HARVARD JOURNAL ON LEGISLATION

VOLUME 2 JANUARY 1965 NUMBER 1

Contents

Published semi-annually by the Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts. Subscriptions per year: United States, $2.00; foreign, $3.00. Subscriptions are automatically renewed upon expiration unless a request for discontinuance is received.

Foreword: Legislation as a Field of Legal Research

WILLARD HURST*

WE GIVE a good deal more attention today than thirty years ago to legislative processes and to statute law, in law school courses, in the law reviews, and in scholarly legal research. However, compared with the importance which legislative decision making and legislation have in the contemporary legal order, legal education and legal scholarship still fall far short of what they should do in this field. With varying degrees of naivete or sophistication in expression, lawyers continue to identify "law" with the output of courts to an extent that does not fit reality.

The work of courts, and lawyers' and laymen's behavior in anticipation of what courts may do, continue to be important elements in the development of law. But time has altered the position of the judiciary in our legal order. In mid-20th century judges make little common law; the bulk of their current contributions to the content of law is made through interpreting and applying statutes and administrative legislation. It is now mainly through the legislative and administrative processes that we formally define those values to be underwritten by the state's power. Even in the domain of the Constitution, where judges continue to add important detailed content to constitutional standards, the shift toward the legislative process is evidenced by the great practical weight now assigned to the presumption of constitutionality. It is time for the legal profession to recognize the central place of statutes and of executive or administrative determinations in the modern social order.

Legal scholarship must adopt new emphases in order to come to grips with these changes in the sources of law. The task requires substantial reallocation of research energies rather than the fram-

* Professor of Law, University of Wisconsin Law School. A.B., Williams College, 1932; LL.B., Harvard, 1935. Mr. Hurst views the fields of legislation and legal research as a teacher of both and as a scholar. He is the author of several notable works, including *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956) which was awarded the Ames Prize in 1958.

ing of novel types of issues. Redirection of resources would be productive along three main lines.

First, legal scholars should examine the broad expanse of substantive law which has developed under legislative and administrative impetus. In part, this effort may profitably run to familiar fields; in many states, for example, the basic statutory law of real property has stood for generations untended, needing comprehensive appraisal of its growth or lack of growth, of its functional or dysfunctional relation to the life of the society. In part, the task is to explore the substance of legislation which enacts new and expanding conceptions of public policy, such as legislation protecting consumers, or affecting the use of natural resources, or regulating access to markets. But updated legal research must examine substantive law from less obvious sources as well. One of the most cramping effects of exaggerated attention to the judicial process is that it encourages legal research to ignore major areas of law—the creation and administration of the whole range of modern franchises, for example—because these are reflected only haphazardly in litigation. One of the most significant and most neglected types of substantive law making is that done through public budget processes, in spending public money—a matter which, in our constitutional tradition, is reserved to the legislature rather than the courts. Researchers can profitably examine the substantive law made through the course of appropriation and the conditions placed on appropriations.

Second, legal scholarship should expand its attention to problems of technical efficiency in framing and administering statute law. Given the central importance of legislation in our legal order, there has been remarkably little research about draftsmen's experiences in devising substantive formulas and procedural devices to translate declared policy into living policy. However useful and well-founded, most published work on statutory drafting reflects the limits of the tradition and experience encountered by particular authors rather than the results of systematic comparative study of the untapped wealth of past uses of legislation. If we turn to the available literature on sanctions or comparative studies of modes of implementing legislated policy, we are in an area of neglect which should be deemed the prime scandal of legal research.

Finally, the profession should be alert to develop a rationally productive division of labor among researchers, allotting to law-trained scholars larger responsibilities in the field of legislation than they have so far assumed. A basic article of wisdom about legal order is that the quality of decision making processes affects both the capacity to make decisions and the substance of the decisions made. In the late 1920's and early 1930's the legal realists profitably exploited this theme with infinite variations as applied to law made by judges. It marks our unreasonable fixation upon judicial process as synonymous with legal process that this "realism" did not extend to any significant volume of like studies in statute law making. We need to know more than we do about the processes of handling, through legislative and administrative law making, the forces of social inertia, the fragmented energies of concentrated special interests, the emotions and simplistic desires of large movements, and the interplay of experts and insiders on the one hand and amateurs and outsiders on the other.

Legal scholars have yielded to political scientists, economists, sociologists, and political, economic, and social historians most study of the public policy embodied in legislation as well as most study of legislative decision making processes. In general, the division of labor between legal scholars and other social scientists is the product of unquestioned custom and convention. In the area of legislation, the division between legal scholars and political scientists seems especially arbitrary. There is so much work to be done that the labor of both disciplines should be usefully employed. To develop a rationally productive division of labor among researchers, we need to take greater advantage of the special accruals of knowledge and special methods or skills of the lawyer. Competent lawyers have, for example, special skill in using words precisely, the ability to define the values which are the objectives of government and the procedures through which the power of the state is channeled. They are specially trained to appraise problems of relevance—to translate perceptions of fact into perceptions of value, to relate one value to other values in the search for a good order of social relations. Because law deals constantly with men's disputes and their efforts to plan and administer action—because law is intensely practical in the sense that it is immediately involved in men's practice—lawyers are specially experienced in ap-

praising power in action, as a process, as the particular resolution of the potentials in a situation.

Though lawyers may have no inherently exclusive claim to competence in these areas, they do have competence; and they are likely to have more of it than students trained in other disciplines. It is a useful mission for the Harvard Journal on Legislation to challenge legal scholarship to utilize its skills on this wider front and to reallocate its resources in more realistic alignment with the problems of the contemporary legal order.

Statutes and the Sources of Law

JAMES MCCAULEY LANDIS*

Thirty years have passed since this article was initially published in the Harvard Legal Essays of 1934, and it has become a classic in legal literature. Mr. Landis advocated recognition of statutes as the origin of cherished common law principles and envisioned increased reliance on legislatively declared principles as sources for further development of the law. The article is reprinted by permission of the President and Fellows of Harvard College.

A CHIEF point of departure between nineteenth- and twentieth-century theories of law lies in the emphasis placed upon the judge as a creative artist in the making of law. This, in turn, has pointed inquiry to the sources of judicial law-making. With the rise of the social sciences, there has developed an insistence that those sources should be as far-flung as that immense empire. The traditional method of handling legal materials, however, feeds too much upon itself and offers strenuous resistance to such interpenetration. New techniques are thus demanded for the exploration of other than the customary sources, but the extent to which these materials should be employed for the judicial development of law remains a perplexing problem.

Though, perhaps, the major portion of the law is now skeletonized between the covers of the statute book, little beyond mere recognition of that fact has altered the present approach to law. Such efforts as have concerned themselves with the treatment of this material have, for the most part, centred about the development of a science of statutory interpretation. But even here the results have been disappointing. There still arises a certain unhappiness among judges, to say the least, when they find themselves compelled to dispose of cases upon the basis of governing statutes. Instead of attempting to acquire a better understanding of the relationship that courts should bear to modern legislatures, the avowed tools of interpretation are still the pious canons of an

* 1899–1964. In 1932, when Mr. Landis wrote this article, he had been for four years Professor of Legislation at Harvard Law School and was destined to enter public service as a member of the FTC and coauthor of the Securities Act of 1933. Thereafter he served as chairman of both the SEC, 1935–37, and the CAB, 1946–47. However, those who speak of him as Dean Landis remember him best as Dean of the Harvard Law School from 1937 to 1946.

early age developed to guide courts in the interpretation of very primitive legislative mandates. Here and there one finds a plea that recognizes more adequately the function of a legislative assembly and the creative qualities intrinsic to the judicial process. Obviously the increasing scope of legislative activity has only made the need for further advancement of the subject of statutory interpretation more imperative.

Beyond the accepted boundaries that can be accorded to statutory interpretation, however, lies a more neglected but more significant field. This concerns the place that statutes are to occupy in the ultimate processes of law-making by judges. Certainly statutes can never embrace within their sweep all human activity that law is called upon to order. Even the latitudinarian methods of statutory interpretation evolved by civilian theorists—sometimes gossamer-like in their fineness and subtlety and so scarcely able to withstand the rough and ready tumble of actual legal administration—have failed to net the interstices so tightly as to confine the judicial process merely to textual construction. However, to admit the existence of wide areas for legal administration beyond the direct governance of statutes is not to assume that statutes have no part in the solution of problems impossible to bring within the reach of their terms.

I

Historically statutes have never played such a confined role in the development of English law. Instead, much of what is ordinarily regarded as "common law" finds its source in legislative enactment. The flexible instrument of conspiracy, both in its criminal and civil aspects, has a definite statutory origin. Doctrines that surround the enforcement of the labor contract in its manifold aspects have grown out of a statute-born policy. One needs only recall such legislation as the Statute of Frauds or the Statute of Limitations to conjure up a vast body of law springing from parliamentary enactment and yet independent of its terms, even interpretatively applied. English and American land law responds to the same tests and reveals upon analysis that many of its germinating ideas have a statutory origin.[1] The American doctrine of common-law statutes is in itself testimony to this concept of the statute as a nursing mother of the law.[2] It is small wonder, there-

fore, that common-law courts at an early stage developed the doctrine of the equity of the statute.[3] To ascribe its origin, as latter-day judges and commentators have done, to the poor draftsmanship of the early statutes which naturally excused judges in extending them beyond their terms, is to ignore the nature of the tasks that then confronted the judiciary. It assumes a refined conception of the separation of powers alien to English political life until the time of Anne. But more than this, it fails to recognize that law had then to be made in some fashion, and that as sure sources for its making lay in the policies outlined by a parliament as in the customs of a people.

The doctrine of the equity of the statute was a double-edged device. As Plowden so sagely observed, merely knowing the letter of the statute does not mean that you know its sense, "for sometimes the Sense is more confined and contracted than the Letter, and sometimes it is more large and extensive." [4] Under its authority exceptions dictated by sound policy were written by judges into loose statutory generalizations, and, on the other hand, situations were brought within the reach of the statute that admittedly lay without its express terms. No apology other than the need for a decent administration of justice was indulged in by judges who invoked its aid.[5] Definite principles, therefore, as to the circumstances which would justify extending statutes to cover cases beyond the scope of their language seem never to have been evolved. Rather there was simply the urge to do equity and so mould the law to conform more closely to its recognized aims.

The cases in which judges resorted to the equity of the statute do, however, reveal several recurring factors. Legislation of an early date is often special in character, applying, like the judgment of a court, to a particular situation brought to the attention of Parliament. The modern concept of wide and generalized legislative powers was of slow growth. Statutes would thus be restricted in their application to designated individuals or be limited in their incidence to a named locality. But the same mischief, to use Coke's favorite phrase, would call for like treatment in like situations, and the recognition of this fact led judges to extend the remedies or restrictions of the special act to other persons and other localities similarly circumstanced.[6] Behind this

treatment of special legislation lay the revolutionizing idea that "when the Words of a Statute enact one Thing, they enact all other Things which are in a like Degree." [7] Such a concept obviously carried the principle of the equity of the statute beyond that of merely transmuting special into general legislation. Enabling judges to distill from a statute its basic purpose, they could then employ it to slough off the archaisms in their own legal structure. Even general legislation could thus be made to yield a meaning for law beyond its expressed operative effect. The class of situations to which the statutory remedy was expressly made applicable were but illustrative of other analogous cases that deserved to be governed by the same principle. The extension of one remedy beyond its recognized common-law area by the statute justified judges in giving another remedy the same expansive effect.[8] The imposition of liability in a defined series of circumstances was not exhaustive, but offered a reason for fastening liability upon similar conduct.[9]

The leavening influence of this principle in the development of early common law has still to be adequately explored. Its significance, though clearly appreciated by the early writers even up to the time of Coke, has been largely obscured by later commentators like Blackstone, who, like the social contract theorists, held to the faith of a full-fledged system of common law. The rise of equity, permeating law with ideas originating within a coordinate judicial system, has undoubtedly served to obscure the significance of this early attitude toward legislation as one of the major dynamic forces in the law's development.[10] But the present-day importance of ancient statutes is ample evidence of the weight that should be accorded to the method of their treatment in the early law. The essence of that method lay in the recognition by judges that behind the formal fiat of the statute lay an aim that challenged their sympathetic attention, and that the appropriate exercise of judicial power permitted courts to advance ends so emphatically asserted.

Later generations were to imprint a feebler *non possumus* upon the judicial process. The reasons for this professed self-abnegation of power seem extrinsic rather than intrinsic to the nature of law. The eighteenth century as a whole marks a recession from the earlier periods of pronounced major legislative activity. The

same century, with characteristic abstract rationalism, attached to the growing fact of the separation of powers an important doctrinal validity. This, in turn, theoretically divorced legislative powers from the judiciary, and led as a matter of logical verity to the conception of judges as passive agents, impotent to do otherwise than merely "find" law. Even the vigor of Lord Mansfield's injection of moral concepts into the law led to rebellion when his personality was removed from the scene. Furthermore, the conception of the common law as a fully matured system, so entrancingly portrayed by Blackstone, naturally lent force to the view that changes in that ideally self-sufficient system should not be lightly countenanced. Under such influences not only was it impossible for the technique of equitable statutory construction to survive, but there developed the antagonistic maxim that statutes in derogation of the common law should be strictly construed.[11]

The first half of the nineteenth century saw a heightening of these influences. The analytical theories of jurisprudence that then held sway served to emphasize the nature of the judicial process as limited to the mere finding of law. The mechanistic evolutionary concepts of the historical jurists required them to oppose all legislation that sought to tamper with the germinal verities that they found inherent in the common law. Added to this was the reaction naturally engendered in a conservative judiciary by the increasing popular demands for reform. The reformers, under the inspiration of Bentham's guidance, turned to legislation as the means of accomplishing their desires, and when the Reform Bill of 1832 brought achievement within their grasp, the attitude of the judiciary, already enunciated in stern maxims, must unconsciously have stiffened.

America, on the other hand, reveals these trends closing in upon its law much later in point of time. The difficulty of bodily transplanting English common law into an alien soil necessitated its modification to meet the new conditions that were there encountered, and thus developed a flexible temper toward its content. With legislation, after the Revolution, a chief agency for the development of law, statutes were readily regarded as sources of law. Indeed, for a time, the doctrine of the equity of the statute held considerable sway in American courts.[12] It was elevated to the position of a juristic principle under the term "construction"

as contrasted with "interpretation" by Francis Lieber in his immortal treatise on hermeneutics.[13] The later professed rejection of such a principle seems, however, to be the result of factors not unlike those that prevailed in England. The extension of the suffrage and the Jacksonian insistence upon wide popular participation in government generated hostility upon the part of the more conservative guardians of the law, which was immeasurably heightened by the dysnomy of democratic legislative methods. In addition to this, juristic conceptions of the passive nature of the judicial process gained sustenance from the erection of the doctrine of the separation of powers into a constitutional maxim, and, with true American faddism for fashions of thinking, achieved an ascendancy that only now is beginning to be threatened. Finally, general contentment with the wide scope of judicial review exercised since the Fourteenth Amendment has robbed legislatures of much of their opportunity to mark out the aims of law, and has generated in the profession something of contempt for the legislative process.

II

Courts to-day have avowedly rejected as part of their technique the doctrine of the equity of the statute. Whatever significance statutes possess to govern results, they achieve by virtue of being interpreted to include the particular situation. Under the guise of interpretation, however, much is accomplished that upon analysis reveals the court as true to the more ancient doctrine of the equitable application of statutes.[14] The results of such dissembling are doubly unfortunate. They discredit the conception that there is any science of interpretation;[15] but they also prevent the development of an appropriate juristic approach towards statutes as a source of "common law." Obviously there is something intrinsic in the attitude toward legislation that was once phrased by reference to the equity of the statute, that cannot be exorcised from the law. To confine to interpretation the judicial development of law from legislation will not suffice; an approach must be made to the problem of the place that statutes should occupy in judicial administration in terms other than hermeneutic theories as to the meaning of legislative enactments.

Certain factors peculiar to modern life make the problem more

pressing. Both the profession and the schools are now demanding something more adequate than the traditional method of developing law purely from earlier judicial precedents. Even though the process permits a slow infiltration of wisdom from other branches of sociological effort, some more open liaison is required. Legislation, too, is assuming both a volume and a creative aspect of purpose that makes it impossible to ignore. But at the same time civilization is achieving a complexity that outstrips this effort to embrace its multitudinous activities by rules, while the traditional attitude of courts toward the legislative process insists upon confining that process to the making of rules. Changes in attitude, points of departure, germinating principles—these the judicial process reserves to itself and places beyond the scope of legislative power. On the other hand, the last few decades have seen the steady development of better methods of legislation. Not only has there been progress in the art of draftsmanship, but the growing use of experts and the committee system, itself tending toward an empiric efficiency, has meant much in the advancement of legislative method. A realization of this fact has already made for greater reliance upon the legislative process as an aid to statutory interpretation. Also, there is a growing comprehension that wide modifications have been effected by recent legislation in the structural content of the law. The realization of their full significance is far from complete, for effort is now bent only towards unearthing and classifying the mass of materials dormant in our statute books. Clearly these factors negative the possibility of relegating the legislative process to the role of mere rule-making and of confining the relationship between courts and legislatures merely to the interpretation of statutes.

One well recognized field exists where statutes have been commonly relied upon by courts to determine whether certain types of conduct are to be regarded as tortious. Legislatures in striking at action deemed by them to be undesirable often fail to think beyond the imposition of a criminal penalty for pursuing forbidden acts. The very prohibition, however, carries with it a judgment of culpability. Courts have generally recognized this fact, and have enlarged the area of tort liability by giving the statute the effect of attaching culpability to action in disregard of the

statute. The different theories expounded by commentators as to the particular significances to be attached to such statutes need not here detain one;[16] it is the use made of this legislation that holds import. The relevance of the legislature's judgment as to the desirability of particular conduct is obvious. In the unfettered choice open to a heterogeneous assembly the pressure of the various interests making for or against penalizing certain action finds a ready reflection. What remains for the judicial process in such cases is the extent to which the indirect pressure of civil liability shall be employed to compel conformance to the legislative rule.

Legislation in this field is only permitted by courts to exercise a limited function, that of crystallizing recognized principles of liability into more rigid rules to cover recurring type situations. A more extensive use of like statutory material can fairly ask indulgence. The statutory rule may have pricked out for reprobation only a limited number of examples from a wide field of not essentially dissimilar instances; but unless the enacted rule covers the particular type of conduct in issue, the traditional technique ignores the legislative treatment of analogous cases. The reasons for this neglect are difficult to grasp. The method of judicial evaluation of the conflicting claims which finally results in the enunciation of a rule has only very generalized and indefinite standards to guide it. Reliance is placed in the main upon particulars which consist of analogous cases decided by other courts, and which consequently reflect only a limited contact with the problem. The judgments of legislatures as expressed in statutory rules often represent a wider and more comprehensive grasp of the situation and yet are practically neglected.

When the highest tribunal of England in 1868 decided that the land-owner who artificially accumulates water upon his premises is absolutely liable for damage caused by its escape,[17] that judgment had an enormous influence throughout Anglo-American law.[18] True, the rule evolved was supposed to possess a rational basis in the earlier common-law treatment accorded wild animals. But we are sufficiently mature to recognize that there are differences between rattlesnakes and reservoirs, and to realize that the ultimate wisdom of such a judgment must rest upon the question of how well it distributes the unavoidable losses incident to the pursuit of a particular industrial occupation.

Had Parliament in 1868 adopted a similar rule, no such permeating results to the general body of Anglo-American law would have ensued. And this would be true, though the act had been preceded by a thorough and patient inquiry by a Royal Commission into the business of storing large volumes of water and its concomitant risks, and even though the same Lords who approved Mr. Fletcher's claim had in voting "aye" upon the measure given reasons identical with those contained in their judgments. Such a statute would have caused no ripple in the processes of adjudication either in England or on the other side of the Atlantic, and the judicial mind would have failed to discern the essential similarity between water stored in reservoirs, crude petroleum stored in tanks,[19] and gas and electricty confined and maintained upon the premises[20]—surely an easier leap than that from wild animals to reservoirs.

The arguments adduced for neglecting such statutory material generally do little more than pour contempt upon the legislative process. Legislation is presumed immune to "principle"; its judgments represent merely the political pressure of a special class; it is both ignorant and perverse. Criticisms such as these, of course, have substance, but statutes are of all types. The task of distinguishing between the deliberate and the *ad hoc* pronouncements of a legislature is not too difficult. A course of legislation dealing continuously with a series of instances can be made to unfold a principle of action as easily as the sporadic judgments of courts.[21] Deliberate and conscientious preferment of competing claims can be shown to underly the enacted rule, while the wide generality of such a choice can be evidenced by the legislation of other jurisdictions.[22] Only jejune conceptions of both the judicial and the legislative process stand in the way of the appropriate use of such statutory material.

III

Another field, somewhat less apparent, reveals courts giving effects to statutes far beyond their express terms. Doctrines of common law dealing with the relationship between individuals will often be seen to hinge upon a conception as to the position that one party is to occupy in our social structure. This becomes solidified into a concept of status. But obviously status has no

meaning apart from its incidents. These incidents, often so numerous as to escape description, have a varying importance in shaping the nucleus of a status. The alteration of some of them possesses no importance beyond the change itself; the alteration of others, however, may call for a radical revision of the privileges or disabilities that have generally been attached to a particular status. The common-law incidents of status, that in their origin have themselves been of empiric growth, must then give way before the new aims deducible from such a basic alteration.

Changes of this nature are commonly the product of legislation. The statutes that express them rarely directly make or alter a status as such; nor do the statutes often see the seamlessness of the pattern that they seek to change. The task of modifying the existing body of the law to fit the structural changes must of necessity be left to courts with the hope that given an end they will mould substantive doctrine to make it effective. Such was the method pursued in the married women's legislation of the last century.[23] The statutes themselves were quite terse, generally granting to married women merely powers to hold and convey property and to sue and be sued.[24] Obviously they swept away the contradictory common-law limitations, but their terms did not directly control numerous allied questions. The resolution of these demanded consideration of how far the change made by the statutes in one incident of the status should affect doctrine developed under a different conception of the married woman's position in society.

The incidental results of the married women's acts are to be seen in decisions dealing with such questions as the liability of the husband for the torts of his wife,[25] his responsibility for crimes committed by her in his presence,[26] their joint liability for conspiracy,[27] the survival of the common-law estate by the entirety,[28] the husband's right to alimony[29] and support,[30] and his duty of support.[31] The statutory grant to the wife of the power to sue, though admittedly concerned with her rights against third persons, has been an important factor in determining what torts committed by one spouse against the property or person of another should give rise to a right of compensation.[32] The specific results that courts have reached in these cases need not here be detailed. It is the method that is significant. There has been

general recognition that the married women's acts embodied principles which were of wider import than the statutes in terms expressed and thus necessitated remoulding common-law doctrines to fit the statutory aims. Judgments that sought to retain older common-law limitations hostile to the aim of the statutes were overruled by subsequent legislation, more attuned to the principles of the married women's acts than the courts that professed to be controlled by "principle." The result is an impressive edifice of law resting upon statute and yet not depending upon the express terms of the statutes for its content.

A similar development can be seen in bastardy law. In the early nineteenth century American states quite generally sought to alleviate the unfortunate position that the common law accorded the illegitimate child as a *filius nullius*.[33] These statutes generally made him the heir of his mother, while some states provided means for the subsequent legitimation of children born out of wedlock. In terms the statutes did not touch the nature of such children as "children" within the terms of a will, nor were they correlated with the contemporaneous wrongful death acts that gave "children" and "parents" reciprocal rights for compensation for injuries resulting in death. The course of decision in these two situations is worth elaborating.

Statutes which allow the illegitimate child to inherit from its mother, in terms apply only to the situation upon intestacy. Whether the illegitimate child should take as a "child" under a will rested theoretically upon the intent of the testator. That intent was fashioned for testators by courts imbued with a morality which rigorously excluded the illegitimate child.[34] That morality found its expression in the common-law concept that the bastard had no inheritable blood. This the statutes swept away, and so they should have been given the effect of throwing into the discard an interpretative attitude based upon that policy. With some exceptions,[35] the statutes were so utilized, and courts either adopted the presumption that the illegitimate child is to be considered the "child" of the parent from whom he has inheritable rights[36] or, throwing aside any presumption, sought to give effect to the true intent of the testator by inquiry into the *de facto* relationship as to the particular child.[37]

American wrongful death acts commonly provide that a "child"

may maintain an action for the death of its "parent" and *vice versa,* or else give the personal representative of the deceased a right to sue for the benefit of the next of kin. The latter type of act plainly draws upon principles of intestate distribution in order to fix the incidence of the injury caused by death, and distributes compensation in accordance with such a general plan. Changes in the principles of intestate distribution, whether made prior or subsequent to the death statute, should therefore carry through into the distribution of compensation effected by the death acts. Thus legislation giving the illegitimate child inheritable rights should make him one of the "next of kin" entitled to compensation by the death statute. Such a result has almost uniformly been reached by the courts.[38] But strangely enough courts have on occasion shrunk from designating illegitimate children as "children" in death statutes that framed their plans of distributive compensation in such language.[39] Here, as distinct from the problem of interpreting "children" in testamentary dispositions, considerations of *de facto* relationships play no part, and the issue turns only upon legal and moral conceptions of the reciprocal duty of support. The illegitimate child statutes have definitely moulded these relationships, and only adherence to doctrine, now devoid of substance, can be adduced for failing to carry out the principle of this legislation.[40]

Another illustration of statutes indirectly effecting relational changes concerns the responsibility of trade-unions for torts committed by their members. Both broad social considerations and the bias of our law would seem to have made for a rule that would impose a real liability upon union funds, but for years the dry logic of the common law made against such a result. When in the Taff Vale[41] and Coronado cases [42] trade-unions were finally made responsible for the conduct of their members, great emphasis was placed upon the fact that legislatures, ignoring the attitude of the common law, had been consistently affixing responsibilities and granting privileges to trade-unions as such. The status that legislation had accorded trade-unions was thus generally carried over into the law. These decisions have been explained as being derived from the statutes by the interpretative process[43] or as being dictated by considerations wholly independent of the course of legislation.[44] But mere interpretation is incapable of

furnishing an adequate basis for the results, while the very different treatment accorded the same problem in the absence of a similar legislative background illustrates the significance of the statutes.[45] Here again legislation afforded more than a rule; it revealed a governing attitude which was not exhausted but merely illustrated by particular instances.

IV

Apart from statutes more acutely defining norms of conduct and legislation affecting status, various other instances occur of the employment of statutes to alter the fixed approach that adjudication grown conceptual has taken to various problems. Statutes may tend to affix a value to a claim that as yet has failed to gain any judicial recognition. The tendency of the statute, however, is to define that value by reference to a series of circumstances that transmute it into a right. But the circumstances are rarely exhaustive, so that courts are called upon to determine whether, outside of its statutory field of recognition, the interest is to receive any protection.

A typical example of such a process is to be seen in the handling of wrongful death statutes by American courts. The common law's refusal to recognize death as a compensable injury seems to have been no "more profound than the absence of a remedy when a man's body was hanged and his goods confiscated for the felony."[46] The doctrine had only a precarious foothold in American common law when wrongful death acts generally swept it aside.[47] But admiralty jurisdiction is at points unamenable to state legislation, and so the issue was presented as to how far such values, widely recognized on land, could claim recognition at sea. Judges, awake to the purport of this legislative movement, eagerly seized upon principles derivable from "natural equity" and "consonant . . . with the benign spirit of English and American legislation on the subject" to mould admiralty law to conform with the trend of civilized thought.[48] But the Supreme Court of the United States, turning its back on what it conceived to be a non-judicial technique, overturned these decisions and insisted that admiralty law must draw its content from the obsolete doctrines of the common law.[49]

The subsequent history of this problem illustrates the waste

attendant upon such an attitude toward the judicial process. The Supreme Court only permitted the maintenance under state statutes of an action for wrongful death, either in the state courts,[50] or by a libel *in personam* in the federal courts,[51] where the tort occurred within the jurisdictional waters of a state or involved vessels subject to the same or substantially similar jurisdictional control. Accidental features, wholly foreign to the intrinsic merits of imposing liability, thus governed results.[52] Finally Congress intervened with its own wrongful death-at-sea act.[53]

But the lesson seems always to need re-learning. In 1924 the Court was called upon to decide whether an action for wrongful death was maintainable in the Canal Zone.[54] The Panama Code contained merely the customary formulation of the civil-law principle of liability for damage caused by fault. A thorough understanding of the sources of this provision would have yielded a definite answer in favor of the claimant,[55] but both the majority and minority of the Court turned to the common law for a solution. The minority, speaking through Mr. Justice Holmes, insisted that the wrongful death statutes, in force in every American state, not only repudiated the basis of the older common-law doctrine but were in themselves the juridical material in the light of which the Code provision should be given a meaning adequate to modern needs. The majority, insisting that common law could not be altered by principles derivable only from legislation, engrafted upon Canal Zone law a doctrine then rejected by every civilized jurisdiction. The decision was immediately repudiated by congressional action,[56] with the net result that one known plaintiff was sacrificed to a theory that made the common law consistent only to its own archaisms.

A similar neglect of the significance to be attached to legislation permeates another field. The common law's insistence that "dying without issue" should be interpreted to mean an indefinite rather than a definite failure of issue is traceable to the fact that by such a construction it would convert the estate of the first taker into a fee tail, consistently with conceptions of the devolution of property natural to a society where primogeniture prevailed.[57] American legislation, based upon more democratic ideas of the distribution of realty, quite generally substituted the fee simple for the fee tail. The conversion of a fee tail into a fee

simple by force of the statute not only robbed the phrase "dying without issue" of its otherwise accepted meaning; it invalidated on the ground of remoteness any gift over made to depend upon an indefinite failure of issue. Obviously such legislation required a reversal of the older canons of construction,[58] but judges continued to recite the ancient rubrics until supplementary statutes directly rejected their mouldering learning.[59] The point can be made clearer by comparing the common-law treatment of bequests of personalty made upon such a contingency. Because of the absence of fee tails in personalty[60] and the consequent remoteness of the gift over, the presumption that dying without issue meant an indefinite failure of issue readily yielded to a different interpretation.[61] The statutes, by abolishing fee tails, in this respect likened realty to personalty, and the liberality that attached to the construction of gifts of personalty should naturally have been carried over to similar gifts of realty. The extraordinary fact is that no such result ensued, but that new rules of interpretation had to be positively imposed by statute.

One may contrast with these cases the attitude of the quasi-civil Scotch law in dealing with salmon fishing in Scotch rivers. From early times Scotch legislation, with the object of securing the free passage of spawning salmon up the rivers, had prohibited the erection of certain obstacles which would prevent unimpeded access to and from the spawning grounds. The statutes only expressly restricted particular modes of fishing. But Scotch courts, drawing from this legislation a principle of free passage against interruption by fixed works placed in the rivers, evolved from the statutes prohibitions against fishing devices the use of which violated such a principle. An ingenious type of weir would thus fall under the ban "although not particularly prohibited by any act of parliament." [62] The House of Lords, giving the same effect to this type of legislation, recognized that the Scotch technique was nothing more than their own older "equity of the statute." [63]

In the handling of the American uniform acts something of this quality occasionally appears. The very fact that such legislation supposedly only restates the common law and that it seeks to comprehend within its four corners the entire law upon the subject, makes it yield more readily to this type of treatment. Courts thus with little hesitation refer to sections of the Negoti-

able Instruments Law to illustrate a principle in the same way in which cases are commonly adduced to guide decision.[64] Even the consciousness that legislation is being used in a somewhat novel manner is missing. But where the rule enunciated by the Act differs rather radically from earlier common-law authority, there is more hesitation in so employing it.[65] Instead of correlating the law in situations not directly governed by the statute to correspond with the basic conceptions of the Act, the mere fact that the Act has for a good reason repudiated an earlier common-law rule is a ground for taking the bad rather than the good as a premise. The desirable approach would call for an even more extensive reliance upon such statutory material, and would demand correlation of the various uniform commercial acts in the effort to unearth guiding principles.[66]

Differences of degree will always present themselves in any consideration of the extent to which values created by statute should be recognized in fields not directly governed by legislation. But a thorough understanding of the process underlying the statute will often give a clue as to the influence that it deserves. "Mischiefs," as Coke said, are often responsible for legislative action and are the key to its meaning. The consequences of the mischief may only have been appreciated by the legislature in a limited field and patent abuses alone eliminated. But thorough understanding of the statute enables one to pierce through the specific remedial measures to a concern with the causative influences that made action necessary. On the other hand, statutes may represent merely a rectification of the existing pattern of the law without striking at its deeper assumptions. Yet even rectifications, sufficiently abundant, may, like the empiric process of adjudication, spell out an attitude of more moment than the manifestations themselves, and thus bring into being a policy calling for a fuller realization.

Distinctions of this nature cannot be formulated into rules. Their discovery, however, follows upon a thorough acquaintance with the whole sweep of the legislative process. Instead of treating statutory materials in an isolated fashion, care and imagination in handling them, such as is customary in dealing with judicial precedents, may produce fruitful results. Coordinating existing legal institutions with statutory aims surely is as significant

as correlating them with conceptions spun from the odds and ends of judicial logic.[67] And like judge-made law, the territorial relevance of statutes is not to be too closely circumscribed. The comparative technique is important to a perception of their wider import. Judges alive to the necessity of making law adequate to the needs of a new continent did not hesitate to draw upon the "benign spirit of English legislation." [68]

V

The interplay between legislation and adjudication has been generally explored from the standpoint of interpretation. The function of the legislature as, in essence, a supreme court of appeal constantly busying itself with correcting the aberrations of the judicial process has been largely ignored. Cases, so far as their doctrinal content go, are overruled at almost every legislative session. The deeper import of such action has yet to be appreciated. A decent respect for the legislative process would strike a more favorable balance between legislative and judicial development of law.

One phase of the problem assumes importance especially in a nation with forty-eight coordinate but common legal systems. One jurisdiction faced with the same problem earlier decided by another jurisdiction has to weigh the significance to be attached to a statute repudiating the judicial solution made of the problem. To the narrow traditionalist the statute itself is a datum which reinforces the fact that the overruled decision is evidence of the common law, and so error perpetuates itself. But the simplicity of such a conception of the common law is slowly passing. A better understanding now exists of the nature of the judicial process and the nicety of the choices that sway judgment and thus result in law. Plainly, then, the statute is pertinent. Bench and bar have been prone to neglect this aspect of legislation. Cases are relied upon as authoritative without cognizance of the fact that in the jurisdiction that gave them birth they have already been repudiated.[69] An editorial criticism of a decision is relied upon as an excuse for refusing to follow it, while the judgment of a legislature overturning its effect is neglected.[70] Judicial reversals avowedly based upon the social inexpediency of the earlier conclusion stifle its germinating powers, but the same

sober judgment of a representative assembly merely adds virulence to the poison of judicial unwisdom. Indeed, at times the process portrays a fantasy more than fit for a new Erewhon.

This has not always been true. When in 1863 the Supreme Judicial Court of Massachusetts had to determine whether a general devise operated to execute a power of appointment vested in the testator, the Court turned its back upon the common-law authorities that refused to accord the devise such an effect. Instead, awake to the inequities of the common-law rule and conscious of its abrogation by the Wills Act of 1837, the Court chose the legislative solution, convinced that "the rule of the English statute appears to us the wiser and safer rule." [71] Similarly New York, where the statutory revisers had already incorporated the rule of the Wills Act but applied it in terms only to realty, extended the statutory doctrine to cover dispositions of personalty.[72] Needless legislation had to be evoked in other states to overturn decisions of their courts, whose traditionalism had led them to adhere to the common-law rule.[73]

An illustration of the same technique may be drawn from the Judicial Committee of the Privy Council. Equity courts had refused, in the absence of an express command, to regard a power of appointment as exclusionary, and had further hampered its exclusionary use by the development of the doctrine of illusory appointments.[74] The whole equitable doctrine had come in for bitter criticism by English chancellors.[75] First by a badly conceived statute,[76] drafted by Lord St. Leonards, and later in 1874 by additional legislation,[77] Parliament swept away the doctrine of illusory and exclusionary appointments. In 1885 the Privy Council was required to determine what rule as to such appointments should govern in Lower Canada. No Canadian authorities or Canadian legislation bore upon the issue, while the English legislation concerned only the United Kingdom. Applying the traditional technique, the Privy Council would have engrafted upon Lower Canada a system that the next legislature would have been called upon to abrogate. Instead, it refused to be "bound by a course of English decisions which have been swept away by the legislature as fraught with inconvenience and mischief . . . and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to remove." [78]

Characteristics of the modern legislative process serve to increase the importance of such a technique. Judicial councils exist with the function of acting as ministries of justice to call to the attention of the legislature weaknesses in existing judge-made law. Their recommendations, when translated into statutes, ought to possess great persuasive value. Expert legislative draftsmen are commonly attached to legislatures, their counsels operating to prevent the unfortunate incidents that characterized the legislation of early democratic assemblies. In the light of changes that modern juristic thinking has wrought in the nature and sources of law, judicial precedents are assuming a less coercive quality. If it be true that law reflects and should reflect experience rather than logic, legislation born of such an urge demands careful and sympathetic consideration.

