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Dissolution of Marriage—"Fresh Air in Family Court"

Hon. John R. Milligan†

Breakdown of Marital Relations—Dissolution*

Generally

Ohio continues to adhere to the historic tradition that marriage is to be fostered and preserved, and divorce is to be disfavored. Thus, statutes authorizing common pleas courts to grant divorces for certain grounds are to be strictly construed, and grounds must be strictly proved.1

The state has a vital interest in marriage and divorce as a matter of public policy. Divorce is not simply a private controversy between husband and wife. The family relationship is the basis of our society, and its preservation is a matter of state concern.2 Publication or circulation of any article "with the intent to procure or aid in procuring divorces, either in this state or elsewhere" is made a crime punishable by a fine of $25 to $500 and/or six months' imprisonment.3

The "Winds of Change"

The revolution in family law in Ohio is over, and not a shot was fired. In 1974, the 110th General Assembly adopted two sweeping reforms: (1) a living-apart statute4 and (2) a comprehensive divorce reform bill.5

Ohio joined the trend across the country to modify grounds for divorce.

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1 Kennedy v. Kennedy, 111 Ohio App. 432, 165 N.E.2d 454, 12 O.O.2d 201 (1959). The court quotes with approval the following statement: 'The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, and to prevent separation. This policy finds expression in probably every state in legislative enactments designed to prevent the sundering of the marriage ties for slight or trivial causes, or by the agreement of the husband and wife, or in any case except on full and satisfactory proof of such facts as the legislature has declared to be cause for divorce.... See 17 Am. Jur. 262; Accord, Nelson v. Nelson, 108 Ohio App. 365, 154 N.E.2d 653, 9 O.O.2d 318, 79 O.L.A. 82 (1959).


3 R.C. § 3105.02 and § 3105.99(A). It is yet to be determined whether "do-it-yourself" divorce kits fall into this class of prohibited activity.

4 R.C. § 3105.01(K), effective May 7, 1974; Amended Sen. Bill No. 348, 110th General Assembly (1974).

The presagers of change were New York and California, where each went from very limited divorce to divorce on grounds of irreconcilable differences. In the decade of the 1960’s, Ohio considered numerous amendments to its divorce laws, and the 1974 legislation culminates these efforts.

Living apart. Ohio follows some 34 states that have adopted living apart as a ground for divorce in one form or another. This was achieved by simply providing that “on the application of either party, when husband and wife have, without interruption for two years, lived separate and apart without cohabitation; and four years in the case in which one of the parties is continuously confined to a mental institution...” the court may grant a divorce.6 The Legislature intends that the divorce may be granted, notwithstanding the fault of the party requesting the divorce on this ground.

Dissolution of marriage. Am. Sub. H.B. 233, 110th General Assembly, is much more sweeping than simply establishing a new ground for divorce. Its features include:

1. Mandatory premarital counseling where juvenile court consent is required;7
2. Four-year living apart where a party is confined in a mental institution;8
3. Reduction in the residency requirement for divorce from one year to six months and changes in the venue requirements;9
4. Dissolution of marriage by approved separation agreement;10
5. Elimination of condonation and recrimination as defenses to divorce on any ground;11
6. Elimination of dower upon granting divorce or alimony-alone relief;12
7. Alimony may be granted, notwithstanding that the parties are

6 R.C. § 3105.01(K). In this sense, divorce on this ground is of the “no fault” variety. The critical issue is whether the parties have lived separate and apart without cohabitation for the required period of time. If they have done this, the legislature is satisfied that the marriage is finished “in fact” and should not be continued over the protestation of the adverse party.
7 R.C. § 3105.05
8 R.C. § 3105.01(K).
9 R.C. § 3105.03.
10 R.C. § 3105.61 et seq. For reasons not made clear, the legislature has determined to develop another label for a husband and wife who terminate their marriage. When done pursuant to this provision, the order of the court will not be a “divorce,” but a “dissolution” of marriage. (Will this new “label” result in people being called “single,” “divorced,” or “dissolved,” or “dissolutioned”?)
11 R.C. § 3105.10(B). The court, by this section, is granted enormous discretion. Thus, where both parties are guilty of misconduct sufficient to constitute ground for divorce, the court may grant a divorce to both parties, or one of the parties, even though the other does not want a divorce.
12 R.C. § 3105.10(D). If this section is interpreted to permit the elimination of the right of a spouse in real estate, upon the granting of an alimony-alone decree, it represents a significant departure from historical Ohio law.
living together at the time the complaint or counterclaim is filed; 13
(8) Granting alimony-alone upon simple "ill treatment by the adverse party"; 14
(9) Specific guidelines for determining and awarding alimony; 15
(10) Continuing jurisdiction in alimony-alone orders where periodic payments ordered; 16
(11) Grant authority to the court to make orders concerning the disposition, care, and maintenance of children of the marriage, notwithstanding denial of primary relief; 17
(12) Establish the "best interest" of children as the pole-star of custody awards; 18
(13) Provision for conciliation in domestic relations cases; 19
(14) Guidelines for modification of prior custody orders; 20
(15) Specific guidelines for determining child support. 21

Courts and analysts of marriage and divorce have been calling for these kinds of changes in the recent past and in numerous ways. 22

Ohio Legislation—Divorce, Alimony Alone, and Dissolution Distinguished

Domestic relations statutes are grouped in Chapter 3105 of the Revised Code. Courts have no authority to grant divorce or alimony alone separate and apart from enabling legislation. 23

There is no common law right of divorce, 24 and a divorce may not be granted as a result of agreement between the parties, 25 nor because the parties are irreconcilable. 26 Further, irreconcilable differences may

13 R.C. § 3105.17.
14 R.C. § 3105.17.
15 R.C. § 3105.18(B).
16 R.C. § 3105.18(C).
17 R.C. § 3105.21(B).
18 R.C. § 3109.04.
19 R.C. § 3105.091.
20 R.C. § 3109.04(B) and (C).
21 R.C. § 3109.05.
22 See Newell v. Newell, Com. Pl., 21 Ohio Misc. 239, 257 N.E.2d 90, 50 O.O. 2d 461, reversed and remanded 23 Ohio App. 2d 149, 261 N.E.2d 278, 52 O.O.2d 178, where the court held that a plaintiff was entitled to divorce, notwithstanding birth of an adulterine bastard child. "No fault divorce in Ohio"—see C. W. Rose, Jr., 31 Ohio St. Law Journal 52. Civ. R. 75 is a further expression of this mood.
23 Thus enactment of statutory grounds does not apply retroactively. Scott v. Scott, 6 Ohio 534, where new ground of habitual drunkenness held not to apply to cases occurring before its passage.
not justify a divorce even where both parties request divorce. Mental incompetency is not a ground for divorce.

The essential difference between an action for divorce and one for other relief is that the former terminates the marriage contract and relationship absolutely and totally, while the latter authorizes orders of alimony during separation without terminating the marriage. Divorce in Ohio is akin to the ancient divorce "vinculo matrimonii," although the causes are much broader than under English law.

Alimony-only decrees are more akin to the ancient divorce from "bed and board," divorce "a mensa et thoro." Sometimes a decree of alimony-only, or alimony-alone, is incorrectly called a "legal separation." In addition to the right to grant alimony-only in such action, the court has the same power as in divorce cases to grant temporary relief pending determination of the issues of the case, to grant temporary custody and make orders of support and maintenance, and to grant custody, visitation and orders of support.

Annulment distinguished. An annulment of a marriage may be distinguished from both divorce and alimony-only in that in an annulment, the court determines that for some specific cause, ground, or impediment, no legal marriage exists or existed.

Dissolution of marriage distinguished. In its effect, a dissolution of marriage will be the same as a divorce, i.e., it will terminate the marriage. It may be distinguished from an annulment in that the annulment relates back to the time of the marriage, whereas the dissolution will acknowledge the validity of the prior marriage.

PROCEDURE

The non-adversary remedy of dissolution of marriage, established in
1974, is unique in domestic relations practice. It may be considered comparable to the proceedings for compromise in a bastardy action. 37

The process contemplates agreement between the husband and the wife at every stage of the proceedings. 38

**Jurisdiction of Subject Matter—Dissolution of Marriage**

It seems clear that the Legislature has now established a continuum of ways in which parties may deal with termination of their marriage. The quickest remedy is when parties agree and file a joint petition for dissolution of marriage. If the parties do not agree, either of them is left to the routine, historic ground for divorce in the adversary process. Obviously, this process takes longer to conclude. The ultimate option is for the parties to separate and seek a divorce on the grounds of living apart for two years.

It is submitted that a standard divorce proceeding would abate upon the filing of a petition for dissolution. By like token, if a petition for dissolution has been filed and either party thereafter files a complaint for divorce, such complaint would act as a repudiation of the dissolution process and would abate such process.

**Consolidation of Pending Cases—Dissolution of Marriage and Divorce**

Historically, most adversary divorce proceedings have been resolved by the execution of a separation agreement during the pendency of the action, and the proceeding in the cause is an uncontested divorce. The provisions for dissolution of marriage offer a potential alternate and less offensive way of solving such questions.

It is submitted that the parties may file a petition for dissolution of marriage in the same case in which a divorce is pending, or such petition may be consolidated with the pending divorce action. Thereupon, the court may proceed to treat the matter as a dissolution of marriage and grant relief without putting either of the parties through the "charade" of producing uncontested evidence of a ground for divorce. This procedure will preserve a higher level of dignity in the relationship between the parties and should be encouraged. 39

**Jurisdiction Over Parties—Dissolution of Marriage**

One of the spouses must have been a resident of Ohio at least six (6) months immediately before filing the petition. 40

**Courts of Jurisdiction—Venue**

The enabling provisions establishing procedure for dissolution of marriage recite only that the matter may be heard by the "court of
common pleas." It may be contemplated that divisions of domestic relations, separately established, will be expected to hear such cases.

**Constitutionality and retroactive application.** It is submitted that the dissolution of marriage provisions are constitutional and that they may be applied to states of facts existing on the date the act becomes effective September 23, 1974.

Venue for purposes of processing a dissolution of marriage is the same as for other civil actions. As a practical matter, however, since the action depends upon agreement of the parties, it will most often be venued at the place of residence of one of the parties.

It is submitted that the procedure will be properly venued in any county where the parties have sufficient contacts pursuant to Ohio Rules of Civil Procedure.

**Parties**

The parties to this procedure are the husband and the wife, and the statute contemplates that both of them will be involved at every stage of the proceeding, including the final hearing. There will be no such thing as dissolution of marriage by default.

The parties are designated as "defendants" in the action.

**Petition**

In what appears to be a continued disagreement between the Legislature and the Supreme Court over the use of the word "petition" or "complaint," the Legislature denominates the written document by which the action is commenced a "petition for dissolution of marriage."

Both parties (defendants) to execute. The husband and wife both must execute the petition.

By a curious legislative fiat, the husband and wife, in a proceeding to dissolve a marriage, are each denominated "defendant."

Inasmuch as both spouses are petitioning the court for relief, it is submitted that a proper style for the case will be: "In the Matter of Mary Brown and John Brown."

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41 R.C. § 3105.16
42 R.C. § 2301.03.
44 R.C. § 3105.62.
45 Civ. R. 3 will apply. See R.C. § 3105.62.
46 R.C. § 3105.63.
47 R.C. § 3105.62.
48 R.C. § 3105.62.
Dissolution of Marriage—Petition—Form

COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION

COUNTY, OHIO

In the matter of:

PETITION FOR DISSOLUTION
OF MARRIAGE

1. and , defendants herein, say that they were married at , on the day of 19__.

2. The parties have minor children born issue of this marriage, to wit: , aged ; , aged ; and , aged .

3. The parties have entered into a Separation Agreement providing for a division of all property, custody of the minor children, alimony, child support, and visitation rights—said Agreement being a full and complete settlement of all issues between them. Copy of said Separation Agreement is identified as “Exhibit A,” attached hereto, and incorporated herein as if fully rewritten.

4. The parties pray that, upon hearing, the Court finds said Separation Agreement to be fair and equitable; to have been voluntarily entered into by and between the parties; and that their marriage be dissolved by law.

[Signature]

Defendant-Wife

[Signature]

Defendant-Husband

WAIVER OF SERVICE OF PROCESS

Each of the parties hereby voluntarily waives service of process in this cause and voluntarily enters his appearance, pledging that he will appear at any and all hearings scheduled by the court during the pendency of this action.

Dated this day , 19__.

[Signature]

Defendant-Wife

[Signature]

Defendant-Husband
Inasmuch as the essence of proceedings to dissolve a marriage is a valid separation agreement between the parties, it follows that each of the parties must be of full capacity to enter such contract. It is submitted that one of the primary responsibilities of the court upon hearing such cases will be to determine whether each of the parties has the capacity to understand the nature and consequences of his agreements.

It is not difficult to speculate about problems that will be encountered when one of the parties to a dissolution of marriage proceedings is incompetent. It is submitted that the remedy is personal to the party to the extent that a legal representative, such as a guardian, may not file such an action. Further, if a party is incompetent at the time of the hearing, the court will likely find that there is no valid separation agreement forming the basis of a decree of dissolution of marriage.

The enabling legislation makes no reference to the age at which married persons may enter into a separation agreement as a part of dissolution of their marriage. It is submitted that the same criteria should apply as in compromise of paternity cases, where the court is obliged to diligently inquire into the fairness of the agreement and the extent of voluntariness of the under-age party.

It is submitted that, by the filing of a joint petition, both parties submit themselves to the jurisdiction of the court, and no formal service of process is necessary. To avoid any possibility of error on that basis, the petition form should contain a waiver of summons and voluntary appearance. 49

The petition is the only pleading contemplated, and no other pleading would be appropriate, unless it be a motion to dismiss, containing disclaimer of the agreement. In that case, the court should summarily dismiss the cause.

This procedure, being consensual, does not contemplate any ancillary or temporary relief, and the parties should provide for the care and support of each other and the children during the pendency of the action in their separation agreement.

The most critical facet of this procedure is the development

49 R.C. § 3105.62 and § 4468.
and execution of an appropriate separation agreement. It may be contemplated that attorneys will devote additional effort to the drafting of comprehensive separation agreements.

The dissolution of marriage process requires that the separation agreement be incorporated with the petition to be filed with the clerk of courts.50

Although it is the current practice, in many divorce cases, to simply refer to the agreement in the judgment entry of the divorce, it is submitted that this practice will not be possible where the remedy is dissolution of marriage. This may be unfortunate, particularly as relates to those agreements where public disclosure is contra-indicated.

The statute contemplates that, during the maximum ninety-day waiting period, the parties may execute and file an amended separation agreement. It would appear that such agreement may be filed without any further amendment of the petition for relief.51

The separation agreement is to be incorporated with the judgment of dissolution. To this extent, it would appear that the separation agreement must appear twice in the record of the case.52

The court, after granting a decree of dissolution, has "full power to enforce its decree, and retains jurisdiction to modify all matters of custody, child support, visitation, and periodic alimony."53 It thus appears that the parties, by their agreement, cannot oust the court of its continuing jurisdiction, both as to enforcement and modification in the limited areas of child welfare and periodic alimony.

Motion. The proper manner by which the continuing jurisdiction of the court should be invoked is the same as in a divorce: by motion filed in the original cause.54

The use of the investigative resources of domestic relations court takes on added significance with the new procedure for dissolution of marriage. The elimination of an adversary stance by the parties opens the possibility—indeed the probability—that some parents will execute separation agreements contrary to the best interests and welfare of their children. In this context of lack of advocacy, the investigator may be the only person who can identify for the court areas of improper agreement or planning.55

Hearing

A clear advantage of this new procedure, in addition to the value of

50 R.C. § 3105.63.
51 R.C. § 3105.63.
52 R.C. § 3105.64.
53 R.C. § 3105.65(B).
54 Civ. R. 75(J).
55 Civ. R. 75(D) and (P).
the parties' agreeing, is the time within which the matter can be concluded.

Not less than 30 nor more than 90 days after the filing of the petition, the hearing must be had.\textsuperscript{56}

**Conciliation.** The time for hearing can be extended to the extent conciliation process is initiated after the filing of the petition. In that event, the hearing may be postponed an additional 30 days from the date of referral.\textsuperscript{57}

It will be necessary for the court to notify the parties of the time and date of the hearing upon the petition for dissolution. It is submitted that this notice should conform to the practice of notifying parties of the hearing for divorce.\textsuperscript{58}

The statute provides little in the way of guidelines to the court about the conduct of the hearing upon the petition to dissolve the marriage. It is submitted that the following items should be inquired into by the court of each of the parties, in the presence of the other, in open court, upon a record:

1. Each party should be placed under oath and questioned by counsel or the court;\textsuperscript{59}
2. The court should receive the report of the investigator;
3. The court should receive the separation agreement and any amended agreement;
4. The court should satisfy itself, from questioning, that each of the parties is competent and understands the nature and consequences of his acts, together with the meaning of his agreement;
5. The court should determine whether each of the parties, by answer under oath, is satisfied with the terms of the agreement or amended agreement;
6. The court should determine from each spouse whether he seeks a dissolution of the marriage;
7. The court should determine whether the execution of the separation agreement, or amendment, was voluntarily entered into.\textsuperscript{60}

May the court entertain the testimony of each of the parties separately, or must they both be present during the testimony of each? The statute does not make this clear, but it would seem that the court, on motion of either party or upon its own motion, could order testimony separate and out of the presence of the other party. In such

\textsuperscript{56} R.C. § 3105.64.
\textsuperscript{57} R.C. § 3105.091.
\textsuperscript{58} See Civ. R. 75(L).
\textsuperscript{59} R.C. § 3105.64(B) contemplates "testimony of both spouses."
\textsuperscript{60} R.C. § 3105.64 and § 3105.65.
case, it would be advisable for counsel for both parties to be present during the testimony of each.61

The code is not clear as to whether the parties must be living separate and apart at the time of the filing of their petition, or at least at the time of the hearing on the petition. Although the Legislature went to considerable effort to provide that living separate and apart was not a necessary precondition of divorce or alimony relief62 they made no provision to this effect as to the dissolution of marriage.

There remains the question of whether the parties can, for any purpose, enter into a valid separation agreement without immediately and physically separating.63 Until this provision is amended, it is submitted that the parties must "immediately separate" and remain separate during the proceedings.

At the conclusion of the hearing, the court has the responsibility of determining whether it should grant the requested decree of dissolution of marriage.

If, upon the testimony and the report of the investigator, the court determines that one of the parties does not continue to request dissolution, or the separation agreement is not satisfactory to each spouse, or the provisions of the agreement are not approved by the court, the court must dismiss the petition and refuse to validate the proposed separation agreement.64

It is submitted that the court does not have the authority to order modification of the submitted separation agreement or its amendment at the time of hearing the petition. The court is limited to approving or rejecting the petition and agreement.

As a practical matter, under the circumstances, the parties may well be given a choice by the court as to whether or not they will voluntarily amend the agreement to conform to the court's wishes as to its provisions.65

If the court approves the agreement, it must grant a decree of "dissolution of marriage," incorporating the separation agreement.

Effect of decree. The judgment of dissolution of marriage is to have "the same effect upon the property rights of the parties, including rights of dower and inheritance, as a decree of divorce."

61 Private or separate inquiry may be desirable where there is some question about the voluntariness of a party's acquiescence in the agreement—or a question of undue influence.

62 See R.C. § 3105.17 and § 3105.17(D), where "separation in consequence of ill treatment" was eliminated.

63 See R.C. § 3103.06, providing that a husband and wife cannot, "by any contract with each other, alter legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation."

64 R.C. § 3105.65.

65 R.C. § 3105.64.
CONCILIATION

Domestic relations courts have been reluctant to become involved in marriage counseling or referral or diversion from the justice system. The traditional view is that the court's responsibility is to process those matters properly brought before the court upon legally sufficient complaint with fairness and justice. Although most judges are sensitive to the tragic implications of divorce and will often allow the parties opportunities to seek help in resolving marital conflicts, they are reluctant to become involved, as a court, in social-work type programs of case-work service. Thus, the provisions of R.C. Section 3117, calling for conciliation judges and conciliation process, have not been implemented since their passage in 1969.66

The 1974 passage of comprehensive revision of divorce laws, making termination of marriage more permissive and minimizing the effect of fault, calls for increased recognition of the need, in many cases, for marriage conciliation or counseling. The court is given the authority to order conciliation during the pendency of the action for a period not to exceed ninety (90) days.67 The critical question will be whether domestic relations courts around the state are willing to broaden their concern and implement these new provisions. It is submitted that the role of the court has been vastly changed by these revisions. The court will become more of a facilitator or engineer of the process by which marriages in trouble are dealt with by the public and private sector of society. Domestic relations judges now have an excellent opportunity to put into practice some of the ideas they have long had for dealing realistically with troubled marriages. History will write the verdict.

The new provisions for conciliation orders apply only to pending actions. In pending actions for divorce, annulment, or alimony-alone, the process may be initiated only after 30 days from the service of summons or first publication of notice.68 Notice that this is generally after answer day so that it will be necessary for the adverse party to file his answer before the court can order conciliation referral. It may have been the

66 R.C. ch. 3117, Conciliation of Marital Controversies.
67 R.C. § 3105.091, a new section, provides:
(A) At any time after thirty days from the service of summons or first publication of notice in an action for divorce, annulment or alimony, or at any time after filing a petition for dissolution of marriage, the court of common pleas, upon its own motion or the motion of one of the parties, may order the parties to undergo conciliation for the period of time not exceeding ninety days as the court specifies. The order requiring conciliation shall set forth the conciliation procedure and name the conciliator. The conciliation procedures may include without limitation referrals to the conciliation judge as provided in Chapter 3117, of the Revised Code, public or private marriage counselors, family service agencies, community health services, physicians, licensed psychologists, or clergymen. The costs of any conciliation procedures shall be paid by the parties.
(B) No action for divorce, annulment, or alimony, in which conciliation has been ordered, shall be heard or decided until the conciliation has concluded and been reported to the court.

68 R.C. § 3105.091.
intent of the legislature that this delay would permit the parties to get into court and state their respective claims before referral. As a practical matter, it might have been better had the referral been allowed before answer date, perhaps at the time of temporary hearings, and the time for filing responsive pleadings to be extended during the period of referral.

The 30-day limitation does not apply to referral of the parties for conciliation where the action is one for dissolution of marriage. The author questions whether there will be many such referrals in these kinds of cases, since the maintenance, continuance, and conclusion of the action depends upon continued mutual agreement of both parties.

CONCLUSION*

DIVORCE BY AGREEMENT, still an "infant" in Ohio, comes as a breath of fresh air into an area of law where deceit, dishonesty, blackmail, and hypocrisy had become the rule rather than the exception.1 The uncontested divorce virtually required many persons to commit unchallenged perjury in order to get divorce relief. When it is realized that domestic relations cases account for the second largest category of cases of citizen contact with the justice system (traffic cases rank first), it can only be concluded that scores of people left the courtroom with a diminished respect for law and the system.2

A judge hearing dissolution-of-marriage cases now finds himself dealing with reality in a situation where integrity can be demonstrated and preserved. With a little imagination and human concern, it is possible to create an atmosphere of compassion and wisdom, particularly as relates to potentials of conciliation and provision for children. Although the fondness of the author for the procedure may be the result of "young love" and the procedure might eventually lead to the same kind of feelings as previously held about divorce, it is submitted that the greatest danger in the system is social, not legal. The entire fabric of marriage is becoming "biodegradable," i.e., an increasing portion of the population rejects marriage as a lifetime commitment. Easier and quicker legal methods of terminating marriage facilitate this notion and allow proliferation of the modern practice of "serial monogamy."3

* The following text is a separate contribution by Judge Milligan, not part of the reproduction from WEST'S OHIO PRACTICE, FAMILY LAW volumes 13 and 14, Copyright 1975, by West Publishing Company.

2 A courthouse elevator operator used to make the point graphically. When the elevator would stop on the third floor, on the way to divorce court on the fourth, he would say, "Third floor, where the truth gets off."
3 Serial monogamy is the practice of being married to only one person at a time, but in sequence.
It seems clear that the Ohio legislature prefers dissolution as the method of terminating marriage. Such cases are granted priority in assignment and are to be relatively uncomplicated. The role of the judge is to be monitor and overseer, rather than decision-maker, as in matters of advocacy. This preference is consistent with the prevalent psychological notion that peoples' actions are always more committed and accepted if they are the result of agreement, as opposed to imposed or inflicted judgment. I believe several steps are necessary by a court that seeks to move its domestic relations caseload in this direction:

1) A clear judicial pronouncement of preference for this procedure with the local bar will set the stage for implementation.

2) Development of simplified methods of filing, investigation, assignment, and hearing will encourage its use. In Stark County, we are finding that automatic assignment of the case exactly six (6) weeks from the date of filing at 10:00 a.m. puts the matter on a track that eliminates much extra effort by court employees and attorneys. (If the assigned date falls on a holiday, the next regular court day at the same time is the hearing date.) If such trial date is inappropriate, the attorney need only present a judgment setting a different date within the statutory limit prior to the hearing day. If there is no such judgment, the case is automatically dismissed if the parties fail to appear.

3) Uncontested divorce cases should become the exception rather than the historic rule. Most uncontested cases are the result of agreement between the parties. When agreement is reached in a pending divorce case, the better procedure is to allow a petition for dissolution (or amended petition, if you like) to be filed, without additional deposit for court costs, and to be heard upon the same automatic hearing date as if filed originally as a dissolution-of-marriage action. If courts allow counsel to continue the comfortable practice of a separate, early assignment of uncontested cases, dissolution will not be appropriately used. It makes little sense to allow a divorce to proceed with only one party present, claiming an agreement under circumstances of fault; and require both to be present and interrogated in a dissolution, where fault is not an issue. In Stark County, we have resolved this problem by holding to the general proposition that uncontested cases are a thing of the past; that all divorce cases are to be decided as nearly as possible in numerical order; and that divorce cases may be “advanced” only for specific, good cause shown. 

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4 See Ohio Rev. Code Ann. § 3105.64 (Baldwin Supp. 1974), fixing hearing between 30 and 90 days.

5 Most courts have determined to allow amendment of a divorce case to one for dissolution, but have refused to allow a dissolution to be amended to a divorce. The theory is that the remedies available in dissolution cases are specific: either grant, continue for not more than 90 days, or dismiss. Ohio Rev. Code Ann. § 310.65 and § 3105.091 (Baldwin Supp. 1974).

6 Reasons for advancing such a divorce may include unavailability of a party, health of a party, employment or custody exigencies.
4) The dissolution hearing must be held with dignity and a sense of purpose and concern. At this point, our court has adopted the following general format: counsel introduces the parties to the court, identifies the case, and represents that the statutory, jurisdictional conditions have been met and that he believes the parties are still requesting a dissolution of the marriage. Thereupon, the judge administers an oath to the parties, who are allowed to remain at counsel table. The judge questions each of the parties to whatever extent he deems necessary. Generally, the questions go to the fact of separation, agreement, disclosure, voluntariness, fairness to the parties, fairness to children, and whether the agreement deals with all of the issues in the marriage. In every event, the judge should carefully advise the parties of the availability of marriage counseling and his willingness to postpone the case for up to ninety (90) days for this purpose. (Occasionally, the parties will surprise counsel by asking for such postponement.) If the judge has any reservations about any of the matters of inquiry, he should continue the case and give the parties an opportunity to come to a full and complete understanding. The bar and bench of Ohio have been given a valuable legal tool and remedy for dealing with the tragedy of marital breakdown. Conscientious use of it should raise domestic relations proceedings to a new level of integrity.
SPACE JOINT VENTURES: THE UNITED STATES AND DEVELOPING NATIONS*

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TWO DEVELOPMENTS STAND OUT as one looks at man's involvement with space. First, in all of his continually expanding activities, man has placed himself at the focal point. He has always considered that space activities must serve the needs and interests of mankind. Second, there has never been any doubt that man's activities in space are subject to the rule of law.

Moreover, all of the forces of the social complex have allowed man by the mid-1970's to move beyond mere exploration and into an era of beneficial and man-oriented exploitation of the space environment. The natural consequence was the birth of a host of new and challenging personal interrelationships—the grist of the lawyer's mill.

CHARACTERISTICS OF THE SPACE ENVIRONMENT JOINT VENTURE

At the outset it is necessary to ask: What is meant by the term space environment joint venture (SEJV)? For present purposes, it can be considered as a form of international cooperation which involves more than the provision by one state of opportunities to foreign states for participation in space activities planned and implemented by the providing state. Thus, a general invitation by the United States to a single foreign state or to foreign states to provide suggestions concerning space activities or experiments to be conducted on a United States space object would not constitute a SEJV. Rather, a SEJV requires substantial participation by way of planning, and implementation of those plans based on a formal or informal agreement, in which the parties seek collective mobilization of a portion of their respective capabilities, resulting in the exploration and use of the space environment for peaceful purposes. Such an approach emphasizes more than casual collaborative efforts in practical space oriented undertakings.

A SEJV may result from bilateral arrangements between two states or between a state and a public international organization. It may also be the product of a multilateral arrangement, whereby the members of a public international organization are given the special function of allocating time, efforts, and resources to a specific space venture, or by the creation of a public international organization to engage in generalized space activities. The role of the United Nations Development Program (UNDP) in supporting and assisting a state in the development and

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conduct of its space program offers an excellent example of such multilateral and multinational activities. A second illustration would be the multi-membered European Space Research Organization (ESRO), which is now being replaced by the European Space Agency (ESA).

THE HISTORY

Proposals for bilateral SEJVs date back to 1962. In March of that year, President Kennedy and Premier Khrushchev considered a United States-Soviet joint venture to the moon; the proposal was later repeated by Ambassador Adlai Stevenson in the United Nations on December 2, 1963. This first moon proposal was followed by an intergovernmental agreement in Geneva, on June 8, 1962, between A. A. Blagonravov of the Soviet Academy of Science and Hugh L. Dryden of NASA. This agreement covered joint cooperation in three space activities, namely meteorology, a world geomagnetic survey, and satellite telecommunications.

INVENTORY OF BILATERAL AND MULTILATERAL SPACE ENVIRONMENT AGREEMENTS

An inventory of international agreements affecting major space resource states has disclosed, so far as SEJVs are concerned, an interesting...
pattern. Such international agreements make provision for fairly intensive international cooperation in a variety of fields, including joint launches, joint scientific and technological activities, as well as supporting activities frequently restricted to ground involvements (e.g., agreements relating to tracking facilities). Leaving aside the historically numerous international agreements relating to tracking facilities, which have involved as many as 100 bilateral commitments, the most universal of the space agreements have been:

1. The Agreement Relating to the International Telecommunications Satellite Organization of August 20, 1971,\(^5\) which had entered into force among 86 states as of January 1, 1974;

2. The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of January 27, 1967,\(^6\) which had been signed by 90 states as of May, 1974;

3. The Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space of April 22, 1968,\(^7\) which had been signed by 79 states as of May, 1974;

4. The Convention on the International Liability for Damage Caused by Space Objects of March 29, 1972,\(^8\) which had been signed by 71 states as of May, 1974.

Aside from the tracking facilities agreements, a current count indicates that the United States is now a bilateral treaty partner with only 17 other nations in space matters. These are Argentina, Australia, Brazil, Canada, Denmark, France, Federal Republic of Germany,\(^9\) India,\(^10\)

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\(^5\) 14 U.S.T. 1278, T.I.A.S. No. 5431.
\(^6\) 18 U.S.T. 2410, T.I.A.S. No. 6347.
\(^7\) 19 U.S.T. 7570, T.I.A.S. No. 6599.
\(^8\) T.I.A.S. No. 7762. See also 68 DEP'T STATE BULL. 949 (1973); 1 J. SPACE L. 86 (1973).
\(^9\) Two projects are being conducted by the United States and Canada. The first is a Communications Technology Satellite (CTS), which has also been identified as the Cooperative Applications Satellite (CAS-C). This program was undertaken to develop broadcasting technology, which will make satellite communications with small ground stations feasible in the 12 GHZ frequency band. The second is the Transmitter Experiment Package (TEP), which has been in development since 1971. Canada is responsible for the space object and NASA is responsible for the basic technology. NASA also has the responsibility for the Delta launch vehicle, and for placing the space object into geostationary orbit. Canada has the responsibility for the operations of the object after launch. NASA Authorization Hearings for 1975, supra note 1, at 676-78.

\(^10\) In 1966, the United States and Germany entered into an agreement for the Helios solar probe. Under the terms of this agreement, the United States supplied a part of the science instrument payload, provided technical support, and undertook to launch two space objects. The United States and Germany have also agreed to cooperate in the launch and use of the Aeros-B space object, which is designed for aeronomy experiments. NASA Authorization Hearings of 1972, supra note 1, at 741. The Aeros-B space object was proposed, designed, built, instrumented and funded by Germany. It was one of the ten NASA 1972 international space missions.
Italy, Japan, Malagasy Republic, the Netherlands, Norway, Spain, Sweden, the United Kingdom, and the U.S.S.R. In some instances there is more than one such bilateral arrangement with such countries.

The United States has entered into special multilateral agreements with 29 national treaty partners. The United States has also entered into a multilateral agreement where its partners are a nation, e.g., Canada, and an international organization, e.g., ESRO. This particular venture calls for the use of the Application Technology Satellite-F (ATS-F) space in which "both sides assumed financial responsibility for their contributions to joint projects." H. Reis, U.S. Reviews Year's Activities of the United Nations in the Field of Outer Space, 69 DEP'T STATE BULL. 231 (1973) [hereinafter cited as Reis]. For recent statements concerning United States cooperative efforts in the space field, see M. Evans, U.S. Cosponsors Resolution Setting 1974 Work Program for U.N. Outer Space Committee, 70 DEP'T STATE BULL. 64 (1974); W. Bennett, Jr., United States Discussed Major Issues Before U.N. Outer Space Committee, 71 DEP'T STATE BULL. 323 (1974).

In 1969, the United States and Japan entered into a Space Cooperation Agreement involving the supply by the United States to Japan of space hardware and technology so that Japan could develop a space launch vehicle allowing for scientific and applications satellites by 1975. See NASA Authorization Hearings for 1975, supra note 1, at 740.


These discussions and the agreements subsequently arrived at, resulted in the joint Apollo-Soyuz Test Project (ASTP), which is scheduled for a July, 1975, launch date. Since 1972, this United States-Soviet Union group on space has dealt with medical research, on-board equipment and regimens, common laboratory and pre-flight and post-flight procedures for determining the physical condition of flight crews. Moreover, in the space science and application areas, there has been:

Continuing exchange of operational and scientific weather data, coordinated oceanological studies, a joint experiment in coordinated microwave measurements in the Bering Sea, efforts to define projects in the study of the national environment, interplanetary data exchanges, physiological data obtained from manned spacecraft exchanges, lunar sample scientist visits, and a joint meeting of lunar cartographic experts to consider basic principles for compiling lunar maps.

The combinations include: (1) two other nations—Australia and Italy; Canada and Mauritania; (2) five others—India, France, Japan, the Federal Republic of Germany, and the Soviet Union; (3) six others—Argentina, Australia, Brazil, France, Italy, and the Federal Republic of Germany; Australia, the Federal Republic of Germany, France, Indonesia, Japan, and the Netherlands; Argentina, Australia, Brazil, France, Japan, and Spain; (4) seven others—Denmark, the Federal Republic of Germany, France, Norway, Sweden, the United Kingdom, and the Soviet Union; (5) nine others—Belgium, Denmark, the Federal Republic of Germany, France, Italy, the Netherlands, Spain, Switzerland, and the United Kingdom, and (6) eighteen others—Argentina, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, France, Guatemala, Guyana, Haiti, Mexico, Paraguay, Peru, Spain, the United Kingdom, Uruguay, and Venezuela. See 2 J. SPACE L. 53-63 (1974).
object in order to demonstrate the practicality of real time communications among central ground stations, aircraft, and maritime vessels by satellite. The experiment has been designated the Position Location and Communication Experiment (PLACE). 15

In addition to the August, 1973, spacelab-space shuttle treaty between ESRO-ESA and the United States, 16 there are agreements between the United States and other international organizations. In 1972, for example, NASA "[l]aunched six satellites for international organizations and other governments on a nonprofit cost basis." 17

A number of treaty arrangements exist among states relating to space activities to which the United States is not a party. There are special separate agreements between the Soviet Union on the one hand and France, Poland, and Romania 18 on the other. The Soviet Union's multilateral treaty partners include Czechoslovakia, the Democratic Republic of Germany and Poland. 19 India has as separate treaty partners Australia and France, and also the Federal Republic of Germany and France. 20 India, as will be mentioned later, has entered into a space oriented agreement with UNDP. Hungary's space partners consist of France, the World Meteorological Organization (WMO), Intercosmos, and Intersputnik. 21 Colombia also has an agreement with WMO. 22 ESRO had entered into bilateral agreements with Canada, the Federal Republic of Germany, India, Israel, and the United Kingdom.

NATURE OF UNITED STATES COMMITMENTS

The United States has entered into international agreements containing general principles of space law, the principles of which have made it more feasible to formulate specific agreements involving joint ventures. Before proceeding to a more detailed analysis of the commitments contained in these specific joint venture treaties, it is advisable to identify the critical provisions of the 1967 Principles Treaty 23 which set the tone for the more particularized agreements. 24

International cooperation in space activities is mandated by Article I of the treaty. This article establishes as a norm of positive international

15 NASA Authorization Hearings for 1975, supra note 1, at 671.
17 See Reis, supra note 10.
21 Id.
22 Members of the United Nations are called upon to make annual reports to that organization on their respective space activities. See e.g., U.N. Doc. A/AC.105/123 (1973).
law, the proposition that "[t]he exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic and scientific development, and shall be the province of mankind." \(^{28}\) This is a new and challenging concept and its operational import is just now beginning to be seen.

The foregoing provision is linked to other provisions contained in the treaty which mandate, as in Article III,\(^ {28}\) that parties carrying on activities in the exploration and use of the space environment, will act "in the interest of... promoting international cooperation and understanding," and in Article IX, which provides that the "[p]arties shall be guided by the principle of cooperation and mutual assistance..."\(^ {27}\)

Moreover, Articles X and XI provide for the promotion of international cooperation by allowing parties to observe the flight of space objects launched by a state or to be made aware of the "nature, conduct, locations and results" of a state’s peaceful exploration and use of the space environment.\(^ {28}\) At the very least these provisions suggest the duty of international cooperation in order that all countries may benefit in man's increasing exploitation of the space environment. Additionally, these provisions contain the expectation that such gains will flow to countries irrespective of their degree of economic and scientific development.

When one takes into account the foregoing commitments relating to cooperation and sharing in the results of space activity, as well as the political expressions contained in the United Nations General Assembly Resolutions relating to national sovereignty over natural resources,\(^ {29}\) there may be some reason to believe that even the non-space resource states have an inchoate interest in a share of the benefits derived from space activity. One way for such states to obtain such benefits is through the implementation of the general concept of "international cooperation."

**SPECIAL PROBLEMS OF THE LESS DEVELOPED COUNTRIES (LDCs)**

The United States has cooperated with states in an effort to share the scientific and technological information gathered in its space activities. Some 50 foreign investigators were invited to participate in the lunar sample program, and some of these were from the LDCs. Indeed, when plans were being made for the Earth Resources Technology Satellite

\(^{26}\) Id.  
\(^{27}\) Id.  
\(^{28}\) Id.  
requests were affirmatively solicited from many nations concerning the gathering of data. Among the experiments proposed by scientists from the LDCs were land use and soil erosion in Guatemala and the hydrologic cycle of the Santa River Basin in Peru. In addition to the requests received from the more advanced nations, the following additional LDCs also submitted proposals: Brazil, Chile, Colombia, Ecuador, India, Republic of Korea, Peru, and Venezuela. Some 23 countries supplied more than 100 participating scientists for the ERTS-1 program, with each country obliged to fund its own experiments.

The United States has established few SEJV treaty contacts with the LDCs. The participation by the United States with 18 other states, identified in the preceding inventory, consisted of a joint evaluation of natural resources in Argentina. When one turns to an identification of the LDCs with which the United States has embarked on SEJVs, it is possible to find but seven such arrangements. The nations involved are Brazil, the Dominican Republic, Guatemala, Guyana, Haiti, India, the Malagasy Republic, and Mauritania. Moreover, the areas of joint involvement are relatively unsophisticated and extremely restricted. For example, the principal purpose of the treaty with the Malagasy Republic was to allow for the installation of a tracking station for Skylab. Yet, the United States may be viewed as having taken the lead in such activities since, by comparison, none of the space treaty partners of the Soviet Union are developing states.

**Joint Venture Between India and the United States**

The interest of the United States in perfecting the use of space objects for educational purposes has resulted in a specific and pragmatic international agreement with India. Undoubtedly India, through its own preparatory efforts, made it possible for these two nations to embark upon a mutually beneficial SEJV. India, as well as a few other developing nations, realizing their own limited capabilities in the space field, looked first to international organizations for guidance and assistance in the development of national space activities. World institutions taking an interest in the exploration and use of the space environment have principally been the United Nations Development Program (UNDP) and UNESCO, but also include FAO, ITU, WMO, IBRD, IDA, IFC, IAEA, the United Nations Environmental Program (UNEP), and the United Nations itself.
Since India and UNDP have collaborated extensively in the practical mobilization of their respective space interests, attention will be concentrated on their space relationships. However, it should be noted that India and UNESCO have carried on important discussions focusing on UNESCO's interest in broadcasting from satellites and remote sensing. UNESCO's space related activities have resulted in the preparation of studies and reports on space experiments; conducting seminars and the preparation of feasibility studies concerning the potential of regional cooperation; holding space-oriented seminars involving developing nations; conducting survey missions dealing with the prospective use of satellites for education and development; conducting simulation exercises relating to potential use of satellites for educational purposes, and coordination with other specialized agencies of the United Nations. UNESCO and ITU, for example, have jointly compiled data relevant to the use of satellites for educational purposes. Such data will have utility for nations having to make financial, organizational, and operational decisions concerning the use of such space objects for both national and regional areas. The joint effort is intended to provide data on the practical and technical characteristics of the systems offering optimum broadcast coverage.

UNESCO's general interest in the use of the space environment for broadcast purposes is reflected in the *UNESCO Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education, and Greater Cultural Exchange*. The Declaration was adopted by a vote of 55 to 7, with 22 abstentions. The United States opposed the Declaration. The reasons for the United States' opposition are set forth in a Department of State communication to the

the appointment of the nine new members by the President of the General Assembly, who took into account the principle of equitable geographical distribution, the Committee was composed of Albania, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chad, Czechoslovakia, Egypt, France, Hungary, India, Iran, Italy, Japan, Lebanon, Mexico, Mongolia, Morocco, Poland, Romania, Sierra Leone, Sweden, the Soviet Union, the United Kingdom, and the United States. The newest members are Chile, the German Democratic Republic, the Federal Republic of Germany, Indonesia, Kenya, Nigeria, Pakistan, Sudan, and Venezuela.


Chairman of the Committee on Aeronautical and Space Science Committee of the United States Senate, dated April 3, 1974. With this background, it will be possible to understand the more active role of UNDP in supplying tangible resources to India as the two jointly ventured to improve India’s practical space capabilities. In focusing on this particular joint venture, the fact that other international organizations have provided financial assistance to nations interested in the development of telecommunications facilities should not be overlooked. The World Bank, IDA, and IFC have assisted such LDCs as Ethiopia and Yugoslavia in such efforts.

But, in 1964, India was the first beneficiary of UNDP’s involvement in the space field. India proposed the establishment of a Center for Research and Training in the Use of Satellite Communications to be implemented with the assistance of the ITU. This proposal has resulted in three programs.

The object of the first project was “to track satellites in orbit, participate in practical tests and conduct training and investigation in satellite communication techniques. The Center has provided training to Indian engineers, scientists and technicians both in all phases of the design, construction, operation and maintenance of a communication satellite earth station and in the technology of the communication satellite systems.”

The second project contemplated “an experiment on mass education . . . whereby television programs would be beamed via the satellite” which was to be known as the Experimental Satellite Communications Earth Station (ESCES). In proposing UNDP financial assistance for such a project, India pointed out that “though the experiments using communication satellites would be conducted in India, the experience gained will be made available for the benefit of all other developing countries and may well provide very useful guidelines for the widespread application of direct broadcast satellite techniques to the problems of mass education throughout the world.”

The third project was India’s proposal to UNDP “for assistance in establishing and operating a Television Production and Studio Technical Training Center.” This phase would provide trained personnel and program material for the educational program. It was India’s view that it would be able to contribute $600,000 to this effort if it could be assured of receiving $1 million from UNDP.

39 Id. at 4-5.
40 Id.
By 1970, UNDP viewed the proposal as having a profound impact on “education, agricultural training, family planning and many other aspects of development.” In 1970, UNDP reported its desire to “continue to do all it can to promote the development of direct broadcast satellite techniques and their application for the benefit of developing countries.”

The results of the above projects were so favorable that NASA concluded that a profitable joint venture with India might be undertaken. Thus, in September, 1969, NASA and India entered into an agreement whereby the ATS-F would be made available to India for broadcast purposes. The title given the project was Satellite Instructional Television Experiment (SITE).

The United States-Indian joint venture foresaw the launching by the United States of ATS-F in May of 1974, with the expectation that the SITE project would be operating for the benefit of India by mid-1975. The plan is for India to have the benefit of the satellite for nine to 12 months. While serving Indian educational needs, this space object will be positioned over Lake Victoria in central Africa, where it will be “visible” to the Indian sub-continent. NASA has been charged with providing the use of the 860 megahertz transponder and will operate transportable ground control facilities situated in Western Europe. India has assumed the responsibility for providing the ground transmitter receivers and software, including the programming of the television broadcasts. Program content will emphasize agricultural techniques, family planning and hygiene, school instruction and cultural integration.

India’s plan calls for the use of direct reception community receivers in 2,000 villages, with benefits accruing to an additional 3,000 villages. The broadcasts will last from four to six hours a day. The community receivers would be situated in schools, community centers, and other local institutions. By March, 1974, India had successfully completed the qualification testing for engineering models of ground receiving stations, and production had been initiated for the quantity delivery of such stations by early 1975. Moreover, India had completed the full receiver deployment plan, including the selection of all site locations. Software production has gotten underway, and logistic support planning is moving forward.

India is also considering the possibility of developing home receivers in anticipation of a direct or individual, as opposed to community, reception. It should be noted that the legal and practical aspects of direct satellite broadcasts, both with and without the consent of a receiving nation

41 Id. at 5.
42 Id. at 5. This document also declares that the United Nations Development Program (UNDP) maintains resident representatives in over 90 developing countries.
43 NASA Authorization Hearings for 1975, supra note 1, at 670-72, 742.
44 Id. at 670.
45 Id. at 671, 768.
when the broadcast emanates from the space object of another nation, has received much attention at the United Nations, UNESCO, and at the International Telecommunications Union. Since in the SITE project India will control the content of the broadcasts, and since the broadcasts will be received only in India, the foregoing problem has not arisen. Technical experts now generally hold the view that the state of the art for direct-to-the-home broadcasts will not allow for such broadcasts until the late 1970's or early 1980's. However, when it is feasible to provide greater satellite power and when low cost augmentation devices which attach to the family TV set have been developed, the larger legal and political problem of direct satellite broadcasts will have to be met.

In 1973, the United Nations appraised the proposed joint venture between India and the United States as follows:

Under an extension of the earlier mentioned UNDP Indian telecommunications project, UNDP is providing assistance in the modification of ESCES to enable it to play its part with the ATS-F satellite expected soon to be launched by the United States National Aeronautical and Space Administration. The ESCES is presently being modified to enable it to transmit and receive television signals. Television transmitting and studio equipment are being added to it and development work is being carried out on the production of television receivers suitably modified to accept signals from the satellite. It has been pointed out by the Indian Government that the experiments using communication satellites which are conducted in India will provide experience which can be made available for the benefit of all other developing countries and may well provide useful guidelines for the widespread application of direct broadcast satellite techniques to the problem of mass education throughout the world.

UNDP engaged itself to “do all it can to promote the development of direct broadcasting techniques and their application for the benefit of developing countries.” UNDP also noted that it was aware that

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46 Id. at 722. Other experts have set the date for the mid-1980's.
49 Id. at 13.
training in the use of computers was essential to the handling of communications data. Thus, it was willing, together with its cooperating agencies, to provide "practical training in computer programs and operations in developing countries on every continent."\textsuperscript{50}

By 1974, UNDP was able to report that it had been able to make available to India for the expansion of the ESCES project the sum of $1,043,300; India, in turn, had contributed the sum of $1,066,514.\textsuperscript{51}

One means employed by the United Nations to assure itself of the progress being realized through such ventures was the appointment of an expert on space applications, H. G. S. Murthy. He has assisted in seminars and workshops held in many parts of the world. One such program of meetings was held in India, in December of 1972, at which time very careful attention was given to technical problems involved in the use of space objects for the purposes of communication. All the meetings related to the operational phase of the Indian Experimental Satellite Communication Earth Station.\textsuperscript{52} Thus, UNDP has assisted in feasibility studies for satellite communications. It has provided technical assistance in the form of seminars and workshops. It has also funded fellowships and scholarships.

While the hope has been expressed that the Indian project would be of help to other developing countries, the United States has indicated that:

[O]pportunities for experiments by other nations with ATS-F after its use by India are very limited. The current [1974] expectation is that the satellite will be returned to the Western Hemisphere so that the U.S. can realize an additional return on its investment by utilizing the satellite for further experiments. Thus, any additional opportunities will have to fit into planned U.S. uses in the Western Hemisphere.\textsuperscript{53}

UNDP, THE UNITED STATES AND DEVELOPING COUNTRIES

UNDP has endeavored to facilitate international cooperation in the development of regional communications satellite systems as well as to assist in other joint ventures. In 1973, it assisted eight Latin American countries in making a feasibility study of a regional system. The proposed

\textsuperscript{50} \textit{Id.}


\textsuperscript{53} \textit{NASA Authorization Hearings for 1975}, supra note 1, at 768. The inability of the United States to extend this particular project should not be construed as a general unwillingness to share space-derived benefits with the lesser developed countries. For example, during 1974, ERTS and other United States remote sensing technologies were used to assist the West African states of Mali, Niger, and Upper Volta. During and following the extended drought in these countries, the United States provided immediate and accurate information to them concerning their natural resources. They were thus enabled to "expedite an expanded resource management program." \textit{Id.} at 735.
Because of the many inaccessible mountain regions, conventional educational methods are impractical in the Andean area. As a result of this factor and the sparsity of teachers, the rate of illiteracy is high in this sector. UNESCO and ITU have, therefore, undertaken investigations of teaching opportunities. According to the 1973 United Nations review:

The project report will enable the Governments concerned to make decisions on the financing, ownership, organization and operation of educational television broadcasting systems on both a national and a regional basis. They will also be provided with a wealth of data on the most practicable technical characteristics of the system needed to provide adequate coverage of the region.

