To make plans on public affairs outside the Senate or the public elections is an offense punishable by death. The reason for this, [the Utopians] say, is to make it difficult for the President and the tranibores to conspire together to oppress the people with a dictatorship and so change the constitution.¹

Saint Thomas, lawyer that he was, doubtless realized that no common law equivalent of the Utopian "Open Meeting Act" existed in England in the age of the Star Chamber and High Commission; nor does one exist today.² Neither does any such right vest in the general public under our federal Constitution,³ although many of the state constitutions require at least that certain sessions of the legislature be held in public.⁴ To supplement their constitutional provisions, most of the legislatures have passed some form of open meeting act, requiring that the meetings of at least some state agencies and local governing bodies be open to the public.⁵ In addition to guaranteeing the public access to governmental meetings, many legislatures have also enacted right to know laws designed to protect public access to governmental documents.⁶ Still other statutes grant access to the meetings and/or the records of specific public bodies, either to interested citizens or the public at large.⁷

³ See Note, Open Meeting Statutes: The Press Fights for the "Right to Know," 75 Harv. L. Rev. 1199, 1203 (1962). Such a right of the general public to attend legislative sessions, etc., is, of course, to be distinguished from a criminal defendant's right to a public trial, U.S. Const. amend. VI, and the right of an interested party to attend and be heard at judicial or quasi-judicial hearings determinative of his rights, see, e.g., Chester County Bank v. East Whiteland Twp., 27 Pa. D. & C. 2d 384 (Chester County Ct. Quarter Sess. 1962).
Pennsylvania common law prior to 1957 authorized "any person who had a personal or property interest . . . to examine and inspect public records . . .";8 such interested parties, however, may have been the only ones entitled to such access.9 In part to clarify the confusions of the common law,10 the legislature in 1957 passed a Right to Know Law opening financial and certain other records of a limited class of government agencies to all citizens of the Commonwealth.11 In the same term the legislature also passed an Open Meeting Act requiring that the meetings of certain state and local governmental bodies be open to the public and that notice of such meetings be given to the press and public.12 The Supreme Court of Pennsylvania, however, has given restrictive readings to the Right to Know Law on at least two occasions,13 and the Open Meeting Act excepted a broad class of meetings from its coverage.14

In 1973, the lower house of the legislature adopted the "Sunshine Rule" opening hitherto secret meetings of House committees,15 and Representative James Knepper introduced legislation16 designed to open meetings of various state and local agencies. As finally enacted, this Sunshine Law17 requires all state and local "agencies,"18 the boards of trustees of all community colleges and state-aided or -affiliated colleges and

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14 Pub. L. No. 213, § 1(B) [1957] Pa. Laws 392, provided in part: "[T]he term 'Public Meeting' shall not mean any meeting, the publication of the facts concerning which would disclose the institution, progress or result of an investigation undertaken by a board in the performance of its official duties." Although the Open Meeting Act provided no sanctions beyond a $25 fine for each violation, id. § 254, the lower courts fashioned an invalidation remedy to enforce the Act. See, e.g., Bradley v. Radnor Twp., 51 D. & C.2d 160 (C.P. Delaware County 1971). Quasi-judicial actions taken at hearings of which interested parties had no notice and at which they had no opportunity to be heard have also been invalidated on due process grounds. Chester County Bank v. East Whiteland Twp., 27 D. & C.2d 384, 394-95 (Chester County Ct. Quarter Sess. 1962).
15 "All public hearings shall be open to the public and reasonable opportunity to be heard shall be afforded to all interested parties . . . ." Pa. H.R. Rule 50, Pa. H.R. Res. 4, 1973 Sess.
universities, the General Assembly and its committees, the governor's cabinet, and any "similar organization created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function" to hold public meetings whenever any "formal action" is taken. The statute also requires public notice prior to any such meeting, limits executive sessions to the hearing of complaints against and the disciplining or discharge of an employee or the planning of labor negotiations, and provides for the invalidation of any action taken in violation of the Act, the enjoining of future violations, and the punishment of any public official attending a secret meeting in violation of the Act. The Act is broadly drawn, however, and sufficient ambiguities exist to require substantial judicial interpretation.

This Comment will examine the extent of the Sunshine Law's coverage: the type of action covered, the types of bodies covered, and the exceptions from coverage. The Comment will also consider the enforcement provisions of the Act, particularly the criminal and invalidation provisions.

I. The Coverage of the Act

A. Types of Action Covered

The Sunshine Law requires that "[t]he meetings or hearings of every agency at which formal action is scheduled or taken are public meetings and shall be open to the public at all times. No formal action shall be valid unless such formal action is taken during a public meeting." "Formal action" is defined as "the taking of any vote on any resolution, rule, order, motion, regulation or ordinance or the setting of any official policy." This

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19 Id.
20 Id. §§ 1, 7, PA. STAT. ANN. tit. 65, §§ 261, 267 (Supp. 1975).
21 Id. § 1, PA. STAT. ANN. tit. 65, § 261 (Supp. 1975).
22 Id.
23 Id.
24 Id. § 5, PA. STAT. ANN. tit. 65, § 265 (Supp. 1975).
26 Id. §§ 2, 9, PA. STAT. ANN. tit. 65, §§ 262, 269 (Supp. 1975).
27 Id. § 9, PA. STAT. ANN. tit. 65, § 269 (Supp. 1975).
28 Id. § 8, PA. STAT. ANN. tit. 65, § 268 (Supp. 1975).
29 One of the co-sponsors of the legislation has predicted court tests for as long as five years. Thomson, 'Sunshine' Law to Open Some of Phila.'s Secret Meetings, The Evening Bulletin (Philadelphia), Aug. 28, 1974, at 20, col. 2.
31 Id. § 1, PA. STAT. ANN. § 261 (Supp. 1975).
coverage is substantially broader than that accorded by New Jersey's open meeting act, which requires public meetings only when a determination is made by vote, but is potentially narrower than the coverage of those statutes containing blanket prohibitions of secret or executive sessions.