VI

The present attitude responsible for our cavalier treatment of legislation is certain to be a passing phenomenon. The consciousness that the judicial and legislative processes are closely allied both in technique and in aims will inevitably make for greater interdependence in both. The beginnings of such a movement are already clearly discernible in the process of statutory interpretation where courts, returning to an earlier attitude, seek to interpret expressions of policy in the light of the manifold circumstances responsible for the statutory formulation.[79] Grammatical interpretation is giving way to functional construction. The distrust of legislative intervention is subsiding with the important advances made in the mechanics of law-making. Our prevailing philosophy makes us less certain that we have seized upon universals, and the search for pragmatical truth carries us naturally to seek for wisdom in the many sources of experience. Black-letter learning has rarely been characteristic of the legislative process, and its importance to adjudication is disappearing with the rise of the social scientific method. And the consciousness that that method, though often in its crudest form, underlies legislation makes for tolerance with the product.

Circumstances militating against a freer use of statutory materials, apart from the passing juridical conception that negates the creative qualities intrinsic in the judicial process, are chiefly technical. The methods of statute-making still fail fully

to disclose the operative forces behind legislation.[80] Adequate records that give the lineage of a statute are, for the most part, non-existent. Often the assurance that respectable impulses have underlain its passage is wanting.[81] Doubt may exist as to whether there has been a thorough exploration of the issues upon which choices have been made. Under the pressure of the legislative mechanics of an earlier generation, statutes have been stripped of everything save normative and compulsory provisions. Reasons for the legislature's action, once incorporated in unwieldy preambles, have been eliminated or expressed only in an incidental fashion where sterile judicial technique forbids their examination. Though the older preamble hardly offers the solution, some means of formulating in an authoritative manner the conceptions of policy upon which the statute is based are necessary.[82] Statute books, too, are encumbered with a mass of detailed administrative regulation that tends to bring the entire process into contempt.

Finally, the profession and the schools are at fault for not affording the bench better technical aids. These United States present a most extraordinary laboratory for comparative legislative study. But while the precedents of even our *nisi prius* courts are carefully catalogued, analyzed, and weighed, no scientific concern is manifested over our constantly accumulating legislation. Texts and source-books thread their way through the welter of our decisions, throwing off statutes as excrescences upon the body of the law. Under the impulse of great law-teaching a national attitude toward the common law has arisen to counterbalance the centrifugal forces of our many states. But even the idea that the same spirit can control legislative law is wanting. The task of its development promises to be a chief concern of to-morrow.

NOTES

[These notes are reprinted substantially as they appeared in the original. Changes have been made only where necessary to correct errors or conform to modern citation practices.]

1. See Holdsworth, *An Historical Introduction to the Land Law, passim* (1927).

2. See 1 Kent, *Commentaries* *473; Alexander, *British Statutes in Force in Maryland* (2d ed. 1912); Kilty, *Report to the Maryland Legislature on English Statutes* (1811); Martin, *A Collection of the Statutes of the Parliament of England in Force in the State of North Carolina* (1792).

3. See Loyd, *The Equity of a Statute*, 58 U. Pa. L. Rev. 76 (1909). For other references to the doctrine see *Foreword* to Ashe, *Epieikeia* (1609); Co. Litt. 1, c. 2, § 21, f. 24b, and references to the doctrine in standard treatises on statutory interpretation.

4. Eyston v. Studd, 2 Plowd. 459, 465, 75 Eng. Rep. 688, 695 (C.B. 1573). *Cf.* Dig. I, 3, 17 (Celsus).

5. Professor Hazeltine suggests that in these cases the king's judges were exercising the royal dispensing power. Plucknett, *Statutes and Their Interpretation in the First Half of the Fourteenth Century* at xxiii (1922). The explanation fits only one half of the practice. A more natural influence in an age not conspicuous for its refined conceptions as to the nature of law and legislation is that the judges simply gave rein to their desires to reach sound results.

6. Y.B. (Roll Series) 14 & 15 Edw. 3, pl. 31, 78 (1340); Bishop v. Folyot, Y.B. (Selden Society) 2 & 3 Edw. 2, pl. 120, 35, 36 (1308–09); Segrave and Montagu's Case, Y.B. (Roll Series) 19 Edw. 3, pl. 67, 438, 440 (1345); Platt v. Sherrifs of London, 1 Plowd. 35, 75 Eng. Rep. 57 (Ex. 1550); 2 Inst. 427, 487.

7. Eyston v. Studd, 2 Plowd. 459, 467, 75 Eng. Rep. 688, 698 (C.B. 1573).

8. Y.B. 3 Hen. 6, f. 14, pl. 18 (1424); Y.B. (Roll Series) 20 & 21 Edw. 1, 42 (1292); Y.B. (Roll Series) 17 & 18 Edw. 3, pl. 19, 510, 516 (1344); Warde v. Wellesthorpe, Y.B. (Roll Series) 17 Edw. 3, pl. 29, 141, 142 (1343); Plenty v. Gold & Talbot, Y.B. (Ames Foundation) 13 Rich. 2, pl. 4, 9 (1389); Abbot of Croyland v. de Veer, Y.B. (Roll Series) 17 & 18 Edw. 3, 472 (1344); 2 Inst. 110, 241, 346.

9. Rast. Entries, tit. Nusauns, 441a (1670); 2 Inst. 152.

10. The traditional theory, deriving from Maine, that legislation is one of the latest agencies in the development of law pays no attention to this doctrine of equitable statutory construction. It might, perhaps, be placed rather in the category of development through "equity" rather than "legislation." The real fact is, however, that the concern of the judges from the fourteenth to the sixteenth century is with statutes rather than "common law." The frequency with which cases turn upon statutes is as well illustrated by the year books of Edward III as Plowden's Reports. The source

of legal development is thus as much parliamentary as judicial. See Holdsworth, *Some Lessons from our Legal History* 34–54 (1928).

11. The doctrine that statutes in derogation of the common law are to be strictly construed was a product of late eighteenth-century thought. Its first announcement seems to have been in Ash v. Abdy, 3 Swans. (App.) 664, 36 Eng. Rep. 1014 (Ch. 1678), decided in 1678 but not reported until 1819; in America it found its first expression in Brown v. Barry, 3 U.S. (3 Dall.) 365 (1797). See Pound, *Common Law and Legislation,* 21 Harv. L. Rev. 383, 400 (1908). Professor Allen attempts to date the attitude back to the origins of common law. See Allen, *Law in the Making* 268, n.2 (2d ed. 1930). The spirit as distinguished from the letter of its foundation, cannot, however, be regarded as dominating judicial thinking until the period indicated by Dean Pound.

12. For open avowals of the doctrine of equitable interpretation, see United States v. Freeman, 44 U.S. (3 How.) 556, 565 (1845); Hoguet v. Wallace, 28 N.J.L. 523 (1860); Simonton v. Barrell, 21 Wend. 362, 365 (N.Y. Sup. Ct. 1839); White v. Carpenter, 2 Paige 217, 229 (N.Y. Ch. 1830); Hersha v. Brenneman, 6 S. & R. 2, 4 (Pa. 1820).

13. No clear distinction exists today between construction and interpretation. Lieber sought to give the term "construction" a content equivalent to the principles subsumed beneath the common-law doctrine of the equity of a statute. See Lieber, *Legal and Political Hermeneutics* ch. 3, § 2 (1839). Sutherland and Black took up Lieber's phraseology but made no such acute attempt to distinguish principles of construction and of interpretation. See Lewis' Sutherland, *Statutes and Statutory Construction* § 365 (1904); Black, *Handbook on Construction and Interpretation of the Laws* 1–4 (1896). Other writers such as Sedgwick, Dwarris, Potter, Maxwell, and Craies, make no attempt to draw any distinction between the two terms. A vague belief still seems to exist that somehow there is a difference between the two concepts. The uniform laws, following a report of the Legislative Drafting Committee, all contain the precatory provision: "This act shall be so *interpreted and construed* as to effectuate its general purpose to make uniform the law of those states which enact it." See *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings* 62 (1927).

14. *Cf.* Silver v. Ladd, 74 U.S. (7 Wall.) 219 (1868); Ragland v. Justices of the Inferior Court, 10 Ga. 65 (1851); Chandler v. Northrop, 24 Barb. 129 (N.Y. Sup. Ct. 1857); Turbett Township v. Port Royal Borough, 33 Pa. Super. 520 (1907). For an example of an attempt to legislate into existence the principle of the equity of the statute, see Ohio Rev. Stat. 1880, § 5242: ". . . and when a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall be applied." A similar provision is to be found in Wyo. Rev. Stat. 1887, § 2590. For the reverse process of reading exceptions into a statute, see Holy Trinity Church v. United States, 143 U.S. 457 (1892). The technique of such a decision, except for integrity of approach, is essentially similar to that in Stradling v. Morgan, 1 Plowd. 199, 75 Eng. Rep. 305 (Ex. 1559) or Eyston v. Studd, 2 Plowd. 459, 75 Eng. Rep. 688 (C.B. 1573).

15. Compare the influence of these and like cases on Radin, *Statutory Interpretation,* 43 Harv. L. Rev. 863 (1930).

16. See Thayer, *Public Wrong and Private Action,* 27 Harv. L. Rev. 317 (1914); Lowndes, *Civil Liability Created by Criminal Legislation,* 16 Minn. L. Rev. 361 (1932); Schneider, *Negligence by Violation of Law,* 11 B.U.L. Rev. 217 (1931); 32 Colum. L. Rev. 911, 912 (1932).

17. Rylands v. Fletcher, L.R. 3 H.L. 330 (E. & I. App. 1868).

18. See Bohlen, *The Rule in Rylands v. Fletcher,* 59 U. Pa. L. Rev. 298 (1911).

19. Langabaugh v. Anderson, 68 Ohio St. 131, 67 N.E. 286 (1903); West v. Bristol Tramways Co., [1908] 2 K.B. 14.

20. Batcheller v. Tunbridge Wells Gas Co., 84 L.T.R. (n.s.) 765 (1901).

21. Compare the illustrative uses made of statutory material in pricking out the application of the concept of unfair competition as related to deceptive advertising in 43 Harv. L. Rev. 945 (1930).

22. Compare the critical light derivable from statutes with respect to the wisdom of the judicial principle announced in Britton v. Turner, 6 N.H. 481 (1834), as developed in 43 Harv. L. Rev. 647 (1930).

23. See Lush, "Changes in the Law Affecting the Rights, Status, and Liabilities of Married Women," being ch. xi of *A Century of Law Reform* (1901); Dicey, *Law and Public Opinion in England* 371–95 (1914).

24. For an attempt to achieve equality of rights and powers by blanket legislation, see Wis. Laws 1921, ch. 529, construed in First Wisconsin National Bank v. Jahn, 179 Wis. 117, 190 N.W. 822 (1922) and Selts Investment Co. v. Baireuther, 202 Wis. 151, 231 N.W. 641 (1930) to enable a wife to become surety for her husband; in Wait v. Pierce, 191 Wis. 202, 209 N.W. 475, 210 N.W. 822 (1926) and Fontaine v. Fontaine, 205 Wis. 570, 238 N.W. 410 (1931) to enable a wife to sue her husband in tort; in Sparks v. Kuss, 195 Wis. 378, 216 N.W. 929, 218 N.W. 208 (1928) to enable a wife to become a business partner of her husband; in Aaby v. Citizens Nat'l Bank, 197 Wis. 56, 221 N.W. 417 (1928) to abolish estates by the entirety. *Cf.* Ansorge v. Green Bay, 198 Wis. 320, 224 N.W. 119 (1929).

25. The bases for the common-law doctrine imposing liability upon the husband for torts unconnected with the wife's separate estate that have been suggested are: (1) that as a matter of procedure the wife could not be sued separately, Head v. Briscoe, 5 Carr. & P. 484, 172 Eng. Rep. 1064 (1833); (2) that the husband should be subjected to such an obligation because he became the owner of the wife's personal property and received the rents and profits from her realty, Tiffany, *Domestic Relations* 96 (3d ed. 1921); (3) that the husband possessed a limited power of chastisement over the wife, Norris v. Corkill, 32 Kan. 409, 4 Pac. 862 (1884); (4) that the wife in committing such torts acted under the superior will and influence of the husband, McQueen v. Fulgham, 27 Tex. 463 (1864). The Married Women's Act swept away the first two grounds, and the third has disappeared. Giving effect to the policy of the Acts should therefore have resulted in the abrogation of the common-law rule, except insofar as the fourth ground may be valid. In the main such abrogation has resulted. See cases collected in 1 Schouler, *Marriage, Divorce, Separation and Domestic Relationships* §§ 130–31 (6th ed. 1921); Tiffany, *op. cit. supra* at 101–04. *Cf.* Edwards

v. Porter, [1925] A.C. 1. The contrary decisions have since generally been abrogated by statute. See Me. Laws 1883, ch. 207; Minn. Laws 1897, ch. 10; Mo. Acts 1915, 269; N.Y. Laws 1890, ch. 51, § 2; N.C. Laws 1921, ch. 10; Tex. Laws 1921, ch. 130; W. Va. Code 1931, 48–3– § 20. *Cf.* Moore v. Doerr, 199 Mo. App. 428, 203 S.W. 672 (1918); Marcus v. Rovinsky, 95 Me. 106, 49 Atl. 420 (1901).

The common-law liability of the husband for the antenuptial contracts and torts of his wife presents an even clearer instance where the effect of the Married Women's Acts should be to overturn earlier doctrine based upon a different conception of marriage. Resting, as the rule did, upon the fact that the husband acquired the wife's personalty and the income from her realty together with the right to her earnings, the Acts removed the bases for such liability. Courts thus generally absolved the husband of personal liability. See 1 Schouler, *op. cit. supra* at § 82. Contrary decisions were quickly abrogated by express legislative enactment. Kies v. Young, 64 Ark. 381, 42 S.W. 669 (1897), overruled by Ark. Acts 1899, 4; Connor v. Berry, 46 Ill. 370 (1868), overruled by Ill. Laws 1869, 255, as construed in Howarth v. Warmser, 58 Ill. 48 (1871), Alexander v. Morgan, Root & Co., 31 Ohio St. 546 (1877), overruled by a series of statutes detailed in Y. & O. Coal Co. v. Paszka, 20 Ohio App. 248 (1925); Platner v. Patchin, 19 Wis. 333 (1865), overruled by Wis. Laws 1872, ch. 155; [*But compare*] Berley v. Rampacher, 5 Duer 183 (N. Y. Super. Ct. 1856), [*with*] N.Y. Laws 1853, ch. 576.

26. The common law presumed that a wife committing a crime in the presence of her husband did it under his compulsion. The same presumption applied at common law to torts committed by the wife in the husband's presence. For these the husband was sorely liable. Kosminsky v. Goldberg, 44 Ark. 401 (1884); Brazil v. Moran, 8 Minn. 205 (1863); Dailey v. Houston, 58 Mo. 361 (1874); Dohorty v. Madgett, 58 Vt. 323 (1885). *Cf.* Handy v. Foley, 121 Mass. 259 (1876). In both situations the reason for the common law rests upon the generalization that the acts are done under duress from the husband. For an early application of this principle, see Laws of Ine, 57, Attenborough, *Laws of the Earliest English Kings* 55 (1922). The Married Women's Acts thus of themselves do not strike at the basis for the rule. In advancing the economic independence of married women, the Acts may indirectly have challenged the truth of the early generalization. But the question hinges upon a wide issue of fact, and does not follow as a deduction from a change in economic status. Courts have, however, concluded that the Acts of themselves abrogated the common-law rule. King v. City of Owensboro, 187 Ky. 21, 218 S.W. 297 (1920); Bevins v. Comm., 204 Ky. 444, 264 S.W. 1063 (1924); Morton v. State, 141 Tenn. 357, 209 S.W. 644 (1918). *Cf.* Anderson v. Comm., 211 Ky. 726, 277 S.W. 1008 (1925); Bell v. State, 92 Ga. 49, 18 S.E. 186 (1893). *Contra,* Dressler v. State, 194 Ind. 8, 141 N.E. 801 (1923). See McCurdy, *Cases on Domestic Relations* 690n. (1930). The Nineteenth Amendment has also been used as a basis for rejecting the common-law presumption. U.S. v. Hinson, 3 F.2d 200 (S.D. Fla. 1925). For an extreme example of the use of emancipatory legislation to establish equality of physical powers, see Mr. Justice Sutherland's argument in Adkins v. Children's Hospital, 261 U.S. 525 (1923) to the effect that the grant of woman suffrage implied that women were as economically capable as men to wrest a living wage, criticized as an

"absurdity" in Powell, *Judiciality of Minimum-Wage Legislation,* 37 Harv. L. Rev. 545, 558n. (1924).

27. The fiction of the identity of husband and wife at common law made it impossible to convict them of conspiracy. 2 Bishop, *Criminal Law* § 187 (9th ed. 1923). *Contra,* as to civil conspiracy, Jones v. Monson, 137 Wis. 478, 119 N.W. 179 (1909). The common-law doctrine cannot be justified upon the basis that the wife acts under the duress of her husband. Scholastic logic seems to have erected the ecclesiastical spiritual unity into a ghostly legal one. Such considerations as make against the disruption of the family unit by forcing disclosures between husband and wife, would receive ample protection by evidentiary rules of excluding testimony. The lack of substance in the common-law doctrine is indicated both by the fact that both spouses could be guilty of the substantive crime and by the rule which made husband and wife guilty of conspiracy if a third person was also concerned. State v. Clark, 9 Houst. 536, 33 Atl. 310 (Del. 1891). The doctrinaire absurdities possible by a wooden application of common-law technique find no better illustration than the continuance of this rule under modern conditions, without even inquiry as to whether it has any social justification. People v. Miller, 82 Cal. 107, 22 Pac. 934 (1889); Worthy v. Birk, 224 Ill. App. 574 (1922); Merrill v. Marshall, 113 Ill. App. 447 (1903); Comm. v. Allen, 24 Pa. Co. Ct. R. 65 (1900); Dawson v. United States, 10 F.2d 106 (9th Cir. 1926). *Cf.* People v. Eppstein, 108 Cal. App. 72, 290 Pac. 1054 (4th Dist. 1930); People v. Ingles, 66 Cal. App. Dec. 1039 (1931). A few courts seizing upon the economic disunity created by the Married Women's Acts have overturned the common-law rule. Dalton v. People, 68 Colo. 44, 189 Pac. 37 (1920); Smith v. State, 48 Tex. Crim. 233, 89 S.W. 817 (1905).

Not unlike the issues here involved are those raised by the effect of the Married Women's Acts upon the common-law doctrine that neither spouse could be guilty of a crime against the property of the other spouse. The separate economic existence given married women by the Acts would make for the abrogation of such a rule. Considerations of the undesirability of permitting resort to the criminal law in intra-familial matters would seem rightly to be subordinated, in the more serious crimes, to the desirability of maintaining inviolate the married woman's rights to her property. The trend has thus been to consider the Acts as having changed the common-law rule. Hunt v. State, 72 Ark. 241, 79 S.W. 769 (1904); People v. Graff, 59 Cal. App. 706, 211 Pac. 829 (2d Dist. 1922); Garrett v. State, 109 Ind. 527, 10 N.E. 570 (1886); Beasley v. State, 138 Ind. 552, 38 N.E. 35 (1894); State v. Shaw, 79 Kan. 396, 100 Pac. 78 (1909); State v. Koontz, 124 Kan. 216, 257 Pac. 944 (1927). See also Married Woman's Property Act, 1882, 45 & 46 Vict. c. 75, §§ 12, 16; construed in Rex v. James, [1902] 1 K.B. 540; Rex v. Creamer, [1919] 1 K.B. 564. *Contra,* Thomas v. Thomas, 51 Ill. 162 1869); State v. Arnold, 182 Minn. 313, 235 N.W. 373 (1931); State v. Phillips, 85 Ohio St. 317, 97 N.E. 976 (1912). See 30 Mich. L. Rev. 622 (1930).

28. The effect of the Married Women's Acts on tenancies by the entirety is most interesting because of the divergency of the results. On view regards the Acts as having no effect upon such tenancies, because the legislation concerns itself with the wife's *separate* property which by definition excludes her interest in the estate by entirety. Morill v. Morill, 138 Mich. 112, 101

N.W. 209 (1904). A second view regards the Acts as having destroyed the husband's right to the exclusive enjoyment of the estate during coverture, thus creating an estate not only inalienable by both parties, but not to be taken upon execution except on a joint judgment against both parties. Getty v. Hupfel's Sons, 292 Fed. 178 (E.D. Pa. 1923). A third view considers that the Acts have destroyed the estate, not only because the statutes abolished the legal identity of hubsand and wife upon which the estate rested but also because they abolished the reason given for the creation of such an estate, namely the wife's incapacity to hold by moieties. Aaby v. Citizens Nat'l Bank, 197 Wis. 56, 221 N.W. 417 (1928); Donegan v. Donegan, 103 Ala. 488, 15 So. 823 (1894); Thornley v. Thornley, [1893] 2 Ch. 229. See Note, 37 Harv. L. Rev. 616 (1924); 1 Schouler, *op. cit. supra* note 25, at § 569.

29. The Married Women's Acts have not affected the former doctrine that the duty to pay alimony rested alone upon the husband. Groth v. Groth, 69 Ill. App. 68 (1896), reversing 7 Chic. L. J. N.S. [*sic*] 359 (1896); Greene v. Greene, 49 Neb. 546, 68 N.W. 947 (1896); Poloke v. Poloke, 37 Okla. 70, 130 Pac. 535 (1913); Hoagland v. Hoagland, 19 Utah 103, 57 Pac. 20 (1899); Brenger v. Brenger, 142 Wis. 26, 125 N.W. 109 (1910). The duty has been imposed upon the wife by statute. Albert v. Albert, 7 Ohio App. 156 (1916). *Cf.* Barnes v. Barnes, 59 Iowa 456, 13 N.W. 441 (1882); McDonald v. McDonald, 117 Iowa 307, 90 N.W. 603 (1902); Burchell v. Burchell, [1926] 2 D.L.R. 595.

30. *Cf.* Hagert v. Hagert, 22 N.D. 290, 133 N.W. 1035 (1911). See also Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836 (1897); Livingston v. Conant, 51 Pac. 859 (Cal. 1898); Hickle v. Hickle, 6 Ohio C.C.R. 490 (1892); Baughman v. Baughman, 7 Ohio Dec. 433 (C.P. 1897); Scully v. Scully, 1 Iddings 10, 18 (Ohio C.P. 1899).

31. The husband's liability for necessaries supplied to his wife has not been affected by the Acts. Ponder v. Morris & Bros. 152 Ala. 531, 44 So. 651 (1907); Flynn v. Messenger, 28 Minn. 208, 9 N.W. 759 (1881); Ott v. Hentall, 70 N.H. 231, 47 Atl. 80 (1899); Ruhl v. Heintze, 97 App. Div. 442, 89 N.Y. Supp. 1031 (1904). See the criticism of the doctrine in 1 Bishop, *Commentaries on the Law of Married Women* §§ 895–900 (1873). As to the effect of the "family expense" statutes, see McCurdy, *op. cit. supra* note 26, at 768n. *Cf.* Gowin v. Gowin, 292 S.W. 211 (Tex. Comm. App. 1927), criticized in Speer, *Law of Marital Right in Texas* § 116 (3d ed. 1929).

32. General agreement exists that the Acts enable the wife to sue the husband for torts committed against her separate property, though the authorities divide upon whether the action should be legal or equitable. See McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1038 (1930). Disagreement exists where the tort is of a personal nature. That the issue in these cases is not one of statutory interpretation but one of developing a rule appropriate to the institution of marriage as altered by statute, see McCurdy, *supra*. Such reasons as were responsible for limiting the right to sue for alienation of affections to the husband have been swept away by the Acts. Courts thus generally have allowed the wife to maintain the action. Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889); Haynes v. Nowlin, 129 Ind. 581, 29 N.E. 389 (1891); Hoover v. Hoover, 103 Fla. 846,

138 So. 373 (1931). See McCurdy, *op. cit. supra* note 26, at 818n. Contrary decisions were rendered in three states. Morgan v. Martin, 92 Me. 190, 42 Atl. 354 (1898); Hodge v. Wetzler, 69 N.J.L. 490, 55 Atl. 49 (1903); Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890). The Maine decision was overruled by Me. Laws 1913, ch. 33, which has, however, been unwarrantably severely construed. Howard v. Howard, 120 Me. 479, 115 Atl. 259 (1921); Pray v. Millett, 122 Me. 40, 118 Atl. 721 (1922). The New Jersey decision was abrogated by N.J. Laws 1906, 525. Sims v. Sims, 79 N.J.L. 577, 76 Atl. 1063 (1910). The Wisconsin decision after being reaffirmed in Lonstorf v. Lonstorf, 118 Wis. 159, 95 N.W. 961 (1903), was overruled by Wis. Laws 1905, ch. 17.

The theory of the common law was that adulterous intercourse by the wife both injured the husband's dignity and raised a possibility of illegitimate offspring that the husband might be required to support. But adulterous infidelity by the husband not only injures the position of the wife, but as was said in Oppenheim v. Kridel, 236 N.Y. 156, 161, 140 N.E. 227, 229 (1923): "Science to-day teaches us the dire consequences which sometimes follow promiscuous intercourse by a man." The real basis for continuing the common-law rule seems to be masculine insistence upon maintaining a double standard. See Collins, J., in Kroessin v. Keller, 60 Minn. 372, 375, 62 N.W. 438, 439 (1895), commentng upon the absence of "disgrace" to the innocent wife, and adding: "The power to bring such actions would furnish wives 'with the means of inflicting untold misery upon others, with little hope of redress for themselves.'" See cases collected in 4 A.L.R. 569 (1919); 28 A.L.R. 327 (1924). The decision of Doe v. Roe, 82 Me. 503, 20 Atl. 83 (1890) denying the wife a right of action was overruled by Me. Laws 1913, ch. 33.

33. See 1 Blackstone, Commentaries *459. A different result was reached in Connecticut as a matter of common law, the courts regarding the bastard as the heir of his mother. Brown v. Dye, 2 Root 280 (Conn. 1795); Heath v. White, 5 Conn. 228 (1824); Dickinson's Appeal, 42 Conn. 491 (1875).

34. For the severity of the common-law attitude toward illegitimate children, see 3 Jarman, *Wills* chs. 42, 43 (7th ed. 1930).

35. Johnstone v. Taliaferro, 107 Ga. 6, 32 S.E. 931 (1899); Lyon v. Lyon, 88 Me. 395, 34 Atl. 180 (1896); Gibson v. McNeely, 11 Ohio St. 131 (1860). *Accord,* Flora v. Anderson, 75 Fed. 217 (C.C.D. Ohio 1896), construing "issue of the body"; Brisbin v. Huntington, 128 Iowa 166, 103 N.W. 144 (1905), construing "children" to exclude an illegitimate child subsequently recognized by the father where a statute provided that the effect of such recognition gave him the right to inherit from his father. Typical of this unyielding attitude of courts towards the bastardy statutes are decisions refusing to permit bastards of the same mother to inherit from each other or to inherit by right of representation through the mother, though they individually possess the right to inherit from the mother. Curtis v. Hewins, 52 Mass. (11 Met.) 294 (1846); Stevenson's Heirs v. Sullivant, 18 U.S. (5 Wheat.) 207 (1820). *Contra,* Briggs v. Greene, 10 R.I. 495 (1873); Grundy v. Hadfield, 16 R.I. 579, 18 Atl. 186 (1889); Town of Burlington v. Fosby, 6 Vt. 83 (1834); Garland v. Harrison, 35 Va. (8 Leigh) 368 (1837). *Cf.* Hardesty v. Mitchell, 302 Ill. 369, 134 N.E. 745 (1922).

36. R.I. Hospital Trust Co. v. Hodgkin, 48 R.I. 459, 137 Atl. 381 (1927); Bennett v. Toler, 56 Va. (15 Gratt.) 588 (1860). *Accord,* Hayden v. Barrett, 172 Mass. 472, 52 N.E. 530 (1899), contruing "heir by blood"; Harell v. Hagan, 147 N.C. 111, 60 S.E. 909 (1908), construing "lawful heir." In Wisconsin the presumption that "children" means legitimate children, since the bastardy statutes, "is impaired but not destroyed." Will of Kaufer, 203 Wis. 299, 234 N.W. 504 (1931); Will of Scholl, 100 Wis. 650, 76 N.W. 616 (1898). The Connecticut court reached the position that "children" and "issue of the body" included illegitimate children as a matter of common law, in view of its earlier decisions that the common law of the state gave the bastard inheritable rights from its mother. Eaton v. Eaton, 88 Conn. 269, 91 Atl. 191 (1914); Eaton v. Eaton, 88 Conn. 286, 91 Atl. 196 (1914).

37. Smith v. Garber, 286 Ill. 67, 121 N.E. 173 (1918); Tuttle v. Woolworth, 76 N.J. Eq. 310, 77 Atl. 684 (1908); Sullivan v. Parker, 113 N.C. 301, 18 S.E. 347 (1893).

The problem of the interpretation of "children" to include or exclude legitimated children presents an issue like that raised by illegitimate children. The statutes here vary considerably but, in the main, they expressly purport to change the "status" of the illegitimate child. See Freund, *Illegitimacy Laws of the United States,* U.S. Dept. of Labor, Children's Bureau Bull. No. 42. This fact, coupled with the greater likelihood that such children occupy the social position of legitimate children, has made generally for their inclusion as "children" in deeds, wills, and other statutes. See Note, 45 Harv. L. Rev. 890 (1932).

38. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N.E. 411 (1911); Security Title & Trust Co. v. West Chicago St. R.R. Co., 91 Ill. App. 332 (1900); Muhl's Adm'r v. Mich. So. R.R. Co., 10 Ohio St. 272 (1859); Southern Ry. Co. v. Hawkins, 35 App. D.C. 313 (D.C. Cir. 1910). *Accord,* when the action accrues to "lineal descendants" and "lineal ancestors," Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170, 148 N.W. 37 (1914).

39. Robinson v. Ga. R.R. & Banking Co., 117 Ga. 168, 43 S.E. 452 (1903); Lynch v. Knoop, 118 La. 611, 43 So. 252 (1907); State *ex rel.* Smith v. Hagerstown & Frederick Ry. Co., 139 Md. 78, 114 Atl. 729 (1921); Illinois Central R.R. Co. v. Johnson, 77 Miss. 727, 28 So. 753 (1900); Alabama & Vicksburg Ry. Co. v. Williams, 78 Miss. 209, 28 So. 853 (1900); Runt v. Illinois Central R.R. Co., 88 Miss. 595, 41 So. 1 (1906); McDonald v. Southern Ry., 71 S.C. 352, 51 S.E. 138 (1905); Dickinson v. Northeastern Ry. Co., 2 H. & C. 735 (1863); Gibson v. Midland Ry. Co., 2 Ont. 658 (1883). *Cf.,* as to Scotch law, Clarke v. Carfin Coal Co., [1891] A.C. 412. *Accord,* as to death benefits payable under Workmen's Compensation Act, Scott v. Independent Ice Co., 135 Md. 343, 109 Atl. 117 (1919). *Cf.,* Bell v. Terry & Trench Co., 177 App. Div. 123, 163 N.Y. Supp. 733 (1917). The fact that the American decisions reaching this result come uniformly from southern states suggests that the mulatto child has something to do with the result. It should be noted, however, that Florida and Texas are among the other jurisdictions in which contrary results have been reached. Hadley v. City of Tallahassee, 67 Fla. 436, 65 So. 545 (1914); Marshall v. Wabash Ry. Co., 120 Mo. 275, 25 S.W. 179 (1894); Thompson v. Delaware, L. & W. R.R. Co., 41 Pa. Super. 617 (1910), construing Pa. Laws 1901, 639 to overrule the opposite result reached in Harkins v. Phila. & Reading Co.,

15 Phila. 286, 11 W.N.C. 120 (1881), and overruling Deichman v. Knecht, 18 Pa. Dist. 279 (1907); Galveston H. & S. A. Ry. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S.W. 705 (1907). *Accord,* as to death benefits payable under Workmen's Compensation Act, Marshall v. Industrial Commission, 342 Ill. 400, 174 N.E. 534 (1930).

40. The question of whether "child" in other types of statutes includes an illegitimate child on occasion raises issues like those presented by the wrongful death statutes. *Cf. In re* Wardell, 57 Cal. 484 (1881); Floyd v. Floyd, 97 Ga. 124, 24 S.E. 451 (1895); Kent v. Barker, 68 Mass. (2 Gray) 535 (1854); Lavigne v. Ligue des Patriotes, 178 Mass. 25, 59 N.E. 674 (1901); Walker v. Robertson, 21 Okla. 894, 97 Pac. 609 (1908); Wettach v. Horn, 201 Pa. 201, 50 Atl. 1001 (1902); Peerless Pacific Co. v. Burckhard, 90 Wash. 221, 155 Pac. 1037 (1916); Hargraft v. Keegan, 10 Ont. 272 (1885).

41. Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants, [1901] A.C. 426.

42. United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

43. See Warren, *Corporate Advantages without Incorporation* bk. II, ch. 9 (1929).

44. See Witte, *The Government in Labor Disputes* 143 (1932).

45. Courts that have expressly rejected the Coronado and the Taff Vale doctrine, despite the high authority of the tribunals that announced it, have adverted expressly to the difference in the legislative background of their own jurisdictions. See Society Brand Clothes v. Amalgamated Clothing Workers of America, [1931] 3 D.L.R. 361, especially the opinion of Bond, J., below in 48 Que. B.R. 14 (1929); Tucker v. Eatough, 186 N.C. 505, 120 S.E. 57 (1923); Citizens Co. v. Typographical Union, 187 N.C. 42, 121 S.E. 31 (1924); District No. 21 v. Bourland, 169 Ark. 796, 277 S.W. 546 (1925). *Cf.* Russell v. Central Labor Union, 1 F.2d 412 (D. Ill. 1924); *Ex parte* Edelstein, 30 F.2d 626 (2d Cir. 1929); United States & Cuban A.W.E. Corp. v. Lloyds, 291 Fed. 889 (S.D.N.Y. 1923). See also Hansell v. Purcell, 1 F.2d 266 (6th Cir. 1924) *cert. denied* in 266 U.S. 617 (1924); Bobe v. Lloyds, 10 F.2d 730 (2d Cir. 1926), *cert. denied* in 270 U.S. 663 (1926).

46. Holmes, J., in Panama R.R. Co. v. Rock, 266 U.S. 209, 216 (1924).

47. Cross v. Guthery, 2 Root 90 (Conn. 1794); Ford v. Monroe, 20 Wend. 210 (N.Y. Sup. Ct. 1838) rejected in Green v. Hudson River R.R. Co., 2 Keyes 294 (N.Y. Ct. App. 1866); James v. Christy, 18 Mo. 162 (1853); Sullivan v. Union Pac. R.R. Co., 23 Fed. Cas. 368 (No. 13599) (C.C.D. Neb. 1874).

48. The Sea Gull, 21 Fed. Cas. 909 (No. 12578) (C.C.D. Md. 1865); The Towanda, 24 Fed. Cas. 74 (No. 14109) (C.C.E.D. Pa. 1877); The Charles Morgan, 5 Fed. Cas. 511 (No. 2618) (S.D. Ohio 1878); Hollyday v. The David Reeves, 12 Fed. Cas. 386 (No. 6625) (D. Md. 1879); The Garland, 5 Fed. 924 (E.D. Mich. 1881); The E.B. Ward, Jr., 17 Fed. 456 (C.C.E.D. La. 1883), 23 Fed. 900 (C.C.E.D. La. 1885); The Columbia, 27 Fed. 704 (S.D.N.Y. 1886), *rev'd sub nom.* The Alaska, 130 U.S. 201 (1889). See The Highland Light, 12 Fed. Cas. 138 (No. 6477) (C.C.D.

Md. 1867). *Cf.* The City of Brussels, 5 Fed. Cas. 761 (No. 2745) (S.D.N.Y. 1873). *But cf.* The Sylvan Glen, 9 Fed. 335 (E.D.N.Y. 1881); The Manhasset, 18 Fed. 918 (E.D. Va. 1884).

49. The Harrisburg, 119 U.S. 199 (1886); The Alaska, 130 U.S. 201 (1889). In The Corsair, 145 U.S. 335 (1892) it was held that though the state statute was applicable and gave a right of recovery, in the absence of the express creation of a maritime lien for such a tort, no action in rem would lie.

50. Steamship Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872); Sherlock v. Alling, 93 U.S. 99 (1876).

51. Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921); Holmes v. Oregon & C. Ry. Co., 5 Fed. 75 (D. Ore. 1880); The Clatsop Chief, 8 Fed. 163 (D. Ore. 1881). So also the right could be enforced in a federal court in a proceeding to limit liability. The Hamilton, 207 U.S. 398 (1907); La Bourgogne, 210 U.S. 95 (1908); The Transfer No. 12, 221 Fed. 409 (2d Cir. 1915).

52. *Cf.* The Sagamore, 247 Fed. 743 (1st Cir. 1917); The Middlesex, 253 Fed. 142 (D. Mass. 1916); Rundell v. La Compagnie Generale Transatlantique, 100 Fed. 655 (7th Cir. 1900). See Magruder & Grout, *Wrongful Death within the Admiralty Jurisdiction,* 35 Yale L.J. 395 (1926).

53. See Act of March 30, 1920, 41 Stat. 537, 46 U.S.C. §§ 761–67; Act of June 5, 1920, § 33, 41 Stat. 988, 1007, 46 U.S.C. § 688. *Cf.* Lindgren v. United States, 281 U.S. 38 (1930); Uravic v. Jarka Co., 282 U.S. 234 (1931). See Magruder & Grout, *supra* note 52, at 418–33.