As a result of the foregoing reports, UNDP has contributed $913,786 to the feasibility study of the Latin American regional educational television satellite system, and the affected nations have contributed $360,000. By 1974, UNDP had contributed $4,042,440 to projects in 11 developing countries and the nations involved had contributed $4,519,955 of their own funds.

As ATS-F continues to demonstrate its significant capabilities, there is an encouraging possibility that the United States will enter into bilateral joint ventures for ATS-F use. Brazil requested approximately 50 hours of satellite time for educational broadcast experiments during 1974-1975 and NASA viewed the proposal favorably. The agreement calls for Brazil to be responsible for providing ground transmitters, ground receivers, and to engage in the programming for the experiment. This joint venture will provide for audio-video broadcasts to approximately 500 schools in the Rio Grande de Norte region of Brazil. Indonesia has indicated informally that it has an interest in sharing in the use of the ATS-F. Since plans have been made for the return of the ATS-F to be used by India during 1975 to the Western Hemisphere, the United States Department of State has suggested that it might be able to find another satellite suitable for a joint venture with Indonesia. However, such potential users are obliged “to pay for the planning, execution and analysis of results of their experiments as well as the cost of experimental ground equipment.”

ReasOns for SejVs with the lDcs

Effective joint space ventures between the space resource nations and the LDCs give promise of substantial common benefits. The LDCs can be strengthened in their capacity to communicate those very ideas which

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54 Supra note 48.
55 Id.
56 Report on Types of Assistance, supra note 51, at 5.
57 NASA Authorization Hearings for 1975, supra note 1, at 768.
58 Id. at 769.
59 Id. at 672. The United States investment in the Application Technology Satellite F is approximately $35 million.
have heretofore prevented their development. The space resource states will have the opportunity to further maximize the myriad capabilities of present-day space objects. For the LDCs, any thought of proceeding unilaterally in the development of a space program is confronted with the problem of prohibitive cost and the need for an enormous reservoir of highly trained specialists. Just as the average individual cannot afford a $33,500 Rolls Royce automobile, it would be a mistake for an LDC to commit its limited resources to an extensive space program. For their general involvement, they can participate in broad and unspecific cooperative activities. However, more direct space benefits will unquestionably follow if they are able to participate in particularized bilateral or multilateral efforts.

One of the advantages to the LDCs' participation in joint ventures includes the choice by the LDC of the areas of action best suited to their needs. As noted in the case of India, such action has been directed toward essential educational, developmental, and social programs. With the space resource state being willing to take the principal responsibility for the construction and launch of the space object, the LDC will be permitted the opportunity to move into soft-ware manufacture and applications. They would additionally be able to embark on ground-based projects which would produce specific expertise at relatively low costs. Such commitments would permit the development of enormous motivation and would contribute to the ultimate success of the joint venture.

In addition, the commitment by an LDC to a joint venture would greatly increase the probability of assistance from UNDP, UNESCO, ITU and other international bodies. So equipped, the LDCs might find that the space resource states would be more inclined to supply scholarships and fellowships to deserving nationals of the LDCs. With an enlarging technical expertise on the part of the LDCs the advanced states would make data collected through such national efforts as ERTS more readily available to deserving LDCs. This kind of information exchange, when coupled with the data received through the ATS-F type space object, would also help to fortify the LDCs in their ability to grow in the areas of education, communications, and the manufacture of software items, as well as the perfection of their capacity to provide logistic support for ground-based activities. Moreover, such collaborative efforts could inculcate confidence and contribute to rational decisions on the part of government officials.

The advantages which are made available to the space resource nations as the result of such a joint venture with LDCs are equally impressive. The space resource states could receive the benefits of suggestions and proposals relevant to future space activity and, in addition, the LDCs would share the monetary and scientific resources and responsibilities in these particular activities. As a result of such collaborative efforts, the advanced nations would be relieved of the
assertions—particularly in the area of data collection relating to earth resources—that such collection and subsequent dissemination constituted an interference with the sovereignty of the sensed nations. This type of understanding and cooperative consultation could contribute to the molding of a firm policy by the United States regarding an open and unimpeded exchange of space object information on an international basis. The bilateral SEJVs would serve as cautionary advice to those international organizations which may wish to become involved in fixing the substantive content of data which can be transmitted via space objects.

This pooling of special talents and capabilities would have a valuable impact upon the identification of new ideas and processes. Through the widening of the list of participants and the sharing of costs incident thereto, there would also be a reduction in costs to the principal actor. Moreover, United States space objects will be able to contain components manufactured or assembled in other nations. The United States would also be able to derive immediate benefits from an agreement with an LDC allowing the United States to employ, on a cooperative basis and during the lifetime of the joint venture, a radio frequency assigned to the foreign nation.

There is a general awareness that radio emissions from space objects have produced interference with emissions from other satellites. The seriousness of this situation has been reflected in the statement relating to ERTS-1 that “fortunately, no mission failures have occurred, but the chances of this happening will increase as the number of satellites, sensors and ground emitters increase.” Such interference has resulted in a charge in September, 1974, that the ATS-6, while situated over the Galapagos Islands in the Pacific, west of Ecuador, and the Synchronous Meteorological Satellite (SMS), while situated over the Atlantic, east of Brazil, had blocked parts of the heavens from more than a dozen radio telescopes situated in the United States, Canada, and the United Kingdom. Both of the United States satellites were situated at an altitude of 22,400 miles, allowing them to orbit the earth at the same rate of speed as the rotation of the earth. Through the sharing of assigned radio frequencies it may be possible for joint venturers to reduce or eliminate such interferences.

Through joint ventures, the United States would be able to use an orbit position on a cooperative basis for the term of the agreement, an orbit which might be assigned to a nation by the effective instrumentality of the world community. NASA has seen the importance of clarifying its future orbit position needs. In commenting on both the matter of radio frequencies and orbit positions, NASA has indicated

[W]e will also examine NASA’s future frequency allocation, bandwidth and orbit position needs and, where necessary, find ways of

60 NASA Authorization Hearings for 1975, supra note 1, at 680-81.
sharing existing frequency allocations more efficiently and strive to open up higher frequency bands, particularly above 10 GHz, to alleviate radio frequency and orbital space crowding problems.\footnote{Id. at 681.}

National competition for these valuable assets is already a lively issue. As early as 1973, the United Nations/UNESCO African Regional Seminar on Satellite Broadcasting Systems recommended that the ITU be made aware of the “future requirements for satellite positions on the geostationary orbit for satellite broadcasting in Africa. In particular, the orbital positions between 15°E and 15°W longitude are of interest for the African continent.”\footnote{United Nations/UNESCO Final Report, supra note 35, at 15.} The Report also noted that “the Seminar recommended that all African nations be made aware of the need to reserve the frequency band 2500-2690MHz for the possible future use of satellite broadcasting in Africa.”\footnote{Id.} If assignments of these or similar orbital positions or frequency bands were to be made to the LDCs, the need for joint ventures would become exceedingly clear. The preceding reasons for establishing mutually beneficial SEJVs between an advanced state and an LDC would also seem to apply with equal force to joint ventures between space resource states and between such states and international organizations.

The successful negotiation of bilateral agreements will allow for an increase of experience and insight as to the possible benefits derivable from multinational space operations. From the perspective of the LDCs it is entirely possible that they will derive advantages from creating regional programs. The advanced nations of Western Europe have found it more expedient to proceed by way of an international organization consisting of 10 countries than to go it alone or rely exclusively on bilateral agreements. Perhaps the LDCs could establish their own equivalent of ESA.

As the LDCs consider their space future, they may wish to direct inquiries to ESA concerning the likelihood of the formation of “associate” or some other subsidiary form of membership in that body. In looking toward the future they will be aware that ESA is likely to be highly performance oriented, whereas both the United Nations and UNESCO have demonstrated that they possess more politically directed capabilities and characteristics. On the other hand, attention should be given to the fact that ITU, up to the present, has been more technically oriented. Thus, the options of the LDCs are many. Presumably they will find situations and combinations of situations in which they will be able to derive maximum benefits from the wonderful innovations of the space age.
Unquestionably as man seeks to maximize the exploration and exploitation of the space environment for peaceful and beneficial purposes, there will be a need to engage in an enormous variety of cooperative activities. A pattern allowing for the assumption of specific obligations has already emerged. This consists of agreements between nations, between a nation and an international organization, and among several nations and an international organization or organizations. Such agreements now exist between space resource states, and to a lesser degree between a resource state and a non-resource state. The non-resource states have been assisted in their efforts to advance their genuine national interests by a number of international organizations. Of particular help to them at this time have been the United Nations, especially through the UNDP, and UNESCO. The non-resource states, as it turns out, are essentially the less developed countries.

All of the cooperative activities which have been taking place—whether taking the form of general programs of cooperation or more specific joint ventures—have produced benefits to the participants. So far the benefits have varied depending on whether a nation is a space resource state, an advanced state, or an LDC. Thus, the space resource states and the advanced states have been able either to engage in, or plan, for a number of activities having wide-ranging aspects; the launching of a wide variety of space objects, complex scientific and technological experiments, medical tests, applications involving broadcasting and sensing, and the preparation of multinational crews with diverse backgrounds, with the attendant need to work out legal codes to govern the manning of multinational space missions.

While the space resource and advanced states were much concerned with the activities of man in space, the LDCs have concentrated on space applications designed to improve the quality of life on the surface of the globe. Thus, they have sought out cooperative activities and ventures which would allow for higher educational, health, and living standards, which can be realized through improvements in communications. On the part of some of the LDCs there has been a disposition to question the unilateral activities of space resource states, particularly where the latter have had the capacity to broadcast into the LDC or to obtain data from within the LDC by way of sophisticated sensing procedures. At the same time, some of these non-resource states were deriving benefits from the highly practical space programs being pursued by the resource states.

In order that the fears of some nations may be alleviated concerning the capabilities of the space resource states, there is a need to make use of the joint venture process to achieve mutually desirable results. Experience with this process has demonstrated that it is one means to ameliorate fearful concerns on the part of some nations. It is a process for realizing mutually beneficial gains for countries willing to embark on
such ventures. As states embark more intensively upon the exploitation of the space environment, both the specific joint venture and the more generalized cooperative efforts of nations will have to be utilized so that there will be a suitable distribution of the benefits of the space environment—the newly found "province of all mankind." Law and the legal process have the capacity to provide an infinite number of principles, standards, and rules so that genuine national interests can be satisfied and world community values can be assured. As with a number of major issues now confronting the welfare of man, the principal need is to find the political will to obtain such values.
THE OCCUPATIONAL SAFETY AND HEALTH ACT: A PROMISE THAT FAILED

HOWARD M. METZENBAUM*

WHEN CONGRESS PASSED the Occupational Safety and Health Act (OSHA) in 1970, it commanded industry to provide its employees with workplaces free from recognized dangers. The legislation declared that the safety of workers is a public concern, a concern vital to the community at large. Spokesmen for the then-presiding Nixon Administration praised the Act heartily and vowed to implement it energetically. "This bill opens up a whole new vista for the Labor Department," said the Secretary of Labor. "We plan to launch the administration of the Act with all the vigor and momentum we can generate."

Four years later, the "vigor" is exhausted, the "momentum" has fizzled, and the "vista" ahead is the same bloody stream of injuries and fatalities that has marred the past.

Some 100,000 workers are still dying every year from diseases contracted while trying to earn a living; in contrast, ten years of fighting in Vietnam took 46,000 American lives.

Still being killed in work accidents every year are 14,500 workers; exactly the same number of American soldiers, 14,500, were killed in the deadliest year of the Vietnam war.

Two million workers are still disabled, permanently or temporarily, every year at work; the full Vietnam war wounded fewer than 304,000 Americans.

Behind these aggregate statistics are grim stories of human tragedy exacerbated by official indifference.

In Norco, Louisiana, a worker at the Shell Oil Company was burned and permanently disfigured in 1973 when a container of sulphuric acid broke. There should have been safeguards, but there were not. OSHA

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2 Statement made by Secretary of Labor, James D. Hodgson, December 29, 1970, on occasion of signing the Act.
3 HEW, PRESIDENT'S REPORT ON OCCUPATIONAL SAFETY AND HEALTH, 111 (1972) [hereinafter cited as PRESIDENT'S REPORT].
4 DEPT. OF DEFENSE, SELECTED MANPOWER STATISTICS, 63, Table No. P82.2 (May 15, 1974) [hereinafter cited as DEPT. OF DEFENSE].
5 NATIONAL SAFETY COUNCIL ACCIDENT FACTS, 23 (1974).
6 DEPT. OF DEFENSE, supra note 4, at 63.
7 PRESIDENT'S REPORT, supra note 3, at 111.
8 DEPT. OF DEFENSE, supra note 4, at 63.
issued no citation. The inspector felt that a citation was unnecessary because the employer repaired the defect after the accident. However, the worker's scars remain.9

In Tyler, Texas, almost 900 workers at an asbestos products plant were exposed, over an 18-year period, to some of the highest levels of asbestos dust ever recorded. The plant closed in 1972, but at least 300 of its workers are now dying of asbestosis, lung cancer, or cancer of the colon, rectum, or stomach. Prior to the closing, OSHA responded to the plant's threat to all life in it by issuing one citation for a non-serious violation. The penalty: $210, or 70 cents for each of the 300 dying workers.10

In Marietta, Ohio, Union Carbide operates a plant that was cited by OSHA in 1972 for over-exposing employees to ammonia and sulfuric acid fumes, fumes which can dissolve the lungs. First, the OSHA citation set no period at all for Union Carbide to eliminate the deadly gases; then it gave the company five months to submit a plan for abatement; then OSHA permitted the employer seven months (or a full year from the first citation) for abatement; and, finally, when the Oil, Chemical, and Atomic Workers Union contested the length of this abatement period, OSHA withdrew it.11 So far as is known, while OSHA and Union Carbide politely take their time, plant workers are still breathing deadly acid fumes.

The repetition of such tragedy is not what Congress had in mind in 1970 when it enacted work safety legislation. The law directed the Secretary of Labor to prescribe safety and health standards for virtually all employers to meet. To enforce these standards, a basically simple procedure was established. An inspector examines a workplace. If he finds a violation, he issues a citation specifying an "abatement period"—an interval during which the violation must be corrected. OSHA may assess a penalty up to $1,000 for a violation,12 and up to $10,000 for willful or repeated violations.13 Even imprisonment may be imposed in some cases.14 For hearing contested cases, the law allowed for a three-man, presidentially appointed agency,15 the Occupational Safety and Health Review Commission, whose decisions are reviewable in the U.S. Appellate Courts.16 And the National Institute for Occupational Safety and Health (NIOSH) was

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10 OSHA Review Hearings, supra note 9, at 794. See also, Brodeur, Annuals of Industry, 49 The New Yorker, 92 (Nov. 5, 1973).
11 Id. at 794, 795.
14 29 U.S.C. § 666(e), (f), (g) (1970).
created to conduct research into occupational disease and to develop appropriate safety standards.

The record of enforcement, however, is riddled with subtle and blatant neglect, resulting in little increase in safety and no decrease in deaths and disability. Administration policy and Labor Department practice have sought to vitiate the intent of Congress. Budgets have been too low to support any agencies of the Act effectively. Research is insufficient, underfunded, skewed by political and economic considerations, and badly monitored.

Both OSHA and NIOSH, according to the AFL-CIO, have been enfeebled by the "systematic replacement of career civil servants with unqualified appointees," many of whom seem to be bent upon undermining rather than upholding the law. The OSHA Review Commission shows a penchant for vacating and weakening those penalties that are levied. In the field, the contact point of enforcement, there are too few inspectors, making superficial inspections, and issuing weak and compromised citations.

An atrocious example of how the intent of Congress is being subverted showed up in public print recently. According to The New York Times, there was a wide variance among the states in the enforcement and recording of OSHA violations. The Times report further indicated that in Ohio only 3% of all violations recorded were major violations, while in other states the percentage was as high as 25%. Enforcement in Columbus has been such that a major union, the Oil, Chemical and Atomic Workers, has labeled the Columbus office as one of the two OSHA regional operations least responsive to unsafe industrial conditions.

Regional administrators who believe it is better to be safe than sorry, who fear an adverse decision on contested citations by the Review Commission, and whose sympathies lie strongly with the problems of employers rather than the rights of employees, cannot enforce the law honestly or forcefully. Step by step, the process of inspection, citation, penalty, and correction of violations becomes compromised.

Nationally, OSHA has a staff of 700 inspectors. In the last three years, they have inspected less than 3% of the nation's businesses. They fine a few at an average rate of $16 per non-serious violation. At

22 OSHA Review Hearings, supra note 9, ISSUE PAPERS PREPARED BY LABOR SUBCOMM. STAFF WITH ASSISTANCE FROM GAO AUDITORS, APPENDIX II at 963 (1974) [hereinafter cited as ISSUE PAPERS, APPENDIX II].
that rate, it is cheaper to pay the fine than to make the plant safe. With enforcement notoriously weak, employers could probably take more advantage of the law than they do.

Not all employers are culprits. It is a fact that many companies have spent a lot of money and effort on safety. DuPont, for instance, has developed a safety manual for the construction industry which serves as a model for other industries.

But such conscientious initiative may well be the exception rather than the rule—a condition for which responsibility must be placed on the drooping shoulders of the lackadaisical federal enforcers.

The Senate Subcommittee on Labor, chaired by Sen. Harrison A. Williams of New Jersey, has recently reported the results of a General Accounting Office investigation of OSHA enforcement. The Subcommittee issued the following bill of indictment against the inspection system: Inspectors often see violations but issue no citations; when inspectors do issue citations, they classify an incredibly low 1.2% as serious, and less than 1% more as willful, repeat, or imminent dangers; and, they fine the "serious" violations an average of $648, a sum that mocks the law's intent.2

Inspectors also may respond to employee complaints only weeks or months later; delay citations weeks or months beyond the 72-hour limit set by law; permit abatement periods far longer than reasonable or necessary, and fail to make mandatory follow-up inspections—among other shortcomings.

Some inspectors try to rationalize their behavior. Though their explanations cannot be found in the inspectors' own compliance operations manuals, they are instructive about the unwritten rules in OSHA field offices. When an inspector refuses to issue a citation for a clear violation, it may be because he did not see a worker near the hazard at the instant of the inspection, or because he could not locate the responsible subcontractor—so he pursues the matter no further.

If an inspector rates virtually all violations as non-serious, it may be because it takes more time and effort to document a serious citation—an expenditure he is not motivated to invest because he is not getting much encouragement from his superiors.

As inadequate as the inspection process is, the review procedures do not hold much more promise for the employee. When a citation is issued, an employer may choose to contest the fact of violation, or the specified abatement period, or the amount of penalty assessed, before the Occupational Safety and Health Review Commission. The employee, however, may contest none of these actions (with one exception),24 nor may he contest inaction; the failure to issue a citation or to impose

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2 Id.
a penalty. The sole parties to an OSHA action are the Secretary of Labor and the cited employer.

The single exception is that employees do have direct statutory standing to contest the length of the period permitted for abatement of penalties. In cases in which the employer has himself contested a citation, employees may file for party standing. OSHA has informal review procedures as well. But none of these avenues give employees a mechanism of any force, either within OSHA or in the courts, to counter either OSHA inaction or any irregularity if the employer chooses not to contest citations.

There is an eminently reasonable premise for this legislative design: that the Secretary of Labor can be counted upon to observe and enforce the law, a law written solely to protect workers. The Secretary has the clear duty to pursue the required adjudicatory and judicial procedures.

But this pursuit has not happened. Administration policy and OSHA practice have reflected not concern for the letter of the law, but concern for the employer's wallet. OSHA penalties tend to be laughably weak—but even so, the Review Commission has habitually reduced them or vacated citations altogether. A computation made from a 1973 compendium of Commission cases showed that employers were given relief in 93 cases—and fines were increased in only 13 cases.

One trade union leader has labeled the Review Commission a "needless employer protection operation." Many union leaders are calling for abolition of the Review Commission as an "additional bureaucratic layer between the Department of Labor and final appeal to the courts." Organized labor's disenchantment with OSHA's ineffectual enforcement practices has led to demands by labor for equal administrative and judicial review rights for employees and employers.

In 1972, a top OSHA administrator in Washington wrote a memo to the Undersecretary of Labor in which he proposed to use OSHA as "a great sales point for fund raising" in the Nixon campaign. He wanted to assure Nixon supporters in the business community that OSHA would issue no controversial standards during the presidential campaign.

It is not known whether the plan was carried out, and whether new standards were deliberately withheld. Labor Secretary Peter J. Brennan, appointed in 1973, did not deny that such may have been the case. He testified before the Senate Labor Subcommittee that "at the present time there is no hanky-panky going on... I don't

25 Id.
26 Statement by Pat Greathouse, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, OSHA Review Hearings, supra note 9, at 317.
27 Id.
28 Id.
29 See note 18 supra.
know what went on in the past, but I can assure you that it won't happen in the future." 30 (emphasis added)

To Senator Williams of New Jersey, the subcommittee chairman, the memo "strongly suggests that the administration never attempted to effectively implement" the act; and, to an AFL-CIO representative who testified, the memo "explains the attitude that permeated OSHA" since 1972.31

Whether or not the memo was acted upon, the willingness of presumably responsible officials to play this kind of game means that union demands for full legal rights to challenge OSHA decisions and non-action must be taken very seriously indeed. Fears that such rights would permit frivolous harassment of employers by employees, and either turn OSHA into a union tool or drain OSHA's resources on investigating numerous minor complaints, have not been confirmed by OSHA's experience so far. No union efforts to exploit the agency have been made since the passage of the Act. In any case, between a hypothetical danger of improper pro-employee bias, and a real and demonstrated danger of pro-employer politics, it is essential to confront the demonstrated danger first.

On the research side of the ledger, OSHA's record is no better than it is in enforcement and review. OSHA derives safety standards from several sources. These include federal laws or contracts bearing on safety standards for using specific substances, and recognized standards from industrial and professional organizations.

As useful as these guidelines may be, the fact remains that extant guidelines are addressed to a limited number of substances—in many cases, materials in wide enough use to have been evaluated routinely, or those whose properties are obvious. There are literally thousands of substances of known or unknown danger for which no standards exist anywhere.

For this very reason, the Act that created OSHA also created a National Institute for Occupational Safety and Health (NIOSH), within the Department of Health, Education, and Welfare. NIOSH is expected to conduct research and to recommend safe standards for using harmful substances to OSHA.32 NIOSH submits its recommendations in the form of a "criteria document" for each hazard, setting forth both data and a comprehensive standard for use.

The 1973 Annual Toxic Substances List includes 25,000 chemical substances and physical agents.33 Of these, three to five percent are covered by OSHA standards.34 NIOSH estimates, however, that another

30 Id.
31 Id.
33 HEW, NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY AND HEALTH: TOXIC SUBSTANCE LIST (1973).
34 See note 26 supra.
1,000 to 2,000 are dangerous enough to require the development of standards.\(^{35}\) Of that number, NIOSH has sifted a "priority list" of 471 substances which have the most effect at the workplace.\(^{36}\)

From February, 1971, to November, 1974, NIOSH submitted to OSHA exactly 21 criteria documents and two letters of recommendation. OSHA had promulgated final standards for just three of the documented hazards by November, 1974. Just three—asbestos, carcinogens, and vinyl chloride—in four years.\(^{37}\)

When the Secretary of Labor receives a criteria document from NIOSH, he must first determine that a rule is necessary, and then he may request a recommendation from an advisory committee on the rule. Recommendation in hand, he publishes the proposed rule in the Federal Register, allowing an opportunity for objections and hearing requests to be filed. After hearings are held, the Secretary promulgates the final, enforceable standard.

Twenty criteria documents remain for which no standard has been adopted. Although 12 of these were submitted from one to two and a half years ago, OSHA has not as yet published a proposed rule in the Federal Register for even one of them.\(^{38}\) It has not appointed an advisory committee for most of them. In fact, until recently OSHA had taken no discernible action whatever on many criteria documents submitted years ago.

Because the above dozen criteria documents have resulted in no standards, over five million American workers remain unprotected. Millions more may be in danger from the hundreds of substances on NIOSH's "priority list" whose properties remain undescribed in criteria documents. In effect, substances used without standards, and without proper research into their properties, make guinea pigs of their users. If the users die, the substances must be lethal. As a congressional committee witness remarked, "We sit back and wait for 20 years and we count the bodies."\(^{39}\)

NIOSH suffers many of the same afflictions that OSHA does: conflicts of interest, badly trained, undertrained and poorly supervised personnel, undermanned and inadequate facilities, and, in NIOSH above all, starvation budgets.

An AFL-CIO official has testified: "We made a special plea for

\(^{35}\) \textit{Issue Papers, Appendix II, supra note 22, at 1061.}
\(^{36}\) \textit{Id.}
\(^{37}\) \textit{Id.}
\(^{38}\) \textit{Id.}
field studies [of petrochemicals] in NIOSH ... but research programs specifically aimed at the study of petrochemicals such as—and including—vinyl chloride were not funded and staffed. The studies were eliminated from the program plans of these agencies. ... The task is mammoth, so mammoth that it is impossible to estimate what should be spent.”

On the same subject, a medical expert said that “Fire fighting is all that is happening. Vinyl chloride is a good example. ... Five to 15% of all vinyl chloride workers will die with hemangiosarcoma of the liver, which is always fatal. This disease is extremely rare elsewhere. [But NIOSH has done no research on it], not because NIOSH officials are callous or don't understand what is going on. They are simply too busy putting out fires in other areas,” a limitation required by their inability to recruit enough professional staff and by an inadequate budget, the expert added.41

NIOSH requested $30,000,000 for fiscal year 1975. This budget would permit NIOSH to generate 18 to 20 new criteria documents on the use of potentially dangerous substances. The Office of Management and Budget cut the request by $4 billion. This would mean that only 14 new studies could begin.42 Fortunately, Congress added to the OMB budget figure new funds specifically earmarked for criteria documents, but the number will remain a pitiful record when matched against the need for standards for as many as 2,000 chemicals.

The fund shortage has affected the quality as well as the quantity of research at NIOSH. Since NIOSH does not have either the facilities or the manpower to do much in-house research, most work must be done by contractors. Contractors currently produce 80% of all criteria documents.

Clearly, then, contract monitoring is a major NIOSH function, but when GAO investigators reviewed NIOSH contract files for the Senate Labor Subcommittee, they found many irregularities.43

Among other things, the investigators learned that numerous contractors had not submitted one or more of the required periodic progress reports and that some contractors submitted no reports at all.

The GAO also learned that contractors’ final reports to NIOSH were often submitted long overdue and that a few were not delivered at all. On occasion, project officers kept this information to themselves, maintained contract files with documents missing, and wrote no reports of visits to evaluate the contractors’ performance.

40 Testimony of Jacob Clayman, AFL-CIO, OSHA Review Hearings, supra note 9, at 111.
41 Testimony of Dr. Irving J. Selikoff, House Hearings on Occupational Standards, supra note 39.
42 ISSUE PAPERS, APPENDIX II, supra note 22, at 1064,
43 Id. at 1066-1070.
These deficiencies can presumably be corrected. Another problem, conflicts of interest among contractors, is far more serious. Despite OSHA's claim that NIOSH is concerned only with basic research, there is evidence that some contractors have business loyalties in conflict with their obligations to NIOSH. For example, the medical director for NIOSH is also the medical director of a second corporation which has a direct, commercial interest in manufacturing and using the same chemicals.44

Furthermore, a variety of observers have expressed serious doubts about the reliability of NIOSH results. The AFL-CIO representative testified that OSHA has been "pressing NIOSH to compromise the integrity of its criteria documents by covertly placing economic issues before health. In essence, they are being asked to twist scientific data into molds prescribed by the selfish interests of the lowest common denominators in the trade associations."45 Another commentator, a medical school professor, said that "The quality of these reports is very mixed and recommendations are usually based on technological and economic feasibility more than health factors."46

This testimony casts some doubt on the accuracy of a statement by John H. Stender, Assistant Secretary of Labor, before the Senate Labor Subcommittee:

NIOSH is a research oriented agency. It is composed of experts in various disciplines whose research is purely scientific. As a result, criteria packages are the product of what is fundamentally basic research. NIOSH does not consider economic feasibility. OSHA, on the other hand, must consider the technical and economic feasibility of translating the criteria package into standards which are adequate to protect workers and at the same time can be feasibly put into law and enforced.47

Mr. Stender notwithstanding, it is often hard to believe that NIOSH standards are based on "purely scientific" criteria. In California, for instance, state law sets lead standards for the population in general which are 100 times stricter than what NIOSH recommends for workers.48 Does science or business explain the disparity?

We may have an answer to this and some other questions about NIOSH and OSHA when the Department of Labor responds to the

44 Testimony of Dr. Samuel Epstein, House Hearings on Occupational Standards, supra note 39.
45 See note 18 supra.
46 Testimony of Dr. Samuel Epstein, House Hearings on Occupational Standards, supra note 39.
47 Testimony of John H. Stender, OSHA Review Hearings, supra note 9 at 221.
48 Testimony of Dr. Samuel Epstein, House Hearings on Occupational Standards, supra note 39.
Report of the Senate Subcommittee on Labor. Secretary of Labor Brennan has promised a detailed response.

But it will not be enough to draft detailed executive reports. Urgent reforms are required in OSHA's enforcement, review, and research functions—reforms that can be achieved only by de-politicizing OSHA's administration. Only when this occurs can the workers of America look forward to fulfillment of the congressional intent in enacting the Occupational Safety and Health Act: a national effort, pursued with "vigor and momentum," to protect their safety and health.
THE PREVAILING PARTY SHOULD RECOVER COUNSEL FEES*

MICHAEL F. MAYER† AND WAYNE STIX‡

INTRODUCTION

THE TIME HAS COME when our judicial system should make compensation to the prevailing party for expenses incurred in litigation a meaningful right, as opposed to a valueless gesture. In brief, this means that in the bulk of civil cases a successful party should no longer have to bear the full burden of his own counsel fees, and conversely those who take to our courts in vain should no longer be permitted to avoid the justice of substantial participation in the costs they have occasioned. To do this requires considerable alteration of the present cost structure applied by our rules as well as a change in our philosophy of compensation for loss.

It has, of course, long been theorized that the essential element of our damage rules is to make the injured party "whole." No party in a breach of contract situation, for example, should be left following the breach with less in hand than he would have had if his adversary had lived up to his bargain. But realistically speaking, this is precisely what happens under the present cost and damage structure when litigation occurs.

I recently won a modest recovery for an abused client who had rendered services without being compensated. Alas, after collection of a full judgment for him with interest and costs, as presently defined, the total recovery was less than a fair and appropriate statement for services rendered. Has this client been made "whole" for the losses he suffered? Has the judicial machinery treated him with even elementary fairness? I submit that it is self-evident that it has not.

It is not recovering plaintiffs alone who suffer fantastic losses. Consider the party unjustly sued, whose contentions ultimately prevail in the judicial test. Does the system make him "whole"? The answer to this rhetorical question is again, "no." Except in the rarest instance, no counsel fee can be recovered, not even the slightest part of it. Not only has this defendant been unjustly required to waste time in litigation, but he must also bear his own counsel fee and numerous other costs uncompensated.

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for by an obsolete system of awards that covers only a small fraction of his out-of-pocket expense.

While the transfer of the cost burden to the unsuccessful litigant is basically desirable because it compensates the innocent party, as a system of justice should, it also has an added advantage. Our inundated judicial machinery needs some relief from clogged courts and calendars.

Is it not likely that windfall-minded claimants lacking a true cause of action, but anxious for a "strike" settlement, will be a little less anxious to enter our courts if they knew that at the end of the judicial road a sizable judgment for costs, including all or a substantial part of an opponent's legal fees would be waiting for them? Or, in the matter of less doubtful claims, is not settlement or fair adjustment far more likely when each side knows there are real and substantial risks in defeat and not just the danger of minimal costs? Under such circumstances, dubious plaintiffs should prove less anxious to sue and intransigent defendants more prone to settle. If for no other reasons than these, judicial housekeeping requires a new attitude toward costs.1

**Cost Structure, Past and Present**

The ancient rule of minimal costs would appear to be based at least partially on historical factors. Despite an early tendency to follow English practice in the colonial period, there were fears in America that the court system would be operated contrary to the interests of the common man. To grant legal fees as costs might, some thought, discourage the poor man's use of the court machinery. There was also the fear that wealthy landed interests might dominate the law and that somehow or other a grant of legal fees could perpetuate that power. These fears have vanished with the years, but not the policies that accompanied them.

In the formative years of this country the total population of 3,929,214 people2 lived mainly on farms. Legal disputes were few, usually over land boundaries. The courts were discovering the law rather than interpreting it. Poor or rich, a litigant could go before a court himself and achieve the same verdict as that gained by a lawyer representing him. The founding fathers, realizing this, stamped the American attorney a luxury. Frowning on extravagance and fearing the result of high court costs, America broke judicially from the English tradition of allowing legal fees as costs to the prevailing party.

1A look at the New York statute is revealing. Assume that one can locate the appropriate provisions specified in the Civil Practice Law & Rules, and that a grant of costs would not be inequitable "under all the circumstances." The prevailing party may then recover $25 before note of issue; after note of issue, $50, and following trial or inquest, $75. N.Y. Civ. Prac. § 8101, 8201 (McKinney 1974). Counsel fees, except in the extraordinary case, remain uncompensated. See notes 73-75, infra, and accompanying text.

The public policy of the eighteenth and nineteenth centuries dictated that Americans take their disputes to court. The theory was twofold. By so doing, the litigants would have their issue decided in a fair and compulsory manner and American jurisprudence would be advanced by increased exposure. America was a noble experiment. For the first time in recorded history the poor and common man could seek the protection of a tribunal of justice on a universal scale. \(^3\)

As American jurisprudence matured, the noble experiment continued with the same public policy dictates and procedures as set down in 1776. Concurrently, population exploded, cities grew, the industrial revolution shook the Jeffersonian Utopia to bits, and the problems of the citizenry changed.

Today, we still do not allow attorney fees as part of court costs. The American population has grown to 205,614,000,\(^4\) mostly living in urban areas. This phenomenon has resulted in substantial overloading of the court calendars with pending suits. Instead of speaking in terms of trial by jury, we think in terms of revolving door justice and plea bargaining. In an attempt to alleviate the procedural problems and the abuse of the judicial system, jurists idealistically ask that disputants settle their differences without the aid of the courts.\(^5\) But still thousands of suits are brought with doubtful intent, merit, and with no legal issue. As the abuse continues the common man of the eighteenth and nineteenth centuries has become the poor urban dweller of the twentieth century, a man who is barred from litigating his problems because of high legal costs and an antiquated system. His wrong cannot be made right. Paradoxically, the reason for the procedural breakdown of our courts and the exclusion of a large percentage of the population is that we are trying to help the poor and the judicial problems of today with 200-year-old methodology.

It is time for the judicial fraternity and lawmakers to admit to the reality that attorneys are no longer an embellishment in the nation's courtrooms. Our laws are vast and complex. A layman must seek legal advice to guide him through the maze of legal procedure and substance of all litigations.

The present cost structure is geared to support large damage litigation to the exclusion of small claims of the poor and common man. It does not necessarily follow, however, that small dollar claims represent small legal and humanitarian issues, and that high dollar actions represent complex and worthy questions.\(^6\) The unfortunate consequence of this situation is


\(^6\) Kuenzel, supra note 4, at 84.
as obvious as it is socially unjust and dangerous. The legal problems of the common citizen are often complex and personally humiliating, but monetarily too insignificant to have a judicial remedy. The result often is frustration, alienation from society, and desperation. A victim of such a plight frequently becomes the violator in search of revenge. And so the cycle makes another turn; crime rates and the number of civil rights infringements rise.

The entire difficulty with our present but antiquated cost structure is simply that it fails to make the injured party “whole.” For example, in a negligence action an attorney will work on a basis of a one-third contingent fee. If he prevails his client will be made two-thirds “whole” and it is quite possible that the attorney has earned only a percentage of the reasonable value of his services.

There are many similar situations of injustice. The court will award only nominal damages for violations to civil rights, reputation, and for assaults and batteries not accompanied by bodily injury or financial loss. The legal fee remains high. The victim prevails in name only; he still must suffer financial injuries and the cost of securing his civil rights to life, liberty and the pursuit of happiness. The poor man who is most susceptible to this type of injustice cannot afford to win.

The conclusion can be but one: In our noble attempt to keep the doors of justice open to all, in our desire to make the court machinery effective, we have accomplished the opposite by clinging to an agrarian solution to a now urban problem. Why do we refuse to recognize that this procedure is not only unadaptable to modern problems, but also it is acting as its own catalyst in advancing those very evils that we try to prevent.

THE ENGLISH SYSTEM OF COSTS

The obvious and simplest remedy for curing the overcrowding of our courts, while at the same time opening the doors of justice to all citizens, is to rejoin England in the policy of awarding reasonable attorney fees to the prevailing party as part of court costs.

Allowing attorney fees as part of costs would join reality and theory by making the injured party “whole.” It would alleviate the situation where an attorney working on a contingent basis must accept less than his reasonable value. The court calendar would not be as populous with the disappearance of strike actions and groundless claims of would-be plaintiffs who now bring actions with no chance of winning. This legal blackmail which forces the defendant to settle for an amount that is not

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7 This is true only if the prognosis for a recovery is at least large enough to cover his costs. Obviously this does not help the indigent person.
8 Kuenzel, supra note 4, at 84.
justly owing the plaintiff would be unable to achieve its economic goal. A
defendant would not be able to force a prevailing plaintiff into time-wasting
litigation by groundless appeals.

In other words, with attorney fees awarded to the prevailing party,
legal blackmail and the necessity to balance the cost of settlement against
the expense of litigation will cease to be a potent tool to prevent justice.\(^\text{10}\)

In England the court has the discretionary authority to award counsel
fees to the prevailing party in a lawsuit. This has been the rule for
hundreds of years. The English system of court costs was not planned
or designed to prevent misuse and abuse of the judicial system and is not
directed toward such ends today. The beneficial effect that this cost system
has on limiting the court congestion, holding down costs and discouraging
nonmeritorious suits has contributed to the efficiency and quality of
British justice and should continue to do so in the future.\(^\text{11}\)

In the face of this fact it is noteworthy that their judicial manpower
has remained comparatively stable for ninety years [as of 1964],
despite the fact that the total population of England and Wales
has increased from 22.7 million people to 43.5 million during
the period in question.\(^\text{12}\)

The cost system was designed and is used for the purpose of making
an injured party "whole." In 1858 Lord Cranworth expounded the
underlying philosophy: "I think that the general principle upon the subject
of cost is, and ought to be . . . that the cost ought never to be considered as
a penalty or punishment, but merely a necessary consequence of a party
having created a litigation in which he has failed."\(^\text{13}\)

After successful litigation, barristers and solicitors submit a document
decision of cost items into court. Either the unsuccessful adversary consents to pay
these enumerated costs or if a dispute develops a special taxing master
makes a determination of what items and amounts are necessary,
reasonable and proper. "Moreover, if the tortfeasor or contract breaker
refuses to honor the legitimate demands of the ultimately successful party
and forces the latter to resort to litigation, he is considered to have
increased the damages inflicted."\(^\text{14}\)

Under the English rules the trial judge has the discretion to deny
costs, or even award them to a losing party in a case (as happens) where

\(^{10}\) Kuenzel, supra note 4, at 79.
\(^{11}\) Greenberger, The Cost of Justice: An American Problem, An English Solution,
9 Vill. L. Rev. 400, 401 (1963) [hereinafter cited as Greenberger].
\(^{12}\) Id. at 400-01. The ratio of Queen's Bench Division Judges per million in population
has increased from 1 to 1.26, to 1 to 2.18. Initial Report of the Committee on
\(^{14}\) Greenberger, supra note 12, at 401.
the "loser" has really won or the successful suit is unjustified. In other unusual circumstances, fees may be denied or even charged to the prevailing party where, for example, a plaintiff refuses a fair settlement offer and recovers less after trial.\textsuperscript{15}

The taxing master allows only necessary and reasonable costs that were directly incurred preparing and attaining justice. Allowance is not permitted for money spent by maintaining an overcautious position, or for a mistake which results in excessive court time, or extravagant or special charges of a witness.\textsuperscript{16} A person who abuses the system and increases the cost of litigation above the essential cost does so at the risk of having to pay the burden of the entire cost or that portion which the court considers excessive. The thrifty English litigant rarely abuses the system.\textsuperscript{17}

Even with the cost control legislation and three methods of determining the reasonable attorney fee,\textsuperscript{18} the court has awarded generous allowances. In \textit{Graigola Merthyr Co. v. Swansea Corp.},\textsuperscript{19} the court awarded the prevailing defendant $350,000. The high absolute dollar awards, however, serve to keep the teeth of the legislation sharp. Would-be abusers know that it will be unprofitable to bring an unjustified suit and persons with legitimate claims, even for small dollar amounts, can proceed assured that the contract-breaker or tortfeasor will pay the costs.

The American dream of equal justice for all exists in England. By incorporating into our state and federal statutes similar legislation allowing reasonable attorney fees for the prevailing party in the discretion of the court we can bring that dream to America and merge reality with theory.

\textsuperscript{15} For an excellent discussion of the exception to the rule of allowing attorney fees as court costs to prevailing party, see Greenerber, supra note 12.

\textsuperscript{16} Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 43, § 50.

\textsuperscript{17} See Smith v. Buller, L.R. 19 Eq. 473, 475 (1875).


"Party and Party taxation" is the most common method. The costs to litigate the suit are kept to a reasonable minimum. The procedure is controlled by a taxing master, who is similar to a referee in a bankruptcy proceeding, who determines what costs are necessary and reasonable to achieve justice.

"Common Fund Standard" method is a rich man's "Party and Party." Under this liberalized cost method fees and charges that would be ruled excessive under the "Party and Party" taxation are allowed, and certain items that would be stricken as luxuries are acceptable to the taxing master. This method of taxing is allowed only under special circumstances. The "Solicitor and Own Client" taxation method is comparable to the present American system. The lawyer and client determine the fee; however, to prevent abuse, the court and taxing master reserve the power to rule on the propriety of the fee.

\textsuperscript{19} See 30 \textit{HALSBURY'S LAWS OF ENGLAND}, pt. 2, § 6 (3d ed. 1959), for complete discussion and related case application.
Copyright

Under the Federal Copyright Law,20 reasonable attorney fees are permitted in the court's discretion.21 "In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs."22

The effect of this section, which allows the court to award reasonable attorney's fee to the prevailing party, has acted as an incentive for those who have valid claims of copyright infringement to seek the aid of the judicial machinery. It has not justified the fears and predictions of the opponents of such a proviso that the courts will become the private domain of the rich, that the poor will be discouraged from seeking the court's protection, and that legitimate claims will go unredressed. In fact the opposite conclusion would seem more valid.

The courts have advanced several predominant theories in copyright cases favoring the awarding of counsel fees as part of court costs. The most prevalent of these theories is to make the winning party "whole." The explanation basically is that the losing party to an action, be it the plaintiff or the defendant, must bear the burden of paying the opponent's counsel fees as a direct and proximate result of his infringement of the plaintiff's copyright. Or, if defendant prevails, the proximate result is the securing to the defendant of full use and enjoyment of the profits and benefits of his creative work unmolested by others.

The classes of situations that fit in this discretionary category are based on some moral wrong in instituting the action. One such target is the deliberate copyright infringer, such as in Stein v. Rosenthal.23 In this case the

...defendants unconscionably invaded plaintiffs' copyright and in their solicitation of customers for their infringing merchandise, harassed the plaintiffs' customers and resorted to such devices as impersonation of federal agents in an attempt to gain a view of the tradesmen's records of business with plaintiffs. Where the techniques

of copying and vending infringing articles are so tinged with bad faith, plaintiffs are entitled to reasonable attorney's fees...24

The court's discretionary wrath in copyright cases is also turned toward the plaintiff who institutes an action in bad faith merely to vex and harass the defendant, where the claim is so lacking in merit that it is unreasonable. Such was the case in Cloth v. Hyman,25 where the court said that

[a]n attorney's fee is properly awarded when the infringement action has commenced in bad faith, as where the evidence establishes that the plaintiff's real motive is to vex and harass the defendant or where plaintiff's claim is so lacking in merit as to present no arguable question of law or genuine issue of fact.26

In the actions where counsel fees were awarded there has been an element of bad faith. In these cases the award was used as a penalty as well as compensation to the prevailing party. Bad faith is an element weighted heavily by the court when exercising its "discretion."

The fact that counsel fees are awarded as a penalty in some cases is blatant, such as, where the prevailing party is disallowed counsel costs because of bad faith on his part. In United Artists Television, Inc. v. Fortnightly Corp.,27 the prevailing defendant was denied $40,000 attorney fees, because the court felt that such awards are to be made only for "penalization" of the losing party. In Jerome v. Twentieth Century Fox Film Corp.,28 the prevailing defendant's application for $30,000 attorney fees was disallowed, to penalize him for his over-technical attitude which forced plaintiff to unnecessary litigation and expense.

The courts have also disallowed attorney fees where the question litigated is unique, novel, complex and of a genuine issue accompanied by no moral guilt or blame. An excellent discussion concerning this subject is Judge Feinberg's decision in Davis v. E. I. DuPont de Nemours & Co.29

In Brefort v. I Had A Ball Co.,30 the court summed up the theory that reasonable attorney fees are awarded to the prevailing defendant to deter copyright infringement by making it more expensive to do so and to shift the burden of protecting the copyright property to the infringer. The theory for awarding a successful defendant reasonable attorney fees is to impose a penalty upon the plaintiff for instituting a "baseless, frivolous, or unreasonable suit, or one instituted in bad faith."31

24 103 F. Supp. at 231-32.
26 146 F. Supp. at 193.
31 Id. at 627.
The Copyright Act makes it possible for individuals, groups and corporations to bring action in the courts to defend their rights to exclusive use of their creative property from infringers regardless of the size of damages to be expected. Unlike other areas of law where reasonable attorney fees are expressly denied as part of the costs, parties involved in this branch of law can bring actions for even a small, but frustrating, infringement because they can be made “whole.” It also prevents claims that are intended to harass and blackmail on groundless allegations.

There is no reason why such a rule should not be established to apply uniformly to other branches of civil law. The doors to the judicial machinery will then be reopened to the monetarily weaker litigant who will find relief for his injuries suffered, although compensatory damages are small and legal fees high.

Section 116 of the Copyright Act does not authorize or speak to the allowance of the actual attorney fee, but to a “reasonable” attorney fee. Apparently the difference between an actual allowance and a reasonable allowance escapes the detection of critics, accounting for the fears of such an award. Allowing reasonable attorney fees would not inflate actual fees because any extravagance, waste or excessiveness would not be compensated for in the court’s awarding of attorney fees. Costs which increase the prevailing party’s legal fee will be his own responsibility. Abuse of the system could only be self-defeating.

In most cases, the court has been generous in awarding counsel fees. The allowances are often large, both in absolute dollar amount and also in percentage of damages awarded. In rare instances the court has allowed attorney fees even to the extent of 100% of damages, where the award was modest.

Once the court has decided to award a reasonable counsel fee, it next applies a second test to determine the dollar amount. Most courts follow the same test of relevant factors, but each court considers certain individual elements more important than others.

The elements most commonly considered important in determining the dollar amount of attorney fees are amount of work necessary, work done, the skill employed, the monetary amount involved, and the result achieved. Cloth v. Hyman, 146 F. Supp. 185 (S.D.N.Y. 1956). See also Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir. 1962); In Re Continental Vending Machine Corp., 318 F. Supp. 421 (E.D.N.Y. 1970).

33 E.g., N.Y. Civ. Prac. § 8304.4 (McKinney 1974).
34 See 2 NIMMER, NIMMER ON COPYRIGHT § 161 (1974).
35 In M. Witmark & Sons v. Calloway, 22 F.2d 412 (E.D. Tenn. 1927), damages awarded were $250 and counsel fees were $250.
36 In determining what is a reasonable attorney’s fee, the court considered amount of work necessary, the amount of work done, the skill employed, the monetary amount involved, and the result achieved. Cloth v. Hyman, 146 F. Supp. 185 (S.D.N.Y. 1956). See also Orgel v. Clark Boardman Co., 301 F.2d 119 (2d Cir. 1962); In Re Continental Vending Machine Corp., 318 F. Supp. 421 (E.D.N.Y. 1970).
amount of work done,\footnote{See cases cited note 36 supra.} amount of skill employed,\footnote{See cases cited note 36 supra. See also cases cited note 36 supra. See also Burnett v. Lambino, 206 F. Supp. 517 (S.D.N.Y. 1962), wherein the court stated: "In fixing these amounts I have considered the attorney's fee was reduced from $10,000 to $5,000.} amount of damages involved,\footnote{See cases cited note 36 supra. See also cases cited note 36 supra.} result achieved,\footnote{See cases cited notes 38, 41 supra.} distance traveled,\footnote{See cases cited note 39 supra.} amount of time involved,\footnote{See cases cited note 39 supra.} and the attorney's professional standing and reputation.\footnote{See cases cited note 39 supra.} It should be emphasized that actual attorney's fee is irrelevant in the determination.

The actual dollar awards have been large, both in absolute amount and percentage of damages awarded. In \textit{Davis v. E. I. DuPont de Nemours & Co.},\footnote{257 F. Supp. 729 (S.D.N.Y. 1966).} for example, the counsel fee of $15,000 was 60% of the $25,000 damages awarded.\footnote{Id. at 732. See also Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); Lewys v. O'Neil, 49 F.2d 603 (S.D.N.Y. 1931).} Antitrust

The Federal Antitrust Law states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore, ... and shall recover treble the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."\footnote{15 U.S.C. § 15 (1914).} The purpose of this statute is to put teeth into antitrust regulations as they affect private individuals and corporations. Although recovery of the reasonable attorney's fee is awarded only to the prevailing plaintiff in a
private litigation, it does make the courts available to an injured party. The beneficial effect this statute has had in protecting parties from violation of the antitrust regulations is best illustrated by the results of antitrust suits brought by the United States against private parties. In actions brought by the federal government no allowance is permitted. Because of the immense size of legal fees in bringing or defending an antitrust litigation it is common practice for corporations to plead "no contest" and pay the penalty to avoid the cost of litigation. In the private sphere, prior to the regulations concerning attorney fees, one corporation or person could bring such an action to harass, being reasonably confident that a "no contest" plea would be entered and that actual litigation would never be commenced. The overall effect is clear: the antitrust infringer had a green light because his victim could not afford to bring an action.47

Unlike the Copyright Act, the Antitrust Act states that court costs shall include a reasonable attorney fee; court discretion plays no part in determining if the plaintiff will recover this cost. The unsuccessful plaintiff in an antitrust action is not awarded his attorney's fee, except in the "case of a derivative suit brought on behalf of a corporation, where it is shown that the corporation has received substantial benefit."48

The dollar amount to be awarded as attorney fees is solely within the court's discretion, if reasonably exercised.49 In determining the amount of this cost, the court looks to the following elements: the nature of the question, its novelty and difficulty, the skill and competence of counsel, his reputation in the community, amount involved, the result in relation to the pleading, counsel experience and customary charges for similar actions.50 The size of the attorney's fee awarded by the court is realistic

47 The primary purpose of Section 4 is to grant private parties the right to recover treble damages for injuries to their property by reason of a violation of the antitrust laws. . . . It was now so enlarged as to give much broader rights to a private party injured so that such party would not only be more adequately protected, but the law itself be in fact made more effective.