The explication of the statutory terms "setting of any official policy" and "meeting or hearing" was left to the Attorney General and the courts. The Attorney General has defined the setting of a policy as "any discussions, deliberations or decisions with regard to the formation, endorsement, ratification or approval of a program or general plan pursuant to which agency business will be conducted or agency decisions made . . . ." He has defined a meeting as "any gathering of those members of an agency with sufficient voting power to make a determination on behalf of the entire agency—i.e., a majority or quorum of the agency . . . ." Although this narrow interpretation of "meeting or hearing" may seem to conflict with the broad statutory purpose, the distinction between the criminal and invalidation provisions of the Sunshine Law resolves the apparent contradiction.

Although isolated instances of less-than-quorum meetings fall outside the scope of the Act, the Attorney General has emphasized that "if a series of meetings of less than a quorum of an agency are used as a subterfuge to avoid the public meeting requirements of the act, there would be a violation." That a secret discussion was not a "meeting," therefore, does not prevent subsequent formal action tainted by that secrecy from being invalidated.

The narrow definition of "meeting" does, however, limit the scope of the Act's criminal provision by preventing the punishment of public officials' innocent discussion of public affairs. The Sunshine Law's criminal provision states that "[a]ny mem-

33 See, e.g., Ala. Code tit. 14, § 393 (1958). In the absence of language defining the action subject to the statute, however, at least one court has, on its own initiative, defined such action narrowly. Adler v. City Council, 184 Cal. App. 2d 763, 7 Cal. Rptr. 805 (Ct. App. 1960). The California legislature subsequently amended the state's open meeting act (the Ralph M. Brown Act) by adding a definition of "action taken" substantially more expansive than that applied by the Adler court. CAL. GOV'T CODE § 54952.6 (West 1966); see 42 OP. CAL. ATT'TY GEN. 61 (1963).
34 OP. PA. ATT'TY GEN. No. 46, in The Legal Intelligencer (Philadelphia), Sept. 24, 1974, at 13, col. 5.
35 Id.
36 As the Attorney General himself has recognized, "the Legislature intended 'any' vote to be open, not just 'formal' votes taken at formal meetings . . . ." Id.
37 Id. 14, col. 2.
ber of any agency who participates in a meeting or hearing knowing that it is being held or conducted in such a way to intentionally prevent an interested party from attending or with the intent and purpose of violating this act is guilty of a summary offense . . . .” By adopting the Attorney General's narrow definition of "meeting," then, the courts can avoid punishment of innocent discussion of public affairs by public officials while invalidating formal action tainted by such private discussions unless subsequently "ratified" at a public meeting through sufficient discussion and debate to apprise the public of the significance of and reasons for the action taken.

B. The Agencies Covered

The Sunshine Law is applicable to the meetings or hearings of "agencies." Section one of the Act defines "agency" as any branch, department, board, authority or commission of the Commonwealth of Pennsylvania, any political subdivision of the Commonwealth, or any State, municipal, township or school authority, school board, school governing body, commission, the board of trustees of all State-aided colleges and universities and all community colleges, or similar organization created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function: Provided, That the term "agency" shall include the General Assembly, or any State department, board, authority or commission to include the governor's cabinet, when meeting on official policy making business.

This definition is most inartfully drawn and can be parsed in two ways. One possible reading would be to consider everything from the first "of" to the beginning of the proviso as a prepositional phrase modifying "branch, department, board, authority or commission." Under this reading, "any branch, department,

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39 See text accompanying notes 134-37 infra.
40 See generally Op. PA. ATT'Y GEN. No. 46, supra note 34, at 14, col. 5.
42 Id. § 1, PA. STAT. ANN. tit. 65, § 261 (Supp. 1975).
authority or commission of . . . any State, municipal, township or school authority" would be covered by the Act.

Although this reading derives some support from the Statutory Construction Act, the legislature, had it intended to include the subcommittees of parent bodies within the definition of agency, could have done so far more directly. A more likely reading of the statute is that five types of organizations are included within the meaning of "agency": (1) "any branch, department, board, authority or commission of the Commonwealth of Pennsylvania"; (2) "any political subdivision of the Commonwealth"; (3) "any State, municipal, township or school authority, school board, school governing body [or] commission"; (4) "the board of trustees of all State-aided colleges and universities, the board of trustees of all State-owned and State-related colleges and universities and all community colleges"; (5) "any similar organization created by or pursuant to a statute which declares in substance that the organization performs or has for its purpose the performance of an essential governmental function." Under this reading, meetings of a subcommittee of a parent body, at which a quorum of the parent body is not present, are not subject to the Act.

C. Limitations on the Act's Coverage

The broad coverage of the Act which results from the definition of "agency" contravenes public policies in several sit-

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43 Such a reading would accord with two presumptions of the Statutory Construction Act—"That the General Assembly intends to favor the public interest as against any private interest," Pa. Stat. Ann. tit. 1, § 1922(5) (Supp. 1974), and that "All . . . provisions of a statute [other than eight specific exceptions, not here relevant] shall be liberally construed to effect their objects and to promote justice," id. § 1928(c).

44 This phrase may be superfluous if "any State, municipal, township or school authority, school governing body [or] commission" is read to include the boards of commissioners and city councils of municipalities, townships, boroughs, and counties.

45 As officially punctuated, this portion of the Act is unintelligible. In order to remedy this defect, the word "commission" is here grouped with the phrase "any State, municipal, township or school authority, school board, school governing body" and the comma between "school governing body" and "commission" replaced with the conjunction "or." Such repunctuation is permissible under the Statutory Construction Act. "Grammatical errors shall not vitiate a statute. A transposition of words and clauses may be resorted to where a statute is without meaning as it stands." Pa. Stat. Ann. tit. 1, § 1923(a) (1974). "Words and phrases which may be necessary to the proper interpretation of a statute and which do not conflict with its obvious purpose and intent, nor in any way affect its scope and operation, may be added in the construction thereof." Id. § 1923(c). This repunctuation causes the definition to include the boards of commissioners and city councils of municipalities, townships, boroughs, and counties.

46 A much simpler definition has been proposed in a model open meeting statute drafted by Common Cause:

"Public body" means any administrative, advisory, executive, or legislative body
uations. To prevent the subversion of these policies, the Act provides four exceptions to the general rule that an agency is subject to the open meeting requirements.

1. The Exception for Disciplinary Proceedings and Labor Negotiations

Section three of the Sunshine Law provides:

No public meeting of any agency shall be adjourned, begun, recessed or interrupted in any way for the purpose of an executive session except as herein-after provided. An executive session may be held during the course of a properly conducted public meeting upon notification to the public present by the presiding officer that for a period not to exceed thirty minutes the meeting will be in recess for the purpose of:

(1) Considering the dismissal or disciplining of, or hearing complaints or charges brought against a public elected officer, employee, or other public agent unless such person requests a public hearing.

(2) Considering actions of the deliberating body with respect to labor negotiations.47

Although this section authorizes only the interruption of public meetings for thirty minutes, it is reasonable to read the section as authorizing executive sessions scheduled separately from the public sessions and lasting as long as necessary if the only business there discussed is that authorized by the section.48 Once the preliminary investigations and discussions are completed, however, must final actions be taken in public session? The Attorney General of Pennsylvania has justifiably answered this question in the affirmative.49
In the first place, the language of section three goes no further than to authorize executive sessions to consider complaints and labor negotiations; "consideration" suggests those preliminary discussions preparatory to a formal vote yet still sufficiently determinative of "official policy" as to constitute "formal action" under the Act.\textsuperscript{50} Furthermore, the legislative history indicates a concern primarily that these preliminary stages be conducted secretly whenever the agency deems it advisable. In the context of disciplinary proceedings, Representative Kester, proponent and supporter of several restrictive amendments, sought no more than the right to conduct such informal discussions in executive sessions as were necessary to protect the privacy and reputation of public officials.\textsuperscript{51} Once such private discussions have been completed, it should work no injustice on any public official for the agency to proceed publicly either to state that the charges were groundless or to discipline the public official by formal action accompanied by a statement of the grounds therefor. In the context of labor negotiations, the legislative history exhibits a concern only for the injurious effects of premature publicity.\textsuperscript{52} In both the disciplinary proceeding and labor negotiation areas, therefore, only preliminary investigations and discussions should be exempt from the Act. As so construed, section three would protect public officials from unsubstantiated charges\textsuperscript{53} without allowing the concealment of official wrongdoing, and would free labor negotiations from the public posturing that could render any settlement impossible.\textsuperscript{54}

A significant problem with this section of the Act is its failure to provide for other situations in which "premature publicity would be detrimental to the interest of the community, as by revealing information to individuals who might profit at public expense."\textsuperscript{55} Such instances will be most frequently encountered in cases of land acquisition.\textsuperscript{56} Although agencies may succeed in

\textsuperscript{50} See generally text accompanying note 34 supra.
\textsuperscript{52} PA. H.R. JOUR. 1840 (July 24, 1973) (remarks of Representative Maloney).
\textsuperscript{53} The secrecy, of course, would not be absolute: witnesses and complainants would still be free to discuss their testimony in public. In view of this fact, therefore, the agency might well choose not to exercise its § 3 privilege, or the official might well demand a public hearing, so as to prevent the spread of rumors and protect himself from smear by leak; such a choice, however, has rightly been left to the agency and official concerned. Cf. Comment, Access to Governmental Information in California, 54 CALIF. L. REV. 1650, 1657-58 (1966).
\textsuperscript{55} Note, supra note 3, at 1209.
\textsuperscript{56} See id.
persuading the courts that preliminary stages of real estate negotiations are not "formal action," prompt legislative amendment\textsuperscript{57} is desirable to prevent the possible invalidation of necessary real estate acquisitions; that section three provides specific exemptions from the Act may lead the courts to conclude that such real estate negotiations, since not specifically exempted, are covered by the Act.

2. The Exception for Emergencies

Section 5(e) of the Sunshine Law provides that the public meeting and notice requirements of the Act shall not apply to an agency meeting held "to deal with an actual emergency involving a clear and present danger to life and property."\textsuperscript{58} This section should not be read so narrowly as the "clear and present danger" test formulated by Mr. Justice Holmes\textsuperscript{59} in the context of first amendment litigation; rather, the courts should adopt what could be called a "critical point" test: if the agency does not act immediately, without recourse to the Act's formalities, does a reasonable possibility exist that life or property may be endangered? As the sponsor of the amendment including section 5(e) noted,

\begin{quote}
[T]he actual emergency exists when the weather forecast is bad, when waters are rising in an adjoining state, under any of these conditions. I do not think you have to have the floodwaters at your doorstep to get an actual emergency. An emergency exists when the threat arises.\textsuperscript{60}
\end{quote}

Because it is the primary responsibility of the agency charged with safeguarding the public to decide when an actual emergency exists, the courts should adopt the position that a reasonable belief by the agency that an actual emergency exists is sufficient to protect agency actions against invalidation.\textsuperscript{61} An attempt by the courts to second-guess the agency's reasonable

\textsuperscript{57} A requirement that the minutes of any such preliminary negotiations be published after final action has been taken would prevent any abuse of the exemption.

\textsuperscript{58} Pennsylvania Sunshine Law § 5(e), PA. STAT. ANN. tit. 65, § 265(e) (Supp. 1975).

\textsuperscript{59} See, e.g., Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

\textsuperscript{60} PA. H.R. Jour. 3184 (Jan. 28, 1974) (response of Representative Englehart to interrogation by Representative Kester).

\textsuperscript{61} Of course, § 8's scienter requirements would protect the agency members against criminal prosecution. Invocation of the reasonable belief defense to an invalidation action, however, might not be consistent with the scope of the invalidation remedy, see text accompanying notes 116-21 infra.
judgments could cause private parties to become reluctant to contract with agencies in such emergency situations lest the contracts be invalidated. Because the purpose of section 5(e) was to authorize agency action in situations where the press of time does not permit compliance with the Act's notice requirements, agency members would not appear to be justified in deliberately excluding members of the public unless such exclusion is necessary for the expeditious handling of the emergency.

3. The Party Caucus Exception

Section seven of the Sunshine Law provides:

For the purpose of this act, meetings of the Legislature which are covered are as follows: all meetings of committees where bills are considered, all hearings where testimony is taken, all sessions of the House of Representatives and the Senate. Not included in the intent of this act are party caucuses. This section is an amplification of the definition of "agency," which broadly includes the General Assembly. The last sentence of the section is apparently a proviso meant to ensure that the privacy of legislative caucuses will be respected. Read in the context of the entire section, the party caucus section should have no application to party caucuses of local governing bodies. This limited reading of the party caucus exception is justified as a matter of policy; if a local governing body is controlled by a lopsided majority with the immense patronage powers of a local political organization, as in the case of the Philadelphia City Council, or if, as in the case of the county commissions of the suburban counties, a local governing body is composed of one minority and two majority commissioners, the latter of whom dominate the commission, any party caucus exception would simply gut the Act.

Although the courts could vindicate the overriding policy of

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65 But see Statement of George X. Schwartz, President, Philadelphia City Council (quoted in The Evening Bulletin (Philadelphia), Oct. 11, 1974, at 9, col. 1): "As long as the Legislature takes the position that its party caucuses are closed, I see no reason why Council should take a different position."
66 Thomson, supra note 29, at 20, cols. 7-8.
the Act by reading the party caucus exception in the context of the whole of section seven, the legislative history could preclude such a reading.68 The legislature, therefore, should amend the Act specifically to cover party caucuses of local governing bodies, at least when two-thirds of such an agency is controlled by members of one political party.69

4. The Confidentiality Exception

Section ten of the Sunshine Law repeals all previous legislation inconsistent with the Act except for “those statutes which specifically provide for the confidentiality of information.”70 This exception will serve two important purposes: it will preserve to the agencies the attorney-client privilege, and it will protect private citizens, especially welfare recipients, from invasions of privacy.

Although there is no Pennsylvania statute granting a blanket right of attorney-client confidentiality, an attorney is incompetent to testify to confidential communications, and his client cannot “be compelled to disclose the same, unless in either case this privilege be waived upon the trial by the client.”71 Although section ten would appear to protect this privilege, the Attorney General of Pennsylvania has held that the Sunshine Law constitutes a waiver of this privilege.72

In reaching this conclusion, the Attorney General relied heavily upon Florida’s Sunshine Law, noting that “[t]hough not identical, Florida’s Sunshine Law is sufficiently like Pennsylvania’s to provide a valuable precedent.”73 Nothing could be further from the truth. First, unlike the Pennsylvania law, the Florida act contains no exception for confidentiality. Moreover, the Florida act was sharply criticized by Pennsylvania legislators supporting the Sunshine Law.74 Results under the Florida act

68 Representative Knepper, responding to interrogation by Representative Rapaport, indicated that it was not his intention that the legislation apply to party caucuses of local governing bodies. Pa. H.R. Jour. 1839 (July 24, 1973).
69 A two-thirds rule would cover those local bodies lopsidedly dominated by one political party whose caucus controls the policies set by the agency, see text accompanying note 67 supra, as well as the suburban county commissions.
73 Id.
74 Representative Wise, a co-sponsor and, with Representative Knepper, a leading supporter of the Pennsylvania act, spoke disparagingly of the Florida statute: “There is one thing that this bill is not, . . . it is not the Florida ‘sunshine’ law . . . . Two fellows could not drive to work together [in Florida] and discuss the business of the day without
are thus not useful precedent in Pennsylvania; the Attorney General's conclusion, insofar as it relies upon Florida precedent, should not be followed.

Section ten can also be interpreted so as to protect the privacy of welfare recipients. The Public Welfare Code places the burden on those seeking information about welfare recipients to come forward with the names of those recipients concerning whom inquiry is being made. Because the Pennsylvania supreme court has interpreted this statute to limit the 1957 Right to Know Law, a similar construction of the Sunshine Law could prevent public and, most importantly, press attendance at most welfare hearings under the section ten exception.

II. THE ENFORCEMENT OF THE ACT

The Sunshine Law contains three enforcement mechanisms: the injunctive power, the invalidation provision, and the criminal penalty. No reported criminal prosecutions under any such open meeting acts in other states exist, so that the criminal penalties are probably the least important enforcement mechanism in the Act. At least potentially, the invalidation provision could prove the most potent; citizens seeking admission to a meeting can threaten prolonged litigation questioning the validity of any actions taken at the secret meeting, thus effectively frustrating, for example, contracts entered into by the agency. The criminal and invalidation provisions pose serious questions involving both interpretation and execution of the Act. The injunctive power, on the other hand, should not tend to frustrate any governmental actions because it can be applied purely prospectively and under the strict supervision of the courts. This Comment, therefore, will consider only the criminal and invalidation provisions.
A. The Criminal Penalty

A number of state open meeting acts provide criminal penalties as an enforcement device. Alabama, Arizona, Arkansas, Louisiana, New Mexico, South Dakota, and Utah, among others, provide that any violation of the act be punished as a misdemeanor.\(^7\) Such acts generally do not require that the offender be a member of the agency holding the secret meeting,\(^7\) and the Louisiana statute specifically makes criminal any conspiracy to hinder or attempt to hinder "attendance by the public at meetings, declared by this chapter to be public meetings."\(^8\) The California and Florida acts, on the other hand, are examples of those making criminal only attendance at a meeting conducted in violation of the act.\(^8\) Although most of the acts do not specify the degree of scienter required to constitute a violation, those that do require either knowledge or willfulness.\(^8\) There has been no significant judicial discussion\(^8\) and no judicial creation of any scienter requirements, but a knowing—or at least reckless—violation should be the appropriate minimal justification for invocation of criminal penalties.\(^8\)

Pennsylvania's Sunshine Law, like the California act, makes criminal only knowing attendance at an illegal meeting,\(^8\) and provides a maximum fine of one hundred dollars plus costs.\(^8\) Unlike the California and Florida acts, however, the Pennsylvania law requires not simply that the defendant agency member know that the meeting is being held in violation of the Act, but that he know that the meeting is being held with the intention of violating the Act.\(^8\) Although Pennsylvania's provision is thus


\(^8\) Alabama provides that violation of the act as well as attendance at such an illegal meeting shall constitute a misdemeanor. Ala. Code tit. 14, § 394 (1958).


\(^8\) Id.

more narrowly drawn than California's or Florida's, three difficulties remain: a member who in the best of faith protests the illegality of a meeting but remains in attendance is subject to criminal prosecution; the presence of criminal provisions may result in stricter construction of the Act; and members may find themselves subject to harassing and discriminatorily selective prosecutions. Before these problems are treated, however, a peculiarity in the language of section eight, which could broaden the coverage of the Act, deserves consideration.

1. Intentional Exclusion of an Interested Party

Section eight of the Pennsylvania Sunshine Law makes criminal not only attendance at a meeting held with the intent and purpose of violating the Act, but also attendance at a meeting, "being held or conducted in such a way to intentionally prevent an interested party from attending . . . ." This passage suggests that a meeting could be held in technical compliance with all other provisions of the Act and still be conducted in such a way as to intentionally exclude an interested party and that, although action taken at such a meeting may not be void, attendance at such a meeting knowing it so to be held is criminal.

The need for this provision stems from that Act's lack of (1) a venue requirement for public meetings, (2) a limitation on the times at which meetings may be held, and (3) a requirement that notice of the meeting contain the meeting's purpose or agenda. Absent such a provision, the Act's failure to impose these requirements could lead to the defeat of the legislative purpose "to open up the administrative agencies"; agency meetings could be held at a time or place inconvenient of access to the interested public, or the notice of the meeting could fail to inform the public of the matters to be acted upon. Once it is proven that

88 See text accompanying notes 97-101 infra.
89 See text accompanying notes 102-05 infra.
90 See text accompanying notes 106-10 infra.
91 Pennsylvania Sunshine Law § 8, Pa. Stat. Ann. tit. 65, § 268 (Supp. 1975), provides in part: "Any member of any agency who participates in a meeting or hearing knowing that it is being held or conducted in such a way to intentionally prevent an interested party from attending or with the intent and purpose of violating this act is guilty of a summary offense . . . ."
94 The Public Utilities Commission, for example, has in the past been sharply rebuked for conducting hearings on Philadelphia utility rate increases in Harrisburg. See, e.g., Hearing for Consumers, KYW-TV/KYW Radio (Philadelphia) Editorial 2365, telecast and broadcast Aug. 19-20, 1974.
95 One common pleas court has held, under the Open Meeting Act of 1957, Pub. L.
the scheduling of the meeting or the exclusion of the meeting's purpose from the notice was done with intent to "prevent an interested party from attending," the attendants at the meeting may be subject to prosecution even if formal action taken there may be valid.

2. Good Faith Protest

Unless good faith protest against the illegality of a meeting is recognized as a defense to a criminal prosecution under the Act, the conscientious legislator will be forced to decide, at his peril and perhaps even at a moment's notice, whether a meeting is being held with the proscribed illegal intent. If, after fruitless protest, he withdraws from the meeting, he risks loss of his vote should a court subsequently find the meeting to have been valid; if, on the other hand, he decides to remain and so protect his vote in the event of a subsequent finding of validity, he risks a finding that the meeting was indeed illegally held, that his protest proves his "knowledge" of the illegality, and that he himself is guilty of a summary offense under section eight of the Act. It is, ironically, the conscientious member, who demonstrates his knowledge through protest, rather than the acquiescent member, who mutely accepts the illegality perpetrated by the majority, that runs the greater risk of demonstrating the knowledge necessary for a section eight conviction.

The issue of good faith protest as a defense has yet to be considered by a court. The Florida Attorney General, however, in construing the criminal provision of his state's statute, has held that such protest is not a defense. Because the dislike expressed by Pennsylvania legislators for the Florida statute was limited to the supposed breadth of the "official acts" covered by the legislation, with only a cursory reference to the criminal provision, reliance on administrative construction of Florida's criminal provision might be less misplaced than reliance on judicial construction of other portions of the Florida act. In view, therefore, of the plain language of section eight, as well as of the construction placed on the similar Florida provision by that state's attorney general, a court could read section eight to deny the good faith defense.

No. 392, [1957] Pa. Laws, that notice of only the meeting itself is required, that "[a]fter proper notice of time and place, all matters coming before the board may be acted upon." Ardmore Manor Civic Ass'n v. Haverford Twp., 51 Pa. D. & C.2d 417, 422-23 (C.P. Delaware County 1970).


FLA. ATTY GEN. OP. No. 071-32.

The rigors of this position, however, can be mitigated by a strict reading of section eight's scienter requirement. This requirement is two-pronged: the meeting must be held with the intent of excluding an interested party or violating the Act, and the defendant member must have known of this illegal intent.\(^9\)

In accordance with the provision of the Statutory Construction Act requiring strict construction of penal provisions,\(^10\) a court could hold, as a matter of law, that the least uncertainty as to the meeting's illegality, so long as reasonably and sincerely held, negates the defendant's knowledge of the meeting's illegality. The court could further find, as a matter of fact, that his continued presence at a meeting after his protest evidences the defendant's doubt as to the illegality; if a defendant were absolutely certain of the illegality he would have no reason to fear loss of his vote because any vote taken at the meeting would be invalid.\(^11\) Thus, although an amendment to the Act providing for good faith protest as a defense to a section eight prosecution would be well advised, a strict interpretation of the scienter requirement in favor of a defendant, coupled with sensible exercise of prosecutorial discretion, should prevent any serious injustice.

3. Strict Construction of Penal Statutes

It is commonplace that penal statutes are to be strictly construed in favor of the accused.\(^12\) In applying this dictate of the Statutory Construction Act to cases arising under the Sunshine Law, the courts may adopt an unduly restrictive interpretation which will later be carried over by the process of stare decisis into non-criminal suits arising under the Sunshine Law. This danger is particularly acute in view of the likelihood that litigants of modest means will choose criminal prosecution, in which costs are borne by the state and the case prosecuted by the district attorney, as the means for obtaining judicial interpretations of the Act.\(^13\)

Notwithstanding the general rule of construction, there is a strong argument in favor of construing the Act broadly even in a criminal prosecution. Many modern regulatory statutes contain penal provisions as an aid to enforcement but are nevertheless

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\(^9\) See text accompanying notes 85-87 supra.


\(^11\) There would still be a danger, however, that a member leaving a meeting would lose his right to have participated in informal action, disciplinary action, and labor negotiations conducted at such a meeting since these actions would be valid under §§ 2 and 3 of the Act, Pa. Stat. Ann. tit. 65, §§ 262-63 (Supp. 1975).


intended by the legislature to be broadly construed in the public interest.\(^{104}\) Such a position is especially justifiable when, as in the case of open meeting acts, the penalties are mild,\(^{105}\) prosecutions are virtually nonexistent, and conviction carries little if any moral (though certainly a political) stigma.

Even if a court insists upon using the general rule of strict construction in a criminal prosecution, it does not necessarily follow that such an approach will emasculate the Sunshine Law. A court need not strictly construe all sections of an act in favor of the criminal defendant; the court could strictly construe only the scienter requirement while according other sections of the Act a liberal construction to benefit the public interest. Although a court might find a sufficient \textit{actus reus} to justify conviction, it could acquit on the ground that the particular defendant had interpreted the Act so narrowly that he lacked the necessary knowledge of the illegality. The scienter requirement thus provides the Pennsylvania courts with a means of narrowly construing the Act in a criminal prosecution without establishing a dangerous precedent encouraging future secrecy.

4. The Initiation of Prosecution

Responsibility for prosecuting violators of the Act rests, as in all criminal prosecutions, primarily with the district attorney of each county;\(^{106}\) private individuals are limited to filing complaints with the district attorney for action by his office.\(^{107}\) This scheme gives rise to the danger that a politically motivated prosecutor will employ the criminal provision of the Act to harass his political opponents.\(^{108}\) Assuming that the prosecutor's political motivation can be established, of course, the accused would be entitled to a dismissal of charges on first amendment and equal protection grounds.\(^{109}\) Proving such discriminatory intent, however, is usually difficult,\(^{110}\) so that the presence of criminal sanc-


\(^{105}\) The Pennsylvania legislature limited the penalty to a $100 fine plus costs, Pennsylvania Sunshine Law § 8, Pa. Stat. Ann. tit. 65, § 268 (Supp. 1975); after considering that it did "not really want to send public officials to jail for violating the open-meeting provision," Pa. H.R. Jour. 1836 (July 24, 1973) (remarks of Representative Miller).


\(^{107}\) But see id. § 1409 (1956). Similar procedures are followed in all other states with criminally enforceable open meeting acts with the exception of Washington, which authorizes private prosecutions under the rubric of "civil penalty." Wash. Rev. Code Ann. § 42.30.120 (Supp. 1975).


tions in the Act does create a danger, limited primarily by not much more than the force of public opinion, that discriminatory prosecutions might indeed be launched by a politically motivated district attorney.

5. Evaluation of the Criminal Provision

The section eight criminal provision is probably not worth the problems inherent in it: the risk of convicting well-meaning agency members who remain at a meeting only to protect their vote after protesting an apparent illegality; the danger that courts will use the presence of penal provisions as an excuse for narrowly construing the Act; and the possibility of discriminatory and harassing prosecutions of public officials.

Although it is arguable that the criminal provision will encourage compliance with the Sunshine Law, the ambivalence of the public toward open meeting prosecutions and the rarity of prosecutions under other open meeting acts with criminal provisions belie this contention. The benefit derived from the section—the possibility that deliberate attempts to discourage public attendance by scheduling meetings at times and places inconvenient of access will be prosecuted—could easily be obtained, on a less haphazard basis, by a properly worded amendment.

B. The Invalidation Remedy

Section two of the Sunshine Law provides that "[n]o formal action shall be valid unless such formal action is taken during a public meeting." Read in conjunction with section nine, which authorizes commonwealth court and the courts of common pleas to render declaratory judgments under the Act, section two provides an additional means by which the Act may be enforced—through obtaining a declaration of invalidity, forcing the agency to hold a new meeting under procedures complying with the Act. Such an invalidation provision, however, can, if misused, disrupt the orderly administration of government business by casting the validity of official actions into doubt and work severe injustice on individuals relying in good faith on the validity of the official action called into question.

111 See text accompanying notes 97-101 supra.
112 See text accompanying notes 102-05 supra.
113 See text accompanying notes 106-10 supra.
115 See text accompanying notes 91-96 supra.
117 Id. § 9, Pa. STAT. ANN. tit. 65, § 269 (Supp. 1975).
Four problems arise in connection with the invalidation provision. Is good faith a defense to an invalidation action? What protection do innocent members of the public have after relying in good faith on official actions subsequently declared invalid? Must a declaration of invalidity be obtained before one proceeds to violate a statute or ordinance apparently valid on its face, or may one challenge the law in defense to a prosecution for its violation? And finally, how may invalid actions be subsequently ratified by the offending agency?

1. Good Faith as a Defense

Although the language of the Sunshine Law does not appear to admit of a "good faith" defense to an invalidation action, the potential for disruption of public business inherent in the invalidation remedy requires such a defense. A requirement that bad faith be shown to justify invalidation under the Sunshine Law would not unduly prejudice the public; citizens suffering a personal or financial injury would have standing to object on due process grounds so long as they could show the causal link between the injury suffered and the failure to receive notice. Invalidation would still be useful in "impress[ing] on the members of the agency the importance and vitality of the open meeting requirements," but such "impressing" should be unnecessary in the case of a good faith error unlikely to recur. That invalidation is basically an equitable remedy should allow the courts to exercise their broad equitable powers in invoking the good faith defense.

2. Invalidation Injury to Third Parties

Four classes of citizens are likely to be prejudiced by invalidation of agency actions: criminal defendants, government contractors, utility companies seeking rate increases, and property owners seeking zoning changes. Only the last of these classes, however, will be subject to serious prejudice as a result of invalidation rulings.

118 Governor Brown vetoed an early version of the California open meeting act (the Ralph M. Brown Act), CAL. GOV'T CODE § 54950-60 (West 1966), out of precisely such a concern. Comment, supra note 53, at 1664.


120 Comment, supra note 53, at 1665.

121 Invalidation would be enforced through a declaratory judgment, traditionally an equitable remedy. PA. STAT. ANN. tit. 12, § 836 (Supp. 1975), vests the same broad discretion in a court to issue a declaratory judgment as exists in equity.
Criminal defendants who relied in good faith on the apparent repeal of a criminal sanction should have little difficulty in asserting that reliance; traditional due process notice requirements should protect such defendants from the effects of an ambiguous agency action, and one would also expect an appropriate exercise of prosecutorial discretion in such cases.

Government contractors should have little to fear because few citizens will have an incentive to attack the awarding of government contracts even if liberal standing requirements are established for such an attack. And if rival contractors attack the award of a contract for having been made in a secret meeting, it should be necessary only to repeat the formal award, not the preparatory bidding, so that the result will remain the same at least where bidding has occurred.

Utility companies, similarly, are unlikely to suffer serious prejudice as a result of the invalidation of agency action granting a rate increase. The utility companies should have no difficulty in justifying a rate increase in a subsequent public hearing if such an increase is indeed warranted.

The chance of serious prejudice resulting from invalidation is greatest for property owners seeking zoning changes. Although there may be little objection to limiting a landowner's use of his property by declaring a zoning modification invalid when he has not materially altered his position in reliance thereon, there would appear to be grave inequity in cases of good faith, justifiable, detrimental reliance. Because it is doubtful that the doctrine of equitable estoppel could be used to protect the property owner in such a situation, this prejudice must be viewed as a serious problem with the invalidation remedy.

3. Choice of Forum for Asserting Invalidity

Section nine of the Sunshine Law provides that commonwealth court shall have jurisdiction over all suits against state agencies and that the courts of common pleas shall have jurisdiction over suits against other agencies. The section broadly authorizes the courts to enforce the Act by declaratory judgment, injunction, or any "other remedy deemed appropriate."

123 See generally text accompanying notes 30-37 supra.
124 Estoppel ordinarily cannot be invoked against a municipality or government agency acting in its governmental, as opposed to its proprietary, capacity. See Commonwealth v. Western Md. R.R., 377 Pa. 312, 105 A.2d 336 (1954).
126 Id.
An unresolved question is whether the validity of an action may be attacked indirectly, as an element of an action or defense over which common pleas court has jurisdiction, or whether the validity must be attacked directly in a suit against the offending agency. If indirect attacks are allowed, then the attacker will be able, at least in certain instances, to avoid the jurisdiction of commonwealth court and argue his case as part of an action in a court of common pleas. This forum shopping could frustrate the purpose both of section nine of the Sunshine Law and the Appellate Court Jurisdiction Act of 1970\(^\text{127}\) by allowing evasion of commonwealth court's jurisdiction over state agencies.

Suppose, for example, that a citizen objected to the procedures used in holding a Public Utilities Commission rate hearing. If he were to bring an action against the Commission, he would be forced to file suit in commonwealth court.\(^\text{128}\) If an indirect attack is allowed, however, he could simply refuse to pay the additional rate, and, when threatened with a termination of utility services, file suit against the utility company in the appropriate court of common pleas. The Commission, then, if it wished to defend its action, would be forced to intervene in the common pleas suit, section nine and the Appellate Court Jurisdiction Act to the contrary.

In such a case, where a litigant is obviously engaged in forum shopping, a court of common pleas should refuse jurisdiction over the suit, citing the policy of section nine and the Appellate Court Jurisdiction Act.\(^\text{129}\) Suppose, on the other hand, that a citizen violates a criminal ordinance or a regulatory provision enforceable through civil penalties. Should he be permitted in such an action to raise the invalidity of the ordinance as a defense? The legislative history of the Sunshine Law provides no answer to this question. A comparison of section two of the Sunshine Law, however, with the invalidation provision of New Jersey's open meeting act suggests that such an indirect attack on the ordinance might be allowed.\(^\text{130}\)

The relevant section of the New Jersey act reads: "Official action taken in violation of the requirements of this act shall be voidable in a proceeding in the Superior Court."\(^\text{131}\) This language implies that action taken in violation of the Act is not invalid or

\(^\text{127}\) PA. STAT. ANN. tit. 17, § 211.508 (Supp. 1975).
\(^\text{128}\) See note 127 supra & accompanying text.
\(^\text{129}\) PA. STAT. ANN. tit. 17, § 211.508 (Supp. 1975).
void from its moment of passage, but only once invalidated by the Superior Court as a result of an invalidation suit. The Sunshine Law, on the other hand, provides that "No formal action shall be valid unless such formal action is taken during a public meeting," implying invalidity from the very moment that the action is taken. Under this reading, the invalidity of an action can be raised in other litigation, at least so long as the litigant's purpose is not to frustrate the Act's grant of jurisdiction to commonwealth court. Because such a broad scope for the invalidation provision could result in the occurrence of the public ill which the ordinance or regulatory provision was designed to prevent without the agency's having been put on notice as to the invalidity of its action so that corrective measures could be taken, the provision should be more narrowly construed: only commonwealth court should have the power to invalidate agency action.

4. Ratification of Invalid Actions

That an agency has taken formal action at a secret meeting and that such action is hence invalid does not preclude the agency from ever again adopting the action; nor, once the agency realizes its error, is there any reason for it to await a declaration of invalidity before it can take steps to ensure the validity of its action. Some theory of ratification, therefore, must be developed to permit the validation of previously invalid actions prior to a judicial determination of invalidity. Such ratification, however, must not be so perfunctory as to constitute the "by-the-numbers" vote condemned by the Sunshine Law's principal sponsor.

The measures necessary to ratify an invalid action will depend upon the purpose that public meetings are seen as serving. If the purpose of public meetings is to inform the public of the workings of the government and the reasons for taking the action in question, then it will be sufficient that the agency reconsider the action in public and fully state its reasons for taking it. Dissenting members must, of course, be permitted to state their opposition and the reasons therefor, and a new vote should be required. Under this theory, however, the agency need not reconsider its position seriously.

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If, on the other hand, the purpose of the open meeting requirement is seen to be the obtaining of public input into the decisionmaking process, then a mere statement of the reasons for the agency's actions and a formal vote, both in public, will not suffice, and the agency members will be forced to reconsider their decision seriously in the light of the public views that the meeting elicits. In such a case, the courts would, in passing on the sufficiency of the ratification process, be required to determine whether or not agency members reconsidered their positions in good faith before voting. The legislative history refutes the latter view, so that no such subjective determinations are necessary on the part of a reviewing court.

The legislature clearly rejected the notion that the Sunshine Law was a “town meeting” rather than merely an “open meeting” act. Representative Knepper, the statute’s principal sponsor, explained,

It was never the intention of this bill to require any public agency to conduct a town meeting. . . . It is simply to guarantee the right of the citizens who elected those officials to know what those officials are doing, to make sure that they are not voting behind the scenes and simply coming out and rehearsing before the public.135

All that should be necessary for proper ratification of previously invalid action, then, is a public consideration of the action in sufficient detail to apprise the public of the nature of the action and the reasons therefor.

Whether a particular course of action is sufficient to ratify a previously invalid action is largely a matter of fact to be left to the decision of the trial court. The standard for determining sufficiency of ratification has usually focused on whether the subsequent public vote is merely “perfunctory”136 or a “sham.”137 Although such definitions leave a wide discretion in the fact-finder, the court should not determine whether the proceedings are a sham simply on the basis of whether the public was actually informed of the reasons for the agency’s action; the sufficiency of ratification should be judged solely by whether the methods employed were reasonably calculated to inform the public.

137 See 49 Texas L. Rev. 764 (1971).
5. Evaluation of the Invalidation Provision

As in the case of criminal penalties, the price of the invalidation remedy may exceed its actual value. As one court noted, "[T]here are enough prospective difficulties in the implementation of [the open meeting law] . . . without putting otherwise valid action at the risk of subsequent determination that the particular deliberations were required to be held under public scrutiny." The disruptive effect that invalidation might have on the conduct of public business have been noted by several commentators and indeed prompted the Governor of California to oppose such a provision in that state's open meeting act. The presence of an invalidation provision could serve to limit the scope of the Act's open meeting provisions themselves as the courts strain to find agency actions valid, and then apply the same definitions in suits for injunctive relief. Finally, the remedy could serve as a source of inequitable injury to innocent third parties justifiably relying on the agency action. The Act would by no means be emasculated if relief were limited to injunction and mandamus, as long as injunctions were framed broadly enough to discourage evasion.

III. Conclusion

The Pennsylvania Sunshine Law balances several conflicting interests. Although the very broad definition of agencies covered suggests that the paramount interest is the public's right to be informed, the various limitations on the Act's coverage illustrate countervailing policy considerations in the contexts of labor negotiations, disciplinary proceedings, emergencies, and the political process.

One commentator has asked whether his state's open meeting act may not be "a right without a remedy." Pennsylvania's Sunshine Law may be, on the contrary, a right with too many remedies. The criminal provisions, which will rarely if ever be enforced, may result in narrow construction of the entire Act and pose a threat in the hands of a politically motivated prosecutor. The invalidation provisions also endanger the stability

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139 See Note, supra note 3, at 1214; 49 TEXAS L. REV. 764, 776 (1971).
140 See Comment, supra note 52, at 1664.
141 See text accompanying notes 120-22 supra.
143 Id.
and predictability of public policy. This Comment has argued that the policy of the Sunshine Law can be adequately enforced merely through the invocation of injunction and mandamus relief, at least so long as the courts do not take an unduly restrictive approach to such relief.\textsuperscript{144} The principal enforcement mechanism, after all, must be the force of public opinion aroused by a "watchdog" press,\textsuperscript{145} and such public opinion, reinforced through judicial decree, can find expression as easily through injunction and mandamus as through any more drastic remedies. It is thus proposed that both the invalidation and criminal provisions of the Act be repealed. Alternatively, the use of the invalidation remedy should at least be limited to cases in which the agency members have acted in bad faith, and private parties injured as a result of their good faith reliance on the validity of an agency action should be allowed to recover damages against the agency or political subdivision concerned.

\textsuperscript{144} But see id.  
\textsuperscript{145} Statement of Governor Milton J. Shapp, quoted in The Philadelphia Inquirer, July 20, 1974, at 1, col. 2.