54. Panama R.R. Co. v. Rock, 266 U.S. 209 (1924). *Cf.* Lebert v. Pacific Mail S.S. Co., 249 Fed. 349 (5th Cir. 1918).

55. See Note, 38 Harv. L. Rev. 499 (1925).

56. Act of Dec. 29, 1926, § 7, 44 Stat. 924, 927.

57. See Tiffany, *Real Property,* §§ 166, 185 (2d ed. 1920).

58. See Amram, *Pennsylvania Rules for Construction of the Words "Die Without Issue,"* 79 U. Pa. L. Rev. 15, 18 (1930).

59. Jones v. Gulf Refining Co., 295 Pa. 92, 144 Atl. 895 (1929); Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409 (1900); Lion v. Burtiss, 20 Johns. R. 483 (N.Y. 1823); Tiffany, *op. cit. supra* note 57, § 185. The case of Forman v. Troup, 30 Ga. 496 (1860) gave an intimation that the court itself would overturn the common-law rule because of the abolition of fee tails by statute in 1821. There the devise read to the children of one daughter, but if that daughter died without "legal lineal heir or heirs," then to the children of another daughter or the survivor. True, the gift over to survivors would help to confirm a contruction in favor of a definite rather than an indefinite failure of issue. The court, recognizing that the Act of 1821 now made the gift over too remote if an indefinite failure should be presumed, drew upon this fact to conclude a definite failure was intended. It was avowedly influenced by the fact that it was the will of the respected Governor Troup that was under consideration, for it refused to "impute such an intention to violate the laws of his State to a man who loved her, and every letter

of her laws, and every inch of her soil with an energy and devotion that no soul could inspire but that of George M. Troup." It is unfortunate that later Georgia courts could not impute such whole-hearted love for the Georgia rule against perpetuities to its common citizenry as well as to its lamented governor. The common-law rule raising the presumption of indefinite failure of issue has been generally abrogated by statute. *Cf.* Pa. Laws 1897, 213; Ga. Laws 1854, No. 62. Section 29 of the Wills Act, which also abrogated the common-law presumption, was unwarrantably narrowly construed. Dawson v. Small, L.R. 9 Ch. 651 (1874); *In re* Leach, [1912] 2 Ch. 422.

60. At common law a gift in tail of personalty was equivalent to a gift in fee. See 1 Fearne, *Contingent Remainders* 492 (10th London ed. 1844).

61. See *id.* at 471; 3 Jarman, *Wills* 306 (5th Am. ed. 1881); Gray, *Rule Against Perpetuities* § 632, n.3 (3d ed. 1915).

62. Earl of Kennval v. Hunter, Mor. Dist 14301 (1802).

63. Hay v. Lord Provost of Perth, 4 Macq. 535 (1863); Wedderburn v. Duke of Atholl, [1900] A.C. 403. See Stewart, *Treatise on the Law of Scotland Relating to Rights of Fishing* ch. 7 (1869); Tait, *Game and Fishing Laws of Scotland* ch. 16 (2d ed. 1928).

64. Note, for example, the citation in McCredie v. Elmer, 132 Ore. 368, 284 Pac. 573 (1930) of N.I.L. § 58, as establishing a principle relative to fraud and illegality which the court extends to failure of consideration. In Sheldon v. Blackman, 188 Wis. 4, 205 N.W. 486 (1925), the court applies principles drawn from the Act to non-negotiable instruments. See also a plea for such a technique, termed "analogical interpretation" in Beutel, *The Necessity of a New Technique of Interpreting the N.I.L.*, 6 Tulane L. Rev. 1 (1931).

65. *Cf.* Union Nat'l Bank v. Franklin Nat'l Bank, 249 Pa. 375, 94 Atl. 1085 (1915).

66. See, for example, the contention of Professor Chafee that section 24 of the Uniform Sales Act, which denies an infant the right to recover a chattel sold by him and resold to a bona fide purchaser, is declaratory of a modern commercial policy and thus should be applied to the analogous situation in negotiable instruments so as to deny an infant the power to rescind his transfer as against a remote holder in due course. See Brannan, *The Negotiable Instruments Law Annotated* § 22, at 180 (4th ed. 1926). This contention was, however, expressly rejected in Strother v. Lynchburg Trust & Savings Bank, 155 Va. 826, 156 S.E. 426 (1931), criticized by Cavers, *Effect of Disaffirmance by an Infant of His Indorsement of Negotiable Paper*, 37 W. Va. L.Q. 426 (1931); also criticized in 17 Va. L. Rev. 727 (1931), 5 U. Cinc. L. Rev. 357 (1931), 19 Geo. L.J. 485 (1931). A contrary attitude was taken by the court in Howard Nat'l Bank v. Wilson, 96 Vt. 438, 120 Atl. 889 (1923). There the court drew upon provisions in the Uniform Bills of Lading and Warehouse Receipts Acts, Vt. Gen. Laws 1917, §§ 3113, 3172, as illustrating a policy that local precedents prior to the passage of uniform acts should be sacrificed in the interest of uniformity, and consequently departed from its earlier decisions to hold in accordance with the majority of the courts on a point not expressly covered by

the Negotiable Instruments Law that an indorsee need not exercise reasonable prudence but only good faith to claim the position of a holder in due course.

67. See Landis, *The Study of Legislation in Law Schools,* 39 Harv. Grad. Mag. 433 (1931).

68. *Cf.* Hagert v. Hagert, 22 N.D. 290, 133 N.W. 1035 (1911). See also Livingston v. Superior Court, 117 Cal. 633, 49 Pac. 836 (1897); Livingston v. Conant, 51 Pac. 859 (Cal. 1898); Hickle v. Hickle, 6 Ohio C.C.R. 490 (1892); Baughman v. Baughman, 7 Ohio Dec. 433 (C.P. 1897); Scully v. Scully, 1 Iddings 10, 18 (Ohio C.P. 1899).

69. See, for example, Allen, J., in Vegelahn v. Guntner, 167 Mass. 92, 98, 44 N.E. 1077 (1896) relying on Reg. v. Druitt, 10 Cox Crim. Cas. 592 (Cent. Crim. Ct. 1867); Reg. v. Hibbert, 13 Cox Crim. Cas. 82 (Cent. Crim. Ct. 1875), then repudiated by the Criminal Law Amendment Act, 1871, 34 & 35 Vict. c. 32, and the Conspiracy, & Protection of Property Act, 1875, 38 & 39 Vict. c. 86.

70. In Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905), which recognized a right in privacy despite the contrary decision in Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902), the court relies strongly upon an editorial in 36 Am. L. Rev. 614–20, 634–36 (1902), and articles in other legal periodicals condemning the Roberson decision, but makes no mention of N.Y. Laws 1903, ch. 132, where the legislature promptly repudiated the Roberson rule. The statute finds no mention in any case that, like the Pavesich case, refused to adopt the law of the Roberson case. Munden v. Harris, 153 Mo. App. 652, 134 S.W. 1076 (1911); Edison v. Edison Polyform & Mfg. Co., 73 N.J. Eq. 136, 67 Atl. 392 (1907); Kunz v. Allen, 102 Kan. 883, 172 Pac. 532 (1918). *But cf.* Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 Atl. 97 (1907). Strangely enough the statute is mentioned in a case which followed the Roberson case. Henry v. Cherry & Webb, 30 R.I. 13, 43, 73 Atl. 97, 109 (1909).

71. Amory v. Meredith, 89 Mass. (7 Allen) 397, 400 (1863).

72. Hutton v. Benkard, 92 N.Y. 295 (1883). *Cf.* Cutting v. Cutting, 86 N.Y. 522 (1881).

73. Thus Pennsylvania adopted the rule of the Wills Act by Act of June 4, 1879, overturning the common-law rule as established in Bingham's Appeal, 64 Pa. 345 (1870). *Cf.* Aubert's Appeal, 109 Pa. 447, 1 Atl. 336 (1885); Howell's Estate, 185 Pa. 350, 39 Atl. 966 (1898). Rhode Island adopted the Wills Act rule by R.I. Gen. Laws 1896, ch. 203, § 9, abrogating the earlier decisions of Matteson v. Goddard, 17 R.I. 299, 21 Atl. 914 (1891); Cotting v. DeSartiges, 17 R.I. 668, 24 Atl. 530 (1892); Mason v. Wheeler, 19 R.I. 21, 31 Atl. 426 (1895). *Cf.* Rhode Island Hospital Trust Co. v. Dunnell, 34 R.I. 394, 83 Atl. 858 (1912). Kentucky adopted the rule of the Wills Act, which it applies to wills, Herbert's Guardian v. Herbert's Ex'r, 85 Ky. 134, 2 S.W. 682 (1887), but which, because the statute in terms applies merely to wills, it refuses to extend to inter vivos transactions. Payne v. Johnson's Ex'rs, 95 Ky. 175, 24 S.W. 238, 24 S.W. 609 (1893). Virginia reached the result of the Wills Act only by legislation. Machir v. Funk, 90 Va. 284, 18 S.E. 197 (1893). Contrariwise New Hamp-

shire reached that result without the aid of legislation, as did North Carolina, though the latter court gives no indication that it was conscious of the older common-law rule to the contrary. Kimball v. Bible Soc'y, 65 N.H. 139, 23 Atl. 83, 84, 85 (1889); Emery v. Haven, 67 N.H. 503, 35 Atl. 940 (1893); Johnston, Ex'r v. Knight, 117 N.C. 122, 23 S.E. 92 (1895).

74. See Gray, *Powers in Trust and Gifts Implied in Default of Appointment,* 25 Harv. L. Rev. 1 (1911).

75. *Id.* at 26, n.102.

76. By the Illusory Appointments Act of July 16, 1830, 11 Geo. 4 & 1 Will. 4, c. 46, no exercise of a power of appointment could be regarded as invalid because of the illusory character of the share given to any member of the class. This act, though drafted by Lord St. Leonards (Sugden, *A Practical Treatise of Powers* 449 (8th ed. 1861)), by not abrogating the doctrine of non-exclusionary appointments entirely and insisting upon the form of an illusory appointment, seems rightly subject to the criticisms made of it by Jessel, M.R., in Gainsford v. Dunn, L.R. 17 Eq. 405, 407 (1874).

77. Powers Law Amendment Act, 37 & 38 Vict. c. 37 (1874).

78. McGibbon v. Abbot, 10 App. Cas. 653, 663 (P.C. 1885) (Lower Can.).

79. See Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886 (1930).

80. *Cf.* Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924).

81. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 270 (1932).

82. *Cf.* Dayton-Goose Creek Ry. v. United States, 263 U.S. 456 (1924); Buck v. Bell, 274 U.S. 200 (1927).

A Basic Protection Insurance Act for Claims of Traffic Victims

ROBERT E. KEETON* AND JEFFREY O'CONNELL**[1]

This proposal deals with the most pressing problems of automobile accident recovery, overcrowded court dockets and unfair allocation of compensation. Utilizing their thorough knowledge of tort and insurance law, Professors Keeton and O'Connell have devised a new plan which substitutes insurance benefits regardless of fault for tort liability in a large portion of cases.

I. A SYSTEM RIPE FOR REFORM

A. SHORTCOMINGS OF THE PRESENT SYSTEM

SERIOUS shortcomings beset the automobile claims system operating in each of our states. In each there is need for re-examination and reform of the whole set of laws, institutions, insurance arrangements, and customary practices currently used in determining who among the hundreds of thousands of annual traffic victims will receive compensation, and how much each will receive. The most striking of the shortcomings can be stated in five points.

First, measured as a way of compensating for personal injuries suffered on the roadways, the system we have falls grievously short. Some injured persons receive no compensation. Others receive far less than their economic losses. Partly this gap is due to the role of fault in the system—to the need for the injured person to assert both that another was at fault in causing the accident and that he himself was legally blameless. In advancing these contentions a traffic victim faces severe problems of proof.

* Professor of Law, Harvard Law School. B.B.A., University of Texas, 1940; LL.B., 1941; S.J.D., Harvard, 1956.

** Associate Professor of Law, University of Illinois. A.B., Dartmouth, 1951; LL.B., Harvard, 1954.

[1] This article is adapted from chapters 1 and 7 and part of chapter 8 of Keeton and O'Connell, *Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance*, to be published by Little, Brown and Company in 1965 [hereinafter cited as Keeton & O'Connell]. Another article, adapted from chapters 5 and 6, has been published as *Basic Protection—A Proposal for Improving Automobile Claims Systems*, 78 Harv. L. Rev. 329 (1964). The book and these articles

Nearly always he finds it difficult to show what actually happened, and occasionally he cannot even identify the person responsible because the accident was hit and run. Another major contributor to the gap between amounts of loss and amounts of compensation is that a person legally responsible for an injury may be financially irresponsible—uninsured and with inadequate assets of his own available to satisfy a claim. The size of the accumulated gap from these two and other causes varies significantly from state to state. Probably it is somewhat less severe in the states with compulsory motor vehicle liability insurance (Massachusetts, New York and North Carolina) than in others generally. But even in these states it is still substantial.

Second, the present system is cumbersome and slow. Prompt payments of compensation for personal injuries are extraordinary indeed. And delays of several years before final payment—or determination that no payment is due—are common, especially in metropolitan areas. The backlog of automobile personal injury cases presents a serious community problem of delay in the courts, affecting other kinds of cases as well. And often justice delayed is justice denied. An injured person needing money to pay his bills cannot wait, as can an insurance company, through the long period necessary to press and recover his claim, and he may be forced to settle for an inadequate amount in order to obtain immediate recovery.

Third, the present system is loaded with unfairness. Some get too much—even many times their losses—especially for minor injuries. To avoid the expenses and risks of litigation insurance companies tend to make generous settlements of small claims. This largesse comes out of the pockets of all who are paying premiums as insured motorists. Others among the injured, as we

---

are products of a study of automobile claims systems conducted at the Harvard Law School with the aid of a consultative panel composed of members of the law faculties of Boston College, Boston University, Harvard University, and Suffolk University, and with financial assistance from the Walter E. Meyer Research Institute of Law, Inc. We express grateful appreciation to the Meyer Institute, to our consultative panel and to the many additional persons who have advised us—lawyers, insurance representatives, professors, public officials, students, and others having particular interest in this subject. We are grateful also for the valuable help of the four persons who have served from time to time on our research staff—Professor Alvan Brody of Suffolk University Law School, Fredric M. Sanders (Harvard Law School, class of 1964), Peter B. Bloch (Harvard Law School, class of 1965), and Jack E. Birkinsha (Harvard Law School, class of 1966).

have just suggested, get nothing or too little, and most often it is the neediest (those most seriously injured) who get the lowest percentage of compensation for their losses. Their larger claims are more vigorously resisted, and their more pressing needs induce them to give up more in return for prompt settlement. This disparity between losses and compensation is not explained by differences in fault in different cases. It is true that under the theory of the present system, in general, only an injured person innocent of fault is entitled to recover, and then only against a motorist who was at fault. But the practical results are more often inconsistent with this theory than consistent. In short, the results are branded unfair by the theory of the system itself, and one searches in vain for any substitute standard of fairness that gives these results a clean bill of health.

Fourth, operation of the present system is excessively expensive. It is burden enough to meet the toll of losses that are inescapable when injuries occur. It is intolerable to have to meet the additional burden of administrative waste built into our methods of shouldering inescapable costs. To some extent, it is true, costs of administration are part of the inescapable burden. But because of the role of fault in the present system, contests over the intricate details of accidents are routine. Often these contests are also exercises in futility, since all drivers must continually make split-second judgments and many accidents are caused by slight but understandable lapses occurring at unfortunate moments. Such contests, and all the elaborate preparations that must precede them, wastefully increase the costs of administration. In cases of relatively modest injury, the expense of the contest often exceeds the amount claimed as compensation. All this expense, of course, is added to automobile insurance costs, and, together with a mark-up for the insurers through whose treasuries the premium dollars must pass, is reflected in the premium of every insured.

Fifth, the present system is marred by temptations to dishonesty that lure into their snares a stunning percentage of drivers and victims. To the toll of physical injury is added a toll of psychological and moral injury resulting from pressures for exaggeration to improve one's case or defense and indeed for outright invention to fill its gaps or cure its weaknesses. These

inducements to exaggeration and invention strike at the integrity of driver and injured alike, all too often corrupting both and leaving the latter twice a victim—injured and debased. If one is inclined to doubt the influence of these debasing factors, let him compare his own rough-and-ready estimates of the percentage of drivers who are at fault in accidents and the percentage who admit it when the question is put under oath. Of course the disparity is partly accounted for by self-deception, but only partly. And even this self-deception is an insidious undermining of integrity not to be encouraged.

This, in capsule, is the way the present automobile claims system looks when we stand back and view its performance in gross. It provides too little, too late, unfairly allocated, at wasteful cost, and through means that promote dishonesty and disrespect for law.

The scope of this problem of compensating for traffic injuries is such that agreement upon any comprehensive solution can be blocked by the cumulative strength of a number of minority groups, each vigorously opposing some segment of any comprehensive proposal. But if energies for reform, too often dissipated in disparate advocacy of a variety of proposals, can be marshaled in support of some one plan that achieves the common objective and minimizes dissatifaction with detail, perhaps the logjam that now blocks all significant reform in this area can be broken. The proposal offered here is the product of a search for a route to reform that is both sound in principle and potentially acceptable politically.

B. Principles Underlying the Proposed Reform

The principal features of our proposal are two: (1) Development of a new form of compulsory automobile insurance coverage (called basic protection coverage), which in its nature is an extension of the principle of medical payments coverage. It compensates all persons injured in automobile accidents without regard to fault for all out-of-pocket losses up to limits of $10,000 per person. Whenever an insured's automobile is in an accident and he, or a guest, is injured, his own insurance company will compensate him or his guest. (2) Legislation granting to basic protection insureds an exemption from tort liability in certain cases (roughly speaking, those in which total tort damages would

not exceed the $10,000 limit of basic protection coverage), and in all other cases granting to basic protection insureds a credit against tort liability to the extent of basic protection benefits paid.

Although this new coverage is like workmen's compensation in calling for payments on a basis of liability without fault and for periodic payments as losses occur, it is nonetheless very different in other important respects. Unlike workmen's compensation acts generally, the proposed basic protection act preserves tort actions for cases of severe injury—cases to which the tort exemption does not apply. Also, the basic protection plan does not require a separate marketing system or a separate system of administrative machinery like a workmen's compensation board. Rather, we propose that the new coverage be marketed through the same channels of private enterprise now used for automobile liability insurance and that claims be processed through present institutions and procedures—including jury trial of the more substantial claims (involving over $5,000 of *economic loss*). Further, the proposed Act does not provide a schedule of fixed benefits for each specific type of injury, as does workmen's compensation. Rather, reimbursement is based only on actual losses as they accrue.

The basic protection proposal, then, is a blueprint for prompt reimbursement of losses month by month as they occur, for reimbursement at reduced overhead and administrative cost because of the avoidance of a multitude of contests over fault and the value of pain and suffering in cases of less severe injury, and for reimbursement through standards and procedures that minimize inducements to dishonesty and causes of disrespect for law in its day-to-day practical application.

We present, immediately below, a numbered statement of points that characterize the basic protection system. These points serve as a summary. Also, together with the footnote citations to sections of the Act, they serve as a table of reference to which one may turn if he wishes to see quickly the relationship of some particular provision to the act as a whole.

C. The Basic Protection Proposal in Brief[2]

1. New Form of Coverage.—*Basic protection coverage is a new form of automobile insurance; most of its features, however, are*

[2] In the footnotes that follow, the proposed Act will be referred to only by section.

derived from types of insurance already in use, medical payments coverage of current policies being the closest analogy.

2. PARTIAL REPLACEMENT OF TORT LIABILITY INSURANCE WITH LOSS INSURANCE.—*The new coverage partially replaces tort liability insurance and its three-party claims procedure with loss insurance and a two-party claims procedure under which a victim claims directly against the insurer of his own car or, if a guest, his host's car.*

3. EXEMPTION OF INSUREDS FROM TORT LIABILITY IN CERTAIN CASES.—*In cases of less severe injury, an action for basic protection benefits replaces any tort action against a basic protection insured; in cases of more severe injury, the tort action is preserved with a credit for basic protection benefits paid.*[3]

4. BENEFITS NOT BASED ON FAULT.—*In general, a person who suffers injury arising out of ownership, maintenance, or use of a motor vehicle is entitled to basic protection benefits without regard to fault,*[4] *though one who intentionally suffers injury does not qualify for benefits.*[5]

5. PERIODIC REIMBURSEMENT.—*Basic protection benefits are payable month by month as losses accrue, subject to lump-sum payments in special circumstances.*[6]

6. REIMBURSEMENT LIMITED TO NET LOSS.—*Basic protection benefits are designed to reimburse net economic loss only; overlapping with benefits from other sources is avoided by subtracting these other benefits from gross loss in calculating net loss.*[7]

7. LOSS CONSISTS OF EXPENSES AND WORK LOSS.—*Economic loss for which basic protection benefits are payable consists of reasonable expenses incurred and work loss. Work loss consists of loss of income from work (for example, wages) and expenses reasonably incurred for services in lieu of those the injured person would have performed without income. For example, the expenses of hiring household help to do work a housewife had been doing before being disabled by injury*[8] *are reimbursable.*

[3] Sections 4.1–.4.
[4] Sections 2.1, 2.2.
[5] Sections 1.6, 1.7.
[6] Sections 1.9(d), 3.1, 3.3.
[7] Section 1.10.
[8] Section 1.9.

8. PROPERTY DAMAGE EXCLUDED.—*Damage to property, including vehicles, is not within the basic protection plan;*[9] *property damage claims will continue to be handled under present law and insurance coverages.*

9. DEDUCTIBLE LOSSES.—*The standard deductible of basic protection coverage excludes from reimbursable losses the first $100 of net loss of all types or ten per cent of work loss, whichever is greater.*[10]

10. STANDARD LIMITS OF LIABILITY.—*The standard maximum liability of an insurer on any basic protection policy is $10,000 for injuries to one person in one accident and $100,000 for all injuries in one accident; an additional limitation prevents liability for more than $750 for work loss in any one month.*[11]

11. OPTIONAL MODIFICATIONS OF COVERAGE; ADDED PROTECTION BENEFITS.—*Coverage with the standard limits,*[12] *exclusions,*[13] *and deductible*[14] *is the minimum that qualifies as basic protection coverage except that larger deductibles, which result in reduced benefits, are offered on an optional basis at reduced premiums.*[15] *Policyholders are also offered on an optional basis enlarged coverage, called added protection coverage.*[16]

12. OPTIONAL ADDED PROTECTION BENEFITS FOR PAIN AND INCONVENIENCE.—*Basic protection benefits are limited to reimbursement of economic losses and provide no compensation for pain and suffering;*[17] *a policyholder may purchase an optional added protection coverage for pain and inconvenience benefits.*[18]

13. CATASTROPHE PROTECTION.—*One optional form of added protection coverage is catastrophe protection coverage, providing coverage up to $100,000 in addition to basic protection benefits.*[19]

14. BASIC PROTECTION COVERAGE COMPULSORY.—*Basic protection coverage is compulsory in approximately the sense that liability insurance is now compulsory in Massachusetts, New York, and*

[9] Sections 1.4, 2.2, 2.3(c).
[10] Section 2.3(a).
[11] Sections 2.3(d)–(e), 2.4.
[12] See para. 10 *supra.*
[13] See para. 8 *supra;* para. 17 *infra.*
[14] See para. 9 *supra.*
[15] Section 2.4.
[16] Section 2.5.
[17] Section 1.9(c).
[18] Section 2.5(a).
[19] Section 2.5(b)(3).

North Carolina; that is, with few exceptions this insurance coverage is a prerequisite to registering or lawfully operating an automobile.[20]

15. AN ASSIGNED CLAIMS PLAN.—*Through an assigned claims plan, basic protection benefits are available even when every vehicle involved is either uninsured or a hit-and-run car.*[21]

16. INJURIES INVOLVING NONRESIDENTS.—*Injuries that occur within the state enacting the plan and are suffered or caused by nonresidents are covered by basic protection;*[22] *when no policy in effect applies to such injuries, they are handled through the assigned claims plan.*[23]

17. EXTRATERRITORIAL INJURIES.—*Motoring injuries suffered out of state by a person who is an insured, or a relative residing in the same household, or an occupant of a vehicle insured for basic protection, are covered by basic protection;*[24] *with this exception, no attempt is made to extend the plan to injuries occurring outside the state enacting the plan.*

18. MULTIPLE POLICIES AND MULTIPLE INJURIES.—*Provisions are made for allocating and prorating coverage when two or more policies or two or more injured persons are involved.*[25]

19. DISCOVERY PROCEDURES.—*Special provisions are made for physical and mental examination of an injured person at the request of an insurer and for discovery of facts about the injury, its treatment, and the victim's earnings before and after injury.*[26]

20. REHABILITATION.—*Special provisions are made for paying costs of rehabilitation, including medical treatment and occupational training, and for imposing sanctions against a claimant when an offer of rehabilitation is unreasonably refused.*[27]

21. CLAIMS AND LITIGATION PROCEDURES.—*In general the basic protection system preserves present tort claims procedures, including jury trial, for settling and litigating claims; modifications*

[20] Sections 5.1–.4, 7.1.
[21] Sections 9.1–.8.
[22] Sections 1.4, 2.2, 2.9.
[23] Section 9.4.
[24] Section 2.10.
[25] Sections 2.6, 2.7.
[26] Sections 6.1–.3, 6.8. In general these provisions are adapted from Fed. R. Civ. P. 35 and 37(b).
[27] Sections 6.4–.6.

adapt these procedures to the basic protection plan and particularly to periodic payment of benefits.[28]

22. RULES APPLICABLE IF A VICTIM DIES.—*The benefits of basic protection are extended to survivors when a motoring injury causes death;*[29] *the tort exemption is inapplicable*[30] *and special provisions treat the problem of overlapping benefits.*[31]

23. THE INSURANCE UNIT AND MARKETING ARRANGEMENTS ARE NOT ALTERED.—*The insurance unit under the basic protection plan is the same as under the present system; ordinarily a policy will be issued on a described vehicle to the owner of that vehicle.*[32] *It is expected that the new coverage will be marketed in the same way as present automobile liability insurance.*

II. MOTOR VEHICLE BASIC PROTECTION INSURANCE ACT

ARTICLE 1
DEFINITIONS

SECTION 1.1 *Motor vehicle.*

A motor vehicle is any vehicle, including any trailer, operated or designed for operation upon a public highway by any power other than muscular power.

SECTION 1.2 *Basic protection insurance and benefits; added protection insurance and benefits.*

Basic protection insurance is required insurance of terms and conditions consistent with the provisions of articles 2 and 5 of this Act, covering net loss as defined in sections 1.9 and 1.10 of this Act; basic protection benefits are payments under this insurance. Added protection insurance is insurance, optional to the insured, providing benefits beyond basic protection insurance on terms and conditions consistent with the provisions of section 2.5 of this Act; added protection benefits are payments under any insurance of this type.

SECTION 1.3 *Insured; named insured; additional insured.*

A named insured is one identified in a policy by name as an insured under that policy. An additional insured is any insured

[28] Sections 3.1–.10.
[29] Sections 1.9, 1.11.
[30] Section 4.2(a)(2).
[31] Sections 1.10(c)(2), 4.3(b).
[32] Section 10.3.

other than a named insured. In relation to any claim under basic or added protection insurance, an insured is an owner, driver, or other person (either a natural person or any other legal entity) out of whose ownership, maintenance, or use of a motor vehicle arises an insurer's liability for payment of basic or added protection benefits to another; provided, however, that one cannot qualify as an insured with respect to an injury he causes intentionally, even though the insurer may be required to pay benefits to another because of the injury, and provided further that, except as otherwise stated hereafter in this section, one whose taking and use of the vehicle of another is a conversion of that vehicle cannot qualify as an insured with respect to any injury arising out of such use of the converted vehicle, even though the insurer may be required to pay benefits to another because of the injury. One whose taking and use of the vehicle of another, though a conversion, is done with a good faith belief that he is legally entitled so to take and use it can qualify as an insured with respect to an injury arising out of such good faith use. And one who is a named insured or is a relative residing in the same household as a named insured of any policy of basic or added protection insurance on the vehicle can qualify as an insured under that policy even though he is a converter of the vehicle.

SECTION 1.4 *Injury.*

Injury is bodily harm, sickness, or disease (including death at any time resulting therefrom) arising out of the ownership, maintenance, or use of a motor vehicle as a vehicle. "Maintenance or use of a motor vehicle as a vehicle" includes loading and unloading it. But this phrase includes conduct within the course of a business of repairing, servicing, or otherwise maintaining vehicles only if occurring in the maintenance or use of a vehicle outside the business premises.

SECTION 1.5 *Injured person.*

An injured person is a natural person sustaining injury.

SECTION 1.6 *Injury caused or suffered intentionally.*

An injury is caused intentionally by a person if an act or omission by him causing the injury is intended by him to cause to any person a harmful or offensive contact or an apprehension of an immediate and harmful or offensive contact. One does not intend his act or omission to cause a harmful or offensive contact unless he acts, or in violation of a duty to act refrains from acting, with not only the

purpose of causing a contact, or the knowledge that it is substantially certain that a contact will be caused, but also the purpose that the contact be harmful or offensive, or the knowledge that it is substantially certain to be so; it is not enough that the act or omission itself is intentional, or even that it is done intentionally with the realization that it creates a grave risk of causing a harmful or offensive contact. An injury is suffered intentionally by a person if he intends his act to cause a harmful contact to himself or to cause a harmful or offensive contact to any other person, or if with such intent he refrains from taking preventive action. Even though a person knows that a harmful or offensive contact is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting what he believes to be more serious injury to any person or persons.

SECTION 1.7 *Accidental injury.*

An injury is accidental, as to the injured person, unless suffered intentionally by him. As to one who is claiming loss through death of another, even if the death is caused intentionally by a third person, it is nevertheless accidental unless the injury causing death is suffered intentionally by the decedent or is caused intentionally by the claimant. As to one who is claiming loss through injury to another not producing death, even if the injury is caused intentionally by a third person it is nevertheless accidental unless suffered intentionally by the injured person or caused intentionally by the claimant.

SECTION 1.8 *Vehicle involved.*

Each of the one or more motor vehicles out of the ownership, maintenance, or use of which an accident producing accidental injury arises is a vehicle involved in the accident. A vehicle may be found to be a vehicle involved in an accident even though not in collision with any person or any other vehicle or object. But in no event may an unoccupied parked vehicle be found to be a vehicle involved in an accident unless it was parked in such a way as to cause unreasonable risk of injury.

SECTION 1.9 *Loss.*

Loss is accrued economic detriment from accidental injury, consisting of (i) allowable expenses and (ii) work loss, and, (iii) if injury causes death, survivors' loss.

(a) *Allowable expenses.* Allowable expenses consist of reason-

able charges incurred for reasonably necessary products, services, and accommodations. In no event will allowable expenses within basic protection coverage include a charge for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations, or a total charge in excess of five hundred dollars ($500) for expenses of all types in any way related to funeral and burial.

(b) *Work loss.* Work loss consists of (i) loss of income from work the injured person would have performed had he not been injured and (ii) expenses reasonably incurred in obtaining ordinary and necessary services in lieu of those that, had he not been injured, the injured person would have performed not for income but for the benefit of himself or of any other who qualifies as a person suffering loss from the injury under the terms of section 1.11 of this Act.

(c) *Pain, suffering, and inconvenience.* Pain, suffering, and inconvenience are not loss; but economic detriment, such as loss of wages arising from the interference of pain and suffering with work, is loss.

(d) *Time when loss accrues.* Loss resulting from an injury accrues not when the injury occurs but rather as work loss, or allowable expenses, or survivors' loss is incurred.

(e) *Survivors' loss.* Survivors' loss consists of (i) loss, after the date on which the deceased died, of contributions of tangible things of economic value (not including services) that survivors qualifying as persons suffering loss under the terms of section 1.11 of this Act would have received from the deceased had he not suffered the injury causing death and (ii) expenses reasonably incurred by such survivors after the date on which the deceased died in obtaining ordinary and necessary services in lieu of those that the deceased would have performed for their benefit had he not suffered the injury causing death.

SECTION 1.10 *Net loss.*

Net loss is loss less subtractable benefits received from sources other than basic and added protection insurance.

(a) *Subtractable benefits.* Except as otherwise provided in this section, all benefits and advantages one receives or is entitled to receive, because of the injury, from sources other than basic and added protection insurance, are subtracted from loss in calculating net loss.

(b) *Nonsubtractable benefits.* In calculation of net loss, no

subtraction is made for amounts one receives or is entitled to receive (i) because of familial obligations of support, or (ii) by way of succession at death, or (iii) as proceeds of life insurance, or (iv) as gratuities. In no event shall any payment made by an employer to his employee be regarded as a gratuity.

(c) *Tort claims.*

(1) *Against a basic protection insured.* In calculation of net loss, no subtraction is made because of the value of or the recovery upon a claim in tort against one who is an insured with respect to the injury on which the claim is based, under any applicable basic protection insurance.

(2) *Against one not a basic protection insured.* No subtraction is made because of the value of a claim in tort against one who is not an insured with respect to the injury on which the claim is based, under any applicable basic protection insurance, except that after recovery is realized upon such a tort claim, a subtraction is made to the extent of the net recovery, exclusive of reasonable attorney's fees and other reasonable expenses incurred in effecting the recovery. If basic or added protection benefits or both have already been received, the claimant shall repay to the insurer or insurers out of the recovery a sum equal to the benefits received but not more than the realized net recovery, and the insurer or insurers shall have a lien on the recovery to this extent. Any remainder of the net recovery from the tort claim applies periodically against loss as it accrues, until an amount equal to the net recovery in tort has been subtracted. If an injured person dies, (i) any net recovery in tort on a claim by the injured person or his estate for loss suffered by him before his death (or in satisfaction of a valid judgment or settlement obtained before his death) is subtracted in calculating net loss accruing to the injured person before his death, and (ii) any net recovery in tort on a claim by a survivor for loss suffered by the survivor after the death is subtracted in calculating net loss accruing to the survivor after the death. But no recovery by the injured person or his estate for loss suffered by him before his death (or in satisfaction of a valid judgment or settlement obtained before his death) is subtracted in calculating net loss accruing to a survivor after the death, and no recovery by a survivor for loss suffered by the survivor after the death is subtracted in calculating net loss accruing to the injured person before his death.

(d) *Income tax advantages.* The value of advantages incident to the fact that certain of the benefits received because of an injury

(whether from basic or added protection or from other sources) are not taxable income is subtracted in calculating net loss. In no event shall this subtraction because of income tax advantages exceed fifteen percent (15%) of the loss of income, and it shall be less than this amount only if the claimant presents to the insurer in support of his claim reasonable proof of a lower value of these income tax advantages in his case.

SECTION 1.11 *Person suffering loss.*

A person suffering loss is one who accidentally suffers loss through injury to his person or to the person of another whose relationship to him is such that, apart from this Act, it would support a tort action for his benefit based on the injury. A legal entity other than a natural person may be a person suffering loss. One who is otherwise within the scope of this definition of a person suffering loss is not excluded from it by reason of his being an owner, driver, or other person legally responsible for the operation of a vehicle involved in the accident out of which the loss arises. Except as provided hereafter in this section, one whose taking and use of the vehicle of another is a conversion of that vehicle cannot qualify as a person suffering loss from any injury arising out of such use of the converted vehicle. One whose taking and use of the vehicle of another, though a conversion, is done with a good faith belief that he is legally entitled so to take and use it can qualify as a person suffering loss from an injury arising out of such good faith use. And one who is a named insured or is a relative residing in the same household as a named insured of any policy of basic or added protection insurance on the vehicle can qualify as a person suffering loss under that policy even though he is a converter of the vehicle.

ARTICLE 2
TERMS AND CONDITIONS OF BASIC PROTECTION AND ADDED PROTECTION INSURANCE

SECTION 2.1 *Liability without fault.*

Basic protection and added protection insurance benefits for persons suffering loss from accidental injury are due under the conditions stated in this Act without regard to fault.

SECTION 2.2 *Benefits provided by basic protection insurance.*

Under basic protection insurance the insurer is liable to pay benefits reimbursing persons suffering loss for net loss suffered

through accidental injury arising out of the ownership, maintenance, or use of a motor vehicle, subject to deductibles, exclusions, limits, and other conditions permitted by this Act.

SECTION 2.3 *Standard provisions.*

The standard provisions for basic protection insurance apply to all claims unless optional provisions are applicable. The standard provisions are provisions defining coverage subject to the standard deductible, the standard exclusions, and the standard limits.

(a) *Standard deductible.* The greater of the following amounts otherwise qualifying for reimbursement under this insurance is to be excluded in calculating benefits to each claimant arising from one accident: (i) the first one hundred dollars ($100) of net loss; or (ii) ten percent (10%) of all work loss.

(b) *Standard extraterritorial exclusion.* Loss is excluded if it arises from injury suffered in an out-of-state accident by one who is not a named insured, not a relative residing in the same household as a named insured, and not an occupant of a vehicle covered by basic protection insurance.

(c) *Standard property exclusion.* All damage to property is excluded from basic protection insurance.

(d) *Standard periodic limit.* Basic protection benefits for work loss sustained in any period of one month shall not exceed seven hundred fifty dollars ($750).

(e) *Standard total limits.* The standard limits of liability of the basic protection insurer for all benefits (exclusive of interest, costs and attorney's fees other than those chargeable against benefits) are ten thousand dollars ($10,000) because of injury (including death resulting therefrom) to one person in one accident and, subject to the limit for one person, one hundred thousand dollars ($100,000) because of injury to more than one person in one accident.

SECTION 2.4 *Coverage less than standard prohibited except for optional deductibles.*

Basic protection insurers may offer singly or in combination, and at appropriately reduced premium rates, any of the types of optional deductible provisions described in this section, in lieu of the standard deductible. With this exception, insurance providing benefits less in any respect than under standard provisions does not qualify as basic protection insurance.

(a) *Increased dollar deductible.* An insurer may offer a provi-

sion that substitutes for the one hundred dollar ($100) figure of the standard deductible any other figure not exceeding three hundred dollars ($300). This modified deductible shall apply only to a claim for basic protection benefits under the policy because of injury to the named insured or to a relative residing in the same household as the named insured.

(b) *Increased percentage deductible.* An insurer may offer a provision that substitutes for the percentage feature of the standard deductible any larger deductible not exceeding thirty percent (30%) of all loss otherwise qualifying. This percentage deductible shall apply only to a claim for basic protection benefits under the policy because of injury to the named insured or to a relative residing in the same household as the named insured. Such a deductible, for a percentage not exceeding thirty percent (30%), may be made applicable to all types of loss, or it may be made applicable to any specified type of loss only, or different percentages, none exceeding thirty percent (30%), may be made applicable to different specified types of loss.

SECTION 2.5 *Added protection provisions.*

(a) *Insurers shall offer a type of pain and inconvenience coverage.* Every insurer writing basic protection insurance within the state shall offer a form of added protection coverage under which the insurer agrees to pay to an injured person who is the named insured or a relative residing in the same household as the named insured, during any period of complete inability to work in his occupation of at least one week in duration, benefits for pain and inconvenience in a specified amount per week or month, at a rate chosen by the insured (from an offering including rates of benefits of one hundred, two hundred, three hundred, four hundred, and five hundred dollars per month), and, during any period of partial inability to work in his occupation, a percentage of such rate proportioned to the degree of partial inability. This form of coverage is subject to an overall limit of liability for all pain and inconvenience sustained by one injured person from injuries occurring in one accident, during periods of complete and periods of partial inability to work combined, in an amount twenty-five (25) times that stated as the monthly benefits for complete inability of one to work in his occupation. "Complete inability to work in his occupation," as used in relation to this coverage, means inability to perform, on even a part-time basis, even part of the duties of his occupation (or if unemployed at the time of injury, of the occupation or occupations for which he was qualified). One who is able

to perform part of the duties of his occupation on a part-time basis is not completely unable to work in his occupation. For purposes of this pain and inconvenience coverage, a person sixteen years of age or over has an occupation if he is a full-time student or is in full-time domestic service, whether as a member of a household or as an employee. Partial inability of one to work in his occupation is any degree of inability other than complete.

(b) *Insurers may offer other types of added protection provisions.* A basic protection insurer may offer, as optional provisions, in as many different forms as it chooses and on any terms it chooses, subject to approval of the Commissioner of Insurance in accordance with sections 2.11 and 10.3 of this Act, agreements for payment of any of the following types of added protection benefits:

(1) *Provisions for pain and inconvenience benefits.* An insurer may offer a provision under which it agrees to pay to the named insured only, or to the named insured and one or more other persons, benefits in compensation for pain, or inconvenience, or both, under other terms and conditions than those specified in paragraph (a) of this section.

(2) *Reduced deductibles and exclusions; increased limits.* An insurer may offer a provision covering all or part of any amount of loss that would be excluded by the standard deductible, the standard extraterritorial exclusion or the standard limits.

(3) *Catastrophe protection benefits.* An insurer may offer catastrophe protection coverage under which the insurer agrees to pay to the named insured only, or the named insured and one or more other persons, benefits in reimbursement of net losses that are not within applicable basic protection coverage because in excess of the limits of that coverage. Catastrophe protection coverage may be offered with no deductible or with any stated deductible not in excess of thirty percent (30%) of all loss. If coverage is to qualify as catastrophe protection coverage its limits of liability must be not lower than one hundred thousand dollars ($100,000) because of injury (including death resulting therefrom) to one person in one accident and, subject to the limit for one person, three hundred thousand dollars ($300,000) because of injury to more than one person in one accident.

SECTION 2.6 *Multiple policies applicable to one injury.*

A person suffering loss may be entitled to benefits under more than one policy of basic or added protection insurance, subject to the provisions of this section.

(a) *Coverage partly cumulative.* If two or more vehicles as to which basic protection insurance is in effect are vehicles involved in an accident, or if two or more policies are applicable to a single vehicle, the coverage under different policies is cumulatively available to a claimant, but only to the extent and under the conditions stated in this section and section 2.7.

(b) *Limit of basic protection insurance per person.* Regardless of the number of vehicles involved in an accident, or the number of policies effective as to a single vehicle, the maximum amount of basic protection insurance available because of injury (including death resulting therefrom) to one person in one accident is the amount of the standard per-person limit of coverage specified in section 2.3(e) of this Act.

(c) *Added protection insurance need not be cumulative.* Added protection insurance of different policies is in no event required to be cumulatively available to a claimant, though insurers may offer it under terms making this coverage in different policies cumulative.

(d) *Basic protection claims of vehicle occupants.* With respect to injury to any occupant of a vehicle (including the driver), basic protection insurance on that vehicle is primary coverage. Only if the primary coverage applicable to one injured person is less than the standard per-person limit because of proration of coverage among multiple claimants under section 2.7 of this Act, and only after the exhaustion of applicable primary coverage, is a person suffering loss entitled to assert a claim based on injury to an occupant of a vehicle against an insurer of any other vehicle.

(e) *Basic protection claims of persons not occupying any involved vehicle.* A claim for basic protection benefits based upon injury to a person who was not an occupant of any involved vehicle as to which basic protection insurance was in effect at the time of the accident may be made against any one or more of the insurers of involved vehicles as to which such insurance was in effect at that time. All such insurers are primary insurers.

(f) *Insured injured by uninsured or inadequately insured vehicles.* If one is a person suffering loss, as defined in section 1.11 of this Act, under circumstances such that, apart from the provisions of this paragraph and article 9 of this Act, (i) no basic protection insurance is applicable to the injury causing the loss, or (ii) no basic protection insurance applicable to the injury can be identified, or (iii) the only identifiable basic protection insurance

applicable to the injury is, because of multiple claims against it or because of financial inability of one or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed in paragraph (b) of this section, he may to the extent of such inadequacy claim against the insurer of any policy of basic protection insurance not otherwise applicable to the injury if he is a named insured or a relative residing in the same household as a named insured of such policy. Any insurer against which such a claim is made because of financial irresponsibility of one or more other insurers is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility.

(g) *Distribution of loss among basic protection insurers.* Where two or more insurers are liable as primary basic protection insurers, or primary coverage has been exhausted and two or more insurers are liable as excess insurers, any insurer paying benefits due is entitled to partial recoupment from the other insurer or insurers similarly liable, together with a reasonable amount as partial recoupment of the expense of processing the claim, so as to accomplish equal distribution of the loss among all such insurers, up to their respective limits of coverage. A proportion of interest and attorney's fees paid is also recoverable from the other insurer or insurers, except insofar as such payments are due to negligent or bad faith handling of the claim. Payments of one insurer to another on account of expense of processing are not chargeable against the applicable limits of coverage. An insurer's obligation as to processing a claim (including its obligation of contribution on account of the expense of processing) terminates when it has made net payments and contributions, attributable to benefits (and exclusive of interest, costs, attorney's fees other than those chargeable against benefits, and other expenses of processing) equal to a limit of its coverage applicable to the claim.

(h) *Withdrawal by basic protection insurer when coverage exhausted.* A basic protection insurer whose limit of coverage is exhausted is entitled to withdraw from all proceedings upon the claim. Claim may then be made against any other insurer with remaining coverage applicable to the claim.

SECTION 2.7 *Multiple claims against a per-accident limit of coverage.*

(a) *Basic or added protection insurer's credits against per-accident limit; principle of allocation.* When a per-accident limit of basic or added protection insurance applies to claims for injuries

to more than one person, the insurer paying benefits to one claimant is entitled, as against other claimants, to credit toward exhaustion of its per-accident limit of liability only to the extent that the payment does not exceed the maximum portion of the coverage to which that claimant is entitled under an equitable allocation of the coverage among all claimants of whose actual or potential claims the insurer knows or should know. An equitable allocation, as that term is here used, is a proportionate allocation among all claimants in such shares as justice may require, as distinguished from an allocation granting priority to claimants whose claims are first submitted, or reduced to judgment, or settled. A named insured of an applicable policy and the occupants of a vehicle owned or driven by him shall have an interest, as persons suffering loss, prior to the interest of occupants of any other vehicle in the basic protection insurance under that policy (and in any added protection insurance under the policy also, unless otherwise specified in the terms of the added protection insurance).

(b) *Allocation by agreement or by order.* An equitable allocation of basic or added protection insurance coverage may be made by written agreement or by order entered in a special proceeding for allocation. An allocation agreement, unless vacated or modified under the provisions of paragraph (e) below, is binding upon every interested person subscribing to it and upon no other. It may be an incomplete allocation, restricted to determining that past and future payments not exceeding an amount specified for a particular claimant are within the limit of coverage equitably allocable to that claimant, without determining whether higher payments to that claimant would be inequitable. Or it may determine such amounts for two or more claimants. Or it may determine the exact portion of coverage equitably allocable to one claimant, or exact portions respectively for two or more claimants. Or it may be a complete allocation, determining exact portions of coverage respectively for all known claimants. An order in a special proceeding for allocation, likewise, may be either an incomplete or a complete determination of equitable allocation, as the court considers proper, except that in no event shall it be restricted to deciding less than must be decided in order to determine what amount the insurer, with assurance of credit as against other parties to the proceeding, may pay on any judgment previously rendered and on any settlement previously made either unconditionally or subject only to the order in the allocation proceeding.

(c) *Insurer may institute special proceeding for allocation.* If

no allocation has been determined by agreement or order, or if an allocation is incomplete or subject to being vacated or modified under the provisions of paragraph (e) below, and the insurer desires authority to make payments to one or more claimants with assurance that the amounts paid will, as against other claimants, apply toward the exhaustion of its limit of liability, it may institute in any court of competent jurisdiction a special proceeding, equitable in nature, for a determination that amounts specified respectively for designated claimants are within the maximum portions of the coverage to which such claimants are entitled under an equitable allocation of the coverage among all known claimants.

(d) *Intervention of interested persons.* Any interested person not otherwise made a party to a special proceeding for allocation is entitled to intervene as a party at any time before entry of an allocation order. After entry of an allocation order, an interested person is entitled to intervene only under the conditions stated in paragraph (e) of this section.

(e) *Vacating or modifying allocation agreement or order.* An allocation agreement or order can be vacated or modified (i) on grounds generally applicable to contracts and judgments respectively, or (ii) by a subsequent agreement of all of the parties to the agreement or order who are still interested persons, or (iii) in an allocation proceeding upon petition by a party to the agreement or order, or by any other interested person, subject to proof of change of conditions by reason of which the previous allocation has become inequitable to the petitioner, such proof being presented at a hearing after due notice to every party to the agreement or order still having an interest in the allocation. If the previous allocation was by order, each party to the former proceeding has due notice if he receives, at least fifteen days before the hearing, a written notice of a petition for vacating or modifying the previous order, filed in the same court and proceeding by a party or by a newly intervening interested person (whose right of intervention in this instance is not affected by whether or not he was notified of the proceeding before the order under attack was entered). An allocation order entered after due notice and hearing cannot otherwise be vacated or modified except upon the following conditions: (i) in the same court and proceeding, upon petition of a newly intervening interested person (the right of intervention in this instance being barred if he had received, at least fifteen days before entry of the order under attack, written notice of the proceeding and of his right to intervene and be heard

therein), and subject to proof, presented at a hearing held no sooner than fifteen days after service of written notice upon every party to the proceeding, that the petitioner is entitled to a higher share of the coverage than previously allocated to him, or (ii) in another court of original instance, upon petition of a person who was not a petitioner in any previous allocation proceeding growing out of the same accident, provided every party to every such previous proceeding is a party to the new proceeding or is no longer an interested person, and provided the parties to the new proceeding include at least one interested person (whether the petitioner or another) who was not a party to any such previous proceeding.

(f) *Insurer's credit for payments consistent with allocation agreement or order.* An insurer is entitled to credit toward exhaustion of its per-accident limit of liability to the extent of payments to a claimant not exceeding the maximum portion of coverage allocated to the claimant under an allocation agreement or order if the payments were made before it instituted or received notice of a proceeding, under the terms of paragraph (e) above, to modify or vacate the agreement or order, except that credits claimed under the terms of this paragraph are subject to challenge by an interested person upon proof (i) that they were inequitable to him, (ii) that he was not a party to the allocation (either as a subscriber to an allocation agreement or as a party to an allocation proceeding), and (iii) that the insurer knew or should have known of his interest and nevertheless either the insurer entered into an allocation agreement to which he was not a subscriber or the insurer was a party to an allocation proceeding of which he did not receive a notice at least fifteen (15) days before entry of the allocation order.

(g) *When benefits become overdue in cases of allocation.* Any claimed benefits the sufficiency of coverage for which is in issue in a pending allocation proceeding (whether an original proceeding or a subsequent proceeding valid under the terms of paragraph (e) of this section) do not become overdue before the expiration of thirty (30) days after entry of an order allocating sufficient coverage for them.

SECTION 2.8 *Insurer's rights of indemnity.*

(a) *From a person intentionally causing injury or a converter.* An insurer paying benefits due under the terms of basic protection or added protection insurance because of an injury caused intentionally, or because of an injury caused by a converter under

circumstances such that he cannot qualify as an insured under section 1.3 of this Act, is entitled to indemnity, from the person or persons so causing injury, for all the outlay incurred on account of such injury, including the net amount of benefits paid, costs of processing claims for benefits, and reasonable attorney's fees and other expenses of enforcement of this right of indemnity.

(b) *From one paying in tort without consent of insurer having reimbursement interest.* A basic or added protection insurer with a right of reimbursement under section 1.10(c)(2) of this Act, if suffering loss from inability to collect such reimbursement out of a payment received by a claimant upon a tort claim (whether in complete settlement or satisfaction or only partially so), is entitled to indemnity from one who, with reason to know of the insurer's interest, made such a payment to the claimant without making the claimant and the insurer joint payees as their interests may appear, or obtaining the insurer's consent to a different method of payment.

SECTION 2.9 *Injuries to nonresidents occurring in the state.*

The provisions of this Act apply in all respects to injuries to nonresidents in accidents occurring within the state. A nonresident's violation of section 5.3 of this Act does not impair the applicability of provisions concerning injury to him.

SECTION 2.10 *Extraterritorial application.*

Loss arising from injury suffered in an out-of-state accident by one who is a named insured under a basic protection policy, or a relative residing in the same household as a named insured, or an occupant of a vehicle covered by basic protection insurance, is covered to the same extent as if the injury had occurred within the state.

SECTION 2.11 *Regulation of policy forms and conditions of coverage.*

Further terms and conditions of basic protection and added protection insurance and of policy forms used by insurers in offering these coverages are subject to the approval of the Commissioner of Insurance, who shall approve only such terms and conditions as are consistent with the purposes of this Act and are fair and equitable to all persons whose interests may be affected.

ARTICLE 3
CLAIMS AND ACTIONS

SECTION 3.1 *Benefits payable periodically.*

(a) *Payable monthly.* Basic protection and added protection benefits are payable monthly as loss accrues.

(b) *When overdue.* Benefits for any period are overdue if not paid within thirty (30) days after the insurer receives reasonable proof of the fact and amount of net loss realized during that period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within thirty (30) days after such proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within thirty (30) days after such proof is received by the insurer. The requirement of partial payment of a claim of which only part is supported by reasonable proof does not apply, however, if the part duly supported is for an amount less than one hundred dollars ($100).

SECTION 3.2 *Benefits not assignable.*

An agreement for assignment of any rights to benefits payable in the future is unenforceable.

SECTION 3.3 *Lump-sum and installment awards and settlements.*

(a) *Lump-sum award and settlement defined.* A lump-sum award or settlement is an award or settlement for full and final discharge of all liability of the insurer to a claimant on account of a specified accident upon payment of a single sum of money.

(b) *Installment award and settlement defined.* An installment award or settlement is an award or settlement for full and final discharge of all liability an insurer might otherwise have to a claimant on account of a specified accident in return for an obligation to pay a specified sum in installments.

(c) *When lump-sum and installment awards are authorized.* An insurer or a claimant may require a lump-sum award or an installment award in an action for basic or added protection benefits that would come due after the date of award, but only upon a finding that the present value of all future benefits to come due does not exceed one thousand dollars ($1,000) or a finding supported by medical evidence that a final settlement will contribute substantially to the health and rehabilitation of the injured person.

(d) *When lump-sum and installment settlements are authorized.* Rights and obligations arising under basic protection or added protection insurance, either with respect to a claim for a limited period of time or with respect to a full claim inclusive of all future loss arising from an injury, may be discharged by settlement, but only by (i) installment settlement for payments of not more than

one thousand dollars ($1,000) per month, (ii) lump-sum settlement for an amount not exceeding one thousand dollars ($1,000), or (iii) settlement for larger installments or for a larger lump sum with judicial approval upon a finding that the form of the settlement, in larger installments or a larger lump sum, is in the best interests of the claimant.

SECTION 3.4 *Interest on overdue payments.*

All overdue payments bear simple interest at the rate of six percent (6%) per annum.

SECTION 3.5 *Payment by draft.*

Payment of benefits may be made by valid draft payable to the order of the person suffering loss or to his authorized representative and honored when presented for payment. For the purpose of calculating either the extent to which any benefits were overdue or the termination of any period of limitation of actions, payment by such a draft shall be treated as made on the date it was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.

SECTION 3.6 *Limitation of actions.*

If no basic or added protection benefits are paid to any survivor for loss arising from a death, no action for basic or added protection benefits for loss suffered by survivors shall be commenced later than one year after the death or two years after the motor vehicle accident from which the death arises, whichever occurs first. If no basic or added protection benefits are paid because of loss arising otherwise than from death, no action for recovery of such benefits shall be commenced later than two years after the accident or one year after an aggregate net loss in excess of two hundred dollars ($200) is suffered by the claimant, whichever occurs first. If basic or added protection benefits are paid, no action for recovery of further benefits by the same or another claimant because of loss arising from the injury shall be commenced later than one year after the last payment of benefits, except that where benefits have been paid for loss suffered by an injured person before his death arising from the injury, survivors may commence an action not later than one year after the death or two years after the last payment of benefits, whichever occurs first.

SECTION 3.7 *Periods as to which adjudications are binding; limitation of actions for new adjudications.*

(a) *Judgment for future benefits if reasonably certain deter-*

mination can be made. Upon trial of an action for benefits, or upon retrial pursuant to an application filed under the terms of this section, judgment shall be entered as to all benefits to be paid periodically thereafter during such periods as to which the court finds that a reasonably certain determination of future net loss can be made in the light of the evidence.

(b) *Judgment for benefits due more than five years after judgment; application for trial de novo.* A judgment awarding benefits to come due more than five years after the date of judgment is binding as to the period beyond five years unless set aside upon application of an interested party, presented for hearing not sooner than five years after the date of judgment. Such an application shall be filed not later than six years after the date of the judgment or one year after the date the last payment of benefits was made, whichever is later. Upon such application, the only issue to be tried is the amount of any unpaid benefits coming due beyond five years after the date of such previous judgment and not more than one year before the date of the application, and that issue shall be tried de novo.

(c) *Judgment for benefits due during shorter period; application for benefits due in later period.* A judgment awarding future benefits for a period less than five years beyond the date of the judgment is binding as to the period it covers, and an application for unpaid benefits falling due after the conclusion of that period shall be filed in the same court and proceeding within one year after the conclusion of that period or one year after the last payment of benefits was made, whichever is later.

(d) *Judgment determining no benefits due.* A judgment determining that no benefits have become due or will become due after a past or future date specified in the judgment is binding, and is not subject to being set aside under the special procedures for retrial prescribed in this section. It can be vacated, revised, or modified only in accordance with the laws and procedures of this state applicable to judgments generally.

SECTION 3.8 *Fees of claimant's attorney.*

(a) *Attorney entitled to reasonable fee.* An attorney is entitled to a reasonable fee for advising and representing a claimant on a claim or action for basic or added protection benefits.

(b) *On claims involving overdue benefits.* If overdue benefits are involved, the attorney's fee shall be a charge against the insurer in addition to benefits recovered, except that, first, there shall be

no such charge against the insurer unless some overdue benefits have been recovered in the judgment or paid after receipt by the insurer of notice of the attorney's representation of the claimant, and, second, in the discretion of the court part or all of this fee may be charged against the benefits due the claimant because his claim was fraudulent or so excessive as to have no reasonable foundation. The provisions of this paragraph are applicable to settlement of a disputed claim before or after commencement of an action as well as to actions tried, but the extent to which the claim was disputed and the question whether the action was tried are factors among others that may be taken into account in determining what amount of fee will be permitted and how much if any of it will be charged against benefits.

(c) *On claims not involving overdue benefits.* If no overdue benefits are involved, to be entitled to payment of a fee by an insurer an attorney must give the insurer reasonable notice of his representation of his client with respect to the claimed benefits before payment of such benefits has been made. After such notice, the insurer shall pay the fee directly to the attorney. Half of such a fee is a charge against benefits otherwise due the claimant and is chargeable against limits of liability as benefits paid. The other half is a charge against the insurer in addition to the benefits due, and is not chargeable against limits of liability.

(d) *Adjudication of disputed fee.* Whenever the claimant, his attorney, and the insurer agree upon a fee to be awarded and upon the manner in which it is to be charged, no judicial approval of the fee is required; in the absence of such agreement, either as to a settled claim or an action tried, a controversy over an attorney's fee may be submitted at the instance of any interested party for determination by the court in which the action was pending or, if no action was pending, in a court competent to accept jurisdiction over the claim for benefits.

SECTION 3.9 *Fees of insurer's attorney.*

Within the discretion of a court, an insurer may be allowed an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was fraudulent or so excessive as to have no reasonable foundation. To the extent that any benefits are then due or thereafter come due to the claimant because of loss resulting from the injury on which the claim is based, such a fee may be treated as an offset against such benefits; also, judgment may be entered against the claimant

for any amount of a fee awarded against him and not offset in this way or otherwise paid.

SECTION 3.10 *Jury trial.*

There is a right of jury trial with respect to claims for basic and added protection benefits only if the amount in controversy is at least five thousand dollars ($5,000) exclusive of interest, attorney's fees not chargeable as benefits, and costs.

ARTICLE 4
TORT AND RELATED ACTIONS

SECTION 4.1 *Basic protection benefits partly in lieu of damages in tort.*

Basic protection benefits provided by this Act are granted in lieu of damages in tort to the extent indicated in the present article of this Act.

SECTION 4.2 *Exemptions from tort liability in certain cases.*

(a) *Cases to which exemption applies.* Every person (either a natural person or any other legal entity) who is an insured (whether named or additional) with respect to an injury under applicable basic protection insurance is entitled to an exemption from tort liability for injury as defined in section 1.4 of this Act (which does not include damage to property) unless either

(1) the total damages otherwise recoverable against him in tort because of the injury exceed ten thousand dollars ($10,000), or

(2) the injury causes death, or

(3) limited basic protection coverage has been allocated among injuries to several persons under the terms of section 2.7 of this Act and the damages otherwise recoverable against the insured in tort because of the injury under consideration exceed the amount of basic protection insurance allocated to it.

(b) *Scope of the exemption.* In cases to which this exemption applies, the person entitled to the exemption is nevertheless subject to liability for damage to property and, in addition, for the first hundred dollars ($100) of net loss from injury as defined in section 1.4 of this Act (which does not include damage to property) caused under circumstances such that he would be liable to pay damages in tort in the absence of this exemption; in all other respects the exemption protects him against liability in tort.

SECTION 4.3 *Responsibility for tort liability of basic and added protection insureds; credits.*

(a) *Cases to which responsibility and credits apply.* Whenever

one is held liable in tort, or by way of contribution or indemnity in lieu of tort damages, for an injury as to which he is an insured (whether named or additional) of applicable basic protection insurance, the basic and added protection insurers of all coverage applicable to the injury are responsible for paying on his behalf as much of the tort damages as would have qualified for payment as benefits under their respective basic and added protection coverages had no tort judgment been obtained. An adjudication of the amount of this liability as part of the judgment in a tort action is final when the tort judgment becomes final, subject to the provisions of paragraph (e) of this section concerning notice to an insurer whose rights and obligations are purportedly affected. All basic and added protection benefits paid by an insurer are credited against this obligation of the insurer and against the tort liability of the insured. Any further payment due from the insurer in discharge of this obligation shall be paid to the claimant in monthly installments each consistent in amount with net loss, as determined in the tort judgment, for the period to which the installment applies, unless otherwise agreed or ordered in accordance with section 3.3 of this Act; all payments so made are credited against the obligation of the insurer and against its liability for basic and added protection benefits.

(b) *Provisions applying if an injured person dies.* If an injured person dies, provisions of this section concerning the responsibility of basic and added protection insurers for paying tort damages on behalf of their insureds apply both to tort damages for loss suffered by the injured person before the death and to tort damages for loss suffered after the death by survivors. The credits against one type of claimed liability (either in tort or under basic and added protection insurance) for payments in discharge of the other type of claimed liability apply, however, only as between claims (i) each of which is either for loss suffered by the decedent before his death or for satisfaction of a valid judgment or settlement obtained before his death or (ii) each of which is for loss suffered by survivors after the death. They do not apply as between one claim for loss suffered by the decedent before his death or for satisfaction of a valid judgment or settlement obtained before his death and another claim for loss suffered by survivors after the death.

(c) *Distribution of burden and benefit among interested parties.* Whenever for any purpose (including the purpose of calculating amounts due by way of contribution or indemnity) it is necessary to distribute among several insureds the benefit, or

among several claimants the benefit or burden, or among several insurers the benefit or burden of the obligations and credits provided in this section, such distribution is to be made on the basis considered by the court to be most equitable.

(d) *Payments credited against limits of liability.* All amounts paid by a basic or an added protection insurer in discharge of any obligation stated in this section are credited, as benefits paid, against the insurer's limits of liability. This provision applies even in those instances in which crediting for other purposes is disallowed under paragraph (b) of this section.

(e) *Notice of proceedings affecting obligations.* A basic or added protection insurer is entitled to reasonable notice of proceedings purporting to affect its obligations under the terms of paragraph (a) of this section, and may intervene in such proceedings at its option at any time. No adjudication purporting to determine its obligations under that paragraph is binding upon it in the absence of reasonable notice.

SECTION 4.4 *Contribution and indemnity.*

Rights to and liabilities for contribution or indemnity that would have existed apart from this Act are affected by this Act only as stated in this section.

(a) *No contribution or indemnity against insured if tort exemption applies.* In no event is an insured of applicable basic protection insurance liable for contribution or indemnity with respect to an injury as to which he has an exemption from tort liability under section 4.2 of this Act.

(b) *Credits for basic and added protection benefits.* In the calculation of liabilities for contribution or indemnity, an insured (whether named or additional) of applicable basic protection insurance is entitled to credit for basic and added protection benefits paid by his insurer, as if they had been paid in partial satisfaction of tort claims.

(c) *Contribution and indemnity for benefits paid.* Except as stated in section 2.8 of this Act and in this paragraph, no insurer or insured is entitled to contribution or indemnity on account of basic or added protection benefits paid. This Act does not bar any right of one who, under applicable basic protection insurance, is an insured with respect to an injury (or of his tort liability insurer, as his subrogee) to recover contribution or indemnity on account of payments made in disposition of a tort claim against him based on

the injury. In such cases amounts paid as basic or added protection benefits are treated as if paid on the tort claim. In no event, however, is the insured (or his tort liability insurer, as his subrogee) entitled to recover a sum in excess of his (or its) actual payments.

Article 5
Registration of Vehicles and Security for Payment of Basic Protection Benefits

Section 5.1 *Requirement for registration of motor vehicles.*

No motor vehicle shall be registered in this state unless the application for registration is accompanied by proof of security for the payment of basic protection benefits in accordance with the terms of this Act. The owner of each motor vehicle registered in this state shall maintain such security continuously throughout the registration period. If security is terminated for any cause, the owner shall surrender forthwith the registration certificate and number plates of the vehicle to the Registrar of Motor Vehicles unless other security in compliance with this Act has been placed in effect.

Section 5.2 *Proof of security.*

(a) *Certificate of insurance.* Proof of security for the payment of basic protection benefits may be provided, with respect to any motor vehicle, by filing with the Registrar of Motor Vehicles a certificate of insurance evidencing the issuance, by or on behalf of an insurer duly authorized to transact business in this state, of a policy including basic protection insurance, consistent with the provisions of this Act, applicable to injuries arising out of the ownership, maintenance, or use of the vehicle.

(b) *Other proof of security.* Proof of security for the payment of basic protection benefits may be provided, with respect to any motor vehicle, by any other method approved by the Commissioner of Insurance as affording security substantially equivalent to that afforded by a certificate of insurance.

Section 5.3 *Proof of security by nonresidents.*

A nonresident owner of a motor vehicle not registered in this state shall not operate or permit such vehicle to be operated in this state for an aggregate of more than thirty days in any calendar year unless he has on file with the Registrar of Motor Vehicles proof of security for payment of basic protection benefits in accordance with the terms of this Act.

SECTION 5.4 *Regulations.*

The Registrar of Motor Vehicles may promulgate and from time to time amend reasonable regulations to provide effective administration and enforcement of the provisions of this article in accordance with their purpose. The Commissioner of Insurance may promulgate and from time to time amend reasonable regulations to provide effective administration of section 5.2 of this Act, relating to certificates of insurance and alternate forms of proof of security, in accordance with its purpose.

ARTICLE 6
EXAMINATION, TREATMENT, AND REHABILITATION OF INJURED PERSONS; DISCOVERY

SECTION 6.1 *Mental or physical examination of injured person.*

Whenever the mental or physical condition of a person is material to any claim that has been or may be made for past or future basic or added protection benefits, a court of competent jurisdiction may order the person to submit to mental or physical examination by a physician or physicians. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all other persons having an interest and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

SECTION 6.2 *Reports.*

If requested by the person examined, a party causing an examination to be made shall deliver to him a copy of every written report concerning the examination rendered by the examining physician, at least one of which reports must set out his findings and conclusions in detail. After such request and delivery the party causing the examination to be made is entitled upon request to receive from the person examined every written report available to him (or his representative) concerning any examination, previously or thereafter made, of the same mental or physical condition. By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the person examined waives any privilege he may have, in relation to the claim for basic or added protection benefits, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

SECTION 6.3 *Sanctions.*

If any person refuses to comply with an order entered pursuant

to sections 6.1 and 6.2 of this Act, the court may make such orders in regard to the refusal as are just, except that no order shall be entered directing the arrest of any person for disobeying an order to submit to a physical or mental examination. The orders that may be made in regard to such a refusal include, but are not limited to, the following: (i) an order that the mental or physical condition of the disobedient person shall be taken to be established for the purposes of the claim in accordance with the contention of the party obtaining the order; (ii) an order refusing to allow the disobedient person to support or oppose designated claims or defenses, or prohibiting him from introducing evidence of mental or physical condition; (iii) an order rendering judgment by default against the disobedient person as to his entire claim or a designated part of it; (iv) an order requiring the disobedient person to reimburse the insurer for reasonable attorney's fees and expenses incurred in defense against the claim; (v) an order requiring delivery of a report, in conformity with section 6.2 of this Act, on such terms as are just, and if a physician fails or refuses to make such a report a court may exclude his testimony if offered at trial.

SECTION 6.4 *Authorization for rehabilitative treatment.*

(a) *Order for cost of treatment.* After a hearing upon application by any interested person and reasonable notice to all other interested persons, and upon findings supported by evidence, a court of competent jurisdiction may enter an order determining that an insurer of basic or added protection insurance applicable to an injury is responsible, subject to the limits and other terms and conditions of the coverage, for the cost of a specified procedure or treatment for rehabilitation to which the injured person has submitted or does thereafter submit.

(b) *Grounds for order.* The findings required to support such an order are (i) that the specified course of procedure or treatment, whether or not involving surgery, is recognized and medically acceptable, (ii) that it has contributed or will contribute substantially to rehabilitation, and (iii) that the cost of such procedure or treatment is reasonable in relation to its probable rehabilitative effects.

SECTION 6.5 *Authorization for occupational training.*

(a) *Order for cost of occupational training.* After a hearing upon application by any interested person and reasonable notice to all other interested persons, and upon findings supported by evidence, a court of competent jurisdiction may enter an order determining

that an insurer of basic or added protection insurance applicable to an injury is responsible, subject to the limits and other terms and conditions of the coverage, for the cost of a specified course of rehabilitative occupational training that the injured person has taken or does thereafter take.

(b) *Grounds for order.* The findings required to support such an order are (i) that the specified course of occupational training is a recognized form of training and is reasonable and appropriate for the particular case, (ii) that it has contributed or will contribute substantially to rehabilitation, and (iii) that the cost of such training is reasonable in relation to its probable rehabilitative effects.

SECTION 6.6 *Order concerning injured person's refusal of rehabilitative treatment or occupational training.*

(a) *Basis for order.* After a hearing upon application by any interested person and reasonable notice to all other interested persons, and upon findings, supported by evidence, as stated in section 6.4 or in section 6.5 of this Act, and further findings (i) that the injured person has refused or has by his conduct caused the insurer reasonably to believe that he may refuse to submit to such procedure, treatment, or training, and (ii) that he does not have reasonable grounds to continue such refusal, a court of competent jurisdiction may enter an order invoking reasonable sanctions against the injured person and others whose claims are based on his injury.

(b) *Reasonable grounds for injured person's refusal.* In determining whether an injured person has reasonable grounds for continuing refusal to submit to the specified procedure, treatment, or training, the court shall take into account, among all other relevant factors, the extent of the probable benefit, the attendant risks, the extent to which the procedure, treatment, or training is or is not recognized as standard and customary, and whether the imposition of sanctions because of the injured person's refusal would abridge his right to the free exercise of his religion.

(c) *Sanctions.* The sanctions that may be invoked in such an order include, but are not limited to, the following: (i) an order that benefits be reduced or terminated at such time as necessary to limit recovery of benefits to an amount equal to the benefits that in reasonable probability would have been due had the injured person submitted to such rehabilitative procedure, treatment, or training; (ii) an order that the physical or mental condition of

the injured person shall be taken to be established for the purposes of the claim in accordance with the contention of the insurer; (iii) an order that, if the insurer elects to pay a specified lump sum (found to be fair and reasonable compensation in lieu of benefits that in reasonable probability would be due if the injured person submitted to the specified procedure, treatment, or training) it shall be fully discharged from all liability arising from the injury.

SECTION 6.7 *Charges for treatment of injured persons.*

Any physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for an injury covered by basic or added protection insurance, and any person or institution providing rehabilitative occupational training following such an injury, may charge a reasonable amount for the products, services, and accommodations rendered. In no event, however, may such a charge be in excess of the amount customarily charged for like products, services, and accommodations in cases involving no insurance.

SECTION 6.8 *Discovery of facts about an injured person.*

(a) *From injured person's employer.* Every employer shall, if a request is made by a basic or added protection insurer against whom a claim has been made, furnish forthwith in a form approved by the Commissioner of Insurance a sworn statement of earnings, since injury and for a reasonable period before injury, of the person upon whose injury the claim is based.

(b) *From physicians, hospitals, clinics, and other medical institutions.* Every physician, hospital, clinic, or other medical institution providing, before or after an injury upon which a claim for basic or added protection benefits is based, any products, services, or accommodations in relation to that or any other injury, or in relation to a condition claimed to be connected with that or any other injury, shall, if requested to do so by the insurer against whom the claim has been made, subject to conditions approved by the Commissioner of Insurance, (i) furnish forthwith a written report of the history, condition, treatment, and dates and costs of such treatment of the injured person and (ii) produce forthwith and permit the inspection and copying of his or its records regarding such history, condition, treatment, and dates and costs of treatment.

(c) *Charge for providing requested information.* An employer, physician, hospital, clinic, or other person or institution providing

information in response to a request under the terms of this section may charge a reasonable amount in reimbursement for the time and cost of providing the information.

(d) *Disputes as to rights of discovery.* In the event of any dispute regarding an insurer's right to discovery of facts about an injured person's earnings or about his history, condition, treatment, and dates and costs of such treatment, a court of competent jurisdiction may enter an order for such discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and shall specify the time, place, manner, conditions, and scope of the discovery. A court may, in order to protect against annoyance, embarrassment, or oppression, as justice requires, enter an order refusing discovery or specifying conditions of discovery, and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceeding, as justice requires.

Article 7
Penalties

Section 7.1 *Illegal operation of motor vehicle.*

Any owner of a motor vehicle, for which proof of security is a prerequisite to its legal operation upon the public highways of this state, under either section 5.1 or 5.3 of this Act, who operates such motor vehicle or permits it to be operated upon a public highway in this state without having in full force and effect security complying with the terms of section 5.2 of this Act, and any other person who operates such a motor vehicle upon a public highway in this state with the knowledge that the owner does not have such security in full force and effect, are each guilty of a misdemeanor and upon conviction may be fined not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or may be imprisoned for not more than one year or both.

Section 7.2 *Illegal charges.*

Any person who charges, demands, receives, or collects for hospital or medical products, services, or accommodations rendered in the treatment of an injured person, or for rehabilitative occupational training, or for legal services rendered in connection with a claim for basic protection or added protection benefits, any amount in excess of that authorized by this Act with awareness that the charge is in excess of that authorized is guilty of a misdemeanor and upon conviction may be fined not less than one hundred dollars ($100) or more than one thousand dollars ($1,000) or may be imprisoned for not more than one year or both.

Article 8
Appeal or Other Review

Section 8.1 *Ripeness of a judgment, order, or finding.*

A judgment, order, or finding is ripe for appeal or any other form of review permitted under the laws of this state if it is one of the following, and not otherwise: (i) a judgment, order, or finding of any amount of benefits due, or that no benefits are due, entered pursuant to the terms of section 3.7 of this Act; (ii) a judgment, order, or finding under the terms of section 3.3 of this Act granting or refusing lump-sum payment; (iii) a judgment, order, or finding under the terms of section 4.3 of this Act that a basic or added protection insurer is liable to pay a sum on behalf of an insured as tort damages. In the last of these three instances an appeal or other form of review may be taken by a basic or added protection insurer if it has intervened in the proceedings pursuant to the terms of section 4.3 (e) of this Act.

Section 8.2 *Revision of a judgment, order, or finding.*

(a) *Appeal, review, vacation, revision, or modification of a judgment, order, or finding ripe for appeal or review.* Except as otherwise provided in sections 3.7 and 4.3 of this Act, a judgment, order, or finding that is ripe for appeal or review under the terms of section 8.1 of this Act is subject to appeal, review, vacation, revision, or modification only in accordance with the laws and procedures of this state applicable respectively to judgments, orders, and findings generally.

(b) *Revision of other orders or findings.* Any order or finding that is not ripe for appeal or other form of review under the terms of section 8.1 of this Act is subject to revision at any time before there is entered in the same case a judgment or some other order or finding that is ripe for appeal or other form of review and, while the action is still pending, continues to be subject to revision if not within the scope of matters determined on appeal or other form of review.

Article 9
Assigned Claims Plan

Section 9.1 *Organization and maintenance of an assigned claims bureau and plan.*

Insurers authorized to write basic protection insurance in this state are authorized, subject to approval and regulation by the Commissioner of Insurance, to organize and maintain an assigned

claims bureau and an assigned claims plan, and to formulate and from time to time amend rules and regulations for their operation and for the assessment of costs on a fair and equitable basis, consistent with the provisions of this Act. In default of the organization and continued maintenance of an assigned claims bureau and assigned claims plan in a manner considered by the Commissioner of Insurance to be consistent with the terms of this Act, the Commissioner of Insurance shall organize and maintain such a bureau and plan.

SECTION 9.2 *Costs of operation of the assigned claims bureau.*

Costs incurred in the operation of the bureau shall be assessed against insurers according to rules and regulations that assure fair allocation among insurers writing basic protection insurance in the state, on a basis reasonably related to the volume of basic protection insurance they write.

SECTION 9.3 *Insurers required to participate.*

Every insurer writing basic protection insurance in this state is required to participate in the assigned claims bureau and the assigned claims plan.

SECTION 9.4 *Persons entitled to claim through the assigned claims plan; benefits to which entitled.*

Each person suffering loss because of an injury arising out of the ownership, maintenance, or use of a motor vehicle in this state may obtain basic protection benefits through the assigned claims plan established pursuant to this Act if (i) no basic protection insurance is applicable to the injury, or (ii) no basic protection insurance applicable to the injury can be identified, or (iii) the the only identifiable basic protection insurance applicable to the injury is, because of multiple claims against it or because of financial inability of one or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed in section 2.6(b) of this Act (in which last case all unpaid benefits due or coming due are subject to being collected under the assigned claims plan, and the insurer to which the claim is assigned, or the bureau of assigned claims if the claim is assigned to it, is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility). Subject to the maximum prescribed in section 2.6(b) for basic protection benefits from all sources, persons entitled to claim through the assigned claims plan are entitled to recover from the insurer to which the claim is

assigned (or from the bureau if the claim is assigned to it) the benefits due under standard provisions for basic protection insurance as prescribed in section 2.3 of this Act.

SECTION 9.5 *Claims arising from one injury assigned to one insurer or the bureau; rights and obligations after assignment.*

The claim or claims arising from injury to one person sustained in one accident and brought through the assigned claims plan shall be assigned to one insurer, or to the bureau, which after such assignment shall have rights and obligations as if having issued a policy of basic protection insurance, of standard provisions, applicable to the injury; provided, however, that the obligations of an insurer under section 4.3 of this Act do not apply.

SECTION 9.6 *Principle of assignment.*

The assignment of claims shall be made according to rules and regulations that assure fair allocation of the burden of assigned claims among insurers doing business in the state on a basis reasonably related to the volume of basic protection insurance they write.

SECTION 9.7 *Claimant to notify bureau for assignment of his claim.*

A person claiming through the assigned claims plan shall notify the bureau of his claim within the time that would have been allowed for filing an action for basic protection benefits had there been in effect identifiable coverage applicable to the claim. The bureau shall promptly assign the claim and notify the claimant of the identity and address of the insurer to which the claim is assigned (or of the bureau if the claim is assigned to it). No action by the claimant against the insurer to which his claim is assigned (or against the bureau, if the claim is assigned to it) shall be commenced later than thirty (30) days after receipt of notice of the assignment or the last date on which the action might have been commenced had it been against the insurer of identifiable coverage applicable to the claim, whichever is later.

SECTION 9.8 *Costs of assigned claims plan to affect premiums.*

All reasonable costs incurred in the handling and disposition of assigned claims (including amounts paid pursuant to assessments under section 9.2 of this Act as well as other amounts reasonably expended in the handling and disposition of assigned claims) shall be taken into account in making and regulating rates for basic protection insurance.

Article 10
Authority and Requirement for Offering Insurance

Section 10.1 *Motor vehicle liability insurers required to write basic protection and certain added protection insurance.*

Every insurer writing motor vehicle tort liability insurance in this state is required to offer basic protection insurance and to offer the form of added protection insurance prescribed in section 2.5(a) of this Act.

Section 10.2 *Insurers may write added protection insurance.*

Every insurer authorized to write motor vehicle tort liability insurance in this state may also, subject to the terms and conditions of this Act, write all forms of basic and added protection insurance.

Section 10.3 *Policy on specified vehicle or otherwise.*

A policy including basic or added protection insurance may be issued to cover injuries arising out of the ownership, maintenance, or use of a specified vehicle or vehicles. Or, subject to regulation of the Commissioner of Insurance, a policy may be issued to cover injuries occurring to any specified person or persons or under any specified circumstances and arising out of the maintenance or use of a vehicle not owned by the named insured.

Section 10.4 *Tort liability insurance for loss excluded from basic protection by the standard dollar deductible.*

Insurers authorized to write motor vehicle tort liability insurance in this state may write such coverage applying to the tort liability for the first one hundred dollars ($100) of net loss (which is excluded from basic protection by the standard deductible prescribed in section 2.3(a) of this Act and as to which rights in tort are preserved under section 4.2(b) of this Act). Such insurers may also write coverage that is subject to a deductible to the extent of this first one hundred dollars ($100) of net loss, and may make the obligations of investigation and defense, as well as the obligation to pay on behalf of the insured, inapplicable to claims within the deductible.

Article 11
Insurance Rates and Rating

Section 11.1 *Standards for rates and classifications.*

(a) *Rates.* Rates charged for basic and added protection in-

surance shall be reasonable and adequate for the classes of risks to which they apply.

(b) *Classifications of risk.* Classifications of risk for rating shall be reasonable. Among other factors, accident involvement may be taken into account.

SECTION 11.2 *Rate making.*

Rate making and regulation of rates for basic and added protection insurance are governed by the statutes of this state concerning rate making and regulation of rates for motor vehicle tort liability insurance.

ARTICLE 12

INSURER'S ANNUAL ELECTION TO SUBJECT ITS OUT-OF-STATE TORT LIABILITY POLICIES TO THE BASIC PROTECTION SYSTEM FOR IN-STATE INJURIES

SECTION 12.1 *Time for filing insurer's election.*

Each motor vehicle tort liability insurer any of whose insureds may become involved in accidents within this state is entitled to file with the Commissioner of Insurance, between October 1 and December 1 of any calendar year, a written election that any claim against one of its tort liability insureds based on an injury occurring in this state during the ensuing calendar year under a policy contract made outside this state shall be subject to the basic protection system.

SECTION 12.2 *Effect of election.*

When an election filed under section 12.1 of this Act applies to a claim, the insurer and its insureds with respect to that claim have all the rights and advantages provided under this Act for basic protection insurers and insureds, and claimants other than the driver of the insured vehicle have all the rights and benefits of basic protection claimants, including the right to receive benefits from the electing insurer as if it were an insurer of basic protection insurance applicable to the claim with limits not in excess of the lower of (i) the limits of the tort liability coverage of the applicable policy and (ii) the standard limits stated in section 2.3(e) of this Act.

SECTION 12.3 *Regulations.*

The Commissioner of Insurance is authorized to promulgate and from time to time amend reasonable regulations to provide effective administration of the provisions of this article in accordance with their purpose.

ARTICLE 13
GENERAL PROVISIONS

SECTION 13.1 *Title of the Act.*

This Act is to be known as the Motor Vehicle Basic Protection Insurance Act.

SECTION 13.2 *Severability.*

The legislature declares its intent that if any part or parts of this Act be held unconstitutional, such part or parts be treated as severable from and not affecting the validity of the remainder of the Act.

SECTION 13.3 *Effective date.*

The provisions of sections 2.5(a) and 10.1 of this Act requiring insurers to offer basic protection insurance and certain added protection insurance, and the provisions of sections 5.1, 5.3, and 7.1, shall take effect on January 1, 19—. All other provisions of this Act shall take effect _____ days after enactment.

III. SOME UNDERLYING QUESTIONS OF POLICY

A. VOLUNTARY OR COMPULSORY COVERAGE?

In general our society favors arrangements providing freedom of choice for each individual; it imposes restraints only when they are a reasonable price to pay for some significant advantage to the community or to individuals within it. We start, therefore, with the assumption that the purchase of insurance should be left to voluntary choice unless good reason can be found for compelling its purchase.

The principal advantages to be gained by imposing legal restraints on a motorist's freedom to obtain or decline insurance covering injuries to victims of the operation of his vehicle are concerned with two of the objectives of an automobile claims system: (1) assuring the availability of a financially responsible source for payment of valid claims, whether the theory of liability on which the claims system is based be negligence or some principle of strict liability or insurance; and (2) allocating fairly the costs of motoring in ways that can be achieved only through insurance.

For the avowed purpose of serving the first of these two objectives the legislatures of all the states, in enacting financial respon-

sibility legislation, have already imposed some restraint on the motorist's freedom of choice about insurance. Thus, the critical issue today is not whether to impose such a restraint but what degree of restraint to impose. The issue is a choice between occasional restraint, under legislation requiring insurance only after some untoward incident (such as an unsatisfied claim against the driver growing out of a past accident, or a conviction of a serious offense such as driving while intoxicated), and commonly applicable restraint, under legislation requiring insurance as a prerequisite to lawful driving—that is, compulsory insurance. As between these two, the principal advantage of the looser form of restraint, as suggested before, is greater freedom of choice. The principal advantage of compulsory insurance is that it more effectively serves each of the two major objectives of assuring financial responsibility and allocating fairly some part of the costs of accidents as a cost of motoring.

Financial responsibility laws leave most motorists free not to insure. Even if the *percentage* of motorists choosing not to insure is small, the *number* is substantial and the result may be tragedy for their victims. Moreover, these financially irresponsible motorists will include in disproportionately large number our worst drivers—the young—driving our most dangerous cars—the old and dilapidated. Making insurance compulsory will, of course, sharply reduce the number of these financially irresponsible drivers. In answer, it might be argued that gap-closing devices—such as unsatisfied judgment funds and uninsured motorist coverage—are needed even with a compulsory insurance law, and although the gap is larger under a financial responsibility law, the same devices can be used to meet it. This line of argument concedes that without a gap-closing device, compulsory insurance clearly comes nearer to assuring that motorists will be financially responsible. But, the argument goes, since gap-closing devices are available, the advantage of compulsory insurance over a financial responsibility law in this respect need not concern us.

It is in examining this last proposition, however, that one can observe most clearly the second advantage of compulsory insurance over financial responsibility laws: Compulsory insurance more effectively serves the objective of *fairly* allocating a chosen share of accident costs as a cost of motoring. The cost of gap-closing

under financial responsibility laws is much greater than under compulsory insurance because the gap itself is so much greater. And, in turn, the size of the gap vitally affects the feasibility of fair distribution of the costs of gap-closing. These costs are commonly imposed partly on motorists generally (for example, through a small addition to registration fees) and partly on insured motorists (for example, by assessing insurers who write automobile liability insurance in the state, with the consequence, of course, that insurers charge higher premiums). Placing part of the burden on insured motorists may be justified if greater benefits are available to them than to uninsured motorists.[1] Under unsatisfied judgment fund acts within the tort liability insurance system, for example, motorists carrying tort liability insurance themselves have been permitted to claim against the fund when injured by an uninsured driver, whereas uninsured motorists have been denied this benefit. But that kind of differentiation would tend to defeat one of the objectives of the basic protection system —assuring that basic economic losses of all victims of accidental injury are reimbursed. Moreover, even if some other kind of special advantage to insured motorists is devised, still if the number of uninsured motorists is appreciable and the percentage of the costs of gap-closing imposed specially on insured motorists is substantial, there is danger that it will be out of proportion with the special benefits they enjoy. In that situation, those who voluntarily obtain insurance pay more than their fair share of accident costs, while uninsured insolvent motorists pay less than their fair share. Compulsory insurance, then, by minimizing the number of uninsured motorists and reducing gap-closing costs to tolerable levels, is a more suitable instrument for achieving fair allocation and distribution of motoring costs, as well as assuring that victims will not be deprived of benefits due under legally valid claims because of the financial irresponsibility of those against whom the claims must be asserted.

With respect to the type of compulsory provisions to be used, we have considered two different plans—one under which basic protection insurance is required unconditionally, and a second "competitive" arrangement under which a vehicle owner is re-

[1] Allied American Mut. Fire Ins. Co. v. Comm'r of Motor Vehicles, 219 Md. 607, 150 A.2d 421 (1959).

quired to have either basic protection insurance or tort liability insurance, but has the option of choosing between them. We recommend the unconditional requirement of basic protection insurance as a simpler and more practical arrangement.[2]

B. "Two-Party" or "Three-Party" Insurance? A Related-Insurer or an Unrelated-Insurer System?

A form of insurance is commonly referred to as three-party insurance if benefits are paid to a third party rather than to the insured. Tort liability insurance is the classic example of three-party insurance. There, it is true, benefits occasionally are paid to members of the insured's family or guests in his car—when the insured is liable to them in tort. Ordinarily, however, although the insured pays the premiums, and although he benefits in that the insurer pays on his behalf, discharging his liability, still the payments go to a third person—usually a total stranger to the insured. This is in contrast to two-party insurance (such as medical payments and collision coverage) under which benefits are paid usually to the insured or his family or guests and only occasionally to third persons unconnected to the insured, either as family or guests.

There are two distinct aspects of this contrast. One is concerned with the theory of liability, and the other is concerned with whether a claimant deals ordinarily with a related insurer (one with whom he has a relation because the insurer was chosen at the time of insuring by the victim or by the owner of the vehicle he was occupying) or an unrelated insurer (whatever insurer carried the coverage on the vehicle that happened to be in collision with the one occupied by the victim).

Consider, first, the question concerning the theory of liability—a contrast most strongly connoted by the terms "two-party" and "three-party." Framed in relation to the basic protection plan, the question presented is this: Should a claim for basic protection benefits be one for strict liability in tort (that is, liability without negligence, such as is now imposed on blasters and in a few cases on automobile manufacturers), or should it instead be one for liability of the insurer in contract to pay insurance benefits (such

[2] This point is developed more fully in Keeton & O'Connell ch. 6; 78 Harv. L. Rev. 329, 372–74 (1964).

as is now the situation when a passenger makes a claim without reference to any contention of negligence against the vehicle owner's insurer under medical payments coverage)? Either of these two forms of legal remedy (strict liability of a motorist or contract liability of an insurer) can easily be used as a means of spreading the cost of motoring among motorists, and thus causing motoring to pay its way. If strict liability of the motorist is the mechanism it must be supplemented by liability insurance, however, in order to achieve equitable distribution of the cost among a wide group of motorists rather than causing a single motorist to pay for all the loss caused by a particular accident. Thus a system built on the theory of strict liability of the motorist must involve three parties in each claim—the claimant, the motorist alleged to be liable, and the motorist's insurer. In form, with such a three-party system of strict liability and liability insurance, the insurer makes payments to the victim on behalf of the motorist and in discharge of the motorist's strict liability in tort. Under a system of contract liability comparable to medical payments coverage, on the other hand, only two parties are involved in each claim—the claimant and the insurer. In form, the insurer makes payments to the victim in its own behalf and in discharge of its own liability in contract. In essence the distinction concerns this question: Against whom will the victim nominally press his claim—against the motorist causing the injury or against the insurer? Under either arrangement, it is ordinarily the insurer who will handle the claim. In both instances the cost of the system is paid through insurance premiums and the insurance company is used as the intermediary for receiving premiums and paying claims. Thus, this choice between a theory of strict liability in tort supplemented by liability insurance and a theory of liability in contract is essentially a formal question with little practical import.

The second contrast that has become associated in usage with the contrast between two-party and three-party insurance concerns a question of greater practical import. Is a claim to be presented ordinarily against an insurer with whom the claimant or his host motorist carries an insurance policy and therefore has a prior association, or instead is it to be presented against an insurer with whom normally neither the claimant nor his host motorist has any association except by fortuity, as in those occa-

sional instances when it happens that both vehicles in a collision are insured by the same company? This contrast is more aptly expressed as one between a related-insurer and an unrelated-insurer system than as one between a two-party and a three-party system. An illustration of this point is that one could adopt the theory of strict liability of motorists (involving three parties in each claim) and yet resolve this other question either in favor of imposing the strict liability on the motorist in whose vehicle the claimant was a passenger (thus choosing a related-insurer arrangement) or instead in favor of imposing the strict liability on the other motorist in a two-car collision (thus choosing an unrelated-insurer arrangement).

It is not feasible to make basic protection coverage either exclusively related-insurer or exclusively unrelated-insurer coverage. In cases of injury to pedestrians, related-insurer coverage would be possible only if every person in the community were required to carry a policy for his own protection, and of course that is impractical. In cases of injury to a policyholder who accidentally drives into a tree, no other car being involved in the accident, related-insurer coverage is possible but not unrelated-insurer coverage, since no insurer but the related insurer is so connected with the accident that it could be called on to pay. Since basic protection coverage applies to both these types of cases, it is necessarily partly related-insurer in nature and partly unrelated-insurer in nature. Nevertheless, an important decision remains as to which form of arrangement is to be adopted for the great majority of cases in which either is possible. That decision will determine whether basic protection coverage is to be primarily a related-insurer or instead primarily an unrelated-insurer system.

Basic protection coverage as we have formulated it is "two-party" insurance as opposed to "three-party" insurance, and it is predominantly related-insurer rather than unrelated-insurer coverage. That is, the claimant ordinarily presents his claim directly to and against "his own" insurer. If he is the policyholder of the policy on the car he was occupying at the time of injury, the insurer is the one he himself selected in obtaining the policy. If he is an occupant of an automobile but not the policyholder, then ordinarily the insurer is one selected by a person with whom he has some form of association, since ordinarily the policy will have

been obtained by a member of his own family or by his host driver. The only substantial group of cases where the victim claims primarily against a "stranger" company is that group in which the victims are pedestrians. In contrast, the present system (aside from medical payments and collision coverages) is one of "three-party" insurance and predominantly unrelated-insurer coverage. That is, the claimant ordinarily must make his claim as a tort claim asserting that a motorist negligently injured him. Thus three parties are involved. Also, ordinarily the victim of a two-car collision makes his claim not against the motorist in whose car he was riding but instead against the other motorist. Thus, ordinarily the victim's claim is against a company that neither he nor his host driver selected as insurer.

Perhaps the comparison between a related-insurer and an unrelated-insurer plan for basic protection is best seen by considering the application of each plan to a two-car collision in which four persons are injured—the driver and a passenger in each car. Under the basic protection plan as formulated (predominantly related-insurer), each of the two injured drivers (D_1 and D_2) would obtain basic protection benefits from his own insurer (D_1 from I_1 and D_2 from I_2); each of the passengers (P_1 and P_2) would obtain basic protection benefits from his own driver's insurer (P_1 from I_1 and P_2 from I_2). In contrast, under a plan making maximum use of the unrelated-insurer arrangement D_1 and P_1 would claim against I_2, and D_2 and P_2 against I_1.

Why might one arrangement be preferred over the other? From a claimant's point of view, the predominantly related-insurer arrangement is preferable. It maximizes the probability that in making his claim and negotiating for settlement of any dispute concerning it he will be dealing with an insurer of his own selection, or one selected by his relative or host driver. Thus the chances of having a friendly rather than an antagonistic relationship are improved. Also, if he has obtained his insurance through an agent, it is very likely that the agent will serve as a channel of communication to increase the probability of a friendly and favorable course of dealings between the claimant and the insurer's claims department.

It may be argued, however, that from the point of view of the public interest disadvantages will arise from the extra bargaining

power the victim will have in dealing with his own insurance company through an agent who has a strong desire to continue to write the victim's insurance coverage—not merely automobile insurance but other types as well. For example, it will no doubt be true that in some instances victims can collect on exaggerated claims (especially if the amount involved is relatively small) by threatening to go elsewhere to make substantial purchases of other insurance as well as automobile insurance. This would be a disadvantage not merely from the insurer's point of view but also from the point of view of public interest, since it would tend to produce payments of benefits in excess of those prescribed by the Act, and these excessive payments would tend to drive up the level of premiums charged for basic protection coverage.

But there are answers to this argument that victims will have excessive bargaining power in dealing with their own insurers. The tendency of victims to use their bargaining position to exaggerate claims in the way just suggested will be partly countered by a tendency of reluctance to make a grossly exaggerated claim when a local acquaintance (the insurance agent through whom the coverage was obtained) will probably know all about it and recognize its true character. Also, it may be that the bargaining power this arrangement gives to the victim does no more than redress a bargaining advantage the insurer might otherwise have because of the contrast between the needy circumstances of the victim and the capacity of the insurer to treat the claim in a purely hardheaded business way as merely one of a multitude of claims to be settled for as little as possible. Weighing these competing considerations, we believe the related-insurer arrangement would not lead to much, if any, more exaggeration of claims than would occur under an unrelated-insurer arrangement. It may be suggested that already there is a serious evil of exaggerated claims in the area of most extensive use of a related-insurer arrangement for automobile insurance—that is, collision insurance covering damage to the policyholder's own vehicle. But the evil does not arise from excessive bargaining power of the insured. Rather, it is a matter of excessive repair charges and inadequate resistance by insurers and the public to illegal practices. In part, the excess of payments by insurers over amounts that would be fair charges for repairs goes into the pockets of repairers. In part, it goes into

adjusters' pockets through illegal kickbacks. And in part it goes into the pockets of insureds as a result of practices of collusion that are as surely illegal as kickbacks, though not as clearly condemned by the mores of the community. The collusion to which we refer is that between repair shops and insureds to escape the effect of deductibles (that is, collusion to overstate the actual charge for repairs with the understanding that the repair shop will collect only from the insurer and will forego collection of the deductible amount that is supposed to be paid by the insured). These are evils as likely to exist under unrelated-insurer as under related-insurer coverage, especially where deductibles are used.

The subject of deductibles leads to another point of comparison between related-insurer and unrelated-insurer arrangements. It concerns the possible use of options for basic protection benefits somewhat below those specified as standard. Under a related-insurer arrangement, one is ordinarily claiming against his own insurer, and it is administratively feasible to allow him to elect lower benefits at a lower premium if that is his preference. This is done in § 2.4 of the Act, authorizing a larger deductible than the standard deductible of $100 of net loss or 10% of wage loss, whichever is greater. A policyholder may elect, for himself and relatives residing in the same household, a deductible as high as $300 or 30% of loss of all types, whichever is greater. The person who would find it not a severe economic burden to bear a loss of this size may conclude that he would prefer to take the annual saving in premiums and to avoid the nuisance of presenting small claims, rather than taking the greater coverage. This element of flexibility and choice in the system could not be so easily preserved if an unrelated-insurer arrangement were adopted. To allow an insured to elect lower benefits for himself would mean, then, that he would pay *his own insurer* less in premiums and in return would be able to collect less in benefits against *other insurers.* Insurers would be anxious to sell the more expensive coverage and hopeful of receiving claims only from those who had purchased the less expensive coverage with a higher deductible. Nor is it clear that the results would work out fairly among insurers in the long run, since there might be factors at work in marketing patterns that would tend to disfavor one insurer in comparison with another. Thus, although it is not impossible to make the option for a larger deductible available under an unrelated-insurer arrangement, it

is clear that the option can be offered with less difficulty under the related-insurer arrangement.

We turn now to still another point of comparison between related-insurer and unrelated-insurer arrangements. It concerns the relationship between basic protection coverage and tort liability coverage. Consider a factual illustration. Two cars collide, one driver (D_1) is injured and the other (D_2) escapes unhurt. Assume, also, that D_1 claims that D_2 negligently caused the accident and is liable in tort for damage to D_1's vehicle, and that personal injury damages suffered exceed the $10,000 limit of the tort exemption so there is a tort claim for personal injury as well as for damage to D_1's vehicle. In this situation, D_1's tort claim is presented against D_2's tort liability insurer (assuming both bodily injury and property damage liability coverage). If an unrelated-insurer arrangement for basic protection were used, then D_1's claim for basic protection benefits would be presented against D_2's basic protection insurer. Since it is probable that D_2 would have obtained both his tort liability insurance and his basic protection insurance from the same company, this would mean that both claims would be made against the same company. This arrangement would lead to some economies of administration in comparison with a related-insurer basic protection system under which D_1's claim for basic protection benefits would be presented against his own basic protection insurer and his claim for tort damages would be presented against D_2's tort liability insurer. Under the unrelated-insurer arrangement of basic protection, only one insurer would be investigating and processing the two types of claims by one claimant. Even though somewhat different investigation would be needed for some aspects of the separate claims (fault in tort, but not in basic protection; different items of damages), still there would be sufficient overlapping to effect an administrative saving. This is, of course, an argument in favor of the unrelated-insurer arrangement. But there are countervailing considerations here, too. A significant objective of the basic protection plan is to cause prompt reimbursement of economic losses as they occur. Use of the unrelated-insurer arrangement would be less conducive to realization of this objective than the related-insurer arrangement because the one insurer having both tort and basic protection claims against it would have strong inducements to withhold even basic protection payments until an agreement

could be reached for settling the tort claim as well. Moreover, the added administrative economies from having both claims processed by one company would be reduced by the fact that different administrative handling would be required since one claim is for periodic benefits not based on fault and the other is for a single lump-sum award dependent upon fault. It may be that despite these countervailing considerations there is some advantage in having both claims presented to one insurer. We have concluded, however, that any balance of advantage in this respect is outweighed by (1) the advantage of having claimants present their basic protection claims ordinarily to insurers of their own selection and (2) the greater feasibility of optional deductibles with a related-insurer arrangement.

The choice in favor of the related-insurer arrangement is reflected primarily in § 2.6 of the Act. Another section affected by this choice is § 2.4, concerning optional deductibles. Alternate drafts of these sections, suitable for use by a legislature that prefers an unrelated-insurer arrangement, appear elsewhere.[3]

C. Lump-Sum or Periodic Payments?

Once good reason is found for awarding compensation to a victim rather than leaving him to bear the loss himself, in what way is compensation to be accomplished? The traditional answer to this question in automobile law, as in tort law generally, is that the court will enter a judgment ordering that the defendant (a negligent driver, for example) pay the injured plaintiff a lump sum of money. The amount is supposed to be fair and reasonable compensation for all past and future loss, as well as pain and suffering, caused by the accident in question.[4] This traditional method of compensation in automobile cases is but one among various ways compensation could be paid. Among other possibilities the most promising are those that involve provisions in some circumstances for periodic payments as losses accrue. In the choice among exclusively lump-sum payment, exclusively periodic payment, and various combinations of the two, factors deserving particular attention are the effects on, first, subsistence and rehabilitation of victims and, second, costs to motorists in insurance premiums.

[3] See Keeton & O'Connell ch. 8, comments on §§ 2.4, 2.6.

[4] For further development of this point, see Keeton & O'Connell ch. 2.

1. *Subsistence and rehabilitation.* Any attempt to justify the impact of the lump-sum method of compensation on subsistence and rehabilitation of victims under the present claims system must take account of two serious problems. First is the problem of early losses; ordinarily the period of most rapid losses and greatest expenses of rehabilitation occurs promptly after injury and well before a lump-sum award can be obtained. Second is the problem of long-term losses; in cases of severe injury, losses continue to accrue long after the lump-sum award and, in cases of permanent disability, for a lifetime.

The present tort liability system performs miserably in relation to the problem of early losses. It fails to offer the victim any power to compel reimbursement for early loss as it occurs, since no relief is available before the end of the long-delayed trial of the tort claim. Moreover, the system contains positive deterrents to advance payments by defendants or their tort liability insurers since it is difficult at best and often impossible to arrange such a payment in a way that does not create a risk of its being treated as an admission concerning a disputed claim of liability in tort. Thus, ordinarily the victim's only hope for help from his tort claim in meeting his early losses is to make a full and final settlement. The more desperate the victim's need, the more cruel is the bargaining advantage of the defendant and his tort liability insurer. To a very modest degree, medical payments coverage of automobile policies has alleviated this problem, since it provides for reimbursement of medical expenses without regard for fault. But because of the customarily low limits of this coverage and because of the fact that it provides nothing to reimburse wage losses, it is barely a beginning to a solution of this problem of early losses.

Looking beyond automobile insurance, the recent study at the University of Michigan Law School under the direction of Professor Alfred Conard showed that "emergency and curative treatment during the period of acute distress" was almost universally provided to traffic victims from one source or another—whether hospitalization insurance, workmen's compensation, or "free" medical service.[5] Needs beyond the period of acute distress, how-

[5] Conard, Morgan, Pratt, Voltz & Bombaugh, *Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation* 78 (1964).

ever, were not provided for quite so well.[6] Moreover, obviously medical needs are but a part of the total economic needs facing a traffic victim and his family even in the short period of acute distress.

In the basic protection plan, we propose to meet the problem of early losses by providing for periodic payments as losses occur. Since benefits are due without regard for fault, only in unusual cases will there be any dispute over liability. And where the amount of the claim is in dispute, provision is made for payment of the undisputed portion of the claim.[7] Also, penalties are imposed on insurers for delay in payment of periodic benefits as they fall due.[8] Thus the victim has a legal right to prompt receipt of benefits in reimbursement of his early losses, and his enforcement remedies are realistic. Such rights and remedies are impossible to arrange in the present tort system because of the necessity of resolving disputes about fault and about the total damages due for the lifetime effects of the injury before an award or settlement. Under the basic protection plan, neither of those questions is in issue in relation to the right to reimbursement of early losses.

In relation to long-term losses, the quality of the performance of our present tort liability system is a more debatable question. Recall that the award, when obtained, is ordinarily a lump-sum award. There is no provision in tort law for requiring an installment award. It is possible for the parties to agree on an installment settlement, and there are in some states special statutory provisions in the financial responsibility acts for such awards against uninsured drivers. These provisions, however, are designed not so much to benefit victims as to alleviate the burden on uninsured drivers. That is, the uninsured driver who would otherwise lose his license to drive may avoid that consequence by agreeing to pay off a tort claim in installments. Also, of course, it is possible for a tort liability insurer and a victim to agree upon a settlement to be paid in installments. But installment settlements in any form are rare under the present system. Thus, losses to be suffered in the future are compensated, if at all, by a lump-sum payment at the time of satisfying the tort judgment or settling the tort claim.

[6] *Ibid.*; see also Keeton & O'Connell ch. 2.
[7] Section 3.1(b).
[8] Sections 3.4, 3.8(b).

Historically, the explanation of this practice is probably rooted more in customary limits of judicial action than in any policy choice about the best way to provide for the victim's rehabilitation and his continuing economic needs. Traditionally courts have been disinclined to allow remedies that might involve continuing judicial supervision. Consequently, periodic compensation as losses occur—month by month, for example—has not been considered an available alternative to lump-sum awards.

Under the present system, unless the plaintiff is a minor or is otherwise legally incompetent to handle his own affairs, ordinarily there is no judicial supervision of the plaintiff's use of the lump-sum award. This is not to say that the law expresses a lack of concern about rehabilitation, or about continued provision over the years for the economic needs of a victim who suffers some long-term disability. Indeed, evidence of the probabilities and costs of rehabilitation and evidence of future economic losses caused by the accident are received and considered in fixing the amount of the award. In theory, moreover, the lump sum is adequate, if prudently invested and used, to reimburse all future losses. Except for the depletion of the lump sum in payment of attorneys' fees and other litigation expenses, which perhaps is offset in most cases by damages awarded for pain and suffering, the lump sum is supposed to be about enough, for example, to buy an annuity that will compensate the victim for future losses as they occur, and surely enough to accomplish this result if invested reasonably but in a way that will produce a somewhat higher rate of return than the rate of interest received through purchase of an annuity.

In fact, however, it is an open secret among plaintiffs' lawyers that the awards they recover for their clients are rarely invested and used so as to provide for the injured person's long-term needs.[9] Thus, in practice, the present system not only fails to meet the problem of early losses but also fails again in the encounter with long-term losses.

The present system is nevertheless defended on the ground that this second failure is not the fault of the system but rather the fault of the victims who do not invest and use their awards wisely. It is said, also, that it would be excessive paternalism for the law

[9] Conrad, Morgan, Pratt, Voltz & Bombaugh, *op. cit. supra* note 5, at 84.

to step in and prevent claimants who want their compensation in a lump sum from recovering it in that form. If injured persons prefer to live in luxury for a while and worry about the future when it comes, why not let them do so?

The merits, in these circumstances, of the argument against paternalism is perhaps debatable. Even if for the sake of argument the issue is formulated as one of choosing between freedom of choice for the victims and paternalistic protection of their interests against their own folly, it is not a wholly one-sided issue. Arguments for allowing victims to squander lump-sum recoveries are built on the undeniable and unchallenged preference of our society for protecting the individual's freedom in such ordinary matters as choosing his vocation and his way of spending his customary earnings. But those are ordinary life situations for which one is prepared by experience. The unexpected tragedy of disablement by injury is a different matter altogether. The great majority of victims are totally unprepared by education and experience for the problems they face in determining whether and how to make a lump sum of money serve them for a lifetime. Yet, in view of the competing considerations, we are not prepared to urge, on the ground that victims need protection against their own foolish choices, a rule requiring a victim to take periodic compensation when he desires a lump sum. There are other factors, however, that also bear on the question whether the present method of lump-sum compensation for future loss should be continued in preference to a system of periodic future payments as losses accrue.

The present system does not merely permit the victim to have his compensation in lump sum when he wants it that way. It gives him no other choice. Thus, one who consistently argues for freedom of choice for victims must be critical of the present system as well as a system that gives the victim no choice but to take periodic payments. At least, then, periodic payments should be available to a victim when he desires them, unless some interest not yet discussed overrides this interest in the victim's freedom of choice. Indeed, arguments based on protecting the victim's freedom of choice are even more forceful in opposing the present system than in opposing a system of periodic payments only, since the present system denies him the choice to recover compensation in the same way he would have received his earnings had he not

been injured—periodically. Moreover, there is more at issue in this choice than the contrast between receiving money periodically and receiving it in lump sum. Choosing a lump sum is in this context a gamble, since one's actual losses will almost certainly prove to be greater or smaller than the estimate on which the lump sum calculation was based. Thus, forcing a victim to take his compensation in lump sum is forcing upon him a gamble he might prefer not to take.

Thus far we have been discussing the interests of victims. Theirs, however, are not the only interests involved. The public at large has an interest in assuring that traffic victims do not become public charges—an interest in maximizing probabilities that injured persons will be rehabilitated and returned to their positions as self-sustaining and useful members of society. And the public at large has an interest in whether the method of compensation chosen—lump-sum or periodic payments—affects the cost of the automobile claims system that must be paid by members of the public in insurance premiums, or in taxes, or in other ways.

Consider the effect of the method of compensation on the probability of rehabilitation. A victim's knowledge that his expenses for rehabilitation are to be reimbursed as they are incurred can serve to encourage him to rehabilitate himself. Also, a system in which periodic compensation is normal and lump-sum compensation is ordinarily unavailable reduces the risk that victims will deliberately or subconsciously delay rehabilitation in order to obtain a higher lump-sum award. When only lump-sum compensation is available, a victim may refuse to try to rehabilitate himself pending the often long period before final disposition of his case, since if he is still disabled when the award is made, he may obtain a high award based on an estimate of long-term or even lifetime disability. Of course, conversely, one can argue that periodic payments tend to discourage rehabilitation because of the injured party's realization that he will receive compensation only so long as he is disabled. This risk can be reduced, however, by setting reimbursement at figures somewhat below total loss so that remaining out of work means some financial sacrifice. In any event, it would seem that the tendency of periodic payments to delay rehabilitation in this way is outweighed by a greater tendency of lump-sum payments to produce such delay. Certainly in cases of

serious injury, in which the need for rehabilitation is usually greatest and the costs to the victim and to society are most severe if rehabilitation does not occur, the effect of a system of long delayed lump-sum payment can be disastrous.

In summary, although effective rehabilitation and provision for the continuing economic needs of motoring victims may have been theoretically objectives of automobile claims systems, they are often frustrated under present procedures, and especially in cases of serious, long-term disability. A system of periodic payments would better serve these needs.

2. *Costs.* Closely related to the impact of the method of compensation on rehabilitation is its impact on costs of an automobile claims system. Higher lump-sum awards resulting from deliberate or subconscious delay in rehabilitation until a claim is settled or tried produce higher claims losses and, in turn, higher insurance rates. Similarly, delays in rehabilitation or in returning to work because of knowledge that periodic benefits will be available only so long as disability continues will tend to produce higher rates.

It might be argued, as bearing on costs, that under a system of periodic payment, many individuals will be tempted to take one more day or week of idleness rather than go back to work, despite the failure of periodic payments to reimburse completely for wage loss. Cumulatively this tendency, the argument goes, might outweigh the cost of delays in rehabilitation pending settlement or trial. After all only a relatively small number of victims could hold out for long periods with any expectation that the long convalescence would be considered genuine. Also a person trying to preserve his impairment for the purposes of a lump-sum tort claim must (1) gamble in that there may be no payment because of tort rules or because of disbelief in the authenticity of his claim, and (2) undergo hardship in that payment will be long delayed. By contrast, almost any victim can manage to hold out for a day or a week to collect a little more in periodic payment. He is much more likely to be able to justify the short extension, and at any rate he is not gambling much—only the few days' wages. On the other hand, figures from the Michigan study conducted by Professor Conard and his colleagues tend to show that a great portion of payments to victims under the present tort system goes to those seriously injured.[10] Thus one cannot discount the importance of

[10] *Id.* at 150.

the tendency of the tort system to encourage such persons to preserve their impairments—especially when one considers the great cost to victims and society of ignoring early attempts at rehabilitation for serious injuries. Another factor driving up costs under a system of lump-sum payments is the tendency of any trier of the facts in forecasting loss from any long term injury to be generous in the knowledge that if he underestimates the individual victim may suffer grievously, whereas if he overestimates only the relatively vast insurance coffers will suffer. Obviously periodic payment can be calculated with greater precision. The net cost advantage of a system of periodic payment in the respects thus far stated, however, may be countered by a factor of administrative cost, with respect to which a system of lump-sum payments probably is advantageous. That is, administrative costs of paying periodically are greater because more payments are made. This disadvantage is not entirely overcome by the marvels of modern machine processing. Nor is it overcome by the further cost of the greater administrative difficulties one encounters in forecasting what loss will be suffered rather than merely looking back to determine what loss has been suffered already.

Assessing the countervailing factors of costs in the absence of precise data, we conclude that under systems of compensation otherwise alike, the overall costs of periodic payment in all cases probably would be about the same as for lump-sum payment in all cases. In any event, data now at hand do not enable us to predict with confidence a substantial difference in cost between these two methods of payment.

3. *Periodic and lump-sum payments combined.* The method of compensation under the basic protection plan is neither entirely lump-sum nor entirely periodic.

If an amount exceeding $1,000 is involved, the claimant cannot be compelled to take a lump sum where he prefers periodic payments, except in rather special cases in which medical evidence supports the conclusion that his pending claim interferes with rehabilitation.[11] Nor can the insurer be compelled to pay in a lump sum, with the same exception. Thus, where the insurer disputes the claim of permanent disability, it may resist a claim for lump sum and pay periodically while waiting to see whether the injured person recovers more rapidly or more completely than is

[11] Section 3.3(c).

predicted in the assertion of his claim. Where both the claimant and insurer wish to settle for a lump sum, however, the settlement is authorized even without court approval in some cases and with court approval if large sums are involved.[12] Thus it is expected that many cases, and especially those involving small amounts of expected future loss, will be settled in this way. This arrangement has the advantage not only of convenience to both parties but also of avoiding in settled cases the administrative costs of continuing small periodic payments over a long period of time.

D. Pain and Suffering.

Early in the modern academic discussion of proposals for replacing principles of negligence in some areas of tort law with strict liability, the possibility of eliminating compensation for pain and suffering was noted.[13] The question has been sharply debated.

The principal arguments for allowing compensation for pain and suffering, even where the basis of liability is one of strict liability rather than fault, may be generalized in the following way: (1) Pain and suffering are real elements of injury. Where there is good reason for legal redress against another because of the way in which an injury occurred, the legal system falls short of its mission of doing justice if it redresses only economic harm. (2) In many situations the affront to one's dignity—to his freedom from unwarranted intrusions against his person—is more disturbing and significant than the interference with his economic interests.[14] In such situations, to compensate for the latter and ignore the former is to act in a way that can only seem—under views widely held in the community—to be arbitrary, technical, and unjust. (3) Even where the basis of liability is some form of strict liability rather than negligence or intentional tort, still the conclusion of liability is founded on some good reason for shifting to the actor whose conduct has been a cause of injury the economic burden the injury imposes on the victim; where such a reason for shifting loss exists, the actor whose conduct has caused pain and suffering as well as

[12] Section 3.3(d).

[13] See, *e.g.*, Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Prob. 219 (1953); Morris, *Liability for Pain and Suffering*, 59 Colum. L. Rev. 476 (1959).

[14] See Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. Chi. L. Rev. 641, 673 (1964).

economic loss should not escape responsibility for having done so while his victim endures the consequences. (4) Administrative difficulties of awarding compensation for pain and suffering are easily exaggerated, and in any event the law should not abandon the quest for justice merely because the going is rough and the ideal beyond reach. (5) Awards for pain and suffering serve a useful purpose in providing a source of funds to pay the claimant's attorney's fees, thus redressing a deficiency of the law in its failure to provide directly for attorney's fees.

The principal arguments for eliminating pain and suffering may be generalized in the following way: (1) Views in favor of awarding compensation for pain and suffering are founded in part on the idea that one who has inflicted pain and suffering on another ought not to escape responsibility for having done so. This idea has its maximum force in relation to intentional torts, and somewhat less force in relation to negligently inflicted injuries. It is still weaker where the basis of liability is changed to one involving neither intentional interference with the interests of another nor negligence. (2) Legal relief should be well adapted to the situation out of which the claim arises, with due consideration for the benefits it bestows on the claimant and others like him and for the broader social interests thus served. Consideration must extend, moreover, to the burdens imposed if legal responsibility is assigned—the burden on a particular defendant and the burden imposed, through him and others like him, on other worthy social interests.[15] The burden of compensating for both economic loss and pain and suffering is in some instances excessive, and one or the other must be preferred. It is better to give priority to economic losses since as to them a money award is compensation in kind, and their reimbursement may be essential to subsistence. In contrast, for pain and suffering no remedy in kind is possible, and compensation for pain and suffering protects not subsistence itself but only the less fundamental interest of a life better than subsistence. (3) Administrative difficulties of trying to measure pain and suffering and to decide upon proper amounts of compensation for them weigh heavily against the desirability of undertaking the task. Not only is administration of a system of awards for pain and

[15] *Cf.* Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513 (1963).

suffering expensive, but also the awards are in some degree inevitably arbitrary because pain and suffering cannot be precisely measured. A lack of evenhandedness results. If two individuals each suffer $2,000 in economic loss from traffic accidents, it is relatively easy for the law to see to it that each is paid the same amount (whether it be the full $2,000 or, instead, that amount less prescribed deductions). But who can ever know whether two individuals have undergone the same amount of pain and suffering? And, if they have, what are their chances of receiving the same amount of compensation, even if the greatest thought and effort go into the appraisal? (4) If provision is to be made for paying a claimant's attorney's fees, this should be done directly and openly.

Bringing these various arguments to bear upon the pragmatic problems confronted in drafting the basic protection proposal, we have reached these conclusions: (1) Basic protection (which is compulsory coverage for accidental losses, not conditioned on fault) should not include compensation for pain and suffering.[16] (2) Optional added protection coverage for pain and inconvenience should be available to provide such benefits to those who consider them sufficiently desirable to warrant payment of the necessary premium on a voluntary basis.[17] (3) The tort exemption applicable in the cases of less severe injury should apply against tort claims for pain and suffering as well as economic loss,[18] even though the basic protection system only partly makes up for this elimination of benefits for pain and suffering. The plan does so in part by candidly allowing attorney's fees[19] in addition to basic protection benefits for economic loss, thereby serving openly one of the objectives that damages for pain and suffering have served *sub rosa.* (4) The present structure of the tort action in more severe cases should be preserved,[20] thus allowing tort awards for pain and suffering to the same extent as at present in cases to which the tort exemption of the basic protection system does not apply.

Underlying this whole pattern is the principle, developed more fully elsewhere,[21] that it is fair to allocate the burden of traffic

[16] Section 1.9(c).
[17] Section 2.5.
[18] Section 4.2.
[19] Sections 3.8, 3.9.
[20] Section 4.2.
[21] Keeton & O'Connell ch. 5; 78 Harv. L. Rev. at 344–57 (1964).

injuries partly to motoring and partly to the various other interests that were being served by the victims' activities out of which—along with motoring—the injuries arose. In seeking to formulate a pattern for allocating the burden of traffic injuries that is both fair and prudent, we have also taken into account that an overall saving occurs if pain and suffering are designated as a share of the burden to be borne by victims. This is true because disputes over pain and suffering have been a source of controversy and litigation second only to disputes over fault,[22] and because the administrative costs of setting values on the unmeasurables of pain and suffering tend to dwarf the amounts involved in the smaller cases. The objective of reducing litigation would be only partly served by eliminating tort actions in small cases if they were replaced with basic protection actions that also involved compensation for pain and suffering. For these reasons we have chosen to assign to victims the entire burden of pain and suffering in small cases (those in which the tort exemption applies) and to compensate economic losses almost fully through basic protection benefits. Perhaps the most significant feature of the basic protection approach in this regard is its efficiency in executing the principle that the burdens flowing from traffic injuries should be shared between victims and motorists. Once a decision is made to divide the loss, it makes sense to transfer the part that is most easily transferable—namely economic loss that is accurately measurable in most cases—and to leave where it lies the loss that is unmeasurable—namely pain and suffering. Granted only a limited supply of dollars for use in reparation, it makes sense to use dollars to replace dollars lost rather than to serve as a substitute for something not truly replaceable in dollars.

Though believing the allocation of the burden of injuries in the way just indicated to be a fair one, we recognize that some persons may nevertheless desire compensation for pain and suffering in small cases as well as in the large cases in which tort actions are preserved. And there is surely nothing unfair or improper about their being allowed to contract for such benefits on a voluntary basis. We have therefore provided for insurers to offer added protection coverage for pain and suffering, optional to basic protection policyholders.[23] We suspect that most persons who might

[22] *Id.* ch. 6; 78 Harv. L. Rev. at 382.

[23] Section 2.5.

as an initial proposition think these benefits desirable are likely to change their minds when the cost of providing them is separately stated in the insurance premiums. But whether we are right or wrong in this respect, the proposed arrangement for optional added coverage of this type leaves the extent of its use to free development in the market place.

E. Property Damage.

Most damage to property in automobile accidents is inflicted on automobiles themselves, though damage to other property—a victim's clothing or luggage, or to property struck by a car, such as a fence, a tree, or a building—is also commonplace.

We have considered four principal methods of dealing with property damage under the basic protection system, as well as a number of variations on each: (1) providing no compensation for property damage as part of basic protection benefits and preserving tort actions for property damage by excepting it from the tort exemption; (2) providing compensation for all property damage within specified limits as a part of basic protection benefits, but on an *optional* basis *as to damage to one's own property,* and eliminating tort actions for property damage by the tort exemption; (3) providing compensation for all property damage within specified limits on a *compulsory* basis, and eliminating tort actions for property damage by the tort exemption; and (4) providing compensation for property damage within narrower limits as a part of basic protection benefits, on an optional basis, and preserving to some extent but not fully the rights heretofore available in tort for damage not compensable under basic protection. Because of some disadvantages in each of the first three methods, we developed tentatively a plan of the fourth type (perhaps a hybrid) according to which damage to vehicles, above a deductible of $100 and not exceeding a limit of $1,000, under standard provisions was to be compensated through basic protection benefits, and tort actions were to be preserved for the remaining damage (the first $100 and all above $1,000). This plan would have the great advantage of eliminating most tort litigation over damage to vehicles since the cases of damage above $1,000 would be few, and the cases in which one suffering lower damage would bother with the uncompensated first $100 would be rare. This tentative

plan also would have allowed a policyholder to elect not to carry even the standard basic protection coverage for damage to his vehicle, in which case he would be electing to bear that $900 of loss to which the tort exemption would still apply even in case his car was parked and was struck by a drunk driver. On mature consideration, however, we concluded that such an arrangement would be undesirable both because of its complexity and because of the probability of dissatisfaction on the part of those who elected not to carry the standard basic protection coverage and later found themselves unable to recover, even against a thoroughly blameworthy driver, for the damage above the first $100 and not above $1,000.

Having discarded solutions of the fourth type, we still found it extremely difficult to choose among the first three. The second and third have the clear advantage of maximum reduction in the amount of small tort litigation since both apply the tort exemption to all property damage unless the total damages for injury to person and property combined exceed the figure chosen (let us say $10,000) as the dividing line for application of the tort exemption. Thus, all costs now incurred in investigation, litigation and settlement of all the less severe tort cases—including all those for damage to vehicles—would be saved. But each of these two methods also has a clear disadvantage. The second (under which basic protection insurance, in addition to covering property other than vehicles, would apply ordinarily only to the policyholder's own vehicle rather than any other vehicle, and would be optional) would lead to substantial public dissatisfaction in certain types of cases of damage to vehicles. Consider the case of the person who elected not to carry this property damage coverage on his car and later had his car damaged by a reckless driver. His instinctive reaction upon learning he had no remedy in tort because of the exemption would be outrage. Perhaps some motorists could be persuaded on mature deliberation to accept the result because of the long-range saving to motorists as a group, reflected in lower premiums, stemming from the elimination of the overhead cost of these tort claims. Of course, any single individual might fear that he would be one of the unlucky minority who would lose more than they saved. One with this pessimistic view, however, would be free to obtain voluntary coverage for damage to his own ve-

hicle. If he chose not to insure, it might be a wise choice since, if typical among those motorists who did not insure against damage to their own cars, he would, over a long span, save more in premiums than he would have recovered in tort had these claims been preserved. This, of course, is the consequence in many situations where one foregoes insuring and takes the risk upon himself. But here the risk—damage to one's car—would not be one of disastrous loss. And, by hypothesis, the risk of damage otherwise than by the negligence of another *is* one the motorist would have chosen to take upon himself. That is, we are considering only a decision of a person not to insure his own car for damage regardless of fault, in which case he then would depend for any recovery on being able to show that some other person negligently caused his damage. Thus, the point at issue in this discussion is only whether to require a person to bear the added risk of damage by a negligent motorist against whom he could recover in tort under the present system. Still, we doubt that all this evidence of the long-range benefit to the typical motorist would assuage the sense of outrage of the uninsured car owner whose parked car had just been demolished by a reckless driver. Nor do we suppose his sense of outrage would be assuaged by the reminder that he made his choice when he elected not to carry the basic protection coverage for damage to his own car.

It may be suggested that a somewhat comparable situation exists in relation to pain and suffering and in relation to those elements of economic loss from personal injury that are not covered by basic protection because of the deductible or because of the periodic limit. But there are significant differences minimizing the probability of substantial dissatisfaction in relation to personal injury claims. First, under basic protection the scope of the noncoverage of economic loss from personal injury (and therefore the extent to which one might find himself wholly uncompensated from either basic protection, or tort rights, or collateral sources such as sick pay) is small; it consists of the deductible ($100 or 10% of work loss, whichever is greater) and the excess of work loss above $750 per month (of which there would be none in most cases). Second, the noncoverage for pain and suffering applies only to small cases, is considerably offset by allowance of attorney's fees,[24] and in any event is not tangible and measurable as

[24] Section 3.8.

property damage is. Third, the counterpart of the case of damage to a properly parked car does not arise as often in relation to personal injury, since usually the victim was himself involved in walking across a street or driving a car, or else was a passenger in the car driven by someone with whom he has some sense of identification. Thus, with his own movement or activity a factor in the accident, it is less likely that a victim will feel that it is outrageously unfair for him not to recover all his damages against one he considers morally responsible for the accident. Moreover, since most of his damage from personal injury is compensated, and compensated promptly through the basic protection system, he is more likely to accept the idea that on the whole he has been well treated, even though he might believe his case to be one of the small minority of cases in which a victim could net more in the end under the present system than under the basic protection system.

The third type of plan considered (under which compensation for property damage is a part of compulsory basic protection coverage) has the disadvantage of sharply increasing the level of compulsory premiums. Probably they would be somewhere near the sum of present tort liability coverage and present collision coverage, whereas with property damage excluded from basic protection the compulsory premium would be near the level of present tort liability coverage alone.

There would also be the disadvantage of *requiring* people to carry what would be the equivalent of collision insurance. Many vehicle owners now choose not to obtain collision coverage; people with older cars are especially likely to reach this decision. They may regard the risk as one they can bear, saving in the long run the added cost of overhead that must be a part of any insurance premium. They may also be influenced by the fact that casualty losses of this type are ordinarily allowable as income tax deductions. Plainly, a significant number of motorists would desire an option, and this has been a factor in our decision to recommend a plan under which an option is preserved.

To require all to carry the equivalent of collision insurance might also drive costs up in another way. It is often said to be axiomatic that with greater insurance coverage come (1) more utilization of the service insured (in this case car repairs) and (2) higher costs of that service through the knowledge that

insurers will pay. Of course, if by requiring owners to insure against damage to their own cars, the interest of safety would be served by encouraging prompt and complete repairs, this might be a strong argument in favor of including property damage within basic protection. The trouble is that "cosmetic repairs"—repairs for appearance—might dwarf repairs related to safe handling of the car, with the result that the expenditures from the pool of compulsory insurance for car repairs might well be disproportionate to the benefit society would receive.

Extending basic protection coverage to property damage might also significantly affect the distribution of insurance business. That is, probably the whole package of basic protection would be written by a single company, whereas tort liability coverage and collision coverage on the same car are now very often written by separate and unrelated companies. This is especially likely where the collision coverage is being written at the instance of a lender from whom the car purchaser is borrowing the purchase money. It may be that this change in the pattern of distribution would serve the public interest by effecting economies in administrative overhead. But the prospect of such a change is bound to increase opposition to the whole plan, and it seems to us unwise to jeopardize the prospects of reform that meets the primary need—that in the area of personal injury—by attempting to extend compulsory basic protection to property damage as well. The impact of personal injury is potentially more serious, and the collision insurance system now in operation applies to a considerable degree the principle of compensation without regard to fault that underlies basic protection. The collision insurance system could be improved, quite clearly, but the need is not so striking as in the case of personal injury.

Though we have chosen not to urge the third plan, we would favor it as a first alternative to the plan we recommend. In addition to the advantages already noted, the third plan would undoubtedly produce a net saving to car owners in insurance premiums. Marketing economies would be realized from combining three coverages (bodily injury liability, property damage liability, and collision coverages) into one (basic protection coverage), and there would be a saving from eliminating the cost of the second round of shifting loss that now occurs when a collision

insurer makes a subrogation claim against a property damage liability insurer. Under the present system, the reduction in collision premiums because of the net subrogation recoveries against other motorists is more than offset by the increase in property damage liability premiums to cover these added losses under that coverage. This is an example of the increased cost accompanying any second shifting of loss from one insurer to another due to the administrative costs incident to disputes over whether the shifting is to occur in particular cases. Thus one of the major advantages of the third plan would be an overall reduction in insurance premiums paid today by every car owner who carries both collision coverage and property damage liability coverage.

On balance, however, we have decided to recommend the first of the four types of plans considered. It has the disadvantage of preserving tort litigation over property damage. It is imperative, of course, that negligence litigation over damage to vehicles be avoided in a very high percentage of cases. Otherwise the desired saving of costs by avoiding controversies over fault could not be realized. It is especially important to avoid litigating relatively small claims as to which the costs of litigation might dwarf the compensation in dispute. But in view of the small amounts of property damage involved in the majority of cases, the relatively narrow range of controversy over the amount of damage (in contrast with the sharp controversy over amount in personal injury cases), and the separation of property damage claims from personal injury claims under the proposed plan, it seems likely that the percentage of settled cases will be extremely high—even higher than it has been under the present system. In the nature of things, under this plan, there will be limits on the inducements and opportunities for exaggeration, on the one hand, or unreasonably low estimates of damage on the other. Moreover, the probability of a reduced burden on the courts is further increased to the extent that collision coverage is carried. The tort dispute is then ordinarily one between a collision insurer (as subrogee) and a property damage liability insurer—a circumstance increasing the probability of settlement. Also, even where settlement does not occur, insurers ordinarily resolve their differences by arbitration rather than litigation. Thus we believe the number of tort cases in courts will be sharply reduced by the tort exemption,

even though it does not preclude tort claims for property damage. The price paid, then, is not great, and there are the significant gains of creating a minimum disturbance of present marketing patterns and practices, holding compulsory premiums to a lower level, and leaving each vehicle owner an option to bear the risk of damage to his own vehicle himself rather than insuring (an option which, as already noted, he now has in relation to collision coverage).

It might be suggested that it still would be desirable to use a variation on the first plan rather than the plan exactly as we have developed it—that is, that it would be better to include within basic protection all property damage other than damage to vehicles. It is true that most of the arguments against extending basic protection to property damage have their principal force in relation to damage to vehicles. But we believe that the arguments for holding compulsory premiums to a lower level and leaving property owners an option to insure their property or not have some force also in relation to damage to property other than vehicles. Moreover, there is an advantage in avoiding the addition of a complexity to the system by treating one type of property damage differently from another.

IV. COMMENTS BY SECTIONS[1]

SECTION 1.10 *Net loss.*

The chief purpose of this section is to limit basic protection to reimbursement of net economic loss, in order to avoid wasteful overlapping of basic protection and benefits from other sources. Thus this section is based on a principle contrary to that underlying the collateral source rule of tort law, under which the tort claimant is able to recover against the tortfeasor for elements of damage as to which reimbursement has already been obtained from other sources such as medical and hospitalization insurance and pay for sick leave. Nevertheless, we have concluded that there are some kinds of economic benefits that ought not to be subtracted in calculating net loss from an injury. Property received

[1] This is a limited selection from the complete section-by-section comments appearing in Keeton & O'Connell ch. 8.

by way of succession at death is not truly in reimbursement for loss. Neither are life insurance proceeds, since to a considerable extent they represent savings passed along at death. These types of economic benefits from death are not to be subtracted from loss in calculating net loss. A third kind of economic benefit treated in the same way is the benefit of a familial obligation—the obligation of one member of a family to support another. The family is ordinarily an economic unit in a practical sense, and it is so treated in this definition. Thus, in a state where an adult child is obligated to support his destitute parent, and the child pays medical expenses incurred by the parent because of a traffic injury, this benefit to the parent is not subtracted in calculating his net loss for basic protection. For a different reason a husband's payment of bills for medical services to his wife is not a subtractable benefit. The husband rather than the wife incurs the loss from medical expenses. Also, the husband—unlike the child in the above example—would be a proper party plaintiff in a tort action for reimbursement of such expenses, and he is therefore a person suffering loss under the definition of that term in section 1.11. Thus, although the wife cannot recover basic protection benefits for the medical expenses, the husband is entitled to do so.

Gratuities are a fourth type of benefit not subtracted from loss in calculating net loss. In this instance the theory is that they are ordinarily intended as gifts to the injured person, and should not be allowed the effect of indirect gifts to a basic protection insurer, as would be the case if they were subtracted in calculating net loss.

With these exceptions, reimbursement from "collateral sources" is taken into account as a subtraction in the calculation of "net loss." Thus, for example, benefits due under a workmen's compensation law, and under disability insurance, whether privately obtained or provided as an incident of employment, are subtracted in calculating amounts due as basic protection benefits. To state the effect from another point of view, basic protection coverage is "excess" insurance collectible only to the extent that no other right of reimbursement is available to the claimant. Of course this means that it will be less expensive than otherwise comparable "primary" coverage would be, because less will be paid out.

Tort claims present a somewhat different problem from these rights of reimbursement because, first, the value of a tort claim is commonly indefinite on account of uncertainty about liability, or damages, or both, and, second, the date of realization of its value is likely to be long delayed. For these reasons, special provisions for tort claims are desirable.

Because of the relationship between tort claims and basic protection it is desirable also to distinguish between tort claims against basic protection insureds and tort claims against others. With respect to tort claims against basic protection insureds, the crediting to avoid overlapping of benefits occurs in calculating payments due on tort liability. For example, if a tort judgment of $15,000 is obtained against a basic protection insured and $3,000 of basic protection benefits have already been paid, that sum is credited immediately against the tort judgment. This provision is set forth in section 4.3. See comments on that section, *infra.*

On the other hand, in relation to tort claims against persons other than basic protection insureds, the crediting to avoid overlapping of benefits occurs in calculating payments due for basic protection. For example, if a person eligible for basic protection benefits obtains a net tort recovery of $5,000 against one not a basic protection insured, that sum is credited against the basic protection insurer's liability. If $3,000 of basic protection benefits have already been paid, the claimant who has just recovered $5,000 in tort is obligated to pay $3,000 to the basic protection insurer. The balance of $2,000 is subtracted from loss as it accrues. If loss in excess of a total of $5,000 accrues in time, and the total $5,000 tort recovery has thus been credited, basic protection benefits are again commenced at that point. This provision appears in the present section as paragraph (c)(2). That paragraph also grants the basic protection insurer a lien on the tort recovery, and section 2.8(b) grants the basic protection insurer a right of indemnity against a tortfeasor or his liability insurer if, though having reason to know of the basic protection insurer's interest, they pay to a tort claimant in derogation of this interest.

Why treat tort claims against basic protection insureds differently from tort claims against others? The fundamental question here is this: Who is to bear the loss where both basic protection benefits and tort recovery are due? The crediting system of section 4.3, applying to tort claims against basic protection insureds

(whereby the basic protection insurer in effect pays part of the tort claims) would be inappropriate in other cases since it would cause basic protection insurers to bear part of the tort liability for those uninsured for basic protection, such as railroads and non-residents without basic protection coverage. This would be to impose an unfair burden on basic protection insurers and in turn on those who pay the premiums for this coverage. Thus, if the same crediting system is to be used in both types of tort cases to avoid overlapping of tort recovery and basic protection benefits, it must be a system whereby the basic protection insurer gets the benefits of the tort recovery. But use of this system for tort claims against insureds would create a very substantial inducement to basic protection insurers to encourage needless tort claims in order to try to shift the burden of loss to the tort liability insurer. This factor outweighs the advantage of simplicity in having one system apply to both types of tort claims. It is true that a similar inducement is present as to claims against non-basic protection insureds, but since basic protection is compulsory there will be relatively few such claims, and risking that inducement is necessary if basic protection insurers are to be spared the burden of primary responsibility for the torts of non-basic protection insureds.

These crediting provisions are preferable to provisions for subrogation because they avoid the expense of subrogation proceedings and they leave the control of the tort claim in the claimant while yet providing against overlapping and thereby reducing the costs of basic protection.

The qualifying phrase "one who is an insured *with respect to the injury on which the claim is based*" in this section and similar phrases in sections 4.2, 4.3, and 4.4 are designed to avoid extending the benefits of being an insured to a case against one who is an insured of a basic protection policy but who is not an insured as to the particular injury—for example, if he caused it intentionally. Note also that even if the victim chooses not to sue on the tort claim, an intentional tortfeasor is subject to suit by the basic protection insurer for indemnity under section 2.8(a).

The operation of the last two sentences of paragraph 1.10(c)(2)—concerning cases where the injured person dies—and the operation of paragraph (d) are discussed elsewhere.[2]

[2] Keeton & O'Connell chs. 6, 8; 78 Harv. L. Rev. 329, 380 (1964).

SECTION 2.5 *Added protection provisions.*

(a) and (b) (1) *Pain and inconvenience coverage.* The one form of added protection coverage that insurers must offer is described in paragraph (a) of section 2.5. Thus the maximum pain and inconvenience coverage a policyholder is certain to be able to purchase is coverage paying at the rate of $500 per month during "complete inability to work in his occupation" continuing for not less than one week, and for partial inability a percentage of $500 equal to the percentage of inability, subject in all events to a limit of $12,500 "for all pain and inconvenience sustained by one injured person from injuries occurring in one accident." He is assured also of being able to purchase coverage paying $100 per month, or $200, or $300, or $400, subject respectively to limits of $2,500, $5,000, $7,500, and $10,000 (these being respectively, "twenty-five (25) times . . . the monthly benefits for complete inability" to work in one's occupation.

This coverage is for pain and inconvenience sustained by "an injured person." It provides benefits, for example, to an injured college student who is an insured, but his injury does not entitle his parents to benefits even though they too suffer pain and anguish because of it.

The term "pain and inconvenience" is chosen to indicate that these benefits are intended as compensation not only for pain and suffering but also for the inconvenience, such as interference with activities outside work, that invariably accompanies injury. These elements of damage are excluded from basic protection because they are not economic losses. But they are nevertheless genuine items of damage against which it is appropriate that one be allowed to insure on an optional basis.

The measurement of items of damage such as these is most difficult. In tort law, this measurement is left to the fact finder, with very little judicial supervision. That arrangement has the great advantage of flexibility, allowing adjustment of an award in light of all the peculiarities of the particular case. It has the great disadvantage of the relatively high expense of administration inherent in a system that requires a separate determination for each case based on evidence of the particulars of that case. The authority granted to insurers in section 2.5 enables them to develop a coverage using a standard comparable to that used in tort cases.

For example, they might agree to pay fair and reasonable compensation for the pain and suffering actually incurred, not exceeding the stated limits. But the only form of coverage insurers are required to offer is one designed to operate at less administrative expense—one under which benefits are determined by somewhat more objective standards. After considering various other possible standards, we have concluded that on the whole the most satisfactory standard is one tying the level of benefits for pain and suffering to the percentage of one's inability to work in his occupation. The degree of pain and inconvenience one suffers is not exactly proportional to the degree of his inability to work, of course, but there is at least a tendency of correlation. We believe this to be the most satisfactory objective standard available.[3]

SECTION 2.6 *Multiple policies applicable to one injury.*

One significant choice expressed in this section is that of limiting to $10,000 the basic protection coverage applicable to injury to one person in any one accident. A second significant choice is that of making coverage on the several vehicles involved in causing an injury cumulatively available to claimants, subject to the per-person limit already referred to and subject to priorities in favor of others, as stated in this and the next section. Thus, when two insured vehicles collide almost certainly $10,000 of basic protection coverage will be available to each injured person. Less than that amount of coverage is available only if more than twenty persons are seriously injured so that allocation under section 2.7 of the $200,000 cumulated limit of per-accident coverage ($100,000 on each vehicle) produces less than $10,000 of coverage for some or all of the injured persons. If such a rare case arises, the victim is nevertheless assured of the availability of $10,000 of basic protection benefits, since as a last resort he can claim any deficiency against the assigned claims plan under the terms of section 9.4.

A third significant choice is expressed in paragraph (d), designating some policies as primary coverage for a particular injury and others as excess coverage for that injury (that is, available only after exhaustion of applicable primary coverage), rather than making all insurers with coverage applicable to an accident jointly responsible for all injuries arising from that accident.

[3] Additional comments on section 2.5 appear in Keeton & O'Connell ch. 8.

A fourth question of significance is faced in carrying out this third choice. In cases of collision between cars insured for basic protection, is the insurer of each car to be the primary source of benefits to occupants of that car, or are the occupants of each car to look instead to the insurer of the other car as the primary source of basic protection benefits? The answer to this question is a choice between a related-insurer and an unrelated-insurer arrangement of the basic protection coverage, discussed elsewhere.[4]

SECTION 3.7 *Periods as to which adjudications are binding; limitation of actions for new adjudications.*

This provision permits an adjudication as to benefits to fall due in the future, but only on the condition that the court finds that a reasonably certain determination of future net loss can be made in the light of the evidence. If the claimant fails to prove his claim as to some or all periods of future loss and the insurer fails to disprove it, the court limits the judgment to the past and such future periods, if any, as to which a reasonably certain determination can be made. Thus, when a claim of future loss is not susceptible of ascertainment—for example, because of a medical issue on which physicians can only speculate—the determination of the right to such benefits is postponed. This system avoids the necessity of a yes-or-no answer to a question that competent and responsible physicians regard as a matter of a degree of probability. On the other hand, if under the evidence it can be found that the degree of probability is so high that a reasonably certain determination of future net loss can be made, an adjudication of the right to future benefits is authorized. Such an adjudication is final as to any future period it purports to cover not in excess of five years beyond the date of judgment. As to any period more than five years beyond the date of judgment, the judgment under paragraph (b) has only what might be described as a prima facie significance. It continues to control if neither the claimant nor the insurer files an application to set it aside. But, upon application by either party, the issue of amount of benefits due is tried de novo as to unpaid benefits coming due beyond five years after the date of the prior adjudication and not more than one year prior to the date of the application. The purpose of this provision for de novo

[4] See pp. 86–92 *supra*.

trial is to avoid giving binding effect to predictions of the exact amount of benefits to come due far into the future. Almost inevitably predictions for a long term of years will turn out to be wrong, and should not be binding. The added proviso that the de novo trial extends only to benefits coming due not more than one year prior to the date of application is designed to require timely applications by a party who wishes to have a judgment for benefits modified.

The rather lengthy period of five years is deliberately chosen so that a court, by entering a judgment purporting to control future benefits, may avoid frequent retrials. On the other hand, if a court considers that the course of recovery from a personal injury is so uncertain that it is desirable to provide for earlier reconsideration (and for retrial if the parties are unable then to reach agreement in the light of the prior adjudication and later developments), it may enter a judgment that governs future benefits during only a specified period (for example, two years beyond the date of judgment).

Paragraph (c) provides for an application for retrial when the judgment awards future benefits for a period less than five years and does not purport to determine that no loss will be suffered beyond the period for which benefits are awarded. Of course such retrial may be avoided by agreement of the parties. The limitation period with respect to the application for retrial does not commence to run until the date of the last payment of benefits, whether for a period within the judgment or one thereafter for which benefits have been paid by the insurer without the compulsion of a judgment.

Paragraph (d) provides for a final judgment (not subject to the procedure for applications for retrial) that no further benefits will be due beyond a specified date. It would be improper for a court to enter such a judgment in the absence of reliable evidence supporting that conclusion, but this provision is designed to permit a termination of all proceedings in appropriate cases. Though it is not subject to being set aside under the application procedures specially provided in this Act, such a judgment would be subject to attack on the very limited grounds now available against judgments in personal injury actions. It might be argued that there is no more reason for finality of a judgment that no more benefits

will come due than for finality of a determination that the net loss will continue to be a stated amount per month for a stated period beyond five years. But there are differences. One concerns the likelihood of error in the forecasts made. Where evidence is strongly persuasive that the victim has recovered fully before trial, for example, while it is true that some forecasting is involved in a finding that he will not suffer a relapse, the percentage of error in the forecasts is likely to be very low in comparison with that in forecasts of continuation of a stated level of periodic loss. Where the probability of error is extremely low, the advantages of allowing reopening on a claim of error are outweighed by the advantages of finality and repose.

SECTION 4.1 *Basic protection benefits partly in lieu of damages in tort.*

This section makes explicit a proposition that is perhaps implicit in the other sections of article 4 of the Act. The basic protection system modifies the remedy heretofore available to one who could recover in tort for his injuries sustained in an automobile accident.

SECTION 4.2 *Exemptions from tort liability in certain cases.*

Examples illustrating the joint operation of the exemption provided in this section and the credits provided in section 4.3 are given in the comments on the latter section.

The plan of this Act is to provide basic protection coverage as a source of prompt and periodic reparation of economic loss within its limits and yet to preserve the injured person's tort claims in more severe cases. This section states the standards by which it is determined whether a case is one of the severity required for preservation of the tort claims. From one point of view, it states the price—giving up the smaller tort claim—the injured person is forced to pay for the right to basic protection benefits. From another point of view, it states the advantages that a basic protection insurer and its insureds have in relation to tort liability of the insured, when they provide basic protection coverage for a victim.

The exemption prevents tort recovery for pain and suffering, as well as for economic loss, when total damages do not run higher than $10,000 (or higher than the smaller figure equaling allo-

cated coverage under the third clause of section 4.2(a), which is explained below). This is significant not only as part of the plan for eliminating some tort cases but also in two other ways. First, it directly reduces the overall cost of settling tort claims by avoiding some of the payout now made as compensation for pain and suffering. Second, it removes the main item of unliquidated damages—namely pain and suffering—from cases not involving very serious injury. Thus it increases the likelihood of settlement and, by eliminating a costly and highly disputable item of loss, reduces the costs of processing claims. Economic loss in such cases remains compensable, but under basic protection rather than tort. On the other hand, in cases of very severe injury, the kind with respect to which there is most likely to be a sense that allowing damages for pain and suffering is essential to doing justice, a right of recovery is preserved by preserving the tort action subject to the credits provided in section 4.3.

Consideration has been given to providing basic protection insureds either a greater exemption from tort liability for all kinds of damages or at least a greater exemption, perhaps even a complete immunity, from liability for pain and suffering. And on the other hand consideration has been given to a smaller exemption from tort liability. Though these are questions of degree, we have concluded that a smaller exemption would be inadequate to serve as a deterrent to tort claims based on injuries that are not very serious, and a larger one seems a more severe restriction on the right to bring a tort action than is needed. The basic plan is to eliminate any possibility of recovery in tort against basic protection insureds in the vast number of claims based on injuries that are not very serious and with respect to which basic protection benefits reimburse economic loss. Otherwise the Act would not achieve the objective of avoiding expensive and wasteful controversies over fault and unliquidated damages in all but serious cases.

Using a cut-off point of $10,000 damages, below which tort actions are not allowed, might be regarded as analogous to using a $10,000 standard deduction under income tax law. In both cases, in the interests of efficiency and economy, the decision is made not to factor out all the potentially disputable details when small

amounts are involved—the details concerning fault and pain and suffering under the tort system and concerning the legitimacy of itemized deductions under the income tax system.[5]

We have considered, also, using a standard for the tort exemption based on criteria other than dollars of damage, for example, preserving the tort action when duration of disability exceeds a specified number of weeks or months. We have concluded, however, that it is better to use a limitation in terms of number of dollars recoverable under the tort measure of damages, which compensates in dollars not only for economic loss but also, through damages for pain and suffering, for a variety of noneconomic elements of injury. First, inherently this kind of dollar standard is designed to give like treatment to equally severe cases of very different types of injury; it is therefore more evenhanded than any standard based on duration of disability we could design. For example, a very severe injury may not cause much disability though it causes a great deal of expense, or a great deal of pain and suffering, or both, as where an executive's hand is smashed and requires extensive treatment but causes relatively little interference with his work. Conversely, an injury to the hand of a workman might need little treatment and cause little expense, but much loss of income from work during the period of healing. All of the various kinds of injuries are evaluated by one scale in the tort measure of damages, since the fact finder places dollar values on all the authorized elements of damages from an injury. If, instead of the dollar scale of severity, a standard were devised to measure severity in terms of duration of disability, the attempt to make it evenhanded would lead necessarily to prescribing for different degrees and types of disability different periods of duration as the minimum needed for the injury to be of such severity as to avoid the tort exemption. Thus, a second reason for preferring a dollar standard is that a standard based on duration of disability would be more complicated and difficult to administer. One who disagrees with our preference for the dollar standard and also

[5] It is iteresting that Blum and Kalven observe another analogy in the standard deduction of the income tax system—namely, that adopting a principle of liability without fault eliminates one source of inducement for fraud "in much the fashion that the standard deduction in the income tax has lowered the over-all chances for fraud with respect to small itemized deductions." Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. Chi. L. Rev. 641, 683–84 (1964).

prefers a somewhat narrower exemption than we propose might wish a revision of subparagraph (a)(2) along the lines of the following alternate:

> [The tort exemption applies unless damages exceed $10,000 or]
> (2) the injury causes death, or causes one to suffer a complete inability to work in his occupation of at least three months' duration, or dismemberment, or complete and permanent loss of function of a member of the body, or permanent disfigurement seriously impairing appearance and causing mental distress of such severity as to support tort damages in excess of five thousand dollars ($5,000) in addition to net loss suffered, or [the sentence being completed with subparagraph (3), discussed below].

Subparagraph (a)(3) provides for an exemption somewhat below $10,000 when allocation of coverage occurs under section 2.7 of the Act. The figure of the standard tort exemption—$10,000—coincides with the amount of coverage required for an insurance policy to qualify as basic protection coverage. In other words, a tort exemption is granted to an extent corresponding with the limit of basic protection coverage. It seems fair, then, that the exemption figure be lowered correspondingly when the coverage figure applicable to a particular injury is lowered by allocation under section 2.7 because of the combination of multiple injuries and limited per-accident coverage. It might be argued that there would be no unfairness to the victim in continuing the tort exemption at $10,000 in such a case, since he is able to recover against the assigned claims plan, under the terms of section 9.4, to the extent of the deficiency in applicable basic protection coverage. But it is desirable to hold claims against the assigned claims plan to a minimum, and preserving the tort action above the limited basic protection coverage in this situation aids in this objective as well as according fair treatment to the victim and the insured. If one disagrees with us on this point, he might prefer that subparagraph (3) be deleted from section 4.2(a). This deletion would have the advantage of simplifying the Act by eliminating an exceptional provision of rare applicability.

In section 4.2(b), which preserves certain small tort claims, the $100 figure is the same as the dollar figure in the standard deductible, section 2.3(a). This qualification of the exemption from tort liability is designed to preserve a right of recovery for the

first $100 of loss that cannot be recovered under basic protection because of the deductible. Although insurance against liability in tort for this $100 may be offered under section 10.4, it is likely that liability insurance could also be purchased with a $100 deductible, leaving these $100 claims to be fought out between individuals—as opposed to involving an insurer—in the cases in which they are pressed.

Since probably these $100 claims will rarely be asserted, it will be seen that the purpose of this section is not so much one of providing further benefits to victims as it is one of avoiding the sense of injustice that might be felt by an innocent victim given no right to recover this $100 from a careless motorist. It is to be expected, however, that few persons will want to go to the trouble of enforcing this right, particularly if there is any doubt whatsoever about liability.

It might be suggested that the tort action should be preserved not only for the first $100 of loss but also for any greater deductible amount that results from calculating 10% of work loss under section 2.3 (a). This situation arises only when work loss exceeds $1,000. In such cases, the net effect of the basic protection system is to give the victim enough advantages he does not have under the present tort system that he is not likely to feel aggrieved about the lack of any legal right to recover 10% of his work loss above $1,000.

Tort actions are preserved for all property damages. The reasons for this arrangement have been stated elsewhere.[6]

SECTION 4.3 *Responsibility for and credits against tort liability of basic and added protection insureds.*

The primary function of this section is to avoid overlapping of basic protection benefits and tort recoveries against a defendant who is also a basic protection insured. A second purpose is to avoid a second round of loss shifting (such as would occur if basic protection insureds were authorized to recover over against tort liability insurers after paying basic protection benefits) and at the same time to avoid the jockeying for advantage that would occur if the loss were made to fall finally on whichever of the two insurers was compelled to pay first. All these objectives are accomplished

[6] See pp. 104–10 *supra.*

by making the basic protection insurer with coverage applicable to the injury responsible for paying on behalf of any person who is an insured of any basic protection policy (whether its own or that of another insurer) as much of the damages recovered against him in tort as would have qualified for basic protection benefits to the victim had no tort judgment been obtained. For example, suppose D_1 and D_2 collide, injuring D_2. The basic protection insurer of D_2's car (I_2) is the insurer responsible for paying basic protection benefits to D_2. Under this section, I_2 is also responsible for paying to D_2 on behalf of D_1 as much of the tort damages recovered by D_2 against D_1 as would have qualified for basic protection benefits to D_2 if D_2 had chosen to collect only basic protection and not tort damages.

Special provision is made for death cases in paragraph (b), since considerations applicable there differ because not only the injured person but also such others as the widow and children are affected.[7]

To bind a basic protection insurer by an adjudication of tort liability part of which is to be paid by it, one of the other parties must see to it that the basic protection insurer receives the notice required by paragraph (e). Otherwise, as indicated in that paragraph and in lines 9–13 of paragraph (a), the basic protection insurer is free to contest its alleged obligation to pay. Having received notice, the basic protection insurer may intervene in the tort proceeding or not, as it wishes—a decision that would turn on the extent and nature of the controversy in each case.

Illustrations of the application of the exemption of section 4.2 and the credit of the present section will clarify their operation. Suppose a case in which the claimant sustained $1,000 medical and hospital expense and $3,000 wage loss. If in the view of his attorney there was a reasonable prospect that a jury would find for him on a tort claim and would award more than $10,000 in damages, an action in tort might be brought. If the claimant obtained a verdict of $10,000 or less in the tort action, the judgment in that action would be for the defendant because the exemption of section 4.2 would have eliminated the tort action. In that situation the claimant's recovery would be limited to basic protection

[7] This provision is discussed more fully in 78 Harv. L. Rev. 380 and in Keeton & O'Connell chs. 6, 8.

for his economic loss plus any attorney's fees awarded him under his basic protection claim. He might thus recover somewhat less than he would have been able to recover before the basic protection system was enacted. But the difference is not as great as one might at first suppose. For example, probably a bit more than a third of a $10,000 tort recovery would have been paid out by the claimant in attorney's fees and other litigation expense, whereas separate provision is made for attorney's fees under basic protection. In this connection it is interesting to note the widespread belief that to a significant extent awards for pain and suffering serve the function of paying counsel fees under the present system.[8]

Under the basic protection system, one who wishes to have protection against the possibility of a lower recovery than he would have obtained in tort prior to this Act can obtain that protection (and perhaps even more if he wishes) by obtaining optional added protection coverages—especially coverage providing benefits for pain and inconvenience suffered.

Consider now a second case like the first except that the jury verdict in the tort action is for $11,000. In this instance, the tort exemption of section 4.2 does not apply. Rather, the credit of section 4.3 comes into operation. Suppose that the medical expense ($1,000) and $2,000 of the wage loss have all accrued before the tort judgment is obtained, and that the claimant has already collected basic protection benefits of $2,500 ($1,000 medical plus the $2,000 wage loss, less the deductible of 10% of the $2,000 and a further subtraction of 15% of the $2,000 because of the income tax saving incident to the fact his benefits are not taxable whereas his wages would have been). In these circumstances, the jury would be asked to state what part of their verdict is for future wage loss and at what rate per month. Suppose they answer, consistently with our assumptions, $1,000 at a rate of $100 per month. This would mean that the basic protection insurer would be responsible for paying that amount less, of course, the 10% deductible and the 15% tax saving, as if coming due monthly under basic protection. That is, under the jury determination that $1,000 of the damages were for wages to be lost at the rate of $100 per month over the next ten months after the verdict, the basic

[8] See p. 101 *supra*.

protection insurer would be responsible for paying $75 a month ($100 less the 10% deductible and 15% tax saving) for the next ten months, or a total of $750 besides the $2,500 already paid, for a grand total of $3,250. This sum would be credited against the tort judgment of $11,000. The balance of that judgment would be paid by the tortfeasor (the basic protection insured) or his tort liability insurer. Of course, as today, the claimant would have to pay attorney's fees and litigation expenses out of his tort recovery.[9]

[9] Comments on other aspects of section 4.3 appear in Keeton & O'Connell ch. 8.

Selected Bureau Drafts

Harvard Student Legislative Research Bureau

1964-1965

E. Stephen Derby
President

Sarah M. Raney
Editor–Journal

David H. Bradley
Director–Research

William E. Rapp
Secretary–Treasurer

Peter H. Goldberg
Richard B. Laden
Robert N. Levin
Leonard S. Machtinger
Walter V. McLaughlin, Jr.
Arnold J. Schaab
Homer D. Schaaf
Marsha E. Swiss
Hamilton J. Teaford
Hardy L. Thomas
Michael C. Tobriner
W. Harvey Webster III
Howard Wilson
Duane F. Wurzer

Sandra A. Bennett
Samuel A. Bleicher
Daniel L. Brocki
Alan R. Chesler
Ira J. Dembrow
James M. Friedman
Ridgway M. Hall, Jr.
Roy A. Heimlich
Edward J. Horowitz
Bernard J. Kabak
Perry M. Kantner
Martin A. Kasindorf
Martin J. Levitas
Martin I. Lubaroff
Edwin M. Martin, Jr.
Howard D. Medwed
Thomas B. Merritt
John E. Milem
George W. Miller
Julian P. Rackow
David H. Small
George W. K. Snyder, Jr.
Philip W. Stichter
John L. Thomas

Harvard Student Legislative Research Bureau: Its Purpose and Functions

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.

Bureau Policies

The Bureau serves the community by assisting proponents of legislation in presenting their ideas in statutory form appropriate for legislative consideration. It is entirely technical and non-political in function. Drafts are based on the policies of clients, and neither the Bureau nor Harvard Law School endorses any of these policies. Neither the Bureau nor any of its members will lobby for the passage of any bill.

Project requests should be directed to the Director of Research, Harvard Student Legislative Research Bureau, Langdell Hall, Harvard Law School, Cambridge, Massachusetts 02138.

A Federal Act to Establish the Roscoe Pound Academy of Criminal Justice

The idea of a National Academy of Criminal Justice was first presented by Professor Sheldon Glueck in an address to Harvard alumni in June, 1963. He advocated "an educational and training institution dedicated to raising the standards and vision of police officials, prosecutors, judges, correctional administrators and others concerned with criminal justice" and designed, also, to serve as a public symbol of the importance of criminal justice in the American polity and of the dignity and social significance of dedicated practice of criminal law. We publish this draft, based on Professor Glueck's proposals, in memory of Dean Roscoe Pound, who taught that no human knowledge is beyond the range of an enlightened view of law.

AN ACT

To establish the Roscoe Pound Academy of Criminal Justice at [the Harvard Law School] and to provide for the establishment of such other Academies of Criminal Justice as the Congress may hereafter authorize.

ARTICLE I. FINDINGS, ESTABLISHMENT, AND PURPOSE

SECTION 101. *Title.*

This Act shall be known and may be cited as the "National Academies of Criminal Justice Act."

SECTION 102. *The need for Academies of Criminal Justice.*

The Congress finds that there is a lack of interest in the administration of criminal law which is detrimental to the national welfare. This has resulted in a scarcity of qualified criminal lawyers, judges, and others concerned with criminal law. It has also led to outmoded concepts of, and techniques for, the prevention of criminal behavior, the protection of the criminally accused, and the rehabilitation of the criminally convicted. The resulting increase in criminal behavior and the loss to the nation of the services of the unrehabilitated have led to a waste of national resources and to a deterioration in national morals detrimental to the economic, political, and social welfare of the nation.

There thus exists a need not only to attract able persons to the field of criminal justice and to train them for their tasks, but also to improve the image of the criminal lawyer and his clients so that public attention may be focused on the importance of justice and proper treatment for those accused or convicted of crime.

There is furthermore a need to study the structure and purposes of criminal law in the light of modern disciplines such as medicine, psychology, and sociology.

In view of these findings, the Congress concludes that it is in the national interest to establish National Academies of Criminal Justice. Such Academies will be centers for the study of criminal law and its relationship to the national welfare. They will educate students dedicated to criminal justice and generally awaken the nation to the importance of modern techniques for the prevention of crime and the treatment of criminals.

SECTION 103. *Establishment of an Academy.*

Subject to the approval of [the Harvard Corporation], there is hereby established the Roscoe Pound Academy of Criminal Justice, which shall be an agency of the United States and shall be located in or near [the Harvard Law School at Cambridge, Massachusetts]. The Congress will establish other Academies at law schools in other areas of the United States as the need therefor arises.

SECTION 104. *Degrees.*

Degrees and certificates will be conferred, upon fulfillment of Academy requirements, at the discretion of the law school at which an Academy is established under this Act.

SECTION 105. *Purposes.*

The purposes of each Academy which Congress establishes under this Act are——

(a) to provide education and training for students interested in the administration of criminal justice, including students who intend to become criminal lawyers, criminal judges, juvenile or family court judges, public defenders or public prosecutors, or who intend to work in police departments, correctional institutions, or on parole boards, or in any other capacity or in any other body or institution related to the administration of criminal law;

(b) to provide opportunities for the study of criminal justice to persons already employed in the administration of criminal justice; and

(c) to provide opportunities for research in criminal justice and related fields.

SECTION 106. *Construction.*

The provisions of this Act shall be construed liberally to accomplish the purposes thereof.

ARTICLE II. THE BOARD OF REGENTS

SECTION 201. *Establishment.*

There shall be a Board of Regents for each Academy which Congress establishes under this Act.

SECTION 202. *Members.*

The Board of Regents of each Academy shall consist of seven members, as follows:

(a) the Attorney General of the United States, who shall be the chairman;

(b) the Dean of the law school at which the Academy is established;

(c) two outstanding jurists;

(d) the Dean of another law school;

(e) a distinguished public defender or voluntary defender; and

(f) a distinguished public prosecutor.

All but the first two of these shall be appointed by the President with the advice and consent of the Senate. The first five appointments made under this Act shall be for terms of two, three, four, five, and six years respectively. Each appointment made thereafter shall be for a term of five years. The President is empowered to fill vacancies due to resignation or other cause, but a member so appointed shall hold office only for the remainder of the unexpired term.

SECTION 203. *Compensation of the Board of Regents.*

The Academy shall compensate each member of the Board of Regents at the rate of $100 for each day spent in the performance of his duties or in travel necessary therefor, including travel to and from meetings of the Board of Regents. The Academy shall also reimburse them for all expenses of such travel and for all other expenses, including the expenses of preparing the annual report to the President and Congress referred to in section 204.

SECTION 204. *Duties.*

The duties of the Board of Regents are——

(a) to hold at least four meetings during each academic year;

(b) to determine general policy and establish fundamental principles for the development of the Academy and the fulfillment of its purposes;

(c) to provide guidance, subject to the rules and policies of the law school at which the Academy is established, to the Director in the administration of the Academy and the execution of his duties;

(d) to approve all faculty and administrative positions created by the Director;

(e) to approve all major expenditures, including acquisitions of real property and construction of buildings;

(f) to receive and approve an annual financial report prepared by the Director and his staff; and

(g) to report annually to the President and Congress on the financial condition and general state of the Academy.

SECTION 205. *Powers.*

The Board of Regents is empowered to——

(a) establish visiting committees, from among its membership or otherwise, for the purpose of inquiring into matters relating to the Academy, and to order the Director to compensate the members of such committees in the same manner as herein provided for members of the Board of Regents;

(b) call in advisers for consultations and direct the Director to compensate them in the same manner as is herein provided for the Board of Regents; and

(c) perform all other functions necessary for achieving the purposes of this Act.

ARTICLE III. THE DIRECTOR

SECTION 301. *Establishment of the office of Director.*

Each Academy established pursuant to the provisions of this Act shall have a Director as its principal administrative officer.

SECTION 302. *Appointment.*

The Director of an Academy shall be appointed for life in the following manner:

(a) He shall be nominated by the Board of Regents of the Academy at which he will serve.

(b) The nomination must be approved by the law school at which an Academy is established.

(c) The President of the United States may then appoint the nominee with the advice and consent of the Senate.

SECTION 303. *Removal from office.*

The Director may be removed from office only by a vote of five of the seven members of the Board of Regents, and only for failure to carry out its policies or obey its directives or for other abuse of office. If the office of Director is left vacant, by resignation or otherwise, the Board of Regents shall appoint an Acting Director to serve until a successor is duly nominated, approved, and appointed.

SECTION 304. *Compensation.*

The President shall set from time to time the rate of compensation of the Director of each Academy established under this Act. The compensation shall be based on the salaries of comparable officials at leading universities.

SECTION 305. *Duties.*

The Director shall administer the Academy within the scope of the policies established by the Board of Regents and subject to its super-

vision and approval. The duties of the Director include, but are not limited to, the following:

(a) to create faculty and staff positions and establish qualifications therefor, subject to the approval of the Board of Regents;

(b) to determine the course of study at the Academy as provided in article IV of this Act;

(c) to appoint faculty and staff on a full- or part-time basis, in accordance with the provisions of the civil service laws and regulations and the Classification Act of 1949, as amended. Such laws and regulations and the Classification Act of 1949, as amended, may be disregarded with the approval of the Board of Regents, but no compensation may exceed GS-18 of the Classification Act of 1949, as amended;

(d) to make arrangements for the conduct of research by private and public institutions at the Academy;

(e) to administer the financial affairs of the Academy; and

(f) to grant allowances to faculty members for research and writing.

ARTICLE IV. CURRICULUM

SECTION 401. *Course of study.*

The course of study at each Academy shall extend over four academic years for persons seeking an LL.B. degree and consist of——

(a) the basic course of study at the law school at which the Academy is established, as modified by the Director with the approval of the Board of Regents; and

(b) such other required courses, elective courses, seminars, and papers as the Director, with the approval of the Board of Regents, prescribes.

SECTION 402. *Curriculum.*

The Director, with the approval of the Board of Regents, may designate subjects of study at the Academy in addition to the basic course of study of the law school at which the Academy is established. The curriculum may include, but is not limited to, the study of——

(a) the biologic, social, and economic conditions generating delinquency and crime;

(b) the legislative methods of defining and controlling crime;

(c) comparative criminal law and procedure;

(d) organization and administration of courts, penal institutions, and departments of prosecution and police;

(e) prosecution and defense;

(f) the sentencing function;

(g) the administration of probation, parole, and pardon;

(h) the juvenile and family courts and auxiliary agencies;

(i) social work;

(j) methods of rehabilitation; and

(k) interrelated problems of law, medicine, psychiatry, psychology, sociology, and other sciences relevant to the administration of criminal justice.

ARTICLE V. STUDENTS

SECTION 501. *Student; student body defined.*

For purposes of this Act, "student" means a person enrolled in the four year course of study referred to in section 401. "Student body" means all students enrolled in the Academy.

SECTION 502. *Appointment.*

The student body of each Academy established under this Act shall consist of one hundred five students. One shall be appointed by each Senator, and five shall be appointed by the President of the United States from the country at large.

SECTION 503. *Qualifications for appointment.*

To qualify for appointment under section 502, a student must——

(a) qualify for admission to the law school at which the Academy is established; and

(b) possess a baccalaureate or, in the Director's opinion, the equivalent thereof in college study. However, for this purpose a student shall be deemed to possess a baccalaureate if he has completed three years of study in preparation for such a degree and if the college at which he has studied will award him the degree prior to or upon his graduation from the Academy on the basis of work done at the Academy.

SECTION 504. *Expenses.*

The Academy shall assume all expenses of students at the Academy.

SECTION 505. *Summer employment.*

The Academy shall attempt to ensure that, during the summers while he is a student at the Academy, each student secures employment relating to his studies. Such employment may be with one of the following: a police department in a large city, the Federal Bureau of Investigation, a prosecuting office, a law office, a court, a parole board, or a correctional institution. The Director may extend such financial aid to each student as he considers necessary in order to permit the student to engage in this employment.

SECTION 506. *One-year grant.*

Upon signing a pledge to enter fields related to the administration of criminal law, each student successfully completing the course of study at an Academy shall be given a sum of money, the amount to be deter-

mined by the Director, not to exceed five thousand dollars, which will be paid over a period of a year immediately following the completion of his course of study.

ARTICLE VI. GRADUATE COURSE OF STUDY

SECTION 601. *Graduate student; graduate student body defined.*

For purposes of this Act, "graduate student" means a person admitted to an Academy who is not enrolled in the four year course of study referred to in section 401. "Graduate student body" means all graduate students admitted to an Academy.

SECTION 601. *Establishment.*

Subject to the approval of the Board of Regents, the Director may establish a course of study extending over one or more academic years for graduate students and may admit persons to it.

SECTION 603. *Qualifications for admission.*

In order to qualify for admission as a graduate student, a person must be approved by the law school at which the Academy is established. The graduate student body may include practitioners who hold an LL.B. degree or other persons who wish to advance their knowledge in the field of criminal justice.

SECTION 604. *Expenses of graduate students.*

If sufficient funds are available the Academy may assume in whole or in part the expenses of graduate students.

ARTICLE VII. MISCELLANEOUS

SECTION 701. *Appropriations.*

There are hereby authorized to be appropriated to the Roscoe Pound Academy of Criminal Justice, out of any money in the Treasury not otherwise appropriated, such sums not in excess of _____ as may be necessary to carry out the purposes of this Act. Funds may remain available until expended.

SECTION 702. *Use of funds.*

Funds appropriated for the purposes of this Act or transferred to the Academy by other Government agencies for such purposes are available for the exercise of any authority granted by this Act.

MEMORANDUM

The purpose of the Act is to establish the Roscoe Pound Academy of Criminal Justice at [the Harvard Law School in Cam-

bridge, Massachusetts] and to provide a statutory framework for similar Academies which Congress may establish at other law schools in the future. All references to the Harvard Law School are by way of example only; hence the name appears in brackets. These Academies would be located on or near the campuses of "host" law schools and would share their facilities. Because the study of criminal justice is more closely related to law than any other academic discipline, the establishment of Academies at law schools would most effectively foster their development. It is envisioned that each Academy would be related to the host law school as a quasi-independent body cooperating with the law school. An Academy would be subject to the ultimate control of the law school in regard to the granting of degrees (section 104), the nomination of the Director (section 302(b)), the basic course of study for LL.B. candidates (section 401(a)), and the admission of students (sections 503 and 603). Its policies could not conflict with those of the host school in other respects (section 204(c)). Nevertheless, most of an Academy's activities would be governed by its own Director and Board of Regents with the Attorney General as chairman.

LL.B. candidates at an Academy would take all the courses required by the host school, but their course of study would last four instead of the usual three years and would include courses offered by the Academy independent of the host law school. Provision is made for practitioners holding an LL.B. or persons active in fields related to the criminal law who seek to advance their training in this field to undertake graduate study.

All expenses of LL.B. candidates at an Academy, including the tuition and other expenses of the host law school, would be paid by the Academy. If sufficient funds are available, the Academy might assume some of the expenses of the graduate students.

The extent of the physical plant of an Academy would be determined by the Board of Regents and the Director and also, of course, by the amount of funds made available by Congress. Administrative and faculty offices, as well as classrooms, would be essential. Research facilities, libraries, dormitories, eating and other facilities could be established by the Academy or shared with the host law school.

Comments on specific provisions of the Act follow.

ARTICLE I

The primary purpose of article I is to define the reasons for the need of such Academies and the purposes they will serve. We do not need to seek far to justify their existence. The present scarcity of qualified criminal lawyers reflects a lack of concern with the criminal law that has relieved the courts and the bar of responsibility for initiating reform even though our traditional position, as a nation, has been to rely on them for fairness in the administration of punitive justice. Society's needs are great, but the criminal bar is understaffed and in many instances incompetent. Other areas of the law have grown with the times. Law firms engaged in negligence or corporate practice operate on a supermarket basis, while the criminal lawyer maintains a greengrocer enterprise characterized by inefficiency and inadequate representation. Reform is shunted off to administrative agencies, pardon boards, and parole boards manned by political appointees who are not familiar with the problems and may be uninterested in finding solutions. Yet, as Roscoe Pound recognized in 1923, "[O]n the whole, Americans will insist upon law and judicial justice in criminal administration more than anywhere else." Ironically, "this insistence has played a large part in enabling a criminal law based on out worn philosophy, obsolete psychology, and ignorance of all the modern achievements of medical science" and the relevant behavioral disciplines "to endure so long." Harvard Alumni Bulletin, Jan. 25, 1923, at 28.

Academic institutions that attract able students into the field and stimulate them to devote part of their professional careers to work in the criminal law serve two important purposes: they help to maintain high standards of criminal justice, and they clarify to the public the causes of delinquency and criminality in society. Although the Roscoe Pound Academy of Criminal Justice could provide only a small number of lawyers qualified with special training in this field, it is hoped that their interest would promote increased activity on the part of the organized bar with respect to criminal law.

Another consideration prompts intensified focus on criminal justice. The Supreme Court, in the recent decision of *Gideon v. Wainright*, 372 U.S. 335, held that the right to counsel, at least in a felony case, is a matter of fundamental due process which must be fully implemented for indigent defendants by the state.

The federal government has recognized the need for competent and adequately compensated counsel for indigent defendants awaiting trial in federal courts for felonies and misdemeanors. The Criminal Justice Act of 1964, Public Law 88–455, 18 U.S.C. § 3006 (a), empowers each federal district court to adopt one of several statutory plans for providing paid counsel for defendants financially unable to obtain an adequate defense. States have reacted by commentary in local bar association journals and by proposing legislation to conform to the *Gideon* requirements. Among the suggested legislation is the Wisconsin proposal that counsel be provided at the misdemeanor and magistrate level whenever a term of imprisonment can be imposed. Generally there has been a recognition of the fact that something more than a public defender system is needed to provide full scale justice. In his book *Not Guilty* at 88–9 (1957), Jerome Frank challenges the adequacy of the assigned counsel system. Since an unpaid and often inexperienced attorney has an interest in avoiding the further expense of a trial, he may choose to plead his client guilty rather than argue for his defense. Thus bargain-basement counsel means only casual representation not likely to result in full justice to the defendant.

This draft actually establishes only one Academy, fictionally located at the Harvard Law School, which would draw a student body from the entire nation. It is, however, envisioned that other Academies would be established at other law schools to draw students from various regions of the country. Thus, eventually there might be five Academies, one for each of the following areas: New England, Middle Atlantic, South, Middle West, and West.

The Roscoe Pound Academy might then serve as the Academy for New England and appropriate modification would be made in the Act's sections 501 and 502 so that only students from New England would attend it. As other Academies are established, it might be desirable to change the function and membership of the Board of Regents created for each Academy under article II, or perhaps put all of the Academies under one such board. The statutory planning of such developments seems best left to the future.

In proposing to name the Academy [at Harvard] the "Roscoe

Pound Academy of Criminal Justice," we seek to honor a man whose contribution in criminal law has been both as educator and advocate. Dean Pound early recognized that criminal reform which came mostly from administrative boards lacked the sympathy of the legal profession. His awareness of the problem as one which the law schools might solve was unique in his day. In urging the establishment of a professorship of criminal law he remarked in 1923:

> [C]ontributions from the other social sciences will be effectively utilized only when and as long as they are worked into the law by lawyers. So long as the wide gulf between the legal and the non-legal literature of the subject continues to be maintained, the latter will continue to fail of practical effect upon the law. The gulf may be bridged only by a lawyer who is at the same time a scholar in the law, in the social sciences, and in criminology. —Harvard Alumni Bulletin, *supra.*

Article II

This article puts each Academy under the supervision of a Board of Regents. The Board would be the principal governing authority of the Academy. It would be generally a supervisory body but would be required to meet four times a year, to approve numerous actions of the Director, and to make an annual report to the President and Congress. Thus, it would have more extensive powers and be more directly responsible for the welfare of the Academy than is the usual board of trustees of similar schools and universities. The Board would consist of seven members—the Attorney General of the United States, who would be the chairman, the Dean of the host law school, and five outside members, whose qualifications are prescribed in section 202. These five members would be appointed by the President. Their terms of office would be five years. Their powers should be broadly construed to allow them to carry out the objectives of the Act.

Article III

This article establishes and defines the office of the Director, the principal administrative officer of the Academy.

The Act provides for his appointment as follows: he would be nominated by the Board of Regents; the nomination would

be subject to approval by the law school or university at which the Academy is established; the nomination as approved would then be sent to the President, and he would make the appointment with the advice and consent of the Senate.

The Director would be appointed for life; however, since his primary duty would be to execute the policies of the Board, he would be removable by the Board for failure to do so, or for other abuse of office. In case the office is left vacant, whether by removal, death, resignation, disability, or otherwise, the Board would have the power to appoint an Acting Director to serve until a successor is duly nominated and appointed.

The rate of compensation of the Director would be established from time to time by the President and would be based on the salaries of comparable officials at leading universities (section 304).

The duties of the Director are contained in a general responsibility clause and in a list of specific duties (section 305). The general clause describes his function as the direction and administration of the Academy within the scope of the policies decided upon by the Board and subject to its supervision and approval.

The Director is given broad discretion to develop the full potential of the Academy because it is difficult to anticipate in advance the particular problems he would encounter and because the spirit of academic freedom requires broad-based powers of administration.

Article IV

The theory behind the Academies is to encourage lawyers to devote a substantial part of their time to criminal justice. It is contemplated that an LL.B. degree would be conferred upon students who have satisfied the course of study prescribed by section 401.

Most students at the school would undertake the same basic course of study as other law students, although their course of study would last four years. They would use the additional year to supplement their knowledge of criminal law through the study of relevant legal or extralegal materials. An Academy that imparts only a knowledge of the criminal law is performing only half of its function. The Academy must awaken interest in re-

molding the law to meet modern conditions and in improving modern methods of practice. The Joint Committee on the Improvement of Criminal Justice, representing the ALI, the Association of American Law Schools, and the ABA, proposed in 1931 a program of advanced instruction in criminal law. Their suggestions are incorporated in section 402 as subjects of study which would provide academic knowledge requisite for successful criminal practice.

Article V

One hundred five regular students would attend the Academy —one appointed by each Senator and five by the President from the country at large. The Act contains two basic qualifications for appointment: (1) qualification at the law school at which the Academy is established, and (2) a bachelor's degree or the equivalent thereof in four years of college study. The last requirement is waived in the case of a student who has completed three years in preparation for an undergraduate degree and whose college will grant him a bachelor's degree upon or before completion of the program of study at the Academy.

The Act provides for all expenses of these students, including tuition and other expenses of the host law school, to be paid by the Academy. Certain expenses (tuition, cost of Academy dormitory space, etc.) would probably be paid directly by the Academy. Other expenses such as board, school supplies, etc., might be defrayed by an allowance to each student in an amount determined by the director.

It is thought that the academic year of the Academy would be the traditional one from September to June. However, the summers of the students should be profitably employed. Thus the Act provides for employment of the student in a job related to his studies in criminal justice. It would be the responsibility of the Academy to assist the student in finding a suitable job and to encourage the student to undertake employment. Such jobs might be found in the police departments of large cities, in the FBI, in prosecuting offices, or in certain courts, parole boards, and correctional institutions. These jobs, of course, might not support the student financially, and the Act empowers the Director to make grants to students to enable them to engage in such work.

Upon signing a pledge to enter any of a number of relevant fields of work, the graduate of the four year Academy program might be given several thousand dollars, payable over a period of one year immediately following his graduation. The actual amount of the grant to each student is discretionary, and need would be a valid criterion under the Act. The purpose of such a provision is to enable the student to make the transition from the Academy to profitable employment. In most cases, the student would be faced with a bar review course, a bar examination, and the difficulty of finding a suitable job, not to mention the hardship of low salary offered in fields dealing with the criminal law even when he finds one. The grant would alleviate these transitional problems but would not, of course, solve the low salary problem in general.

For this reason, the pledge is optional, and many of the graduates of the Academy may prefer not to sign it, leaving themselves free to engage in more remunerative practice. However, most of this group could be expected to work in the criminal law field on a part-time basis and contribute, further, by acquainting the bar with its responsibilities for the adminstration of criminal justice.

Article VI

The Act gives the Director and the Board of Regents the authority to establish a course of study for graduate students and to admit qualified students to it. The purpose of providing for a graduate program is to enable individuals already engaged in work related to the administration of criminal justice to increase their understanding of the problems in the area. Participation in the program is not limited to lawyers, because others such as social workers and probation workers also contribute to the effectiveness of our criminal law and should be offered advanced training.

While the host law school must approve the admission of non-lawyers as well as lawyers to the program, admission requirements would necessarily differ for the two groups. Since the host law school might, in its discretion, confer an advanced degree on graduate students already possessing an LL.B., it would probably subject this group to the same requirements as its own graduate students. Non-lawyers, who might receive certificates,

should be subjected to requirements more appropriate to their own backgrounds.

Because graduate students might also experience financial difficulties, and because their contributions to the advancement of criminal justice are potentially valuable and should be encouraged, the Academy might assume some of their expenses if sufficient funds exist. However, post-graduation subsidies have not been authorized for those completing a graduate program because (1) many would be returning to previously held positions, (2) they would have foregone a regular income for a shorter period of time than regular students at the Academy, and (3) the absence of senatorial or Presidential appointment in the case of graduate students makes grants to them less appropriate.

An Act to Establish an Alternative Standard for Teacher Certification

Recently, there has been much controversy concerning the adequacy of existing teacher certification standards, stimulated in part by Dr. James Bryant Conant's book, The Education of American Teachers (1963). Controversy has centered around the question of whether the specific semester hour and course requirements for certification which currently exist in most states, particularly those requirements involving education courses, are the best means of ensuring that qualified persons teach in public school classrooms. The following draft establishes a standard for teacher certification which eliminates specific semester hour and course requirements. It leaves the process of educating teachers to the discretion of approved institutions of higher learning while providing a state with sufficient safeguards to ensure the competence of its teachers.

THE ACT

PART I. SHORT TITLE AND DEFINITIONS

SECTION 101. *Short title.*

This Act may be called the "Alternative Standard for Teacher Certification."

SECTION 102. *Definitions.*

(a) *Approved institution of higher learning.* An "approved institution of higher learning" is one which is accredited by the Middle Atlantic Association of Colleges and Secondary Schools, the New England Association of Colleges and Secondary Schools, the North Central Association of Colleges and Secondary Schools, the Northwestern Association of Colleges and Secondary Schools, the Southern Association of Colleges and Secondary Schools, or the Western College Association, or approved by the state commissioner of education. The commissioner may suspend the approval of any approved institution of higher learning under section 401(b).

(b) *Graduation.* "Graduation" is the receipt of a baccalaureate or its equivalent, or a higher degree.

(c) *Public schools.* "Public schools" are tax supported institutions offering instruction at the kindergarten, primary, elementary, junior high, or secondary levels.

(d) *School age children.* "School age children" are natural persons under twenty years of age.

(e) *Teaching experience.* "Teaching experience" is training derived from giving, alone or in conjunction with an experienced teacher, classroom instruction to school age children.

PART II. REQUIREMENTS FOR CERTIFICATION

SECTION 201. *Degree.*

To be eligible for certification under this Act a person must earn a baccalaureate or its equivalent from an approved institution of higher learning.

SECTION 202. *Recommendation.*

To be eligible for certification under this Act a person must secure, from an official designated by an approved institution of higher learning of which he is a graduate, a recommendation stating that he is qualified to teach a specified grade level or levels of school in the public schools of this state. Such a recommendation shall be made in accordance with the following conditions:

(a) The official making a recommendation under this section must represent an institution which was an approved institution of higher learning both at the time of the graduation of the person recommended and at the time of the making of the recommendation.

(b) The official recommending a person as qualified to teach kindergarten or grades one through three must be trained in the preparation of teachers for those grade levels.

(c) A recommendation that a person is qualified to teach at grade levels above the third grade must state those subjects taught in the public schools of this state for which the person has sufficient subject matter preparation to qualify him to teach. Such a recommendation need only be based on subject matter preparation; enrollment in professional education courses need not be a criterion.

(d) A recommendation must be made within ten years following the graduation of the person recommended.

SECTION 203. *Teaching experience.*

To be eligible for certification under this Act a person must secure teaching experience at one of the grade levels of school for which he qualifies to teach under section 202. The experience must be in one of the following forms:

(a) A completed program of practice teaching directed by the approved institution of higher learning of which the person is a graduate; or

(b) A completed program of practice teaching approved by the state commissioner of education; or

(c) Two years of full-time teaching experience in either public schools or private schools either within or without the state; or

(d) One year of service in the public schools of this state as an apprentice to an experienced teacher.

SECTION 204. *Additional requirements.*

(a) To be eligible for certification under this Act a person must be of good moral character.

[(b) To be eligible for certification under this Act a person must secure training in physiology and hygiene.]

SECTION 205. *Certification.*

(a) The state commissioner of education shall certify to teach in the public schools of this state all persons satisfying the requirements of this part, subject to the examinations which the commissioner may require under section 402.

(b) The state commissioner of education shall certify a person to teach only those subjects at those grade levels for which the person is recommended as qualified under section 202, but upon the request of the local board of education employing or proposing to employ a teacher certified under this Act, the commissioner may extend this certification to additional subjects or grade levels.

PART III. PRIVILEGES

SECTION 301. *Partial fulfillment of requirements.*

Any person who has fulfilled all of the requirements for certification except that of teaching experience prescribed in section 203 is eligible to secure practice teaching or apprentice experience in the public schools of this state in fulfillment of the requirement of section 203.

SECTION 302. *Renewal, suspension, and revocation.*

Certification obtained under this Act is subject to the procedures and standards for renewal, suspension, and revocation of teacher certification normally employed in this state.

PART IV. AUTHORITY OF THE STATE COMMISSIONER OF EDUCATION

SECTION 401. *Grant or suspension of institutional approval.*

(a) The state commissioner of education may designate additional approved institutions of higher learning only if he finds that the curriculum of such an institution is adequate to qualify its graduates academically to teach in the public schools of this state.

(b) The state commissioner of education may suspend the approval of an approved institution of higher learning only if he finds that the curriculum of such an institution is inadequate to qualify its graduates academically to teach in the public schools of this state.

SECTION 402. *Examinations.*

In addition to the powers granted him elsewhere in this Act, the state commissioner of education, in doubtful cases, may require a person, as a condition of eligibility for certification under this Act, to pass subject matter examinations appropriate for teachers of the grade levels for which such person is recommended as qualified under section 202.

MEMORANDUM

I

The primary purpose of teacher certification is to insure that only qualified persons teach in a state's public school systems. It is necessary for the state to carry this burden because local school boards often are not equipped or in a position to check adequately the qualifications of teachers in their schools. But it is increasingly evident that there are needs common to many of our school systems which are not being met, partially because of unresponsive teacher certification standards. These needs are reflected in the growing shortage of teachers in many areas, the increasingly vocal public desire to promote greater academic achievement on the part of primary and secondary school teachers, and the concern that a consensus be reached as to the most effective program of teacher preparation.

II

Current teacher certification standards generally require the completion of a specific number of semester hours of professional education courses and a prescribed minimum program of liberal arts training. These standards do not provide a fully effective guarantee of teacher quality, and they tend to have harmful side effects.

The shortage of teachers manifest from the early 1940s until the present day has forced the states to certify temporarily more teachers than can qualify under the present standards. Although many of these teachers may be as capable in the classroom as their fully certified colleagues, the state authorities have no way of ascertaining whether, in the aggregate, they meet minimum standards of competence, because in practice the local school boards determine the qualifications of these teachers by hiring them and then requesting emergency certification.

In 1960–61 there were 93,917 teachers in this country teaching under the authority of the so-called "emergency" certificates. This number represented 6.7% of the total number of classroom school teachers. Armstrong & Stinnett, *A Manual on Certification Requirements* 23 (1961). That this trend is bound to continue cannot be doubted. California in 1960, assuming an optimum student–teacher ratio of 25.7 to 1, had a teacher deficit of 10,973. Yet in 1962, California, ranking second among the sixteen most populous states in total number of teachers prepared, graduated only 9,224, not all of whom remained in the state, to fill this gap, to replace teachers leaving the profession, and to handle increased enrollments. Conant, *The Education of American Teachers*, appendices A, D (1963). California ranked fifth in percentage increase of public school enrollment, 1950–62. *Rand McNally Handbook of Education* 51 (Foshay ed. 1963). The result is continued reliance upon local school boards for the determination of the competence of almost 7% of our primary and secondary school teachers.

Very few states have teacher surpluses, and competition between the states for available teachers is keen. It would seem that states with more liberal but effective certification standards would be at an advantage in having a relatively larger pool of persons who may qualify as teachers. For a liberal approach see Colo. Sess. Laws 1961, ch. 213. An average of eight and one half per cent of the total instructional staff of the nation's public schools leave their teaching positions each year, and it is safe to assume that many of these migrate and obtain teaching positions in other states. *Rand McNally Handbook of Education* 53 (Foshay ed. 1963). A state that cannot afford to compete for and hold teachers by paying high salaries cannot afford, at the same time, to limit its pool of potential teachers by having rigid, inflexible standards of teacher certification.

Since 1957 and the launching of Sputnik I there has been an increasingly stronger belief that the academic achievement of our teachers should be greater. The complaint frequently voiced is that teachers know how to teach but not what to teach. *Cf.* Hodenfield & Stinnett, *The Education of Teachers* 4 (1961). A recent survey in New York revealed that teacher training in academic subjects was not as productive as it could be. *Id.* at 109. Some critics argue that the reasons for poor academic preparation can

be traced in part to the proportion of a teacher's time expended in attending certain professional education courses which have little to recommend them other than that they are required as prerequisites for certification in one or more states. An analysis, prepared in a recent year, of 294 teacher training institutions accredited by the National Council for Accreditation of Teacher Education indicated that primary school teachers were required to take a median of 34 semester hours of education courses (the range being from 18 to 69 semester hours). Seventy per cent of these institutions required 20 to 40 semester hours, and three schools required 60 hours or more. For secondary school teachers the median requirement was 23 semester hours (the range being from 10 to 51 semester hours). *Id.* at 157–58. State semester hour requirements vary equally widely. See Woellner & Wood, *Requirements for Certification* (29th ed. 1964).

As these figures indicate there is little consensus among educators and state authorities as to the best methods of teacher training. This confusion is reflected in the selection of courses offered in many institutions, and is in part responsible for the bad name that education courses have among many would-be teachers.

What consensus there is can be gleaned from the current certification requirements of the majority of states and from state attitudes toward practice teaching. By 1960 a baccalaureate had been adopted as a prerequisite for primary certificates in 40 states and for both primary and secondary certificates in 34 states. *Rand McNally Handbook of Education* 27 (Foshay ed. 1963). By 1964, 49 states required a baccalaureate of secondary school teachers. See Woellner & Wood, *op. cit. supra.* State approval of Master of Arts in Teaching programs and the requirement of practice teaching for certification in most states indicates that there is general agreement that supervised practice teaching experience should be demanded of all teachers. See *Ibid.* Beyond the apparent consensus that a baccalaureate and practice teaching should be prerequisites for all teachers, there seems to be little agreement as to what other requirements, if any, should exist. See Conant, *op. cit. supra* at 59, 141–42.

Current certification practices seem to dissipate constructive criticism of our teacher training processes because criticism ulti-

mately takes the form of evaluation or re-evaluation of this course or that course. The general scope is ignored. Moreover, the variety of certificates issued (different classes of certificates are often issued, with various limitations, to indicate different levels of background experience) has done nothing to make this problem any less severe. In 1959 the states issued a total of 630 different certificates, ranging from one in West Virginia (with one or more forms) to 65 in New Jersey. Of these 88 were issued on preparation below a bachelor's degree. Hodenfield & Stinnett, *op. cit. supra* at 103. And all of these problems are further complicated by the fact that notions of the status of the teaching profession are wrapped up in any defense of current certification practices.

III

The standard proposed is intended as an alternative to current certification requirements which would leave present requirements intact. It sets forth three broad educational requirements for teacher certification: a baccalaureate, a recommendation from an institution of higher education, and practice teaching. These requirements are consistent with those suggested recently by Dr. James Bryant Conant. See Conant, *op. cit. supra.*

The premise of the alternative standard is that the ultimate test of a person's teaching ability is not the number of semester hours the person spent studying educational theories or specific subject matter, but the manner in which he performs as a classroom teacher. Classroom performance is dependent upon the ability to inspire and to adapt and respond to different student-created problems, and this ability in turn rests in great measure upon the individual's receiving both a solid foundation in academic subjects and a firm grounding in practical teaching skills.

The alternative standard differs from existing standards in that it does not prescribe education course requirements, but this does not mean that the recommendation does not demand a thorough understanding of the fundamentals of professional techniques. It is not a valid criticism that the state cannot be sure of the competence of teachers certified under this standard because of the lack of education course requirements. On the contrary, the state can be more sure of teaching competence than under existing practice; because each candidate is individually appraised by

his college or university as to subject matter preparation, and the practice teaching requirement provides the state with assurances that the candidates have minimum competence in classroom teaching. The state retains the same capacity to scrutinize collegiate background as before. A teacher's attitudes and his ability to motivate students are qualities which can only be evaluated by his immediate supervisors. This is true under present requirements and would continue to be true under this proposal. The state's function is to insure that a teacher has the proper background, and it is the function of the local school system to judge his teaching ability. Further, the creation of an additional pool of persons qualified to teach in the public schools—some of whom may now be teaching in the Peace Corps, private schools and colleges—should help to relieve some of the pressure to certify persons on an emergency basis to fill immediate needs. When persons are certified on an emergency basis, the state has no control over their qualifications.

Under the proposed alternative standard the primary responsibility for educating teachers is placed in the hands of the educators. The intent is to remove the state from direct interference in the process of teacher education, while protecting the state by reserving to it the power to evaluate, and possibly reject, the product of that education through the process of individual examination or by removing an institution from the approved list. It is desirable that this be done because each institution is best able to select, through reference to its own facilities and personnel, the training it can offer which will best qualify its graduates. Required courses are no guarantee of quality when imposed upon institutions and professors who do not believe in them. If an institution believes in the value of a course, a requirement is unnecessary. If an institution does not believe in the value of a course, that course tends to receive only token attention, and requiring it may restrict able professors who, with greater understanding of their own strengths, could offer superior courses if given the freedom.

Considering the disagreement over the number of semester hours of education courses necessary to train competent teachers, it seems increasingly wise to leave to the individual institutions the right to select what each feels is the proper emphasis in the

preparation of teachers. To place artificial restrictions upon institutions inhibits them in experimenting to determine what combination of their courses will produce the best trained teachers and tends to perpetuate at least some unnecessary education courses. Conant, *op. cit. supra* at 128–31, 137–38. Maximum use needs to be made of all course time if teachers are to be as well trained as possible.

As the responsibility for teacher training is given principally to the colleges and universities, institutional pride will stimulate efforts in each school to raise the quality of graduates. This tendency will be further accentuated by the gradual recognition of hiring personnel that some institutions produce teachers of a higher caliber than others. It is true that some education courses will probably be dropped in some institutions, but this would indicate only that the individual institution did not believe such courses were really necessary. Those education courses which remain will be generally worthwhile.

One of the arguments advanced by proponents of required education courses is that these requirements raise the status of teaching as a profession by limiting the number who can enter the profession and by emphasizing that there is a body of knowledge unique to the profession. To the contrary, it is suggested that the emphasis upon education courses, perpetuated by state certification requirements, has tended to lower the status of teaching as a profession by developing the attitude that teachers know only "how" to teach. That there is public feeling that teachers should meet higher academic standards is demonstrated in the recently enacted California legislation requiring for certification a fifth year of study after receiving a baccalaureate. Cal. Educ. Code §§ 13189, 13191. For five year requirements for permanent certification see Woellner & Wood, *op. cit. supra*, "Maine," "Pennsylvania," "Texas" (29th ed. 1964). The California statute was designed to raise requirements for academic and subject matter preparation at the expense of education courses. Conant, *op. cit. supra* at 25. Understandably, the elimination of a specified number of required education courses will lead to a greater emphasis upon the academic subject matter preparation of future teachers by colleges. Increased emphasis upon academic preparation, while retaining only worth while education courses,

will increase respect for secondary and elementary teaching as a learned profession. The entrance requirements to the profession will remain high, since a baccalaureate, recommendation from the undergraduate institution, and practice teaching will be prerequisites, and these requirements will prevent a flood of new and poorly qualified entrants. Perhaps, standards will become even higher as a result of the greater academic emphasis, *e.g.*, by increasing the pool of persons qualified to teach, some of those not qualified but now teaching under emergency certificates will be eliminated. If the status of teaching as a profession is raised, new people are bound to be attracted to it. Further, there are many who may have been discouraged from seriously considering teaching as a profession because they were told, or discovered for themselves, that many education courses were unchallenging, while the requirements were numerically formidable. There are others, perhaps, who did not decide they would like to teach in public schools until it was too late, either to complete the necessary education courses or to transfer from an institution which did not offer them.

Although this alternative certification standard has the capacity to stand by itself as the sole certifying mechanism, this is not its short-run objective. It merely provides an alternative to the existing standards for teacher certification. Consequently, it is less severe in its effect than a complete revision in that it isolates a group of prospective candidates for teacher certification and specifies that they shall be deemed to have met all requirements. For those who do not qualify under this amendment, the traditional alternative methods of certification are still available. The amendment, then, does not completely rewrite the certification procedure, but merely supplements it by designating an additional pool of qualified, potential candidates. Since the proposed standard can be enacted merely as an alternative, and is thus less drastic than a complete revision, it should have a better political chance of passage. The standard can be enacted on a trial basis and if it proves unsuccessful, it can be repealed with little harm done because the presently existing system will have remained intact.

Further, to supplant traditional systems abruptly would be to deprecate the achievements of teachers already certified under

existing provisions, and those partially certified. But it is contemplated that future generations of teachers will opt to qualify under this alternative standard rather than under the traditional standard, thereby effecting the demise of the older forms and removing one more obstacle from the path of uniformity in teacher certification requirements from state to state.

Comments on specific provisions of the Act follow.

IV

Part I. Short Title and Definitions

Section 102. *Definitions.*

(a) Consideration of this definition is postponed until the discussion of section 201, *infra.*

(b) The definition of "graduation" dispels any confusion which might arise in the interpretation of section 202. Everyday usage confines "graduation" to the receipt of an undergraduate degree. To rely upon that meaning here would serve to penalize prospective teachers who go on to secure graduate training. For example, suppose that a holder of a graduate degree presents a recommendation from the institution which granted that degree, within ten years after its receipt, in fulfillment of the requirement for certification under section 202. Without the aid of the definition in this subsection, the recommendation so presented might be declared invalid for either of two reasons: (1) that the recommendation was not made by an official of the candidate's undergraduate institution, or (2) that the recommendation was not presented within ten years of the candidate's receipt of his undergraduate degree (if such is the case). Exclusion on either ground is assuredly not intended by this Act.

(c) The intent of this definition is to eliminate public institutions of higher learning from the scope of this alternative certification standard.

(d) This definition serves notice that teaching experience under section 203 must be obtained in contact with students whose ages do not exceed the normal age of students across the country who are in their last year of secondary school.

(e) The purpose of this definition is to reject any claim to

teaching experience based on infrequent home tutorials or sporadic observation of classroom conditions.

Part II. Requirements for Certification

Section 201. *Degree.*

This section is designed to insure general academic competence. The premise is that teachers should have a broad academic background if they are to handle adequately the range of student questioning and to command respect as learned people. No single examination or general course requirement can assure that such a background is present, but a baccalaureate granted by a recognized institution on the basis of general competence in a variety of academic disciplines can serve as such an assurance.

Although it is desirable that each state determine for itself those institutions that can provide the requisite background, it would be an impossible task for the various state departments of education to continuously evaluate the calibre of preparation offered by the approximately 1,200 institutions in the country from which teachers are drawn. Furthermore, if a satisfactory alternative mode of inspection is made available, the commissioners would be protected from political pressures to approve only institutions offering a program which matches present certification requirements and to make a grant of approval, irrevocable in practice if not in theory.

Such a satisfactory alternative solution can be found by use of the regional accrediting associations. See section 102(a). The regional associations are highly respected groups which accredit educational institutions in all areas of the country. For a description of how they operate, see Blauch, *Accreditation in Higher Education* (1959). A presumption may be safely declared by the state legislatures in favor of their recommendations, but additional protection is provided in section 401 by granting a residual power of review to the state commissioner of education.

Accreditation by a regional association should not be the single and absolute standard used for determining an "approved" institution for a number of reasons. First, the work of the associations is carried on primarily by private individuals who serve on a voluntary basis; as a consequence, the efforts which have produced currently high standards in these associations cannot be guar-

anteed to continue for all time. Second, since these associations are independent of the control of state authorities, their accrediting standards do not have to conform with those of each state. Third, the associations rarely are able to evaluate an institution more than once every ten years, New England Association of Colleges and Secondary Schools, *Institutional Members of the Association* 2, 7–10 (1964), and to protect its interests each state should have the power to add or withdraw institutions if the situation so demands. The final reason is that to make accreditation by a regional association the only test of an approved institution might possibly be an unconstitutional delegation of legislative power.

In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), a provision of the Bituminous Coal Conservation Act delegating the power to fix maximum hours and minimum wages to a segment of the producers and miners was held an unconstitutional delegation of legislative authority. Justice Sutherland felt that this was "... legislative delegation in its most obnoxious form: for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." *Id.* at 311. Since accreditation by a regional association is a prerequisite to membership in it, some of the schools which form the membership may have a vested interest in refusing accreditation to competing institutions. Also, as private bodies, the associations would not be answerable to public authority for wrongful accreditation decisions. For a general discussion of legislative delegation to private groups, see Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201 (1937).

A discussion of the law of Maine (The Harvard Student Legislative Research Bureau prepared an amendment to the certification laws of Maine for a client in that state.) can demonstrate the general limits of constitutional legislative delegation obtaining in some states.

The Maine constitution provides that "[t]he powers of this government shall be divided into three distinct departments, the legislative, executive, and judicial," art. III, § 1, and that "[t]he legislative power shall be vested in two branches," art. IV, pt. 1, § 1. Delegation of final authority to the associations, without

legislatively declared standards to guide that group in exercising its authority, then, would seem to be an unconstitutional delegation of legislative power to a private group.

Maine has dealt with such delegation problems in the following manner. In *Inhabitants of Town of Beals v. Beal,* 150 Me. 80, 104 A.2d 530 (1954), a statute giving the Town of Beals the right to lease the right to operate a ferry ". . . to any responsible person or persons who shall be legal residents of Beals," was upheld as a necessary and constitutional delegation of legislative power, rejecting the contention that it was an arbitrary abuse of discretion in violation of the Maine constitution, art. IV, pt. 1, § 1. Likewise, in *McGary v. Barrows,* 156 Me. 250, 163 A.2d 747 (1960), the court rejected the contention that it was an unlawful delegation of legislative power to the School District Commission to authorize it to make a final determination of the outcome of referenda, to approve corporate organization of administrative districts, and to issue certificates of organization having conclusive effect with relation to the formation of school administrative districts. The question of whether ". . . the legislature has established adequate criteria which will control the exercise of sound discretion by the State Board of Education or the School District Commission," in the above statute was answered in the affirmative. *Opinion of the Justices,* 153 Me. 471, 145 A.2d 250 (1959). However, a proposed statute giving certain powers to the Commission of Inland Fisheries and Game but making no reference to existing standards and setting forth no general policy of regulation and control as to hunting or fishing on the lands concerned was held to be unconstitutional in violation of the Maine constitution, art. IV, pt. 1, § 1. *Opinion of the Justices,* 155 Me. 30, 152 A.2d 81 (1959).

An exclusive delegation to the regional accrediting associations to designate approved institutions would be a delegation with no legislative prescription as to the standards to be employed in determining which institutions should be approved and would thus appear to be unconstitutional in Maine, and probably in other states where legislative authority is jealously guarded. With the ultimate power to approve or to suspend approval in the hands of the state commissioner of education, however, section 201 would not seem to violate the constitutional standard. The com-

missioner is an official of the state, he is given a legislatively declared standard in section 401, *i.e.* that the curriculum must be adequate academically, to qualify graduates to teach in the state, and finally, he is given no more power than he now possesses in his capacity to prescribe the specific standards which individuals must meet to be certified.

Maine law prescribes an additional safeguard in common with a number of other states; namely, that a statute may not incorporate standards which are to be determined in the future. In *State v. Intoxicating Liquors*, 121 Me. 438, 117 Atl. 588 (1922) a statute adopting the federal standard for the determination of intoxicating liquor was held to be an unconstitutional delegation of legislative power in so far as it purported to incorporate future enactments by Congress establishing, from time to time, new standards for intoxicating liquors. Accord, *State v. Gauthier*, 121 Me. 522, 118 Atl. 380 (1922). An exclusive delegation to the regional associations to determine approved institutions might suffer from the additional constitutional infirmity of purporting to adopt the future accreditation standards of the regional associations.

In defining an approved institution this Act embraces the approach of a strong declaration of legislative policy that the accreditation decisions of the regional associations be accepted whenever possible. This approach is similar to that used by the California legislature. See Cal. Educ. Code Ann. §§ 13188(d), 13191(d). It is believed that this approach will avoid any constitutional problems and prevent the commissioner from approving only those institutions which offer programs meeting present state course requirements for certification.

SECTION 202. *Recommendation.*

Section 202 requires an institutional recommendation of the candidate for certification. This requirement is designed to ensure that the candidate will be qualified to teach the subject matter at the grade level or levels for which he is certified. Each recommending institution is directed to designate an official to make this recommendation. The recommendation might be made upon the application of a candidate for state certification in accordance with a form supplied by the state commissioner of education. An

official school stamp or seal might also be required by regulation to ensure authenticity. Such a requirement would put each institution on notice that the recommendation is considered official and that the institution's reputation stands behind it. The necessity of having an official designated for this purpose is evident. Such a process will rule out the recommendations of favored students by individual professors and will tend to produce uniformity among the recommendations of a particular institution. Institutions should not object to making recommendations because no more effort would be involved than is now required in recommending students for graduate study.

While subject matter recommendation may be sufficient for prospective teachers of grades four through twelve, it is important that primary school teachers know *how* to teach the basic subjects of the elementary curriculum—to present such material to very young minds—and *how* to recognize fundamental learning difficulties quickly. Primary school teachers must also be able to help children adjust to their surroundings in these early years of social exposure away from home, and they must be able to instill learning habits in young students which teachers at higher levels will reinforce and develop. Consequently, to ensure adequate training, candidates for certification as primary school teachers must be recommended by an official experienced in the preparation of primary school teachers. The grade level recommendation must be a part of the certification requirements for both primary and secondary school teachers because of the increased efficiency promoted by the capacity to place teachers, with a fair degree of accuracy, in those grades where they will be able to make the most effective use of their abilities.

The recommendations must also be for subjects commonly taught in the public schools of the respective state. Otherwise a teacher's qualifications might not be relevant for teaching in the state. And to obtain an assurance of competence in doubtful cases, the commissioner is given the right to require the passing of subject matter examinations appropriate for the recommended grade level under the terms of section 402. This authority is not to be exercised in the prescription of a blanket examination requirement for all candidates.

Paragraph (d) of section 202 is intended to emphasize a policy decision that a recommendation made after ten years from the receipt of a degree cannot be accorded validity because of the problems, for the state and the institution, involved in evaluating the calibre of an institution's instruction and a student's record more than a decade earlier. Paragraph (a) will help to alleviate a number of complex problems of interpretation. To paraphrase, any recommendation to be valid must be made when the institution is currently approved. Any recommendation valid under the foregoing requirements will be declared invalid if the institution concerned was not approved at the time of the candidate's graduation. The reason for these additional limitations is that no institution which is unapproved at the time of the making of the recommendation can be insulated from suspicion regarding the objectivity of such a recommendation, and secondly, that no candidate should benefit from the subsequent approval of an institution, which, in many cases, reveals nothing about the character of the candidate's own preparation.

SECTION 203. *Teaching experience.*

This section requires some teaching experience of any candidate for certification and is designed to assure that prospective teachers know how to teach. Several alternative methods of obtaining this experience are delineated so that as many qualified candidates as possible may be included. Except for the alternative set forth in section 203(c) the state would have an element of direct or indirect supervisory control over all of these options. This element of state supervision serves as a guarantee that the prospective teacher has practiced his classroom technique with the help of professional counsel and guidance. Instruction in conjunction with practice teaching is more meaningful to the student than abstract theory in a classroom lacking school age children.

Actual teaching experience, without a guarantee of professional supervision, can also provide the necessary background as to how to teach, and was included as section 203(c) to attract private school teachers, new residents who have taught in other states and teachers currently serving under emergency certificates into the ranks of the fully certified. Because of the lack of supervision

implicitly involved in this mode of gaining teaching experience, two years were thought to be necessary for fulfillment of this requirement.

SECTION 204. *Additional requirements.*

The moral character requirement under paragraph (a) is one commonly found in most of the states, and is just as necessary under this alternative standard. In addition to protecting children from incompetent teachers the states are responsible for protecting impressionable children from corrupting influences which might find their way into the classrooms if safeguards are ignored.

Optional paragraphs, as (b), can be added at this point to require training in physiology and hygiene or to declare non-academic requirements thought to be necessary. For instance, such paragraphs could set age and citizenship standards. It must be emphasized, however, that these additions should not impose course requirements which would compromise the basic reformatory purposes of this Act.

SECTION 205. *Certification.*

Paragraph (a) is to prevent the arbitrary withholding of certification from a prospective teacher who has fulfilled the requirements of part II.

Paragraph (b) directs the commissioner to make the certificate commensurate with the teacher's qualifications, but would permit him to make allowances for emergency conditions existing from time to time in many of the local school districts with regard to the supply of teachers. Many local school districts encompassing low density communities cannot afford to provide the variety of subject matter competence which the wealthier districts might be able to furnish. This proviso is intended to permit the commissioner to waive the certificate restrictions of this subsection on the application of the local school board concerned, either before or after such a school board has employed a particular teacher or teachers.

PART III. PRIVILEGES

SECTION 301. *Partial fulfillment of requirements.*

A candidate who has fulfilled all the requirements of part II

except the teaching experience requirement should not be prevented from securing an apprentice teaching position in the state. The beneficial character of apprenticeship teaching has been legislatively recognized in section 203 (d).

SECTION 302. *Renewal, suspension, and revocation.*

Any certificate acquired under this alternative standard should be subject to the same regulatory standards governing certificates acquired under existing practices.

PART IV. AUTHORITY OF THE STATE COMMISSIONER of EDUCATION

SECTION 401. *Grant or suspension of institutional approval.*

This section gives the commissioner the power to add institutions to the list of those approved if he finds that their general academic curricula are adequate to qualify graduates to teach in the state. Conversely, he can suspend approval of an institution if the quality of the curriculum declines below the acceptable level. Re-instatement of an institution whose approval has been suspended is governed by paragraph (a).

The power of suspension must be exercised with care, and it would constitute an abuse of discretion for the commissioner to suspend the approval of an institution because that institution does not offer a course in professional teaching techniques which he thinks should be offered. Approval may be suspended only if the calibre of the academic course curriculum declines because, for example, of a decline in the overall competence of the faculty.

SECTION 402. *Examinations.*

The scope of this section has been considered in the discussion of section 202, *supra.*

A Federal Act to Establish Use Tax Collection Standards

Although there is consensus that state use tax legislation needs reform, the number and complexity of the problems in this area have impeded efforts toward a comprehensive solution. Progress may demand the isolation of those defects which can be remedied within the existing framework. The proposed federal act limits the number of use tax returns a state may require in a year, establishes a uniform date for filing, and requires compensation of expenses incurred by the vendor in collecting and remitting use taxes. By reducing the cost to the vendor of complying with the use tax statutes of a number of states the act removes one obstacle to the free flow of goods across state lines.

STATES, counties, and municipalities are turning increasingly to sales and use taxes as a means of raising revenue. They shift the collection burden to the vendor and hold the vendor liable for taxes which it fails to collect. A corporation engaged in interstate commerce involving a number of jurisdictions that impose use taxes finds that it must keep a variety of records, be familiar with many different tax laws, file multiple returns at varying dates, and comply with myriad regulations to collect the tax and to avoid incurring liability for uncollected taxes. Small or marginal businesses may refrain from doing business in a jurisdiction where the volume of their sales would not justify the added expense of tax collection. See, *e.g.*, Statement of Harold T. Halfpenny, *Hearings Before the Special Subcommittee on State Taxation of Interstate Commerce of the House Committee on the Judiciary*, 87th Cong., 2d. Sess., ser. 20a, at 124–25 (1962).

Taxing jurisdictions that impose use taxes hold the out-of-state vendor responsible for the collection and remittance of these taxes on goods that the vendor ships into the taxing jurisdiction. The Supreme Court has held that such an arrangement does not unconstitutionally burden interstate commerce. See, *e.g.*, *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944); *Scripto v. Carson*, 362 U.S. 207 (1960). In the *Scripto* case, the Court held that Florida could impose use tax collection duties upon a Georgia vendor who maintained no offices, buildings, or (for purposes of this decision) permanent employees in Florida and whose only

connection with Florida consisted of contracts with ten Florida residents acting as part-time brokers. This decision, by removing some legal uncertainties, may encourage states that would otherwise not attempt to impose such requirements to extend their domain. See, *e.g.*, Statement of Harold T. Halfpenny, *supra* at 121. These extensions would enlarge the problems previously mentioned.

The proposed Act attempts to reconcile the interest of the states in raising revenue with the national interest in an "open economy" and in encouraging businessmen to vend their goods without regard to state lines. It would be unwise to prevent the states from imposing use taxes altogether. The states' locally imposed sales tax schemes would be ineffective without the "compensating" use tax that is imposed on out-of-state goods. Local businesses would suffer a competitive disadvantage if their retail sales were taxed and those of their interstate competitors were not. Furthermore, interstate business should pay its share of the costs of the state governments which afford it protection, opportunities, and benefits. Nevertheless, the accounting and reporting costs to interstate vendors who comply with the many use tax laws are a serious enough burden on interstate commerce to require some relief.

In order to protect the states' interests, the minimum-nexus-requirement approach of Public Law 86–272, 73 Stat. 555 (1959), as amended, 15 U.S.C. §§ 381–84 (Supp. II, 1961) and the Daddario Bill, H.R. 1060, 88th Cong., 1st Sess. (1963), has been rejected. This approach prohibits the imposition of a tax when the potential taxpayer's only activities in the state are solicitation of orders by local salesmen and delivery of goods into the state. Instead, the proposed Act accepts the *Scripto* principle that regular and continuous exploitation of a local market affords a sufficient basis for state taxation. Thus, the Act would not significantly affect the states' revenue raising power.

The Act is designed to reduce the existing burden on interstate business by (1) limiting the number of returns a state may require each year (paragraph 2(a)), (2) reimbursing the vendor for his collecting expenses (paragraph 2(b)), (3) shifting auditing expenses to the taxing jurisdiction (paragraphs 2(c) and (d)), and (4) providing a relatively short period of limitation, thus reducing

the risk to the vendor of having to pay uncollected use taxes out of his own pocket.

AN ACT

To establish standards which must be met by taxing jurisdictions that require out-of-state vendors to collect and remit use taxes.

SECTION 1. *Definitions.*

(a) *Taxing jurisdiction.* "Taxing jurisdiction" means any state, commonwealth, territory, or possession of the United States, any subdivision thereof, or the District of Columbia.

(b) *Use tax.* "Use tax" means any tax, by whatever name called, levied on the storage, use, or consumption within the taxing jurisdiction of tangible property or services acquired for value outside the taxing jurisdiction.

(c) *Foreign vendor.* "Foreign vendor" means a person required to collect and remit a use tax arising from an interstate transaction.

SECTION 2. *Conditions for requiring collection and remittance of use tax.*

A taxing jurisdiction may not require a foreign vendor to collect or remit a use tax unless the jurisdiction—

(a) requires a use tax return, including an information report or statement or payment, not more than once each year on the 15th day of February, but if the amount of tax due for any quarter exceeds $100, the taxing jurisdiction may require a return for that quarter;

(b) reimburses the foreign vendor for the vendor's expenses in collecting and remitting the use tax by allowing a credit in an amount equal to the greater of $10 or one per cent of the tax required to be collected for the period of the return, but the taxing jurisdiction may provide that this reimbursement be forfeited in the event of a late return;

(c) bears the expenses incurred by the taxing jurisdiction's officials in traveling to the location of the foreign vendor's records to perform an audit of the vendor's records required by the taxing jurisdiction whenever the increase in tax liability resulting from the audit is less than the lower of $100 or 10 per cent of the amount shown on the vendor's declarations for the periods audited; and

(d) reimburses the foreign vendor for reasonable expenses incurred by the vendor in bringing his business records to the taxing jurisdiction whenever the increase in tax liability resulting from the audit is less than the lower of $100 or 10 per cent of the amount shown on the vendor's declarations for the period audited. Reimbursement under this paragraph shall be made within 60 days after demand by the foreign vendor.

SECTION 3. *Period of limitation.*

A foreign vendor is not responsible for the collection and remittance of a use tax arising from a transaction completed more than three years before the vendor receives initial notification from the taxing jurisdiction that the vendor is subject to its use tax statute. However, a taxing jurisdiction may require a foreign vendor to remit any use tax which the vendor has collected.

SECTION 4. *Reports and recommendations by the General Accounting Office.*

The General Accounting Office shall submit an annual report to the Congress concerning problems that arise under this Act and in the general area of interstate use taxes. It shall make recommendations for legislation concerning taxing standards after consultation with the Advisory Commission on Intergovernmental Relations.

MEMORANDUM

SECTION 1. *Definitions.*

(a) "Taxing jurisdiction" is defined broadly enough to encompass any political unit in the United States that might impose a use tax.

(b) The definition of "use tax" is patterned after various state statutes. It refers to that tax which compensates for or supplements the tax imposed on local retail sales. It is broad enough to reach intrastate sales as well as interstate sales, but the definition of "foreign vendor" restricts the Act's application to interstate transactions. The phrase "acquired for value" is intended to include sales, rentals, and any of the various possible leasing arrangements; it is intended to exclude acquisition by borrowing, by gift, or by theft.

(c) It is through the definition of "foreign vendor" that the Act is tied exclusively to interstate transactions. Because this is federal legislation, the term "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies. 1 U.S.C. § 1. This definition must be read together with the definition of use tax. Since a use tax may be imposed on things which are acquired by rental or lease, the term "vendor" necessarily includes those who rent or lease their property as well as those who sell it.

SECTION 2. *Conditions for requiring collection and remittance of use tax.*

(a) At the present time states commonly require monthly use tax returns without regard to the amount of tax due. This provision alleviates this situation and thereby minimizes the bookkeeping, accounting, and legal expenses of the vendor. Less frequent remittances may also reduce the taxing jurisdiction's administrative costs, although the saving would probably be offset by the expense of delayed income.

(b) Since a vendor operating in various states goes to considerable expense in becoming familiar with many tax laws and in filling out returns, he should be compensated so that he will not be deterred from operating in those various states. The simplest way of accomplishing this is by allowing the vendor to take the reimbursement as credit against the tax that otherwise would be due. The minimum reimbursement of $10 is in effect an exemption; *e.g.*, under a use tax rate of 5%, no tax would have to be remitted until sales into the taxing jurisdiction for the return period exceeded $200. The Act leaves the state free, however, to require a return even though no tax is due. A maximum limit on the amount of reimbursement was considered and rejected because the expense of collection tends to increase in proportion to the amount of sales. The allowance of a penalty for late returns is a sanction imposed by many states and is not intended to be abrogated by this Act.

(c) and (d) Under many use tax laws the out-of-state vendor must either bring its books of account to the state for audit or else must pay the expense of the state's auditors in traveling to the vendor's location. This burden is not imposed on in-state vendors in connection with audits of their sales tax returns. Kust & Sale, *State Taxation of Interstate Sales*, 46 Va. L. Rev. 1290, 1299 (1960). The proposed provisions put the interstate vendor on a par with the intrastate one regarding audit expenses. An interstate vendor that is found in substantial arrears on tax remittance, however, will have to bear the audit expense if the taxing jurisdiction so requires.

SECTION 3. *Period of limitation.*

When a vendor is notified of his liability to collect the use tax

for a taxing jurisdiction, the vendor may already have been transacting business in that jurisdiction for many years. It would be an unduly harsh burden on the vendor in such a case to require that he remit uncollected taxes which extend into the past more than three years, since the taxes will be difficult to estimate and will probably have to come from the vendor's own pocket. Although this provision excludes the concept of constructive notice of a foreign state's laws, the threat of being held responsible for three years' back taxes should provide sufficient incentive to vendors to become familiar with laws to which they may be subject. The various periods of limitation of the states are left intact after the vendor has received notification or begun collection on his own.

SECTION 4. *Reports and recommendations by the General Accounting Office.*

Congress should provide that this area of taxation be watched by the General Accounting Office or by some other appropriate body and that an annual report be made to a congressional committee so that Congress may be apprised of the problems that arise. A provision for consultation with the Advisory Committee on Intergovernmental Relations is included to insure a comprehensive treatment of the problems.