2 Von Kalinowski, Antitrust Laws and Trade Regulations § 11.04 & n.7 (1974).

48 See Schechtman v. Wolfson, 244 F.2d 537 (2d Cir. 1957).

The modern equity practice is to allow counsel fees to successful prosecutors of derivative suits although no judgment has been obtained if they show substantial benefit to the corporation through their effort. [Citing cases.] But there should be some check on derivative actions lest they be purely strike suits of great nuisance and no affirmative good, and hence it is ruled generally that the benefit to the corporation and the general body of shareholders must be substantial.


49 In South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970), the court awarded the plaintiff $2,410,452 in damages before tripling as required by the Sherman Antitrust Act and Clayton Act. In answer to the defendant's contention that the award of a $335,000 attorney's fee was unreasonable, the court said: "A party seeking review of an award of attorney's fee in an antitrust case has the burden of clearly demonstrating error in the factual basis of the award or an abuse of discretion." 434 F.2d at 794.

and covers, in most instances, a large part of the actual legal cost. Usually, the award is held to less than the actual damages awarded, before tripling. An exception to this rule is in cases where the actual damages are small. In such cases the court will award an attorney's fee that is based on the above criteria, regardless of the fact that it amounts to more than the actual damages.51

The usual attorney fees awarded pursuant to the antitrust regulations are large both in actual dollar amount and in percentage of trebled damages.52 As one would expect, as the damages awarded increase, the reasonable attorney fees also increase, but at a slower percentage rate.53 The net effect of the generous and realistic awards that reflect the purchasing value of the dollar is that, in both the antitrust and copyright areas of the law, the basic theory of the founding fathers is being put into practice.

The concepts of poverty and expense are, among other factors, relative to one's neighborhood, social position, and needs. A corporation is poverty stricken in relation to the federal government; the lone novelist is poor compared with a major motion picture corporation. Before the copyright and antitrust regulations allowing reasonable attorney fees were passed, victims of powerful violators were also the victims of legal blackmail, strike actions and remediless violations that thrive under the present system of torts and contracts.

Other Federal Legislation

The Copyright and Antitrust Regulations are not the only federal

924 (S.D. Me. 1969). In the exercise of its sound discretion the Farmington court sustained an attorney's fee of $327,300 based on the following factors:
(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government; (2) the standing of counsel at the bar . . . ;
(3) time and labor spent by counsel; (4) the magnitude and complexity of the litigation; (5) the responsibility undertaken by counsel; (6) the amount recovered; and (7) the knowledge the court has of the conferences, the arguments that were presented and the work shown by the record to have been done by the attorneys for the plaintiff prior to trial.


53 For instance, in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 587 (10th Cir. 1961), where trebled damages were $4,400,000, and attorney fees were $500,000, or only 11.36%.
statutes providing for reasonable attorney fees. Without exhausting the list of such statutes, the following acts parallel the Antitrust Regulations in allowing a reasonable attorney’s fee for the prevailing plaintiff: Fair Labor

Standard Act, Interstate Commerce Act, Railway Labor Act, Packers and Stockyard Act, Merchant Marine Act, Communication Act, and the Tort-Claim Act. The Securities Act of 1933, like the Copyright Act, allows either prevailing party a reasonable attorney’s fee.

With the knowledge of the above federal statutes and the state statutes to be discussed below, it becomes difficult to justify the argument against allowing reasonable attorney fees in other areas of law. The success of these statutes in providing remedies for all wrongs, regardless of monetary amount, in making injured parties “whole,” in eliminating or decreasing abuse of the legal system and in clearing the court calendars of actions that have no merit or that can be settled without court

54 29 U.S.C. § 216(b) (1938): “The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant...” (emphasis added).


56 7 U.S.C. § 210 (1921): “If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.”

57 46 U.S.C. § 1227 (1936): “Any person who shall be injured in his business or property by reason of anything forbidden by this section... shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

In case any common carrier shall do, or cause or permit to be done, any act, matter or thing in the chapter prohibited or declared to be unlawful... shall be liable to the person... injured thereby for the full amount of damages sustained... together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery...


In any suit under this or any other section of this subchapter, the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigation if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him.
assistance, is evident by reading court opinions dealing with these statutes. Why opponents of such legislation cling to their unsubstantiated fears is a mystery. Those who maintain that such a cost system would not work in civil cases of tort and contract are closing their eyes to the English system and the statutes which reflect its success with mathematical clarity. These opponents must also discount or explain away the success that Alaska, Washington and Oregon have had with statutes similar to the federal legislation.

STATE STATUTES

Alaska, Washington and Oregon all have statutes that grant attorney fees to the prevailing party in a lawsuit. These statutes, although not in agreement with the present legislation of the original 13 colonies, do offer, in fact, judicial protection to all citizens. The concept of reasonable attorney fees, which is a matter of heated scholarly debate and of questionable merit in the east, is commonplace in the courts of the aforementioned western states. It is the authors' opinion that if we stop talking and look to the practical results achieved by these three western states and England, the answer will be self-evident. The three questions that should be posed are: Does our system today offer the protection of legal justice that the founding fathers described? Do Alaska, Washington, Oregon and England offer such protection? What do these jurisdictions have that we do not? The answer to the third rhetorical question is, of course, in large part, that these jurisdictions include reasonable attorney fees as part of court costs.

To illustrate, under the Alaska law in Varnell v. Swires, where an employee-appellant sought judgment against his employer in the United States District Court without pursuing his remedies under the local workman's compensation law, a legal fee was awarded to the respondent in the sum of $150.00. The case clearly followed the rule of McNeill & Libby v. Alaska Industrial Board, where a $200.00 fee was similarly allowed the prevailing party.

62 ALASKA STAT. § 09.60.010-.060 (1973). "Except as otherwise provided by statute the Supreme Court shall determine by rule or order what costs, if any, including attorney fees, shall be allowed the prevailing party in any case." Id. at § 09.60.010.

WASH. REV. CODE § 4.84.010-.020 (1962).

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, express or implied, of the parties, but there shall be allowed to the prevailing party upon judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs.

Id. at § 4.84.010.

ORE. REV. STAT. § 20.010 (1973):

The measure and mode of compensation of attorneys shall be left to the argument, express or implied, of the parties, but there may be allowed to the prevailing party in the judgment or decree certain sums by way of indemnity for his attorney fees in maintaining the action or suit, or defense thereto, which allowance are termed costs.

63 261 F.2d 891 (9th Cir. 1958).

64 191 F.2d 260 (9th Cir. 1951), cert. denied, 342 U.S. 913 (1952).
In *Jonas v. Bank of Kodiak*, a dispute arose over whether travel expenses were allowable to an attorney for a successful party under the Alaska Statute. There was only one attorney then resident in Kodiak at this time and he represented the unsuccessful plaintiff in the case. While counsel fees of $500.00 were allowed the successful defendant, the necessary travel expense was denied as outside the scope of the statute.

Under a pre-statehood Alaska rule, evidence need not be submitted to the jury as to the reasonableness of an attorney's fee. The appellate courts have found the local judge to be fully capable of determining a reasonable fee without the need of testimony being taken.

Similarly, in *Columbia Lumber Co. v. Agostino*, the appellate court refused to interfere with the trial court's discretion in awarding a $250.00 counsel fee to the successful party. The respondent had considered it insufficient.

In the State of Washington, under a statutory rule, attorney's fees are allowed only in modest specific amounts to the prevailing party other than in cases which are recognized exceptions. A more substantial grant will be made where the matter of fees is covered by contract, a note, or where litigation has been caused by a malicious third party. This section limits fees to rather nominal amounts. While the principle is properly established by the statute, we feel this minimal approach is not sufficient. Oregon is similarly modest in its approach to the problem. Under the statute and case law, a reasonable counsel fee to the prevailing party is permitted in cases where the amount in controversy is less than $1,000.00, and a demand has been made for the same at least 10 days before suit was instituted.

It should be said that these three states are not the only jurisdictions allowing such costs. New York, for example, has granted a certain class of persons under limited circumstances such costs in Section 64 of the General Corporation Law. It should be noted that this statute more
closely follows the English system of solicitor and barrister taxation than its American counterpart. The New York General Corporation Law says "actually and necessarily," not "reasonable." It has been shown that "reasonable costs" have been liberally construed by courts based on time involved, skill employed and other subjective criteria, while the British courts, although also rendering large allowances at times, look more to basic necessities. The English system thus interpreted and employed in the New York General Corporation Law is an excellent compromise between the two systems that could reap all the benefits outlined above and still be more acceptable to opponents of such legislation.

In New York, in limited classes of exceptional cases, counsel fees may also be imposed on the unsuccessful party. These would include instances where a contract sued upon specifies the obligation to pay counsel fees as a matter of right. Actually, the recovery if allowed, is upon the contract and not a matter of costs. Similarly, where there is fraud or malice or where a party is obliged to litigate with a third person due to defendant's bad faith, legal fees may be allowed.

In the case of Chatham Nameplate Inc. v. Pfeffer, the Supreme Court of Queens County allowed counsel fees to the plaintiff where the defendant had forced the plaintiff to litigate with a controlled corporation while diluting its assets to himself. The court found fraud and bad faith on the defendant's part, as well, and felt that the case fitted within "the recognized exception to the rule that attorney fees incurred in litigating a claim are not recoverable as an item of damage."  

As an alternative theory, the court found a right to assess counsel fees as part of "punitive damages" for wanton conduct. By this test, as well, the defendant was found responsible.

Where an attachment against a defendant's property has been improperly issued and is set aside, counsel fees in securing the vacatur may also be recovered.

The approach of these decisions is not the approach that your authors submit for your consideration. There should be no requirement of fraud or bad faith before an allowance of fees is permitted. But these cases do refute the argument made by our opponents that the courts cannot responsibly set fair compensation to prevailing counsel and that to impose such a duty would overwhelm the judiciary.

We suggest, for your consideration, a proposed state statute to read as follows:

Any court of record with appropriate jurisdiction of any action or proceeding is hereby authorized and directed, effective

197_, to order payment to the prevailing party or parties in said action or proceeding pending before it, upon the entry of any order or judgment therein, of counsel fees in a sum to be determined in the court's reasonable discretion, as well as costs and disbursements as provided by law. Such fees may be determined by the court on stipulation of the parties or otherwise by the court, or if found necessary, referred to a referee for hearing and report. Where the matter of such counsel fees is contested, it shall be determined with a view to such criteria as results achieved, time expended, novelty of legal problems involved, experience of counsel, public benefit and other relevant factors. No such listing of criteria is to be regarded as exclusive. While the matter of good faith of the nonprevailing party in instituting such action or proceeding may be considered as relevant as to the size of any such counsel fee so awarded, a finding of such good faith shall not in itself bar or limit the granting of reasonable counsel fees to the prevailing party or parties. Provided, however, that in the event that the court finds that the action or proceeding brought or defenses asserted, were frivolous in nature or for damages in excess of any reasonable demand or otherwise unjustified, then and in such event the court shall have the discretion to deny counsel fees to the prevailing party or parties in part or in toto.

**Conclusion**

There are a host of other examples authorizing the granting of fees to the prevailing parties. These fees have been administered without huge windfalls to lawyers or anyone else. Judicial techniques can easily be utilized to meet this problem. They have overcome far more serious difficulties in legal administration.

Logic, fairness and equity now clearly require discretion in our courts to permit the granting of a counsel fee to a prevailing party where litigation has been instituted. The precise manner to accomplish this purpose and the methods and techniques to be utilized should be fully and promptly investigated. While there are problems to be dealt with, the principle should be quickly established which will allow damaged parties the assurance of reasonable indemnity. The legal profession, society and justice would be the beneficiaries. Counsel fees should be considered as the direct and proximate result of the damages litigated. The victim of a wrong should not be forced to weigh the cost of attaining justice against the cost of putting the judicial machinery into operation.
ADVERSARY JUVENILE DELINQUENCY PROCEEDINGS: IMPEACHMENT OF JUVENILE DEFENDANTS BY THE USE OF PREVIOUS ADJUDICATIONS OF DELINQUENCY

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V. LEE SINCLAIR, JR.†

INTRODUCTION

In adult criminal proceedings, any defendant who wishes to testify faces certain risks when he steps into the witness box. The risks such a defendant engenders certainly include the possibility of having his prior criminal convictions brought up by the prosecution, for purposes of impeaching his testimony. In essence, the defendant who takes the stand, like any other witness, places his reputation for truth and veracity into issue. The theory behind this general rule emanates from the belief that the defendant’s testimony can be no more credible than the defendant himself. Therefore, the prosecution is given the right, under certain

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3 At common law persons convicted of certain crimes were disqualified from testifying as witnesses, 1 S. GREENLEAF, EVIDENCE § 373, at 514 (16th ed. 1899); 2 J. WIGMORE, EVIDENCE § 519, at 608 (3d ed. 1940). Modern statutes, however, now permit the previously convicted witness or defendant to testify, but grant the prosecution the opportunity to attack the witness’ credibility by the use of the individual’s previous convictions, those convictions to weigh inferentially upon the believability of the testimony given. Mccormick’s Handbook of the Law of Evidence § 43, at 85 (2d ed. 1972) [hereinafter cited as mccormick].
4 Stone, Cross-Examination, supra note 2, at 454: The defendant who goes into the witness box acquires a new role in the proceedings, that of a witness... entirely separate from his role as defendant, and when he assumes it, he assumes... the burdens and benefits attaching to the role of witness... Among the burdens is the risk of being examined as to credibility.
See also 2 Wharton’s Criminal Evidence § 478, at 444-45 (13th ed. 1972): A defendant who testifies in his own behalf puts his credibility in issue the same as any other witness, even though no evidence has been adduced of his good character or reputation. In general, the same rules relating to impeachment, which are applicable to an ordinary witness, apply to the defendant.
5 Mccormick, supra note 3, § 41, at 81: “The character of a witness for truthfulness or mendacity is relevant circumstantial evidence on the question of the truth of particular testimony of the witness.”

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limitations, to attack the credibility of the defendant and his testimony by inquiring into his past criminal "conduct."

While the foregoing discussion may be regarded as a generally acceptable statement of the law, jurisdictions throughout the United States vary greatly on the specific point regarding which particular criminal convictions may be raised for the purposes of impeachment. Many jurisdictions allow inquiry as to any conviction for a crime involving moral turpitude. Others permit inquiry as to convictions for felonies, or "infamous crimes" which may be classified as crimes involving crimen falsi. Still others permit the trial judge at his discretion to determine whether or not the defendant's prior criminal convictions affect his credibility as a witness. The Uniform Rules of Evidence provide for the impeachment of a witness by the use of prior convictions for crimes involving dishonesty or false statement. If the witness also happens to be the defendant, no evidence of his prior criminal convictions is admissible under the Uniform Rules, unless he has first introduced evidence tending to support his own credibility. Under the Federal Rules of Evidence, a defendant's credibility may be attacked by the use of prior criminal convictions punishable by death or imprisonment in excess of one year (i.e., felonies), or by the use of those involving dishonesty or false statement.

Irrespective of the particular rule followed, courts permit inquiry into this area because of a rather strong belief that it would be misleading to the fact finder, to allow a previously convicted defendant to testify as if he were a "witness of blameless life...." While it is true that every

6 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 751 (6th ed. 1973). The right to attack the credibility of a defendant or witness is granted for the purpose of enabling the fact finder to weigh his testimony in light of his previous actions. It can serve no other purpose, and in the case of a jury trial, the jury must be instructed as to the limited purpose that the evidence is to serve. See Spencer v. Texas, 385 U.S. 554, 561 (1967).

7 See McCormick, supra note 3, § 43, at 85-86.


11 See McCormick, supra note 3, § 43, at 84-85.


13 The Uniform Rules of Evidence were drafted by the National Conference of Commissioners on Uniform State Laws and approved at its annual conference in 1953.


15 The Federal Rules of Evidence were enacted into law on January 2, 1975, to take effect 180 days from the date of enactment. See Pub. L. No. 93-595 (Jan. 2, 1975).

16 FED. R. EVID. 609(a).

17 McCormick, supra note 3, § 43, at 89.
defendant who enters the courtroom starts his life "afresh," it is equally true that every such defendant brings with him his past, no matter how haunting or insidious it may be. Therefore, insofar as it affects his credibility, past criminal convictions may be revealed to enable the fact finder to weigh the defendant's testimony in light of his background.

**IMPEACHMENT IN JUVENILE COURT ON THE BASIS OF PRIOR JUVENILE COURT RECORDS**

In adversary juvenile delinquency proceedings, the impeachment of any juvenile who wishes to testify, by the use of the witness' previous adjudications of delinquency, is somewhat more clouded than the aforementioned situation involving adult defendants. This confusion arises, in part, from modern statutes relating to juvenile proceedings which typically provide that a judgment, finding, disposition, or any evidence given in a juvenile court shall not be used against a child in any other court, and that a finding of delinquency shall not be deemed to be a criminal conviction.

An analysis of the various statutes leads to several possible conclusions:

1. They were designed to protect juvenile offenders from any subsequent use of their delinquency records except for dispositional or sentencing purposes;
2. They were designed to protect juveniles from the possibilities of having their juvenile records or any evidence given in juvenile court revealed or used when such juveniles were transferred to criminal court.

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18 People v. Zackowitz, 254 N.Y. 192, 197, 172 N.E. 466, 469 (1930).
19 Any individual's past conduct obviously sheds some light upon his make-up. If the past conduct involves acts of a criminal nature, those acts are relevant circumstantial evidence of his inclination to speak the truth, as discussed in McCormick, supra note 3, § 41, at 81. Therefore, since all relevant evidence should be admitted at trial, 1 J. WIGMORE, EVIDENCE § 57, at 650 (3d ed. 1940), past criminal conduct can be revealed to inform the fact finder of all relevant data.
20 As in the case of adult criminal defendants, juveniles have the constitutional right to remain silent. See In re Gault, 387 U.S. 1 (1967).
21 As used in this article, the term "adjudications of delinquency" includes only those adjudications for some violation of criminal law.
22 Inasmuch as there is very little case law on the question, there is room for confusion and disagreement as to what the law is or should be. Compare 3A J. WIGMORE, EVIDENCE § 980(7), at 834 (Chadbourn Rev. 1970) with McCormick, supra note 3, § 43, at 86 and 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 751 (6th ed. 1973). Cf. 4 JONES ON EVIDENCE § 26.20, at 223 (6th ed. 1972).
24 For example, McCormick, supra note 3, § 43, at 86 and 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 751 (6th ed. 1973). See also Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941).
25 Almost all states provide for the transfer of juvenile offenders to criminal court to be tried as adult defendants, see, e.g., OHIO REV. CODE ANN. § 2151.26 (Page Supp.
court to be tried as adults, or when they later became adult defendants, or when they testified outside of juvenile court;

3) They were designed to protect juvenile offenders from the possibility of having their prior juvenile records brought up for purposes of treating such offenders as habitual criminals, after they reached the age of majority.

Each of these possible interpretations has received some support from highly respected commentators, and various writers. In addition, a few courts have had the opportunity to construe the statutes in reference to this impeachment question, and have reached somewhat different conclusions. For example, one Ohio court has recently interpreted a typical juvenile statute, such as that mentioned previously, and has determined that a juvenile defendant's previous adjudications of delinquency may be brought up when he testifies in his own behalf at an adjudicatory hearing, for the purpose of discrediting his testimony. The court held that these prior offenses are admissible to show the juvenile's previous criminal behavior, and to demonstrate his possible interest in the outcome of the litigation.

In contrast to this decision, one federal court in interpreting a


26 See Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936).
27 See 1 J. WIGMORE, EVIDENCE § 196, at 673-74 (3d ed. 1940).
29 See 1 J. WIGMORE, EVIDENCE § 196, at 673-74 (3d ed. 1940).

32 See, e.g., Brown v. United States, 338 F.2d 543 (D.C. Cir. 1964); Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941); State v. Kelley, 169 La. 753, 126 So. 49 (1930); People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943); State v. Marinski, 139 Ohio St. 559, 41 N.E.2d 387 (1942); Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936); In re Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974); State v. Hale, 21 Ohio App. 2d 207, 256 N.E.2d 239 (1969).
33 See text accompanying note 24 supra. See also OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1973), which provides in part: The judgment rendered by the [juvenile] court... shall not impose any of the civil disabilities ordinarily imposed by conviction of crime in that the child is not a criminal by reason of such adjudication... The disposition of a child under the judgment rendered or any evidence given in [juvenile] court is not admissible as evidence against the child in any other case or proceeding in any other court...

34 In re Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974).
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juvenile statute very similar to the Ohio law, determined that the overall rehabilitative philosophy of the juvenile court system forbade any use of previous adjudications of delinquency to impeach the testimony of a juvenile witness in juvenile court. The court expressly held:

As the language of the statute expressly forbids the interpretation that the disposition of a child in a juvenile court proceeding constitutes conviction of a crime, and as nothing short of conviction of crime is sufficient to warrant the inquiry which appellant was forbidden to make, his contention [that impeachment on the basis of previous adjudications of delinquency should have been allowed] is completely devoid of merit.

A close reading of the statute interpreted by the federal court raises serious doubts as to the propriety of the court's analysis. As the dissent in the case poignantly indicated, the statute did not expressly forbid "[t]he juvenile court itself...[from considering] previous misconduct...of a witness...where that misconduct is of such a character as will bear upon the credibility of that witness." The dissent certainly believed that a juvenile court's consideration of the previous misconduct of a child did not "impose upon a witness any of the civil disabilities ordinarily imposed by conviction, or treat a witness as a criminal, or constitute admission of evidence against a witness, contrary to the juvenile statute in question..." The dissenter could not "conclude that it was the intention of Congress, when it laid down the wholesome protections of the Juvenile Court Act against treating children as criminals, to blind the eyes of the juvenile judge or of a jury in the juvenile court to considerations vitally bearing upon the credibility of testimony." The plain meaning of both the Ohio and the District of Columbia statutes indicates that they were designed to protect juveniles from the use of their prior juvenile court dispositions, or any other evidence given in a juvenile court, in any court other than a juvenile court. The statutes'


36 Thomas v. United States, 121 F.2d 905, 908-09 (D.C. Cir. 1941).
37 Id. at 909 (emphasis added).
38 Id. at 911.
39 Id.
40 Id.
41 See statutes cited notes 33 and 35 supra. The wording of both statutes is virtually identical.
42 The language of the statutes mentioned notes 33 and 35 supra, expressly provides that an adjudication of delinquency given in juvenile court is inadmissible in any other case or proceeding in any other court. The language "in any other court" cannot be ignored as its wording is plain and unambiguous. As the Supreme Court stated in Caminetti v. United States, 242 U.S. 470, 485 (1917): "[T]he meaning of [a]...statute must, in the first instance be sought in the language in which the act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its
clear intent is not to preclude the use of such dispositional findings or evidence in the juvenile court itself. To determine otherwise would be to completely disregard the wording of the statute and the obvious legislative intent.

The Ohio court, in interpreting the previously mentioned Ohio juvenile statute, implicitly determined that an adjudication of delinquency, while not technically defined or regarded as a criminal conviction, carried with it sufficient probative value as to bear upon the credibility of the juvenile in question and his testimony. This interpretation of the statute does not impose any civil disability upon the juvenile, nor does it treat him as a criminal. Instead, this interpretation faces up to the true realities of the situation and helps to further the truth finding goals of the juvenile courts.

If the interpretation herein supported is correct, juvenile courts will have the otherwise usual opportunity to weigh the testimony of any juvenile defendant against the juvenile's previous actions. Furthermore, if a juvenile has had prior court adjudications of delinquency, the court in allowing questioning as to his previous juvenile court record may be

terms." The statutes in question do not forbid the use of an adjudication of delinquency in the juvenile court itself. To hold otherwise would be to completely disregard the language of the enactments and the express legislative intent.

43 The expressed intent of a legislative enactment can be gleaned from the plain meaning of the statutory wording. See 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01-03 (4th ed. 1973). The plain meaning of the juvenile statutes being analyzed, indicates that the legislatures did not intend to forbid the juvenile courts themselves from considering all relevant evidence, including impeachment evidence. Had the legislatures intended some other result, logic dictates that some other wording would have been utilized, e.g.:

A judgment rendered by a juvenile court or any evidence given in such court shall not be admissible against a child in any other case or proceeding in any court whatsoever, except that such an adjudication or disposition may be considered by any court whatsoever for dispositional or sentencing purposes.

[Author's example.]

See In re Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974). See also Davis v. Alaska, 415 U.S. 308 (1974), suggesting that such language as that offered could be constitutionally impermissible when balanced against the rights of a criminal defendant.

44 When a statute's wording is plain and clear, that language cannot be ignored, and it is not subject to judicial interpretation but application to particular facts. See 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973). In the words of one federal court: "There is no safer nor better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses...." Swarts v. Siegel, 117 F. 13, 18-19 (8th Cir. 1902).


46 In re Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974).

47 See Thomas v. United States, 121 F.2d 905, 911 (D.C. Cir. 1941) (Stephens, J., dissenting in part): "For the juvenile court so to consider previous misconduct does not in my view impose upon a witness any of the civil disabilities [disqualification in a civil service examination, etc.] ordinarily imposed by conviction...."

enlightened as to the juvenile's possible interest in the outcome of the action. Thus, the impeachment questioning process should in fact support the system's truth determinative goals by enabling the court to consider all relevant facts and circumstances. It would be a true miscarriage of justice to require juvenile courts to determine cases through a "tinted window."

**IMPEACHMENT OUTSIDE OF JUVENILE COURT ON THE BASIS OF JUVENILE COURT RECORDS**

Having supported the view that impeachment of a juvenile defendant in juvenile court is proper under the typical juvenile statute, the question naturally arises as to whether juvenile records should be used as the foundation for impeachment questioning outside of juvenile court. This issue could arise, after the juvenile reaches majority and faces trial as an adult, or where a juvenile testifies in a court other than a juvenile court, as a defendant or a witness.

With some exceptions, the courts have soundly held such questioning to be improper in light of the prohibitions found in the typical juvenile statute. An analysis of the statutes lends support to this general view, as

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49 See In re Benthune, No. CA-4057 (Ct. App., 5th Dist. Ohio, Nov. 18, 1974). In this case, the juvenile in question had previously, on another charge, received a suspended permanent commitment to a juvenile institution. Inasmuch as he was almost certain to be committed if adjudicated delinquent on his present charge, the juvenile had a great interest in the outcome of the action. The fact that he was under a suspended commitment was relevant evidence of his possible motivation for being untruthful. But see Brown v. United States, 370 F.2d 242 (D.C. Cir. 1966). In that case the trial court indicated in an adult criminal prosecution that persons with prior convictions were likely to commit perjury because of the harsher sentences imposed upon repeat offenders. The Court of Appeals reversed holding that the statement of the trial judge was a misconstruction of the theory of impeachment. The court stated: "One need not look for prior convictions to find motivation to falsify, for certainly that motive inheres in any case, whether or not the defendant has a prior record. What greater incentive [to lie] is there than the avoidance of conviction?" 370 F.2d at 244.


51 See text accompanying notes 25, 26 and 27 supra.

52 See Davis v. Alaska, 415 U.S. 308 (1974), noted in 43 U. Cin. L. Rev. 647 (1974) (right of confrontation outweighs state's police power to protect juveniles from being impeached by the use of prior juvenile records); People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943) (in a statutory rape prosecution, the credibility of a 15-year-old prosecutrix may be attacked by the use of her prior juvenile court record); State v. Marinski, 139 Ohio St. 559, 41 N.E.2d 387 (1942) (once a criminal defendant testifies on direct as to his life history including a list of the various schools he had attended, the prosecution may in rebuttal cross-examine the defendant as to his incarceration in a juvenile institution, where the defendant had failed to mention that fact on direct examination); State v. Hale, 21 Ohio App. 2d 207, 256 N.E.2d 239 (1969) (once a criminal defendant introduces evidence of his good character and conduct, the prosecution may in rebuttal, introduce evidence as to the defendant's previous involvement in juvenile court proceedings). See also Fed. R. Evid. 609(d), Pub. L. No. 93-595 (Jan. 2, 1975), which allows impeachment of a juvenile witness, on the basis of juvenile records, in a criminal proceeding, where such would be necessary for a fair trial.

do interpretations two and three, mentioned above. These interpretations seem to support the obvious meaning of the enactments and the overall rehabilitative philosophy of the juvenile justice system.

As opposed to the situation involving juvenile defendants testifying in juvenile court, it seems that the rehabilitative goals of the juvenile justice system would perhaps be destroyed, if an adult could be questioned as to previous transgressions committed while he was under the age of majority. Assuming arguendo, that the rehabilitative goals of the system encourage the privacy and eventual elimination of juvenile records, there seems to be an overriding interest in refusing to allow any impeachment of an adult as to his previous juvenile record. Similarly, a juvenile testifying outside of the confines of a juvenile court should be protected from the embarrassment and possibly harmful degradation of impeachment questioning in a public courtroom.

**IF IMPEACHMENT IN JUVENILE COURT IS PROPER WHILE IMPEACHMENT OUTSIDE JUVENILE COURT IS IMPROPER, DOES THIS VIOLATE EQUAL PROTECTION?**

If impeachment of a juvenile in juvenile court is proper, and if similar impeachment of a juvenile outside of a juvenile court or after he becomes an adult is improper, the question naturally arises as to whether this interpretation violates the constitutional safeguards of the equal protection clause.

The equal protection clause of the United States Constitution simply protects members of the same class or grouping from unequal treatment by a state, for an unreasonable or irrational reason. The clause does not command that all persons be treated absolutely equally, but merely that

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54 See text accompanying notes 25-29 supra.


57 To allow impeachment questioning would totally defeat the rehabilitative goals of the juvenile justice system. Such a view would enable prosecutors and others to use juvenile records to haunt a person throughout his entire life. See Kozler v. New York Tel. Co., 93 N.J.L. 279, 281, 108 A. 375, 376 (N.J. 1919): "We see no reason why the Legislature may not enact that it is against the public policy to hold over a young person in terrorem, perhaps for life, a conviction for some youthful transgression." But see Davis v. Alaska, 415 U.S. 308 (1974).

58 See Brown v. United States, 338 F.2d 543, 547 (D.C. Cir. 1964): "[T]he juvenile himself has a protected interest [when testifying in adult court] in maintaining the credibility of his public testimony."


if there is going to be some unequal treatment, there must be some rational basis for it. If a state develops some classification which results in unequal treatment for no justifiable reason, the classification must be struck down as being repugnant to the Constitution. Correlatively, where fundamental interests are involved or where suspect classifications are utilized, not only must the classification be reasonable, but the state must also show a compelling reason for the statute's differentiation.

As a starting point, it appears quite reasonable to say that the juvenile impeachment issue does not involve fundamental interests. Furthermore, the difference in treatment granted to juveniles testifying outside of juvenile court, or to adult defendants generally, is not based upon what is presently thought of as a suspect classification. Therefore, the so-called traditional equal protection test should be utilized to examine the unequal treatment mentioned above, to determine whether or not that treatment violates the juvenile defendant's right to equal protection of the laws.

The crucial question to be answered in analyzing the interpretation herein supported, is whether the unequal treatment is based upon some reasonable foundation. If so, there can be no equal protection violation.

The limited impeachment position favored by this article furthersthe truth determinative goals of the juvenile justice system, supports the system's objectives of eliminating juvenile records after a specified time; protects juveniles from the degradation of being impeached while testifying outside of juvenile court, and lastly, helps to further the rehabilitative goals of the system generally. These four points surely provide a reasonable justification, if not a compelling interest, for the

64. Cases such as Skinner v. Oklahoma, 316 U.S. 535 (1942), have tended to define fundamental interests as "basic civil rights" or "basic constitutional rights." See Shapiro v. Thompson, 394 U.S. 618 (1969); Levy v. Louisiana, 391 U.S. 68 (1968). The juvenile impeachment question does not seem to involve any of these basic or fundamental interests.
65. Suspect classifications as they are commonly thought of, are based upon such things as race, religion, ethnic background, etc., See Developments in the Law—Equal Protection, 82 HARV. L. REV. 1065 (1969). The classification, in reference to the juvenile impeachment question, is not based upon such a classification.
67. See text accompanying note 59 supra.
68. See text accompanying notes 49 and 50 supra.
69. See text accompanying notes 55-57 supra.
70. See text accompanying note 58 supra.
71. From personal experience, this writer feels that juvenile court judges often consider the first step in the rehabilitation of a juvenile offender to be one of telling the truth, no matter what it may be. Therefore the impeachment questioning process may in fact encourage a juvenile to speak the truth.
unequal treatment involved. Therefore, under the traditional equal protection test at the very least, the equal protection clause apparently is not violated by the view espoused herein.

IF IMPEACHMENT OF A JUVENILE IN JUVENILE COURT
 IS PROPER, DOES THIS INTERFERE WITH THE
JUVENILE'S RIGHT TO DUE PROCESS OF LAW?

Although one possible constitutional attack to the juvenile impeachment issue has been discussed and analyzed, another constitutional safeguard may have some application to this discussion.

In the landmark case of In re Gault, the Supreme Court determined that the due process clause of the United States Constitution had a vital role to play in adversary juvenile delinquency proceedings. The Court felt that "[I]t would be extraordinary if [the]... Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process' [in juvenile delinquency proceedings]." Consequently, the Court held that adversary juvenile delinquency proceedings "must measure up to the essentials of due process and fair treatment."

Cases arising after Gault have generally determined that the applicable due process standard to be applied in juvenile proceedings is one of fundamental fairness. Thus, the Supreme Court has determined that fundamental fairness includes, inter alia, the right to the assistance of counsel; the right to confront witnesses; the right to remain silent; the right to an evidentiary standard of proof beyond a reasonable doubt; but not the right to a trial by jury. No Supreme Court case to date has specifically spelled out all the elements of a fundamental fairness-due process standard applicable in juvenile delinquency proceedings generally. However, the Court has extended only those standards which it deems to be essential to the general goal of fundamental fairness. So far this has been a somewhat more restricted standard than would be applied in an analogous adult criminal proceeding. It appears quite likely then, that only those standards deemed to be essential to due process will be extended to juvenile proceedings.

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73 U.S. Const. amend. XIV, § 1.
74 In re Gault, 387 U.S. 1, 30 (1967).
75 Id. at 28-9.
76 Id. at 30.
78 Id. at 30.
79 In re Gault, 387 U.S. 1 (1967).
Therefore, the question to be asked in reference to this discussion, is whether an interpretation which allows a juvenile to be impeached in juvenile court by the use of previous adjudications of delinquency, is so fundamentally unfair as to violate due process.

An extensive search of the available law has failed to uncover any case discussing this specific question. However, several cases involving adult defendants have arisen which might shed some light on this problem. These adult cases, arising at both the state and federal level, have dealt with the question of whether due process is violated when a defendant during cross-examination is impeached by the prosecution on the basis of his prior criminal record. In these cases the claim was made that the jury, despite instructions to the contrary, was unable to consider the prior convictions solely for the purpose of weighing the credibility of the defendant and his testimony. Therefore as this theory goes, due process was violated because the defendant was not afforded his sixth amendment right to trial by an impartial jury. In the vast majority of these cases, this claim has been rejected.

In contrast to the adult procedure, the juvenile process does not, as a general rule, involve a trial by jury. In fact, the Supreme Court in McKeiver v. Pennsylvania held that juveniles were not as a matter of constitutional law entitled to a jury trial. Therefore, the claims which have been made in some adult cases as to jury confusion in reference to the impeachment process, have little or no application to the juvenile situation where a jury is rarely involved. Even assuming that the claims put forth in the adult cases have some constitutional merit, the dangers of violating

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81 But see 4 Jones on Evidence § 26.20, at 223 (6th ed. 1972); McCormick, supra note 3, § 43, at 86-87, n.64.
85 Id.
86 See Spencer v. Texas, 385 U.S. 554 (1967). But see State v. Santiago, 53 Hawaii 254, 492, P.2d 657 (1971). In this context, Bruton v. United States, 391 U.S. 123 (1968), overruling Deli v. Paoli, 352 U.S. 232 (1957), may have some application. In the Bruton case, two adult defendants were jointly tried on the same charges. A confession of one of the defendants who did not testify was introduced into evidence. This confession implicated the co-defendant. Although the trial court instructed the jury to consider the confession only against the confessor, the Supreme Court, referring to Jackson v. Denno, 378 U.S. 368 (1964), held that such a limiting instruction did not overcome the prejudice to the co-defendant and was in violation of the co-defendant's constitutional right to confrontation. By analogy to the present situation, perhaps a limiting instruction to a jury in reference to the limited purpose of the impeachment questioning process does not overcome the prejudicial effect of the evidence, and in fact deprives the defendant of his constitutional right to a fair trial. This, however, is merely speculation and not the present state of the law.
87 403 U.S. 528 (1971).
88 Id. at 545.
due process are certainly minimized and perhaps eliminated when no jury is used, and a case is tried before the court, as is the usual situation in the juvenile process. Surely a judge, as opposed to a jury, will have no doubt about the limited purpose that impeachment questioning serves.

Assuming this analysis is well founded, another due process related question arises as to whether or not all prior adjudications of delinquency may be used for impeachment purposes. It would seem reasonable to suppose that the fundamental fairness concept might in fact be violated if all types of delinquency adjudications could be brought forth to impeach a juvenile when he testifies.89

In order for the process to remain fundamentally fair, the impeachment questioning process should be limited to only those adjudications of delinquency involving the commission of some crime which bears upon the credibility of the juvenile defendant.90 Obviously, there are many crimes which do not bear upon the credibility of an actor who engages in deviant behavior.91 Therefore, those crimes should not serve as the basis for impeachment questioning of a juvenile defendant in juvenile court.

Inasmuch as the juvenile judge sits as both the trier of the facts and applier of the law, the matter of what crimes should be used for impeachment questioning should not be left to his discretion, because that procedure would require some proffer of testimony before the questioning was allowed. Even though the judge strives for impartiality, such a procedure may have some unconscious but prejudicial effect upon the court if the proffer should be excluded from formal consideration. Therefore, a policy should be established to specify which particular crimes bear upon the credibility of any juvenile defendant. The best approach appears to be one which would allow impeachment on the basis of only those crimes involving either crimen falsi or moral turpitude, inasmuch as these crimes certainly bear upon the credibility of any

89 If all types of prior delinquency adjudications were allowed, even those not really bearing upon credibility, the process would certainly seem unfair.
90 As to the probative value of different types of criminal offenses for impeachment purposes, see Burg v. United States, 406 F.2d 235, 238 (9th Cir. 1969) (Ely, J., concurring). But see Brown v. United States, 338 F.2d 543, 547 (D.C. Cir. 1964): “Because of the purpose of the Juvenile Court Act and the absence of procedural safeguards, a finding of involvement against a juvenile [in the commission of a crime] does not have the same tendency to demonstrate his unreliability as does a criminal conviction for the adult offender.” This position, as expressed by the Brown Court, in light of Gault, and the interpretation suggested here, seems dubious to say the least.
individual who violates the law. In this manner, the juvenile court will consider only those adjudications of delinquency which vitally bear upon the credibility of the juvenile defendant. This approach would not ostensibly violate the fundamental fairness-due process standard applicable in juvenile proceedings.

CONCLUSION

When a minor commits a criminal act, the mere fact that he is underage does not, from a practical standpoint, erase the fact that a crime has been committed. He is not, however, classified as a criminal because it is the law's policy to attempt to help him rather than to punish him. Notwithstanding this fact, the criminal act that the juvenile commits still bears upon his credibility as a witness, and when he takes the stand to testify in his own behalf in juvenile court, the believability of his testimony should be tested by his past criminal misconduct.

The plain meaning of the juvenile statutes in question supports this interpretation, and in fact encourages it. Any other analysis would seem to do violence to the statute's obvious intent while hampering the juvenile courts' truth determinative goals.

92 See 1 UNDERHILL'S CRIMINAL EVIDENCE § 242, at 750 (6th ed. 1973):
Where a crime involving moral turpitude is the standard for impeachment, it is held that such a crime involves an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellows or to society which is contrary to accepted and customary rules of conduct. Perjury, larceny, murder, narcotics offenses, sex offenses, and filing fraudulent tax returns, all involve moral turpitude. It is generally not involved in liquor offenses, gambling, assault and battery, disorderly conduct, and breaches of military discipline."
ADVERTISING OF FOOD AND DRUGS: CONCEALING A TRUTH, HINTING A LIE

...today's copywriters avoid clearly false statements. They tend instead to use "those less obvious forms of falsehood which in causitry and law are called suppressio verdi and suggestio falsi, concealing a truth and hinting a lie, methods which certain types of advertising have carried to pitch and skill that leaves us breathless."¹

THE FOCUS OF THIS COMMENT is on recent advertisements promoting foods and drugs. Listed below are some representative ads, either recently published in magazines, or broadcast on radio or television. The question is whether they represent practices which, under the Federal Trade Commission Act, are prohibited, or should be prohibited.²

(1) The announcer narrates that "in a recent test" of pain relievers, measuring their effectiveness against "pain other than headache," Excedrin was found to be "significantly more effective" than common aspirin. At the end of the ad, the announcer states, "Excedrin—more effective against pain."

(2) The announcer states, "There's not much difference in pain relievers that you can see, but in your bloodstream, the differences are very real." He shows us a graph, which plots the level of pain relief of several remedies, including Anacin. The graph shows that the "peaks" for the "highest level" of pain relief of the other products comes earlier, but that Anacin's peak, though coming later, is the highest. There is also a lower level on the graph, marking what is called "effective level of pain relief." The announcer observes that "while all three products reach an effective level in minutes, in the final analysis, Anacin hits and holds the 'highest' level of pain relief. This difference is the added pain reliever that Anacin provides." He closes the ad by stating, "Anacin relieves pain fast."

(3) An attractive young woman identifies herself as having a Ph.D. She is shown serving Tang to her children. (Tang is a mixture that includes sugar, orange flavorings, vegetable gums, artificial colorings, hardened coconut oil, and vitamins C and A. It is mixed with water, and served in place of fruit juices.) The woman remarks that her children like its taste, and she "like(s) the fact that it has so much vitamin C."


² Quotations from radio or television ads are based upon notes which were made while the ads were broadcast. The quotes have been re-checked for accuracy. Statistics regarding ingredients and places or method of manufacture come from the package of the product involved.
The following are representative excerpts from ads for a product called “Sugar in the Raw”:

It contains all of its natural vitamins and minerals because it hasn’t been bleached, processed, and stripped of its natural goodness. It’s naturally blonde. Nothing is added—no chemicals. No preservatives. Sugar in the Raw is naturally sweet—naturally delicious. Get back to nature.... It’s got no refinement, but Sugar in the Raw contains all of its vitamins and minerals. It's naturally more nutritious—

From a printed advertisement: “It’s got no refinement! Sugar in the Raw. Organic! Unrefined! Natural! The honest to goodness sugar that contains natural vitamins and minerals.”

Euell Gibbons, an author of several books on nature, describes Post Grape Nuts Breakfast Cereal as his “back to nature cereal.... It is a wholesome cereal . . . made from natural wheat and barley. These natural ingredients are baked into crunchy nuggets and fortified with vitamins. Its naturally sweet taste reminds me of wild hickory nuts.”

Television viewers are shown a panorama of the Swiss Alps. The announcer narrates, “From Switzerland, a land where the air is incredibly pure, comes an old recipe” from which Alpen, a “natural” ready-to-eat breakfast cereal, is inspired. He continues by describing the cereal with such phrases as “full of natural goodness . . . pure and simple . . . Alpen: wholesome and satisfying,” while viewers are shown a family of attractive, healthy looking blue-eyed blondes in a Swiss chalet-style setting, enjoying their breakfast cereal. The ad does not disclose that the cereal is made in England.

A young wife is home, suffering from a cold. Her husband returns with three different cold remedies. The wife objects, saying that the first two have “an antitussive, an analgesic, and alcohol, not found in Contac.” The ad concludes by suggesting that it is preferable to take Contac, instead of the other products, for Contac has to be taken less often.

In another Contac ad, we are advised: “Give your allergy to Contac,” because one of the capsule’s ingredients, an antihistamine, is what doctors prescribe most often for hay fever sufferers.

Two men are shown together in a living room. One of them has a headache, and he asks his friend if he can give him something for it. The friend gives him Arthritis Pain Formula. The suffering man protests, “I have a headache, not arthritis.” “Doesn’t matter,” his friend reassures him, “read the label. A.P.F. is great for headaches, too.” Later in the ad the friend states, “A.P.F. has more pain reliever than most headache tablets.”

Whitehall Laboratories, makers of Arthritis Pain Formula, also advertise another product, Anacin, as effective in relieving arthritis pain: “Anacin has the pain reliever for arthritis most recommended by doctors.”

One friend suggests to another, that since she is “out of sorts,”
and "not in the swing" because she "needs a laxative," she should get Haley's M.O., for it is a "gentle acting laxative blend." The friend, thinking out loud, says, "A laxative blend? I'll try it!"

(12) Sominex, in its latest series of ads, shows a young wife (with her husband, Tom, standing behind her), calling up her mother, thanking her for telling Tom about Sominex. In another ad, a mother and married daughter are shown sitting on porch steps. The daughter has apparently moved to the city; the mother, who lives in the country, has come for a visit. The daughter tells her mother that "[she] did like you said, [and] took Sominex" when she had trouble falling asleep. The mother approves. In a third ad, kindly old "Uncle Ned," seated at a piano, sings a song with a young couple. Gloria, the young woman, is Ned's niece. She thanks her uncle for telling her about Sominex, which she now takes when she has "occasional" trouble sleeping.

(13) An announcer begins an ad with the lines, "If you have trouble falling asleep night after night, then maybe you should see your doctor; but if you have only occasional trouble, then perhaps you'd like to know about Sleep-Eze. It was tested in a hospital.

An advertisement may violate the Federal Trade Commission Act in one of several ways. It may be an "unfair method of competition in commerce," an "unfair or deceptive act of practice in commerce," or, in the specific cases of food, drugs, devices, or cosmetics, an ad can be considered "false" if it is "misleading in a material respect." One author has broken down the jurisdictional requirements, for an advertiser to come under the Act, into three broad categories: (1) The party to be protected: this now includes both competitors, when victims of "unfair methods of competition," and consumers, who can either be victims of "deceptive acts or practices," or "false" advertising. (2) In commerce: this requirement has been held to exist under Section 45. Merely "affecting" commerce has been held to be insufficient. While local activity is not covered under Section 45, it is suggested that when an action is brought under Section 52, interstate advertising without interstate sales provides a sufficient basis for F.T.C. jurisdiction. (3)

7 Id.
11 Mueller v. United States, 262 F.2d 443 (5th Cir. 1958); Shafe v. FTC, 256 F.2d 661 (6th Cir. 1958).
Interest of the Public: Section 45(b)\(^{13}\) limits the Commission's jurisdiction to cases in which "it shall appear to the Commission that a proceeding ... would be to the interest of the public." This requirement has been called "a prerequisite to the assumption of jurisdiction by the Commission rather than a test of [the] propriety of issuing a cease and desist order."\(^{14}\) Among the factors demonstrating the public interest in "false" advertising are the substantial volume of the advertiser's business,\(^{15}\) the presence or absence of a probability of deception of the public,\(^{16}\) a threat to the health of the public,\(^{17}\) a diversion of business from those not engaging in "false" advertising,\(^{18}\) or a violation of Trade Practice Rules.\(^{19}\)

In addition to what is outlined in the statute, the following general rules have been recognized: It is sufficient that the ad have a "capacity" or "tendency" to deceive.\(^{20}\) It is not necessary to prove "actual deception."\(^{21}\) An ad is deceptive, even if it would only deceive those who are careless or gullible.\(^{22}\) "In adjudging the falsity of advertising representations, regard must be had, not to finespun distinctions and arguments that may be made in excuse, but to the effect which such representations might reasonably be expected to have on the general public."\(^{23}\) Ambiguous

\(^{15}\) International Parts Corp. v. FTC, 133 F.2d 883, 885 (7th Cir. 1943). (Cases cited in notes 15 through 19 can be found in Barnes, supra note 14, at 656-7.)
\(^{16}\) Pep Boys—Manny, Moe, & Jack v. FTC, 122 F.2d 158, 161 (3d Cir. 1951); Irwin v. FTC, 143 F.2d 316, 325 (8th Cir. 1944); Arnold Stone Co. v. FTC, 49 F.2d 1017 (5th Cir. 1931).
\(^{17}\) Koch v. FTC, 206 F.2d 311, 319 (6th Cir. 1953).
\(^{18}\) Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941), cert. denied, 314 U.S. 668 (1941); Alberty v. FTC, 118 F.2d 669, 670 (9th Cir. 1941); FTC v. Winsted Hosiery Co., 258 U.S. 483, 493 (1922).
\(^{19}\) Prima Products v. FTC, 209 F.2d 405, 407-8 (2d Cir. 1954).
\(^{21}\) FTC v. Balme, 23 F.2d 615, 621 (2d Cir. 1928).
\(^{22}\) There have been many descriptions of the standard which should be used: "Laws are made to protect the trusting as well as the suspicious." FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937). The F.T.C. Act was made for the protection of "... the public—the vast multitude which includes the ignorant, the unthinking, and the credulous." Charles of the Ritz Distribs. Corp. v. FTC, 143, F.2d 676, 679 (2d Cir. 1944). In FTC v. Sterling Drug, Inc., 317 F.2d 669, 674, the court cites 1 CALLMAN, UNFAIR COMPETITION AND TRADEMARKS § 19.2(a) (1), at 341-44 (1950) (and cases cited therein).

The general public has been defined as "that vast multitude which includes the ignorant, and the unthinking, and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions." The average purchaser has been variously characterized as not "straight thinking," subject to "impressions," uneducated, and grossly mis-informed; he is influenced by prejudice and superstition; and he wishfully believes in miracles, allegedly the result of progress in science. ... The language of the ordinary purchaser is casual and unaffected. He is not an "expert in grammatical construction" or an "educated analytical reader" and, therefore, he does not normally subject every word in the advertisement to careful study.

\(^{23}\) U.S. Retail Credit Ass'n v. FTC, 300 F.2d 212, 219 (4th Cir. 1962).
statements, susceptible of both a misleading and truthful interpretation, will be construed against the advertiser. Failure to disclose a "material" fact will make an ad deceptive. "A statement may be deceptive even if the constituent words may be literally true or technically construed so as not to constitute a misrepresentation." It is not necessary to find a deliberate intent to deceive. It is not necessary to find that the advertiser had knowledge of the falsity of his claim.

The Commission has great discretion in determining the meaning of an ad, but it must prove that the meaning is false. The evidence usually consists of testimony of Commission experts, surveys, and trade witnesses. While, as a practical matter, courts are hesitant to overturn a decision of the F.T.C. as to what constitutes a deceptive practice (should the advertiser decide to appeal the Commission decision), the advertiser, on

24 Murray Space Shoe Corp. v. FTC, 304 F.2d 270, 272 (2d Cir. 1962).
25 "To tell less than the whole truth is a well known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished." P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950).
26 Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956), cert. denied, 352 U.S. 1025 (1957).
27 Bokenstette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943).
28 D.D.D. Corp. v. FTC, 125 F.2d 679, 682 (7th Cir. 1942).
29 In Millstein, The Federal Trade Commission and False Advertising, 64 COLUM. L. REV. 439, 470 (1964) [hereinafter cited as Millstein], it is written: A review of the cases demonstrates that generally the Commission will find that an advertisement promises what the Commission itself believes it promises, notwithstanding dictionary definitions, the testimony of consumers and experts, or the results of surveys. The Commission always seems able to find one rule or another that can justify its determination of meaning. Furthermore, the courts seem quite willing in most instances to uphold the Commission's view of the promise. (For further reference, and cases cited, see Millstein at 470-78.)
31 In FTC v. Colgate Palmolive Co., 380 U.S. 375, 385 (1965), the late Chief Justice Warren wrote: "As an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are the courts to determine when a practice is 'deceptive' within the meaning of the [F.T.C.] Act."
the other hand, is able to delay complying with the Commission order for years, while his case is on appeal. During this time, he is free to continue running his allegedly deceptive ads. The Commission, in the past few years, has devised the remedy of "corrective advertising" to help counteract the effects of prolonged advertising deception.

Materiality: The idea that the representation must be materially deceptive is not directly expressed in Section 45(a), but is mentioned in Section 55(a)(1), in cases of "false" advertising of foods, drugs, devices, or cosmetics. It has been observed that courts have required even "unfair and deceptive practices" under Section 45(a) to stem from material misrepresentations. In *F.T.C. v. Colgate Palmolive Co.*, the

Courts usually uphold F.T.C. actions unless it is proved that the Commission acted arbitrarily (Carter Products, Inc., v. FTC, 268 F.2d 461, 497 [9th Cir.], cert. denied, 361 U.S. 884 [1959]), clearly abused its discretion (Independent Directory Corp. v. FTC, 188 F.2d 468, 470 [2d Cir. 1951]), or failed to make an allowable judgment in its choice of remedies (Carter Products, Inc., v. FTC, 186 F.2d 821, 826 [7th Cir. 1951]).

It took 15 years, for example, for the F.T.C. to take "liver" out of "Carter's Little Liver Pills."

The remedies which the F.T.C. can impose are essentially the following:

1. Cease and desist order: An order requiring the advertiser to stop publishing or broadcasting those ads, or similar ads, which have been found to be deceptive, unfair, or false.

2. Affirmative Disclosure: A requirement that, in future ads, certain information be included, without which, the ad's representations would have a material omission.


For a comparison of actions under the F.T.C. Act and the common law, see Weston, *Deceptive Advertising and the F.T.C.*, 24 FED. BAR J. 548 (1964).


This case involved the infamous Rapid Shave sandpaper shaving demonstration. The cream could shave sandpaper, but only after soaking the paper in water for 80 minutes. The demonstration in the ad did not disclose that fact, and indeed, the demonstration did not show the cream actually shaving sandpaper, ostensibly because sandpaper does not photograph faithfully. A "mock-up" using sand and plexiglass was used instead. When is "deception" from a "mock-up" to be considered materially deceptive? Ice cream, for example, cannot be photographed under hot studio lights, and so mashed potatoes are usually substituted. That is not considered to be materially deceptive. The explanation of the holding in the Rapid Shave case is best expressed in Note, "Extrinsic Misrepresentation" in Advertising Under Section 5(a) of the Federal Trade Commission Act, supra note 36, at 732,
United States Supreme Court held that a misrepresentation can be material not only if it relates to the product, but also if it materially induces the purchase of the product.

**Public Injury—Public Interest:** Although an ad may be deceptive, courts will usually look to see if there exists a "public interest" in stopping the advertising. This sometimes results in the consideration of a different, though related question: what potential injury may result from the deception? While this would usually involve financial injury, courts have also held that there is sufficient injury when a consumer is "tricked" into buying a product.

**Defenses:** There are certain defenses which an advertiser might plead, when an action is brought against him under the F.T.C. Act. It appears, though, that an advertiser may still find it difficult to prevail against an F.T.C. complaint.

follows: "Rapid Shave's hypothetical ability to shave sandpaper as portrayed was irrelevant, for only after they were led to believe that this feat was actually being performed before their eyes did many persons decide to buy the product."

In Kerran v. FTC, 265 F.2d 246, 248 (10th Cir.), cert. denied, 361 U.S. 818 (1959), it was held that a material issue could be raised "at least in part upon ill-founded sentiment, belief or caprice." The case involved an advertiser's failure to disclose, in its ads, that its motor oil was "used" oil that had been re-refined. While the oil was identical, chemically, to "new" oil, the court held that consumers would prefer "new" as opposed to "used" oil, and should be advised in advertisements that the oil promoted was not "new."

Other examples of materiality based upon "popular" consumer preferences include:

L. Heller & Son v. FTC, 191 F.2d 954 (7th Cir. 1951), which held that it was an unfair trade practice not to disclose in advertising that imitation pearls were imported, since Americans were deemed to have a preference for domestically produced goods.

Purified Down Prods. Corp., 48 F.T.C. 155 (1951), held that a producer of goosefeathers must disclose the fact that they were used, as purchasers were deemed to prefer new feathers.

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38 See text accompanying notes 13-19 supra.
40 (1) Puffing: "'Puffing' refers, generally, to an expression of opinion not made as a representation of fact.... While a seller has some latitude in 'puffing' his goods, he is not authorized to misrepresent them or to assign to them benefits or virtues they do not possess." Gulf Oil Corp. v. FTC, 150 F.2d 106, 109 (5th Cir. 1945).
(2) Truth: "Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." Bockensette v. FTC, 134 F.2d 369, 371 (10th Cir. 1943); See also P. Lorillard Co. v. FTC, 186 F.2d 52 (4th Cir. 1950).
(3) No prejudice to public: The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else.... In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.... Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightfully named, are diverted to others whose methods are less scrupulous.
Unfairness: Section 45(a) refers to "unfair" methods, acts, or practices in commerce. Gerald Thain, Assistant Director for National Advertising, Bureau of Consumer Protection, Federal Trade Commission, has observed that the Commission traditionally has attacked only unfair methods of competition, "in the anti-trust sense," but he urges that "unfairness" under the Act should also be used to attack advertising which is unfair to consumers. (Misleading advertising, for example, has been held to be "unfair" in its effect, but only in the sense that it puts honest competitors at a disadvantage.)

Thain has also pointed out that actions based on simple deception were adequate in the past, but advertisers, he observes, have become more sophisticated in their techniques of persuasion, requiring the development of new actions and remedies, to protect consumers and competitors. He feels that actions based on "unfairness" may provide the solution. President Kennedy, in his 1962 Consumer Message to Congress, outlined what he referred to as "consumer rights": (1) The right to safety; (2) The right to be informed; (3) The right to choose; (4) The right to be heard. Under the "right to be informed" are included the following significant words of elaboration: "... and to be given the facts [needed] to make an informed

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43 In FTC v. Raladam Co., 316 U.S. 149, 152 (1942), the Court held: "[W]hen the Commission finds as it did here that misleading and deceptive statements were made with reference to the quality of merchandise it is also authorized to infer that trade will be diverted from competitors who do not engage in such 'unfair methods.'"
choice.” The White House Conference on Food, Nutrition, and Health added a fifth “right”: The right to proper food and proper nourishment.

The idea of unfairness has thus been described to be a broad concept, and it has been interpreted to mean that advertisers should give consumers adequate information about their products, to enable consumers to make rational choices. This usual lack of information upon which to make a rational decision is also related to the idea that, in many fields (and certainly including food and drugs), advertisers seek to “create” through their ads differences between virtually identical products.

Also condemned are ads which are said to evoke “moods”; ads which are capable of persuading consumers to ignore such “rational considerations as the price, or quality of the thing which is promoted.


46 See Thain, supra note 44, at 610.

It is ironic to recall FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963). The F.T.C., in contemplation of bringing actions against various drug manufacturers for their advertising of analgesics, conducted an independent study which suggested that aspirin was as effective as other more elaborate “combination of ingredients” products. The makers of Bayer Aspirin attempted to publish the study, to promote their product. The F.T.C. attempted to stop them, claiming that such a study might be interpreted by some consumers as an official endorsement of aspirin.


It is revealing to examine the advertising/sales ratios of different commodities, as compiled by Greer, Product Differentiation and Drug Mergers (II), 4 ANTI-TRUST L. & ECON. REV. 63 (1971):

Advertising/Sales Ratios in Non-Drug Industries (of products capable of “product differentiation”):

- Beer .................. 9%  
- Cigarettes .................. 10%  
- Soap .................. 10%  
- Breakfast cereals .......... 15-18%  
- Soft drinks .......... "about" 10%  
- Electrical appliances .......... 13%

In Drugs:
- Bristol-Myers (Bufferin) .................. 27.6%  
- Warner-Lambert (Pharmaceuticals) ........ 16.8%  
- Sterling Drug (Phillips, Bayer) ........ 21.6%  
- Miles Laboratories (Alka-Seltzer) ........ 24.0%

In Travers, supra note 30, at 555, it is observed:
According to Cox, FELLMUTH, AND SCHULZ, THE CONSUMER AND THE F.T.C. App. 3 (1969), the following were the first-quarter television advertising expenditures of 1968 for the following products:
- Anacin .................. $4,618,500  
- Bayer Aspirin ........ 3,110,500  
- Bufferin .................. 2,929,500  

In 1967, the F.T.C. received an appropriation of $14,378,000. Of this amount, $6,846,000 was allocated to stopping deceptive practices (Id. App. 1). This latter figure is less than the combined television advertising budget for Anacin and Bayer during the first quarter of 1968.

49 See Thain, supra note 44, at 902.

No F.T.C. actions against an advertiser for using “mood” to promote a product have been found, but possible examples of such ads might be:
- Sominex (ad number [12]): These ads promote a “mood” of respectability, in
Some "non-rational" ads have been characterized as ads which play on consumers' emotions, needs, and fears.\textsuperscript{50} One case which has been cited to show the F.T.C.'s new disposition to attack advertisements which use such techniques is the "Vivarin" decision.\textsuperscript{51} J. B. Williams was promoting its caffeine stimulant as a "new" product which housewives should take, to prevent feeling tired, so that they could become more sexually alluring to their husbands. The ads did not even disclose that caffeine was the active ingredient.\textsuperscript{52}

In \textit{F.T.C. v. Sperry and Hutchinson Co.},\textsuperscript{53} a case not directly dealing with unfairness in advertising, there is printed, in a note, a set of guidelines for unfairness which seem to be applicable to advertising:

The Commission has described the factors it considers in determining whether a practice which is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

1. Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of fairness;

2. Whether it is immoral, unethical, oppressive, or unscrupulous;

3. Whether it causes substantial injury to consumers (or competitors or other businessmen).\textsuperscript{54}

The list of factors, particularly in (2) and (3), might be interpreted as very broad indeed.\textsuperscript{55}

promoting a sleeping aid, a product which many people undoubtedly have negative feelings about.

Alpen: (ad number [6]): An idyllic mood of mountainous Switzerland seems to be stressed as much as the breakfast cereal.

\textsuperscript{50} See Thain, \textit{supra}, note 44, at 902.

\textsuperscript{51} J. B. Williams Co., 81 F.T.C. 238 (1972).

\textsuperscript{52} Gerald Thain, in Thain, \textit{Drug Advertising and Drug Abuse—The Role of the F.T.C.}, 26 Food Drug Cosm. L.J. 487, 499 (1971), remarks:

Although the Vivarin complaint proceeds on the theory that the advertising is false and misleading, I personally feel that the use of the challenged ads comes very close to what I would define as an unfair practice. I would question the fairness of any ad which exploits the aspirations of married women by representing that a product such as Vivarin, can and will be effective in making them attractive and exciting to their husbands.

\textsuperscript{53} 405 U.S. 233 (1972).

\textsuperscript{54} Id. at 244-5, n.5.

\textsuperscript{55} For a less optimistic assessment of the value of the enumerated factors, see Note, \textit{Psychological Advertising: A New Area of F.T.C. Regulation}, Wisc. L. Rev. 1097, 1108 (1972). Thain, \textit{supra} note 44, at 899, argues:

In the past, the "Unfairness Doctrine" has been used mainly to attack actual practices, rather than advertising, and usually these practices have been so blatantly inequitable or coercive as to evince actual intent to defraud consumers. ... There is nothing inherent in the meaning of the term "unfair act or practice," however, that limits it to this type of activity. Just as the term "deceptive acts or practices" has been construed to include false advertising, so the term "unfair acts or practices" may be construed to include unfair advertising. (emphasis added).
Food and drugs, when taken wisely, will promote good health, but misleading or unfair advertising of food and drugs resembles an infectious disease in some ways. Like any other disease, such advertising is all too capable of impairing one’s health. Such advertising, with its half truths, incorrect conclusions, enticing pictures and jingles, attractive settings, layouts, models, contagious humor, and exaggerated claims, attacks unwary consumers, with the likely result that they will be persuaded to buy products for the wrong reasons. Advertisers may convince a consumer to buy or take a drug for an “ailment” that needs no treatment with drugs. Consumers, by buying one product, may be precluded from getting something else which would actually be better. Consumers, by “treating only a symptom” which they have been encouraged to self-diagnose, may mask the seriousness of their affliction.

Misleading advertising of food and drugs is also much like a disease in the sense that it constantly appears in new forms. The possibility exists, that with each new advertising campaign for a product, an advertiser can portray the product in some misleading or unfair way. As medical researchers constantly attempt to identify new strains of diseases, and develop new vaccines to immunize against them, so, it seems, that it is necessary constantly to examine food and drug advertising, to see if some new strain of some old advertising malady is present, and to determine what measures are appropriate to deal with the “infection.”

One further point should be emphasized: The F.T.C., in its deliberations, is concerned with questions of fact, as opposed to questions of law. The Commission, in advertising cases, seems to concentrate most


For a collection of surveys which suggest how poorly fed Americans are, see Baxter, Nutritional Labeling: An Analyst, 26 Food Drug Cosm. L.J. 82 (1971).

Peterson, Informative Labeling as a Consumer Guide, 27 Food Drug Cosm. L.J. 70 (1972), offers statistics which suggest that children see only ads for “fun” or “junk” foods. The question which this suggests is whether parents see ads for foods which are nutritionally much better.

Charlton, supra note 55, complains, on behalf of the food industry, that the F.T.C. hasn’t given the industry any guidelines in the past, and did not even have until recently a nutritionist on its scientific staff.

“The gaps in our public knowledge about nutrition, along with actual misinformation carried by some media, are contributing seriously to the problem of hunger and malnutrition in the United States.” Thain, supra note 44, at 892, citing White House Conference on Food, Nutrition, and Health: Final Report (1969) at 179.

on determining the meaning or implication of the representations. It then usually refers to the F.T.C. Act, to hold that the representations violate some portion of the statute. The Commission rarely if ever cites to court decisions, or to prior F.T.C. decisions, for it is unnecessary to cite any precedent to make a factual finding. Questions of law, and the issue of possible abuse of discretion by the Commission, are appealed to the federal courts, if the advertiser wishes to pursue his case. Most of the F.T.C. decisions are not appealed, and thus it would seem that many questions of law that are raised in them are left unanswered.

The discussion of the ads that follow concentrates on finding the meaning or implication of the ads, for that is the way that the F.T.C. would consider them. Unlike in F.T.C. decisions, comparisons are provided with F.T.C. cases dealing with similar advertising problems. The other cases also help to point out that certain kinds of advertising practices have not been, but probably should be considered by the Commission.

Each of the 13 ads described earlier, in this writer's opinion, is either misleading, or is otherwise unfair. Others may not agree with some of the writer's assessments, but this Comment will hopefully offer strong reasons why these ads should be construed as in violation of the F.T.C. Act. The fact that these ads, and similar ads, have been permitted to be published or aired, strongly suggests that the F.T.C. still has much unfinished work ahead of it before food and drug advertising is free of serious improprieties.

**Faulty conclusions:** In the first two examples, the ads reach, on the basis of information given to viewers, conclusions which hardly seem warranted. Number (1) is just one of several ads in a series which seem to try, consistently, to confuse viewers into believing that the tests concluded that Excedrin was proved to be "significantly more effective" against any kind of pain, compared against any other product. For those who will remember the vague qualification, "pain other than headache," the ad might still be potentially dangerous. A mother, for example, might take the ad to mean that Excedrin is suitable to use to relieve her child's pain from an upset stomach. A product containing aspirin, as Excedrin does, may actually increase stomach pain, rather than relieve it, as aspirin often upsets the taker's stomach, as a side effect. The argument, that the user should read the directions on the label, should be no defense in this instance. A person could conceivably buy the product for stomach upset, only to realize later that it is not the right medication to take.

The Anacin ad (Number [2]) is puzzling on its surface, and becomes even more confusing as it is considered further. It suggests that viewers should not be satisfied merely with a pain reliever which gives them an "effective level of pain relief" in minutes. Instead, we should take Anacin,

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68 See Barnes, *supra* note 14, at 618.
because it, later on, “hits and holds the highest level of pain relief.” Whether that means that it is any more “effective,” by Anacin’s own definition, is not clear. The reason why Anacin reaches its “higher level,” we are told, is apparently because it contains more pain reliever per dosage. The difference, then, is one of strength, as opposed to “effectiveness.” Presumably, if Anacin is better because it is stronger, we could achieve the same result with the other products, simply by taking more of them.\textsuperscript{60} The ad closes, paradoxically, with the old familiar slogan, “Anacin relieves pain fast,” but the graph shown in the ad, on the other hand, proved that the other two products reached an “effective level” before Anacin did.\textsuperscript{61}

The question not answered is: of what significance is it that Anacin

\textsuperscript{60} See Carter Prods. Inc. v. FTC, 323 F.2d 523 (5th Cir. 1963).

\textsuperscript{61} After running this ad for several months, it was revised slightly to end “… and Anacin relieves pain fast.” Even with the conjunctive, this statement can hardly be said to follow logically from the data on the graph.

(Anacin recently introduced a new series of ads, which features endorsements from professional people. In one ad, Mrs. Loftus, who identifies herself as a college teacher, says that she takes Anacin when “[s]he has a headache… [for] there’s something in it that works” [emphasis added]. The announcer interjects, “That’s right, Mrs. Loftus!” and he then gives the same confusing explanation for Anacin’s “superiority” that was used in ad number [2]. Anacin’s supposed “superiority,” of course, is due to its greater strength per dosage, and is not due to any “miracle ingredient” which Mrs. Loftus infers is present.)

The most recent, comprehensive action by the Commission against advertisements of pain relievers was taken, astonishingly, over 13 years ago. See American Home Products Corp., 67 F.T.C. 430 (1961). The F.T.C. there found that drug manufacturers had made the following false representations:

\textit{Speed:}

\begin{enumerate}
\item “Anacin acts with such incredible speed as to provide relief of [sic] pain faster than any other analgesic preparation available and offered to consumers.”
\item “Bufferin provides relief from pain twice as fast as aspirin.”
\item “St. Joseph Aspirin provides relief of [sic] pain faster than any other analgesic preparation available and offered for sale to consumers.”
\item “Bayer Aspirin works faster than any other analgesic preparation available and offered for sale to consumers.”
\item “Bayer Aspirin for Children works faster than any other children’s analgesic preparation available and offered for sale to consumers.”
\end{enumerate}

\textit{Tension:}

\begin{enumerate}
\item “Anacin relaxes tension.”
\item “Bufferin relieves tension.”
\item “Excedrin relieves tension.”
\end{enumerate}

\textit{Depression:}

\begin{enumerate}
\item “Anacin helps overcome depression.”
\item “Excedrin acts as an anti-depressant.”
\end{enumerate}

\textit{Strength:}

“Excedrin is an extra-strength pain reliever, is 50\% stronger than aspirin, and that two Excedrin tablets equal three ordinary pain tablets.”

\textit{Relief from Swelling:}

“Excedrin will combat the cause of pain by reducing the swelling of tissue.”

The Commission decided to withdraw the complaints in 1965, apparently because it felt that the proceedings had become bogged down from delays (see 67 F.T.C. at 448-449). The claims made in ads (1) and (2), cited in the text, are much more subtle than the claims made in the ads cited in the Commission’s complaint: Excedrin no longer claims that it relieves tension, acts as an anti-depressant, or relieves tissue swelling; Excedrin now simply is claimed to be “more effective” against “pain other than headache.” Anacin does not claim now that it works faster than other over-the-counter analgesics, or that it relaxes tension or helps overcome depression; Anacin is promoted simply as “better” because it is “stronger.”
is stronger? What the ad really implies, is that a “stronger” medication is a “better” medication. A weak remedy is an inferior remedy. More strength means more relief.62 (It is worth noting generally, also, that ads which boast of a drug’s monumental “strength” per dosage, do not seem

62 The F.T.C. apparently does not share this writer’s opinion, that drugs should not be advertised as more “effective” because they are stronger. Thain, Drug Advertising and Drug Abuse—The Role of the F.T.C., supra note 52, at 491, cites the F.T.C. Proposed Rule of July 5, 1967, for the advertising of non-prescription analgesic drugs. Proposed Rule number (2) seems to say that it is permissible for an ad to claim that a drug is “more effective” because of its greater strength, as long as it is disclosed that its greater “effectiveness” is attributable to the increase in dosage. This position, it is submitted, enables drug advertisers to reenforce the notion, in consumer minds, that “stronger” is always “better.”

What then, are the limits which the F.T.C. has imposed on drug advertisers? The answers are found in bits and pieces, in F.T.C. Complaints. In the last ten years, the Commission has decided the following:

(1) **No drug ad should encourage consumers to “self-diagnose” an ailment.** J. B. Williams Co., 68 F.T.C. 481 (1965). The makers of Geritol encouraged people to diagnose tiredness as iron deficiency anemia, when only a physician could accurately determine if a person is suffering from such anemia.

(2) **Ads should not imply that a product will “cure” an ailment, if the product in fact only treats its symptom(s).** Merk & Co., 69 F.T.C. 526 (1966). The makers of Sucrerts represented that their lozenges would kill “even staph and strep germs on contact.” The Commission decided that statement implied that Sucrerts would cure diseases caused by those infections. The Commission found that while the lozenges did kill staph and strep “germs” on contact, the lozenges only killed them on the surface of the throat. Therefore, the preparation could only provide temporary relief.

(3) **Drug ads should not encourage “self-medication.”** Bristol Myers Co., 74 F.T.C. 780 (1968). The F.T.C. found that the makers of Bufferin advertised that medical tests showed that Bufferin reduced swelling and inflammation, increased joint movement, and improved grip strength of arthritis sufferers. The ad continued, “If you have arthritis, you should be under a doctor’s care, even in the early stages. If your doctor prescribes Bufferin, it’s good to know you can take it without the stomach upset other drugs often cause. Bufferin, a leader in arthritis research.”

The Commission complained that the ad failed to disclose that, in the tests, the drug was administered in “near toxic doses” (74 F.T.C. at 853) to achieve the results indicated. The Commission went on to conclude,

Despite its carefully hedged language, there can be little doubt that this advertisement was not intended solely to report the conclusions of the tests but was also intended, or at least would tend, to induce arthritis sufferers to purchase Bufferin—that is, to encourage arthritics to engage in self-medication. . . . The advertisement was published in two magazines of general circulation; and, despite its studied ambiguity, its principal impact is to suggest that costly treatment may be unnecessary since Bufferin, a product available over the counter, is useful for treating the disease.

(4) **Advertisers must be prepared to substantiate all claims made in their ads.** Pfizer, Inc., 81 F.T.C. 23 (1972). For a detailed analysis of this decision, see Note, The Pfizer Reasonable Basis Test—Fast Relief for Consumers but a Headache for Advertisers, 1973 DUKE L.J. 563 (1973).

(5) **It may be “false” advertising to imply that a product designed to treat one kind of symptom, will bring benefits to the user in other, unrelated ways.** J. B. Williams Co., 81 F.T.C. 338 (1972). The makers of Vivarin, a caffeine stimulant, were found to have represented falsely that their product would “make one more exciting and attractive, improve one’s personality, marriage and sex life, and will solve marital and other personal problems.” (81 F.T.C. at 242). One F.T.C. official has argued that the ad should have been attacked as “unfair,” instead of as “false and misleading.” See note 52 supra.
to emphasize the risk of overdosage as prominently. The Anacin ad would have made more sense, and would have avoided reinforcing the dangerous myth about "strength" always being desirable, by stating, for example, "Don't buy Anacin simply because they're stronger, but if you find that you need a stronger pain reliever than the type you may presently be using, then try Anacin." 64

Testimonial: Ad number (3), for Tang Instant Breakfast Drink, involves a very unusual kind of testimonial. The housewife identifies herself as having a Ph.D., and then tells viewers about the supposed virtues of Tang. How should viewers react to the disclosure of her educational status? Would it in any way encourage them to buy the product, and if so, for what reasons? Would those reasons be valid or "rational" ones? Has anything been misrepresented in the ad, assuming that the woman does, in fact, have a Ph.D.? It would seem to be no coincidence that the woman selected to do the ad has an unusual, "esteemed" status. 65

The endorsement here could not be called a "collective endorsement," for it is not implied, nor would it seem that many viewers would infer, from the ad, that all, or even many Ph.D. holders endorse Tang. On the other hand, the ad is not, in its effect, a personal endorsement, either. Such an endorsement would be made by an individual who is known and respected (i.e., a baseball player, a movie star, or astronauts, as used in

63 It is true, that older ads for sleeping aids warned, "Take only as directed. Avoid excessive use." Most products today use a more general warning, such as Bayer's, "As with all medications, take only as directed," or, as Lloyd Bridges would mention on radio ads for Contac, "Take Contac only as directed, and only when you know you need it."

64 Another "consumer myth" may be involved with drug ads which stress strength: "two tablets are all you should ever take." Drug manufacturers "get around" this myth simply by increasing the dosage per tablet, and then claim that their product is superior because it is "stronger." The consumer stays happy, by taking his two "stronger" tablets, convinced that they are really superior to the "weaker" tablets he had been taking "two of" before.

65 Recall how the earlier ads stressed how Tang was used in the Apollo Space Program. Since that N.A.S.A. program has now ended, it would stand to reason that the advertisers would try to find a suitable "substitute" for astronauts. In another recent ad for Tang, featuring a woman who appears to be a commercial airlines pilot as well as a mother, the woman says, "When Stan [her young son] heard that Tang went to the moon, he said, 'Let's try it!'"

66 Readers may be surprised to learn that Eleanor Roosevelt made an ad for Imperial Margarine in the late 1950's! (Recent Imperial ads show husbands or wives wearing huge crowns after tasting the spread's "fit for a king" flavor.) The money Mrs. Roosevelt earned for her testimonial was donated to a United Nations fund, although that was not disclosed in the ad.

67 The closest, most recent F.T.C. case involving a testimonial of a food product is Beatrice Foods Co. 81 F.T.C. 830 (1972). Baseball player Lou Brock appeared in a series of ads for Holloway's Milk Duds. The Commission decided that the ads were "false, misleading or deceptive" because "the consumption of confectionaries such as 'Holloway's Milk Duds' is not linked to or necessary for the instilling, improving or maintaining of athletic ability or performance. Instead, said endorsements are based upon a monetary relationship... and not upon any nutritional superiority or attribute of said product."
the earlier Tang ads), and whose personal association with a product would prompt consumers to buy it. In the Tang ad, since the woman is not a well known figure, one can only conclude that the advertiser is trying to suggest that a word of approval from a holder of some sort of advanced degree is a valid reason for consumers to buy his breakfast drink.

It may be argued that the ad is "false" under Section 55(a)(1) of the F.T.C. Act, "to the extent to which the advertisement fails to reveal facts material in the light of such representations." By this rationale, the "material omission" would be the undisclosed reason why an otherwise anonymous Ph.D. holder approves of a product. The fact would seem to be a material fact, and not disclosing it simply leaves viewers to draw possibly faulty conclusions that such an endorsement necessarily means that the product is recognized as desirable by an expert in the field, or that it is preferable to other breakfast drinks or juices.

The "Natural" Foods: Numbers (4) through (6) are examples of ads promoting "natural" foods. The most salient point, at least from the advertiser's standpoint, is that to call anything "natural" is to say something good about it; something that, in some mysterious way, registers a positive impression with consumers and apparently motivates them to buy. But what, exactly, does "natural" mean? Different advertisers have different ideas. "Sugar in the Raw" was promoted as "natural" and "organic," because it was claimed that it had no preservatives, and because it was "unrefined." Post Cereals, on the other hand, promotes its Grape Nuts as a "back to nature cereal." A close reading of Euell Gibbons' description in ad number (5) would seem to suggest that since wheat and barley are "natural," that is enough, by implication, to make the cereal natural when those grains are baked. The reference, however, to "fortifying" Grape Nuts with vitamins suggests that there are additional ingredients that are not, indeed, "natural." The Quaker Oats Co. offers, on the side of its package for Quaker 100% Natural Cereal, the following interesting information:

Natural foods should not be confused with organic foods generally represented to be grown without aid of artificial fertilizers and without pesticides.

69 See FTC v. Colgate Palmolive Co., 380 U.S. 374 (1965), and text accompanying note 37 supra.
70 In Erikson v. FTC, 272 F.2d 318 (7th Cir. 1959), cert. denied, 362 U.S. 940 (1960), the advertiser was prohibited from using ads which pictured men "attired in a type of white jacket customarily worn and associated with members of the medical profession." It is arguable that a Ph.D.'s endorsement, to many viewers, might be the equivalent of a medical doctor's approval.
71 It is amusing to recall that advertisers have not always promoted "natural" as necessarily "desirable." George Washington Hill, in 1931, for example, created a flamboyant ad campaign for Lucky Strike Cigarettes, which claimed that Lucky Strike's "Toasting" process removes "sheep-dip base" found naturally in all tobacco leaf. See LEWINE, GOOD-BYE TO ALL THAT 72-73 (1970).
72 Cumberland Packing Co., 81 F.T.C. 352 (1972).
Quaker 100% Natural Cereal is a natural food product, made from conventionally grown foodstuffs to which no artificial additives or preservatives have been added.\(^{73}\)

No guideline from either the F.T.C. or F.D.A. has been found, covering the term "natural."\(^{74}\)

Only one F.T.C. complaint has been found which is even remotely connected with "natural" foods: Cumberland Packing Corporation.\(^{75}\) On the basis of ad excerpts number (4), and other similar ads, the Commission found that Cumberland had falsely represented its product, Sugar in the Raw, as:

1. an organically grown food;
2. not a processed food;
3. a significant source of vitamins and minerals;
4. substantially different from, or superior to, other sugars because it does not utilize or contain any chemicals or preservatives.

The claims made in ads (5) and (6) are more elusive. The Commission, in its discretion, could conceivably interpret the Grape Nuts representations as false, for a "back to nature" cereal might be defined to mean that it is not "adulterated," even with additional vitamins. In order to move against the Alpen Cereal ad (number [6]) the Commission would have to depart from its traditional focus of inquiry, which has been whether the representations are actually "true" or "false," and concentrate on evaluating the very subjective suggestions that are being made.\(^{76}\) Does this ad play on consumers' needs, fears, or desires in some way? Even if it does, it might be argued, most other ads do the same thing, to some degree. Is there any reason why this particular ad should be singled out for action? The writer believes that it should be, because it probably is difficult for a consumer, viewing an ad such as Alpen's, to be critical about what is being suggested to him. A prospective car buyer, to take another example, would probably not let a glamorous model, or setting, materially influence him in his final decision of which car he will purchase. A housewife will not regularly buy a laundry powder simply on the basis of claims made in ads for it, that the brand advertised will clean clothes

\(^{73}\) The definition would seem to dispel some confusion in the minds of consumers. Unfortunately, no advertisement has been found which has attempted to define a "natural food" as comprehensively. It is puzzling to read, in the list of ingredients of Quaker 100% Natural Cereal, that non-fat dry milk has been added. It is best left to experts to argue over whether non-fat dry milk is "a conventionally grown foodstuff," or, if it is an additive, they can then argue over whether it is "artificial," or "natural."

\(^{74}\) In Wolnak, Health Foods: Natural, Basic, and Organic, 27 Food Drug Cosm. L.J. 453 (1972), the author does not refer to any official guidelines for the meaning of "natural" and "organic." The inference is irresistible, that no official definitions exist for those terms.

\(^{75}\) \[F.T.C. 352 (1972).\]

better than other products. The housewife, instead, will decide whether to buy the product again on the basis of the results she obtained with it. In both the case of cars and laundry powders, then, the consumer can critically evaluate what is represented. In the Alpen ad, on the other hand, consumers are gently soothed with subtle suggestions, against which they have not developed a high resistance. After eating “adulterated” foods, a food with “natural goodness,” which is “pure and simple,” “wholesome and satisfying,” must appear to be a desirable, healthful change from the old fare. A consumer can easily confuse the ad’s incantations with representations suggesting that the product actually contains more nutrients than other foods. There is little for the consumer to objectively verify, after he has tried the product once, to help him decide if he should buy it again. The consumer may not so much be buying a cereal, as much as he is buying an “idea.” The ad is unfair, for those people who cannot understand what exactly is motivating them to buy the cereal (i.e., are they buying the cereal because they think that it is nutritionally superior, or are they buying it simply because they approve of the enticing words and pictures in the promotion?), and it is false if the implied promise of nutritional benefits is greater than what the cereal actually provides. These are questions of fact which the Commission, in its discretion, can determine.77

Further Drug Advertisements:

The Contac ad number (7) appears to be a very clear-cut violation of the F.T.C. Act. By mentioning ingredients found in competitors’ products, and then emphasizing that they are not found in Contac, it would seem that there is a failure “to reveal facts material in the light of such representations,” as well as a failure to indicate the “consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement.”78

Ordinary consumers do not know what an antitussive, or an analgesic is.79 Contac would have us conclude, in our ignorance, that these ingredi-
ents are undesirable in a cold remedy. The ad also seems to constitute a clear case of an unfair competitive practice against other manufacturers, since the ad is definitely disparaging competitive products by innuendo.\textsuperscript{80}

The second Contact ad (number [8]) is included, to suggest how inconsistent Contac's reasoning about drug ingredients really is. In the cold remedy ad, it was suggested that the identified but unexplained "additional" ingredients of the competitors' products were undesirable. Now, in the allergy ad, we are being told that we should take Contac if we suffer from hayfever, because, apparently, one of Contac's ingredients is effective against hayfever symptoms. The fact that seems to be overlooked is that if only one ingredient is effective against the symptoms, the other ingredients in Contac become superfluous. They become, really, much like the competitors' "additional" ingredients in their cold remedies. The second Contac ad would thus seem to be seriously inconsistent with the first. If such a practice is not "false," then surely it is unfair.

Ad number (9) improperly suggests that a drug product which seems to be designed to relieve the symptoms of one kind of ailment, can also be taken to relieve the symptoms of a different ailment. Advertising an arthritis remedy as effective against headache pain, it is submitted, does not "educate" the public in a beneficial way, but may instead encourage many consumers to misuse drugs inadvertently. Some viewers may become convinced that any arthritis remedy, even those prescribed by doctors, is effective against headaches; particularly since "Arthritis Pain Formula" could be misconstrued to be a generic term, instead of a brand name. After watching ad number (9), it seems very possible for an uncritical viewer to give a child a prescription drug for arthritis, to relieve the child's headache.\textsuperscript{81}

Ad number (10), when compared with (9), involves a situation which is the opposite of that found in the two Contac ads, for we have two "different" remedies, one ostensibly formulated to relieve arthritis pain, while the other is very likely thought of as a headache remedy, now being advertised for "each other's" ailments. The fact that both products come from the same manufacturer reinforces the charges that many manufacturers create the same products, and then make artificial distinctions between them.\textsuperscript{82} Here, we go a step further, for the "artificial distinctions" between the products are in effect being destroyed. Such advertising can only contribute to the general confusion that must exist in many people's minds about pain relievers, and should be condemned as "unfair" to consumers under the F.T.C. Act, even if the representations are not found to be factually false.

\textsuperscript{80} See text accompanying notes 41-55 supra.

\textsuperscript{81} See note 22 supra; Carter Prods., Inc. v. FTC, 186 F.2d 821 (7th Cir. 1951), and text accompanying note 40 supra.

\textsuperscript{82} See text accompanying notes 78-81 supra; see also text accompanying notes 43-55 supra.
The statement in ad number (9), that "A.P.F. has more pain reliever than most headache tablets," is descriptively vague. In ad number (7) for Contac, product ingredients were identified by name, but their effects were not explained or described. In ad number (10), on the other hand, we are given a description of an ingredient, and left to guess its name. The "pain reliever" referred to, presumably, is aspirin, but advertisers probably avoid identifying it by its most generally understood name, lest viewers be "misled" into buying plain aspirin instead of the advertised "combination of ingredients" product.83

There is another potentially dangerous encouragement in ad number (9), and in most of the ads which follow. This ad, as many other drug ads, shows one friend suggesting that another take some kind of drug. In many ads, the friend who is, in effect, "pushing" a certain remedy, may cite statistics or other information to back up his recommendation, such as "Phillips is the kind of laxative doctors recommend most often." Consumers watching television drug ads can generally assume that information which one "friend" is scripted to pass on to another is essentially accurate (unless, of course, we have an outright "false" ad!), but the real danger is that such ads teach consumers to be very uncritical about the source of their information on drugs. Consumers should be encouraged to get their information from more reliable sources than friends. Normally, one would think that a pharmacy would be such a source, but an ad for Phillips Milk of Magnesia makes a mockery even out of that suggestion.84

Laxatives: Ad number (11), of course, is objectionable from the standpoint that one friend, again, is "prescribing" a drug to another. But besides that ad number (11) is highly objectionable, for it is descriptively vague about the condition that laxatives are designed to treat. Do euphemisms such as "not in the swing," "out of sorts," "irregular," or "sourpuss" faithfully convey the impression that a laxative is to be taken to relieve constipation? It would seem quite reasonable for some viewers to conclude that such terms also suggest that laxatives are to be taken for the treatment of other ailments; ailments for which laxatives are not

83 See F.T.C. Proposed Rule of July 5, 1967, supra note 61; see also note 79 supra.
84 In the ad a young girl, apparently just beginning to work at the drugstore, does not know which laxative to recommend to a customer. A friendly postman walks in, and advises her to recommend Phillips, for "it's the kind of laxative doctors recommend most often." Relieved, the girl walks back over to the customer, and recites what she has just learned. She does not indicate when or how she got the information. The customer, impressed, buys the Phillips.

The implication of that ad is disturbing, for in it an employee at a drugstore hears some unverified information about a drug, literally from a man off the street, and then without attempting to verify it in any way, she passes it on to a customer, without suggesting how potentially unreliable her source of information is. The customer is not as critical as she might be, but it is arguable that she should be able to rely on what she hears about drugs from someone who works at a drugstore.
designed to be used, such as diarrhea, and “sour” stomach. These ads, in effect, dangerously encourage people to self-diagnose a variety of afflictions as treatable with laxatives.

Over-the-Counter Sleeping Aids: The last two ads, numbers (12) and (13), are in the writer’s opinion extremely objectionable. They are undoubtedly designed to encourage people who have not used drugs to help them get to sleep, to start using such drugs. There is a difference between encouraging a person who is already taking a drug for an ailment, to “switch” to another brand, and encouraging a person to introduce an entirely new kind of drug into his “medicinal diet.” That difference at times may only be theoretical, but these two ads do not make any pretenses about what they are trying to do: they do not try to persuade sleeping aid users to “switch” from one brand to another, they are trying to get non-users “started” on what really is “a whole new thing.”

From the “aspirin age” of several decades ago, this country has become plagued with drug excesses of all kinds. It seems to be quite justifiable to argue that, on account of this, advertisers should not

85 Phillips Milk of Magnesia ads at one time stressed that milk of magnesia is not only a laxative, but an antacid as well.

86 See Ocean Spray Cranberries, Inc., 80 F.T.C. 975 (1972), for a case involving the use of the imprecise euphemism “food energy,” in place of the term “calorie.”

See also J. B. Williams Co., 68 F.T.C. 481 (1965) and Bristol-Myers Co., 74 F.T.C. 780 (1968). In those cases the advertisers were admonished for encouraging “self-diagnosis” and “self-medication.”

The sheer number of laxative ads on television may also have the undesirable effect of convincing viewers that, with so much promotion, laxatives are to be used by a great many people fairly often. For example, while in a Phillips ad one friend phones another saying that, “for the first time in years, I need a laxative,” there is the highly questionable slogan for Ex-Lax which is currently in use: “Everyone needs help once in a while.” Millstein, supra note 29, at 492, observes that the F.T.C. does not have the power to “regulate the quantity, taste, social values, blatancy, or frequency of advertising; these are matters with which no federal agency is presently equipped to deal. A full national debate leading to new legislation is necessary if these matters are to be controlled.”

87 Cigarette advertisers and manufacturers have always insisted that through their ads they were not trying to encourage anyone to start smoking cigarettes, but, instead, they were interested in “winning over” people who had already decided to smoke cigarettes.

While that was the theory, it is interesting to recall some of the television programs which were sponsored by cigarette manufacturers. In the late 1950’s, Marlboro Cigarettes sponsored The Many Loves of Dobie Gillis, a program which obviously appealed to younger viewers. A more callous example is Winston Cigarettes’ sponsorship of the popular animated series, The Flintstones. On the Flintstone shows, unlike the Dobie Gillis series, the program characters actually did ads for cigarettes. It is difficult even to begin to imagine what sort of impact animation of “Fred” and “Wilma” shown smoking, and extolling the virtues of Winston Cigarettes, would have on countless young viewers.

In radio days listeners were encouraged to start smoking with such “match-ups” as Camel Cigarettes and Benny Goodman, in the late 1930’s, and Frank Sinatra and Chesterfield Cigarettes, in the 1940’s.

88 The Aspin Age (M. Leighton, ed. 1949) is a compilation of entertaining articles about America in the 1920’s and 1930’s. The title faithfully conveys the impression of a nation moving into a “higher gear.” As the more frantic pace created new “headaches” for people, they turned more and more to their aspirin bottles to find relief.
be permitted to inundate the airwaves and periodicals with suggestions that people can solve more problems by taking more drugs.

The Sominex ads (number [12]) seem to be trying to sell viewers on the idea that it is not alarming for ordinary people to take drugs in order to get to sleep. The ads seem to stress wholesome people in wholesome surroundings encouraging each other to “pop” a Sominex at bedtime. No individual in any of the recent ads that were viewed had a word of caution to say about the practice, except to mention that Sominex is fine to take when one has “occasional” trouble. In the Sleep-Eze ad (number [13]), it is stated, “If you have occasional trouble [getting to sleep], then perhaps you’d like to know about Sleep-Eze.” The dangerous omission in such a statement is, how often is occasional? Both ads seem to leave that question for viewers to decide themselves. In effect, the ads are encouraging viewers to self-diagnose what is an “occasional” sleeping problem, and then self-prescribe an over-the-counter drug for its treatment.89

The Sominex ad was found objectionable for not explicitly warning viewers that their insomnia might need a doctor’s attention. Sleep-Eze, on the other hand, explicitly warns viewers at the beginning of its ad. Is the ad thereby made preferable over the Sominex ad? This writer’s answer is that the Sleep-Eze ad ranks among the worst of all the ads considered, for it seems to motivate people to buy out of fear. What the copywriters have cleverly done, is to turn a desirable “affirmative disclosure” about the potential seriousness of a sleeping problem, into a very devious scare tactic.90 The warning comes at the beginning of the ad. It is reasonable to assume that such an alarming statement will immediately draw the attention of a viewer who has been experiencing great difficulty in sleeping; the kind of person who should really see his doctor instead of his pharmacist, for a non-prescription sleeping aid. Once that suffering person’s attention has been gotten, on comes the “soft sell” for Sleep-Eze. The ad encourages the viewer to downplay the potential seriousness of his insomnia, by suggesting to him, that if he has only “occasional” trouble, he may not need to see a doctor, after all, for Sleep-Eze is

89 See J. B. Williams Co., 68 F.T.C. 481 (1965); see also Bristol-Myers Co., 74 F.T.C. 780 (1968).

90 In J. B. Williams Co., 68 F.T.C. 481, 542 (1965), the F.T.C. considered a drug ad which advised “check with your doctor”:

Despite respondent’s argument to the contrary, we find that the implication in their advertising that a person can self-diagnose a deficiency of iron from his tiredness symptoms is not dispelled by the phrase “check with your doctor.” In the first place the word “check” suggests that the viewer go to the doctor only to verify a condition that he is quite capable of recognizing himself. Moreover, this phrase is usually followed by another statement which completely obscures its meaning, such as “check with your doctor, and if you've been feeling wornout, because of iron-poor blood—take GERITOL.” On the interpretation most favorable to respondents, this advertising suggests that the tired viewer have his condition checked by a doctor, and then treat himself according to a television statement. We fail to see how this unlikely suggestion clarifies the meaning of the advertisement.

See also Bristol-Myers Co., 74 F.T.C. 780 (1968).
available without a prescription. If a person is given a choice in diagnosing the seriousness of his problem, will he choose the more or less alarming alternative? It is not very much different from giving an overindulgent drinker the choice of describing himself as an “alcoholic,” or as a “social drinker.” In the case of an insomniac, the best way for him to reenforce his hope and belief that his problem is not serious, is for him to buy Sleep-Eze.

CONCLUSION

The advertising improprieties discussed in this comment seem to suggest that ads should satisfy four requirements:

1. **Representations and Disclosures:** When an ad makes representations, they must be accurate and complete. Certain disclosures may be required in ads for some kinds of products.

   Representations obviously should be accurate, and they should be complete, to avoid any possible misunderstandings. While it has been suggested that “each consumer be provided not only with the truth, but with enough information on which to base an intelligent and informed decision,” this writer believes that a requirement to disclose such “useful” information should depend upon the kind of product advertised. With some products, it is difficult to imagine what sort of disclosures could be made, to help consumers make “rational” evaluations of them. One example to consider would be the advertising of potato chips. Such a “snack” or “junk” food was never meant to be bought for “rational” or “intelligent” reasons. The advertiser should thus be permitted to use “irrational” promotional techniques in potato chip ads, such as enticing pictures and jingles, attractive settings, layouts, models, and contagious humor, as long as consumers are not misled by the ads (misled, for example, into believing that potato chips are nutritionally valuable), and as long as there are no problems in the ads, as illustrated in the three remaining categories. Ads for products such as drugs, on the other hand, can involve certain dangers, which justify the inclusion of warnings. For example, an ad which would simply state, “Brand-X Sleeping Potion is now available at your favorite drugstore,” makes no representations about the product, which might be said to require further elaboration, but it seems appropriate to require such affirmative disclosures as “Check with your doctor,” and “Observe label directions.”

2. **Understanding the Representations or Suggestions:** The ordinary consumer must be able to understand, from an ad, the meaning or significance of the representations or suggestions.

   An “accurate and complete” representation can be as misleading and

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harmful as an outright "false" representation, if the consumer cannot understand its meaning or significance. The distinction between this requirement and the first requirement will not always be well defined, since a consumer may not understand an advertiser's representations, because they are "incomplete." This second requirement covers ads in which the information is provided, but no conclusion from the information is drawn. For example, the breakfast cereal ads "accurately and completely" describe some of their ingredients, but the ads fail to indicate to consumers why it is good for them to eat cereal with such "natural" ingredients. The ad for Excedrin (ad number [1]), however, offers the conclusion that it is "more effective against pain," without providing appropriate preceding representations to warrant such a conclusion. Thus the Excedrin ad, unlike the cereal ads, is not "accurate and complete" in its representations, and it comes under the first category.

(3) Understanding the Reason for Buying: The ordinary consumer must be able to understand, from an ad, why exactly he may be motivated to buy the product.

This category deals with subtle suggestions in ads, which consumers may not consciously perceive, which persuade them to buy products. The Alpen ad (ad number [6]) is a good example of this. The Sleep-Eze ad (ad number [13]) seems to qualify, too, with its skillfully understated use of fear, to motivate purchases. The F.T.C. has only begun to explore "psychological advertising," and this field deserves more detailed consideration by legal writers. It is sufficient to say that a consumer has a right to choose freely between products, and in order for him to be able to choose freely, he must be able to understand how advertisers may be attempting to persuade him. A consumer should be able to evaluate ads critically, and should not be victimized by skillful advertisers who may be able to plant persuasive suggestions in his less critical subconscious mind.

(4) "Fairness and Ethics:" An ad should not use "unfair" practices, nor "encourage" consumers in questionable ways.

This broad category takes in such things as unfair competitive practices, and questionable encouragements. This comment has found a variety of appalling suggestions made in ads:

(a) A "stronger" drug is a "better" drug (ad [2]).

(b) One can safely rely on friends' advice about drugs (ads [9], [11], and [12]).

(c) One can, in effect, solve more problems by taking more drugs (ad number [12]).

(d) One can safely determine, alone, whether a sleeping problem is serious enough to warrant a doctor's treatment (ad number [13]).

(e) Any vague sort of reference to a hospital, clinical, or university study guarantees that a product is reliable, and is probably preferable to other, similar products (ads [1], and [13]).

In closing, it is worth reiterating that since food and drugs have the potential of injuring health, instead of simply causing financial injury, increased vigilance of food and drug advertising is justified. Consumers have a right to be told more than they have been told about the products they ingest.

BARRY S. DONNER

EXPUNGEMENT IN OHIO: ASSIMILATION INTO SOCIETY FOR THE FORMER CRIMINAL

I. INTRODUCTION

IT HAS ONLY BEEN within the last 50 years that there has been official recognition of the debilitating legal and social consequences that result from a citizen's arrest and conviction. Legally imposed restrictions and the social stigma concomitant with a criminal record effectively operate to penalize ex-convicts even after they have paid their "debt" to society. A person with merely an arrest record suffers damage to reputation, impeachment as a witness, disabilities in acquiring schooling and professional licenses, more intense police scrutiny, and direct economic losses.\(^1\) Consequences of a criminal conviction are more severe.\(^2\)

Most criminal records are available to the general public; which fact gives rise to many of the consequences attendant to conviction of a crime. In recognition of this fact, several state legislatures have enacted laws commonly termed "expungement statutes."\(^3\) These statutes seek to go beyond mere sentence and imprisonment in dealing with the problem of the criminal offender's relationship with society:

Expungement and annulment are the product of the recent emphasis in corrections on rehabilitation. Both kinds of statutes are designed to restore forfeited rights and uplift the offender's status by

3 The use of the word "expungement" to describe these statutes is somewhat of a misnomer. To expunge "means to destroy or obliterate; it implies...a physical annihilation." BLACK'S LAW DICTIONARY 693 (rev. 4th ed. 1968). None of the statutes call for actual destruction of records.
Spring, 1975

exonerating him from the fact of conviction and concealing the conviction from public view. These statutes are unique because their primary objective is the elimination of the penalties imposed by public opinion rather than those imposed by law.4

Although the statutes manifest various approaches to the concept of expungement (no two read exactly alike), they are all linked by the emphasis upon rehabilitation and the former offender's assimilation into society.

II. THE EXPUNGEMENT STATUTES IN GENERAL

Approximately 20 states now have expungement laws, the oldest and most extensively interpreted being that of California.5 The nature of the relief afforded by the different statutes varies from withdrawing a plea of guilty, or setting aside the verdict,6 to expungement7 and sealing of records.8 The former attempts to nullify the fact of conviction, while the latter endeavors to hide all evidence of any proceedings against the successful applicant. The typical expungement statute states in general terms the effects of a grant of expungement, such as release from all penalties and disabilities resulting from the conviction9 and restoration of all rights and privileges.10 Most of the more recently enacted statutes specifically provide that the successful petitioner for expungement may, in applications for employment or licensing, state that he has never been convicted of a crime.11 Almost all the expungement statutes, however, permit the record of conviction of the expunged crime to be pleaded and proved in a subsequent criminal prosecution.12

4 Special Project, supra note 2, at 1148-49. Confidentiality of juvenile criminal records is and has been widely recognized; many states provide for expungement of such records by statute. E.g., OHIO REV. CODE ANN. § 2151.358 (Page Supp. 1973). Juvenile expungement statutes, however, are not within the scope of this Comment.


6 E.g., CAL. PENAL CODE § 1203.4 (West Supp. 1974). Although statutes with such a provision are commonly called "expungement statutes," they really are not. Gough, supra note 2, at 152. These statutes are of more limited effect than true expungement statutes, like that of Ohio. Id. Most existing court decisions about expungement interpret statutes of this nature and, therefore, are not completely analogous to true expungement statutes.


9 E.g., TEX. CODE CRIM. PRO. ANN. tit. 42.12 § 7 (1966).


11 E.g., KAN. STAT. ANN. § 21-4617(b) (Supp. 1973). Statutes with such a provision state that the effect of the relief shall be that all criminal proceedings are deemed not to have occurred. E.g., NEV. REV. STAT. § 179.285 (1971). See also MICH. COMP. LAWS ANN. § 780.622 (1968), which merely provides that the proceedings are deemed not to have occurred, making no mention of applications for employment. Where the petitioner is released from all penalties and disabilities, such as in the California law, there is never such a provision.

The applicability of all statutes is limited either to probationers,\textsuperscript{13} convicts who have received pardons,\textsuperscript{14} first offenders,\textsuperscript{15} or to those who committed a crime before reaching the age of 21.\textsuperscript{16} Some laws combine the requirements, and some add parolees to the list of those who are eligible.\textsuperscript{17}

Some states make expungement the goal of rehabilitation and require that the petitioner for expungement show that he has reformed before he makes his application. He must have exhibited good moral character since his conviction, or he must show that it is in the public interest to grant the relief.\textsuperscript{18} Some statutes imply this by providing that the court "may" grant the applicant's request.\textsuperscript{19} Others apparently regard expungement as a method to accomplish or a way to encourage rehabilitation. They require that the relief be granted after satisfactory completion of parole or probation, or upon pardon.\textsuperscript{20}

III. THE OHIO EXPUNGEMENT STATUTE\textsuperscript{21}

A. The First Offender

The availability of expungement in Ohio is limited to the first offender,\textsuperscript{22} which the law defines as: "... anyone who has once been convicted of an offense in this state or any other jurisdiction. When two or more convictions result from or are connected with the same act, or result from offenses committed at the same time, they shall be counted as one conviction."\textsuperscript{23} Unfortunately, this definition does not eradicate all uncertainty.

The most salient uncertainty seems to be in regard to multiple indictments and multiple counts of a single indictment. The statute makes it clear that, if the offenses charged in the various counts or indictments

\textsuperscript{21} The Ohio expungement statute is contained in Ohio Rev. Code Ann. § 2953.31-36 (Page Temp. Supp. 1973). As originally introduced in the legislature the numbering was § 2969.01-05. This explains the apparently meaningless reference in present § 2953.35 to "Sections 2969.01 to 2969.05." (There is no Chapter 2969 in the present Code). Through oversight the chapter and section numbers were not changed.
derive from a single act or from contemporaneous acts, there is still only one conviction. However, convictions on multiple counts or indictments of offenses that arise from non-contemporaneous actions are certainly not uncommon, and the statute does not make it clear whether such conviction would bar the offender from obtaining expungement of his records.

The question of the relationship between offenses and convictions, on the one hand, and multiple counts and indictments, on the other, has been examined by the courts chiefly in dealing with recidivist statutes. There are two views on the matter. One is that separate indictments or counts are separate offenses and that one convicted under separate indictments comes within the reach of a habitual criminal statute. However, these cases are narrow in their application, because they interpret specific statutes and do not announce general principles of law.

The majority view is that, "... where there were two or more convictions on as many indictments or on two or more counts in the same indictment, only one of them may be subsequently utilized as a previous conviction within the contemplation of habitual criminal statutes." It appears that the rationale for this view is that the convictions should be sufficiently separated in time to give the offender opportunity to reform. Rehabilitation cannot begin until the offender has realized that he has committed a wrong and he fully understands the gravity of his actions:

It is obviously the experience of the cold steel doors of the penitentiary slamming behind him or the inexorable conditions of probation, restricting his movement and actions that effectively demonstrate the futility of crime. Apparently it is only when he has faced the total, stark consequences that he should have learned his lesson.

Since no court has yet interpreted the term "first offender" in the context of an expungement statute, it is not illogical to rely upon and analogize with precedent in the area of recidivist statutes. The terms "habitual criminal" and "first offender" are semantically related. S. Rubin, The Law of Criminal Corrections 465 (2d ed. 1973). Furthermore, recidivist and expungement statutes have their roots in the same concept: rehabilitation. See text accompanying note 2 supra. Whereas expungement, at least in Ohio, is available only to those who reform, recidivist statutes apply to those who do not, or cannot, reform.


E.g., People v. Braswell, 103 Cal. App. 399, 284 P. 709 (1930), was concerned with a recidivist statute that was separated into two parts. One part explicitly stated that prior convictions must be "separately brought and tried," while the other left out the phrase. The court held that the omission must have been intentional and that conviction of charges of different offenses tried concurrently would bring the offender within the reach of the habitual criminal statute. Id. at 407-08, 284 P. at 712-13.


People v. Spellman, 136 Misc. 25, 29, 242 N.Y.S. 68, 71 (1930). See also People v. Snow, 1 N.Y.2d 30, 133 N.E.2d 681, 150 N.Y.S.2d 75 (1956); Cromeans v. State, 160 Tex. Crim. 135, 268 S.W.2d 133 (1954), which went so far as to hold that convictions resulting in suspended sentences are disregarded in applying recidivist statutes.

Ohio case law is in accord with the majority view.\(^{30}\)

The same reasoning that is used in dealing with recidivist statutes is also valid as to an expungement statute, which also has its basis in rehabilitation. In all justice, the offender should be given an opportunity to meet the requirement of reformation, that opportunity coming after the proceeding against him. Conviction of charges of separate offenses, tried in the same proceeding, should be counted as only one conviction so that the offender may earn a right to expungement of his records.\(^{31}\)

B. The Court's Discretion

Section 2953.32(C) of the Ohio law states that expungement of official records will be ordered, "[i]f the court finds that the applicant is a first offender, that there is no criminal proceeding against him, that his rehabilitation has been attained to the satisfaction of the court, and that expungement of the record of his conviction is consistent with the public interest..."\(^{32}\) Thus, the court at nisi prius is given a certain amount of discretion in dealing with two of the criteria: the completeness of rehabilitation and the determination that expungement of the individual's records will be in the public interest.\(^{33}\) As is the case in other areas of judicial discretionary powers, an appeal should be considered proper because of the potential for abuse in the use of this discretion.\(^{34}\)

In State v. Miller,\(^{35}\) the applicant for annulment had pleaded guilty to a charge of burglary, but upon suspension of sentence he was placed on probation. During the probationary period his fiancee became pregnant and his probation was revoked. Miller served one year of the sentence and thereafter married his fiancee, started his own business, bought a home, and led a totally law-abiding life. The lower court denied his application for annulment\(^{36}\) on the evidence presented,\(^{37}\) even though there had been

\(^{30}\) See Carey v. State, 70 Ohio St. 121, 70 N.E. 955 (1904). The decision in Brumbaugh v. State, 36 Ohio App. 375, 173 N.E. 267 (1930), should be distinguished because there the defendant had pleaded guilty to two separate offenses at two different times. The charges were consolidated only for judgment and journalization.

\(^{31}\) This also was the intent of at least one of the sponsors of the Ohio expungement statute in the state legislature. Affidavit of State Senator (now U.S. Congressman) Ronald Mottl, July, 1974, on file Akron Law Review.


\(^{33}\) Most expungement statutes endow the court with some amount of discretion.


\(^{36}\) The application for expungement was made under Kan. Stat. Ann. § 21-4616 (Supp. 1973), which applies to offenders who commit crimes before reaching the age of 21. Much of the wording of that statute is identical to that of the Kansas adult expungement law, Kan. Stat. Ann. § 21-4617 (Supp. 1973), especially those parts that relate to the effect of an expungement order. Furthermore, the reasoning of the
no showing of non-rehabilitation by the state other than the record of his probation revocation. In a well-reasoned opinion, the Supreme Court of Kansas reversed and said:

Judicial discretion must always be exercised within the bounds of reason and justice. Judicial discretion is abused when it is arbitrary, fanciful or unreasonable, where no reasonable man would take the view adopted by the trial court.\textsuperscript{38}

The court then considered the evidence presented in the lower court:

The facts presented at the annulment hearing clearly demonstrated that the defendant has made every conceivable effort to conform to the norms and demands of our society. . . . There is no evidence whatsoever in the record to show that the defendant has any propensity toward continuing criminal conduct or that he is a clear or present danger to the public.\textsuperscript{39}

Thus, in spite of the fact that a trial court's handling of a matter ought to be given due respect, decisions which show a clear-cut abuse of discretion need not be a total bar to relief for the reformed criminal seeking expungement.\textsuperscript{40} The Kansas court went so far as to spell out a rule for judges to follow in the future:

We hold that the filing of a simple request with supporting evidence to show compliance with the statutory requirements should constitute \textit{prima facie} entitlement to the annulment of a conviction. Annulment of a conviction should be granted unless the court finds some strong affirmative cause to deny it. In other words the norm should be the granting of relief . . . unless the state shows some good compelling reason not to grant it.\textsuperscript{41}

Although this may conflict with strict interpretations of expungement,\textsuperscript{42} it is probably closer to the spirit of expungement's attempt to help replace the former offender in society as a contributing member thereof.

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\textsuperscript{37} The district court also held the annulment law unconstitutional.


\textsuperscript{39} \textit{Id.} at 546, 520 P.2d at 1255.

\textsuperscript{40} However, there is no reason to believe that the court has any discretion in dealing with the matter of the time at which an application for expungement may be brought. See Anderson v. State, 512 P.2d 1387 (Okla. Crim. App. 1973), for an example of strict, to-the-day compliance with time provisions in criminal proceedings. \textit{Ohio Rev. Code Ann.} § 2953.32(A) (Page Temp. Supp. 1973) expressly provides for a three-year lapse for a felon and a one-year lapse for a misdemeanant. The court's discretion is implied only in § 2953.32(C).


\textsuperscript{42} See Meyer v. Superior Court, 247 Cal. App. 2d 133, 55 Cal. Rptr. 350 (1966). \textit{See also} People v. Ignazio, 137 Cal. App. 2d 881, 290 P.2d 964 (1955) (in the absence of some showing of fulfillment of conditions, there is a presumption that the applicant did not fulfill them).
C. The Handling of the Expunged Records

When the court determines that the requirements have been met to its satisfaction, it orders all "official" records sealed. 43 "Official" records should be distinguished from "public" records. The latter refers to "any record required to be kept by any governmental unit." 44 More specifically, public records would include:

Any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the office. ... 45

The term "official records," on the other hand, has a broader meaning in that the term also includes those papers and documents made in the normal course of the performance of a public official's duty. 46 Undoubtedly, this definition would also include copies of such papers and documents. 47 However, matters of opinion contained in an official report do not come under the definition. 48

Once it is determined which records are subject to a court order of expungement, the official in charge of them must decide exactly how he is to comply with the law. The Ohio statute merely provides for the sealing of all records pertaining to the case and the deletion of all index references. 49 There is no provision outlining procedure, nor is there even a definition for the term "sealed." Therefore, the individual official has been left to decide the procedure he deems appropriate. 50

A survey of several large Ohio counties 51 shows that the clerks of court follow a fairly uniform procedure. To delete index references the

51 Questionnaires were sent to the clerks of court of Cuyahoga, Hamilton, Montgomery, Franklin, Summit, Stark, Lucas, Mahoning and Trumbull counties. Cuyahoga, Hamilton and Montgomery counties did not reply. The Mahoning County clerk answered only that one application had been received in the year of the law's
clerk strikes through the name with a black felt-tipped pen. He then places all records and papers, including docket references, in a sealed file or envelope. While a few offices place the old case number on the expunged file, the clerk in one county assigns it a special number and maintains a confidential expunged number index. Where the successful applicant for expungement was one of several defendants in the original case, a special problem arises since only the applicant's name can be removed from the documents while some record of the individual's involvement must be preserved in case he is ever arrested again. In such instances, one clerk reported that he retypes all papers, omitting the name of the applicant, and places these in the regular files and dockets, while the original papers are put in the applicant's expunged file. In every county, expunged files are kept in a safe or other confidential space.

In general, other agencies follow a similar procedure. The Cuyahoga County Sheriff's Office has devised a complete, well-conceived record sealing method which might be a model for other agencies with similar facilities. The original file jacket is removed from the Master Criminal File and destroyed. All index cards, documents, entries, and all other references to the applicant's arrest and incarceration are placed in a new file jacket marked only with the appropriate sheriff's office number. The jacket's cover tab is then taped shut in such a manner that will deface or tear the file jacket if entry into the jacket is attempted. This sealed file is then placed in the numerically proper location in the Master Criminal Files. An ingenious device is used in the event the individual who has had his records expunged is ever arrested again or if inquiry of any type is made. The existence and that case was still pending. Apparently no procedure will be devised there until the court issues an expungement order.

The questionnaires requested information about the clerks' procedures in sealing their own records, their procedure in distributing an expungement order to other agencies, and the number of applications that had been granted and denied in the first year of the law's existence.


Inspections of the records included in the order may be made only by any law enforcement officer, prosecuting attorney, city solicitor, or their assistants, for the purposes of determining whether the nature and character of the offense with which a person is to be charged would be affected by virtue of such person having previously been convicted of a crime or upon application by the person who is the subject of the records and only to such persons named in his application.

54 One clerk, however, stated that the inquiring party is referred to the judge who handled the case. This would seem to defeat the whole purpose of the expungement law, because, if the inquiring party is referred to a judge, he knows that the individual, at some time, must have been convicted of a crime.
55 Questionnaires were also sent to the sheriffs and prosecutors of Hamilton, Franklin, and Cuyahoga counties. Only the sheriffs of Hamilton and Cuyahoga counties replied. A special questionnaire was mailed to, but not returned by, the Ohio Bureau of Criminal Identification and Investigation.
Fingerprint Section of the sheriff's office maintains a fingerprint index that refers to the expunged file's number. Thus, if the successful applicant is charged with another crime, new fingerprints are taken by the arresting agency and will be referred to the sheriff's fingerprint index, which will indicate whether there is an existing file on the person. In this manner all inquiries must be accompanied by a set of original fingerprints.

Those agencies without such a sophisticated apparatus must employ simpler methods. For example, one prosecutor's office simply marks index cards and case files "Expunged" and places them in a special file in the Administrative Assistant's office. One probation department merely places expunged documents in distinctly colored folders in order to distinguish them from other files.

One prevalent criticism of expungement, as a means of hiding the former criminal's conviction from the public view, has been that "criminal records are located in so many different places that it is impractical to fashion an order to expunge them all." This is a valid observation, and its truth will surely hinder the effectiveness of any record-sealing statute.

In Ohio, sheriffs and police are required to take the fingerprints of anyone arrested for a felony and forward them, along with other description, to the Ohio Bureau of Criminal Identification and Investigation (B.C.I.). Courts, also, are required to send B.C.I. a weekly summary of cases involving a felony or misdemeanor which becomes a felony on the second offense. The Superintendent of B.C.I., in turn, must cooperate with bureaus in other states and with the F.B.I. to effect a complete interstate, national, and international system of criminal identification. Private agencies and employers also keep records on persons in their charge, and any criminal activity would probably be noted.

The record acquiring power of the Federal Bureau of Investigation is more pervasive. Under federal law the Attorney General is required to acquire, collect, classify and preserve criminal identification and other records and to exchange them with state, local and federal officials. The F.B.I. may obtain records not only from law enforcement agencies

56 See Gough, supra note 2, at 175 n.120.
57 Inter-Office Memo, Summit County Probation Department, Jan. 24, 1974.
58 Steele, A Suggested Legislative Device for Dealing with Abuses of Criminal Records, 6 U. MICH. J.L. REF. 32, 34 (1972) [hereinafter cited as Steele].
59 OHIO REV. CODE ANN. § 109.60 (Page Supp. 1973). This applies even to those arrested on suspicion of a felony. If the accused is exonerated, however, the identification data must be returned to him on request.
but also from federal banks and all banks insured under FDIC. In 1970 alone, the F.B.I. processed 29,000 fingerprint cards daily. In 1970 alone, the F.B.I. processed 29,000 fingerprint cards daily.

The problem of reaching the widely disseminated records is not easily solved. The practice in most counties appears to be that, immediately after an order of expungement is issued, the first duty of circulating the order falls upon the clerk of courts. One county clerk sends copies of the order, as a matter of course and without specific instructions from the attorney or the court, to the county probation department, the city police, the county sheriff, the arresting agency (if not the police or sheriff), the F.B.I., the Ohio B.C.I., and the Ohio Bureau of Statistics. The clerk of the municipal court also receives a copy if the case had been bound over. Another county clerk also informs the county and/or city prosecutor of the order. In those counties where the clerk has a list of agencies which receive expungement orders as a matter of course, the clerks will also send to any other person or agency named in the court’s journal entry. In those counties it therefore should be the responsibility of the applicant’s attorney to ensure that all appropriate agencies are included in the expungement order. In fact, in two of the counties surveyed, Trumbull and Franklin, the attorney must notify all agencies, the clerk takes no part in the distribution process. The list of agencies set out above would likely suffice in most cases; however, notification to private agencies and anyone else known to have any record of the first offender’s former criminal activity would be desirable.

In addition to the clerk and the applicant’s attorney, other agencies sometimes endeavor to aid in the dissemination of the expungement order. The Cuyahoga and Hamilton county sheriffs send copies of the order to all agencies or governmental bodies to which they may have formerly supplied information regarding the individual. This is a wise policy, since, in the sophisticated computerized system of record keeping that exists today, it is difficult at best for the attorney to ascertain all those entities that have records on the individual. The procedure of the Ohio Bureau of Criminal Identification and Investigation is not known, but even if it did endeavor to notify all its distributees, much of it would be meaningless effort.

64 28 C.F.R. § 0.85(b) (1974).
66 As a California writer and lawyer has suggested, certified copies of the order would probably be most prudent. Booth, The Expungement Myth, 38 LOS ANGELES B. ASS’N BULL. 161, 163 n.15 (1962).
67 For example, it is likely that the local credit bureau would have some notation in their files. It is doubtful, however, that an order to expunge records would be enforceable against a private enterprise. But see Atchison, T. and S.F. Ry. Co. v. Lopez, ..... Kan. ..... , 531 P.2d 455 (1975).
68 A state court judgment ‘...restricting the use of criminal records would not extend beyond the state boundaries.’ Steele, supra note 58, at 37. This is yet another fact that makes expungement a less than totally effective means of hiding a former criminal record.
The F.B.I., although not required to do so, will remove from its files and return identification data to the contributing agency upon request. 69 The Summit County Clerk of Courts reports that the F.B.I. returns all data when it receives the expungement order, the F.B.I. apparently construing the order as a request for return of records.

In summary, if expungement is to achieve its purpose, all available means should be employed to conceal records. This is undoubtedly a painstaking process and may be rather futile in some cases. 70 More legislative guidance as to procedure and more court supervision of compliance with its dictates would go far in correcting these defects. 71 Perhaps even reciprocity agreements with other states would help eliminate some expungement loopholes.

D. The Practical Effect of Expungement

Of prime concern to the former criminal himself will be the practical benefits that he receives from expungement. Renewed opportunity for employment or professional licensing is likely to be the major, if not sole, reason for turning to the remedy. Ability to serve on a jury or as a member of a public board or qualification to run for office are criminal's records from public view.

California's counterpart to B.C.I. is required by statute, however, to notify all its distributees of a juvenile expungement order. CAL. PENAL CODE § 11105.5 (West 1970).

69 Menard v. Saxbe, 498 F.2d 1017, 1022 (D.C. Cir. 1974). As the court noted, 6,000 such requests were honored in 1970.

70 Supra note 68 and accompanying text.

71 See GEORGETOWN LAW INSTITUTE MODEL ANNULMENT AND SEALING STATUTE, supra note 34, § 4. The Ohio law does not require agencies to inform the court of compliance with the expungement order, but the survey reveals that some agencies do so in the course of normal procedure.

The Ohio legislature did attempt to put force behind the law by making it a fourth degree misdemeanor to knowingly supply unauthorized persons with expunged data. OHIO REV. CODE ANN. § 2953.35 (Page Temp. Supp. 1973). Laws providing a penalty for disclosure of confidential matter are not uncommon, but reported cases of actual imposition of such penalties are virtually non-existent, Daniel Ellsberg being a well-known example.

There may be a civil remedy in damages against the indiscreet public employee who discloses confidential criminal records. The concept of privacy has been the basis for a growing number of equity cases where the courts, without statutory authorization, have ordered expungement of arrest records in the case of arrestees who were discharged before trial or whose constitutional rights were violated in the arrest. E.g., State v. Pinkney, 33 Ohio Misc. 183, 290 N.E.2d 923 (1972); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971); Annot. 46 A.L.R.3d 900 (1972). Dean Prosser gives a most complete analysis of the civil action in tort for invasion of privacy. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 802 (4th ed. 1972). The former criminal, whose expunged records have been illegally disclosed, might well consider an action against the appropriate official on the basis of Prosser's classifications of Intrusion or Public Disclosure of Private Facts. Id. at 807, 809. Valuable rights, such as the right to keep private personal records and documents, have been recognized as appropriate grounds for equitable relief against public officials. Frey v. Dixon, 104 N.J. Eq. 386, 58 A.2d 86 (1948) (dictum). Furthermore, in the light of Scheuer v. Rhodes, 416 U.S. 232 (1974), the fact that defendants in such a civil action for damages are public officials would not necessarily be a bar to the tort suit.
factors which do not have such a broad effect on the ex-convict's life but which may nevertheless be important to him.

Covering the practical effect, the Ohio expungement law is general at one point:

An order of expungement of the record of conviction restores the person subject thereof to all rights and privileges not otherwise restored by termination of sentence or probation or by final release on parole.72

At another point it is more specific:

In any application for employment, license or other privilege, any appearance as a witness or any other inquiry...a person may be questioned only with respect to convictions not expunged, unless the question bears a direct and substantial relationship to the position for which the person is being considered.73

These provisions are also susceptible to differing interpretations. Whether they will be interpreted broadly, so that an ex-convict is truly no longer an ex-convict, or narrowly, with many loopholes and exceptions, will be of utmost significance to those first offenders who opt for expungement.

1. Employment

Most private employers show great hesitation in hiring former criminals. Some flatly reject them, and most will not hire them if there are other applicants without criminal records. In addition, even if the ex-convict does find a job, he is usually relegated to menial, unskilled labor.74 Restrictions on public employment may be even greater.75

An inevitable question on any application for employment is whether the applicant has ever been convicted of a crime.76 Although the Ohio statute does not specifically authorize a negative answer,77 the applicant whose records have been expunged would probably be safe in replying "No." Although authority in some states is to the effect that employers can use expunged convictions in considering an application78 and,

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74 Special Project, supra note 2, at 1001-02.
75 Id. at 1013-18.
76 Even here, however, employers are being restricted. For example, Hawaii Rev. Stat. § 21-378 (Supp. 1973), prohibits employer discrimination on the basis of past criminal records and California has recently enacted a law whereby employers are prohibited from asking questions regarding criminal records on initial employment applications. Cal. Labor Code § 4327 (West Supp. 1975).
therefore, by implication, may require the applicant to reveal prior convictions, the reasoning of these authorities probably is based on the narrow relief afforded by their respective expungement statutes. In Ohio, "the proceedings shall be deemed not to have occurred." By answering negatively, the former offender would merely be accepting the position that the law assumes. Furthermore, the enigmatic clause "... a person may be questioned only with respect to convictions not expunged ..." also indicates that a negative answer is appropriate.

The negative answer might in many cases end inquiry into a prospective employee's criminal past, but the diligent employer may still learn of prior convictions in other ways. The applicant who has answered in the negative may also be required to account for the period that he was actually imprisoned. Explanations such as "self-employment" or "extended vacation" will serve only to aggravate any suspicions an employer may have. Furthermore, it has been said that exceptions, such as those in the Ohio law, to the strict confidentiality of records open the door for employer access.

From a public policy and public interest standpoint, it may even be unwise to conceal conviction from all employers. Professor Gough has listed some areas where the nature of the job virtually requires exclusion of certain prior offenders: a former embezzler with a bank; a former sex offender as a teacher; any previous offender as a policeman or in a position involving high national security and defense. These areas are undoubtedly what the legislature intended to affect with the insertion of the clause "... unless the question bears a direct and substantial relationship to the position for which the person is being considered."

82 Lack of enforcement of prohibition of access and required waivers of confidentiality giving the employer the authority he needs to gain access to records are two such means. 1970 Wash. U.L.Q. 530, 531-32 n.8 (1970). Also, a question on an employment application, such as, "Have you ever been convicted of a crime that has been expunged?" should not be permitted as a circumvention of the purpose of the statute.
83 American Bar Ass'n, Removing Offender Employment Restrictions 7 (1972).
85 Steele, supra note 58, at 40.
86 Gough, supra note 2, at 182-83.
87 Ohio Rev. Code Ann. § 2953.33(B) (Page Temp. Supp. 1973). This part of the statute presents some serious difficulties. For example, the question arises as to who is to determine whether the conviction bears a substantial relationship to the position sought. Surely it cannot be left to the former criminal himself, who would obviously be prejudiced in his own favor. Resting the decision on the employer seems absurd, because, if the applicant states that he has never been convicted and if the records are truly effectively sealed from the public view, the employer will never learn of the expunged record to make the determination. Perhaps statutory guidance is necessary.
Such arguments under the uncertain delineations of public policy are difficult to refute. They do ignore the very tenet of Ohio’s expungement: rehabilitation. “To rehabilitate means to restore to one’s former rank, privilege or status, to clear the character of reputation or stain, to retrieve forfeited trust and confidence.” Thus, expungement, being a result of rehabilitation, places the former criminal in his status quo ante. For expungement to do so, it assumes that the one-time criminal no longer has the criminal character, and, if this assumption is true, a former embezzler should be considered as qualified as anyone else to work in a bank.

2. Licensing

Ohio, like other states, regulates the legal ability to pursue certain occupations by licensing. Statutes dictate the qualifications which one must have to be granted a license and outline the grounds upon which one may have his license revoked or suspended. To become a C.P.A. or a licensed architect, for example, one must be of “good moral character.” A physician’s license may be suspended for conviction of a felony, and no one convicted of a felony of moral turpitude may be a real estate broker. Conviction of a felony is ground for revocation of almost all licenses.

The effect of expungement on the applicability of a first offender’s conviction to the licensing laws is not clear. The exception contained in Section 2953.33(B), discussed above as to employment; did not appear in the expungement bill as it was originally introduced in the legislature. But its addition during the enactment process indicates there will be at least some situations in which the expunged conviction will be considered by licensing boards. It remains to be determined which situations, but until such a determination is made, the former criminal will not be guaranteed that expungement will open the door to all licensed professions.

88 In re Stoller, 160 Fla. 769, ...., 36 So. 2d 443, 444-45 (1948).
90 Needless to say, though, a judicial determination of rehabilitation would not impress the parent who is faced with the prospect of having a one-time child molester in the same classroom with his own children.
96 Undoubtedly public policy will be an important consideration in the interpretation of the statute and its effect upon licensing. See notes 84-86 and accompanying text supra.
97 California has enacted specific provisions to several of its licensing statutes regarding the effect of expungement. E.g., CAL. BUS. & PROF. CODE § 10177 (West 1970) (real estate licenses).
The possibility exists that expungement will have no effect in the area of licensing. It might be argued that the licensing boards can inquire about any conviction, whether expunged or not, because any occupation important enough to be licensed and regulated by the legislature would fall within the exception which allows inquiry concerning expunged convictions which have a direct relationship to the position sought. Arguably any conviction has a direct relationship to an occupation important enough to be regulated by the state.

Although licensing boards are not permitted to be totally arbitrary in reviewing license applications, they have been accorded broad powers and discretion. In Papatheodoro v. Department of Liquor Control, the court held that restoration of rights and privileges upon termination of sentence or discharge from parole does not erase the effect of a licensing statute's provision that no person convicted of a felony may obtain a liquor license and that, therefore, the licensing board must deny the application on the basis of the conviction. A license is not a property right, and the state may validly deny its issuance. License laws, ...

... are police regulations designed to promote the general welfare and protect the public morals. They were enacted in the interest of public health and safety and their object is not to punish... It is essential to distinguish the nature of the statute in question from the nature of our criminal statutes which are punitive in their nature. The legislative will of the people of Ohio has been expressed in the Liquor Control Act... Here there is a fair, just and reasonable connection between the statute in question and the common good of society.

California case law, following the same general reasoning as the Papatheodoro decision, is uniform as to the effect of expungement on licensing statutes. Expungement is a criminal remedy, while licensing is civil in nature. Objection is raised to judicial determination of rehabilitation, and, for the purposes of licensing, such determination does not have to be recognized. In view of the "high degree of professional skill and fidelity to the public it [licensed occupations] serves," licensing boards must be allowed their own discretion in deciding whether a former criminal has rehabilitated sufficiently to assume such responsibilities.

The narrowness of the provisions of the California expungement law

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99 118 N.E.2d 713 (Ohio C.P. 1954).
100 Id. at 716.
101 Id. at 715.
102 Id. at 716.
105 Id. at 872, 338 P.2d at 186.
as to its practical effect\(^\text{106}\) should not be overlooked in analogizing the California decisions to the Ohio statute. Mere release from penalties and disabilities resulting from the conviction\(^\text{107}\) would necessarily be of less effect than restoration of all rights and privileges not otherwise restored by termination of sentence or final release on parole.\(^\text{108}\) The latter clause also distinguishes Ohio's expungement statute from the statute under consideration in the *Papathedoro* case.

A 1949 Ohio Attorney General Opinion\(^\text{109}\) presents more analogous reasoning. There a convicted felon had served in World War II and had thereby come under a postwar Presidential proclamation pardoning all convicts who had served in the armed services during the war. He applied for a liquor license, and the Department of Liquor Control requested the opinion of the Attorney General as to the effect of the pardon on the licensing statute which prohibited former felons from obtaining a liquor license. The Attorney General opined that a Presidential or Governor's pardon totally relieves the person pardoned from licensing disabilities:

> It [a pardon], in legal contemplation, obliterates the offense, giving him a new credit and capacity, and rehabilitating him to his former position in society. It is said to make of the convict a new man, and to be, in effect, a reversal of the judgment, a verdict of acquittal, and a judgment of discharge thereon, to this extent, that there is a complete estoppel of record against further punishment pursuant to such a conviction.\(^\text{110}\)

This language is virtually identical to that which has been used to describe the general effects of an order of expungement,\(^\text{111}\) and the reasoning of the Attorney General as to pardoned convicts vis-à-vis licensing statutes seems equally applicable to the former criminal who has had his conviction expunged.

Thus, there are two forces at odds in the area of licensing and expungement: the police power of the state and its interest in assuring that only the highest caliber of persons practice certain professions, versus the state's interest, as effectuated by the expungement law, of replacing the deserving, reformed criminal to a useful position in society. The two interests are not wholly incompatible if the ex-convict has truly reformed, but the courts and the legislature have traditionally accorded much power and importance to the licensing boards, and usurpation of such power by expungement will most likely not be perfunctorily recognized.

### 3. Other Areas

The recently enacted Criminal Code provides that a person convicted

\(^{106}\) See note 6 *supra*.


\(^{110}\) Id. at 513 (quoting 30 O. Jur. § 17 [xxxx]).

\(^{111}\) See notes 4, 87-88 and accompanying text *supra*. 

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of a felony loses the right to be an elector, to be a juror, and to hold an office of honor, trust, or profit. The convicted felon regains his competency to vote upon final discharge and is restored all the rights and privileges forfeited upon a full pardon. This wording may present a problem for the ex-convict who wishes to hold a public office or serve on a jury and who seeks expungement to remove his disabilities in these areas. The statute only states that upon pardon are the privileges restored, and the expungement statute states that privileges returned are those not otherwise restored by termination of sentence, probation, or final release on parole. The question which therefore arises is whether the privileges restored by expungement include those privileges restored only by pardon in Section 2961.01. Although the new Criminal Code and the expungement statute became effective on the same date, the latter statute was the first passed through the legislature. If chronology is significant, it can be argued that the legislature intended to include in the expungement law the restoration of the privileges restored only upon pardon in Section 2961.01. However, it can also be argued that there is a conflict between the two statutes, and, since Section 2961.01 is the more specific, it must govern. In view of the positive remedial purposes of the expungement law, the courts should attempt to construe it liberally and in such a manner so that both laws are given effect. Since Section 2961.01 does not say that restoration of the ability to be a juror or hold public office occurs only with a pardon, consistent construction is not impossible.

The Ohio Constitution provides that no person convicted of embezzlement of public funds shall hold any state office. There is authority to the effect that statutory expungement will not override such a constitutional provision.

Expungement would probably eliminate the necessity of registration for the former sex offender. A first offender who has had his record

117 There is also the argument of the close analogy between the practical effects of a pardon and that of expungement. See notes 111-12 and accompanying text supra.
121 Ohio Const. art. II § 5.
123 See Abbott v. City of Los Angeles, 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).
sealed might be allowed to carry firearms, and apparently he could not be impeached as a witness.

It is open to question whether federal courts, in cases arising under federal law, will recognize state expungement. The United States Court of Appeals for the Ninth Circuit has consistently held that, for the purposes of immigration and naturalization, Congress did not intend to accept state expungement. Federal courts will most probably decide each case on an individual basis, using judicial discretion and interpretation of congressional intent.

IV. CONCLUSION

Expungement as a method of restoring the rehabilitated criminal to his former status has been severely criticized: "Record concealment is unworkable; it fails to lift other penalties attendant to the record; it sanctions deceit; its half secrecy leads to speculative exaggerations; it frustrates constructive research; and it is not equally available to all." The statement may be true even with a strong, unequivocal law, but its truth has greater inevitability with a weak, loophole-ridden statute. The Ohio expungement statute is not unequivocal. Without authoritative guidance, procedures for sealing have differed and vary from the careful to the haphazard. Unless there is strict enforcement of the statutory dictates, employers will still be able to learn of conviction records, and unless there is a judicial turnabout or a more straightforward statute in regard to licensing, expungement in Ohio will be of little help to the first offender who applies for a professional license. It is evident that more astute legislation is needed. At the very least, liberal court interpretation, like the Miller decision, is an absolute necessity if Ohio expungement is to approach the achievement of its purpose.

124 Ohio law now allows a former felon to petition the court to relieve him of the disability provided, inter alia, he has been law-abiding since his discharge. Ohio Rev. Code Ann. § 2923.14 (Page Spec. Supp. 1973).
125 Ohio Rev. Code Ann. § 2953.33 (B) (Page Temp. Supp. 1973). However, the wording of § 2953.32(E) does not make it clear whether that provision applies only to criminal proceedings in which the former criminal is himself a defendant or to all criminal proceedings. If the latter, then he could be impeached at any criminal trial.
126 Brownrigg v. Immigration and Naturalization Serv., 356 F.2d 877 (9th Cir. 1966); Garcia-Gonzales v. Immigration and Naturalization Serv., 344 F.2d 804 (9th Cir. 1965), cert. denied, 382 U.S. 840 (1967).
A Lawyer's Expungement Procedural Outline

I. Facts to be ascertained from the client.
   A. The crime of which he was convicted.
      Section 2953.36 provides that expungement will not apply where the crime
      was one for which probation was unavailable or where the conviction is
      under Chapters 4507, 4511, or 4549 of the Revised Code. This includes
      crimes under those chapters as they are enumerated under the new Criminal
      Code. Some crimes that were listed under those chapters in the old
      Criminal Code have been inserted into Title 29 and therefore are not
      excluded from expungement.
   B. The year of his conviction and when parole, sentence, or probation terminated.
      Section 2953.32(A) provides that three years must have passed since his final
      discharge in the case of a felony, and one year in the case of a misdemeanor.
   C. Whether there is any criminal proceeding presently against him.
      Section 2953.32(C) provides that there must be no proceedings against him
      at the time of the application.
   D. Whether he has been convicted of any crimes since the first conviction.
      Expungement is limited to first offenders.
   E. The name and location of the sentencing court.
      Section 2953.32(A) provides that the application shall be made to such court
      if the conviction was in Ohio. If it was an out-of-state conviction, the
      application may be made to any court of common pleas.
   F. General facts about his personal life that would be persuasive to the court
      of his rehabilitation.
      Such facts might include the following:
      1. Employment record;
      2. Marital status and number of children;
      3. Whether he is a home owner;
      4. Community activities;
      5. Interests and hobbies; and
      6. Record on probation.

II. Filing with the court.
   A. The form of the application.
      Since the form differs from county to county, the attorney should ascertain
      the procedure in the particular county in which he is filing. The application
      should allege fulfillment of the conditions as enumerated in Section 2953.32(C).
   B. A $50 filing fee is required, except for the indigent applicant.
   C. The attorney should obtain a hearing date at the time of filing.
      The court will notify the prosecutor of the hearing and may also have the
      probation department make inquiries and a written report as to the merit
      of the application.

III. When the order is granted.
   A. The attorney must file a judgment entry for court approval to the effect that
      expungement has been granted.
   B. Depending on the practice of the county in which the granting court sits, the
      attorney may have to list agencies to whom the order is to be sent. Some
      counties require that separate Instructions to the Clerk be filed. The text
      contains a discussion of agencies that should receive a copy in all cases;
      whether other agencies should be sent a copy depends on the facts of the
      client's history.
   C. Agencies that receive the order are not required to report compliance with
      it. However, the conscientious attorney might take it upon himself, after a
      period of time, to inquire of the agencies as to whether they have sealed
      their records.

JAMES L. WAGNER
ANY DISCUSSION OF SPECIFIC ASPECTS OF JUVENTILE LAW NECESSARILY REQUIRES THAT AT LEAST A BRIEF INQUIRY BE MADE INTO THE HISTORY OF ITS DEVELOPMENT. THIS BECOMES APPARENT WHEN IT IS REALIZED THAT JUVENILE LAW IS NOT THE PRODUCT OF A NEAT AND ORDERLY BACKGROUND, BUT RATHER THE RESULT OF NUMEROUS SOCIOLOGICAL AND ECONOMIC CONDITIONS SURROUNDING NOT ONLY INDIVIDUAL COMMUNITIES BUT THE WHOLE SOCIETY. IT IS WITH THIS MOTIVATION THAT THE STATUTORY CREATION OF JUVENILE LAW BUILDS AND CONTINUES TO THRIVE. AND, IT IS FOR THIS REASON THAT THIS COMMENT CONCERNING THE LOSS OF THE BENEFITS OF THE JUVENILE LAWS THROUGH WAIVER OF JURISDICTION, WITH EMPHASIS ON THE OHIO WAIVER STATUTE AND ITS INTERPRETATION BY THE OHIO SUPREME COURT IN IN RE BECKER SHOULD BEGIN WITH A THUMBNAIL SKETCH OF ITS BACKGROUND.

The first laws in the United States specifically designed to govern the conduct of juveniles were implemented by the Illinois legislature on April 21, 1899. This statute and the ones which were to closely follow in other states, were born in a society surrounded with problems of mass immigration, rapid and haphazard urbanization, and industrialization of unprecedented dimensions. Social and legal reformers sought to offset some of these conditions and remove the children from the rigid, technical, and sometimes harsh justice of the adult criminal court, and place them in the "protective" custody of the parent state. The goals were "to investigate, diagnose, and prescribe treatment, not to adjudicate guilt or fix blame," and in this light "children were not to be treated as criminals nor dealt with by the process used for criminals." This "rehabilitative spirit" was best described by Julian Mack in 1909:

THE PROBLEM FOR DETERMINATION BY THE JUDGE IS NOT, HAS THIS BOY OR GIRL COMMITTED A SPECIFIC WRONG, BUT WHAT IS HE, HOW HAS HE BECOME WHAT HE IS, AND WHAT HAD BEST BE DONE IN HIS INTEREST AND IN THE INTEREST OF THE STATE TO SAVE HIM FROM A DOWNWARD CAREER?

I. JUVENILES AND THE STATE

The Doctrine of Parens Patriae

The jurisdiction of the state is based primarily on the assumption of the power of parens patriae. This doctrine was initially developed in the English court of chancery, where the chancellor acted as the personal representative of the crown exercising this prerogative to aid unfortunate minors. The underlying basis of this jurisdiction is somewhat unclear; but, the execution of this presumed authority generally took form in the assumption of the duties of maintenance and protection which resided in the minor's parents.

In retrospect the derivation of parens patriae seems to have been an improper exercise of jurisdiction and this fact has been the subject of comment and criticism. Nevertheless, this doctrine was accepted at an early date by the states and continues as a statutorily sanctioned basis for the exercise of jurisdiction over minors. Through these statutes, each state legislature has devised a separate specialized court and method of procedure for exercising jurisdiction whenever the interest of the state is determined to be better served by governmental interference.

These juvenile courts no longer operated through the principles of chancery or entirely under common law principles, but rather in a semblance of equity by statute. Generally, the procedures instituted in these courts were intended to be as informal and non-adversarial as possible, in keeping with their stated purpose of "saving" rather than punishing the child. Consequently, proceedings involving juveniles were described as "civil not criminal"; the juvenile offender was classified as delinquent not criminal; and, the juvenile was entitled only to the basic

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10 See, e.g., Rendleman, Parens Patriae: From Chancery to the Juvenile Court, 23 SUP. CT. L. REV. 205 (1971); Cogan, Juvenile Law Before and After the Entrance of Parens Patriae, 22 SUP. CT. L. REV. 147 (1970).
11 In Ohio, parens patriae has been used for the purposes of commitment since 1869. See Prescott v. State, 19 Ohio St. 184 (1869). See also House of Refuge v. Ryan, 37 Ohio St. 197 (1881) (involving a petition in habeas corpus for release of a committed minor, which, on appeal, was upheld under this doctrine).
right of fair treatment in the proceedings. Thus, the courts were given the fullest of control and authority in making decisions as to treatment, while avoiding the substantive and procedural problems found in the criminal law.

It was felt that when the common law doctrine of parens patriae was linked with this form of statutory equity the application of constitutional safeguards was unnecessary.

There is no probability, in the proper administration of the law, of the child's liberty being unduly invaded. Every statute which is designed to give protection, care, and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails. This philosophy, of course, resulted in an enormous amount of power being centered in the juvenile courts, particularly in the individual juvenile judges. One eminent authority, in an observation of the situation as it existed in 1909, made the candid remark that "[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts...."

It is almost axiomatic that where great discretion exists, abuses of discretion, or at least major inequities, will also exist. The juvenile justice system is no exception. Perhaps emphasis should have been placed upon the phrase "proper administration of the law" in the preceding quotation, for it is a crucial assumption. Generally we think of constitutional procedural safeguards as defining the meaning of this phrase. By excluding them from consideration in juvenile cases it is virtually insured that some inequities will arise. Yet, to introduce them full force into juvenile proceedings would be to transform them into proceedings so closely approximating those of the criminal system that their protective and rehabilitative aspects could be forfeited. While this certainly presents a dilemma of considerable dimension in a vital arena of governmental and

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14 See Pee v. United States, 274 F.2d 556, 559 (D.C. Cir. 1959). This case established a due process standard for determining which constitutional guarantees were applicable to juveniles. This standard was later modified and used by the Supreme Court in Gault.


17 R. Pound, Foreword to P. Young, Social Treatment in Probation and Delinquency (1952). See also In re Gault, 387 U.S. 1, 18 (1967), also citing the text accompanying this note.
societal concern, it is far from insoluble. An examination of the approach utilized by the Supreme Court in several major juvenile cases is not only instructive but earmarks a path to the potential solution.

II. GATEWAY TO CONSTITUTIONAL RECOGNITION: THE SUPREME COURT

Kent v. United States and Due Process

In Kent v. United States, the Supreme Court decided the first in a progression of cases that would define a number of the bounds of juvenile rights. Morris Kent, Jr., was arrested in 1961 at 16 years of age on charges of housebreaking, robbery, and rape in the District of Columbia. Because of his age, he was subject to the exclusive jurisdiction of the juvenile court. Without a hearing and over protestations of counsel, who had offered to show that Kent was suffering from a mental disorder and that he would be a suitable subject for rehabilitation if given proper treatment, the juvenile court judge waived jurisdiction and ordered the youth bound over to the regular procedure of the District of Columbia. He made no findings and did not recite any reason for the waiver.

Kent was subsequently convicted of all of the offenses mentioned above, excluding rape. On appeal based on the allegedly improper waiver, the court of appeals expressed the opinion that the exclusive method of reviewing the juvenile court’s waiver order was a motion to dismiss the indictment in the district court, and affirmed Kent’s conviction.

18 The foremost items inducing such concern seem to be the increased rates of crime and recidivism recently evident in the juvenile population. See Wizner, The Child and the State: Adversaries in the Juvenile Justice System, 4 COLUM. HUMAN RIGHTS L. REV. 389, 393 (1972), citing F. A. ALLEN, THE BORDERLINE OF CRIMINAL JUSTICE 43-50 (1964); Leonard, LEAA and Federal Delinquency Control Programs, 23 JUVENILE JUSTICE 7, 8 (Aug. 1972). As noted by Senator Birch Bayh: “... [O]ur juvenile justice system is too often a revolving door which for many ultimately leads to the adult criminal justice system and a lifetime of criminal behavior.” Bayh, Juveniles v. Justice, 4 COLUM. HUMAN RIGHTS L. REV. 309, 313 (1972). The total number of cases handled by the Ohio juvenile courts has steadily been on the increase at a rate which is not necessarily correlative to the total number of persons comprising the juvenile population. For further numerical data see OHIO DEPT. OF MENTAL HYGIENE AND CONVICTION, OHIO JUVENILE COURT STATISTICS, which is published annually. See also Note, A Proposal for the More Effective Treatment of the “Unruly” Child in Ohio: The Youth Services Bureau, 39 U. CIN. L REV. 275-81 (1970).


20 The history of this case is offered by the Court at 383 U.S. at 542-50. It is there noted that Kent was on probation at the time of his arrest and indictment from charges stemming from housebreakings and attempted purse snatchings in 1959, when he was 14 years old.

21 383 U.S. at 546. The juvenile judge apparently felt that as interpreted in Wilhite v. United States, 281 F.2d 642 (D.C. Cir. 1960), the District of Columbia waiver statute required only a “full investigation” and not a hearing on the matter of waiver. He recited in the order that after “full investigation, I do hereby waive [jurisdiction].”

The Supreme Court reversed the conviction and remanded the case for a new hearing on the waiver order in juvenile court. In rendering its decision, the Court found that "the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile [and thus the waiver hearing] ... must measure up to the essentials of due process and fair treatment." This guarantee of due process was found to afford certain procedural protections, namely: the right to a hearing; the right to counsel at the hearing; that the attorney be granted access to all records relating to the juvenile, and the right to a statement by the court of the reasons for the decision. The Court in so doing rejected the view that parens patriae and the "civil v. criminal" rationale was sufficient reason to disregard all constitutional rights. The Court did not express the view that this meant a total application of all the requirements of a criminal trial or even an administrative hearing.

Although Kent has been interpreted by some courts as having been decided purely on the grounds of a statutory interpretation of the District of Columbia code, rather than constitutional due process grounds, the opinion did set out eight basic criteria that can be used by the juvenile judge when considering a waiver of jurisdiction. These have been written into many of the state statutes in whole or in part to satisfy the "essentials of due process and fair treatment." They are:

1. the seriousness of the alleged offense against the community and whether the protection of the community requires waiver;
2. whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
3. whether the alleged offense was against persons or property;
4. the prospective merit of the complaint;
5. the desirability of trial and disposition in one court where the juvenile's associates in the commission of the offense are adults;
6. the maturity of the juvenile as determined by consideration of criteria such as his home life, environmental situation, emotional attitude, and pattern of living;
7. the record and previous history of the juvenile; and,
8. the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation.

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23 383 U.S. at 556, 562.
24 Id. at 557.
In speaking for the majority, Justice Fortas viewed the situation from a realistic point of view and questioned whether the system worked at all: 

"... There is evidence in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 27

The Gault Decision 28

In 1964, Gerald Gault, 15 years of age, was picked up by the Sheriff of Gila County, Arizona, on a verbal complaint alleging he had made a lewd and obscene phone call to a neighbor. No notice that Gerald was being taken into custody was conveyed to his mother or even left at his home by the authorities. The youth was subsequently brought before the appropriate juvenile court having jurisdiction over him by reason of his age. A hearing was held. However, neither Gerald nor his mother was ever given advance notice of the charges against him. Neither the youth nor his parent was ever informed of any constitutional rights which he might have possessed. In fact, the complaining neighbor who had allegedly received the phone call never appeared in court, nor did she ever talk to the juvenile judge regarding her complaint. 29 The judge found Gerald to be delinquent by reason of his violation of an Arizona misdemeanor statute prohibiting the use of obscene language over the telephone and committed him to the State Industrial School "for the period of his minority ..." a six-year sentence. 30

A petition of habeas corpus was brought in the state courts challenging the constitutionality of the delinquency proceedings. After a hearing on the petition, the Superior Court dismissed the writ and the appellants sought review in the Arizona Supreme Court, which also dismissed the writ, finding that the requisite constitutional due process requirements had been met. 31

The Supreme Court of the United States reversed, ruling that the due process clause applied in juvenile court proceedings when a determination is to be made as to "whether a juvenile is a 'delinquent' as a result of alleged misconduct on his part, with the consequence that he may be committed to a state institution." 32 The Court thus limited its finding to the adjudicatory stage of proceedings which present a possibility of

27 383 U.S. at 556. Justice Fortas is certainly not alone in these convictions as can readily be found throughout TASK FORCE REPORT, supra note 6. See generally Wizner, The Child and the State: Adversaries in the Juvenile Justice System, 4 COLUM. HUMAN RIGHTS L. REV. 389, 392-93 (1972); Ketcham, The Unfulfilled Promise of the Juvenile Court, 7 CRIME AND DEL. 97, 102-03 (1967).

28 In re Gault, 387 U.S. 1 (1967).

29 Id. at 7.

30 Id. at 7-9. The penalty actually prescribed by the Arizona misdemeanor statute was a fine of $5 to $50, or imprisonment for not more than two months.


32 387 U.S. at 13.
incarceration. The Court also found that a juvenile is entitled to certain specific due process rights, namely: the right to notice which complies with constitutional due process requirements; 33 the right to counsel; 34 the constitutional privilege against self-incrimination; 35 and, absent a valid confession adequate to support a delinquency adjudication, the right to confrontation and cross-examination of witnesses. 36

One of the most important and relevant portions of the opinion is found in the reaffirmation of its position in Kent toward the relationship between parens patriae and constitutional guarantees:

In Kent v. United States, supra, we stated that the Juvenile Court Judge's exercise of the power of the state as parens patriae was not unlimited. We said that "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."... We announced with respect to such waiver proceedings that..."the hearing must measure up to the essentials of due process and fair treatment." We reiterate this view, here in connection with a juvenile court adjudication of "delinquency," as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution. 37

As Justice Harlan perceived it, the stress should be placed on determining the forms of procedural protection necessary to guarantee the "fundamental fairness" of juvenile proceedings. 38 This opinion seems to suggest the desirability of a delicate balance of supplying rehabilitation and reformation while not denying constitutional procedures guaranteeing "fundamental fairness" and replacing the same with the arbitrary imbalance of a non-adversarial and completely informal proceeding.

33 Id. at 23-24, described in other terms as that which would be "constitutionally adequate in a civil or criminal proceeding." See, e.g., Cole v. Arkansas, 333 U.S. 196 (1948) (criminal notice); Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) (civil notice).
34 387 U.S. at 41. For a recent expression of the constitutional right to counsel in adult criminal cases involving the possibility of even minimal incarceration, see Argersinger v. Hamlin, 407 U.S. 25 (1972). Although this article will not deal with the right of the juvenile defendant to defend himself in the action against him by the state, the circuit courts appear to be in disagreement as to the propriety of such a situation in adult criminal proceedings. Compare United States v. Pike, 439 F.2d 695 (9th Cir. 1971) (holding that the defendant does have a right of pro se representation) with United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1973) (holding that there is no right to pro se representation in criminal actions even though a majority of state constitutions appear to guarantee this right).
35 387 U.S. at 47, at which is found the following language: "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."
36 387 U.S. at 56.
37 Id. at 30.
38 387 U.S. 1, 74-75 (Harlan, J., concurring opinion).
Winship and McKeiver

In re Winship involved a youth who had been found delinquent on a standard of proof lower than “proof beyond a reasonable doubt,” which is required in adult criminal proceedings. The state juvenile court there relied on the New York statute dealing with the subject of delinquency proceedings, which not only authorized, but mandated the standard of proof of “a preponderance of the evidence” for such proceedings.

The Supreme Court determined that in procedures involving a juvenile who is charged with an offense which would be a crime if committed by an adult, “the same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child.” Justice Brennan, who delivered the majority opinion, did examine the historical significance and importance of the reasonable doubt standard in the operation of the criminal law. It should be noted however, that Winship was also carefully limited to the adjudicatory stage of proceedings in which the juvenile could be deprived of his freedom.

Thus, the majority opinion in Winship emphasizes the narrowness of the application of the reasonable doubt standard, intimating “no view concerning the constitutionality of procedures governing children ‘in need of supervision.’” The procedures involving the unruly or ungovernable, dependent, or neglected child are not affected. Furthermore, the Court insisted that it did not see how the application of the safeguard of the reasonable doubt standard would compel the states to abandon or displace any of the substantive benefits of the juvenile process, which were described as: the non-criminal nature of the proceeding; the informality, flexibility and speed of the hearing; the discretion in the use of treatment techniques; and, the prehearing intake procedures.

The Court seemed to indicate, at least by implication, that a balancing process based on the standard of “fair treatment” would not...

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42 New York Family Court Act § 744(b) (McKinney 1962).
43 397 U.S. at 365.
45 397 U.S. at 358, 366.
46 Id. at 359.
47 See note 13 supra.
48 397 U.S. at 367. But see 397 U.S. 358, 376 (Burger, C.J., dissenting opinion) (asserting what the Chief Justice considered a conflict between the majority decision in Winship and the intentions of the several legislatures to create benevolent and less formal institutions).
50 See note 14 supra and accompanying text.
automatically result in the application of all the guarantees in the Bill of Rights to juvenile procedures.

_McKeiver v. Pennsylvania_ seems to uphold the view of the majority in _Winship_ that the total incorporation of the Bill of Rights into the juvenile system is not the ultimate destiny of _Kent, Gault, Winship_ and its progeny. It seems clear, as the result of _McKeiver_, that the Court will use a theory of "selective incorporation" when dealing with the Bill of Rights as applied to the states through the due process clause of the fourteenth amendment, or with other fundamentally recognized rights.

The sole issue presented for determination in _McKeiver_ was, "whether there is a constitutional right to a jury trial in juvenile court." The Pennsylvania Supreme Court affirmed McKeiver's conviction by the single juvenile judge, concluding that the addition of a trial by jury "might well destroy the traditional character of juvenile proceedings," and further expressed the opinion "that a properly structured and fairly administered juvenile court system can serve our present societal needs without infringing on individual freedoms." In 1971, the Supreme Court of the United States affirmed the decision and held that there is no guarantee of the right to trial by jury in juvenile courts even in cases where the offense charged would be a felony if committed by an adult or where the juvenile's loss of freedom is possibly at stake.

51 403 U.S. 528 (1971).


54 438 Pa. at 350, 265 A.2d at 355-56.

55 403 U.S. at 551.

In its consideration, the Court found that the requirement of a jury trial: (1) would remake the juvenile proceeding into a fully adversary process putting an end to the idealistic prospect of an intimate, informal protective proceeding;\textsuperscript{57} (2) would not remedy the defects of the system;\textsuperscript{58} (3) would disallow any further experimentation by the states to seek new ways to solve the problems of the young;\textsuperscript{59} and, (4) would bring with it into that system the traditional delay, formality, and clamor of the adversary system, and possibly, the public trial.\textsuperscript{60} Thus, the decision rested on the Court's finding from the totality of the circumstances that a regressive effect would result from constitutionally guaranteeing the right to a jury trial with the consequence actually being a "[loss of] what has been gained, and tending once again to place the juvenile squarely in the routine of the criminal process."\textsuperscript{61}

The effect of the Supreme Court decisions in \textit{Kent}, \textit{Gault}, and \textit{Winship} has been to offer new insight into the workings of the juvenile system. \textit{McKeiver} should not be read as retarding the progress of this viewpoint. It should be interpreted as a \textit{meaningful limitation} placed on the application of constitutional principles to the juvenile field evidencing the Court's desire to continue with a rehabilitative outlook.

While the consolidation of the aforementioned cases does not establish what might be termed a firm constitutional test capable of uniform and determinative application, four principles seem to emerge as prospective guidelines: (1) procedures essential to "fundamental fairness" are not to be disposed of merely because of rehabilitative and benevolent aims; (2) that these procedures which are essential will not distract from those original benevolent and rehabilitative aims; (3) the Court is not prepared to dispose of the juvenile system by totally incorporating guarantees of the Bill of Rights which would, in reality, defeat these aims of rehabilitation and add little to "fundamental fairness"; and, (4) the Court will concern itself only with the adjudicatory phase of the proceedings, all other phases seemingly too close to real treatment and rehabilitation, and subject only to fair treatment as defined by the state.

Any set of guidelines which may reasonably be drawn from the consideration of these four major Supreme Court decisions must of necessity be somewhat broad. However, it seems fair to assert that these decisions reflect a recognition on the part of the Court of the continued value of the maintenance of separate juvenile justice systems based upon protective and rehabilitative, rather than punitive, ideals. It seems clear that the guidelines spelled out in these cases are meant to complement rather than displace the "special rights" afforded children in juvenile

\textsuperscript{57} 403 U.S. at 545.
\textsuperscript{58} Id. at 547.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 550.
\textsuperscript{61} Id. at 547.
court proceedings. It is with these guidelines in mind that we should proceed to an analysis and evaluation of Ohio juvenile procedure and its system of waiving juvenile court jurisdiction.

III. DIRECT APPEAL FROM WAIVER OF JURISDICTION IN OHIO

Statutory Rights of Juveniles in Ohio

The “special rights” of children under Ohio’s juvenile justice system are readily apparent upon examination of the basic procedure involved in bringing a child within the exclusive jurisdiction of the juvenile court, the ultimate dispositions made by the juvenile court, and the manner in which an order waiving the court’s jurisdiction is carried out as controlled by statute in Ohio. The Juvenile Code provides that “any person” may swear out and file a complaint against a juvenile in the county in which the child resides or where the offense was committed. Section 2151.27 states that although the complaint may be based on information and belief, it must allege the particular facts upon which the allegation of delinquency, traffic offender, unruliness, neglect or dependency is based.

A juvenile can also be taken into custody by police in all cases in which the police could arrest an adult for the same offense. After custody, however, the proceedings regarding juveniles in custody are to be initially held in the juvenile court. When a child is thus brought before the juvenile court, an intake officer must initially make an investigation. Following this investigation, the officer must release the child unless detention seems warranted or required under Section 2151.31. If the juvenile is so detained under Section 2151.314, a complaint is filed and a hearing must be had within 72 hours to determine if the detention is necessary or required. Under
Section 2151.314, reasonable notice must be given to the parents, guardian, or custodian of the juvenile, as well as to the juvenile himself; and, the parties must be informed of their right to counsel at this preliminary hearing on temporary commitment. If the parties are unable to afford counsel, one will be appointed by the court.69

Although there is no explicit statutory right to be shielded from publicity, the general purpose of the juvenile statutes, as outlined in Section 2151.01, would seem to demand this.70 The pressures on both the juvenile and the officers of the court, which are necessarily coincidental to public display, can hardly be termed conducive to rehabilitation in the hope of checking his downward career.

The juvenile may not be kept or jailed in a facility intended primarily to house adult offenders, except where almost quarantine-like surroundings are provided which allow the juvenile to neither see, hear, nor come into contact with an adult offender.71 Likewise, he may not be fingerprinted or photographed (a common procedure for adults) except for identification purposes, or with the permission of the juvenile judge.72 If fingerprints or photographs are taken, they are to be transferred to the juvenile court where they become a part of the youth’s confidential file.73

As previously stated, a juvenile taken into custody by police pursuant to the laws of arrest is not considered under arrest, except for the purpose of testing the constitutional validity of that custody.74 Thus, a juvenile would not compile an “arrest record” unless the juvenile court waives its jurisdiction. Although a juvenile may acquire an official record, which would include the actual adjudicatory measures and procedures and an

70 See Allstate Ins. Co. v. Cook, 324 F.2d 752 (6th Cir. 1963).
Treatment of children in custody; detention home. No child under 18 years of age shall be placed in or committed to any prison, jail, or lockup, nor shall such child be brought into any police station, vehicle, or other place where such child can come in contact or communication with any adult convicted of crime or under arrest and charged with crime . . .” See Ohio R. Juv. P. 7(H).
72 Ohio Rev. Code Ann. § 2151.313 (Page Supp. 1973). However, fingerprints may be taken by law enforcement officers investigating an act which would be a felony if committed by an adult where there is probable cause to believe the youth is involved. See generally Ferster and Courtless, The Beginning of Juvenile Justice, Police Practices and the Juvenile Offender, 22 Vand. L. Rev. 567 (1969) (criticizing the maintenance of fingerprint files by the police and the personnel having access to the same).
unofficial record, which would include the reports and tests made by intake officers and other court officials, these juvenile records are all subject to expungement upon application by the person to the court or upon the court’s own motion following a period of two years after the termination of an order of the court or the child’s release from a state treatment facility.75

In addition, any orders made by the court prescribing commitment can continue only until the child reaches the age of 21 years.76 The wide discrepancy in the possible commitment period between the juvenile laws and incarceration under the criminal code is generally evidenced by the sentence initially imposed in Kent. If Kent had been adjudicated under the juvenile code of the District of Columbia his maximum commitment would have been for five years or until 21 years of age; whereas, he was in fact sentenced to 30 to 90 years under the criminal code after waiver was ordered and the jurisdiction of the juvenile court relinquished.77

In In re Whittington, the Fifth District Court of Appeals of Ohio concluded “that the Juvenile Code was established to afford valuable rights to juveniles.”78 The juvenile rights as set out in the Ohio Revised Code are indeed valuable as tools in tailoring informal and flexible juvenile procedures, this presumably being the original intention of the legislature in creating a separate system to deal with juveniles. The approach is both realistic and practicable, dictating an avoidance of the stigma attaching to criminal procedure which is so detrimental in attempts to foster an atmosphere conducive to effective rehabilitation.

Waiver of Jurisdiction

While critically important, these rights are not absolute. Prior to the adjudicatory, fact-finding stage, the process begins which will ultimately determine whether an order to relinquish the juvenile court’s jurisdiction for the purpose of criminal prosecution should issue from the court.79

75 Ohio Rev. Code Ann. § 2151.358 (Page Supp. 1973). However, the right here is not automatic and in reality operates only for those with sufficient interest, understanding of its consequences, and money to proceed under the statute. Whatever stigmatizing effect a juvenile record might have, it is inconsequential when compared to a criminal arrest record after the juvenile court waives jurisdiction. See, e.g., Menard v. Mitchell, 430 F.2d 486, 490 (D.C. Cir. 1970) (the mere fact of arrest limits opportunity for schooling, employment, and professional licenses). See generally J. Coffee, Privacy v. Parens Patriae: The Role of Police Records in the Sentencing and Surveillance of Juveniles, 57 Cornell L. Rev. 571, 591-94 (1972) (dealing with the realistic effect on prospective employers and employment agencies); Comment, Juvenile Police Record-Keeping, 4 Colum. Human Rights L. Rev. 461 (1972) (statutory assurances of confidentiality are illusory because of the nature of the treatment given to juvenile records); Task Force Report, supra note 6, at 92-93.


78 See note 76 supra.


After a complaint has been filed alleging that a child is delinquent by reason of having committed an act which would constitute a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to
When a juvenile is so transferred to the criminal court for adjudication as an adult, the jurisdiction of the juvenile court is "abated" and each and every one of the aforementioned statutory rights is forfeited. Rights which are, as indicated by the Whittington court, so valuable and important to the juvenile process, should be jealously guarded by society, and every attempt should be made to protect them from being lost through an arbitrary or even an unintentionally inappropriate order. Section 2151.26, which deals with the waiver process, attempts to preclude such a result, and shows the effect of Gault and Kent in requiring a hearing, notice thereof at least three days prior to the hearing, counsel, and a written finding of facts which includes a statement of reasons for transfer if one is actually made. These due process requirements meet those set up in Kent and Gault for determining the "critically important" question of whether a child will be deprived of the special protections and provisions of the Juvenile Court Act.

Section 2151.26 also prescribes the criteria that are to be used in deciding whether to transfer the case. These criteria essentially represent the Ohio legislature's recognition that rehabilitation and treatment are not suitable for some juveniles. Before issuing the transfer order, the court must find that: (1) the act would be a felony if committed by an adult; (2) the child is 15 years of age or older; (3) there is probable cause to believe that the juvenile committed the act; and, (4) after investigation, there are reasonable grounds to believe that the juvenile

the appropriate court having jurisdiction of the offense, after making the following determinations:

(1) The child was 15 or more years of age at the time of the conduct charged;
(2) There is probable cause to believe that the child committed the act alleged;
(3) After an investigation including a mental and physical examination... that there are reasonable grounds to believe that:
   (a) He is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
   (b) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority...


80 Ohio Rev. Code Ann. § 2151.26(E) (Page Supp. 1973), which states: "Such transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint."
81 Ohio Rev. Code Ann. § 2151.26(C) (Page Supp. 1973): "Notice in writing of the time, place and purpose of such hearing shall be given to his parents, guardian, or other custodian and his counsel at least three days prior to the hearing."
82 Ohio Rev. Code Ann. § 2151.352 (Page Supp. 1973): "A child, his parents, custodian, or other person in loco parentis of such child is entitled to representation by legal counsel at all stages of the proceedings and if, as an indigent person, he is unable to employ counsel, to have the court provide counsel for him..."
is not amenable to rehabilitation or that the safety of the community may require legal restraint beyond his majority.\textsuperscript{86}

In a determination that there are reasonable grounds to believe that the child is not amenable to rehabilitation, the Ohio Rules of Juvenile Procedure provide the procedural guidelines.\textsuperscript{87} However, these guidelines, as set down in Juvenile Rule 30, do not totally encompass all the criteria which are listed in the appendix to the Kent decision. A considerable amount of latitude and discretion is still afforded the presiding juvenile judge.\textsuperscript{88} If the waiver order does issue, the juvenile is turned over for criminal prosecution, under the terms and conditions set by the juvenile court pursuant to Juvenile Rule 30(F).\textsuperscript{89}

\textit{In re Becker and Direct Appeal of Waiver Orders in Ohio}

On July 10, 1974, the Supreme Court of Ohio spoke to this issue in \textit{In re Becker}.\textsuperscript{90} This decision unfortunately places in question the effective availability of statutory juvenile rights to juveniles eligible for an order waiving the jurisdiction of the juvenile court. The specific question before the court was whether a transfer order, pursuant to Ohio Revised Code Section 2151.26, was a final appealable order.

A complaint was filed in the Summit County, Ohio, Juvenile Court against Richard Becker charging him with delinquency by reason of first degree murder. After a proper probable cause hearing, as required by the juvenile code and rules of procedure, the juvenile court relinquished jurisdiction and transferred Becker to common pleas court for criminal prosecution as an adult. Prior to his trial in common pleas court, Becker appealed the waiver order to the Ninth District Court of Appeals of Ohio, which court found that a transfer order was a final appealable order.\textsuperscript{91} In so doing, the court overruled a motion by the State of Ohio


\textsuperscript{87} \textit{Ohio R. Juv. P.} 30(C):

\textit{Determination of amenability to rehabilitation}. In determining whether the child is amenable to treatment or rehabilitative processes available to the juvenile court, the court shall consider:

1) The child's age and his mental and physical health;
2) The child's prior juvenile record;
3) Efforts previously made to treat or rehabilitate the child;
4) The child's family environment; and
5) School record.

\textsuperscript{88} See State v. Carmichael, 35 Ohio St. 2d 1, 298 N.E.2d 568 (1973) (the scope of "reasonable grounds" is left to discretion of court). \textit{But see} People v. Fields, 388 Mich. 66, 199 N.W.2d 217 (1972) (finding a statute similar to Ohio's waiver statute unconstitutional because it lacked suitable and ascertainable standards). \textit{See generally S. Davis, Rights Of Juveniles} 116-121 (1974), for a good overview on the general vagueness of juvenile statutory standards involved in waiver proceedings.

\textsuperscript{89} \textit{Ohio R. Juv. P.} 30(F), reads as follows: "Release of transferred child. The juvenile court shall set terms and conditions for the release of the transferred child in accordance with Criminal Rule 46."

\textsuperscript{90} 39 Ohio St. 2d 84, 314 N.E.2d 158 (1974).

\textsuperscript{91} \textit{In re Becker}, C.A. No. 7353 (9th Jud. Dist. Ohio App., Jan. 22, 1974). In its journal entry, the court stated: "We hold that a transfer order under Juv. R. 30 is a
for dismissal and ordered a stay of proceedings in common pleas court pending the final outcome of the appeal.

The Supreme Court of Ohio reversed the court of appeals, basing its decision primarily on the fact that a dispositional finding of delinquency was not made in juvenile court. The court also relied heavily on an Illinois case, *People v. Jiles*, finding that such an appeal would provide for unnecessary delay in the disposition of Becker's innocence or guilt regarding the alleged offense.

Prior to November 19, 1969, a transfer order pursuant to Ohio Revised Code Section 2151.26 required the juvenile court to find the juvenile delinquent before relinquishing jurisdiction. A leading case on point, had found that such a transfer order was a final appealable order based on Ohio Revised Code Sections 2501.02 and 2505.02, which deal with the jurisdiction of the Courts of Appeal and the definition of "final" in the context of "final appealable order." Subsequent to November 19, 1969, Ohio Revised Code Section 2151.26 was amended and the requirement of a finding of delinquency prior to transfer was removed and thus is no longer needed.

The decision in Becker, then, effectively construes the right of appeal as being based on the dispositional adjudication of delinquency rather than on the finality of the juvenile court action in substantially affecting the statutory rights of juveniles. In favoring the former rationale rather than the latter, the abatement of the juvenile court's "exclusive" jurisdiction is given less weight than the importance of a speedy determination final appealable order, because it terminates the Court's jurisdiction and prevents that minor from being adjudged a delinquent and treated as a minor in the rehabilitative process."

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94 See State v. Carter, 27 Ohio St. 2d 135, 272 N.E.2d 119 (1971) (recognizing that specific language is not required for a finding of delinquency and requiring that a finding of delinquency is necessary to waive jurisdiction); *In re Mack*, 22 Ohio App. 2d 201, 260 N.E.2d 619 (1970) (the waiver order is conditioned on a finding of delinquency). Please note that in both *Carter* and *Mack*, the waiver order was made prior to the November 19, 1969, amendments to the Juvenile Code.
95 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967).
96 OHIO REV. CODE ANN. § 2501.02 (Page Supp. 1973), reads in pertinent part: "The court of appeals shall have jurisdiction: (A) Upon an appeal upon questions of law to review, affirm, modify, set aside, or reverse judgments or orders of courts of record inferior to the court of appeals... (emphasis added)."
97 OHIO REV. CODE ANN. § 2505.02 (Page 1954), reads in pertinent part: "Final Order. An order affecting a substantial right in an action which in effect determines the action and prevents a judgment..." (emphasis added). Neither statute has been amended since the determination in State v. Yoss, 10 Ohio App. 2d 47, 225 N.E.2d 275 (1967).
of innocence or guilt. This seems to be directly in conflict with the issue described in *State v. Yoss* as being one of jurisdiction. 98

The *Becker* court's reliance on the Illinois case of *People v. Jiles* 99 for support in its concern for speedy disposition seems somewhat shaded since the statute relied on in *Jiles* was amended subsequent to that court's decision. 100 Under the previous Illinois statute, which was used in *Jiles*, the state prosecutor made the decision whether to proceed criminally or not. The juvenile judge's participation was limited to noting an objection to the prosecutor's decision which brought about a hearing before the chief judge of the circuit. 101 Although this method of determination is a relatively unique situation, it logically implies that there is nothing to appeal other than the prosecutor's discretion and the first "real decision" made by a court is that of guilt or innocence at the criminal trial. Under this particular set of circumstances, the Illinois court's concern for speed in obtaining the first judicial determination, i.e., the guilt or innocence of the juvenile, can readily be justified.

The Illinois statute, as amended prior to the *Becker* action, appreciably limits the prosecutor's discretion in removal matters by requiring a hearing and investigation by the juvenile court to determine its propriety under set criteria, 102 before a waiver order is granted. Now, the first judicial determination effectively limiting substantial juvenile rights is made by the juvenile court in the "critically important" waiver proceeding.

In considering one aspect of appealability, a Supreme Court determination construing "finality," as applied in 28 U.S.C. Section 1291, 103 is found to be helpful. In *Cohen v. Beneficial Indus. Loan Corp.*, 104 the Court considered the finality of a denial of an indemnity bond in stockholder litigation and stated: "The effect of the statute [Section 1291] is to disallow appeal from any decision which is tentative,

98 10 Ohio App. 2d 47, 49, 225 N.E.2d 275, 276 (1967).
101 Id. See also Note, Due Process and Juvenile Court Removal Procedures, 67 Nw. U.L. REV. 673 (1972).
102 ILL. ANN. STAT. ch. 37, § 702-7(3)(a) (Smith-Hurd Supp. 1974) reads:
In making its determination on a motion to permit prosecution under the criminal laws, the court shall consider among other matters: (1) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody . . . beyond his minority.

103 Judiciary and Judicial Procedure Act, 28 U.S.C. § 1291 (1958), reads: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . "
104 337 U.S. 541 (1949).
informal or incomplete. . . . [S]o long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal."\(^{105}\)

Cohen also speaks of giving the provision of finality a practical rather than technical construction. The adoption of this point of view would seem to fit the benevolent role of the state in rehabilitation and treatment. In addition, the waiver order relinquishing the "exclusive jurisdiction" of the juvenile court leaves nothing open, unfinished or incomplete as to the relinquishment, although it cannot be denied that his guilt or innocence has not yet been determined.

In *Lantsberry v. Tilley Lamp Co.*,\(^{106}\) the Supreme Court of Ohio spoke of the concept of final orders being based upon the rationale that a court which makes an order which is not final retains jurisdiction for further proceedings. In definition, the court stated in substance that a final order is one disposing of the whole case or some separate and distinct branch.\(^{107}\) The waiver order is separate from the determination of guilt in that it only determines which court will hear the case on the basis of distinct criteria as set out in the juvenile code.

But, a determination of finality in an order or its effect on substantial rights does not in and of itself grant the right to an appeal.\(^{108}\) The Supreme Court has never held that states must afford citizens the right of appellate review as an element of due process,\(^{109}\) and thus such a right must rest upon statute. The applicable jurisdictional statute in Ohio is Ohio Revised Code Section 2501.02 with Ohio Revised Code Section 2505.02 lending itself to the definition of "final order."\(^{110}\) It is upon the interpretation of these two statutes that the right to an appeal will ultimately depend.

The *Becker* court made an interpretation which limits Ohio Revised Code Section 2501.02 to a technical and literal reading. This in turn led to a conclusion which excluded juvenile appeals not involving a specific dispositional finding of delinquency, neglect, or dependency.\(^{111}\)

\(^{105}\) Id. at 546.

\(^{106}\) 27 Ohio St. 2d 303, 272 N.E.2d 127 (1971) (speaking particularly to final orders in *Ohio Rev. Code Ann.* § 2505.02 [Page 1954]).

\(^{107}\) 27 Ohio St. 2d 303, 306, 272 N.E.2d 127, 129 (1971). *Accord* Roach v. Roach, 164 Ohio St. 587, 132 N.E.2d 742 (1956) (an order is final and appealable if it divests a party of the right to have the court making the order place him in his original position); Schindler v. Standard Oil Co., 165 Ohio St. 76, 133 N.E.2d 336 (1956) (finding that the sustaining of a general demurrer on grounds of misjoinder where no petition amendment is possible is a final appealable order since it effectively terminates a substantial right).


\(^{110}\) *See* notes 95 and 96 *supra* and accompanying text.

\(^{111}\) *See In re* Bolden, 37 Ohio App. 2d 7, 306 N.E.2d 497 (1973), which construed a temporary commitment order under *Ohio Rev. Code* § 2151.355 as not a final
IV. CONCLUSION

An order waiving the jurisdiction of the juvenile court is "critically important" as determined by the Supreme Court in Kent v. United States.\(^{12}\) The core issue in a waiver hearing is the question concerning which court shall have jurisdiction of the juvenile and the case. However, much more is determined than merely the court and location in which the action will be prosecuted, for a number of important collateral issues surround this question of jurisdiction and necessarily depend upon the outcome of that finding by the juvenile court.

While Ohio can surely be seen as having a valid state objective in limiting delay for the purpose of the administration of criminal justice, it must initially be recognized that, although the ultimate objective of the court to which the juvenile court relinquishes jurisdiction will be a determination of the guilt or innocence of party, the primary objective at a waiver hearing is a determination of proper jurisdiction. For the purposes of finality and appealability then, the abatement of the jurisdiction of the juvenile court, where no other judicial determination can possibly follow therein, and the irreparable loss of substantial statutory juvenile rights should weigh more heavily in the balance than a speedy determination of guilt or innocence which is not in issue at the waiver hearing.

The criteria for deciding whether a waiver order should issue are set out by Ohio statute in what appear to be definitive terms.\(^{13}\) Yet these are, in reality, merely guidelines to be used by the juvenile judge. The weight and interpretation that is to be given these criteria is dependent upon the posture and attitude of each individual judge and thus may vary considerably throughout the state.

Many factors can influence a juvenile judge's opinion, not the least of which is his background, development, and understanding of not only the law in general, but juveniles and juvenile law in particular. Indeed, it was found in a 1969 poll of Ohio juvenile judges\(^{14}\) that in response to the question, "[d]oes public feeling concerning the offense influence your decision?" 17% of the judges answering indicated an affirmative reaction. The problems of the size of the caseload being handled by the court and the financing available with which to operate might possibly enter the

\(^{12}\) 383 U.S. at 556. See text accompanying notes 23-25 supra.

\(^{13}\) OHIO REV. CODE ANN. § 2151.26(A) (Page Supp. 1973); OHIO R. JUV. P. 30. See also S. DAVIS, RIGHTS OF JUVENILES (1974).

\(^{14}\) Comment, Waiver of Jurisdiction in Juvenile Courts, 30 OHIO ST. L.J. 132, 137-138 (1969). The national survey indicated a slightly lower percentage of 14% in TASK FORCE REPORT, supra note 6, at 78.
picture, as well as the political outlook of the elected juvenile judge in dealing with an offense which might be touchy in the public eye.

Through the decision in Becker, the Ohio Supreme Court has taken a place among a minority of states which deny a direct appeal from a waiver order.\footnote{For some of the states allowing direct appeals from orders of waiver, see, e.g., P.H. v. State, 504 P.2d 837 (Alaska 1972); Graham v. Ridge, 107 Ariz. 387, 489 P.2d 24 (1971); In re Doe I, 50 Hawaii 537, 444 P.2d 459 (1968); In re Templeton, 202 Kan. 89, 447 P.2d 158 (1968); In re Trader, 20 Md. App. 1, 315 A.2d 528 (1974); Juvenile Dept. v. Johnson, 86 N.M. 37, 519, P.2d 133 (1974). For some of the states which do not allow direct appeals from orders of waiver, see, e.g., People v. Jiles, 43 Ill. 2d 145, 251 N.E.2d 529 (1969); In re T.J.H., 479 S.W.2d 433 (Mo. 1972); Commonwealth v. Croft, 445 Pa. 592, 285 A.2d 118 (1971); State v. McArdele, 194 S.E. 2d 174 (W. Va. 1973).} While the statements in the preceding paragraphs were not intended to be critical of any individual juvenile judge in Ohio, for they are often the quickest to recognize and push for a needed reform when it presents itself, they do bring to light some of the reasons which may in fact underlie a waiver decision, and the resulting variables which weigh heavily in the determination.

By not providing direct appeal from orders of waiver, Ohio has, in a sense, left the door open to the possibility that a decision on waiver, which is arbitrary or even due to mistake, will not be corrected until the juvenile has been exposed to the criminal system. By that time, it doesn’t matter to the juvenile that the decision was unintentionally arbitrary, or due to an oversight or mistake, for he has already been subjected to that which the juvenile court was instituted to protect him from in the interest of rehabilitation and reformation.

Thus, a motion to dismiss in criminal court and the possible appeal from the ruling on that motion following the course of the trial, are in fact, truly “... hollow remedies which cannot possibly give complete relief, because by that time the juvenile will already irretrievably have lost his right[s]...”\footnote{In re T.J.H., 479 S.W.2d 433, 437 (Mo. 1972) (Seiler, J., dissenting).} with all the safeguards accorded a minor gone. It is from this point of view that the waiver order should be measured, always keeping in mind the balance between a speedy determination and the possible 50 or 60 years of life which remain to the juvenile, at least part of which will see the juvenile back in the mainstream of society.*

THOMAS F. HASKINS, JR.

* Richard D. Becker was found guilty of First Degree Murder in Summit County, Ohio, Common Pleas Court, following the remand by the Supreme Court of Ohio. On October 2, 1974, his motion for a new trial was overruled and he was subsequently sentenced to the Ohio State Penitentiary for the remainder of his natural life. An appeal was taken by Becker challenging not only his conviction but also the juvenile court waiver order. While the case has been argued by counsel for both parties, no decision had been rendered as of the date of printing. See State v. Becker, C.P. No. 73-12-1265 (Summit County, Ohio C.P. Sept. 18, 1974), appeal docketed, C.A. No. 7616, 9th Jud. Dist. Ohio App., Dec. 12, 1974.
INTRODUCTION

THE LANDLORD-TENANT RELATIONSHIP is derived from English feudal law.¹ In feudal England a lease was primarily a conveyance of an interest in rural land that would be used for farming.² The value of the lease was not measured by any structure on the premises but rather by the land itself. Influenced by this simple arrangement, somewhat rudimentary rules evolved governing leases.³ Later, due to the shift in population from rural to urban areas, leases became more complex and entailed more than the mere conveyance of land.⁴ Today the tenant of an apartment is more concerned with his dwelling than with the land upon which the apartment rests. A modern lease is, therefore, viewed more as a “package of goods and services” consisting of adequate heating, lighting and plumbing, rather than four walls and a ceiling. Though the needs of the tenant have changed, the law governing leases has remained rooted in archaic property law principles.⁵

While under modern contract law the buyer of goods and services may rely, unless otherwise agreed, on the quality of goods and services furnished to him,⁶ the tenants of residential premises are still burdened with the doctrine of caveat emptor.⁷ Though the trend is changing,⁸ the general rule is that there is no implied warranty of

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¹ 2 F. POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 115-17 (2d ed. 1898).
³ See 9 KAN. L. REV., supra note 2, at 371.
⁶ Id.
⁸ 1 AMERICAN LAW OF PROPERTY § 3.45 (A.J. Casner ed. 1952).
habitability in a lease of residential premises.\textsuperscript{10} Where a tenant secures a covenant to repair from the landlord, that covenant is independent of the tenant’s duty to pay rent.\textsuperscript{11} If the landlord fails to repair, the tenant is still obligated to pay rent. The tenant is a party to a contract which he has little opportunity to formulate.\textsuperscript{12} While a buyer in a consumer setting is protected because of his unequal bargaining position,\textsuperscript{13} the residential tenant is not afforded such protection.

The new Ohio Landlord-Tenant Act\textsuperscript{14} is the legislature’s attempt\textsuperscript{15} at correcting the imbalance between landlord and tenant. This new law is Ohio’s unique adaptation of the Uniform Residential Landlord and Tenant Act.\textsuperscript{16} The thrust of the new act is to abrogate the Ohio common law

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\textsuperscript{10} See Burdick v. Cheadle, 26 Ohio St. 393 (1875); 1 American Law of Property § 3.78 (A. J. Casner ed. 1952).


\textsuperscript{14} See note 7 supra. See also Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Colum. L. Rev. 629, 630 (1943); Meyer, Contracts of Adhesion and the Doctrine of Fundamental Breach, 50 Va. L. Rev. 1178, 1181 (1964).

\textsuperscript{15} See note 7 supra. See also Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Colum. L. Rev. 629, 630 (1943); Meyer, Contracts of Adhesion and the Doctrine of Fundamental Breach, 50 Va. L. Rev. 1178, 1181 (1964).

of *caveat emptor*\(^{17}\) and independent covenants\(^{18}\) and reinterpret residential leases in light of modern contract law.\(^{19}\)

The purpose of this article is to acquaint the reader with the newly defined rights, duties and remedies of the landlord and the tenant. Analysis will be placed on: (1) Ohio case law prior to the act; (2) similar provisions of URLTA, and (3) comparative case and statutes in other jurisdictions emphasizing the new trend in landlord-tenant relations.

**SCOPE AND COVERAGE**

The Ohio Landlord Tenant Act contains two sections. The first section redefines and broadens the Forcible Entry and Detainer procedures.\(^{20}\) The second section encompasses the rights and duties of both landlord and tenant.\(^{21}\) The latter section contains six basic definitions including Landlord, Tenant, Rental Agreement, Security Deposit, Dwelling Unit, and the principal definition of Residential premises.\(^{22}\) The Act does not extend coverage to commercial leases, which are still governed by traditional property law.\(^{23}\) The rationale for this distinction is that the inequality of

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\(^{17}\) *See* Rodeheaver v. Sears & Co., 220 F. Supp. 120 (N.D. Ohio 1962); Godall v. Deters, 121 Ohio St. 432, 169 N.E. 443 (1929); Burdick v. Cheadle, 26 Ohio St. 393 (1875); Herman v. Albers, 13 Ohio N.P. 98, 22 Ohio Dec. 429 (C.P. 1912).


\(^{19}\) *See generally* note 7 supra.

\(^{20}\) *Ohio Rev. CODE ANN.* § 1923.02, 1923.04, 1923.06, 1923.061, 1923.081, 1923.14, 1923.15 (Baldwin Supp. 1974); *see also* *Ohio Rev. CODE ANN.* § 1923.01, 1923.03, 1923.05, 1923.07, 1923.09-.13 (Baldwin 1974).

\(^{21}\) *Ohio Rev. CODE ANN.* § 5321.01-.19 (Baldwin Supp. 1974).

\(^{22}\) *Ohio Rev. CODE ANN.* § 5321.01 (C):

"Residential Premises" means a dwelling unit for residential use and occupancy and the structure of which it is a part, the facilities and appurtenances therein, and the grounds, areas, and facilities for the use of tenants generally or the use of which is promised the tenant. "Residential Premises" does not include:

1. Prison, jails, workhouses, and other places of incarceration or correction, including halfway houses or residential arrangements which are used or occupied as a requirement of probation or parole;
2. Hospitals and similar institutions with the primary purpose of providing medical services and "Homes" licensed pursuant to chapter 3721 of the Revised Code;
3. Tourist homes, hotels, motels, and other similar facilities where circumstances indicate a transient occupancy;
4. Boarding schools, where the cost of room and board is included as part of the cost of tuition, but not college and university approved housing and private college and university dormitories;
5. Orphanages and similar institutions;
6. Farm residences furnished in connection with the rental of land of a minimum of two acres for production of agricultural products by one or more of the occupants;
7. Dwelling units subject to the provisions of sections 3733.41 to 3733.48 of the Revised Code;
8. Occupancy by an owner of a condominium unit.

\(^{23}\) *Ohio Rev. CODE ANN.* § 5321.01 (C) (Baldwin Supp. 1974.) Most landlord-tenant acts deal solely with residential premises. *See* URLTA § 1.101 and Comments thereto. Other states have enacted separate statutes to deal with commercial leases. *See* *Fla. STAT.* § 83.001-255 (Supp. 1974). Still other states have made no distinction. *See* *Wis. STAT. ANN.* § 704.01 (Spec. Pamphlet 1974).
bargaining power evidenced in residential leases is not manifest in commercial leases. However, certainly this proposition is not always true, for the lessor of commercial premises, like his residential counterpart, has knowledge superior to that of the tenant concerning the condition of the rental property. Therefore, non-residential tenants should also be afforded some protection.

While the definition of Residential Premises is broad—"a dwelling unit for residential use and occupancy . . ." —the act does not cover residential arrangements that are incidental to another primary purpose. Correctional institutions such as jails, prisons and halfway houses, as well as medical facilities, including hospitals and nursing homes, "orphanages and similar institutions" are excluded. The act also specifically excludes transient occupancies such as hotels and motels, condominiums, farm labor camps and farm residences employing over two acres of land to agricultural production.

The final exclusion from residential premises is: "Boarding schools where the cost of room and board is included as part of the cost of tuition, but not college and university approved housing and private college and university dormitories." The inclusion by the legislature of college approved housing and private college dormitories, through the use of a double negative, is unusual, but even more perplexing is the denial to private college students those remedies granted to other tenants in parallel

26 E.g., the minimum duties of the landlord and the tenant should be applied to commercial leases. See Ohio Rev. Code Ann. § 5321.04, 5321.05 (Baldwin Supp. 1974).
27 Ohio Rev. Code Ann. § 5321.01(C) (Baldwin Supp. 1974). For the full text, see note 22 supra.
28 Id.
29 Ohio Rev. Code Ann. § 5321.01(C)(3) (Baldwin Supp. 1974). For full text, see note 22 supra; cf. URLTA § 1.202. See also Ohio Rev. Code Ann. § 5739.01(0) (1973), which defines "transient guest" for sales tax purpose as a "person occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.”
situations. Since under the new act private college students, who reside in a dormitory, are even denied the right to injunctive relief, the only effective remedy for these students is an action for breach of contract against private college and university landlords who fail to perform their statutory duties.

A notable subject covered by the Act is public housing which, like its private residential counterpart, is often in dire need of reform. By comparison, some landlord-tenant acts exclude public housing but the trend is to provide coverage to such projects. Although state landlord-tenant laws are not applicable to wholly federally owned and operated projects, they are applicable to state and municipally owned housing authorities which receive federal financial assistance.

APPLICATION

Ohio’s Landlord-Tenant Act became effective on November 4, 1974. The first problem the courts will face is the law’s application to leases entered into prior to the effective date. Under the Ohio Constitution, retroactive application of substantive law is prohibited. Remedial legislation, however, is not similarly limited by this constitutional provision, based upon a distinction between changes in accrued rights and changes in remedies to enforce those rights. Thus, there is nothing to prevent application of the new Act’s remedial measures to causes of action accruing after November fourth, but based upon rights existing prior to that date. For example, obligations breached under a lease entered into prior

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34 Ohio Rev. Code Ann. § 5321.01(C) (Baldwin Supp. 1974). The exclusion of tenant remedies applies only to private college and university dormitories, which would presumably bring any state college or university approved housing within the purview of the act. See text accompanying notes 92-119 infra.

35 Id. See Ohio Rev. Code Ann. § 5321.12 (Baldwin Supp. 1974), which allows either party to bring an action for breach of contract or duty imposed by law. See also Ohio Rev. Code Ann. § 1923.061 (Baldwin Supp. 1974), which allows a tenant when being evicted for nonpayment of his rent to counterclaim.

36 It is also noteworthy that while the URLTA § 1.202(2) excludes land sale contracts, the Ohio act does not.


41 Ohio Const. art. II, § 28. See Kilbreath v. Ruby, 16 Ohio St. 2d 70, 242 N.E.2d 658 (1968); Smith v. N.Y. Cent. R. Co., 122 Ohio St. 45, 170 N.E. 637 (1930); Safford v. Metropolitan Life Ins., 119 Ohio St. 332, 164 N.E. 351 (1928).

to the enactment date of the law could be enforced by application of remedial provisions of the new Act.\textsuperscript{43}

The application of the substantive sections of the Act, especially the landlord's duties,\textsuperscript{44} creates a more difficult problem since under the Ohio Constitution, they can not be retroactively applied.\textsuperscript{45} However, there is some basis for making retroactive warranties of habitability in Ohio case law. Other jurisdictions have applied these warranties as a matter of public policy prior to the effective date of legislation creating those duties.\textsuperscript{46} Such a pattern should be followed in Ohio under a 1972 case, \textit{Glyco v. Schultz},\textsuperscript{47} where the court incorporated warranties of habitability in residential leases.

As to the application of the Act to leases entered into after the effective date, the constitutional issue of impairment of the obligation of contract may arise.\textsuperscript{48} The problem dissipates when one considers that private property rights are not absolute, but subject to the reasonable exercise of the state's police power, and that the state has a general police power to impose regulations provided there is a substantial relationship between the regulation and protection of public welfare.\textsuperscript{49} The Ohio Landlord-Tenant Act meets this test because leases as contracts must be interpreted in light of changing concepts of public welfare.\textsuperscript{50} Similar landlord-tenant laws in other states have withstood constitutional attack on the issue of infringement of contract, since there is a substantial state interest in upgrading landlord-tenant relations.\textsuperscript{51} The new landlord-tenant law superimposes reasonable rights and duties upon the traditional landlord-tenant relationship.\textsuperscript{52}


\textsuperscript{44} \textit{Ohio Rev. Code Ann.} § 5321.04(A) (Baldwin Supp. 1974).

\textsuperscript{45} \textit{See cases cited note 42 supra.}

\textsuperscript{46} \textit{See Foisy v. Wyman, 83 Wash. 2d 22, 515 P.2d 160 (1973); Berizito v. Gambino, 63 N.J. 460, 308 A.2d 17 (1973).}


\textsuperscript{48} \textit{U.S. Const. art. I, § 10(1); Ohio Const. art. I, § 28.}


\textsuperscript{51} \textit{See Troy Hill Village Inc. v. Fischler, 122 N.J. Super. 572, 301 A.2d 177 (1971).}

\textsuperscript{52} \textit{See Teonella v. Rottagliata, 120 N.J. Super. 400, 294 A.2d 431 (1972).}
LANDLORD'S DUTIES

Under Ohio common law, prior to Glyco v. Schultz, in the absence of fraud the landlord made no warranty of fitness in residential premises. Even where the tenant repaired the premises, he had no right of reimbursement against the landlord. Since covenants in a lease were independent, a substantial breach by the landlord did not relieve the tenant of his obligation for rent. Until changed by statute, the obligation to pay rent remained even after the premises were totally destroyed.

The sole dependent covenant which relieved a tenant of his covenant to pay rent was "quiet enjoyment." Under this covenant, the landlord promised that neither he nor anyone with title superior to his would interfere with the tenant's possession. In order to be relieved of the duty to pay rent, the breach not only must be a substantial interference with the tenant's use of the land, but must also have required the tenant to vacate.

The three principal obligations imposed on the landlord under the statute are dependent covenants. Under the statute, the landlord is required: (1) to comply with all health, housing and safety codes which materially affect health and safety; (2) to make repairs to keep the premises fit and habitable, and (3) to keep all common areas of the premises safe and sanitary. When any one of these obligations is

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(A) A landlord who is a party to a rental agreement shall:

1. Comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety;
2. Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
3. Keep all common areas of the premises in a safe and sanitary condition;
4. Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances and elevators, supplied or required to be supplied by him;
5. When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental
breached, the tenant can, after notice and failure of the landlord to remedy the situation within a reasonable time not exceeding 30 days, pursue the tenant remedies under the statute. 60 These remedies include the right to deposit all rent payments with the clerk of municipal or county courts.61 Among other remedies, the tenant has in certain circumstances a statutory right to counterclaim for breach of these dependent covenants. 62

The landlord's obligations are not as burdensome as they seem on first reading. The landlord must correct only those housing code violations which materially affect health and safety.63 The landlord has always had this duty. Prior to the enactment of this statute, however, the landlord's duty was owed to the state 64 and not to the tenant.65 The duty to repair also is limited. It extends no further than to keep the premises fit and habitable. 66

The extent of the landlord's duty to meet housing code regulations and to provide repairs in general will directly depend on the interpretation of the statutory language of "materially affects health and safety" and "fit and habitable." Definitions of these standards may be provided from three sources. The landlord and the tenant may define these standards by agreement, provided that their definitions are not inconsistent with the intent of the statute.67 These terms may also be defined by reference to


61 OHIO REV. CODE ANN. § 5321.07(B) (1) (Baldwin Supp. 1974).

62 OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974). See text accompanying notes 137-152 infra. See also OHIO REV. CODE ANN. § 5321.12 (Baldwin Supp. 1974), which allows the tenant to bring a separate action for breach of contract against a landlord who has breached his statutory duties.


municipal housing codes and case law from other jurisdictions.

The landlord's third principal obligation, to keep common areas safe and sanitary, is a codification of the duty imposed upon him by Ohio tort law. Under Ohio case law, a landlord is under a duty to use ordinary care to keep common areas under his control in a reasonably safe condition. He is liable for injuries to the tenant or his guest proximately caused by the failure to perform that duty. Both the practitioner and the courts may wish to make reference to the landlord's common law tort duty to define his statutory obligation to keep the common areas safe and sanitary.

Beyond these three principal obligations, the landlord must meet certain other specific statutory requirements. Among these requirements are the duty to provide for the upkeep of plumbing and electrical systems and to provide waste receptacles for buildings containing more than four dwelling units. The landlord may also have a duty to provide running water, hot water, and heat depending upon the nature of the building in which the dwelling unit is contained. The requirement of providing heat and hot water may also be eliminated depending on who has control of the heating equipment and the nature of the utility hookup itself. The landlord may also have a duty to maintain appliances furnished to the tenant, but he can pass the responsibility to maintain appliances to the tenant through a stipulation in the lease.

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68 See, e.g., Akron City Code § 1820.16(C)(3), which defines unfit as that which creates a "serious hazard to health, morals, safety, or general welfare of the occupants or other residents of the City." See also Akron City Code §§ 1820, 1828, 1898.99 (1975).
73 The practitioner should be advised of the possibility of the development of a negligence per se tort liability under the statute. The statutory duties defined in Ohio Rev. Code Ann. § 5321.04 (Baldwin Supp. 1974) (for full text, see note 59 supra), may become synonymous with "reasonable care." A breach of the statutory duty causing injury to the tenant or his guest may become negligence in itself. See generally Prosser, The Law of Torts § 36 (4th ed. 1971), for a discussion of the concept of negligence per se.
RIGHT OF ACCESS

To enable the landlord to comply with his new obligations, the legislature has provided him with a statutory "right of access,"77 which supplements his prior limited right of entry.78 The legislature has defined this right by reference to the tenant's duty not to withhold consent in certain situations.79 Whether this circular definition is the sum total of the landlord's right of access, the legislature has left unclear.80 In any event, the statute provides for a cause of action against both parties. On the landlord's side, he may not abuse his right nor harass the tenant by continually demanding access. If he does abuse his right, the tenant can terminate the lease, obtain an injunction, or, more importantly, sue for actual damages. Upon judgment, the tenant is also entitled to reasonable attorney fees.81 On the other hand, the tenant may not unreasonably withhold consent. The landlord's remedies mirror those of the tenant where the landlord abuses his right to access.82

TENANT'S DUTIES

Under the common law, the only affirmative duty that a tenant owes to his landlord, outside of the duty to pay rent, is the duty to refrain from committing waste.83 Under the new Act, the tenant retains this duty.84 In addition, he must forbid others who are on the premises with his consent


79 OHIO REV. CODE ANN. § 5321.05 (B), (C):
(B) The tenant shall not unreasonably withhold consent for the landlord to enter into the dwelling unit in order to inspect the premises, make ordinary, necessary, or agreed repairs, decorations, alterations, or improvements, deliver parcels which are too large for the tenant's mail facilities, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.
(C) If the tenant violates any provision of this section, the landlord may recover any actual damages which result from the violation together with reasonable attorney's fees. This remedy is in addition to any right of the landlord to terminate the rental agreement, to maintain an action for the possession of the premises or injunctive relief to compel access under division (B) of this section.

80 Cf. URLTA § 3.103 which is specific in defining the landlord's right of access.

81 OHIO REV. CODE ANN. § 5321.04 (B) (Baldwin Supp. 1974). For full text, see note 59 supra.

82 OHIO REV. CODE ANN. § 5321.05 (C) (Baldwin Supp. 1974). For full text, see note 79 supra.


84 OHIO REV. CODE ANN. § 5321.05 (A) (Baldwin Supp. 1974):
(A) A tenant who is a party to a rental agreement shall:
(1) Keep that part of the premises that he occupies and uses safe and sanitary;
from committing waste.\textsuperscript{85} The statute also requires the tenant to keep the premises safe and sanitary, to comply with all applicable health and safety codes, to dispose of garbage properly, to keep plumbing fixtures clean, and to operate electrical and plumbing fixtures properly.\textsuperscript{86} The tenant may also assume under the lease the duty to maintain appliances furnished by the landlord.\textsuperscript{87}

The most significant requirement imposed upon the tenant is to refrain from disturbing his neighbors.\textsuperscript{88} Since the landlord may enforce this duty,\textsuperscript{89} it may be extremely important to other tenants. Under common law, unless the landlord expressly or impliedly authorized the acts of the tenant, the landlord was not responsible for the tenant's conduct.\textsuperscript{90} Now that the landlord can legally control the tenant, he ought to be responsible for such disturbances to other tenants.\textsuperscript{91}

**TENANT'S REMEDIES**

The tenant's basic remedy under the new Act is to withhold rent from the landlord by paying it into the court,\textsuperscript{92} although he does have

- (2) Dispose of all rubbish, garbage, and other waste in a clean, safe, and sanitary manner;
- (3) Keep all plumbing fixtures in the dwelling unit or used by tenant as clean as their condition permits;
- (4) Use and operate all electrical and plumbing fixtures properly;
- (5) Comply with the requirements imposed on tenants by all applicable state and local housing, health, and safety codes;
- (6) Personally refrain, and forbid any other person who is on the premises with his permission from intentionally or negligently destroying, defacing, damaging, or removing any fixture, appliance, or other part of the premises;
- (7) Maintain in good working order and condition any range, refrigerator, washer, dryer, dishwasher, or other appliances supplied by the landlord and required to be maintained by the tenant under the terms and conditions of a written rental agreement;
- (8) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises.

\textsuperscript{85} OHIO REV. CODE ANN. § 5321.05(A) (6) (Baldwin Supp. 1974). For full text, see note 84 supra.

\textsuperscript{86} OHIO REV. CODE ANN. § 5321.05(A) (2), (3), (4), (5) (Baldwin Supp. 1974). For full text, see note 84 supra.

\textsuperscript{87} OHIO REV. CODE ANN. § 5321.05(A) (7) (Baldwin Supp. 1974). For full text, see note 84 supra.

\textsuperscript{88} OHIO REV. CODE ANN. § 5321.05(A) (8) (Baldwin Supp. 1974). For full text, see note 84 supra.

\textsuperscript{89} OHIO REV. CODE ANN. § 5321.05(C) (Baldwin Supp. 1974).


\textsuperscript{92} OHIO REV. CODE ANN. § 5321.07 (Baldwin Supp. 1974), which also allows the tenant injunctive relief or to terminate the lease. Rent withholding is prevalent in many jurisdictions. E.g. MASS. GEN. LAWS ANN. ch. 111, § 127a-127h, ch. 239 § 8A (Supp. 1974); MICH. COMP. LAWS ANN. § 125.530, 125.535 (Supp. 1974); MO. ANN. STAT. §§ 441.550-.640 (Supp. 1975); N.J. REV. STAT. §§ 2A:42-74 to 2A:42-84 (Supp. 1974);
other remedies. The initial step to the tenant’s remedies is notice. The tenant may send effective notice under the statute when:

1. The landlord has breached the rental agreement or his statutory obligation;
2. "[T]he condition of the premises are such that the tenant reasonably believes" that the landlord has breached the rental agreement or his statutory obligations;
3. A government agency has found housing code violations which materially affect health and safety.

The notice must specify the condition which the tenant contends represents a violation of the landlord’s rental or statutory obligations. The notice is sent to "the person or place where rent is normally paid." Upon receipt of the notice, the landlord has 30 days or a reasonable time, whichever is shorter, to rectify the condition.

If the landlord fails to remedy the condition and the tenant is current in rent, the tenant can pursue his remedies under the statute. The statute presents these remedies in terms of three disjunctive alternatives. The first and third remedies are very simple: either deposit the rent with the clerk of court, or terminate the lease. The second remedy is a logistician’s delight and an attorney’s nightmare, in providing the tenant the option to:

Apply to the court for an order directing the landlord to remedy the condition. As part thereof, the tenant may deposit rent pursuant to division (B) (1) of this section, and may apply for an order reducing the periodic rent due the landlord until such time as the landlord does remedy the condition, and may apply for an order to use the rent


95 Id.
96 Id.
97 Ohio Rev. Code Ann. § 5321.07(B) (Baldwin Supp. 1974). See Ohio Rev. Code Ann. § 5321.18(C) (Baldwin Supp. 1974) (the landlord waives his right of notice if he fails to give the tenant written information as to ownership or managing agent).
98 Ohio Rev. Code Ann. § 5321.07(B) (Baldwin Supp. 1974). See Ohio Rev. Code Ann. § 5321.09(A) (2) (Baldwin Supp. 1974) (if the tenant is not current in rent or has not given proper notice, the landlord may obtain rent release from the Clerk of Courts).
100 Ohio Rev. Code Ann. § 5321.07(B) (1), (3) (Baldwin Supp. 1974).
deposited to remedy the condition. In any order issued pursuant to this division, the court may require the tenant to deposit rent with the clerk of court as provided in division (B) (1) of this section.101

A careful deciphering of subsection two reveals that the tenant has these principal options:102

1. The tenant can seek injunctive relief to compel the landlord to repair the condition and reduce the periodic rent due until the repair is made. Furthermore, rent deposit is unnecessary unless stipulated by the court.103

2. The tenant can deposit his rent with the court with the understanding that he can later apply for a release of the money to remedy the condition.

How effective will one of the above options (rent deposit, injunctive relief, or termination of the lease) be to the tenant? The first option, simple rent deposit, may motivate the landlord to fix minor defects in order to obtain release of these funds.104 A more recalcitrant landlord would require the tenant to seek his second option of a court order to compel the landlord to repair.105 However, the burden is on the tenant to (1) establish the need for repair, and (2) to obtain the court order.106 This would necessitate the retention of private counsel or legal aid assistance. Since there is no provision for such fees in the Act, the cost involved may and often would exceed the benefit to be gained by the tenant.107 Besides the expense of the court order, the tenant must first have given the landlord 30 days or a reasonable time, whichever is shorter, to

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101 OHIO REV. CODE ANN. § 5321.07(B) (Baldwin Supp. 1974).
102 Id. The alternatives enumerated in the text are not intended to be exclusive. Through the use of ambiguous drafting, subsection two appears to provide the tenant with four options, which are: (1) rent deposit; (2) injunctive relief to compel the landlord to remedy the condition; (3) a court order to have the periodic rent reduced until the landlord remedies the condition, and (4) release of deposited rent to remedy the condition. On its face, the statute allows these four options to be sought individually, together, or in combination. However, there are practical considerations as to the application of all four options together, since certainly the court cannot compel the landlord to repair while at the same time releasing deposited rent to allow the tenant to repair. For further explanation, see URLTA § 4.101, after which, in theory, the Ohio section is modeled.

103 OHIO REV. CODE ANN. § 5321.07(B) (Baldwin Supp. 1974). Whenever the tenant seeks a court order, he may be well advised to deposit his rent with the clerk of courts, since he is still obligated on his lease and would otherwise be responsible to pay his rent to the landlord. Although not required to do so, the tenant by depositing his rent may apply even greater leverage against a landlord to repair the premises.


105 OHIO REV. CODE ANN. § 5321.07(B) (2) (Baldwin Supp. 1974).

106 Id.

107 Id. Cf. URLTA §§ 4.101, which allows for attorney fees if the breach by the landlord is willful.
remedy the condition. This delay may be intolerable where emergency situations exist, such as lack of heat in the winter, or inadequate toilet facilities.\textsuperscript{108} Even if the tenant wishes to repair the emergency condition using his rent money, he must, under the Act, have court approval.\textsuperscript{109} By comparison, other states in such situations allow the tenant to repair, where he can do so in a workmanlike manner, and deduct the amount of the repair from his next month’s rent.\textsuperscript{110} The deduction must be reasonable in relation to the repair and may not exceed one month’s rent. Litigation may later arise as to the necessity of the repairs or the reasonableness of the deduction, but at least the premises will be habitable.\textsuperscript{111} “Repair and deduct” statutes provide a simple and more satisfactory remedy to the tenant than the Ohio procedure in which rent is deposited and then released by court order.

The tenant’s third option is to terminate the lease and vacate.\textsuperscript{112} This remedy, while simple and direct, has two disadvantages. First, residential housing is a seller’s market and the tenant’s ability to quickly find other housing is questionable.\textsuperscript{113} Second, if, in fact, the landlord has not breached any of his statutory or lease obligations, the tenant could remain liable on his lease agreement.\textsuperscript{114}

From a social viewpoint, one general problem with the tenant’s rent deposit with the court, as well as any increase in tenant’s rights and remedies is that it tends to discourage private investment in residential housing.\textsuperscript{115} In many instances, the profit from residential housing is marginal. Without the continual flow of rent, the landlord can not finance his operation. By allowing the tenant to withhold his rent and deposit it with the court, the landlord may become too financially burdened to

\begin{itemize}
  \item \textsuperscript{108} \textit{Ohio Rev. Code Ann.} § 5321.07(B) (Baldwin Supp. 1974).
  \item \textsuperscript{109} \textit{Ohio Rev. Code Ann.} § 5321.07(B) (2) (Baldwin Supp. 1974).
  \item \textsuperscript{112} \textit{Ohio Rev. Code Ann.} § 5321.07(B) (3) (Baldwin Supp. 1974). \textit{See} \textit{Ohio Rev. Code Ann.} § 5321.16(B) (Baldwin Supp. 1974), for the tenant’s ability to regain his security deposit.
  \item \textsuperscript{114} \textit{Ohio Rev. Code Ann.} § 5321.07(B) (Baldwin Supp. 1974). However, the right to terminate the lease, one of the tenant’s remedies may be based upon a \textit{reasonable belief} due to condition of the premises that the landlord has breached his statutory duties or the rental agreement. \textit{See} \textit{Ohio Rev. Code Ann.} § 5321.07(A) (Baldwin Supp. 1974).
  \item \textsuperscript{115} \textit{See} ABA Committee, \textit{supra} note 13, at 588, 589.
\end{itemize}
make needed repairs.\textsuperscript{116} Other jurisdictions faced with this problem have taken the property into receivership, remedied the condition and placed a lien on the premises.\textsuperscript{117} The forcing of repairs either by court order or receivership may drive landlords to seek alternative uses for their residential property. Apartment buildings may be torn down and replaced by office buildings, which provide a more attractive investment.\textsuperscript{118} The net effect of rent withholding and judicial activity may be to increase rents and housing shortages which would frustrate rather than aid the beleaguered tenant.\textsuperscript{119}

In response to the special burden which the tenant's remedies of rent deposit with the court, injunctive relief, and termination of the lease place on smaller landlords, the legislature has exempted landlords of one, two, or three dwelling units.\textsuperscript{120} In order to be exempted, the landlord must send written notice of his ownership of three dwelling units or less to the tenant at the initial time of occupancy.\textsuperscript{121} Whether this exemption is a distinct advantage to smaller landlords remains to be seen. When rent is deposited by the tenant with the clerk of court, it is held in escrow, and a landlord who has not breached his obligations can obtain its release.\textsuperscript{122} On the other hand, the tenant of an exempt landlord, who cannot deposit his rent, may nonetheless withhold it, if he feels the landlord has breached his obligations. Thus, the exempt landlord will bring an action in Forcible Entry and Detainer to regain possession and rent due with no guarantee that the tenant will have the money to pay a judgment in the landlord's favor.\textsuperscript{123} Therefore, is the exempt landlord really granted a benefit by the legislature?

**LANDLORD'S ACTION FOR RENTAL RELEASE**

The landlord has an effective procedure for obtaining release of

\textsuperscript{118} \textit{Id.}


\textsuperscript{121} \textit{Id.}

\textsuperscript{122} \textit{OHio REV. CODE ANN.} § 5321.07(C) (Baldwin Supp. 1974). As already mentioned, private college and university dormitories are also excluded. \textit{See} text accompanying notes 33-35 supra.

\textsuperscript{123} \textit{OHio REV. CODE ANN.} § 5321.07(C) (Baldwin Supp. 1974). The landlord of three units or less is not exempt from the tenant's right to counterclaim in Forcible Entry and Detainer, or the tenant's right to bring a separate action for breach of contract. \textit{See} \textit{OHio REV. CODE ANN.} §§ 1923.061, 5321.12 (Baldwin Supp. 1974).

\textsuperscript{124} \textit{OHio REV. CODE ANN.} § 5321.09 (Baldwin Supp. 1974), for the duties of the clerk of court, who may charge 1% of the rent deposited as court costs. \textit{See} \textit{OHio REV. CODE ANN.} § 5321.08 (Baldwin Supp. 1974).

\textsuperscript{125} \textit{OHio REV. CODE ANN.} § 1923.02 (Baldwin Supp. 1974). The unsatisfied judgment creditor-landlord will have to seek the same remedies as any other judgment creditor, such as garnishment. \textit{OHio REV. CODE ANN.} § 1911.33 (Page 1968).
funds deposited with the clerk of court. The landlord may obtain a total rental release in three situations which are:

1. The landlord has rectified the condition complained of and the tenant sends written notice to the clerk of courts that the condition has been remedied;
2. The tenant did not give proper notice or was not current in rent when he deposited his rent with the clerk of courts, or
3. The landlord has not breached his rental agreement, his statutory obligations, or violated any “building, housing, health or safety code.”

Upon filing of a complaint for rental release, the tenant is given notice and the right to answer and counterclaim as in “any other civil case.” A trial on the merits must be held within 60 days of the filing of the landlord’s complaint. Once again, the tenant is burdened with the need of legal counsel. This will be both time-consuming and expensive, since there is no provision for recoupment of the tenant’s attorney’s fees, even if he is successful at trial. However, if the tenant himself has caused the condition upon which he deposited his rent or has acted in bad faith, he is liable for damages plus reasonable attorney’s fees. Altogether, the tenant’s remedies are not very attractive.

Further complicating matters, the landlord may, during the pendency of his action for total rental release, apply for a partial rental release. The landlord may bring an action for partial rental release to meet his usual and customary operating expenses such as mortgages and insurance premiums. Whether this action is ex parte or before both parties is not stated, but certainly the landlord’s ability to recoup part of the rent will lessen his incentive to make any necessary repairs. In considering whether to release part of the rent, the court will consider factors such as the amount of rent derived from other dwelling units in the building, operating expense of these units, and the cost to remedy the condition alleged by the tenant. A factor notably not included is the landlord’s income obtained from other apartment buildings. Therefore, a seemingly wealthy landlord may recover substantial funds on the narrow criteria enumerated in the statute. The courts will have to consider whether the statute’s criteria are exclusive.

127 Id., although the court may grant a continuance upon a showing of good cause.
130 Id.
132 Id.
LANDLORD’S REMEDIES

Under prior Ohio law, the landlord had a quick summary remedy, in Forcible Entry and Detainer, to evict a tenant who was wrongfully holding possession by either holding over his term or being in default of his rent payments. The new law does not disturb this basic landlord remedy, but expands both the scope and procedure in Forcible Entry and Detainer to respond to the new rights and duties on the landlord and the tenant. The scope of the landlord’s remedy in Forcible Entry and Detainer is expanded to include (1) breaches by the tenant of his statutory duties which materially affect health and safety, and (2) breaches by the tenant of the rental agreement.

From a procedural standpoint, the complaint must specify the alleged breach since the notice requirement differs depending upon which section the landlord bases his action. It is also necessary that proper summons containing the new statutory language be served on the tenant, five days prior to the trial date instead of the former three days.

(A) TENANT’S RIGHT TO COUNTERCLAIM AND RAISE DEFENSES IN FORCIBLE ENTRY AND DETAINER

The landlord often used his remedy of Forcible Entry and Detainer to both evict a tenant who failed to pay rent, while at the same time adding

133 OHIO REV. CODE ANN. § 1923.02 (Baldwin Supp. 1974).
134 OHIO REV. CODE ANN. § 1923.02(2)(H) (1) (Baldwin Supp. 1974). The landlord may not write tenant’s duties into leases to shorten the notice requirement; this would be prohibited as an inconsistent provision. See OHIO REV. CODE ANN. § 5321.06 (Baldwin Supp. 1974).
135 OHIO REV. CODE ANN. § 1923.02(2)(H) (1) (Baldwin Supp. 1974). Thirty days notice is required for an alleged breach of the tenant’s duties, within which the tenant can remedy the condition. See OHIO REV. CODE ANN. § 5321.11 (Baldwin Supp. 1974). Three days notice must be given for a breach of the rental agreement. See OHIO REV. CODE ANN. § 1923.04 (Baldwin Supp. 1974). Notice must have the proper statutory language in a conspicuous manner: “You are being asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance.”

In order to terminate month to month tenancy, 30 days notice is required. Seven days is required for a week to week tenancy. See OHIO REV. CODE ANN. § 5321.17 (Baldwin Supp. 1974).
136 OHIO REV. CODE ANN. § 1923.06 (Baldwin Supp. 1974). The language must be present in a conspicuous manner:

A complaint to evict you has been filed with this court. No person shall be evicted unless his right to possession has ended and no person shall be evicted in retaliation for the exercise of his lawful rights. If you are depositing rent with the clerk of this court, you shall continue to deposit such rent until the time of the court hearing. The failure to continue to deposit such rent may result in your eviction. You may request a trial by jury. You have the right to seek legal assistance. If you cannot afford a lawyer, you may contact your local legal aid or legal service office. If none is available, you may contact your local bar association.

a supplemental action to recover the rent due. Since the primary action was the landlord's right to regain possession, this action was normally tried separate and apart from the action for rent. Prior to Glyco v. Schultz, the landlord generally made no covenant as to the condition of the premises. The only defense available to the tenant, at a trial for possession, was payment of rent. Thus, the landlord could successfully evict the tenant, who had no valid counterclaim against the landlord's action for possession.

Under the new Ohio law, whenever the tenant fails to pay his rent while in possession, and the landlord responds by seeking to evict the tenant or bring a separate action for rent due, the tenant is given a statutory right to counterclaim and raise defenses. Thus, a practical effect of the new act is that the landlord now joins his primary action to regain possession along with his supplemental action for rent. At the hearing, the tenant can counterclaim for breaches by the landlord of his statutory duties or the rental agreement along with the right, in proper circumstances, to raise the defense of retaliatory eviction.

If a tenant wishes to counterclaim, he must pay special attention to rule 13 of the Ohio Rules of Civil Procedure and the effects of res judicata. The unchanged section of Forcible Entry and Detainer states that a judgment is “not a bar to a later action brought by either party.” However, when the landlord adds the second cause of action for rent to his primary action for possession, the nature of the tenant's counterclaims may change from permissive to compulsory counterclaims.

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137 Ohio Rev. Code Ann. § 1923.02(A), (B) (Baldwin Supp. 1974).
144 Id.
a case, the tenant's counterclaims arise out of the same cause of action, namely, the lease, and are therefore compulsory counterclaims, which if not raised at trial will be barred from later suits. The tenant should be careful to raise his counterclaims at the proper time.

In the event the tenant counterclaims, the court may require the depositing of "past due rent and rent becoming due during the pendency of the action." While the concept of prepayment of rent as a condition precedent to counterclaiming is not unique to the Ohio law, there remains a substantial question as to what circumstances necessitate rent deposit. In New York, for example, a state court struck down as unconstitutional a statute which required the mandatory depositing of funds as a condition precedent to asserting a counterclaim. Other states have been reluctant to impose such a burden on the tenant and only require prepayment in order to protect the landlord's interest. The Ohio courts should follow this example by examining the potential merits of each case before requiring deposit.

(B) EQUITY POWER OF THE COURT TO INSPECT RESIDENTIAL PREMISES

In order to aid the court in ascertaining the condition of the residential premises, the statute authorizes the court to order an inspection of the premises by an appropriate government agency. In addition, the court at its discretion is authorized to order restoration of the premises to a habitable condition and where the tenant has vacated, it may refuse to allow any rerental until the premises are habitable. While this procedure is permitted in the case where the landlord brings suit in Forcible Entry and Detainer, it is deleted from the already discussed tenant's remedies. Certainly, a court-ordered inspection of the premises to expose housing code violations would ease the burden on the tenant to obtain injunctive relief. The courts should consider using their equity power to supplement the tenant's remedies.


151 Id.


155 Id.


157 Id.
(C) JUDGEMENTS WHEN THE TENANT COUNTERCLAIMS IN FORCIBLE ENTRY AND DETAINER

As already discussed, the new act provides for a joinder of the landlord’s two causes of action, possession and rent, while at the same time allowing the tenant to counterclaim and raise defenses.\(^{158}\) Regardless of who prevails in the litigation, the tenant can still have possession of the premises if he pays into the court the amount necessary to satisfy the judgment for rent obtained by the landlord.\(^{159}\) The landlord may not refuse the money and evict the tenant. Thus, the tenant may leave his rent unpaid, be successfully sued by the landlord in Forcible Entry and Detainer, and then, upon paying the amount due under the judgment into the court, be in the same position as if he had paid his rent on time.\(^{160}\)

Under this procedure, a well-advised tenant may refuse to pay his rent rather than use the tenant’s remedies (rent deposit with the court, injunctive relief, terminating lease)\(^{161}\) if he feels the landlord has breached any of his obligations. The tenant may notify the landlord of the breach and that no rent will be paid until the condition is remedied. The landlord is placed in the perplexing position of deciding between the time and expense of Forcible Entry and Detainer and remedying the condition. The end result in either case is that the tenant will still be in possession of the premises.\(^{162}\) In the meantime, the tenant can deposit his rent money with the bank, rather than with the clerk of courts.

Since the new Act provides a better remedy for the tenant in refusing to pay his rent, than in paying his rent to the clerk of courts, the Ohio courts will have to decide whether this is the true intent of the statute. The courts may have to impose a good faith requirement on the tenant counterclaiming, to parallel the same requirement imposed on the tenant’s rent deposit,\(^{163}\) and to avoid tenant misuse.\(^{164}\) If the courts do not impose such a requirement, the elaborate rent depositing procedure as well as the other tenant remedies may not be utilized.

RETALIATORY ACTION

In order to protect the tenant in the exercise of his new statatory

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\(^{159}\) Id.

\(^{160}\) Id. The only disadvantage to a tenant by not being current in rent is that he loses the defense of retaliatory eviction. See OHIO REV. CODE ANN. § 5321.02, 5321.03(A) (1) (Baldwin Supp. 1974).

\(^{161}\) OHIO REV. CODE ANN. § 5321.07 (Baldwin Supp. 1974).

\(^{162}\) OHIO REV. CODE ANN. § 1923.061 (Baldwin Supp. 1974). If the tenant can pay the judgment, he still retains possession after the landlord’s action.

\(^{163}\) OHIO REV. CODE ANN. § 5321.09(D) (Baldwin Supp. 1974), which states that if the tenant has deposited his rent in bad faith, he will be liable for the damages caused the landlord plus reasonable attorney fees.

\(^{164}\) See URLTA § 1.301(4), which defines good faith as "honesty in fact in the conduct of a transaction concerned." See also URLTA § 4.105, which requires the tenant to counterclaim in good faith.
rights and to promote the reporting of housing code violations, the new Act restricts the landlord's absolute right to terminate a periodic tenancy. Traditionally, some landlords would respond to a complaining tenant by terminating the lease. The effect of termination was to silence that particular tenant while setting an example for other tenants. Since retaliatory eviction on the part of the landlord has the potential to undermine the entire Landlord-Tenant Act, the legislature has prohibited such conduct.

More specifically, the landlord is prohibited from increasing rent, decreasing services, evicting or threatening to evict in response to a tenant who asserts one of his protected rights, which are: (1) complaining to a government agency of a violation which materially affects health and safety; (2) complaining to the landlord concerning a breach of his statutory obligations, and (3) joining a tenant union. Upon a successful showing of retaliatory conduct on the part of the landlord, the tenant can either regain possession, if he has been evicted by the landlord, or terminate the lease or, in appropriate circumstances, raise retaliatory action as a defense to a landlord's eviction suit in Forcible Entry and Detainer. In addition, the tenant can recover actual damages plus reasonable attorney fees.

While the purpose behind the Ohio statute is commendable, it may not afford the tenant the necessary protection from the landlord's retaliatory conduct, since there are three decided loopholes for the landlord. The first is that he is only prohibited from retaliating against a tenant who complains to a government agency of a violation which in actuality materially affects health and safety. Conversely, under a strict reading of the statute, the landlord can retaliate against a tenant who in good faith complains to a government agency of violations which are not

169 Id. The tenant may not use retaliatory eviction as a defense to a landlord's eviction proceeding in four situations: (1) the tenant is in default in rent payments; (2) the tenant is holding over his term; (3) the tenant himself or others on the premises with his consent were the primary cause of applicable code violations, and (4) in order for the landlord to repair the premises, the tenant must vacate. However, the tenant can still bring an action for any damages caused by the landlord's retaliatory conduct. See Ohio Rev. Code Ann. § 5321.03 (Baldwin Supp. 1974).
171 Ohio Rev. Code Ann. § 5321.02(A) (1) (Baldwin Supp. 1974). However, URLTA § 5.101 is worded the same way.
code violations or not serious code violations. Thus, paradoxically, under a statute designed to promote the reporting of housing code violations, the tenant, who has no expertise in housing code regulations, may be reluctant to report a violation since if he is incorrect in his assertion of a violation, he will have no protection under the statute. 172

Secondly, the landlord may be provided a loophole since the statute does not enumerate what constitutes a prima facie case of retaliatory conduct. 173 By comparison, many states aid the tenant by creating a rebuttable presumption that the landlord's motive is retaliatory when, within a specified period of time after the tenant has asserted a protected right, the landlord brings an action for eviction or increases the rent. 174 The Ohio law affords the tenant no such protection and grants the landlord the unrestricted right to increase "the rent to reflect the cost of improvements" or "the cost of operation of the premises." 175 Since the Ohio law allows the landlord economic grounds to increase the rent, the tenant appears to have the difficult burden to show: (1) he asserted a protected right; (2) the landlord knew he asserted that right, and (3) the action taken by the landlord was for the sole purpose of retaliation. 176

The third loophole for the landlord is that, since he can increase the rent to reflect the costs of improvements or increased operating costs on the premises, he may use this right to pass back onto the tenant the expense of any repairs made necessary by tenant complaints. 177 Whether needed repairs are to be termed "improvements" or increased operating expenses will be left for the court to decide. 178 However, to allow the landlord the right to make the tenant pay the costs of repairs may stifle any further attempts by the tenant to complain about the need to repair.

SECURITY DEPOSITS

The landlord in a landlord-tenant relationship will require the tenant

172 OHIo REV. CODE ANN. § 5321.02(A) (1) (Baldwin Supp. 1974). However, the tenant is allowed to pursue his remedies based upon reasonable belief due to the condition of the premises. See OHIo REV. CODE ANN. § 5321.07(A) (Baldwin Supp. 1974).

173 OHIo REV. CODE ANN. § 5321.02 (Baldwin Supp. 1974).


175 OHIo REV. CODE ANN. § 5321.02 (C) (Baldwin Supp. 1974).


177 OHIo REV. CODE ANN. § 5321.02(C) (Baldwin Supp. 1974).

178 Id. Cf. URLTA § 5.101 which allows the landlord no absolute right to increase rent.
to deposit a sum with him in order to secure the tenant's performance. While the new Act does not abrogate this right, it does create a duty, under certain circumstances, to pay interest at a rate of 5% per annum on portions of the deposit which are in excess of $50.00 or one month's rent, whichever may be the greater. While this can be seen as a minor deterrent to the landlord's charging of an excessive amount, it actually is of little value to the normal tenant since the majority of deposits demanded are generally one to two months' rent or an even lesser amount.

The new Act codifies what was previously a common law concept in Ohio, and allows the landlord to apply the deposit toward past due rent and to any damages which the tenant may have caused by a violation of the statutory duties as itemized in section 5321.05 or other duties contained in the rental agreement between the parties. When the landlord does so elect to make a deduction from the security deposit at the termination of the relationship, he must itemize and identify in writing the purpose for which each and every deduction is made and forward the same with the amount remaining within 30 days. The tenant also has an obligation, under this section, to give the landlord written notice of his new or forwarding address to which the deposit and itemized list may be sent.

When the tenant has thus given notice and the landlord fails to comply with his statutory duties, the landlord is subjected to the tenant's right to recover the security deposit due him. In addition, the court may grant damages in an amount equal to that sum wrongfully withheld, and reasonable attorney's fees expended in the tenant's effort to regain his property. Conversely, if the tenant does not give the required notice, he loses his right to punitive damages and compensation for attorney's fees and may recover only the security deposit due him from the landlord.

A strict reading of the statute reveals that the landlord is penalized

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179 See Ohio Rev. Code Ann. § 5321.01(E) (Baldwin Supp. 1974), which defines security deposit as "any deposit of money or property to secure performance by the tenant under a rental agreement."
180 Ohio Rev. Code Ann. § 5321.16(A) (Baldwin Supp. 1974). This section also requires the landlord to pay annually the interest on the deposit to tenants who remain in possession over six months.
181 See Berger, Hard Leases Make Bad Law, 74 Colum. L. Rev. 791, 825 (1974), where the author points out that the majority of leases are limited to security deposits not in excess of one month's rent. For example, under Ohio Rev. Code Ann. § 5321.16(A) (Baldwin Supp. 1974), if the monthly rent due is $100 and the security deposit is $110, the landlord pays interest on $10.00.
183 For a full discussion, see text accompanying notes 83-91 supra.
185 Id.
only when he fails to forward to the tenant an itemized list of the deductions and the amount of the security deposit remaining after the deductions. Thus, deductions which are nonetheless frivolous but itemized and sent to the tenant along with the remaining security deposit will not subject the landlord to the penalty section. In any case, by imposing the most severe penalty in the act, the statute has aided the tenant in his quest to regain his deposit, by providing him with the opportunity to have a clear written record of all damages which the landlord has allegedly incurred during the tenant's possession.

**Self-Help Prohibited**

Under the common law, the landlord was deemed to have a quick remedy against tenants through the self-help eviction. Provided, of course, that the landlord did not breach the peace in the utilization of this method, he saved both the time and expense which otherwise would have been involved if the matter were litigated in the courts. The new Act not only enlarges the rights of tenants in Forcible Entry and Detainer, but also limits the common law right by prohibiting self-help evictions even in situations where the tenant's right of possession has ceased.

While distress for rent has been given a certain amount of recognition in other states, it has never gained the support of the judiciary in Ohio. This concept is continued in the Act by prohibiting summary seizure of the tenant's property by the landlord for the purpose of securing past rent due except pursuant to a court order.

The prohibition against self-help remedies as contained in the Act is not merely an empty right. Section 5321.15(C) includes a penalty for the landlord's violation of either the self-help or the distress provisions. That particular section grants to the tenant a cause of action for all damages

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188 *Ohio Rev. Code Ann.* § 5321.16(B) (Baldwin Supp. 1974).
189 *Ohio Rev. Code Ann.* § 5321.16(C) (Baldwin Supp. 1974). However, there may be an alternative interpretation of the application of the penalty section against landlord misconduct, since punitive damages are equal to the undefined term "wrongfully withheld" amount. In view of the expanded rights for tenants under the new act, a fair interpretation of the amount "wrongfully withheld" may subject the landlord to penalty when he deducts for frivolous but itemized deductions, or itemized deductions for damages which are outside the tenant's statutory or lease obligations. In either case, such itemized deductions from the security deposit by the landlord may imply bad faith and a wrongful withholding of the security deposit, which should subject him to penalty. However, while the interpretation provided in the text is more in line with a strict reading of the statute, this point seems destined to be determined by litigation in the courts. *See* URLTA § 2.101.
arising from wrongful acts of the landlord plus reasonable attorney fees incurred in prosecuting the action. Such a provision should serve to make an errant landlord wary of impeding the tenant's statutorily recognized rights.

**FUTURE LEASES**

The drafters of leases which are utilized subsequent to the enactment date of the act, should concern themselves with specific compliance with four particular stipulations added to the Ohio code by the new Act. The first of these sections requires that the residential tenant be given written notice of the name and address of the owners of the rental premises and the owner's agent. The underlying purpose of such a requirement is not only to enable the tenant to ascertain the true identity of his landlord, but also to afford an efficient method of initiating the legal proceedings against the landlord which are authorized under the new Act. By failing to comply with this section, the landlord waives his right to notice from the tenant that rental funds have been deposited with the clerk of courts, and the right to notice by the clerk that the funds have been so deposited, each of which would otherwise be mandatory.

The second relevant provision prohibits the inclusion within the rental agreement of exculpatory and cognovit clauses and agreements whereby the tenant must pay the attorney's fees of the landlord. Each of these clauses would otherwise limit the liability of the landlord to a great extent. In addition, the landlord may not transfer his interest in the premises by rental agreement, assignment, conveyance, trust, deed, or security instrument free of his statutory duties. While the statute is unclear as to whether the original landlord retains responsibility for the fulfillment of his statutory duties, it is certain that the landlord remains liable on his express covenants, such as those to repair the premises, even after an assignment to a third party.

The third factor evolved by the legislature was created in an attempt to protect the tenant and insure that all of the statutory rights created in the act remain available. Basically, the majority of leases entered into by the tenant are set forth in standardized forms which are provided by the landlord on somewhat of a "take it or leave it basis." Even in cases

197 See URLTA § 2.102, and comments thereto.
200 Ohio Rev. Code Ann. § 5321.13(B) (C) (D) (Baldwin Supp. 1974).
202 For discussion of this concept, see Burby, Real Property § 58 (3d ed. 1965).
where the lease is not on a standardized form, but is drawn up on an individual basis, it would seem likely that its contents would be found to be more favorable to the landlord. In order to counter this, the Act provides that no lease may contain a provision inconsistent with or prohibited by the Act, nor may it provide for the modification or waiver of rights expressly granted in the Act. The only exception to this mandate allows a clause whereby the tenant's duties are expressly assumed by the landlord.

The fourth and most interesting provision involves a carryover of the aspects of unconscionability, which are included within section 2-302 of the Uniform Commercial Code. This was accomplished in the new Act by substituting the words “rental agreement” wherever “contract” appeared and retaining the remaining text of UCC 2-302 in its entirety. Prior to this addition of the Code concept of unconscionability, which was initially drafted merely for use in the sales area, it had met with only limited success when applied by analogy to real estate rental agreements. While this may serve as a drawback in some situations, the new Act will conceivably allow the varying concepts of economic duress, one-sidedness and deceptive forms to be applied to lease arrangements.

While this is arguably intended to provide the same protection to the tenant as is afforded to the consumer in the sales arena, the courts should strictly scrutinize individual leases to fulfill the intentions of this section.

204 OHIO REV. CODE ANN. § 5321.06 (Baldwin Supp. 1974).
212 See Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948).
CONCLUSION

The new Ohio law has brought the landlord-tenant relationship into the twentieth century. The nature of the relationship is now governed by statute instead of common law. By creating rights and duties for both the landlord and tenant, the legislature has established a policy of promoting fit and decent housing. The purpose of this article has not been to criticize this new legislation, but to point out to the court and to the practitioner the possible interpretations of the new Act.²¹⁵

ROBERT J. CROYLE

FOUR YEARS OF ENVIRONMENTAL IMPACT STATEMENTS: A REVIEW OF AGENCY ADMINISTRATION OF NEPA

INTRODUCTION

THE FEDERAL GOVERNMENT, through its presence in almost every phase of the nation's activity, is shaping the character of the future. This is perhaps nowhere more true than in the field of environmental concerns where choices about uses of our physical resources are frequently irrevocable. Recognizing this, Congress set out to impose on the federal government a course of "preventive and anticipatory"¹ decision making with respect to the environment. This effort took the form of the National Environmental Policy Act of 1969 (hereinafter NEPA or the Act).² The Act officially declares environmental quality to be a national priority and lists as goals for the nation to:³

1. Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
3. Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;


³ NEPA § 4331(b).
Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

These goals may reveal a naive optimism but, as has become clear, they do not represent the heart of the bill. The policy of the Act is to make the environment a legitimate and necessary concern of all government officials. No agency of the federal government is to undertake any major action without first understanding the implications of the action for the surrounding physical environment.

Underlying the Act is also the recognition that major public works often proceed at cross purposes and without reference to the wishes of the people who are most affected by them. Thus, it requires, at least insofar as there are environmental values at stake, that agency decision making open itself to input from other federal agencies, from state and local governmental units, and from the public.

NEPA is not simply the statement of a philosophy or an empty exhortation. Section 4332(2)(c) of the Act is an "action forcing" provision, imposing on all agencies of the federal government the duty to include an Environmental Impact Statement (hereinafter EIS) in all recommendations for "major federal actions significantly affecting the quality of the human environment." The impact report must be a detailed statement discussing unavoidable adverse environmental effects, alternative courses of action, the relationship between the short-term use of the environment and long-term productivity and, finally, any irretrievable commitments of resources. There are no specific sanctions for failure to

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4 See notes 114-25 and accompanying text, infra, for discussion of procedural versus substantive rights under NEPA.


6 NEPA § 4332(2) (C).

7 NEPA was modeled after the Employment Act of 1946 which was concerned with the responsibility of the federal government to act to avoid economic dislocations. However, the action-forcing provisions of § 4332(2)(C) have no direct legislative model in their application to all federal actions rather than those of a particular agency. 2 CEQ ANN. REP. 222-23 (1970).

8 NEPA § 4332(2) (C).
comply with the EIS requirement. The drafters appear to have assumed that the Act would be self-enforcing.

This article will focus on the environmental impact statement process of NEPA functions. It will analyze some of the structural weaknesses of the process, some of the interests private parties are using it to protect and, finally, whether or not it is bringing us closer to a realization of the lofty goals the Act sets forth in Section 4331.

THE COUNCIL ON ENVIRONMENTAL QUALITY

NEPA creates in the Executive Office of the President, the Council on Environmental Quality (hereinafter the Council or CEQ).9 The Council is to serve primarily as an environmental clearinghouse, gathering and disseminating data and making recommendations for national environmental legislation.10 The statute gives CEQ no specific authority to enforce its policies and, up to now, it has exercised none directly.11 CEQ nevertheless plays an important part in the EIS process. Executive Order No. 1151412 authorized CEQ to issue guidelines for the implementation of the provisions of Section 4332(2).13 These Guidelines,14 coupled with expansive interpretations of NEPA by the courts, have created a major evaluation step in almost all administrative decision making. Pursuant to the Guidelines, agencies must follow an elaborate procedure for at least giving formal recognition to potential ecological effects of their actions. CEQ Guidelines are not binding on agencies and on occasion courts have invalidated them as not sufficiently stringent.15 But as a rule, both administrative bodies and the judiciary rely on them for guidance as to NEPA compliance.

In Greene County Planning Board v. FPC,16 rejecting the FPC's argument as to when an EIS had to be filed, Judge Kaufman commented:

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9 NEPA § 4342.
10 NEPA § 4344.
11 But see Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (9th Cir. 1974), aff'd, 417 U.S. 1301 (1974) for a possible developing trend. Justice Douglas, sitting as Circuit Justice for the 9th Circuit, granted a stay of a district court order allowing dam construction to proceed, on the strength of a letter from the CEQ which expressed the opinion that the impact statement prepared was inadequate. This was later affirmed by the whole Court.
13 Prior to the issuance of the Order, it may have been thought that § 4332(2)(C) would be self-effectuating "despite its vague terms and lack of clear procedure . . ." Comment, The Council on Environmental Quality's Guidelines and Their Influence on the National Environmental Policy Act, 23 CATH. U.L. REV. 547, 550 (1974) [hereinafter cited as Comment]. The legislative history of the Act does not address the issue of implementation.
16 455 F.2d 412 (2d Cir. 1972).
Although the Guidelines are merely advisory and the Council on Environmental Quality has no authority to prescribe regulations governing compliance with NEPA, we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies "to foster and promote the improvement of the environmental quality," NEPA Section 204, 42 U.S.C.A. Section 4344, has misconstrued NEPA.\(^\text{17}\)

NEPA has provoked an extraordinary amount of litigation. In the four years since its passage, there have been over 500 lawsuits based on the Act.\(^\text{18}\) CEQ monitors the judicial development closely and attempts to incorporate new interpretations into its Guidelines. In *Calvert Cliffs' Coordinating Committee v. Atomic Energy Commission*,\(^\text{19}\) the Court held that, at every important stage in decision making, there must be an explicit balancing of environmental values against the commonly used economic values. This holding became a "recommendation" in a memorandum by CEQ to all federal agencies,\(^\text{20}\) and it is now included in the revised CEQ Guidelines.\(^\text{21}\) One author suggests that where there are conflicting holdings by the courts, as frequently there are, CEQ adopts the most expansive interpretation as its policy.\(^\text{22}\) Because of judicial deference to the Guidelines, "[t]he process resembles a feedback loop whereby a new position taken by CEQ induces a corresponding change in the court decisions which in turn produces a further change in CEQ interpretation of NEPA."\(^\text{23}\)

In addition to authorizing the establishment of Guidelines of general applicability, Executive Order 11514 requires that each agency develop its own formal environmental clearance procedures designed to fulfill the mandates of NEPA.\(^\text{24}\) *Calvert Cliffs* represented a direct challenge to the Atomic Energy Commission's rules for NEPA compliance. Judge Wright agreed with the plaintiffs, *inter alia*, that regulations which permitted the AEC Safety and Licensing Board to decline to review environmental issues at the hearing level unless they were specifically raised, and which prevented consideration of "backfitting" of technological innovations to nuclear plants under construction, were fatally defective. The case was remanded for further rulemaking. Despite the very vague

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\(^\text{17}\) Id. at 421.
\(^\text{19}\) 449 F.2d 1109 (D.C. Cir. 1971) [hereinafter cited as Calvert Cliffs v. AEC].
\(^\text{20}\) CEQ Memo to Federal Agencies on Procedures for Improving Impact Statements, 3 BNA Envtl. Rptr. 82 (1972) [hereinafter cited as CEQ Memo].
\(^\text{22}\) Comment, supra note 13, at 566.
\(^\text{23}\) Comment, supra note 13, at 571.
language of the statute, and the relatively undeveloped state of the CEQ Guidelines at that time, the Court relied on the expression in Section 4332, "to the fullest extent possible," to find that NEPA bound agencies to strict procedural standards.

The CEQ assists agencies on an individual basis in preparing their own rules for implementing NEPA, but the official CEQ Guidelines are the primary model, and agency regulations tend to follow it very closely.

THE ENVIRONMENTAL IMPACT STATEMENT PROCESS

In evaluating NEPA compliance, courts focus both on the adequacy of the information flow that occurred during the preparation of the impact statement, a process-oriented inquiry, and the sufficiency of the statement itself, a content-oriented inquiry. For achieving the purposes of the Act, both are equally important. This section of the paper will examine the information flow process.

Briefly, the CEQ Guidelines set out four distinct stages of environmental assessment for every major project: early notice, draft statement, comment period and final impact statement. Theoretically, only when all of these are completed can an agency review the proposal and make a determination whether to go forward.

**Early Notice.** The “early notice” system informs the public of the decision to prepare an impact statement as soon as the agency makes it. It is much more likely that intervention at this stage will help to shape the final project than intervention which comes when a dam is two-thirds complete, or a nuclear power plant is constructed and ready to begin operation. Yet regardless of this timely opportunity to participate, courts are unwilling to invoke the doctrine of laches to dismiss an action which is brought well after the date of final project approval. It may be that courts

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26 449 F.2d at 1115.
29 Because the Act has some retroactive effect and is applicable to many ongoing projects, agencies may modify the sequence in certain cases. 40 C.F.R. § 1500.13 (1974).
30 40 C.F.R. § 1500.6(e) (1974).
recognize that publication in the *Federal Register*, the means of early notice the Guidelines suggests, is unlikely to give actual notice to members of the general public, however great their interest.

Ideally, the interagency, interdisciplinary approach urged by the Act should begin with the earliest planning stages of a project. The Office of Management and Budget *Circular A-95* allows local, regional and state governmental agencies to review and comment upon many proposed applications for federal assistance. Use of this for environmental objectives could make the early notice system an effective means for soliciting local viewpoints at a meaningful time. However, it has experienced only limited success even in its application to general non-environmental planning problems.

**Draft Statement.** CEQ suggests that an agency make an effort to discover and discuss at the draft stage all major points of view with respect to an action under consideration. "The draft statement must fulfill and satisfy to the fullest extent possible at the time the draft is prepared the requirements established for final statements by Section 4332(2)(C)." This requires consultation with federal agencies who have particular expertise in the relevant subject matter, other specialists, local governmental units which will be affected, pro-environmental organizations and citizens who have expressed an interest in the project. When the draft is complete, the preparing agency has an affirmative duty to circulate the document and to solicit comments from those same groups and from any others who have announced their concern or who may have a contribution to make.

**Comment Process.** The comment period lasts from 30 to 60 days even though the agency members may have spent years compiling the draft. It may include a public hearing. There are frequently general statutory requirements for hearings, and where that is the case, the hearing must address itself to environmental as well as non-environmental concerns. Participants should be given the opportunity to cross-examine agency officials and applicants for the federal assistance on the basis of the draft EIS. If there is no general provision for a hearing, the agency...

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34 40 C.F.R. § 1500.8(c) (1974).
35 40 C.F.R. § 1500.3 (1974).
37 *CEQ Memo, supra* note 20.
38 40 C.F.R. § 1500.7(a) (1974).
39 The recommendation that comments be solicited from environmentalist groups marks a major stride forward from Sierra Club v. Morton, 405 U.S. 727 (1970), where the issue was whether such a group could show a sufficient interest to support a claim of standing.
40 40 C.F.R. § 1500.9 (1974).
41 Greene County Planning Bd. v. Fed. Power Comm’n, 455 F.2d 412, 423 (2d. Cir. 1972), cert. denied, 409 U.S. 849 (1972) [hereinafter cited as Greene County v. FPC].
should make an independent determination as to whether environmental issues warrant a hearing. Relevant considerations are: the size of the project, the level of public interest, the likelihood that members of the public will be able to make significant contributions at a hearing, the extent to which the public has already had an opportunity to participate.42

Although any administrative agency within the federal government can be called upon to comment on another agency's draft statement, the Environmental Protection Agency (EPA) is required to by law whenever a proposal may have an impact on an area within its scope of authority.44 In practice, the EPA comments on virtually all EIS's.45 It does not have a veto power over agency projects on which it comments but, if EPA finds a proposed action unsatisfactory from an environmental standpoint or determines that an EIS is so inadequate that meaningful comment is not possible, it must report its findings to the CEQ and to the public.46

A few other agencies, because of their particular fields of expertise, are asked to comment on large numbers of the draft statements. The Department of Interior, for example, reviews hundreds of proposed actions affecting land use and fish and wildlife values.47 Although CEQ is the overseer of NEPA, it has only a minor role in the comment process. Agencies must file copies of every EIS with the Council. CEQ selects a very small number of statements for actual review and its purpose is to discover structural weaknesses in the preparation process and promulgate improved Guidelines to deal with those weaknesses. CEQ comments directly only on particularly troublesome or controversial projects.48

Final Impact Statement. All written comments submitted to the principal agency become part of the final environmental impact statement (FES) and, to the extent that the draft does not adequately address issues raised in the comments, the agency must review and modify the statement.49 Frequently dispute in litigation centers around whether an agency sufficiently answered in the final EIS objections raised by commenting parties.50 After the agency completes the final report and distributes it to those who participated in the comment process, it must wait 30 days before action on an approved project begins. This allows a period for final review. If, after submitting comments on the FES, there is a

42 40 C.F.R. § 1500.7(d) (4) (1974).
43 3 CEQ ANN. REP. 237 (1972).
44 Among the statutes which provide for EPA to comment on draft EISes are the Clean Air Act, 42 U.S.C. § 1857 et seq. (1955), and the Noise Control Act, 42 U.S.C. § 4901 et seq. (1972).
46 40 C.F.R. § 1500.9(b) (1974).
47 40 C.F.R. § 1500.9 (1974).
48 Id.
49 40 C.F.R. § 1500.10(a) (1974).
discovery of significant new information or a judicial order necessitates further modifications, CEQ generally will not require recirculation of the impact study. Unless an agency is refusing to file an EIS, judicial inquiry into NEPA compliance must await the agency’s final determination to proceed with the project in question.

The foregoing discussion has assumed that an environmental impact statement is required. Frequently, this is the issue in dispute. NEPA applies to “major Federal actions significantly affecting the quality of the human environment.” That phrase has resolved itself into four distinct threshold questions: Is the project a major action? Is it federal in nature? Will it have a significant effect? Does it involve the quality of the human environment?

If an agency decides that the answer to all of these is negative, it need not prepare an impact statement. However, to ensure that appropriate consideration is given to the policies of NEPA and to provide a reviewable record should anyone challenge the preliminary determination, courts have required a formal “negative declaration” stating the reasons why the agency is not undertaking an environmental study. It is unlikely that such a step was foreseen by the drafters of NEPA. But in their attempt to force compliance “to the fullest extent possible,” judges have found support for it in Section 4332(b), which directs agencies to: “Identify and develop methods and procedures, ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations.”

To allow meaningful review, the negative declaration must be detailed and specific to the peculiar demands of the use and site under consideration. It is, in effect, a scaled-down EIS. In Hanly v. Mitchell, the General Services Administration (GSA) decided that an EIS was not required for a Metropolitan Correction Center in lower Manhattan. GSA’s negative impact statement discussed plans for heat, water, and garbage and sewage disposal. The court held that the document was inadequate and remanded the case to GSA twice to consider, inter alia, the impact of a prison on the families who lived in the neighborhood, the likelihood of riots and disturbances, the possibility of increased crime and drug availability, and the parking arrangements for visitors. The court’s

52 Greene County v. FPC, 455 F.2d 412, 423 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972).
53 NEPA § 4332(2) (C).
54 E.g., Scientists’ Institute for Pub. Information, Inc. v. AEC, 481 F.2d 1079, 1094 (D.C. Cir. 1973) [hereinafter cited as SIPI v. AEC].
56 460 F.2d 640 (2d Cir. 1972), cert. denied, 409 U.S. 990 (1972).
rulings were not that an EIS was necessary, but only that prior to making a threshold determination, GSA had to consider a broad range of relevant factors and had to give the public an opportunity to submit information which might bear on the agency’s decision.

Where it is conceded that an action is a “major federal action significantly affecting the quality of the human environment,” one of several limited exceptions may operate to exclude it from the scope of NEPA. Courts exempt actions where there is a valid claim of national security, emergency or legislative stipulation.

In a rapid series of decisions during the eleventh hour controversy over nuclear testing near Amchitka Island, Alaska, the Fifth Circuit ruled that the impact statement prepared by the AEC was deficient, that presidential approval does not negate an agency’s obligation to comply with NEPA and that executive privilege would not be recognized to prevent discovery of the documents used to prepare the EIS. But when faced with the final request to enjoin the blast, the court refused. Although the AEC had not met its duties under NEPA, the court acceded to the important interests of national security urged by the government. The Supreme Court affirmed.

During the recent Middle East oil embargo, the Federal Energy Office (FEO), with congressional authorization, imposed regulations governing the allocation of crude oil among refiners. Gulf Oil Company argued that the allocation scheme was invalid because FEO inaugurated it without preparing an EIS. The Temporary Emergency Court of Appeals held that in circumstances such as critical oil shortage the need for immediate action takes precedence over NEPA. The “emergency” exception also applies to temporary actions such as an interim rate increase.

If the legislature explicitly so stipulates, an agency action may be excused from the requirements of NEPA. Administrative officials often argue that when Congress approves appropriations bills for individual projects or programs, it is tacitly agreeing that the action is consistent with the policies of NEPA. Courts reject this theory of “repeal by implication.” In the Gillham Dam case, Judge Eisele responded to that argument by saying: “It is more reasonable to assume that the Congress in making annual appropriations for such projects, assumes that the

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57 The Second Circuit later ruled that the negative impact statement was adequate, and that construction could proceed without the preparation of a full EIS. Hanly v. Kleindienst, 484 F.2d 448 (2d Cir. 1973).
58 Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 463 F.2d 788, 463 F.2d 796 (5th Cir. 1971).
61 See Port of New York Authority v. ICC, 451 F.2d 783 (2d Cir. 1971).
responsible agencies are complying with all applicable laws."

On the other hand, where congressional intent is clear, "even severely circumscribed judicial review is both inapposite and unnecessary." In the *Alaska Pipeline* case, NEPA claims were rendered moot by a statute which specified that the six-volume EIS prepared by the Department of the Interior shall be deemed sufficient under NEPA.65

A fourth and very different kind of exception to NEPA applicability, is federal revenue sharing.66 One justification offered for the exemption is the absence of sufficient "federal action." This is not entirely persuasive. The Office of Revenue Sharing retains full veto power over proposals; it supplies, restricts and oversees the allocation of funds and it conducts periodic audits and investigations.67 Some authors suggest that *Ely v. Velde*, which held that NEPA applies to a block grant program of the Law Enforcement Assistance Administration, lends support to the application of NEPA to revenue sharing. The court in *Ely* distinguished the two: "A block grant is not the same as unencumbered revenue sharing, for the grant comes with strings attached. The state voluntarily requested federal participation in the center and in this manner obtained construction funds conditioned upon compliance with NEPA..."72 While this distinction is not compelling, it seems likely that courts will continue to accept the exemption out of respect for the "no strings" philosophy of unrestricted grants. And if states continue at the current rate to pass their own NEPA's, the exception will have minimal impact on the policy of the Act.72 Courts have carefully limited all of these exceptions and they probably do not represent a significant retreat from the standard of fullest possible compliance.

63 EDF v. Corps, 492 F.2d 1123, 1141 (5th Cir. 1974).
66 Another exception to note only in passing applies to the District of Columbia. Because of the special status of Washington, certain activities may require federal approval. However, they are, by nature, municipal activities and the EIS requirements are waived. See Tolman Laundry v. Washington, 6 ERC 1264 (D.C. Super. 1974).
69 F. ANDERSON, NEPA IN THE COURTS 60-61 (1973) [hereinafter cited as ANDERSON].
70 451 F.2d 1130 (4th Cir. 1971).
71 497 F.2d at 256.
72 See 4 CEQ ANN. REP. 248 (1973). The CEQ notes that 15 states and the Commonwealth of Puerto Rico have enacted their own versions of NEPA.
The impact statement process applies to every "recommendation or report on proposals for legislation and other major federal actions..." However, the impact statement process outlined above is best suited to evaluating individual actions which frequently are part of, and assume the value of, much larger programs. In that context, the principal agency or applicant for federal assistance tentatively selects the course of action and a site. Environmental analysts can then isolate the particular kinds of effects the action will generate in the particular location. The need for speculation is diminished and citizen participation is maximized. Agency officials can easily identify the segment of the public whose input they should seek and, because of the immediacy of the threat or benefit of the proposed action, there is more likely to be a high level of public interest.

If an agency delays environmental evaluation until it has before it an application for an offshore oil lease or a funding request for the final segment of a highway, it defeats the policy of NEPA to choose courses of action that are least detrimental to the natural environment. By that point, the agency has made the major program decisions and only minor adjustments in the plans of the particular project are possible. Whether consciously or through oversight, the agency has avoided serious consideration of alternative approaches. To remedy this, there has been some progress toward program impact studies whereby an agency begins environmental evaluations at the earliest possible stages.

*Calvert Cliffs* invalidated the Atomic Energy Commission's regulations for implementation of NEPA because they postponed consideration of certain crucial environmental issues with respect to nuclear power plants from the construction permit stage to the operating license proceedings. Judge Wright noted that:

Compliance to the fullest extent possible would seem to demand that environmental issues be considered at every important stage in the decision making concerning a particular action—at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate and where alterations might be made in the proposed action to minimize environmental costs.

Two years later, Judge Wright recognized that, for effective balancing of environmental factors, impact studies may be required at the research stage, long before the agency considers an application for a particular action.

To wait until a technology attains the stage of commercial feasibility before considering the possible adverse environmental effects attendant upon ultimate application of the technology will undoubtedly

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73 NEPA § 4332(2) (C).
74 449 F.2d at 1118.
frustrate meaningful consideration and balancing of environmental
costs against economic and other benefits.\textsuperscript{75}

The Court was unconvinced by the AEC's position that the liquid metal
fast breeder reactor program that the plaintiffs were challenging was in
such incipient stages that any EIS would be purely speculative. To support
its request for funding, the Commission had prepared an elaborate cost-
benefit analysis involving projections for the development of the technology
and the Nation's energy needs through and beyond the year 2000. The
analysis notably lacked any discussion of ecological dangers.

The Court set out several criteria by which agencies should judge
when an EIS is required: \textsuperscript{76}

1. Does the agency know enough about the program to make an
evaluation meaningful?

2. Is the agency restricting consideration of other alternatives
because of the development of this program?

3. Is the agency making any irretrievable commitments of resources,
financial or otherwise?

4. How significant are the anticipated effects of the overall program?

The CEQ Guidelines now require that an agency establish a formal
procedure for deciding what acts necessitate an environmental evaluation
of a given program.\textsuperscript{77} When an agency concludes that an EIS is not
yet necessary but will be at a later date, it must file a "negative
declaration" stating the reasons for its determination.\textsuperscript{78}

The problem of timely evaluation is not limited to the field of research
and development. If the federal government is considering a major
highway building program or strip mining legislation, some NEPA studies
should begin at that time to decide whether those answers to transportation
or energy needs are consistent with environmental values and whether the
agency can structure the program in ways that will minimize adverse effects.

If the agency or Congress authorizes the broad policy objectives with
full knowledge of the general kinds of impacts the program will have, later
individual project statements need not reexamine those issues.\textsuperscript{79} At each
successive stage in the decision making, the EIS should focus increasingly
on impacts which the program statement did not anticipate\textsuperscript{80} or which are
peculiar to the individual project in question. This "tiering" of impact
statements is a step toward compliance with NEPA's mandate to "Study,

\textsuperscript{75} SIPI v. AEC, 481 F.2d 1074, 1089 (D.C. Cir. 1973).
\textsuperscript{76} \textit{Id.} at 1094-98.
\textsuperscript{77} 40 C.F.R. § 1500.6(c) (1974).
\textsuperscript{78} 40 C.F.R. § 1500.6(d) (2) (1974).
\textsuperscript{79} \textit{Id.}\textsuperscript{80} See Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974).
develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning appropriate uses of available resources." The primary risk that tiering introduces into the EIS process is that, at the early stages of evaluation, some risks may seem too remote to merit attention. Later in the process, those conducting project evaluations will assume that previous discussion on those same issues was sufficient. In addition, it is more difficult to define standards of adequacy for an EIS at the program level.

Multi-agency actions also may require modifications of NEPA processes. If several federal agencies contribute to the planning and execution of a single project, the Council on Environmental Quality recommends that they conduct a single environmental assessment. This can be done on a joint basis or through the selection of a "lead" agency, usually the agency with the greatest overall involvement or the greatest environmental expertise. In either case, all participating agencies contribute to the final product.

Frederick Anderson of the Environmental Law Institute criticizes the composite EIS approach because it excuses an agency from the obligation to focus directly on the effects of its own activities. While this may be so, the absence of a single study evaluating the cumulative impacts of a multi-faceted program presents an even greater likelihood that the policies of NEPA will be thwarted. Separate actions within the general scheme may not be sufficiently major to require an impact statement themselves even though the project as a whole will significantly affect the quality of the human environment. Furthermore, when each agency prepares its statement alone, no one official is in a position to make an accurate cost-benefit analysis of the whole program. To ensure that each agency has adequately balanced environmental concerns with respect to its actions and that the lead agency has considered the cumulative effects, CEQ should specially scrutinize multi-agency plans.

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81 NEPA § 4332(2) (D). See also ANDERSON, supra note 69, at 290-92.
83 40 C.F.R. § 1500.7(b) (1974).
84 3 CEQ ANN. REP. 234-36 (1972).
85 40 C.F.R. § 1500.7(b) (1974). The paucity of cases in which there are several defendant agencies may indicate that this is not a widely used practice. But see Upper Pecos Ass'n v. Stans, 328 F. Supp. 332 (D.N.M. 1971), aff'd, 452 F.2d 1233 (10th Cir. 1971), vacated 409 U.S. 1021 (1972).
86 ANDERSON, supra note 69, at 199-200. Anderson's position is supported by the reasoning in Calvert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir. 1971), and in Greene County v. FPC, 455 F.2d 412 (2d Cir. 1972), which prohibit an agency from relying on compliance with the environmental regulations of another agency or the impact studies conducted by the applicant. Both cases hold that the principal agency must conduct an independent review.
87 Warm Springs v. Gribble, 378 F.2d 240 (9th Cir. 1974), suggests that at least in the litigated cases, a formal expression of opposition by CEQ carries substantial weight.
Courts,⁸⁸ the CEQ⁸⁹ and environmental specialists⁹⁰ unanimously insist that an environmental statement must be more than a “post hoc rationalization” for a predetermined course of action. Yet that seems to be inescapably the nature of a project EIS. The EIS is not a general inquiry into various possible solutions to a given problem. Rather, it is a justification for the agency’s choice. It serves as an advocacy tool. Pursuant to Section 4332(2)(C)(iii), the impact statement must mention alternative approaches. Treatment of those is frequently only cursory and the focus remains on the preferred action.⁹¹ As a practical matter, the agency may be choosing between the main proposal and not acting at all.⁹² If there is an urgent need or political pressure, then even inaction is not a real choice. Environmental impact studies for legislation, research and development, and broad federal programs offer at least a limited guarantee that responsible agencies will do some balancing of environmental factors prior to selecting the lead proposal over other viable alternatives.

The character of the administrative agency system is a further obstacle to effective consideration of alternatives. Federal agencies have narrow, usually well-defined fields of responsibility and expertise. To perpetuate their existence, they must have a major program or industry to regulate. Each agency has a vested interest in developing and continuing the programs within the scope of its authority. Addressing an attempt by the Department of the Interior to execute a lease for offshore drilling, the court in National Resources Defense Council v. Morton⁹³ held that an agency must consider all reasonable alternatives, including those outside what it has the power to adopt.⁹⁴ If agencies are vying with each other for influence, they are likely to evade this obligation whenever possible. But willingness to comply is only one part of the problem. One agency may be unaware of alternate approaches that other agencies could pursue.⁹⁵ More likely, they will lack the information they would need to balance the costs and benefits of the solutions that are not within its competence against the known consequences of its own proposal. As was noted above, a situation may demand immediate action and, if the

⁸⁸ See Greene County v. FPC, 455 F.2d 412, 424-25 (2d Cir. 1972). See also SIPI v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).
⁸⁹ 4 CEQ ANN. REP. 234 (1973).
⁹⁰ See EDF v. Corps, 492 F.2d 1123 (5th Cir. 1974).
⁹² See Murphy, supra note 32, at 980-81.
⁹⁴ It now appears in the CEQ Guidelines, 40 C.F.H. § 1500.8(a)(4) (1974).
⁹⁵ The comment phase of the EIS process is imperfectly suited to gathering sufficient data about the solutions other agencies might pursue.
principal agency decides that another department can achieve the same objectives with less detriment to the environment, it has no means to implement the other plan. It can only decide not to act.

**AGENCY ADMINISTRATION OF NEPA**

Agency resistance to NEPA goes much deeper than the problem of adequate consideration of alternatives. Federal regulatory agencies are primarily concerned with economic expansion. Congress sought to impose on them what it described as an equally important duty to protect the environment. But the ecological concerns remain foreign and secondary, particularly when they appear to be inconsistent with the agencies’ broader mandates. Noncompliance ranges from deliberate concealment of known serious impacts to simple miscalculation of the magnitudes of effects.

The Atomic Energy Commission is among the most criticized agencies for its reluctance to comply. In *Calvert Cliffs*, the Court of Appeals for the District of Columbia said of the AEC’s proposed regulations: “We believe that the Commission’s crabbed interpretation of NEPA makes a mockery of the Act.” Later, the same court found that the AEC could have “no rational basis” for its determination that it was not yet required to prepare an EIS for a research program which AEC had funded for more than $200 million. That opinion very nearly accused the AEC of outright bad faith violations of the law.

Despite these and numerous other lawsuits, it appears that the AEC continues to hedge and dissemble in order to win approval of its projects. A recent newspaper report indicates that for the last 10 years the Commission has purposefully concealed information about the dangers of nuclear power plants for which it has issued both construction and operation permits. Many of the efforts of concealment occurred in the context of EIS studies. Dr. Glenn Seaborg, former head of the AEC, said that the agency wished to avoid the public “misunderstanding” and the adverse reactions the studies might provoke. This suppression of data is a direct contravention of the policy of the Act which Judge Eisele described in the *Gillham Dam* case:

At the very least, NEPA is an environmental full disclosure law. The Congress, by enacting it, may not have intended to alter the then

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96 Senate Report, supra note 5, at 20.
97 See Yarington, supra note 18, at 293. “There exists a natural, in fact, healthy bias on the part of most action-oriented federal agencies in favor of doing what they were established to do….”
98 449 F.2d 1109, 1117 (D.C. Cir. 1971).
100 See, e.g., Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974); SIPI v. AEC, 481 F.2d 1079 (D.C. Cir. 1973); Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (5th Cir. 1971); Calvert Cliffs v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).
existing decision making responsibilities or take away any then existing freedom of decision making, but it certainly intended to make such decision making more responsive and more responsible.\textsuperscript{102}

It would be less troublesome if we could assume that the AEC is alone in flouting NEPA goals. However, there is substantial evidence to the contrary.

The Center for Science in the Public Interest (CSPI) investigated impact statements prepared for highway construction by the Department of Transportation which is, by a significant margin, the largest single source of impact studies.\textsuperscript{103} Their results show that, although many of the EIS's are legally insufficient, the Department regularly approves the projects. Among the findings of CSPI are: 13% of the statements did not mention air pollution; 34% did not consider community disruption; 54% did not consider the impact on nearby property values; 86% failed to discuss mass transit alternatives; 30% denied that there would be any adverse effects.\textsuperscript{104}

For several years, the Environmental Protection Agency (EPA) argued that it was not bound by the procedural restrictions of NEPA. Courts agreed on the theory that there was “little need in requiring a NEPA statement from an agency whose \textit{raison d'etre} is protection of the environment and whose decision [making] is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework.”\textsuperscript{105} In fiscal 1974, Congress earmarked $5 million of EPA funds for the preparation of impact statements. This persuaded EPA to conduct environmental studies on a “voluntary basis” for certain of its major regulatory actions.\textsuperscript{106} Following that announcement, Region X Director John Burd reported that during fiscal 1975, because of limited resources, EPA would write EIS's for only 5% of its major construction grant projects under the Federal Water Pollution Control Act.\textsuperscript{107}

The Interstate Commerce Commission (ICC) may finally be ready to accept its duties under NEPA. After four setbacks in court,\textsuperscript{108} the ICC is changing its procedures and increasing the number of environ-

\textsuperscript{103} In 1971, DOT accounted for 66% of all EISes; in 1972, the figure was 49%; and through June 30, 1973, DOT was preparing 40% of the total number of statements. (The downward trend is due in part to increased reliance on program EISes.) 4 CEQ \textit{Ann. Rep.} 244-45 (1973).
\textsuperscript{104} For a summary of the CSPI report, see Morgenthaler, \textit{On the Road Again: Certification Acceptance Forces NEPA to Adapt}, 4 \textit{Env't Rptr.} 50023, 50026 n. 29 (1974).
\textsuperscript{106} 1974 \textit{BNA Env't Rptr.} “Federal Laws” 21:4001.
\textsuperscript{107} \textit{BNA Env't Rptr.} “Current Developments” 187.
mental assessments it conducts. From 1970 through 1973, the ICC submitted two impact statements to CEQ. During the first eight months of 1974, it submitted eight.\(^{109}\)

*Zabel v. Tabb*\(^{110}\) provides a different perspective on agency use of NEPA. In *Zabel*, the Corps of Engineers relied on the Act to justify its decision not to issue a dredge and fill permit. The EIS process and a public hearing revealed widespread opposition to the plan but the applicants urged that the Corps could only refuse to proceed for environmental reasons. This is the only case this writer discovered wherein NEPA was used as an affirmative defense.

Agencies can also undermine the Act by insufficient impact evaluation. Failure to analyze secondary impacts such as changes in land use patterns in the surrounding area or increased traffic a new project will precipitate is probably the most common form of noncompliance.\(^{111}\) EPA recently announced that it is curbing its grants to localities for sewer mains because the program had been encouraging unsound patterns of community growth.\(^{112}\) The program got underway in 1972 and EPA approved negative impact declarations for several sites. Localities, anxious to obtain the federal subsidies, began building sewage facilities which, in some instances, anticipate expectable population increases for the next 2,000 years. Because EPA did not require land use and energy impact evaluations as part of the grant award process, communities have been planning for low density, urban fringe development despite the fact that the cause of energy conservation might be better served by high density, urban living patterns. EPA obligated itself to more than $3.4 billion in grants before it discovered this problem. Had the agency prepared a program EIS before funding individual projects, it might have foreseen that such infrastructure improvements would induce changes in land development and it could have regulated award grants to provide for more desirable patterns.

Administrative decision making remains a low visibility process and, if an agency seeks to avoid the requirements of NEPA, purposefully or through negligence, it can do so with impunity for long periods of time. Judicial intervention tends to come late, frequently after the agency has made most of the critical determinations. It is not rare that a court-ordered EIS can do no more than consider ways to minimize the harms of a program


\(^{110}\) 430 F.2d 199 (5th Cir. 1970).


to which the agency is all but irrevocably committed. Thus, agency recalci-
trance stands as the single most potent obstacle to the success of NEPA.¹¹³

PROCEDURAL VS. SUBSTANTIVE REVIEW UNDER NEPA

In spite of the problems of timeliness, judicial review is an integral part of the operation of NEPA. Courts and commentators are now wrestling with whether the Act allows substantive as well as procedural review.¹¹⁴ Substantive review permits a plaintiff to ask not only, "Did the agency go through all the appropriate steps in assessing the environmental impact of its proposal?" but also, "Is the finished product, the final EIS, an adequate evaluation?"

The courts that do allow inquiry into substantive issues rely on the standard for review that the Supreme Court set in Citizens to Preserve Overton Park v. Volpe.¹¹⁵ The statute in question in Overton Park, the Federal-Aid Highway Act,¹¹⁶ has an impact statement requirement similar to that of NEPA. It provides, in pertinent part,

Any State highway department which submits plans for a Federal-Aid highway project...going through any city...shall certify to the Secretary that it has had a public hearing...and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the Community.¹¹⁷

In response to a challenge for noncompliance with that provision, Justice Marshall said that the reviewing court must determine: whether the Secretary acted within the scope of his authority, whether his determination was arbitrary, capricious and an abuse of discretion or otherwise not in accordance with the law, whether the agency failed to consider all relevant factors in reaching its decision, or if the decision itself represented a clear error in judgment.¹¹⁸

Under this "substantial inquiry" test,¹¹⁹ the scope of review is very narrow. The plaintiff must establish that "the actual balance of costs and benefits that the agency struck was arbitrary or clearly gave insufficient weight to environmental values."¹²⁰ If the court so finds, as it did in Overton Park, it remands to the agency for further decision making.¹²¹ It does not have the authority to order the abandonment of

¹¹⁴ EDF v. Corps, 492 F.2d 1123 (5th Cir. 1974), provides a recent listing of which circuits permit substantive review.
¹¹⁷ Id. at § 128(a).
¹¹⁸ 401 U.S. at 416.
¹²⁰ Calvert Cliffs v. AEC, 449 F.2d 1109, 1115 (D.C. Cir. 1971).
a project even if it believes that modification cannot bring the project into compliance with Section 4331 policies.

Many commentators argue that NEPA's future success rides on the availability of substantive judicial review. In light of the restricted review allowed, this position is unwarranted. The subject matter of an EIS is often very technical, beyond the comprehension of most lawyers and judges. It is quite common for there to be serious, good faith dispute among experts about the effects of a particular kind of action. Finally, the EIS may require a balancing between incomparables such as housing for the poor and the destruction of aqulife in a nearby river as a result of the pollution such housing will cause. Under these circumstances, it is necessary that an agency have a broad range of discretion. On the other hand, only the most wide-ranging review would permit a court to determine whether an agency is in accord with the policies of NEPA, except in cases of blatant noncompliance. The complexity of these factors makes it easy for an agency that wishes to avoid substantive compliance. It can confuse the issues even further by including extraneous technical data and by bolstering its position with additional expert opinions. In part, writing an EIS that will survive judicial scrutiny is an art; agency personnel can be expected to improve with practice. In summary, the "substantial inquiry" test is too meagre a device to combat all the varieties of mere pro forma acquiescence to NEPA. But regardless of the limited scope of review, plaintiffs have seized upon NEPA and attempted to expand its meaning in all directions.

**PLAINTIFFS IN NEPA LITIGATION**

A review of the more than 500 suits that have been filed under NEPA since its inception suggests that complainants are using it to protect a much wider range of interests than those for which Congress originally intended. Plaintiffs in NEPA suits fall into four major categories: national groups organized for the protection of the environment; private individuals and neighborhood groups that have banded together to oppose a particular action because they fear its effect on their property values; businesses with an identifiable economic interest in the outcome of the litigation, and state and local governmental units seeking to protect the interests of their citizens. These categories are, at best, rough generalizations. The

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126 102 CEQ MONITOR 135 (May 1974).
127 See Anderson, *supra* note 69, Appendix B.
pairing of plaintiffs and motives may be interchanged in some cases and, many times, plaintiffs will have mixed motives. Nevertheless, they do point out a pattern in the litigation.

It is not surprising that large, nationally known conservationist organizations initiate much of the NEPA litigation. The environmental impact statement process is calculated to alert such groups, if not the general public, to projects in which they are likely to take an interest. The CEQ Guidelines institutionalize the participation of "relevant conservation commissions."\textsuperscript{128} Courts have also helped to ensure a major role for them by their holdings with respect to standing, attorneys' fees and, to a lesser degree, burden of proof.

In \textit{Sierra Club v. Morton},\textsuperscript{129} the Supreme Court ruled that a person seeking review of agency action on environmental grounds must be able to show some injury to himself or a member of the group he represents. This was not a substantial burden but it was lightened even further by \textit{SCRAP v. United States}\textsuperscript{130} which permits standing where the injury alleged is to the public at large. It now seems unlikely that any court will deny standing to an environmentalist association.\textsuperscript{131}

The cost of litigation can pose a significant barrier to the pursuit of the important public interests embodied in NEPA. To encourage environmental groups to advance their claims, courts rely on the "private attorneys general" doctrine to award fees and costs, generally to a prevailing party. In \textit{Wilderness Society v. Morton},\textsuperscript{132} the court awarded fees even though, strictly speaking, the plaintiffs did not prevail. The NEPA claims were never finally resolved by the court because of congressional intervention.\textsuperscript{133} However, the court recognized that the plaintiff's lawsuit served "as the catalyst to ensure that the Department of Interior drafted an impact statement and that the statement was thorough and complete."\textsuperscript{134}

In \textit{Wilderness Society}, only half the fees were recoverable because 28 U.S.C. Section 2412 prohibits the assessment of fees against the federal government or any agency thereof unless otherwise specifically provided. This statutory prohibition will be a complete bar to recovery where the government is the only defendant. In the instant case, \textit{Alyeska}, the permit applicant for the Trans-Alaska Pipeline System, had intervened

\textsuperscript{128} 40 C.F.R. §§ 1500.9-.10 (1974).
\textsuperscript{129} 405 U.S. 727 (1972).
\textsuperscript{130} 412 U.S. 669 (1973).
\textsuperscript{131} 4 CEQ ANN. RPT. 241 (1973.) For a more extensive discussion of standing in NEPA cases, see \textit{Anderson}, supra note 69, at 26.
\textsuperscript{132} 495 F.2d 1026 (1974).
\textsuperscript{133} The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1652 (1973), indicates that the impact statement prepared by the Department of Interior shall be deemed sufficient under NEPA.
\textsuperscript{134} 495 F.2d at 1034.
and actively participated in the litigation as a real party in interest. The court found that it was fair to assess Alyeska for half of the cost of the attorneys' fee.

Cases which explicitly address the problem of burden of proof are few and conflicting. Several decisions have recognized that the agencies have the "labor, public resources and expertise to make the proper environmental assessment and to support it by a preponderance of the evidence." They have held that the plaintiff asserting environmental interests need only make a prima facie showing of noncompliance with NEPA before the burden shifts to the defending agency.

Some argue that the courts have been far too generous in their treatment of organizations such as the Sierra Club. The result has been the serious delay of important national programs. In *Environmental Defense Fund v. Corps of Engineers*, a major flood control effort was two-thirds complete when the court granted injunctive relief pending an environmental impact statement. The court noted that annual spring flooding caused widespread destruction of life and property. Later in the opinion the court discussed more extensively the claim advanced by the plaintiffs that the project would change one of the few remaining locations for stream fishing into a more common flat water fishing site.

Individuals and local citizens groups who sue under NEPA are not always as public-spirited in their motives as conservationists and courts may subject their claims to closer scrutiny. In *Nucleus of Chicago Homeowners Ass'n v. Lynn*, a coalition of community organizations and individuals claimed that a proposed low income, federally subsidized housing would significantly affect the quality of the environment so as to require the Department of Housing and Urban Development to file an EIS. The plaintiffs argued that, as a class, tenants of low income housing have a high propensity for anti-social behavior and that their presence would have a deleterious effect on the neighborhood. The court held

137 See Murphy, supra note 32, at 993.
140 The plaintiffs allege that they are members of the "middle class and/or working class" which emphasizes obedience and respect for lawful authority, has a much lower propensity toward criminal behavior and acts of physical violence, and possesses a high regard for the physical and aesthetic improvement of real and personal property. The plaintiffs further allege that "as a statistical whole" tenants of public housing possess a higher propensity toward criminal behavior and acts of violence, a disregard for the physical and aesthetic maintenance of real and personal property, and a lower commitment to hard work. Therefore, so the plaintiffs insist, the construction of public housing will increase the hazards of criminal acts, physical violence, and an aesthetic and economic decline in the immediate vicinity of the sites. The plaintiffs maintain that these factors will have a direct adverse impact upon the physical safety of the
that the evidence did not support the proposition that prospective tenants would significantly affect the environment. In its opinion, the court noted that, "[e]nvironmental impact in the meaning of the Act cannot be reasonably construed to include a class of persons *per se*." The relevant inquiry is whether actions resulting from the economic and social characteristics will affect the environment and, on that issue, plaintiffs' sociological predictions were not persuasive.

The legislative history of NEPA does not resolve the issue of whether social impacts of particular groups of people are within the scope of the statute. Undesirable land use patterns and urban congestion are among the concerns of NEPA. The primary and, arguably, exclusive focus of the Act is ecological, not sociological. Senator Jackson stated that the policy of the bill is to strive "to achieve a standard of excellence in man's relationship to his physical surroundings."

Industrial plaintiffs have begun to rely on NEPA to protect their economic interests. The threshold problem in these cases is standing. A corporation's competitive position is not within the ambit of NEPA protection. If a business enterprise establishes that there is a public interest as well, courts generally allow the case to go forward on the merits even when it is clear that the pecuniary motive dominates.

*National Helium Corp. v. Morton* involved the cancellation of purchase contracts for helium by the Department of Interior. Although government contractors have standing to sue, the court also recognized National Helium Corporation as a private attorney general for purposes of the NEPA claims. The interests of the business coincided with the public interest in possible irreparable harm resulting from the escape of helium into the atmosphere.

In *Chemical Leaman Tank Lines v. United States*, a trucking company challenged an Interstate Commerce Commission regulation which eased licensing proceedings for carriers of recyclable material which was currently being discarded. Despite both the plaintiff's economic motive and the ICC's pro-environmental aim, the district court permitted plaintiffs residing in close proximity to the sites, together with a direct adverse impact upon the aesthetic and economic quality of their lives. 372 F. Supp. at 148.

141 372 F. Supp. at 149.
142 *Accord, Hanly v. Kleindienst, 471 F.2d 823, 833 (2d Cir. 1971)*: "It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement."
143 115 CONG. REC. 40417 (1969).
144 Id. at 40416.
standing. The industry and the public shared a stake in evaluating the potential environmental drawbacks of higher levels of pollution, highway congestion and depletion of the national fuel supply which might result from increased truck traffic.

In a more restrictive holding on standing, the District Court of Maryland dismissed a suit by a hospital seeking to bar approval of the construction of another hospital in the immediate vicinity, concluding that a plaintiff corporation "cannot assert an injury to its aesthetic enjoyment of the environment."147

The last identifiable group of NEPA plaintiffs is that of state and local governmental units. Recognizing the traditional dominance of these bodies in land use areas, the Act sought to make them an integral part of decision making in the NEPA scheme.148 Several of them have pursued the interests of their citizens through the administrative process into the courts.149 In City of New York v. United States,150 the city sought to annul an ICC order allowing abandonment of a Brooklyn railroad line. They successfully argued that the action required an impact study of the economic and physical deterioration that would occur in the local community as a result of the loss of jobs and loss of business for the railroad users, suppliers and customers. In Scenic Hudson Preservation Conference v. FPC,151 New York intervened to argue that the EIS prepared for a proposed power plant did not adequately assess the danger to a nearby aqueduct that is a major source of the city's water supply. These aims are more consistent with NEPA goals.

NEPA set very ambitious procedural and substantive goals for itself. It is not clear that it will succeed in accomplishing them. However, if parties exploit the Act as a vehicle for obtaining judicial review of all government actions with which they are dissatisfied for any reason, they will overburden it and obscure its primary aims. Because of the broad language of the Act and a general sympathy with its philosophy, courts have been hesitant to restrict its application. The bulk of litigation and the varieties of relief sought suggest a problem that looks far beyond NEPA to the need for a more open and responsive administrative process that allows greater opportunities for the expression of local and individual preferences in every sphere of government activity.

148 NEPA § 4332(2)(C), (F).
151 453 F.2d 463 (2d Cir. 1971).
CONCLUSION

As indicated throughout this paper, the National Environmental Policy Act of 1969 has distinct procedural and substantive goals. The procedural aims, as courts have interpreted them, are quite specific and strictly enforceable. The substantive goals, on the other hand, are ambitious sounding but vague and not readily susceptible of enforcement. If we are interested principally in absolute qualitative improvement in our physical surroundings, NEPA is not the most appropriate solution.

The environmental impact statement process is a cumbersome procedural machine and there is little to suggest that it is producing drastic changes in agency programs and attitudes. The Council on Environmental Quality in its Fourth Annual Report listed a number of projects that agencies have abandoned as a result of NEPA studies. That they were able to list them may be the best indication that such abandonment is the rare exception. There are numerous litigated cases, as well, in which project review goes up and down through the courts at various stages in the EIS process, perhaps as many as three or four times over several years. In the end, the court finds that the agency has not been guilty of an abuse of discretion in its approval of the project in substantially the same form as originally planned.

The mere requirement of evaluating environmental impact may have some beneficial side effects that are difficult to detect from outside an agency. In fulfilling the rituals of preparing an EIS, enumerating alternatives and reviewing suggestions of ways to minimize adverse effects, agencies may be discovering and adopting modifications of their projects. However, there is no positive evidence of this.

Minimum quality standards, nondegradation regulations and absolute prohibition of certain harmful substances and activities are more direct


The Storm King hydroelectric plant has been in litigation since 1965. Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), cert. denied sub nom., Consolidated Edison Co. of New York v. Scenic Hudson Preservation Conference, 348 U.S. 941 (1966); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971), cert. denied, 404 U.S. 926 (1972); Scenic Hudson Preservation Conference v. FPC, 499 F.2d 127 (2d Cir. 1974). The Hudson River Fisherman's Association (HRFA) has become the plaintiff's successor in interest and the litigation continues. Hudson River Fisherman's Ass'n v. FPC, 498 F.2d 827 (2d Cir. 1974). The NEPA claims were added in 1971. Currently, the FPC is conducting further hearings on the potential harm to fish. New York Times, Nov. 12, 1974, at 35, col. 7. There is no indication that Consolidated Edison has made any significant alterations in its original plans.
methods for achieving an improved environment.\textsuperscript{155} They set out much clearer standards than NEPA and limit the range of discretion of recalcitrant agencies. However, they are not without their flaws.\textsuperscript{156} They may involve unwarranted assumptions about the state of knowledge of pollutants and environmental impacts.\textsuperscript{157} Because of their concreteness, they tend to stifle the kind of research and case-by-case analyses that agencies should be conducting under NEPA. But the primary drawback in the absolute standard approach is that it fails to recognize that difficult environmental questions involve serious competition among important conflicting values. A single, inflexible rule cannot answer those questions.

Congress did not establish the protection of our natural habitat as our foremost national priority. Only an environmental crisis of much greater proportions than the one we face now could provoke that determination. It is premature to abandon it and yet no radical reforms present themselves either. Many have suggested a veto power for the CEQ. That assumes that CEQ can acquire an adequate understanding of agency processes and goals to make a responsible judgment about when a veto is appropriate. It may also represent an over-valuation of our concern for the environment. We generally do not accord any single agency the weight a veto power entails.

The present structure of NEPA is ideal for according the environment the attention it deserves. What is lacking are incentives for enforcement within the agencies. It is necessary to create for agencies the same vested interest in the environment as they have in their main field of concern. Earmarking agency funds to be used only for NEPA-related purposes, making special environmental study grants available for major programs and providing separate funding for environmental staffing might help to create that vested interest. These suggestions require a reaffirmation by Congress—in the form of additional appropriations—that they still believe in the goals they set out in NEPA.

Theoretically, EIS procedures are suited to encouraging rational balancing and that, in itself, seems like a minimal burden to impose on agencies. But NEPA is not working in several important respects as this paper has illustrated. Congress should reevaluate NEPA and determine national priorities.

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CONSTITUTIONAL LAW:

**Student Rights Under the Due Process Clause...**

**Suspensions from Public Schools**

Goss v. Lopez, 95 S. Ct. 729 (1975)

In addressing itself to the constitutionality of Section 3316.66 of the Ohio Revised Code, the United States Supreme Court in Goss v. Lopez has ruled for the first time upon the extent to which the rights of students are to be protected under the due process clause of the fourteenth amendment in conjunction with any disciplinary removal from a public school. By its action the Court has tacitly undertaken to lift the cloud on student rights which has existed under the common law doctrine of *in loco parentis*, and interpose procedural safeguards upon any decision of school officials to deprive a student of educational benefits.

During the early months of 1971, Betty Crome attended a demonstration at a neighboring school and was subjected to mass arrest with other students and later released without being formally charged. Before her own school was to begin on the following morning, she was notified of her suspension for a 10-day period. Dwight Lopez was also suspended for 10 days without a hearing following a disturbance in his high-school lunchroom. He later testified that he was an innocent bystander to the disturbance. Dwight Lopez, Betty Crome and seven other secondary school students, each of whom had been suspended from schools in the Columbus, Ohio, Public School System due to various incidents arising

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1 **Ohio Rev. Code Ann.** § 3313.66 (Page 1972), provides in pertinent part:

[T]he principal of a public school may suspend a pupil from school for not more than ten days.... Such principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor....

As the terms are utilized here, "suspension" refers to a dismissal from a school for a short duration, generally 10 days or less; "expulsion" refers to a dismissal from a public school for the remainder of a school term or longer.

2 95 S. Ct. 729 (1975).

3 The Goss court approached the issue as to whether a state-created right to an education is either a protected property or liberty interest under the fourteenth amendment's due process clause.

4 1 W. Blackstone, *Commentaries* *453* described this common law doctrine thusly:

[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer for the purposes for which he is employed.

5 In the absence of sufficient state involvement, private or parochial secondary schools are not amenable to the due process clause of the fourteenth amendment for the purposes of preventing arbitrary suspensions or expulsions. See Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970).

during a period of student unrest, instituted a class action suit under 42 U.S.C. Section 1983\(^7\) against their respective school administrators. The plaintiffs sought declaratory and injunctive relief, asserting that Section 3316.66 of the Ohio Revised Code was unconstitutional in that it permitted public school officials to deprive them of their rights to an education without a hearing in violation of the due process clause of the fourteenth amendment.

A three-judge United States District Court for the Southern District of Ohio declared that plaintiffs were denied procedural due process in being suspended without a hearing either prior to suspension or within a reasonable time thereafter, and that Section 3316.66 of the Ohio Revised Code as it related to permitting such suspensions was unconstitutional.\(^8\) The requested injunction, ordering the school administrators to expunge all references to such suspensions from the students' records, was granted.

On direct appeal,\(^9\) the United States Supreme Court affirmed the judgment of the district court. Writing for a majority of five,\(^10\) Justice White held that students facing a temporary suspension from a public school have a “property interest in educational benefits” and a “liberty interest in reputation” which require protection under the due process clause of the fourteenth amendment from arbitrary deprivations.\(^11\) The opinion added that as a constitutionally protected minimum, due process requires, in connection with a suspension of 10 days or less, that the student be given notice of the accusation, an explanation of the evidence, and an opportunity to proffer a vindication.\(^12\)

In historical context, the public school students' struggle for recognition of constitutional rights has been long and arduous.\(^13\) As a matter of tradition the courts have been reticent to interfere with the policies and practices of the educational community.\(^14\) Although the Supreme Court has infrequently reached constitutional rights issues

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\(^{9}\) Pursuant to 28 U.S.C.A. § 1253 (1966), direct appeals to the Supreme Court are provided from decisions of three-judge district courts granting or denying an interlocutory or permanent injunction in any civil proceeding.

\(^{10}\) Justices Douglas, Brennan, Stewart, and Marshall joined in the White opinion.


\(^{12}\) Id. at 740.

\(^{13}\) See generally J. Hogan, The Schools, the Courts, and the Public Interest (1974), for an historical overview.

in the educational sphere, the state and its school boards have been acknowledged to have broad express or implied powers to adopt policies and regulations relating to student conduct. The reasoning under the due process test has been that the courts will not strike down any policy established by a state or its school boards which is reasonably calculated to effect and promote discipline within the school.

Prior to 1954 and Brown v. Board of Education, public education was almost exclusively considered to be a matter of state and local concern and a body of case law developed at the state level that permitted, if not actually sanctioned, educational policies and practices that failed to meet federal constitutional requirements. Traditionally, a court would view a particular school regulation to assure itself that reasonableness prevailed as a factor in the making of school law. A state or school board's treatment of its pupils carried a presumption of validity with the burden of proof on the complainant to establish the unreasonableness of the regulation or policy. The concept has evolved, however, that when a constitutional right is invoked, the burden is upon the state to justify the reasonableness of educational regulations or policies that infringe upon that right.

Since 1954 the courts have embarked upon a minimal supervision of public education. There has been a gradual infusion of constitutional standards into educational policies, practices and structures. Under traditional constitutional criteria in line with the due process test, the attack on a state sanctioned educational policy or regulation has generally involved two questions:

15 E.g., Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (cases generally recognizing a liberty right under the first and fourteenth amendments of a freedom to teach and a freedom to learn).
16 In Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969) (in which the Court recognized a student's protected right of symbolic expression under the first and fourteenth amendments) the Supreme Court stated: "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."
17 Compare Blackwell v. Issaquena County Bd. of Education, 363 F.2d 749 (5th Cir. 1966) with Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), where the court balanced a school regulation that prohibited the wearing of "freedom buttons" ("One man one vote SNCC") against the interference with the students' protected right of free expression on the basis of whether or not the buttons occasioned disruptive conduct.
20 See Pugsley v. Sellmeyer, 158 Ark. 247, 251, 252, 250 S.W. 538, 539 (1923), which upheld a school regulation which prohibited the wearing of talcum powder on the faces of female students.
21 Id. at 254, 250 S.W. at 539.
23 Id. at 509.
(1) whether the student has been unnecessarily denied a constitutionally protected right, and
(2) whether the policy or regulation is reasonable, and not arbitrary, as being pertinent to the operation and welfare of the educational process.

Therefore, it is deemed permissible to enforce appropriate standards of behavior provided that they are consistent with constitutional safeguards.

Until its decision in *Goss*, the Supreme Court only acknowledged first amendment rights to exist in the public schools, as incorporated by the force of the fourteenth amendment. The Supreme Court was hesitant to rely solely on the due process clause since any reasonable basis for a state sanctioned policy or regulation would defeat the application of the due process test. This hesitancy on the part of the Court was best expressed in *West Virginia State Board of Education v. Barnette*, wherein Jehovah's Witnesses challenged the constitutionality of a school board regulation that made a refusal to salute the flag grounds for expulsion from school. In delivering the opinion of the Court, Justice Jackson stated:

> [I]t is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.

Although the force of specific constitutional provisions strengthens the applicability of the due process clause, in a proper case the Supreme Court will recognize property or liberty interests to be protected by the due process clause alone.

Prior to *Goss*, only inferences could be drawn as to how the Supreme Court might rule upon the extent of due process rights to be accorded public school students. With *Dixon v. Alabama State Board*....

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24 E.g., *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (symbolic expression is protected as long as normal school functions are not disrupted); *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) (the states' right to prescribe public school curriculum does not "carry with it the right to prohibit on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment"); *West Virginia v. Barnett*, 319 U.S. 624 (1943) (a state cannot compel a student to pledge and salute the flag as a condition for access to public education where such compulsion would interfere with the student's intellectual or spiritual beliefs).


26 Id. at 639.

of Education,28 In re Gault,29 and Kent v. United States30 as a backdrop, increased emphasis was placed in the federal courts on the expansion of the judicial concern with individual rights to secondary school disciplinary cases by the means of the due process clause. In Goss, the due process rights of students expelled were not questioned.31 The distinction between a suspension and an expulsion was recognized.32 The Court attested that Dixon had been uniformly followed by the federal courts in making the due process clause applicable to decisions to remove a student from the public school for a period of time long enough to classify the removal as an expulsion.33 However, it appears to be due to conflicting decisions of the lower federal courts, regarding the extent to which due process rights were to be accorded suspended public school students, that the Supreme Court made its delineation of applicable due process guarantees.34

It was recently held in San Antonio Independent School District v. Rodriguez35 that while education is important, it is not a fundamental right explicitly or implicitly guaranteed by the federal constitution. Wielding this principle as a basis for their argument, the appellants in Goss contended that the due process clause did not attach to protect against suspensions from the public school system. The Court made use of a two-part analysis suggested in Board of Regents of State Colleges v. Roth36 in its approach to this issue: first, it determined whether the interests at stake were within the fourteenth amendment's protection of Discipline of Secondary School Students and Procedural Due Process: A Standard, 7 WAKE FOREST L. REV. 32 (1970); Comment, Procedural Due Process in Secondary Schools, 54 MARQ. L. REV. 358 (1971).

28 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (wherein the due process clause was held applicable to decisions made by a tax supported college to remove a student from the institution for a period of time long enough for the removal to be classified as an expulsion).
29 387 U.S. 1, 13 (1967). The Court described the due process to be accorded juvenile offenders with the statement that "whatever may be their precise impact neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."
30 383 U.S. 541, 555 (1966) (wherein the Court stated, "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness").
31 While OHIO REV. CODE ANN. § 3316.66 (Page 1972) provides in pertinent part in the case of an expulsion that, "[t]he pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board and shall be permitted to be heard against the expulsion..." no similar procedure is provided for a suspended student.
36 408 U.S. 564 (1972).
liberty or property and then it determined whether the nature of the interests were sufficient to cause procedural due process requirements to apply.

The Court in Roth had stated that property interests protected within the fourteenth amendment's due process clause "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules... that stem from an independent source such as state law...." Drawing upon the Roth definition, the Court in Goss recognized educational benefits to be a protected property interest where the state elects to "extend the right to an education" to its citizens by statute. Under this criterion, a citizen's entitlement to an education is to be protected by the due process clause. On the basis of Ohio Revised Code Sections 3313.48 and 3313.64, directing local authorities to provide a free education to all residents between five and 21 years of age, and Ohio Revised Code Section 3321.04, a compulsory attendance law, the Court established that the appellees were legitimately entitled to a public education. Under the Court's analysis, a right once created is not to be arbitrarily denied simply due to a charge of misconduct, as a procedural process must come into operation to substantiate the charge.

The Court based its decision not only upon a protected property interest, but also found a protected liberty interest in the appellees' reputations. Due to the damaging effect which sustained and recorded charges of misconduct can have upon a student's standing in his or her educational community and on later opportunities for higher education and employment, the Court held, under the authority of Wisconsin v. Constantineau, that the appellees had a liberty interest in their reputations which must be protected under the due process clause.

The appellants presented the argument, adopted by the dissenting

37 Id. at 577.
39 Ohio Rev. Code Ann. § 3313.48 (Page Supp. 1974) provides in pertinent part: "The board of education of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction...."
40 Ohio Rev. Code Ann. § 3313.64 (Page Supp. 1974) provides in pertinent part: The schools of each city, exempted village, or local school district shall be free to all school residents between five and twenty-one years of age.... School residents shall be all youth who are children or wards of actual residents of the school district. District of school residence shall be the school district in which a school resident is entitled to attend school free....
41 Ohio Rev. Code Ann. § 3321.04 (Page 1972) provides in pertinent part: "Every parent, guardian, or other person having charge of any child of compulsory school age.... must send such child to a school, which conforms to the minimum standards prescribed by the state board of education, for the full time the school attended is in session.... Excuses.... may be granted...."
43 400 U.S. 433, 437 (1971) wherein the Court stated: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."
opinion, that a state created entitlement to education is not protected by the due process clause unless the state subjects the student to a "severe detriment or grievous loss" of that entitlement. Suspensions from school, it was argued, do not assume constitutional dimensions. Applying the Roth test to determine whether due process requirements attached, the Court in Goss looked to the nature of the property interest in educational benefits, rather than the weight that interest had when balanced against the interests of the school system. Stressing the importance of the educational process, the Court concluded that a suspension for "more than a trivial period," clearly indicating even a one-day suspension, has a serious impact upon a child and that certain minimal requirements of due process must be accorded to the student.

In determining the nature of the minimum due process applicable to students facing suspension, the Court stated that "some kind of notice" and "some kind of hearing" is mandated. The concern of the Court appears to be to prevent unfair or erroneous exclusions from the educational process and consequential interference with a student's protected interests. As a general rule notice and a hearing are required prior to suspension. However, the Court's ruling allows immediate removal of a student from school where his or her presence endangers persons or property or threatens disruption of the academic process, with notice and a hearing to follow as soon as is practicable. Although not deciding nor construing the due process clause to require the school to afford the student an opportunity to secure counsel or to call and confront witnesses, the Court acknowledged by way of dicta that in longer suspensions, expulsions, or unusual situations, something more than the rudimentary procedures that the Court has detailed may be necessary.

Justice Powell, writing for the minority, dissented on the basis that although Ohio Revised Code Sections 3313.48, 3313.64, and 3321.04 create the educational entitlement, under the Roth rationale Ohio Revised Code Section 3316.66 "defines" the "dimensions" of the property interest. The contention was that the Ohio legislature, having created a property right amenable to the due process clause, may also protect or

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45 As authority for the "grievous loss" standard, the case of Joint Anti-Fascist Refuge Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) is cited.
47 Id. at 737.
48 Id. at 742 n.3 (Powell, J., dissenting).
49 Id. at 737.
50 Id. at 738.
51 Id. at 740.
52 Id. at 740, 741.
53 Justices Blackmun and Rehnquist, and Chief Justice Burger, joined in the Powell dissent.
limit the operation of that right when it is encompassed within an “entire package of statutory provisions.”\(^5\) Protesting that the majority ignored precedent in reaching its decision, the dissenting opinion cited *Tinker v. Des Moines School District*\(^5\) and *Epperson v. Arkansas*\(^7\) for the view that the states have traditionally broad based powers concerning the operation of their schools which are not incompatible with the individual interests of the student.\(^5\) The dissenting opinion further protested the majority’s intrusion of the due process clause into “routine classroom decisions.”\(^5\) Classifying a suspension as an inconsequential infringement upon a student’s interest in education, the minority expressed concern that the Court had entered into a “thicket” of judicial intervention into the operation of the educational process which would adversely affect the quality of education.\(^6\)

Despite the concern expressed by the minority in *Goss*, and although the Supreme Court there expanded the scope within which procedural due process is to be accorded to public school students, the Court has not abandoned its traditional due process approach to state sanctioned educational policies and regulations.\(^6\) Presumably on a case by case basis any reasonable legislation affecting public school students will be upheld wherever specific constitutional guarantees are not invoked. The Court has consistently denied review to public school haircut and appearance cases even though they are frequently couched in due process terms.\(^6\) Similarly, it appears unlikely that the *Goss* decision will have an immediate

\(^{55}\) Id. 
\(^{56}\) 393 U.S. 503, 507 (1969); see also note 13 supra. 
\(^{57}\) 393 U.S. 97, 104 (1968). 
\(^{59}\) Id. at 746. 
\(^{60}\) