review,* 56 Harv. L. Rev. 1170 (1943); Cook, *The Logical and Legal Bases of the Conflict of Laws* (1942).

[11] 249 Minn. 376, 82 N.W.2d 365 (1957).

case, and that "since the last act in the series of events for which plaintiff instituted his action occurred in Wisconsin, which has no Civil Damage Act . . . , the latter can have no application in determining plaintiff's rights or defendant's liability." [12] In rejecting defendant's contention, the Minnesota court discarded the mechanical jurisprudence of the Restatement in favor of "principles of equity and justice." The court noted that the defendant liquor dealer was a resident of Minnesota, licensed under its laws, and required to operate according to those laws, that the violation of Minnesota law which resulted in the accident occurred in Minnesota, and that the liquor dealer's wrongful conduct was completed in Minnesota. The fortuitous crossing of a state line that happened to intervene prior to the accident lost all significance when viewed in the context of Minnesota's interest in the case, and the court was able to find that its Civil Damage Act afforded a remedy to the plaintiff. "By this construction," concluded the court, "no greater burden is placed upon the defendant than was intended by [our Civil Damage Act]." [13]

For our purposes the significance of the *Schmidt* case may be simply stated. *Schmidt* and cases like it[14] indicate that courts today, faced with the task of defining the reach of a universal statute, will not seek answers in the ready-made rules of the Restatement. Rather they will exercise "an informed judgment [bent upon] balancing . . . all the interests of the states with the most significant contacts in order to best accommodate the equities among the parties to the policies of those states." [15] And this fact is of vital interest to our legislative draftsman. He will not have to say, as he might ten years ago, that if the legislature decides to leave delimitation of the territorial scope of a statute to case-by-case development in the courts, it will be done by reference to mechanical rules. Rather he will be able to say, with some assurance, that when a statute reaches the courts for delimitation, it will get the benefit of an "informed judgment," intent on ascer-

[12] *Id.* at 379, 82 N.W.2d at 367.

[13] *Id.* at 381, 82 N.W.2d at 368. Although the court emphasizes the fact that the injured plaintiff was a citizen of Minnesota, that factor is of questionable significance. For a discussion of the due process issue that might be raised by a decision in favor of a Wisconsin resident, see Currie & Schreter, *supra* note 1, at 1361.

[14] *E.g.*, Bernkrant v. Fowler, 55 Cal.2d 588, 360 P.2d 906, 12 Cal. Rptr. 266 (1961); Lauritzen v. Larsen, 345 U.S. 571 (1952); Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962), Note, 63 Colum. L. Rev. 133 (1963); Babcock v. Jackson, 17 App. Div. 2d 694, 230 N.Y.S.2d 114 (1962) (Halpern, J., Dissenting).

[15] Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 161–62 (1946).

taining and implementing the policies and interests of the state to the greatest extent possible, consonant with reason and justice.

But this is only one-half of the picture, and a poorly focused half at that. We know, or can predict in a very general way, how the judicial mind will work when a universal statute comes before a court in a case involving foreign elements. We know that there will be a weighing of interests rather than the mechanical application of one law or another based upon an often fortuitous contact. Now we must examine the other side of the picture—the legislative side—so that we may compare the two. This first examination will be brief, merely to complete the overall picture. A more detailed examination of the legislative background of our problem will be undertaken in Part II of the paper.

An example drawn from actual legislation will best serve to introduce the legislative half of the picture. Section 155 of the New York Insurance Law, which is by no means unique, provides that no policy of life insurance that is "delivered or issued for delivery" in New York shall contain certain provisions unfavorable to policy holders. This is *not* a universal statute, because the prohibition does not appear on its face to apply to all policies of insurance, but by its terms is limited to those policies that are "delivered or issued for delivery" in New York.

Let us examine how this territorially limited statute works. In *Zogg v. Penn Mutual Life Ins. Co.*,[16] the Second Circuit had before it a conflict case involving section 155. Plaintiff was beneficiary of an insurance policy on the life of a New York resident written by defendant company. The court assumed *arguendo* that the policy, though mailed to the insured in New York, became binding in Massachusetts upon delivery there of a "binding receipt." Under Massachusetts law a provision in the policy limiting death benefits to a return of premiums in the event of the insured's suicide, while sane or insane, within two years of the date of issue was valid. Section 155 of the New York Insurance Law, on the other hand, had been construed to render such a restriction void where the insured committed suicide while insane; this was what had actually happened in the case.

The essential matter in dispute in the *Zogg* case was the extent of the rights of a New York beneficiary under a policy of insurance written on the life of a New York resident by an insurance company licensed to do business in New York. For purposes of

[16] 276 F.2d 861 (2d Cir. 1960).

this matter in dispute, how could it be contended that any law other than the law of New York governed? Defendant argued that because of the "binding receipt" delivered in Massachusetts, that law should govern. However valid this argument may have been had the case involved the effect or validity of the "binding receipt" itself, it plainly was without force in the context of the actual dispute. Judge Clark recognized this and dismissed defendant's contention, although his counting-of-contacts approach leaves something to be desired.[17]

But what about section 155? Because it is not universal in form but specifies precisely when it is to be applied, it is not enough for the court simply to balance the interests involved and to say that New York law should apply. A further question had to be answered: whether an insurance policy on the life of a New York resident that became binding in Massachusetts could still be "delivered or issued for delivery" in New York within the meaning of section 155. Citing *Auten v. Auten* and following the enlightened approach to choice-of-law problems that we previously noted, the court answered this question, finding section 155 applicable on the facts of the case. Although defendant argued that a contract of insurance could not be "delivered or issued for delivery" in New York if it became binding elsewhere, the court rejected this argument, because it would in effect have incorporated the principle of the *lex loci contractus* as the governing law into a statute that was plainly intended to be broader in scope.

The extra step of statutory construction that the court had to take is the significant element of the case for our purposes. The court was forced by the "delivered or issued for delivery" clause in the statute to go beyond its weighing of interests in order to determine the meaning of the choice-of-law clause that was included in the statute. If the choice-of-law clause had not been in the statute to begin with, leaving the statute in universal form, the very determination that New York insurance law should govern, which determination would have been made after an analysis of the state interests and policies involved, would have been equivalent without more to a determination that New York insurance law extended to the facts of the instant case.

[17] The court merely listed the contacts with New York without giving any consideration to the matter in dispute. It should be noted that merely adding up the contacts and using the law of the state which has the preponderance of contacts is just as mechanical an approach as the "place of injury" or "place of contracting" approach. See note 2 *supra*.

As it turned out, the added judicial step forced on the court by the choice-of-law clause in section 155 did not change the final result in the *Zogg* litigation. That is to say, a balancing of the interests involved as well as an examination of the territorial clause, indicated that New York law should apply. This may not always be the case, however, and to further explore the implications of section 155 we might look at two variations on the *Zogg* facts.[18] Suppose, first, that the insured had been a domiciliary of Massachusetts and had given the New York address because he expected to be visiting relatives there. In this situation New York's paramount interest disappears, and Massachusetts, as the domicile of the insured, would seem to have the greater interest in applying its law. But could a New York court, given *Zogg* and its interpretation of section 155, apply Massachusetts law to our first variation? Defendant in *Zogg* suggested that "delivered or issued for delivery" was not a choice-of-law rule and that the "place of making" rule still controlled. The court rejected this argument and in so doing elevated the "delivered or issued for delivery" clause to a choice-of-law rule that would seemingly preclude the New York courts from applying Massachusetts law on the facts of our first variation. According to *Zogg*, section 155 directs that if an insurance contract is "delivered or issued for delivery" in New York, New York law governs, and it makes no difference that the contract may have become binding elsewhere.

If by contrast section 155 were universal in form and did not contain the "delivered or issued for delivery" clause, it is likely that a more flexible judicial choice-of-law rule could have been worked out. As the court noted in the *Zogg* case, the primary purpose of the New York Insurance Law was to protect residents of the state. Regulation of an out-of-state risk insured by a company subject to the insurance regulations of another state would be of little interest to New York. Furthermore, in our variation on *Zogg* the defendant insurance company does business in Massachusetts as well as New York and is given a degree of protection under Massachusetts law that it may reasonably claim in the New York suit. On these facts it is submitted that New York would not be denying the plaintiff equal protection of the laws if it decided to limit the protection of section 155 to New York residents, and a judicial choice-of-law rule that utilized such a limita-

[18] I have borrowed these variations from Professor Caver's classroom discussion at the Harvard Law School.

tion would probably be valid.[19] As a further example of the functioning of a legislative choice-of-law rule, consider this second variation on the facts of the *Zogg* case. Assume that the insured, who was in the Navy, had been sold the insurance policy while on furlough at his home in New York. The policy was issued from the insurer's home office in Philadelphia for delivery by its agent to the insured in Boston, where he was stationed. On these facts it is probably fair to say that if section 155 were in universal form, the court could have eliminated as unimportant in light of the matter in dispute all factors except the residence of the insured. It could then have concluded on the basis of his New York residence that New York law was applicable.

We have already seen, however, that section 155 as written contains a choice-of-law clause which directs the New York courts to apply New York law to all insurance contracts "delivered or issued for delivery" in the state. In our second variation the contract was neither delivered nor issued for delivery in New York; hence section 155 would appear to be inapplicable despite the fact that New York has a clear interest in applying its law. Even more puzzling is the lack of direction which now exists. To which state's law should the New York court look? *Zogg* repudiated the *lex loci contractus* rule on the basis of the *Auten* case, which propounded the "most significant relationship" test; but section 155 operates to prevent the application of that test to the facts of this second variation. This puzzling situation will be dealt with to some extent later, but for now it is sufficient to notice, as we did with respect to the first variation, that the choice-of-law clause in the statute may significantly affect the functioning of a court in conflict cases. The free reign given to courts to weigh interests where universal statutes are involved may be severely shortened by legislative choice-of-law rules, perhaps to the point of nullifying the many judicial advances made in the field of conflict of laws in the past few years.

Another example of this phenomenon is found in New York's

[19] The non-mechanical weighing-of-interests approach to conflict cases will often make residence an important factor. For the fascinating and as yet unresolved constitutional problem raised, see Currie & Schreter, *Unconstitutional Discrimination and the Conflict of Laws: Equal Protection,* 28 U. Chi. L. Rev. 1 (1960); Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities,* 69 Yale L.J. 1323, 1366, 1368 (1960). As is suggested above, Professor Currie's interest analysis may be oversimplified, resulting in disproportionate weight being given to the residence factor. If this is so, the constitutional problem may not loom so large as he suggests. See Traynor, *supra* note 1, at 856.

Foreign Executed Wills Act,[20] patterned after section 7 of the Model Execution of Wills Act. The act provides that a will executed outside New York is valid if valid by either the law of the testator's domicile or of the place of execution. It is a territorially limited statute, not meant to apply to all wills, but only to those wills executed outside the state. The theory behind the act is that if a testator executes a will in one state and satisfies its formalities, he should not be penalized if he later changes his domicile to a state which requires different formalities. Consider the following hypothetical fact situation. Mr. and Mrs. Black, domiciliaries of Connecticut, move to New York after their son marries, leaving the family home for the son and his new family. The son, who works in New York, has his will drawn up one evening at home by a neighbor who works for a Wall Street law firm. The will complies with Connecticut formalities. The will is formally executed in New York the next day. Following in the steps of his parents, the son eventually moves to New York and dies a New York domiciliary. Assuming that New York formalities have not been complied with, is his will valid in New York? This is clearly the type of situation that New York meant to encompass in its Foreign Executed Wills Act and a court could no doubt have held it to be within the saving power of that act if the act had been in universal form. The will was not executed outside New York, however, and the act as written would therefore be inapplicable, giving us another example of the restrictive effect of legislative choice-of-law rules.

No conclusions will be drawn at this point about the relative merits of legislative and judicial delimitation of statutes. Thus far we have only seen in a rough way what the two methods entail and some possible differences between the two methods. Much of the problem has yet to be considered. Our legislative draftsman is in a better position than he was at the outset, but he is by no means ready to report to the legislature. He must first apply himself to a close look at the legislative function in the choice-of-law process. Are legislative choice-of-law rules actually restrictive, and, if so, are they unduly restrictive? If we decide that certainty is not too dear, even at the cost of freedom of judicial action, can we at least minimize the restrictive effect of legislative choice-of-law rules? What form is best for legislative choice-of-law rules? These are some of the questions that will be considered in Part II of the paper.

[20] N.Y. Deced. Est. Law § 22-a.

The Legislative Background

In contrasting the legislative with the judicial function in the territorial delimitation of statutes, the restrictive nature of the former was stressed. We chose actual legislative choice-of-law rules and showed how they failed to function adequately in specific fact situations. The failure that we noted may have been due to legislative oversight. Certainly this is suggested by New York's Foreign Executed Wills Act. Consequently, our "restrictive" hypothesis merits closer analysis on a more theoretical level. Given an ideally informed legislature, will legislative choice-of-law rules limiting the scope of statutes still be restrictive compared to judicial delimitation?

A. *Effect.*

It might be best to start with Professor Currie's views on the subject, as he is an outspoken proponent of legislative choice-of-law rules. His theory is developed in a well-known article on married women's contracts,[21] written around a slightly altered version of the standard casebook case of *Milliken v. Pratt*.[22] In that article Currie assumes that Massachusetts, Mrs. Pratt's domicile, holds the firm belief that married women are "a peculiarly susceptible lot, prone to make improvident promises, especially under the influence of their husbands," thus explaining the Massachusetts rule that "no contract whereby any married woman might undertake to assume liability as a surety should subject her to judgment in any court." On the other hand, Maine, the residence of Milliken & Co., the creditor, is primarily interested in security of transactions and has consequently taken away the protection afforded married women by Massachusetts (or has freed them from archaic restrictions, depending on your point of view).

In order to assess the competing interests of Massachusetts and Maine, Currie breaks the case down into its four basic "contacts": the residence of the creditor, the residence of the married woman, the place of contracting, and the forum. He constructs a table to keep track of these four contacts as he arranges them in sixteen different combinations between Maine and Massachusetts. Two of the sixteen combinations are wholly domestic cases with all contacts either in Massachusetts or Maine and hence present no

[21] Currie, *Married Women's Contracts: A Study in Conflict of Laws Methods*, 25 U. Chi. L. Rev. 227 (1958).

[22] 125 Mass. 374, 28 Am. Rep. 241 (1878).

conflict. The remaining fourteen cases have contacts in more than one state, and an apparent conflict exists. In seven of these cases, however, the married woman's residence is in Maine, and it would seem that Maine law could be applied without cost to Massachusetts' protective attitude toward its married women. Furthermore, in three other cases the married woman and the creditor are both Massachusetts residents, and Maine law could be disregarded in these cases without upsetting the security of its transactions. In ten cases, then, the apparent conflict which appeared because of the two-state nature of the transaction turned out to be only a false conflict upon Currie's four-contact analysis of the interests involved.

Reasoning that the false conflicts arise in cases where either Massachusetts or Maine has no interest to be furthered, Currie proposes statutes for the two states that would prevent the application of their respective policies in those cases, as revealed by his four-contact analysis. The Massachusetts act would provide that its protective policy shall apply "in all cases in which the married woman is a resident of this state, or of another state whose laws provide similar immunity." [23] In like manner the Maine act would provide that its policy of allowing married women to contract freely shall be applied "in all cases in which Maine is the residence of either or both parties." These statutes would eliminate the ten false conflict cases that Currie found in the course of his analysis. But this still accounts for only twelve of the sixteen variations. In the remaining four cases the residence of the creditor is Maine and that of the married woman is Massachusetts. According to Currie, these cases present true conflicts. How do his proposed rules dispose of these "true" conflict cases? They dispose of them in a wholly mechanical fashion, the outcome of the case depending solely on choice of forum: in Maine the creditor will win; in Massachusetts the wife will win.

At this point we should re-ask the question posed at the beginning of Part II of this article: Is legislative delimitation of the territorial scope of statutes more restrictive than judicial delimitation? If a court, unfettered by the type of legislation that Currie proposes, could solve Currie's true conflict cases in a non-mechanical way, then we would have to judge legislative delimitation more restrictive than judicial delimitation. Currie apparently feels that his statutes are not restrictive, despite the mechanical way

[23] Currie, *supra* note 21, at 255–56. This form reflects Currie's awareness of the constitutional problems inherent in his proposed legislation.

in which they function in the "true" conflict cases. In other words, he feels that the courts of Massachusetts and Maine, operating without any choice-of-law rules at all, would *still* be constrained to give the same significance to choice of forum given to it by his proposed statutes, and, therefore, the proposed statutes are not restrictive. Where an interest analysis exposes a true conflict, says Currie, "no satisfactory solution can possibly be evolved by means of conflict-of-laws law. . . . It cannot be solved by any effort, *judicial* or legislative, however brilliant its conception." (Emphasis supplied.)[24] Because he believes this, Currie designs his choice-of-law rules to avoid the "true" conflict impasse as an original matter. "When it is suggested that the law of a foreign state should furnish the rule of decision, the court should, first of all, determine the governmental policy expressed in the law of the forum." If the case is such that the forum would have a legitimate interest in applying its law to further this policy, "it should apply the law of the forum, *even though the foreign state also has an interest in the application of its contrary policy. . . .*" (Emphasis supplied.)[25] This method results in choice of forum being determinative whenever a "true" conflict exists, which is the result reached under his proposed Massachusetts and Maine statutes.

We may well agree with Currie that the chances of a legislative solution to "true" conflict cases are slim. A legislature is probably incapable of anticipating and weighing all possible interests in a multi-contact situation and of producing workable legislation. It is not at all clear, however, that judicial efforts along the same lines are bound to fail, and to test the Currie hypothesis with respect to judicial efforts in this area, I should like to use two hypothetical cases built around a *Milliken v. Pratt* model.[26]

In the first, Milliken & Co. is an aggressive Maine concern that sells and installs lightning rods throughout New England. It sends

[24] *Id.* at 259.

[25] Currie, *Note on Methods and Objectives in the Conflict of Laws,* 8 Duke L.J. 171, 177–78 (1959).

[26] Again I must give credit for these hypotheticals to Professor Cavers who used them in his classroom discussion of Milliken v. Pratt. The interest analysis that follows is not a new concept. Kramer, *Interests and Policy Clashes in Conflict of Laws,* 13 Rutgers L. Rev. 523, 533 (1959). There is also some indication that Professor Currie's attitude toward such an analysis is softening. See note 27 *infra.* At the time he wrote the *Milliken* article, however, Professor Currie was not above some very critical comments on "the high-minded, transcendent, and form-free counsels" of those who urged a more complete weighing of interests than he. Currie, *Married Women's Contracts: A Study in Conflict of Laws Methods,* 25 U. Chi. L. Rev. 227, 249 (1958).

smooth-talking salesmen to Massachusetts and neighboring states to solicit orders which must be accepted at the home office in Maine. If the buyer is married, his wife must sign the order as guarantor. The Pratts, Massachusetts residents, have a Milliken lightning rod installed on their barn in Massachusetts, but Mr. Pratt fails to pay. Milliken & Co. now sues Mrs. Pratt on her guarantee. According to Professor Currie's simplified four-contact analysis, this case presents a true and unsolvable conflict. Actually, the solution seems to be quite easy. The issue presented in the lightning rod litigation is whether Milliken & Co., after aggressively seeking out a sale in Massachusetts to Massachusetts residents, should be heard to complain about the protective policies that Massachusetts seeks to implement with respect to certain of those residents. It is not unreasonable to say that if Milliken & Co. wants Massachusetts business badly enough to come into the state for solicitation of orders, it can take that business without the wife's guarantee. If not satisfied with only the husband's credit, it can solicit its orders elsewhere. The hardship on the Maine concern is so slight that it would be difficult to imagine a Maine court being so solicitous for its resident plaintiff as to deny protection to the Massachusetts wife on the facts of this hypothetical.

In the second hypothetical Milliken & Co. is a Maine wholesale grocery and campers supply store. The Pratts, residents of Massachusetts, run a summer camp in the Rangeley Lake section of Maine and Mr. Pratt orders supplies for the camp from Milliken & Co. Milliken & Co. agrees to fill the order but requests a written guarantee from Mrs. Pratt. The guarantee is given at the store in Maine. Mr. Pratt fails to pay, and Milliken & Co. sues Mrs. Pratt. Again we have, according to Currie, a true and unsolvable conflict. But again it appears that Currie gives up too easily. Though they are Massachusetts residents, the Pratts have put themselves wholly within the ambit of Maine law for this transaction. The business for which the supplies have been purchased is a Maine business; the creditor is a Maine creditor; the goods, in Maine when purchased, were shipped to the Maine camp. Where the matter in issue is the validity of the guarantee given to the Maine grocer in these circumstances, of what significance is Mrs. Pratt's Massachusetts residence? Maine's interest in security of transactions becomes of primary importance on the facts of this hypothetical just as Massachusetts' interest in protecting its married women from high pressure salesmen within its borders took on primary importance in the first hypothetical. It is difficult to imagine that Maine

in the lightning rod case or Massachusetts in the Rangeley Lake camp case would be so parochial as to fail to recognize the very attenuated nature of its interest in the case and fail to give effect to the other state's interest accordingly.

No attempt can be made in a paper of this scope to deal thoroughly with Professor Currie's methodology. Suffice it to say that his views on the capabilities of courts have been seriously questioned and that he himself appears to be retreating from the extreme view stated in his *Milliken* article.[27] If we accept the validity of the decisions worked out by the courts in the two hypothetical cases, the implication is clear that legislative choice-of-law rules may restrict judicial treatment of conflict cases. Weighing of interests, if it is to be done at all, is best done on sensitive scales by courts unfettered by preconceived rules. It is submitted that there will be no unsolvable conflicts if a case-by-case development of choice-of-law rules is allowed. But of course our inquiry is not complete upon reaching this conclusion. The competing interests of certainty and predictability must be accounted for. What is best from the point of view of abstract justice is not always best in practice. We will see later that in certain areas of the law unfettered weighing of interests will not be tolerated by the parties involved. Thus, it becomes necessary to continue our investigation of the legislative background, turning now to problems of form.

B. *Form.*

The dearth of published material about territorially limited statutes in general carries over to the formal aspect of the problem. No one seems to have asked just what a choice-of-law rule is or what distinguishes choice-of-law rules from other legal rules. This

[27] See Traynor, *supra* note 1. Professor Currie in a recent article in the Duke Law Journal used the following language: "New York might reasonably assert an interest in the application of its policy. . . . This is not to say that New York must, or necessarily would, construe its statute (or define its interest) this broadly. *It might reasonably take into account the interest of Illinois in protecting the father, and perhaps some of the other circumstances of the case, and conclude that it should not create a conflict by asserting a conflicting interest.*" (Emphasis supplied.) Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1, 44–45 (discussing Hoag v. Barnes, 9 N.Y.2d 554, 175 N.E.2d 441, 216 N.Y.S.2d 65 (1961). The cases do not follow Currie's methodology. If anything, they go too far the other way, counting contacts rather than weighing the contacts in light of the matter in dispute. See the comments on Zogg v. Penn Mutual Life Ins. Co., note 17 *supra*. All that is urged here is that courts can and will weigh many factors in reaching a decision unless restricted by narrowly drawn legislative choice-of-law rules. *Cf.* Kramer, *supra* note 26, at 534.

apparent lack of interest is quite surprising, for in at least one area of the law of conflict-of-laws the characterization of a rule as a choice-of-law rule has great significance. That, of course, is the area of the renvoi doctrine which often leads a court to reach one result rather than another by refusing to look at the choice-of-law rules of a foreign jurisdiction. At some point in the application of the renvoi doctrine the question must be faced: What is a choice-of-law rule? In describing the proposed Massachusetts and Maine rules as not being choice-of-law rules in the "traditional sense," [28] Professor Currie suggests other questions: What are "traditional" choice-of-law rules? Does the form of a choice-of-law rule have any significance? These are questions that our draftsman should be able to answer before reporting to the legislature.

A recent case in a United States District Court in Indiana will best serve to introduce the legislative problems connected with the renvoi doctrine. In *Hobbes v. Firestone Tire & Rubber Co.*,[29] plaintiff, an Indiana resident, sued defendant, an Ohio resident, for injuries sustained in a Kentucky automobile accident. The accident occurred more than one year, but less than two years, before the action was brought, and the Indiana statute of limitations on actions of this sort was two years. Indiana had a borrowing statute that provided that if the action was barred by the "laws of the place where the defendant resided" it would also be barred in Indiana.[30] Ohio, the place where defendant resided, had a two-year statute of limitations like Indiana's; hence, neither the Indiana nor the Ohio statute of limitations would bar the action. But Ohio also had a borrowing statute. It provided that "if the laws of any state or country where a cause of action arose limit the time for the commencement of the action *to a lesser number of years* than do the statutes of this state in like causes of action then said cause of action shall be barred in this state at the expiration of said lesser number of years." (Emphasis supplied.)[31] The cause of action arose in Kentucky, which had a one-year statute of limitations on actions of this kind. Therefore, defendant claimed that the action was barred.

After thus stating the facts, the court stated that "the question to be determined in the disposition of [the case] is the controver-

[28] Currie, *Married Women's Contracts: A Study in Conflict of Laws Methods*, 25 U. Chi. L. Rev. 227, 259 (1958).

[29] 195 F. Supp. 56 (N.D. Ind. 1961).

[30] Ind. Acts Spec. Sess. 1881, Ch. 38 § 43, 195 F. Supp. at 57.

[31] Ohio Rev. Code Ann. § 2305.20 (Page 1954), 195 F. Supp. at 58.

sial conflicts-of-law theory of 'renvoi,' and its acceptance or non-acceptance by this Court." [32] What renvoi is and why it is controversial are fairly easy questions to answer. Renvoi is the doctrine which directs a forum to look to the whole law of a foreign jurisdiction whenever the forum refers a question to a law other than its own. Renvoi is controversial because a reference to the whole law of another jurisdiction includes a reference to that jurisdiction's choice-of-law rules, which may direct the forum back to its own law. Once referred back to its own law, the forum must to be consistent look at its own whole law, which, of course, will send it back to the foreign state, and so on without end. Renvoi would not be at all controversial if a reference to the whole law of the foreign jurisdiction could never result in a reference to the whole law of the forum.[33]

In *Hobbes* the court characterizes all borrowing statutes as choice-of-law rules. As a general matter this is probably correct. Professor Sumner of U.C.L.A. describes choice-of-law rules as "indicative rules," that is, rules which are not "directly concerned with the disposition of cases," but which are "the principles . . . that a court uses to select the law that will be used." [34] But it will be remembered that the issue as stated by the court in *Hobbes* was whether the controversial renvoi theory should be accepted. If this is the issue, a definition of "choice-of-law rule" unrelated to the controversial aspect of renvoi would be useless. It is submitted that when the renvoi commentators speak of choice-of-law rules, they are referring only to those rules of a particular jurisdiction which may refer to the whole law of another jurisdiction. Thus, a rule may be a choice-of-law rule within Professor Sumner's definition and yet fall outside the definition of that phrase for purposes of the "controversial conflicts of law theory of 'renvoi.'" [35]

[32] 195 F. Supp. at 58.

[33] See generally Griswold, *Renvoi Revisited,* 51 Harv. L. Rev. 1165 (1938). The statement is oversimplified. Some writers, *e.g.,* Cheshire, *Private International Law* 57–59 (2d ed. 1938), find theoretical fault with the "whole law" approach; but the merry-go-round result is the basic complaint.

[34] Sumner, *Choice of Law Rules: Deceased or Revived?* 7 U.C.L.A. L. Rev. 1, 9 (1960).

[35] Hobbes v. Firestone Tire & Rubber Co., 195 F. Supp. 56, 58 (N.D. Ind. 1961). A rule that refers specifically to the local law of another state would be such a rule. An interesting phenomenon occurs here. If a state court has consistently construed one of its choice-of-law rules as referring only to the local law of a foreign jurisdiction, it would seem that a foreign court, referring to that state's law, could consider its conflict rule as interpreted, and could avoid the renvoi circle. This is not done in practice. It seems that legislation is required to take an "indicative" rule out of the "whole law" category.

With this in mind we must take a closer look at the *Hobbes* case. The court refused to look to the Ohio borrowing statute, classifying it as a choice-of-law rule and, hence, part of the whole law of Ohio which could not be regarded without approving the renvoi doctrine. Was the court correct? Quite clearly it was not. The Ohio borrowing statute, unlike the Indiana borrowing statute, does not refer to the "laws" of another jurisdiction. "Law" could, of course, mean all the laws, including choice-of-law rules of a jurisdiction. Ohio's statute, by contrast, refers only to the part of the law of the place where the cause of action arose which limits the time for the commencement of the action to a certain number of years. Ohio is directed to look to the statute of limitations of Kentucky, for example, to see how long a time Kentucky gives for the commencement of tort actions; and this is all that the Ohio court can do. Any other law of Kentucky, such as its borrowing statute, is beyond Ohio's purview, because it does not indicate the number of years in which a Kentucky action must be commenced. If we define "choice-of-law rule" in terms of the controversial aspect of the renvoi doctrine, as only those rules which may refer to the whole law of another jurisdiction, then Ohio's borrowing statute is not a choice-of-law rule. Consequently, Indiana could have looked to the Ohio borrowing statute as part of Ohio's internal law and could have avoided any "recognition and acceptance of the 'renvoi doctrine' as a sound legal principle." [36]

The uncritical acceptance of the choice-of-law label led the *Hobbes* court to an erroneous decision on the facts of that case, but the implications of the decision go well beyond the case itself. Suppose, for example, that we are legislative draftsmen in Massachusetts with the job of fitting the Uniform Marriage Evasion Act into Massachusetts law. We know that a necessary element of the act is interstate cooperation in preventing evasive marriages, and we are willing to include the reciprocity clause of the act in our law: "No marriage shall be contracted in this Commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this Commonwealth in violation hereof shall be null and void." [37] The question arises whether this is a choice-of-law rule in the renvoi sense, and, if so, whether it should be put in a different form accordingly.

[36] *Id.* at 63.
[37] Mass. Gen. Laws Ann. ch. 207, § 11 (1958).

A brief look at the purpose and function of the reciprocity clause will show why the renvoi doctrine concerns us. The primary purpose of the clause is to give Massachusetts power to cooperate with other states in dealing with evasive marriages, even though these do not offend the laws of the Commonwealth, in the hope that other states will work with Massachusetts in preventing marriages undesirable to the Commonwealth. But this is probably not the only function of the clause. Because there are few procedures for enforcing marriage restrictions prior to marriage, attack under the reciprocity clause upon a marriage celebrated in Massachusetts will probably come after the ceremony and out of the Commonwealth, perhaps in the place where the party resided and intended to continue to reside. Since it is a virtually universal rule of the conflict of laws that a marriage valid where celebrated is valid everywhere,[38] a permissive provision of Massachusetts law—permitting first cousin marriages, for example—could be used to defend the marriage in a state that forbade first cousins to marry, unless the Massachusetts Marriage Evasion Act contains a reciprocity clause or unless the non-Massachusetts forum has a marriage evasion act of its own. The clause is well designed to handle this situation. A non-Massachusetts forum, referring to the reciprocity clause, is invited to make the necessary finding of residence and intent; if satisfied that the clause should apply, it may then judge the marriage by its own standards. In this manner Massachusetts permissive statutes can never become party to an evasive marriage. Our Massachusetts draftsman is concerned, however, lest the courts of the other state, like the federal district court in Indiana, say that they are unable to look at the reciprocity clause because it is a choice-of-law rule of Massachusetts and that looking at it will imply "recognition and acceptance of the 'renvoi doctrine' as sound legal principle." [39]

The reciprocity clause quoted above (section 11 of the Massachusetts Marriage Evasion Act), like the Ohio borrowing statute in the *Hobbes* case, is not a choice-of-law rule in the renvoi sense. Although it may refer to the law of another jurisdiction, it does so hypothetically. That is, it declares that the marriage will be void if it "would be void if *contracted* in such other jurisdiction."

[38] Restatement, Conflict of Laws § 121 (1934). For an interesting case raising very similar problems, see Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958).

[39] Hobbes v. Firestone Tire & Rubber Co., 195 F. Supp. 56, 63 (N.D. Ind. 1961).

(Emphasis supplied.)[40] The other jurisdiction is not told that the marriage will be void if void by its "laws." This could conceivably indicate a reference to the whole law of the other jurisdiction, which in turn would lead to a reference back to Massachusetts whole law, and so on without end. Rather, the other jurisdiction is told to treat the marriage as if it were a local marriage. This leaves no room for a reference to choice-of-law rules and could never put the other jurisdiction on the renvoi merry-go-round. But despite the fact that section 11 is drafted so as theoretically to avoid the renvoi complaint, the danger always exists that the mistake of the *Hobbes* court will be perpetuated.

If our legislative draftsman is worried about the *Hobbes* case and its renvoi problem, he might want to know whether the problem can be avoided by any formal device. It is submitted that the problem can be avoided by proper legislation, but only after a wholesale revision of Massachusetts marriage law, which would probably create more problems than it would solve. Since we are exploring the field of choice-of-law drafting, however, it might be worthwhile seeing how the result could be accomplished, even though as a practical matter we would rather rely on the courts to avoid the *Hobbes* mistake. This exercise will afford an opportunity to attempt answers to the question concerning form that we posed at the beginning of Section B of Part II of the paper.

To avoid the *Hobbes* result we want to draft a rule that does not come within even Professor Sumner's broad definition of choice-of-law rule. The best vehicle for this is the type of non-traditional choice-of-law rule that Currie proposed in his article on married women's contracts. Such a statute restricts the application of the enacting state's law but does not refer to any other law. It does not help select the law that will be used.[41] In order to incorporate Currie-type rules in the marriage setting, Massachusetts law would have to be changed from restrictive (no man shall marry his mother) to permissive (a man may marry his

[40] Mass. Gen. Laws Ann. ch. 207, § 11 (1958).

[41] A forum, referred to Massachusetts by its choice-of-law rule, might find that Massachusetts law did not apply. What should the forum do at that point? According to the *désistement* theory outlined by Dean Griswold in his renvoi article, *supra* note 33, at 1168, the forum should apply its own law in such a case. Professor Sohn suggests that the forum should fill the gap by applying that foreign law that claims applicability in the particular case. Sohn, *New Bases for Solution of Conflict of Laws Problems*, 55 Harv. L. Rev. 978, 983 (1942); *cf.* Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 Mich. L. Rev. 637, 687 (1960).

cousin). Then, in order to permit the avoidance of its permissive law in situations where another state has a paramount interest in applying its law, Massachusetts could provide: "These provisions shall not apply to a marriage contracted in the Commonwealth by a party residing and intending to continue to reside in another jurisdiction." This would clearly be part of the local law of Massachusetts and would be regarded as such by a non-Massachusetts jurisdiction. With this form of legislation a non-Massachusetts forum could make the necessary finding of residence and intent and then could refuse to apply Massachusetts permissive law despite the forum's rule that a marriage valid where celebrated is valid everywhere. If the forum felt that the marriage was not evasive and that there was no need for applying its more restrictive law, it could refuse to find the requisite intent that would make Massachusetts law inapplicable. Thus, there does seem to be a way around the renvoi problem.[42]

More must be known about the non-traditional, Currie-type statute before its use can be considered, however. Is there any difference, other than the possibility of avoiding the *Hobbes* difficulty that we just noted, between Currie's rules and traditional choice-of-law rules? Because there is an apparent conflict between Currie's proposals and those of earlier writers on the topic of legislative choice-of-law rules, the question merits investigation. Arthur Nussbaum, writing in 1943, felt that there was a significant difference between true choice-of-law rules and the "spatially conditioned internal rule," the name that he gave to the Currie-type rule. Nussbaum noted the distinction attributable to the renvoi problem discussed above and found a further difference: the interpretation of these spatially conditioned internal rules "will more or less depend on local policies, which may widely differ from the views that guide a court in the solution of conflict questions." [43] It was apparently on the basis of this further difference that J. H. C. Morris, writing in England in 1946, came out against the use of the particular choice-of-law clause, or, to borrow Nussbaum's terminology, the "spatially conditioned internal rule." Morris concluded: "General choice-of-law clauses in statutes are

[42] Of course it is questionable whether one state can ever prevent another state from applying the former state's law. See Pearson v. Northeast Airlines, 309 F.2d 553 (2d Cir. 1962); Cavers, *The Two "Local Law" Theories*, 63 Harv. L. Rev. 822 (1950); Note, 63 Colum. L. Rev. 133, 143 (1963).

[43] Nussbaum, *Principles of Private International Law* 71f (1943).

preferable to particular choice-of-law clauses because the latter obscure the fundamental distinction between domestic rules and conflict rules." [44]

The easiest way to see just what it is that caused Morris to oppose the type of rule that Currie now favors is to examine the illustrative example that Morris uses in his article. He starts with three hypothetical English statutes. The first is universal and contains no choice-of-law clause: "A marriage between persons either of whom is under the age of sixteen years shall be void." The second contains a general choice-of-law clause, designed to supplement a universal statute like the first. It limits the scope of the universal statute and provides what law shall govern when English law does not: "Questions relating to the age at which persons can validly marry shall be decided in accordance with the place of celebration." The third is a statute with a particular choice-of-law clause, or "spatially conditioned internal rule," to which Morris objects. It limits the application of English law without doing more: "A marriage celebrated in the United Kingdom between persons either of whom is under the age of sixteen shall be void." The last is the Currie-type statute discussed above.

To show us how bad this third type of statute is, Morris assumes that France also has a particular choice-of-law clause in its underage marriage act but that France provides that a marriage between *French nationals* either of whom is under the age of sixteen shall be void. Given this conjunction of statutes, a marriage in France by underage English nationals would have to be validated by both France and England, a result which Morris finds both inconvenient and illogical, because "both English and French law regard marriages between persons under the age of sixteen as socially undesirable." [45]

What should strike us as odd about Morris' analysis is his conclusion that both England and France would really like to hold this marriage void. How can he say this in the face of the English and French statutes which prevent the courts of either country from invalidating just such a marriage? Do not the statutes adopted by the two countries reflect their real desire and intent vis-a-vis this kind of marriage? There can be little doubt that in Morris' view, the particular choice-of-law clauses in the two statutes do not reflect the local policies of either England or France. He feels

[44] Morris, *The Choice of Law Clause in Statutes*, 62 L.Q. Rev. 170, 184 (1946).
[45] *Id.* at 171.

that although they are not true choice-of-law rules, they have all the infirmities of the true choice-of-law rules of two decades ago, inasmuch as they are mechanical rules that fail to reflect considered local policies and interests. That this is really what troubles Morris becomes clear when we look at what he says about general or true choice-of-law clauses. These are better, he tells us, simply because they can be disregarded by a foreign court. If France had a general choice-of-law clause to the effect that "questions relating to the age at which persons may validly marry shall be determined in accordance with their personal law," and if Britain had the general choice-of-law clause set out above, then a marriage celebrated in France by underage English nationals could be invalidated by both England and France. Both countries, pleading the renvoi difficulty as did the *Hobbes* court, could ignore the limitations on the local law included in the general choice-of-law clause and could apply French or English law to invalidate the marriage. And why should the limitation be ignored? It should be ignored simply because it is arbitrary and mechanical and because it fails to reflect true local policies. In short, what Morris is saying is that if you are going to have mechanical choice-of-law rules in the first place, you should at least put them in such a form that they can be disregarded by foreign courts. That way they will cause the least amount of trouble.

These views obviously conflict with Currie's views, and our legislative draftsman might well ask how Currie can ignore the thesis of the Nussbaum and Morris articles and say of his proposed choice-of-law rules, "It seems to me that there are advantages in this way of stating conflict of laws rules." [46] The simple answer is that Currie is writing against a very different background of choice-of-law rules than was either Nussbaum or Morris. The rules that Currie proposed for incorporation into Massachusetts and Maine law to deal with married women's contracts, as well as the rule that we hypothesized for Massachusetts to deal with marriage evasion cases, reflect and give effect to the interests and objects of the enacting state. Because these rules reflect the desires of the enacting state, we are concerned with assuring their recognition by foreign states, not with facilitating their avoidance, as was pointed up in the discussion of the *Hobbes* case.

The simple explanation for the apparent conflict between Currie

[46] Currie, *Married Women's Contracts: A Study in Conflict of Laws Methods*, 25 U. Chi. L. Rev. 227, 259 (1958).

and the earlier writers should come as no surprise. The change in the character of choice-of-law rules was outlined in a general way in Part I of the paper. We saw there that the judicial mind had changed considerably in its outlook toward conflict cases, and we predicted that an "informed judgment" would be exercised by courts in dealing with conflict cases. Then we began this investigation of the legislative process, ending with the question whether there is a proper form for legislative choice-of-law rules. It appears that the answer to our question is simple. Form may be relegated to a secondary position; there is nothing inherently good or bad in any particular form. The renvoi problem can be avoided by careful drafting. In all other respects, form should follow function. The function of the legislative draftsman is to build a rational body of conflict rules. He should feel free to use whatever form of rule will best achieve this goal.

This is as good a point as any to end our general investigation and to follow our legislative draftsman to the legislature, where he will give his report. No doubt his investigation will have been in connection with some proposed legislation. Accordingly, a brief look at the actual application of the ideas we have been discussing to specific areas of the law is in order.

C. *Practice.*

Legislation limiting the territorial scope of statutes is in use today. We have already been introduced to several examples: New York's Insurance Law and Foreign Executed Wills Act and the Massachusetts Marriage Evasion Act. Some have been drafted well with an apparent understanding of the formal requirements of the renvoi doctrine, illustrated by section 11 of the Massachusetts Marriage Evasion Act, while others, such as New York's Foreign Executed Wills Act, do not appear to be well considered. Still others, like the New York Insurance Law considered in connection with the *Zogg* case, seem to have an unduly restrictive effect on the judicial process. Some restrictive legislation is inevitable until the full capability of courts in conflict cases is developed and recognized. "Certainty" and "predictability" are terms that the legislators understand and to which they are sympathetic, whereas judicial "weighing of interests" smacks of anarchism and is not likely to find as much favor with the legislators.[47]

[47] J. H. C. Morris summed up the issue quite well where he said: "Opinions will differ on the question whether it is desirable to codify the rules of the conflict of laws. . . . If certainty is the principal object of the law, then there does seem a

The proponents of certainty and predictability have had their way in two important areas of the law: corporation and Blue Sky law. Let us look briefly at these areas.

Blue Sky laws, regulating the complex area of security transactions, present a real challenge to the would-be conflict of laws codifier. The field of Blue Sky regulation is itself entirely statutory, suggesting that the old common law conflict rules, developed in a different context, may be inadequate. It is also by nature prone to interstate dealings that are bound to give rise to conflicts. But Blue Sky laws, unlike laws designed to protect married women or laws to foster security of transactions or laws to protect insured persons from giant insurance companies, are essentially non-vital. Only three states and Puerto Rico have no Blue Sky law at all,[48] and although regulations differ from state to state, no vital interest is encroached upon if the law of one state is applied rather than that of another. If New York sets a higher standard of behavior than Connecticut, it may want to see broker-dealers live up to its standards, but it will not be overly upset to see Connecticut's standards applied, even if Connecticut law is applied merely because the offer to sell, for example, was made in Connecticut and not New York. This non-vital character of Blue Sky regulation probably was a factor militating in favor of the codification undertaken in the Uniform Securities Act, which we will look at shortly.

It would be possible for a Blue Sky law to provide simply that it is unlawful for any person to transact business in the state as, for example, a broker-dealer or agent, unless he is registered. In actual fact virtually all state Blue Sky laws appear in this largely universal form.[49] Conceivably, the courts of the state that had such a provision could work out satisfactory choice-of-law rules to give meaning to the phrase "transact business in the state." The task is not easy, however, due to the special and often technical nature of the problems surrounding security dealings and the lack of even analogous precedent. Describing the actual state of Blue

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prima facie case for codification. . . . On the other hand, it may be urged with equal force that in the present state of our knowledge of the fundamental bases of the conflict of laws, codification (however well executed) would merely add to the confusion by inhibiting flexibility and precluding the court from attributing due weight to the social and economic factors involved in any particular case." Morris, *The Choice of Law Clause in Statutes*, 62 L.Q. Rev. 170, 171, 172 (1946).

[48] Loss and Cowett, *Blue Sky Law* 39, 40, 41 (1958). This number was reduced by one when Alaska adopted the Uniform Securities Act in 1959.

[49] *Id.* at 182.

Sky choice-of-law precedent, Professor Loss and Mr. Cowett said, "There is authority for applying the law of the place of contract, the law of the place of performance (delivery of the security), and the law of the place where the transaction was solicited." [50] It was against this background that the authors of the Uniform Securities Act made their decision to codify conflict of laws rules in the Blue Sky area.

> Undoubtedly [the conflict provisions] were the hardest to draft of the entire statute. But the very proliferation of problems which created this difficulty indicated to the authors and their collaborators how desirable it would be to have a degree of predictability in an area in which the law not only varies from state to state but also defies any sort of specific description in most states.[51]

The conflict provisions of the Act are straightforward. It is provided that the anti-fraud provision, the dealer and security registration provisions, the provision outlawing unlawful representation, and the civil liabilities provision are applicable "to persons who sell or offer to sell when (1) an offer to sell is made in this state, or (2) an offer to buy is made and accepted in this state" and, with the exception of the civil liabilities provision, to "persons who buy or offer to buy when (1) an offer to buy is made in this state, or (2) an offer to sell is made and accepted in this state." The statute carefully defines when an offer to sell or buy is made in the state and when it is accepted in the state. A special exception for publications, radio, and television is provided, such that an offer to sell or buy will not be "made in this state" if it is published in a bona fide publication of general circulation published outside the state or with most of its circulation outside the state or if it originates on a radio or television program originating outside the state.[52]

It will be recognized that the choice-of-law provisions of the Uniform Securities Act are "mechanical" in form. At first glance, it might appear that this sort of codification is unwise, because mechanical rules have a most restrictive effect on proper judicial functioning in conflict cases, as we have seen. It is submitted, however, that in the context of Blue Sky legislation the mechanical rules are probably justifiable. When they came to make their

[50] *Id.* at 186.
[51] *Id.* at 226.
[52] Uniform Securities Act § 414.

decision to codify, the draftsmen of the Uniform Securities Act found that they were dealing with:

a) a legislatively created area of the law without prior model or common law precedent;
b) an area of the law of commercial transactions that traditionally desires and requires predictability;
c) a subject especially prone to conflict situations;
d) an area of the law that does not involve the vital policies of any state;
e) a subject in which the existing choice-of-law precedent was hopelessly confused;
f) a subject that called for uniformity of treatment.

This is certainly an imposing array of reasons in support of codification, and thus the legislation in no way belies the earlier conclusion that codification is bound to restrict the judicial process in conflict cases. Rather, the reasons suggest that in the Blue Sky area restrictiveness may be a necessary price to pay for certainty. Time will tell; as yet the provisions are untested.

The Uniform Securities Act approach to choice-of-law codification is by no means the only possible approach. A compromise position, which would yield less certainty than the mechanical rule but which would comport more with the current trend in conflict cases, is possible. The laws of certain states with respect to foreign corporations reflect this compromise approach. No attempt will be made to go into the area of corporation law and its choice-of-law problems in any detail.[53]

Professor Reese and Mr. Kaufman in their article on corporate law in the conflict-of-laws take the position that corporate acts that can also be done by individuals, such as the making of contracts, may be governed by different laws just as individuals who contract in different states may be subject to different laws. Matters peculiar to corporations, however, such as election and appointment of officers and directors, adoption of by-laws, and the like, raise serious problems if subjected to diverse interstate regulation. As to these matters the need for uniformity and predictability looms large, and the simple "place of incorporation" choice-

[53] For further information on that subject reference should be made to two articles, Latty, *Pseudo Foreign Corporations*, 65 Yale L. J. 137 (1955); and Reese and Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118 (1958), and to the spate of law review notes on the Western Airlines case, *e.g.*, Note, 49 Calif. L. Rev. 974 (1961); Note, 9 U.C.L.A. L. Rev. 242 (1962).

of-law rule is consequently most often applied. In certain circumstances a state other than the state of incorporation may want to apply its law to the internal affairs of a foreign corporation. This desire is troublesome for the choice-of-law draftsman, for even aside from the practical difficulty of adjusting the various interests involved, he must work within an unclear constitutional framework, balancing the due process clause and the full faith and credit clause. Thus,

> A state . . . should not be privileged to apply its own law in preference to that of the state of incorporation unless its interests are seriously involved and its connection with the corporation a close one. . . . The state's interests must be greater and its connection with the corporation closer than would be necessary to give it legislative jurisdiction to apply its law under the ordinary test of due process. . . . A state in which a foreign corporation does only a small fraction of its business probably would violate full faith and credit if it applied its own law rather than that of the state of incorporation to hold the payment of a dividend illegal.[54]

In dealing with a sensitive area such as this, one would be tempted to say that judicial delimitation of the scope of statutes with its characteristic flexibility and facility for delicate balancing is a must. This conclusion does not necessarily follow, however. If we turn back to the Uniform Securities Act and the factors that we noted there as reasons supporting the codification, we will find that many apply to this closely related area of regulation of foreign corporations. It is a commercial area where predictability is in great demand, conflicts are very prevalent, and the policies involved are non-vital. The added element is the constitutional uncertainty that inheres in multi-state regulation of the internal affairs of corporations. This factor does not preclude any codification; it merely precludes any mechanical approach such as was taken in the Uniform Securities Act.

What is the alternative? Former section 1317 of the New York Business Corporation Law is a good example. It exempted all foreign corporations from regulation except a "domiciled foreign corporation," which was defined as a corporation "with at least two-thirds of all its outstanding shares being owned either beneficially or of record by residents, *or* with at least two-thirds of its business or investment income allocated to New York for franchise

[54] Reese and Kaufman, *supra* note 53, at 1139.

or tax purposes." (Emphasis supplied.)[55] This statute embodied several of the bases found relevant by the cases in supporting jurisdiction, as alternative bases of statutory jurisdiction. Predictability comes with the exhaustiveness of the list; flexibility comes with the alternative grounds. California attempted similar legislation with respect to some of its Blue Sky laws but it failed to pass.[56] There may be some feeling on the part of legislators that this is really weak legislation—not a "rule" yet not "no rule at all"—and should be avoided. The current New York statute reverts to type and provides that a foreign corporation doing business in the state is subject to regulation.[57] This may or may not be an indication of legislative disdain for alternative rules. A new section drastically limits the significance of the change, providing that a foreign corporation doing business in the state is exempt from regulation if its shares are listed on a national securities exchange *or* if less than one-half the total of its business income for the preceding three years was allocable to this state for franchise tax purposes.[58]

Although legislation cannot be expected to anticipate all possible bases for jurisdiction, in areas of the law such as corporation law, where certainty is important and where some mechanical rules can be tolerated, the limited alternative choice-of-law rule seems to be a helpful tool. It may be true that no legislative solution can be worked out for "true" conflict cases in areas of the law such as torts or contracts, as Currie suggests; but his proposed rules which operate mechanically depending upon choice of forum are certainly not designed to improve the situation. Much more can be said for leaving the truly unpredictable areas of the law to judicial delimitation with its flexibility, and for using the alternative bases approach in areas of the law where predictability is absolutely essential.

[55] N.Y. Bus. Corp. Law § 1317. Apparently this section was amended prior to the effective date of the Act (Sept. 1, 1963).

[56] See Note, 49 Calif. L. Rev. 974, 978 (1961); Note, 9 U.C.L.A. L. Rev. 242, 247, 248 (1962).

[57] N.Y. Bus. Corp. Law § 1317.

[58] N.Y. Bus. Corp. Law § 1320.

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1963-1964

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Purpose

The primary purpose of the Harvard Student Legislative Research Bureau is to make available to governmental and public service groups technical services in the preparation and drafting of legislation. Since its organization in 1952, the Legislative Research Bureau has drafted legislation dealing with a variety of subjects in response to requests submitted by federal, state and local legislators and officials, state attorneys-general and law revision commissions, members of law school faculties, and civic groups.

While assisting clients in a practical manner, the Bureau provides valuable educational experience for its members. The responsibility for the work of the Bureau rests entirely with its student membership, composed of second and third year law students selected annually on a competitive basis.

The Bureau is financed by a grant from Harvard Law School and does not accept remuneration from clients.

Selection of Projects

Since the Bureau receives more requests for assistance each year than it can accept, selection of projects is necessary to insure that the projects undertaken will receive prompt and thorough treatment.

When a request is received, the legal and drafting problems which it poses undergo a preliminary study and analysis for the purpose of determining whether the project is one which the Bureau can accept. Several factors are considered in making this decision. Among them are: the importance of the proposed legislation to the community in which it may be enacted, the educational experience which the project offers to the membership, the availability of personnel, the interest of the membership, and the likelihood of the bill's being enacted into law.

The Bureau does not accept projects involving research alone, but only those which include the drafting of specific legislation.

Drafting and Editing

A project, once accepted, is referred to a committee of the membership which does the actual research and drafting. Experienced third-year members act as committee chairmen, overseeing the work and guiding its progress. Work on projects begins shortly after the opening of the academic year, and project deadlines are established according to the requirements of the client and the complexity of the problems involved.

The completed draft and the explanatory memorandum which accompanies it are next submitted to critical review by student editors. Most of the projects are also submitted to a member of the Harvard Law School faculty for review and comment. When the staff is satisfied with the form and content of the completed draft and the covering memorandum, they are forwarded to the client for consideration. The Bureau tries to keep in close contact with clients to be certain that its drafts conform to clients' policy determinations. The procedure is flexible enough to allow adaptation to the particular needs of clients.

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A Federal Act to Resolve Conflicting State Claims to Abandoned Property

This act is proposed as a comprehensive solution to interstate escheat problems. There are two issues: protecting persons from double liability and determining the one state entitled to receive the abandoned property. The Supreme Court's decision in Western Union Telegraph Co. v. Pennsylvania *prevents multiple liability, but the only solution currently available for the second problem is to bring an original action in the Supreme Court. The proposed act allows suits to be brought in federal district courts and establishes a series of preferences among the states which claim the same abandoned property.*

THERE ARE two formidable problems involved in the present controversy over escheat of abandoned property: first, protecting persons from having to pay more than one state; and second, resolving disputes among the states both before and after payment has been made to one of them.

In *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71 (1961), the Supreme Court attempted to solve the first problem but did not deal with the second. The Court held that Pennsylvania could not enforce its demand for payment against Western Union so long as another state was claiming the same property. Thus an obligor – the entity under an obligation to make payment representing the value of abandoned property – does not have to pay any state until there has been an authoritative determination of the proper state. The claim of another state, in this case New York, is not affected by a decision of the Pennsylvania courts. Consequently, an answer to the second problem is left to case by case resolution by the Supreme Court in its original jurisdiction. The Court may not seek a comprehensive solution, but eschew broad principles and limit each decision to its particular facts.

Texas v. New Jersey, Original Action No. 13, is the first case to be brought before the Court under the *Western Union* decision. Florida has been given leave to intervene, 373 U.S. 948 (1963), and a Master's report has been filed and accepted.

This act attempts to provide a comprehensive answer to both problems in the form of a federal statute. A uniform reciprocal state statute was considered, but the fate of the excellent Uniform Disposition of Unclaimed Property Act, 9A *Uniform Laws Ann.*

253 (1955), which has been adopted by only twelve states, demonstrates the desirability of a solution which would not be forced to run the gamut of fifty state legislatures.

This act does not alter the basic right of any state to escheat abandoned property; its principal aim is to regulate the enforcement of those rights within the bounds of "due process" and orderly administration.

Section 102 of this act affords protection to the holder. Sections 103 and 104 determine priorities for choosing the state entitled to the abandoned property. Section 105 gives the federal district courts original jurisdiction to decide suits between states involving claims for payment of abandoned property.

The memorandum consists of a detailed exposition of the act, an analysis of the constitutional basis for federal escheat legislation, and a comparison of the priorities of this act with those under existing state law.

THE ACT

SECTION 101. *Definitions.*

As used in this Act:

(A) *Abandoned property.* "Abandoned property" means an interest in intangible personal property or an equitable interest in real property, which interest by the laws of any state is or is presumed to be abandoned or ownerless and whose disposition is not governed by any other law of the United States.

(B) *Obligor.* "Obligor" means any person who is trustee in case of a trust, or who is indebted to another, or who is under a duty to make payment to another, or who is a corporation or other business association of which any stock or other interest of ownership is abandoned property.

(C) *Owner.* "Owner" means the person last known to the obligor to be the depositor in the case of a deposit, the beneficiary in case of a trust, the creditor, claimant, or payee in case of other choses in action, or the person having a legal or equitable interest in abandoned property. In the event of a separation of legal and equitable interests, the person known to the obligor to have the equitable interest shall be considered to be the owner, and if there is no such person known to the obligor, then the person known to the obligor to have the legal interest shall be considered to be the owner.

(D) *Person.* "Person" includes any individual, business association, or trustee.

SECTION 102. *Conflicting State Claims.*

(A) If there are two or more states each of which by its laws may, upon the expiration of any time period or occurrence of any event specified by its laws, obtain custody or ownership of the same abandoned property, only that state which has the highest preference under sections 103 and 104 of this Act may enforce a demand for payment for the property to a state by the obligor of the property.

(B) Where an obligor has made full payment for abandoned property to one state which by its laws claimed that property, no other state may enforce against the obligor a demand for a second payment to a state for the same property.

SECTION 103. *Preference Among the States.*

States have preference in enforcing demands for payment for abandoned property in the following order:

(A) If the obligor is subject to the jurisdiction of the courts of that state, the state of the last address of the owner which is known to the obligor.

(B) If the obligor is a corporation other than a national bank, the state under whose laws the obligor is incorporated (or if the obligor is incorporated in more than one state, the state in which the obligor has its principal office), or if the obligor is a national bank, the state in which the obligor has its principal place of business stated in its charter.

(C) If the obligor is not an individual, the state in which the obligor has its principal office. If the obligor is an individual, the state in which the obligor has its domicile.

SECTION 104. *Subsequent State Claims.*

(A) If the period after which property is declared or presumed to be abandoned or ownerless has expired under the laws of a state which at the time of expiration had the highest preference of any state then having laws under which it could then or in the future escheat or assume custody of the abandoned property, no other state may enforce a demand for payment for that property.

(B) If the period after which property is declared or presumed to be abandoned or ownerless has not expired under the laws of a state, another state having a higher preference under section 103 of this Act, which enacts a law under which it also claims then or in the future the abandoned property, shall have preference over the former state in enforcing a demand for payment for the abandoned property.

SECTION 105. *Adjudication of State Claims.*

(A) The district courts shall have original jurisdiction of any civil action asserting a claim for payment for abandoned property filed by one or more states against one or more other states, regardless of the amount involved, which by their laws claim payment for the same abandoned property or which have obtained payment for that property from its obligor.

(B) Such an action may be brought in the district court of any district located within any of the defendant states.

(C) The court shall have power to issue its process for all such defendant states; which process shall be returnable at such time as the court or a judge thereof shall determine and shall be addressed to and served on the governor or attorney general of such states and shall be served by the United States marshals for any of the districts located within the defendant states.

(D) The court, without a jury, shall hear the cause and determine, according to the provisions of sections 103 and 104 of this Act, which state is lawfully entitled to receive the property. The court may order one state to pay, without interest, an amount representing the property to another state, or declare which state may demand payment from the obligor, or enter any other necessary or appropriate order.

(E) Final judgments or orders rendered by the court of appeals may be reviewed by the Supreme Court by appeal by any of the parties.

(F) Findings of fact and conclusions of law made by state courts in escheat proceedings are not binding on a state which is not a party thereto, in the determination of suits brought in federal courts under this Act.

(G) No suit may be brought under this Act more than twenty (20) years after the abandoned property has been paid by its obligor to a state or states.

SECTION 106. *Reports.*

Nothing in this Act limits the power of the states to require obligors to make reports to the states concerning abandoned property of which they are or have been the obligors.

SECTION 107. *Severability.*

If any provision of this Act or the application thereof to any state, person, or circumstances is held invalid, the invalidity shall not affect other provisions or applications of this Act which can be given effect

without the invalid provision or application, and to this end the provisions of this Act are severable.

MEMORANDUM

I. Explanation of Proposed Act.

Section 101. *Definitions.*

(A) "Abandoned property" is defined in the section as a "right to receive payment of any debt or of any legal or equitable interest in intangible personal property or an equitable interest in real property . . . ." This is intended to cover all intangible property; *e.g.*, choses in action, bank deposits, corporate dividends, utility service deposits, insurance proceeds, payments of trust income, and beneficial ownership of real estate. The property is viewed as being an unclaimed and unpaid obligation for which someone has a right to demand payment. This definition utilizes the laws of the individual states to determine when property is abandoned and is therefore subject to the provisions of this act.

Section 101(A) prevents conflict with other federal statutes regulating the disposition of unclaimed property. See 13 Stat. 99 (1864), 12 U.S.C. § 194 (1958) (national bank liquidations), *Roth v. Delano,* 338 U.S. 226 (1949); 70 Stat. 785 (1956), 11 U.S.C. § 106 (1958) (bankruptcy); 72 Stat. 1259, 38 U.S.C. § 5220 (1958) (right to property of veteran who died without heirs while in a federal institution). This act covers only that intangible property not covered by any other federal act.

(B) The term "obligor" expresses what is meant by the term "holder" in section 101(d) of the Uniform Disposition of Unclaimed Property Act, 9A *Uniform Laws Ann.* 254 (1955) (hereafter cited as Uniform Act). "Obligor" is more consonant with the nature of intangible property, since an intangible cannot be "held." The obligor is viewed as an entity which has a duty to make a payment. Thus the obligor of unclaimed life insurance proceeds is the insurance company. The obligation of a corporation to deliver abandoned stock is covered by this act. This definition will include state and federal courts and officers, but it is believed that little conflict exists concerning them.

(C) The term "owner" is defined in relation to the knowledge of the obligor. This precludes states from claiming through differ-

ent possible owners. This definition draws upon the definition of owner in section 1(f) of the Uniform Act and includes the specific examples of a depositor, beneficiary, creditor, claimant, payee, and the general situation of a person having a legal or equitable interest in abandoned property. In the event of a division of legal and equitable ownership, the equitable owner is preferred, but only if he is known to the obligor. This is in keeping with the objective of establishing one definite owner. This provision is intended to cover the common situation where dividends are payable to a broker holding stock in his own name for the benefit of a third party.

(D) "Person" is inclusively defined. "Business association" is intended to have no specific legal limitation and includes corporations, partnerships, and any other commercial entities.

SECTION 102. *Conflicting State Claims.*

This section is intended to protect obligors from demands for payment for abandoned property by more than one state. Subsection 102(A) is designed to cover the situation where states seek to enforce demands for payments against an obligor who has not made a voluntary payment to any state. This subsection provides that only that state which has the highest preference according to sections 103 and 104 of this act may enforce such a demand against the obligor. Thus a state which by its own laws may enforce such a demand but which is not the state with the highest preference is prohibited from enforcing its demand.

For this subsection, conflicting state claims exist even when the time period for the property to be abandoned has expired under only one state's laws, provided that there is another state then having laws by which payment will be demanded as soon as its time period expires. For example, if state A claims bank deposits which have been inactive for ten years and state B claims the same deposits after they have been inactive for twenty years, and the deposits have been inactive for eleven years, then state A may not demand payment by the bank unless A has a higher preference under section 103 than does B. Hence B is protected by this subsection even though its claim has not yet matured. States will, therefore, gain no advantage under this section by reducing their statutory time period. Section 104, discussed below, deals with the conflicts created when one state enacts laws claiming property, either before or after the time period of another state has elapsed.

The phrase "custody or ownership" is used to make it clear that this act applies whether states claim title to, or only protective custody of, abandoned property. In this memorandum, laws with either type of claim are referred to as escheat laws.

Subsection 102 (B) is designed to protect an obligor who voluntarily makes payment to any state which claims the property. If, subsequently, it turns out that another state has a higher preference than the one to which the payment was made, the obligor is protected from any demand made by the second state. That second state, having the higher preference in fact, must seek payment from the state to which the obligor made payment. This subsection allows an obligor to attempt to comply with the various state escheat laws without having to face the peril of being mistaken as to which state has the highest preference. The obligor is freed from having to defend against possible multiple suits for payment for the same property.

SECTION 103. *Preference Among the States.*

The preferences which are set forth in this section apply when a state seeks to enforce demands for payment either from a state, section 105(D), or from an obligor, section 102(A). The preferences, listed in descending order, are the same for both situations.

Subsection 103(A) provides for the highest preference. It is modeled on section 10 of the Uniform Act, and, like the Uniform Act, expresses the policy that the state in which the owner was last known to live has the most equitable claim to the abandoned property. It is more likely that the owner lives or has died in that state than in the state selected by other tests sometimes mentioned, such as the state of incorporation of the obligor. Had the owner claimed the property, much of its value would presumably have been spent in that state. Also, that state provided public services which benefited the owner.

A second requirement, that the obligor be subject to the judicial jurisdiction of that state, is imposed to reduce the administrative burden on both the obligor and the states. This requirement makes it easier for a state to enforce its claims, since it has the power to require the obligor to submit its records for examination. Jurisdiction avoids the undesirable situation of a state having to enforce its judgments in a foreign court. The burden on the obligor is minimized since it need make reports and payments to fewer states than would be true if either of the requirements stood alone.

Several writers have discussed the merits of conflicting state claims and have suggested that states having contacts with the obligor should be preferred over states having contacts with the owner. Lake, *Escheat, Federalism and State Boundaries,* 24 Ohio St. L.J. 322, 340–42 (1963); Note, *Escheat of Corporate Dividends,* 65 Harv. L. Rev. 1408, 1413–19 (1952). States related to the obligor can show present contacts, which other states cannot. Acceptance of this argument would result in directing payments for some types of property to only a handful of states.

It has been suggested that different tests be applied according to the type of property abandoned. In the case of life insurance proceeds, for example, it has been proposed that the state where the contract was made and where the insured then resided should prevail. Note, *Jurisdiction to Escheat Abandoned Life Insurance Policies,* 35 Va. L. Rev. 336, 342–48 (1949). The Uniform Act does give varying tests according to the type of property involved, although the state of the last known address of the owner will prevail over other states except for life insurance proceeds, utility service deposits and refunds, and funds "held by state officials." Sections 3, 4, and 8 of the Uniform Act.

This act gives the same preferences for all types of property, because the committee believed that the merits of state claims are about equal for all types of property. However, this section could readily be expanded to treat different types of property differently, without interfering with the harmony and operation of the other sections.

Subsection 103(B) lists a second preference for corporate obligors. This second preference is given to reduce further the possibility of an obligor gaining a "windfall" of continued use of another's funds. It expresses the policy that no ascertainable state other than that of the last known address of the owner has a more equitable claim to abandoned property. The test of 103(B) — the state of incorporation — is designed to present the least administrative inconvenience to the obligor.

Subsection 103(B) also applies where the obligor is incorporated as the *same entity* in more than one state. "Principal office" means the place where the obligor's records are kept and where the officers of the obligor normally discharge their duties. This test, like that of subsection (C) which applies only to non-corporate obligors, is designed mainly for the convenience of the obligor.

Since national banks are chartered by the United States and

not incorporated by a state, the principal place of business as specified in its charter is provided as the test. 44 Stat. 1229 (1927), 12 U.S.C. § 81 (1958). For example, the Bank of America, which has branch offices in New York City and Chicago, has its principal place of business only in California.

Subsection (C) applies to obligors other than corporations. "Principal office" has the same meaning as in subsection (B). Since most obligors are commercial entities with a "principal office," resort to the preference for an individual obligor will be rare. "Domicile" is that place where a man has his true, fixed, and permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning. *In re Stabile,* 348 Pa. 587, 36 A.2d 451 (1944).

If no state having a preference listed in section 103 has a statute claiming the property, another state claiming it under a different test may do so, so far as this act is concerned. However, the recent *Western Union* case prevents a taking if the obligor is threatened with multiple liability.

Under this section, it is conceded that a last minute change in either the status of the obligor or the last address of the owner known to the obligor can operate to affect which state has the highest preference to escheat. Thus if a state in which the last known address of the owner is found suddenly acquires jurisdiction over the obligor, that state will be able to escheat the property under a 103(A) preference, even if the nearly-matured right of another state, which until the change had the highest preference, is thereby cut off. Aside from the equitable and technical difficulties of drafting a provision to deal with such last minute changes of fact, it is highly unlikely that any of these changes will be connected with or caused by this act. There will be little motivation for obligors to change their situation so that one state and not another can claim the abandoned property.

These preferences — or tests — for claiming the property do not significantly conflict with existing state statutes. Part III compares these preferences with the tests used in present state laws.

SECTION 104. *Subsequent State Claims.*

This section, like section 103, applies to claims made by a state either against an obligor or against other states.

The operation of this section is illustrated by the following

example. An obligor is indebted for unpaid dividends declared seven years ago. The obligor is incorporated in Ames which has a custodial abandoned property statute providing for state custody of all intangible property held by Ames corporations which has been unclaimed for five years. No other state has any laws under which it might eventually enforce a demand for payment of these dividends. The last address of the owner known to the obligor is in Thayer, and the obligor has received no word from the owner for seven years. In fact, the owner has died without heirs in Thayer, which has jurisdiction over the obligor.

If at this point Thayer passes a statute under which it demands payment for this property, such statute would be ineffective. Although Thayer has a 103(A) preference which is higher than the 103(B) preference of Ames, since "the period after which property is declared or presumed to be abandoned or ownerless has expired under the laws of [Ames] which *at the time of expiration* had the highest preference of any state then having laws under which it could escheat . . . or assume custody of the abandoned property, no other state may enforce a demand for payment for that property." (Emphasis added.)

If, however, Ames has a ten year statutory period and Thayer now enacts a statute under which it will demand payment for the property when its time period for abandonment has elapsed, Thayer gains preference over Ames, which cannot now claim the property from either the obligor or from Thayer.

These provisions will further reduce multi-state disputes over the same property, since they fix a definite point after which no other state may claim the property. A potentially higher-preference state will be barred from making a claim even though it enacts a statute, as in the first example above, in order to provide security for earlier matured claims which may or may not have been collected.

This section might encourage some states to reduce the time periods after which property becomes subject to their demands, since by doing so they would protect themselves against potential future statutes of states with higher preference claims. Some check on this reduction of time periods might be provided by the fourteenth amendment's guarantee of due process to the owner. By the express wording of this section, states would gain no advantage by reducing their abandonment period over other states which already have escheat laws.

SECTION 105. *Adjudication of State Claims.*

This section is motivated by convenience for the states and in no way changes the operation of the other sections of this act. The constitutional basis of subsections (A) and (D) are discussed in Part II of this memorandum.

Subsection (A) specifically confers original jurisdiction on the federal district courts for suits between states over intangible property for which payment may be made or has already been made to a state by an obligor.

One of the main purposes of this section is to ameliorate the crowded Supreme Court calendar. It is also expected that suits in a district court will enable a state's claim to receive a speedier adjudication and will possibly provide a more convenient forum for the suit.

It should be noted that this act, while giving original jurisdiction to the district courts, in no way alters the original jurisdiction of the Supreme Court; it only opens up an alternative avenue for a state.

The grant of original jurisdiction is given to the district courts regardless of the amounts involved. The provision in subsection (A) to this effect is intended to avoid any possible contradiction between the grant of jurisdiction under this act and the general grant of jurisdiction found in 28 U.S.C. §§ 1331 and 1332.

Subsection (B) authorizes venue to be in any district within any defendant state. While this may put a burden on the plaintiff state to go to the defendant state, it seems less onerous than to require a state to defend itself in a district court located in the plaintiff state. Requiring the plaintiff state to sue in the defendant state may also serve to check the number of ill-founded claims brought into court. In addition, a plaintiff state may find it easier and less costly to sue a nearby state under this provision than to travel to Washington to bring suit in the Supreme Court.

Subsection (C) is patterned after Rule 6 of the Supreme Court Rules of Procedure, the rule which applies to service of process in actions brought in the Supreme Court. It is assumed that the general procedure for suits under this section will be governed by the Federal Rules of Civil Procedure which, according to Rule 1, "govern . . . all suits of a civil nature" brought in a federal district court. These rules have been given a broad and liberal construction, *Batelli v. Kagan & Gaines Co.*, 236 F.2d 167, 169

(9th Cir. 1956), and are applicable to suits by and against the United States, *Sherwood v. United States,* 112 F.2d 587, 590–91 (2d Cir. 1940).

The committee decided that no special provision for joinder of a state and an obligor as defendants should be provided. In most cases no problem will arise in joining them. If state A seeks a determination that an obligor must pay it and not state B the amount representing abandoned property, state A may sue state B in the district of state B where the obligor resides or, if the obligor is a corporation, where it is incorporated, licensed to do business, or is doing business, 28 U.S.C. § 1391, and thus join both as defendants. Where the obligor does not come within the terms of existing venue requirements, it was felt that the obligor should not be burdened by having to defend where it is not otherwise required to do so.

Subsection (D) requires the court hearing a suit between states claiming the same abandoned property to determine the rightful claimant "according to the provisions of sections 103 and 104 of this Act." The court is given the power to order a state to pay another state an amount, without penalty, representing the property or to declare which state may enforce a demand for payment from the obligor.

This provision provides a solution to the state versus state situation which is consistent with the state versus obligor treatment of section 102(A). It also provides the court with a comprehensive solution to the entire area of conflict — a solution which has been reached after considering the interests of all states rather than of only those which are parties to a particular lawsuit.

Subsection (E) provides for appeal from the court of appeals to the Supreme Court. The courts of appeals already have "jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291.

Unless the states are given the right to carry their appeals all the way to the Supreme Court, this section would probably be a nullity. No matter how convenient it might be to commence a suit in a district court, no state would be likely to do so unless there were a certainty that the Supreme Court would hear an appeal if one were desired on some of the issues involved.

Subsection (F) codifies and broadens part of the opinion in *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71

(1961), where it was held that the Pennsylvania courts could not cut off the claims of the state of New York. This subsection provides that in a similar situation findings of fact, as well as conclusions of law, will not bind any state that is not a party to the state court proceedings.

Subsection (G) sets a twenty year statute of limitations. This limitation provides finality and certainty as to which state has the right to abandoned property and allows both the state and the obligor to dispose of records more than twenty years old.

It is assumed that any state with a time period for the abandonment of property which is longer than twenty years plus the least number of years provided for by another state having a claim to the property would reduce its time period so as not to lose its claim for such property. This possible inconvenience to some states is outweighed by the desirability of finality and convenience to the obligor and to the state which took payment for the property.

SECTION 106. *Reports.*

Section 106 specifically reserves to the states power to require obligors to make reports concerning any abandoned property. In this way a state can make a determination regarding its rights to payment and the advisability of claiming payment from another state. This section allows states to continue to obtain at least as much information from obligors as they may now obtain.

SECTION 107. *Severability.*

Section 107 is a standard severability clause modeled on section 28 of the Uniform Act and protects the entire act from the infirmity of any single section.

II. CONSTITUTIONAL BASES FOR THE ACT.

A. *Commerce Clause.*

Abandoned property such as corporate dividends, life insurance proceeds, and bank deposits is part of, or substantially affects commerce. Consequently, a federal act can be sustained by Article 1, § 8 of the Constitution — the commerce clause.

The Supreme Court has taken an expansive view of the power of Congress to legislate under the commerce clause.

> Commerce is interstate . . . when "it concerns more States than one." . . . [The power granted Congress] is the power to legislate

> concerning transactions which, reaching across state boundaries, affect the people of more states than one; — to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 551–52 (1944).

Congressional regulation of intangibles similar in nature to bank deposits and life insurance proceeds has frequently been sustained by the Court. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1 (1877) (transmitting information); *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938) (transmitting energy); *United States v. South-Eastern Underwriters Ass'n, supra* (issuing insurance).

The rationale of these decisions should extend to the subject of escheat, because the statute operates only when two or more states demand payment for the same property. Such claims are prima facie proof that the transactions involved "concern more states than one." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Furthermore, the inability of a single state to cope with the problem lends support to the existence of federal power. This act regulates the multi-state conflict by determining the priorities by which states can escheat such property and by determining the flow of funds between the states once payment has gone to one state.

Even if such a payment of itself were held not to constitute interstate commerce, Congress would not be precluded from acting. A provision of the Agricultural Adjustment Act which imposed a marketing penalty on wheat growers who had grown an excess quota of wheat for on-farm consumption was sustained as a valid exercise of congressional power. The Court reasoned that since the consumption of home-grown wheat was the most variable factor in the disappearance of the wheat crop from the market, such consumption affected interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). The logic of this holding carried to its extreme would arm Congress with a Damoclean sword insofar as Congress — under the commerce power — would be able to govern the production of goods even for the local markets on the grounds that such production overhangs the interstate market. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, 464 (1949). Thus the fact that particular goods will not enter into interstate com-

merce does not prevent congressional regulation through the commerce clause. The Oleomargarine Act of 1950, 64 Stat. 20, 21 U.S.C. § 347 (1958), provides a clear example: "Colored oleomargarine or colored margarine which is sold in the same State or Territory in which it is produced shall be subject in the same manner and to the same extent to the provisions of this Act *as if it had been introduced in interstate commerce.*" (Emphasis added.) Furthermore, the sums at issue are substantial. It has been estimated that the value of abandoned property in the United States "exceeds $15 billion and is growing at a rate of more than $1 billion a year." *The Wall Street Journal,* Jan. 22, 1962, p. 1, col. 1.

B. *Due Process Clause.*

The principle that due process prohibits two states from claiming the same abandoned property from an obligor was established in *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71 (1961). The state courts of Pennsylvania, acting under the state's escheat statute, rendered a judgment against Western Union for the amount of unclaimed funds held by the company. Pennsylvania claimed these funds because they arose out of money orders which were purchased within the state. New York, under its escheat statute, also claimed these funds, since Western Union was a New York corporation having its principal place of business within New York. Citing *Pennoyer v. Neff,* 95 U.S. 714 (1877), the Supreme Court held that the Pennsylvania judgment need not be given full faith and credit by New York, since New York was not subject to the jurisdiction of the Pennsylvania courts. Since several states asserted *in rem* jurisdiction over the same abandoned property, and having determined that a non-party state claimant would not be bound by the first judgment, the Court proceeded to discuss the rights of Western Union. The obligor, compelled under the law of Pennsylvania to make payment to that state, would have no assurance that it would not also be held liable in New York. This possibility of multiple liability violated Western Union's due process of law.

Section 102 of this act provides that the obligor need not pay more than once, codifying the *Western Union* decision. It then goes on to choose between conflicting state claims. The effect of the act is to enforce the due process clause under the power explicity given Congress in section 5 of the fourteenth amendment. The only requirement for such an act is that it be "appropriate."

Legislation meets this test if it is adapted to carry out the objects of the amendment. *Ex parte Virginia,* 100 U.S. 339, 345–46 (1879).

The fact that the Supreme Court by its decision in *Western Union* is already protecting the obligor does not prevent Congress from acting. The Court can decide only cases and controversies. A decision may come after long delay, and it may be limited in scope. *Texas v. New Jersey,* Original Action No. 13, has already been before the Court for two years. *Connecticut Mutual Life Ins. Co. v. Moore,* 333 U.S. 541 (1948), applied only to life insurance proceeds.

The protection afforded by the due process clause should not permit an obligor to receive a windfall of the unlimited use of the funds. The solution is to provide priorities between the states, a remedy now available only by an original action in the Supreme Court. *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, 79 (1961). By passing this act, Congress would adopt a solution already recognized as suitable by the Supreme Court — the use of priorities. It is thus appropriate legislation under the fourteenth amendment.

C. *Full Faith and Credit Clause.*

By this act Congress arguably prescribes the circumstances under which the escheat law of one state is to be given full faith and credit in another state. Article IV, § 1.

Congress has been reluctant to use this clause as a constitutional basis for legislation; the courts have rarely resorted to it; and this act has not been drafted to take full advantage of it. The Supreme Court has intimated in dictum that the extra-territorial effect of state statutes is subject to congressional legislation. *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n,* 306 U.S. 493, 502 (1939). A number of commentators have concluded that Congress has great untapped power under this clause. See, *e.g.,* Corwin, *The "Full Faith and Credit" Clause,* 72 U. Pa. L. Rev. 371 (1933).

D. *Original Jurisdiction.*

The Constitution gives the Supreme Court original jurisdiction in controversies between states, Article III, § 2. Such jurisdiction need not be exclusive: "[W]e are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction." *Ames v. Kansas,* 111 U.S. 449, 469 (1884).

Cases arising under this act would consist primarily of issues of fact as to the application of the priorities. Under these circumstances, since the Supreme Court rarely hears evidence, the Court would undoubtedly refer cases to a master or to a district court. The act directly gives concurrent jurisdiction to the federal trial courts. The Supreme Court has alluded to this solution ". . . and whether we might under some circumstances refer them [suits between states] to United States District Courts we need not now determine." *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, 79 (1961). Under the act a state could still bring suit in the Supreme Court, in which case the Court might elect to retain jurisdiction.

III. Comparison with Present State Law.

The preferences listed in section 103 do not significantly conflict in most cases with present state statutes. They should only occasionally disrupt present state practices and power to demand payment for abandoned property. They directly conflict with the Uniform Act only in regard to utility deposits and refunds. The following is a detailed comparison of section 103 of the proposed act with the present state statutes.

A. *Bank Deposits.*

Twenty-seven states presently claim, by a variety of tests, abandoned bank deposits. Fourteen states[1] use as their highest test section 10 of the Uniform Act:[2] holder subject to jurisdiction of state plus last known address of owner in state. This is the same test as in the highest preference, section 103(A), of this act.

Twelve of these states[3] use as their second test the test of section 2 of the Uniform Act: deposits made in state plus bank doing business in state. Since few banks have branches receiving deposits outside the state in which they are incorporated, this test will usually designate the same state which would be designated by the second preference, section 103(B) of this act: state in which bank is incorporated.

Various tests are used by other states. These will conflict with the first preference of this act for those depositors whose last known addresses were in states other than that in which the bank was incorporated and received the deposits. They usually, however, will point to the state given the second preference by this act. Three states[4] use the test: domicile of the bank. Six[5] use the

test: bank within the state. Four[6] use the test: bank doing business in the state, but at least two of them probably mean to cover only banks domiciled in the state. Two[7] do not specify a test. Arkansas[8] excludes banks from its statute. New York[9] uses the test: all banks organized under or subject to the laws of the state or of the United States.

B. *Life Insurance Policies.*

Twenty states have statutes expressly claiming abandoned life insurance proceeds. Nineteen of them[10] use the test of section 3 of the Uniform Act: insurance company engaged in business in state plus last known address of person entitled to funds in state. This test coincides with that of section 103(A) of this act. These states give no alternative test; this act does provide the alternative of state of incorporation, in order to avoid the possibility of a "windfall" to the insurer.

Arkansas and Louisiana[11] exclude life insurance companies from their escheat statutes. Section 103(A) of this act conflicts with the statute of only one state, New York, of those states having an explicit provision for life insurance. The New York statute, N.Y. Aband. Prop. Law §§ 103(d), 700, proposes the test: issued by a domestic corporation or by a foreign corporation authorized to do business in the state on the lives of residents of New York; the test has been somewhat narrowed by litigation[12] to require also that the policy be issued for delivery in New York.

C. *Corporation Dividends, Stock, and Bond Interest.*

Nineteen states explicitly claim corporate stock, dividends, and interest on bonds. Twelve of them[13] use as their first test one that is identical with that of section 103(A) and which is the conflict resolution test of section 10 of the Uniform Act: holder subject to jurisdiction of state plus last known address of owner in state. These twelve use as a secondary test one which is also the primary test of four states: corporation organized under the laws of the state.[14] This is the test of section 5 of the Uniform Act and is identical with the test of section 103(B) of this act. These eleven, plus Massachusetts, also use as an alternative test: corporation doing business in state plus last known address of owner in state. This is included in the preference of section 103(A) of this act.

Sections 103(A) and (B) conflict with the statutes of three states[15] which use the test: corporation doing business in the state. The statute of one state[16] does not specify a test. New York[17] uses

the test: owed to a resident by a domestic corporation or by a foreign corporation doing business in this state.

D. *Funds of Dissolved Business Associations.*

Eighteen states expressly claim abandoned funds of dissolved business associations. Twelve states use the tests of the Uniform Act which are identical with those of this act. Their first test is: holder subject to jurisdiction of state plus last known address of owner in state (section 10 of the Uniform Act). Their second test is that of section 6 of the Uniform Act: state of incorporation.[18] One state[19] uses only the test: state of incorporation. Two other states[20] use the test: corporation was doing business in the state. Wyoming[21] uses the test for state banks: place of business in state. North Carolina[22] uses as its test for dissolved national banks: funds due to a depositor or shareholder in the state. Hawaii[23] does not have an explicit test.

E. *Court-held Funds.*

No serious conflicts exist concerning court-held funds. Only three states[24] have a test – funds held by any United States officer or agency for a person whose last known address was in the state – which conflicts with that of other states. The other states[25] having statutes explicitly applying to court-held funds use the test: held by a court in the state.

F. *Funds Held by a Fiduciary.*

Thirteen states[26] of the sixteen having explicit provisions for fiduciary-held funds use the tests of the Uniform Act which are quite similar to those of this act.

Uniform Act	*This Act*
1. holder subject to jurisdiction of state plus last known address of owner in state (section 10).	1. identical, section 103(A).
2. fiduciary's domicile, *or* corporate fiduciary doing business in state plus last address of owner in state, *or* held in state by any person (these from section 7).	2. corporate obligor's domicile, section 103(B), *or* obligor's principal office in state, section 103(C), *or* individual obligor's domicile, section 103(C).

New York[27] uses the test: owed to a resident by a fiduciary doing business in the state. Louisiana[28] excludes certain trusts from its statute. Only the test of Pennsylvania[29] presents much potential conflict: any dry trust held by any trustee.

G. *Utility Deposits or Rate Refunds.*

The tests of the proposed act do conflict with the statutes of states having explicit provisions for utility service deposits or rate refunds. Ten states[30] have adopted section 4 of the Uniform Act which has one test: utility doing business in state, and deposits made for services to be performed in state or refunds made for services performed in state. The statute of Kentucky, Ky. Rev. Stat. § 393.080 (1962), is not explicit on deposits but covers refunds for services rendered in the state. The statutes of two states[31] are not explicit as to a test.

In practice the funds would usually go to the same state under either the Uniform Act or this act, since the last known address of the owner would usually be in the state where the services were performed or to be performed. The administrative burden on the utility company imposed by the Uniform Act might be slightly less, however, since the company would make payments to a smaller number of states.

Another distinction between this act and the Uniform Act is that this act adds a second test: corporate domicile. Use of an alternative was rejected for the Uniform Act, 9A Uniform Laws Ann. 259, on the grounds that it would cause administrative inconvenience to the state of incorporation, cause inconvenience to customers seeking to reclaim property, and that the state of incorporation has no equitable right to the funds. However, the committee decided that there is no real distinction between these funds and others for which the Uniform Act did provide an alternative test. If these arguments seem convincing, however, a special provision could be added to this act, modeled after the provision of the Uniform Act.

H. *Miscellaneous.*

A number of states have a general test for all abandoned property, or have a general provision in addition to those for specific types of property. Thirteen states[32] use the tests of the Uniform Act: first, holder subject to jurisdiction of state plus owner in state (section 10); second, property held or owing in state (section 9). Texas[33] uses a strongly conflicting general test: any property held

within state, or last known address of owner in state regardless of where property is located. However, Texas has also enacted section 10 of the Uniform Act,[34] and therefore would defer to the preference of 103(A) of this act. Some states[35] have broad statutes not giving any explicit test. Some states[36] have broad statutes claiming any property located in the state. Nearly all states have statutes claiming the property of persons dying intestate and without heirs, many[37] expressly limited to property located in the state.

NOTES FOR PART III

1. Ariz. Rev. Stat. Ann. § 44–360 (1956); Cal. Civ. Proc. Code § 1509 (Supp. 1963); Conn. Gen. Stat. Rev. § 3–73a (Supp. 1962) (section phrased: address of owner in other state plus property subject to escheat by other state); Fla. Stat. Ann. § 717.11 (Supp. 1962); Idaho Code Ann. § 14–510 (Supp. 1963); Ill. Ann. Stat. ch. 141, § 110 (Smith-Hurd Supp. 1963); Ky. Rev. Stat. § 393.092 (1962); Mont. Rev. Codes Ann. § 67–2210 (Supp. 1963); N.M. Stat. Ann. § 22–22–11 (Supp. 1963); Ore. Rev. Stat. § 98.346 (Supp. 1963); Tex. Rev. Civ. Stat. Ann. art. 3272a, § 10 (Supp. 1962); Utah Code Ann. § 78–44–10 (Supp. 1963); Va. Code Ann. § 55–210.11 (Supp. 1962); Wash. Rev. Code § 63.28.160 (1961). Michigan has a similar provision; it does not claim property whose owner is in another state when the bank is required to make report to that other state. Mich. Stat. Ann. § 26.1053(6) (Supp. 1963).

2. Section 10 does not assert a basis for the enacting state to claim property but does provide for a test which if met by another state allows that other state to gain property rather than the enacting state. Thus a "super" preference is created. Section 10 also requires that the other state have a reciprocal provision in its statute.

3. Ariz. Rev. State. Ann. § 44–352 (1956); Cal. Civ. Proc. Code § 1502 (Supp. 1963); Conn. Gen. Stat. Rev. § 3–57a (Supp. 1962); Fla. Stat. Ann. § 717.03 (Supp. 1962) (does not explicitly require bank to be engaged in business in state, § 717.02); Idaho Code Ann. § 14–502 (Supp. 1963); Ill. Ann. Stat. ch. 141, § 102 (Smith-Hurd Supp. 1963); Mont. Rev. Codes Ann. § 67–2202 (Supp. 1963); N.M. Stat. Ann. § 22–22–3 (Supp. 1963); Ore. Rev. Stat. § 98.306 (Supp. 1963); Utah Code Ann. § 78–44–2 (Supp. 1963); Va. Code Ann. § 55–210.3 (Supp. 1962); Wash. Rev. Code § 63.28.080 (1961). Kentucky did not enact this test. Texas has a strongly conflicting second test: any bank receiving and holding deposits in state, or last known address of depositor in state regardless of where bank is located. Tex. Rev. Civ. Stat. Ann. art. 3272b(1)(a) (Supp. 1963).

4. Del. Code Ann. tit. 12, §§ 1130, 1170 (Supp. 1962); N.J. Rev. Stat. §§ 17:9–18, 17:9–22 (1963) (state banks); N.D. Cent. Code. §§ 6–08–24.1, 6–01–02(3) (Supp. 1963).

5. Ky. Rev. Stat. § 393.060 (1962); Me. Rev. Stat. Ann. ch. 59, §§ 1–O, 19–G (Supp. 1963) (apparent test for national banks and savings banks); Mass. Gen. Laws Ann. ch. 200A, § 3 (1958) (place of business in state or

authorized to do business in state); Minn. Stat. Ann. §§ 48.521(2), 48.522 (1946); R.I. Gen. Laws Ann. § 19–11–9 (Supp. 1963) (located in and doing business in state); Wis. Stat. § 220.25 (1961).

6. Hawaii Rev. Laws § 235–11 (1955) (test is probably domicile as the section purports to apply to all deposits of the bank); Mich. Stat. Ann. § 26.1053(5)(a), (d), § 26.1053(6) (Supp. 1963) (general test covering all corporations, whether or not engaged in banking; foreign corporations are excluded unless the last known address of the owner is in the state or unless the physical situs of the property is in the state); N.J. Rev. Stat. §§ 17:9–18, 17:9–22 (1963) (for national banks and probably intended to parallel the test of domicile used for state banks); Pa. Stat. Ann. tit. 27, § 283 (1958) (from § 241 read in: doing business in state).

7. La. Rev. Stat. Ann. § 6:164 (1951) (appears to apply only to state banks examined by Louisiana bank commissioner); N.C. Gen. Stat. § 116–24 (1960).

8. Ark. Stat. Ann. § 50–603(c) (Supp. 1961).

9. N.Y. Aband. Prop. Law §§ 103(c), 300 (perhaps intended to apply only to banks domiciled in New York).

10. Ariz. Rev. Stat. Ann. § 44–353 (1956); Cal. Civ. Proc. Code § 1503 (Supp. 1963); Conn. Gen. Stat. Rev. § 3–58a (Supp. 1963); Del. Code Ann. tit. 12, § 1180 (Supp. 1962); Fla. Stat. Ann. § 717.04 (Supp. 1962); Idaho Code Ann. § 14–503 (Supp. 1963); Ill. Ann. Stat. ch. 141, § 103 (Smith-Hurd Supp. 1963); Ky. Rev. Stat. § 393.062 (1962); Mass. Gen. Laws Ann. ch. 175, § 149A (1958); Mich. Stat. Ann. § 26.1053(5)(b) (Supp. 1963); Mont. Rev. Codes Ann. § 67–2203 (Supp. 1963); N.J. Rev. Stat. § 17:34–49 (1963) (domestic company, or foreign company authorized to do business in state); N.M. Stat. Ann. § 22–22–4 (Supp. 1963); N.C. Gen. Stat. § 116–23.1 (1960); Ore. Rev. Stat. § 98.312 (Supp. 1963); Pa. Stat. Ann. tit. 27, § 462 (1958); Utah Code Ann. § 78–44–3 (Supp. 1963); Va. Code Ann. § 55–210.4 (Supp. 1962); Wash. Rev. Code § 63.28.090 (1961).

11. Ark. Stat. Ann. § 50–603(c) (Supp. 1961); La. Rev. Stat. Ann. § 9:151 (Supp. 1963).

12. *Connecticut Mutual Life Ins. Co. v. Moore*, 297 N.Y. 1, 74 N.E.2d 24 (1947), *aff'd*, 333 U.S. 541 (1948).

13. See note 1, all but Illinois and Texas.

14. Ariz. Rev. Stat. Ann. § 44–355 (1956); Cal. Civ. Proc. Code § 1504 (Supp. 1963); Conn. Gen. Stat. Rev. § 3–59a (Supp. 1962); Fla. Stat. Ann. § 717.06 (Supp. 1962); Idaho Code Ann. § 14–505 (Supp. 1963); Ky. Rev. Stat. § 393.064 (1962); Mont. Rev. Codes Ann. § 67–2205 (Supp. 1963); N.M. Stat. Ann. § 22–22–6 (Supp. 1963); Ore. Rev. Stat. § 98.322 (Supp. 1963); Utah Code Ann. § 78–44–5 (Supp. 1963); Va. Code Ann. § 55–210.6 (Supp. 1963); Wash. Rev. Code § 63.28.110 (1961); — use this as a second test. Hawaii Rev. Laws § 235–21 (1955) (corporate stock); Mass. Gen. Laws Ann. ch. 200A, § 5 (Supp. 1963) (or foreign corporation doing business in state if owed to resident of state); N.J. Rev. Stat. § 2A:37–30 (1952); N.C. Gen. Stat. § 116–25 (1960); — use this as the primary test.

15. Mich. Stat. Ann. § 26.1053(5) (d) (Supp. 1963) (but does not claim from foreign corporation unless owner is in state or unless physical situs of

property is in state, § 26.1053(6)); N.J. Rev. Stat. § 2A:37–30 (1952) (as an alternative to domicile); Pa. Stat. Ann. tit. 27, §§ 241, 282 (1958).

16. Hawaii Rev. Laws § 235–15 (1955) (unclaimed dividends; probably intended to apply only to domestic corporations in order to parallel § 235–21 for corporate stock).

17. N.Y. Aband. Prop. Law §§ 500, 501.

18. For references to section 10 of the Uniform Act see note 1. The citations to section 6 of the Uniform Act are:
Ariz. Rev. Stat. Ann. § 44–356 (1956); Cal. Civ. Proc. Code § 1505 (Supp. 1963); Conn. Gen. Stat. Rev. § 3–60a (Supp. 1963); Fla. Stat. Ann. § 717.07 (Supp. 1962); Idaho Code Ann. § 14–506 (Supp. 1963); Ill. Ann. Stat. ch. 141, § 106 (Smith-Hurd Supp. 1963); Mont. Rev. Code Ann. § 67–2206 (Supp. 1963); N.M. Stat. Ann. § 22–22–7 (Supp. 1963); Ore. Rev. Stat. § 98.326 (Supp. 1963); Utah Code Ann. § 78–44–6 (Supp. 1963); Va. Code Ann. § 55–210.7 (Supp. 1962); Wash. Rev. Code § 63.28.120 (1961).

19. Mass. Gen. Laws Ann. ch. 200A, § 6A (Supp. 1963).

20. Mich. Stat. Ann. §26.1053(12) (Supp. 1961) (but takes funds of foreign corporation only if situs of funds is in state, § 26.1053(6)); Mo. Ann. Stat. §470.010 (Supp. 1963).

21. Wyo. Stat. Ann. §§ 13–1, 13–166 (1957).

22. N.C. Gen. Stat. § 116–25 (1960).

23. Hawaii Rev. Laws § 235–14 (Supp. 1961).

24. Cal. Civ. Proc. Code § 1604 (Supp. 1963); Ky. Rev. Stat. § 393.068 (1962); N.M. Stat. Ann. § 22–22–9.1 (Supp. 1963).

25. Statutes applying only to state courts: Ariz. Rev. Stat. Ann. § 44–358 (1956); Cal. Civ. Proc. Code § 1507 (Supp. 1963), but see note 24; Conn. Gen. Stat. Rev. § 3–62a (Supp. 1963); Del. Code Ann. tit. 12, § 1160 (Supp. 1962); Hawaii Rev. Laws § 235–10 (Supp. 1961); Ill. Ann. Stat. ch. 141, § 108 (Smith-Hurd Supp. 1963); Ky. Rev. Stat. § 393.100 (1962); Mont. Rev. Codes Ann. § 67–2208 (Supp. 1963); N.M. Stat. Ann. § 22–22–9 (Supp. 1963); N.C. Gen. Stat. § 116–25 (1960); Ore. Rev. Stat. § 98.336 (Supp. 1963); Wash. Rev. Code § 63.28.140 (1961).

Statutes applying to both state and federal courts: Ark. Stat. Ann. § 50–603(d) (Supp. 1963); Fla. Stat. Ann. §§ 716.02, 717.09 (Supp. 1962); Idaho Code Ann. § 14–508 (Supp. 1963); Mass. Gen. Laws Ann. ch. 200A, § 6 (1958); Mich. Stat. Ann. § 26.1053(11) (1953); Mo. Ann. Stat. § 470.270 (Supp. 1963); N.Y. Aband. Prop. Law §§ 600, 1200; Pa. Stat. Ann. tit. 27, § 282 (1958); Utah Code Ann. § 78–44–8 (Supp. 1963); Va. Code Ann. § 55–210.9 (Supp. 1962).

Statutes unclear, but probably applying only to state courts: Minn. Stat. Ann. § 345.08 (Supp. 1963); N.D. Cent. Code § 54–01–02.1 (1960).

26. See note 1 for section 10 citations. Section 7 of the Uniform Act: Ariz. Rev. Stat. Ann. § 44–357 (1956); Cal. Civ. Proc. Code § 1506 (Supp. 1963); Conn. Gen. Stat. Rev. §3–61a (Supp. 1963); Fla. Stat. Ann. § 717.08 (Supp. 1962); Idaho Code Ann. § 14–507 (Supp. 1963); Ill. Ann. Stat. ch. 141, § 107 (Smith-Hurd Supp. 1963) (does not apply to active express trusts, § 107a); Ky. Rev. Stat. § 393.066 (1962); Mont. Rev. Codes Ann. § 67–2207 (Supp. 1963); N.M. Stat. Ann. § 22–22–8 (Supp. 1963);

Ore. Rev. Stat. § 98.332 (Supp. 1963); Utah Code Ann. § 78–44–7 (Supp. 1963); Va. Code Ann. § 55–210.8 (Supp. 1962); Wash. Rev. Code § 63.28.130 (1961).

27. N.Y. Aband. Prop. Law §§ 500, 501. See also § 511 which has a similar test for brokers.

28. La. Rev. Stat. Ann. § 6:166 (1951).

29. Pa. Stat. Ann. tit. 27, § 282 (1958) (apparently for a corporate trustee; it must also be doing business in state, tit. 27, § 241).

30. Ariz. Rev. Stat. Ann. § 44–354 (1956); Fla. Stat. Ann. § 717.05 (Supp. 1962); Idaho Code Ann. § 14–504 (Supp. 1963); Ill. Ann. Stat. ch. 141, § 104 (Smith-Hurd Supp. 1963); Mont. Rev. Codes Ann. § 67–2204 (Supp. 1963); N.M. Stat. Ann. § 22–22–5 (Supp. 1963); Ore. Rev. Stat. § 98.316 (Supp. 1963); Utah Code Ann. § 78–44–4 (Supp. 1963); Va. Code Ann. § 55–210.5 (Supp. 1962); Wash. Rev. Code § 63.28.100 (1961).

31. N.Y. Aband. Prop. Law § 400; N.C. Gen. Stat. § 116–25 (1960). Massachusetts also has a provision, with no explicit test, which would cover deposits but not refunds. Mass. Gen. Laws Ann., ch. 200A, § 4 (1958).

32. See note 1 for section 10 citations. Section 9: Ariz. Rev. Stat. Ann. § 44–359 (1956); Cal. Civ. Proc. Code § 1508 (Supp. 1963); Conn. Gen. Stat. Rev. § 3–64a (Supp. 1963); Fla. Stat. Ann. § 717.10 (Supp. 1962); Idaho Code Ann. § 14–509 (Supp. 1963); Ill. Ann. Stat. ch. 141, § 109 (Smith-Hurd Supp. 1963); Ky. Rev. Stat. §393.090 (1962); Mont. Rev. Codes Ann. § 67–2209 (Supp. 1963); N.M. Stat. Ann. § 22–22–10 (Supp. 1963); Ore. Rev. Stat. § 98.342 (Supp. 1963); Utah Code Ann. § 78–44–9 (Supp. 1963); Va. Code Ann. § 55–210–10 (Supp. 1962); Wash. Rev. Code § 63.28.150 (1961).

33. Tex. Rev. Civ. Stat. Ann. art. 3272a, § 1(b) (Supp. 1963).

34. Tex. Rev. Civ. Stat. Ann. art. 3272a, § 10 (Supp. 1963).

35. See, *e.g.*, La. Rev. Stat. Ann. § 9:151 (Supp. 1963); N.C. Gen. Stat. § 116–23 (1960); Pa. Stat. Ann. tit. 27, § 282 (1958).

36. See, *e.g.*, Ark. Stat. Ann. § 50–604 (Supp. 1963); N.J. Rev. Stat. § 2A:37–13 (1952); N.D. Cent. Code § 54–01–02 (1960).

37. See, *e.g.*, Del. Code Ann. tit. 12, § 1101 (Supp. 1962); Ky. Rev. Stat. § 393.020 (1962); Mont. Rev. Codes Ann. § 67–102 (1962); N.J. Rev. Stat. § 2A:37–12 (1952); N.C. Gen. Stat. § 116–21 (1960); Ohio Rev. Code Ann. § 2105.06(J) (Page Supp. 1963); Wyo. Stat. Ann. § 9–687 (1957).

An Act to Establish Rules for Legislative Investigating Committees

The widespread use of legislative investigations has emphasized their usefulness in informing legislative bodies, but has also emphasized the damage which they may cause to individuals. This act attempts to reconcile these interests by setting forth rules of procedure to govern legislative investigating committees and by granting certain rights to interested parties. The act was drafted for South Carolina, but most of its provisions are as applicable to one state as another.

THE ACT

PART I. SHORT TITLE AND DEFINITIONS.

SECTION 101. *Short Title.*

This Act may be called "Rules for Legislative Investigations."

SECTION 102. *Definitions.*

(A) *Investigating Committee.* An "investigating committee" is any committee or subcommittee of the legislature engaged in obtaining testimony from witnesses. No investigating committee shall consist of less than three members.

(B) *Testimony.* "Testimony" is any form of evidence.

(C) *Quorum.* A "quorum" is a majority of the members of an investigating committee.

(D) *Members.* The "members" of an investigating committee are the legislators or other persons appointed as members to serve on it.

(E) *Interested Party.* An "interested party" is any person who learns that he has been specifically identified in testimony taken before the investigating committee, and who reasonably believes that his reputation has been adversely affected by such testimony.

(F) *Executive Session.* An "executive session" is a session at which only members of the investigating committee, staff personnel, the witness, and his counsel shall be present.

(G) *Chairman.* The "chairman" is the presiding officer of the committee. He may be either the permanent chairman or another member designated on a temporary basis in the absence of the permanent chairman.

PART II. RULES GOVERNING CREATION OF INVESTIGATING COMMITTEES.

SECTION 201. *Who May Create.*

Only the General Assembly, the Senate, or the House of Representatives may create investigating committees.

SECTION 202. *Authorization.*

The authorization for an investigating committee shall clearly state the subject matter and scope of the investigation.

PART III. RULES OF PROCEDURE FOR INVESTIGATING COMMITTEES.

SECTION 301. *Investigating Committee Action.*

All committee action designated as Investigating Committee Action shall be by majority vote, a quorum of the members being present. Any committee function not specifically mentioned in these rules may be designated as Investigating Committee Action, either (with respect to all investigating committees) by the General Assembly, the Senate, or the House of Representatives, or (with respect to any individual committee) by the committee itself.

SECTION 302. *Decision as to the Order of an Investigation.*

The decision as to the order of investigation of a subject authorized under section 202 shall be Investigating Committee Action.

SECTION 303. *Decision to Issue Subpoena.*

The decision to issue any subpoena shall be Investigating Committee Action.

SECTION 304. *Notice to Witnesses.*

A reasonable time before they are to testify, all prospective witnesses shall be notified of the subject matter and scope of the investigation and shall be given a copy of these and any other relevant rules. When subpoenas are served, the information required by this section shall be presented at the time of service.

SECTION 305. *Notice to Members.*

Notice of hearings and of contemplated Investigating Committee Action shall be given to all available members of the committee at least twenty-four hours before action is taken.

SECTION 306. *Who Shall Take Testimony.*

Taking of testimony shall be by the investigating committee's counsel, or other staff personnel, or the members of the committee. A quorum shall be present.

SECTION 307. *How Testimony Is Taken.*

Unless otherwise decided by Investigating Committee Action, all testimony shall be taken in open session. However, if any witness so requests, his testimony will be taken in executive session unless otherwise decided by Investigating Committee Action.

SECTION 308. *Records.*

A complete record shall be kept of all Investigating Committee Action, including a transcript of all testimony taken.

SECTION 309. *Release of Testimony.*

(A) The decision to release testimony and the decision as to the form and manner in which testimony shall be released shall be Investigating Committee Action. However, no testimony shall be released without first affording the witness who gave such testimony, or his counsel, an opportunity to object to the proposed release.

(1) The witness or his counsel may, by such objection, require that testimony given in open session, if it is released at all, be released in the form of a full, consecutive transcript.

(2) The witness or his counsel may, by such objection, require that testimony given in executive session not be released in any form or manner whatsoever.

(B) The witness or his counsel, upon payment of the cost of preparation, shall be given a transcript of any testimony taken. However, the witness or his counsel shall not be entitled to obtain a transcript of the executive session testimony of other witnesses. The release of a transcript under this subsection is not the release of testimony within the meaning of subsection (A).

SECTION 310. *Decision to Issue Contempt Citation.*

The decision to issue a contempt citation shall be Investigating Committee Action.

PART IV. RULES GOVERNING RIGHTS OF WITNESSES.

SECTION 401. *Counsel.*

The witness may have counsel present to advise him at all times. The witness or his counsel may, during the time the witness is giving testimony, object to any Investigating Committee Action detrimental to the witness's interests and is entitled to have a ruling by the chairman on any such objection.

SECTION 402. *Cross-examination.*

The witness or his counsel may cross-examine adverse witnesses.

However, the chairman of the investigating committee may reasonably limit the right of cross-examination. The chairman's ruling is final unless otherwise decided by Investigating Committee Action.

SECTION 403. *Pertinency of Requested Testimony.*

The witness or his counsel may challenge any request for his testimony as not pertinent to the subject matter and scope of the investigation, in which case the relation believed to exist between the request and the subject matter and scope of the investigation shall be explained.

SECTION 404. *Who Can Compel Testimony.*

The committee chairman may direct compliance with any request for testimony to which objection has been made. However, the chairman's direction may be overruled by Investigating Committee Action.

SECTION 405. *Television, Films, Radio.*

Any decision to televise, film or broadcast testimony shall be Investigating Committee Action. If the witness or his counsel objects to a decision to televise, film or broadcast his testimony, his testimony shall not be televised, filmed or broadcast.

SECTION 406. *Statements and Form of Answers.*

The witness or his counsel may insert in the record sworn, written statements of reasonable length relevant to the subject matter and scope of the investigation. In giving testimony, the witness may explain his answers briefly.

SECTION 407. *Privileges.*

The witness shall be given the benefit of any privilege which he could have claimed in court as a party to a civil action; provided that the committee chairman may direct compliance with any request for testimony to which claim of privilege has been made. However, the chairman's direction may be overruled by Investigating Committee Action.

SECTION 408. *Rights of Interested Parties.*

Any interested party may request an opportunity to appear before the investigating committee. The decision on this request shall be Investigating Committee Action. If such request is granted, the interested party shall appear before the committee as a witness.

PART V. SANCTIONS FOR ENFORCEMENT OF RULES.

SECTION 501. *Legislative Responsibility.*

The General Assembly, the Senate, and the House of Representatives have primary responsibility for insuring adherence to these rules.

SECTION 502. *Erroneously Compelled Testimony.*

Testimony compelled to be given over a proper claim of privilege, or testimony released in violation of section 309, or any evidence obtained as a result of such improper procedure is not admissible in any subsequent criminal proceeding.

SECTION 503. *Contempt.*

No witness shall be punished for contempt of an investigating committee unless the court finds:

(A) that the conduct of the witness amounted to contempt,

(B) that the requirements of sections 304, 310, 404 and 405 have been complied with, and

(C) that in the case of:

(1) a citation for failure to comply with a subpoena, the requirements of section 303 have been complied with;

(2) a citation for failure to testify in response to a request for his testimony challenged as not pertinent to the subject matter and scope of the investigation, the requirements of sections 202 and 403 have been complied with and the request was pertinent as explained;

(3) a citation for failure to testify in response to a request for his testimony on grounds of privilege, the requirements of section 407 have been complied with.

SECTION 504. *Saving Clause.*

A decision by a witness to avail himself of any protection or remedy afforded by any provision of these rules shall not constitute a waiver by him of the right to avail himself of any other protection or remedy.

PART VI. SEPARABILITY.

SECTION 601. *Separability.*

If any provision of these rules or the application thereof to any person or circumstance is held invalid, the remainder of these rules and the application of such provision to other persons or circumstances shall not be affected thereby.

MEMORANDUM

Any code of procedure guiding legislative investigation must strike a balance between providing the necessary data on which to base legislation and protecting witnesses from unfair treatment. Because of the paucity of decisional law and available sanctions

in this area, and because of the need to give adequate direction with respect to these often conflicting concerns, a statute seems to be the best method of regulating investigations. Such a statute should provide a flexible but uniform procedure and protect against dilatory tactics by witnesses without infringing their rights.

Although procedures must, to a large extent, be generalized and give considerable discretion to committees, the General Assembly must be alert to violation of the procedures. To this end section 501 places the primary responsibility of assuring compliance on the legislature.

Part I. Short Title and Definitions.

Section 102. *Definitions.*

(A) The definition of "investigating committee" extends the protection afforded by these sections to all instances where witnesses are before the legislative committees. Any hearing of witnesses can become inquisitorial unless each witness is given some safeguards. Some commentators have suggested that the procedural rules for legislative investigations should attempt to define different types of investigations, in which different types of restraints would be required. However, a legislative investigation is, by its very nature, so flexible, even from day to day and from moment to moment, that it is impossible to categorize it as "in aid of legislation" or "informational" or "inquisitorial," for purposes of determining what rights the witnesses shall have. If witnesses are to be protected at all — and that would seem to be the main reason for adopting a set of rules like these — they must be able to claim their protection whenever they feel that they have become "defendants" in the eyes of the committee. Even a witness who appears before the investigators voluntarily may occasionally find himself in that predicament. Therefore, the definition of "investigating committee" has the effect of making the safeguards permitted by the rules available to any witness who testifies or produces evidence before any legislative committee for any purpose.

(B) "Testimony" covers both parol and written evidence. There seems to be no rational distinction between the two types of evidence, for the purpose of any of these rules.

(C) Read in conjunction with section 301, this section requires that a majority of the members of a committee be present before any Investigating Committee Action can take place. The purpose

of defining "quorum" thus is to prevent any one member or minority from exercising important committee powers without being subject to the surveillance of the majority. Of course, if only 51% of the committee is present, and if only 51% of those present vote in favor of a given activity, the decision of the committee will be based on the wishes of a minority of its membership. (This cannot happen on a committee of minimal size, where two out of the three members would have to vote for any action taken.) However, a majority of the members will at least know what action is being taken.

(D) This section provides a definition of the word "members" as used in sections 102(C), 102(F), 301, 305 and 306. The section is intended to make clear that the listed sections exclude from the membership of a committee all staff personnel or other persons who may be parties to or present at an investigation.

(E) This section requires that an "interested party" reasonably believe that his reputation has been adversely affected. Without this requirement, persons could delay the progress of the committee unnecessarily. Since a person does not become an "interested party" until he learns that he has been identified, the mere release of a transcript is insufficient to make a person identified in that testimony an "interested party." If a witness shows his transcript to a person who was identified in the document and that person reasonably believes his reputation has been adversely affected, he then becomes an "interested party." (It should be noted that notification in this manner might provide a basis for a contempt citation of the witness.) Identification may be by name or by such references as a person's title.

(F) This section defines "executive session" by specifying those persons who alone shall be present. The purpose of an executive session is to encourage the witnesses to speak freely and to restrict the publication of testimony. To this end, section 102(F) limits executive sessions to those parties whose presence is essential.

Part II. Rules Governing Creation of Investigating Committees.

Part II is designed to bring a maximum of legislative judgment to bear on each proposal for an investigation and to force a legislative resolution of the major policy issues involved.

It is contemplated that committees will sometimes have to go

back to the legislature to receive authorization for new lines of investigation or elaboration of its present authorization.

SECTION 201. *Who May Create.*

Section 201 does not permit committees to authorize investigations themselves, but committees may suggest what investigations are needed.

SECTION 202. *Authorization.*

The authorization for an investigating committee must meet the constitutional standard of *Watkins v. United States,* 354 U.S. 178, 209 (1957) in that it must have "the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense." Moreover, witness's challenges as to the pertinency of questions under section 403 are to be tested against the terms of the committee's authorization. *Sweezey v. New Hampshire,* 354 U.S. 234 (1957). The authorization, therefore, must be specific enough to support the general lines of questioning which it is contemplated the investigators will use in examining witnesses.

A reasonably specific authorization not only protects the witnesses before the committee, but also aids the committee in deciding what the lawmakers expect of it, and serves to inform the interested public as to the committee's activities and responsibilities.

PART III. RULES OF PROCEDURE FOR INVESTIGATING COMMITTEES.

SECTION 301. *Investigating Committee Action.*

The purpose of this rule is to insure committee democracy in investigatory proceedings. Since section 102(A) provides that no investigating committee shall consist of less than three members, no Investigating Committee Action can be taken without at least two members present. This approach is in line with recent recommendations of legislators and lawyers. The Senate's Select Committee to Study Censure Charges has recommended a rule that at least two committee members be present when witnesses are questioned, unless their presence is waived by the witnesses or by a majority of the committee. S. Rep. No. 2508, 83d Cong., 2d Sess. 67 (1954). Senator Morse and the late Senator Lehman suggested that a majority of the committee be present in order to take testimony. 100 Cong. Rec. 2208 (1954). New York amended its Legis-

lative Law to require the presence of two committee members at the taking of testimony. N.Y. Legis. Law 60–61. The American Bar Association's Special Committee on Individual Rights as Affected by National Security, in its *Report On Congressional Investigations* 27–28 (1954), also recommends that at least two committee members be present at hearings.

The reason for the second sentence of this section is to negate any implication that all other matters *must* be left to be included or excluded on an individual committee basis.

SECTION 304. *Notice to Witnesses.*

"A reasonable time" will depend on the location of the witness, his occupation or official position and how busy it keeps him, the character and amount of information he is expected to bring with him, and in appropriate cases, the amount of time he will need to secure and consult with legal counsel.

Notifying the witness of the topic and scope of the hearing will enable him to gather the information which the committee desires, and if the occasion warrants it, to secure counsel. He must be given a copy of all relevant rules, including these, so that he will know how the hearing is to be conducted. Of course, any statute or rule passed in accordance with section 301, expanding the range of functions included in the category of Investigating Committee Action, would be a "relevant rule" within the meaning of this section.

SECTION 305. *Notice to Members.*

This rule specifies twenty-four hours as the minimum notice consistent with the legislators' busy schedules. In section 304, it was not feasible to set a definite time limit because a committee often will not know, from one day to the next, what witnesses it is going to need to call. There is no such difficulty in notifying committee members of a meeting. The identity of legislators serving on a committee is known well in advance, and it is desirable that all members attend each meeting. Since legislators have many duties other than their obligations to a particular investigating committee, twenty-four hours' notice is probably the minimum consistent with adequate preparation.

SECTION 306. *Who Shall Take Testimony.*

Since the General Assembly, Senate, and House of Representatives have primary responsibility for overseeing these rules (sec-

tion 501), the interrogation of witnesses is to be conducted by someone responsible to the legislative branch.

The quorum requirement not only prevents one-man inquisitions being carried out in the name of the General Assembly, but also assures that the questioning will cover all matters which the majority of the members consider relevant to the committee's objectives.

SECTION 307. *How Testimony Is Taken.*

This section provides that testimony generally will be taken in open session. It is felt that abusive tactics are less likely if testimony is given in sessions the public may attend. However, there will be times when testimony should not be publicly disclosed. When the witness feels that his testimony is of such a character, he is permitted to request that his testimony be taken in executive session. (See section 102(F) for the definition of "executive session.") However, this section still leaves to the committee the ultimate power to deny the witness's request.

The privacy of an executive session should induce the witness to speak more freely. Thus, this rule and section 309(A)(2) should encourage the witness to be more cooperative in giving the committee the information it needs.

SECTION 309. *Release of Testimony.*

This section covers all situations in which testimony may be released by the investigating committee. Its purpose is to provide for control by the committee over these releases, while affording witnesses some protection in the release of the records.

Originally, release is determined by a majority of a quorum of the committee. However, the witness whose testimony is scheduled for release must be given an opportunity to object. The power he has over the release depends upon the type of testimony involved. If it is testimony in open session, the witness may, under subsection (A)(1) force the committee to release only a full, consecutive transcript. This gives a witness the opportunity to prevent such evils as quotation out of context, distortion by a paraphrase, and innuendo without basis in the full text. Of course, this problem will arise only if the committee wishes to release testimony in an abbreviated form, since the witness has no power to prevent the full release of his own open session testimony. If the committee does not wish to release the testimony in full and the witness has objected to an abbreviated release, it need not

release the testimony at all. According to subsection (A)(2), the witness may prevent the release of executive session testimony. While the committee cannot be forced to go into executive session, once it does so, greater security is afforded to the witness.

It should be noted that, under subsection (B), the witness may obtain a transcript of any testimony taken in open session, but not of the executive session testimony of other witnesses.

Subsection (B) also distinguishes the release of a transcript from the release of testimony as provided for in subsection (A) so as to prevent the application of that subsection to the release of transcripts.

SECTION 310. *Decision to Issue Contempt Citation.*

South Carolina is one of the few states which allows legislative committees to issue contempt citations. Usually, citations must be issued by the parent body, upon referral of the case by the committee. However, in *Ex parte Parker*, 74 S.C. 466, 55 S.E. 122 (1906), the court held that a committee could be delegated the right to issue contempt citations. In order to protect the witness and insure that his behavior is viewed by the committee as being in contempt, any decision to cite a witness for contempt must be by Investigating Committee Action. Of course, if the committee has no power to issue citations, this provision is unnecessary. However, in such a case, the decision to refer the case to the parent body should be Investigating Committee Action.

PART IV. RULES GOVERNING RIGHTS OF WITNESSES.

SECTION 401. *Counsel.*

This section provides for the right to counsel. The premise for this right lies in the adversary proceedings, and the legislative investigation has many of the characteristics of such a proceeding. Almost all recent investigation by the national and state legislatures allows the witness to appear with counsel. See Comment, *Congressional Investigation and the Privileges of Confidential Communications*, 45 Calif. L. Rev. 347 (1957). Further, the growth of statutory and case law in this area makes it imperative that the witness have legal advice available to him since the witness no longer can protect himself. Implicit in this discussion is the view that, for the purposes of section 401, counsel serves in an advisory capacity for the witness. His presence is not a carte blanche for dilatory tactics, and the chairman can exercise control

over counsel so that the counsel's role is limited to advising his client and making proper objections and motions before the committee and conducting cross-examinations.

The phrase "detrimental to the witness's interest" in the second sentence is intended to refer to an area of concern somewhat broader than "reputation," as used in section 102(E). Objections made under this clause will not hinder the operations of the committee, since they can be ruled upon immediately by the chairman or the majority of the committee. Further, these rulings are not subject to interlocutory appeals but serve only to preserve bases for later appeals. It should be noted that the range of the witness's option is limited since an objection may be made only when the witness is testifying. Thus committee action not related to that witness's own interests, or actions taken by the committee at times other than those specified, cannot serve as the basis for an objection under section 401.

SECTION 402. *Cross-examination.*

Section 402 makes a middle ground on the right of cross-examination, providing for the existence of such a right but placing its exercise under firm committee control. The chairman has the right to limit reasonably the scope and manner of cross-examination. For example, he may require that the cross-examination be by written interrogatories or the imposition of time limits on testimony. His rulings are final "unless otherwise decided." This phrase refers to a decision by Investigating Committee Action. (See section 301.) Under this section, neither the witness nor his counsel has the right to object to the ruling of the chairman. Thus the only persons who can object to the ruling are the other members of the committee, who can force a decision on the matter to be by Investigating Committee Action. Since this statute posits what is, in effect, an adversary proceeding, the right to reasonable cross-examination is essential.

SECTIONS 403 and 404. *Pertinency of Requested Testimony and Who Can Compel Testimony.*

These rules are supported by the opinion of Mr. Chief Justice Warren in *Watkins v. United States,* 354 U.S. 178, 214 (1957):

> Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner

in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.

If both the witness and the questioner are trying in good faith to promote the objectives of the investigation, the procedure of these rules will either persuade the witness to withdraw his challenge, or will induce the questioner to withdraw his question.

If anyone is attempting to abuse the committee's proceedings, section 404 provides the basis for quick decision, or can provide the foundation for a contempt citation and for judicial review. The committee can control any possible abuse by the chairman through Investigating Committee Action.

It is expected that the authorization of the investigation under section 202, will be the criterion by which the pertinency of questions will be judged, since it will give a clear statement of the investigation's scope and subject.

SECTION 405. *Television, Films, Radio.*

The control of the use of mass media communications in this area has been the subject of much debate, and the issues are clearly defined in Snee, *One for the Money, Two for the Show: The Case Against Televising Congressional Hearings,* 42 Geo. L.J. 1 (1953). Section 405 is the result of an examination of this debate and is in keeping with the basic policy of this proposed statute. The validity of legislative investigation lies in the role of the investigation in efficiently gathering information for use in legislative decision-making. For this reason, the executive session has been developed. It should be noted that section 405 has no relation to the executive session since that session is closed to the public. All possible provisions should be made so that the witness can testify candidly and completely. Therefore, the choice under this section is left to the witness and his decision is final. Of course, the problem is not presented unless the committee decides to televise, film or broadcast the hearing. Further, since the original decision is in the hands of the committee, it may use this power to correct the converse evil of a witness who wishes to use the hearings as a soapbox. In effect, then, both the witness and the committee have the right to decide that the hearing shall *not* be televised, filmed or broadcast, but neither alone has the right to decide that such media shall be used.

SECTION 406. *Statements and Form of Answers.*

Section 406 provides for three situations and its effect is both expeditious and protective. (1) Provision for insertion of statements into the record *prior* to the taking of testimony will expedite committee work, since the statements will establish relevant facts, easily covered in such statements, thus eliminating the need for some questions during testimony. (2) Since the rule specifies no time limit for the insertion of statements, these statements may be given after the testimony in order to protect the witness by allowing him to amplify and explain testimony already given. Further, such statements will make recalls for further testimony less frequent. (3) The second sentence of the rule eliminates the requirement of a yes or no answer by an interrogator, thus protecting the witness from unfairness, as well as expediting committee business in cases where the explanation eliminates the need for unnecessary questions. As with all these rules, section 406 provides an optional right in the committee to reject or cut off irrelevant or unreasonably long statements.

SECTION 407. *Privileges.*

Only if the witness is "put on trial" before a legislative committee will he have any need of the privileges which this rule provides. For example, an agricultural expert, testifying as to matters within his expert competence, will ordinarily have no reason to invoke the privilege against self-incrimination or the attorney-client privilege. However, where questions seek to expose aspects of a witness's private life, he should have the same protections when testifying in the legislative chambers as in a court of law.

Recognition of the witness's privileges will not handicap legislative fact-finding to the extent that it sometimes restricts judicial fact-finding. Legislative committees are not subject to the rules of evidence. Furthermore, the "legislative facts" which they seek — *i.e.*, facts as to how the law can best deal with a general problem — are less dependent on the testimony of any particular witness. Comment, *Congressional Investigations and the Privileges of Confidential Communications*, 45 Calif. L. Rev. 347, 356 (1957).

In re Hearings before Joint Legislative Committee (*Ex parte Johnson*), 187 S.C. 1, 196 S.E. 164 (1938), indicates that the privilege against self-incrimination applies to legislative hearings. Therefore, the portion of this section dealing with that privilege is only a codification of the common law of South Carolina.

The privileges of confidential communications (clergyman-parishioner, doctor-patient, husband-wife, and attorney-client) are commonly observed, as a matter of unwritten custom, by congressional committees. S. Rep. No. 2, 84th Cong., 1st Sess. 27–28 (1955). However, a dictum in *Ex parte Parker*, 74 S.C. 466, 472, 55 S.E. 122, 125 (1906), suggests that no South Carolina legislative committee is bound, as a matter of common law or constitutional law, to honor the privileges.

The value of some of the traditional privileges has been attacked by reputable authority. McCormick, *Handbook of the Law of Evidence*, 165–66 (1954); A.B.A. Section on Judicial Administration, *Report of Committee on Improvements in the Law of Evidence*, Part III, § 12 (1938). New privileges have been advocated. Comment, *Congressional Investigations and the Privileges of Confidential Communications*, 45 Calif. L. Rev. 347, 356 (1957). Some of the newer occupations and professions are asking that their clients be given the same protection as those afforded to people who consult lawyers, physicians, and clergymen. McCormick, *op. cit. supra.* It is, therefore, foreseeable that the status of privileges may change in South Carolina in the coming years. Thus, no definite privilege has been specified since there might come a time when the "legislative defendant" would, as a result of changes in the privilege rules, receive treatment unequal to that accorded a judicial defendant. If there is any valid policy behind these privileges, they should be given to persons "on trial" before legislative committees, as well as before courts. In either type of tribunal, the risk to reputation and to the preservation and effectiveness of confidential relationships is equally great. However, a "legislative defendant" is entitled to expect neither more nor less than equal treatment.

SECTION 408. *Rights of Interested Parties.*

This section permits an "interested party" (as defined in section 102(E)) to appear before the committee. The rules maintain the balance of keeping the committee unimpeded by unfounded requests while giving the committee an opportunity to take testimony from persons who may have a legitimate contribution to make in those cases where such a person has not been subpoenaed.

An "interested party's" request to become a witness is passed upon by committee action, and the decision is final. If the committee decides not to grant the request, the "interested party" cannot become a witness.

This apparently harsh treatment of a person who reasonably believes his reputation has been adversely affected is not as serious a lack of control over the ex parte statement as may first appear. First, under ordinary common law principles, his reputation is in no way affected until there has been a publication of the allegedly adverse comment. Thus, a person identified in unreleased testimony has not been legally harmed. Second, the committee which decides his request should respect a reasonable request; committee action of this type should carry with it the ordinary presumption of legality. Third, if in fact a person is an "interested party," it is more than likely that the committee will wish to hear from him. Thus, these sections strike a balance between allowing appearances of those who will advance the investigation and preventing appearances of those who will hamper the investigation; no man has the right to "equal time" for every instance in which his name is mentioned.

Part V. Sanctions for Enforcement of Rules.

Section 501. *Legislative Responsibility.*

The primary means for the positive enforcement of this statute is legislative self-control. Of course, the judiciary's power of judicial review remains, as well.

Section 502. *Erroneously Compelled Testimony.*

This section was designed to discourage the practice of wrongfully compelling or releasing testimony which the law allows a witness to withhold. The overzealous investigator is confronted with the prospect that the witness may go unpunished for his wrongs. A similar approach was adopted in Rule 232 of the American Law Institute's *Model Code of Evidence* (1942):

> Evidence of a statement or other disclosure made by a person is inadmissible against him if the judge finds that he had and claimed a privilege to refuse to make the disclosure but was nevertheless required to make it.

However, the provision in the Model Code does not protect the witness from the "fruit of the poisonous tree" — *i.e.*, from evidence which the investigators would not have discovered without the help of the improperly-compelled testimony. Section 502 adds that protection. On the other hand, the protection afforded by this section is not as broad as S.C. Code § 9–214, which deals with testi-

mony erroneously compelled by the Permanent Reorganization Commission of South Carolina. Although the latter has not yet been judicially interpreted, it appears to grant immunity not only to the illegal evidence itself and to the "fruit of the poisonous tree," but also to evidence independently discovered, so long as it relates to a transaction about which the witness has wrongfully been compelled to testify.

Section 502 is not merely an "immunity bath" for the witness who gives the wrongfully compelled testimony; it disqualifies the evidence itself, so that it may not be used against anyone. This section applies only with respect to criminal proceedings.

SECTION 503. *Contempt.*

Section 501 gives the legislature the primary responsibility for insuring the observance of the rules; an automatic protection for testimony improperly compelled over a claim of privilege is provided by section 502; in addition, section 504 saves all pre-existing remedies or protections to all persons. Most court contests over the observance or violation of rules for legislative investigating committees occur in contempt trials. Section 503 provides several defenses to a witness cited for contempt, in addition to the already existing defenses (preserved by subsection (A)). The additional defenses are divided into two classes.

The defenses in the first group (subsection (B)) are those which are considered to relate to the conduct of the entire investigatory process. To convict for contempt, the committee must have complied with section 304 (providing for notice to witnesses in advance of their testimony); section 310 (providing that decisions to cite witnesses for contempt must be by Investigating Committee Action); section 401 (providing the witness's right to counsel); section 404 (providing that the testimony be compelled by the chairman, or the committee, so that a decision to force compliance with any request will be made with the request and challenge to it specifically in mind); and section 405 (providing the witness with a right to prevent needless publicity of his testimony). The rationale for attributing such importance to the five provisions is that any violation of these rules would tend to infect the entire investigatory proceeding to the detriment of the witness.

The defenses in the second group (subsection (C)) protect the witness in more limited situations. Subsection (C)(1) protects the witness from being convicted of contempt for failure to respond to a request, if he properly claimed a privilege with

respect to that request. The most important portion of the rule is subsection (C)(2): if the witness fails to comply with a request for testimony, he will not be subject to conviction for contempt for such refusal unless three specific findings are made by the court (in addition to those required by subsections (A) and (B)). First, the court must find that the authorization of the committee clearly stated the subject matter and scope of the investigation (section 202). Second, the court must find that the pertinency of the requested testimony was explained to the witness if he challenged the request (section 403). Third, the court must find that the request was pertinent to the authorized subject matter and scope, in the manner stated.

The burden of proof as to all of these findings is upon the committee. However, the burden should not be difficult to discharge.

Violation of some of the rules will *not* make contempt convictions impossible; *e.g.*, if the committee members are not properly notified of proposed Investigating Committee Action under section 305, the rules will be violated but no witness may complain of this in a contempt trial. Thus, section 503 does not unduly hamper investigations; moreover, it is to be expected that a witness who feels that he has a modicum of protection of his statutory rights will be more willing to testify.

SECTION 504. *Saving Clause.*

This is a standard saving clause which protects the right of the witness to use any remedies existing at law that are not made available expressly in this statute. Presumably, other available remedies would include court actions in tort against committee personnel and publishers, not cloaked with legislative immunity, for defamation or for interference with advantageous relations.

Cumulative Index to Bureau Drafts
1952–1963

Index

Presented below is a partial listing of projects completed by the Harvard Student Legislative Research Bureau. With the client's permission the Bureau will send a copy of the completed project upon request at cost. Cost consists of duplicating expenses, at present ten cents per page unless otherwise noted. The number of pages given includes both the statute and accompanying memorandum, if any. Address requests to the Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138, and indicate by number the project requested. The first two figures of the project number indicate the year in which the project was completed. This Index will be supplemented annually in the *Harvard Journal on Legislation.*

ADVISORY OPINIONS

5610. An act providing that, upon request of the Governor or the Attorney General of Idaho, the state supreme court shall give an advisory opinion on the constitutionality of state statutes. 5 pages.

ANTI-TRUST

6102. An act to enable the Minnesota Attorney General to issue civil investigative demands pursuant to his investigations of alleged anti-trust violations. The act is patterned after the Model State Anti-Trust Law set forth in 39 Tex. L. Rev. 717 (1961). 26 pages.

BANKING

5614. A uniform state act authorizing foreign banking corporations to make loans without being considered as doing business in the state. The act requires that such banks file certain information with the Secretary of State and appoint him agent for service of process. 16 pages.

CAMPAIGN CONTRIBUTIONS

6106. An act for Massachusetts to require disclosure and reporting of political campaign contributions and expenditures, and to prevent various corrupt practices therein. The act requires disclosure to an appropriate official of the candidate's campaign treasurer and the amounts and sources of all contributors and expenses incurred in the campaign. These reports are open to public inspection and summaries of them are sent to appropriate newspapers. Knowing violation of the act is a misdemeanor punishable by fine and/or imprisonment. 23 pages.

CIVIL DEFENSE

5412. An act creating a Metropolitan Washington Civil Defense Area which includes the District of Columbia and adjacent counties of Virginia and Maryland. The act provides for the establishment of a National Capitol Civil Defense Council; outlines the powers and duties of the Council; provides for personnel training and benefits; and authorizes compensation for property taken under authority of the act. 21 pages.

CIVIL RIGHTS

5604. Amendments to the Federal Civil Rights Bill requiring exhaustion of state administrative and judicial remedies before recourse can be had to the federal courts. 10 pages.

the privilege of proceeding in forma pauperis to aliens and corporations. 11 pages.

Judges

5504. An amendment to the Massachusetts statute authorizing district court judges to sit in the superior court on misdemeanor and motor vehicle tort cases. The judges exercise all the powers and perform all the duties of the superior court justices. 5 pages.

6108. Separate drafts of legislation relating to the probate courts, district courts, utilization of retired judges and retirement of judges in Massachusetts. These are drafts specifically designed for the judicial system of Massachusetts. A separate 7 page memorandum is also available presenting the argument for full-time judges. 37 pages.

6315. An act amending the Massachusetts statutes to permit probate judges, on the request of the chief justice of the superior court and with the approval of the administrative committee of the probate court, to sit in the superior court on law cases. 6 pages.

Jurors

5602. An act to revise the procedure for selecting jurors in Massachusetts. The act establishes a Jury Commissioner in each county of over 500,000 to be selected by the Supreme Judicial Court. It places the responsibility for selecting veniremen on the Commissioner and establishes procedures to be followed by the Commissioner. 12 pages.

Notice

5903. Amendment to the California statutes requiring notice of hearing be given in a manner consistent with *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950). 66 pages.

Removal of Actions

5506. An act restricting appeal and removal in motor vehicle tort cases in Massachusetts to relieve superior court congestion. The act provides that such cases brought in the district court are removable only under certain conditions, *e.g.*, if the amount in controversy is likely to exceed $2,000. 4 pages.

Service of Process

6205. An act to provide for out-of-state service of process in actions brought in the courts of Alaska. Two alternative drafts are provided: (1) provides for out-of-state service upon natural persons and leaves service upon corporations incorporated in jurisdictions other than Alaska to various provision

mined unfit to proceed to trial by reason of insanity. Unless the prosecution establishes that the preponderance of the evidence will sustain the charge, the accused is committed to a civil, instead of criminal, institution. 6 pages.

Sentencing and Parole

5403. An act providing for the comprehensive reorganization of the Massachusetts penal system. The act embodies a change from the punitive to the rehabilitative theory of criminal justice and establishes an adult correctional authority for the coordination of sentencing, rehabilitation and discharge procedures. The act transfers the power to sentence convicted felons from the trial judge to the authority, and substitutes the authority for the parole board and the advisory board of pardon. 40 pages.

Sex Offenders

5704. An act establishing procedures in Massachusetts for treatment of persons convicted of sex crimes. The act provides for psychiatric treatment until final release upon cure. 22 pages.

Transfer of Prisoners

6313. An amendment to the Massachusetts statute granting the Commissioner of Correction authority to transfer female prisoners to houses of correction without the approval of the county sheriff. 2 pages.

DEBT POOLING

5701. A memorandum surveying state laws on debt pooling. It considers the possible consequences of budget planning and the effect of the Federal Bankruptcy Act on any proposed legislation. 16 pages.

DOUBLE JEOPARDY

5914. An act to eliminate double jeopardy in Massachusetts. The act is designed to prevent prosecution for an offense against the commonwealth after a conviction or acquittal on the merits for an offense against the United States, or against another state or territory thereof, when the two offenses were committed in the same course of conduct and are of the same character. The act was engendered by the decision in *Bartkus v. Illinois,* 359 U.S. 121 (1959). 16 pages.

EDUCATION

Correspondence Schools

6208. An act to provide for the licensing of correspondence

Proportional Representation

5315. An act providing for the election by proportional representation of members of the city council and school board in certain Massachusetts cities. The act provides that upon petition by 10% of the registered voters, cities which had previously elected certain officials on the basis of proportional representation may restore that procedure. 3 pages.

ESTOPPEL BY DEED

5625. Two alternative acts modifying the doctrine of estoppel by deed in Massachusetts. 11 pages.

EVIDENCE

Medical

6006. Amendments to the Massachusetts statutes relating to medical records. The amendments: (1) permit leaving medical records with the clerk of a criminal court, (2) provide for the establishment of a definite period for keeping records in Massachusetts, (3) provide that records regarding venereal disease and mental disorder may be filed in a confidential manner with the court clerk, but shall be inspected only following prior examination by the judge, and (4) provide that communications made during psychiatrist-patient interviews shall not be admitted as evidence. 26 pages.

FIREARMS

6003. An act to regulate the possession and use of firearms in South Carolina. The act prohibits the sale or purchase of pistols, except by registered collectors; prohibits the possession of pistols, except by such persons as law enforcement officials, sportsmen complying with state regulations, and people possessing a permit; and provides for a fine and forfeiture of the pistol. The act also prohibits certain classes of persons, such as drug addicts and minors, from acquiring or possessing any firearms under any circumstances and provides criminal penalties for this provision. 10 pages.

FOREIGN TRADE AGREEMENTS

5804. A technical revision and codification of the trade provisions of United States Code, Title 19, §§ 160–71, 1303, 1336, 1338, 1351–54. The federal statutes that provide for tariff flexibility, regardless of whether the law would tend to stimulate or retard foreign commerce, have been included. 38 pages.

5913. An amendment to the United States Code, Title 19,

§§ 1351–67, clarifying and reorganizing these provisions which relate to reciprocal trade agreements. No substantive changes are made. 19 pages.

HEALTH AND SAFETY

Municipal Regulations

5717. An act to consolidate existing fire, health and other regulations for Boston. The act establishes a central agency and a special housing court, provides for inspection and the filing of complaints, and creates a loan fund which may be used to facilitate improvements necessary to comply with regulations. 10 pages.

5907. Regulations for the Massachusetts Department of Public Health setting forth detailed safety and sanitary provisions for the construction and maintenance of bathing places, bath houses and commercial pools in the commonwealth. 30 pages.

Reorganization of the State Department

5204. Comprehensive amendments to the Massachusetts statutes providing for the reorganization of the Department of Public Health. The reorganization scheme establishes the offices of a Commissioner and a Deputy Commissioner and details their functions, powers and qualifications. It also provides for the reallocation of funds and the transfer of functions from other departments to the Department of Public Health. 25 pages.

HOUSING

5408. A bill amending a proposed Massachusetts rent control act. The amendment provides a procedure for the initiation of a rent board investigation and for public hearings upon the petition of either landlords or tenants requesting changes in maximum rents. 3 pages.

IMMIGRATION AND DEPORTATION

5501. Proposed amendments to the Immigration and Nationality Act which would place restrictions upon the deportation of aliens who had resided in the United States for prescribed periods of time. 12 pages.

INCORPORATION

Professional Groups and Individuals

6110. An act to authorize incorporation of professional groups and individuals in Massachusetts. The act authorizes

the incorporation of physicians, surgeons, chiropodists, physical therapists, dentists, veterinarians, optometrists, dispensing opticians, public accountants and attorneys-at-law who are registered under various statutes or under the rules of the Supreme Judicial Court. The statute supplements and does not restrict the present incorporation law of the commonwealth. Published in XLVII *Mass. L.Q.* 405 (1962). 24 pages.

INTERSTATE COMMERCE

5626. An amendment providing enforcement provisions for a federal act which puts interstate shipments of prepared poultry and its products under the jurisdiction and control of the United States. 8 pages.

5816. A federal act to promote free interstate commerce in fluid milk. The act sets uniform sanitary standards which are administered by state officials and is designed to remove obstructions caused by a multiplicity of state and municipal health regulations. 21 pages.

JUVENILE DELINQUENCY

5603. An act for New Hampshire imposing responsibility upon parents who either intentionally or negligently contribute toward the delinquency of their children. The act provides criminal penalties, fines, and probation of the parents. 8 pages.

5808. A comprehensive juvenile delinquency law for the state of Maine. It provides for jurisdiction of the juvenile courts, the conduct of juvenile proceedings, adjudications and dispositions in juvenile cases, appeals, and the reception and care of juveniles in state institutions. 52 pages.

LABOR

Children

5608. A comprehensive child labor code for the District of Columbia. The code sets a minimum age, defines the types of employment for which children of various ages are eligible, establishes necessary administrative procedures, and covers the relationship between child labor and compulsory school attendance. 41 pages.

Public Employees

5813. An act for New Hampshire to compel arbitration between county, municipal, and school district employees and whoever determines their wages. The act is to resolve the problem created by *Manchester v. Manchester Teachers Guild,*

provides for the suspension or revocation of licenses upon conviction. 7 pages.

MENTAL HEALTH AND INSANITY

5807. An amendment to the Massachusetts statutes to provide for the placement and supervision of mentally deficient persons in private institutions and homes. 7 pages.

5911. An act to amend the procedure for commitment or transfer of mentally ill persons to the State Hospital at Bridgewater, Massachusetts. The amendment clarifies the existing statutes and allows the Commissioner of Mental Health to transfer persons with subsequent, instead of advance, notice to the nearest relative under certain criteria. 14 pages.

MOTOR VEHICLES

5502. An act to reward persons who safely operate motor vehicles. The act adds a merit point system to the present Massachusetts system of charging demerit points for infractions of traffic safety regulations and for fault in causing property damage or personal injury. The Registrar of Motor Vehicles is to keep records of merits and demerits which are to be transmitted to the Commissioner of Insurance. The act provides that a driver with a consistently good record shall receive a discount on his compulsory automobile insurance premiums.

5801. An act to provide motor vehicle financial responsibility for Alaska. The act is set in the framework of the Uniform Vehicle Code and is partially based on Chapter 7 of the Vehicle Code. Major substantive changes include that a driver involved in an accident must obtain proof of financial responsibility instead of requiring such proof only upon an unsatisfied judgement, and granting the Commissioner discretion to remove the suspension of the license of a driver who has violated the financial responsibility provisions on a showing that the driver must earn his living by driving a motor vehicle. 19 pages.

PERPETUITIES

5627. An act to change the Vermont rules of perpetuities by authorizing a *cy pres* approach. 11 pages.

POSTMASTERS

5821. A federal act to provide for the merit appointments of postmasters. The bill presents two alternatives: (1) provides that the Postmaster General must submit to the President the

PUBLIC ASSISTANCE

5505. Several bills dealing with the administration of the Massachusetts public assistance program, which *inter alia:* grant the clerk of the district court power to summon the child of an aged person to determine the child's financial ability, grant the district courts jurisdiction in equity to enforce the liability of certain kindred for support of poor persons, extend workmen's compensation to employees of welfare districts, clarify the duty of the Department of Public Welfare to maintain all children in its custody; provide for reimbursement by the commonwealth for public welfare assistance to veterans, indemnify boards of public welfare for sums expended in certain welfare cases where the person aided is entitled to payment from other sources for the disability creating the need for relief and support. 15 pages.

6011. An act to establish for Rhode Island a medical assistance program for the aged which would qualify for federal funds under the amendments to the Social Security Act passed by Congress in 1960. The act provides for payment of all costs in excess of 250 dollars incurred in any one calendar year for any of twelve specified medical services to any person over sixty-five years of age who has an income less than a figure determined by four alternative methods. 14 pages.

PURCHASING

5810. An act amending current provisions relating to the use of American materials in public contracts. The draft contains four alternative amendments to the "Buy American Act," embodying varying degrees of flexibility in, and different procedures regulating, the use of foreign materials in work done under government contracts. 16 pages.

6112. An act for Washington to facilitate investigation, detection and prosecution of cases of graft and suppression of competitive public bidding. The act requires state officials and employees to report circumstances which reasonably indicate the existence of graft and suppression of competitive bidding for public contracts, requires persons submitting bids for public contracts to make certain relevant records available for inspection by the state auditor and attorney general, and provides the state a civil damage remedy for violations of the act. 15 pages.

RAILROADS

6005. A memorandum setting forth three alternative methods by which commuter railroads can receive financial assistance from the Commonwealth of Massachusetts and/or local

towns and cities thereof. Statutory provisions to enact each method are set forth and the advantages and disadvantages of each are discussed. The three methods are: (1) direct commonwealth subsidy to commuter railroads, (2) authorization of cities and towns to contract for commuter service, and (3) exemption of railroad operating property from local taxation with partial reimbursement by the commonwealth to the cities and towns affected. 24 pages.

SEARCH AND SEIZURE

Motor Vehicles

6010. An act to establish when and under what circumstances a law enforcement officer may search a vehicle without a search warrant in South Carolina. Search incident to arrest and search not incident to arrest have different standards. Seizure of certain articles are permitted. The act and memorandum have been reedited to conform to *Mapp v. Ohio*, 367 U.S. 643 (1961). Published 1 *Harv. J. Leg.* 51 (1964). 24 pages.

Search Warrant

6204. An amendment to the Massachusetts statutes to generalize the list of property or articles for which a search warrant may be issued. The amendment would authorize a search warrant for four categories of property and supplant the list of sixteen types of property. 11 pages.

SOVEREIGN IMMUNITY

5908. An act providing for the waiver of the sovereign immunity of the government of Guam in actions of contract or tort which do not arise from an exercise of discretion in making policy. The District Attorney of Guam is empowered to settle certain claims administratively and, if unsuccessful, to defend such suits in the District Court. 16 pages.

TAXATION

5312. Amendments to the Massachusetts statutes providing for a reduction in the dollar amount of the statutory exemption for liens on real estate owned by recipients of old age assistance benefits. 1 page.

5317. An act to convert the Massachusetts inheritance tax to an estate tax. The act is generally patterned after the existing Federal Estate Tax, but simplifies the more complex sections. It covers rates of tax, property and transfers affected, and the type and scope of deductions allowed. 43 pages.

5718. An act providing tax relief to the aged in New York by a refund or abatement of a portion of school tax. The act extends tax relief to both aged homeowners and rentpayers. The act outlines administrative steps to be taken in each instance and incorporates safeguards to prevent misapplication of the act. 18 pages.

TORT LIABILITY

Radioactive Materials

5702. An act for Massachusetts imposing tort liability on charitable institutions for personal injuries caused by use of radioactive materials. The memorandum considers problems involved in the definition of the term "radioactive materials" and discusses the advantages of administrative, instead of judicial, adjudication of the claims. 11 pages.

TRUSTS

5503. A model statute on the administration of charitable trusts. The statute creates a commission on charitable trusts, the primary duty of which is to bring before the appropriate courts, when desirable, schemes for the new application of charitable trust funds. The statute also requires that such trusts place information about their activities on public record. 30 pages.

5624. An act for Massachusetts dealing with the administration of trusts in the event of an emergency caused by atomic attack. The act provides for the appointment of emergency trustees and permits delegation of the administration of the trust, to be effective in time of atomic emergency. 15 pages.

UNFAIR TRADE PRACTICES

5912. Four amendments to the statutes of the state of Washington banning certain unfair trade practices: (1) discriminatory discounts between purchasers by dealers of automobile glass and by automobile repair shops, (2) agreements to supply at less than cost which obligate the user to purchase other goods exclusively from the supplier, (3) deceptive practices in the canned goods industry, and (4) selling as fresh produce agricultural products which have been frozen and thawed. Criminal sanctions and injunctive proceedings brought in the name of the state are provided. 41 pages.

Advertising

5910. An act to prohibit misleading, false or "bait" advertising in the state of Washington. Promulgation of an adver-

(3) an act making "open-end" mortgages an acceptable method of financing home repairs in "urban rehabilitation areas"; (4) an act extending the powers of Redevelopment Corporations by permitting the purchase of real estate in a deteriorating area from the local housing authority or agency. 29 pages.

6309. An act clarifying the terms of state financial assistance to urban renewal and redevelopment projects in Massachusetts. Administrative discretion in determining the amount of a state grant is replaced by a provision that the state grant must be one-fourth of the federal grant. The formula also provides that the amount of the state grant will be increased by the existence of non-cash local grants-in-aid. 17 pages.

WORKMEN'S COMPENSATION

5309. Amendments to the Massachusetts Workmen's Compensation Law, providing for the examination of injured employees by impartial physicians who shall have full access to all relevant medical records. Provision is made for the discontinuance of compensation and for the admission in evidence of hospital records. 3 pages.

5606. A federal act to equalize workmen's compensation costs in various parts of the country by prohibiting deductions to employers for compensation payments, unless the state compensation law has been approved by the Secretary of Labor. 3 pages.

5725. A model act to provide workmen's compensation for out-of-state injuries. The act solves the jurisdictional problems which arise when the workman tries to recover for those injuries in his home state. 7 pages.

ZONING

Cluster Zoning

6103. An amendment to permit "cluster zoning" under the zoning ordinance of Concord, Massachusetts. The amendment permits developers and others an exception from, and contraction of, lot area requirements in return for agreement to comply with certain conditions relating to creation of open space areas in the subdivision developed. 13 pages.

Conversion to Conforming Use

5812. A model act providing for the amortization of nonconforming uses. It gives the owners of structures which do not conform to zoning ordinances, and which were built before the ordinances were passed, a reasonable time to replace them with conforming structures. 7 pages.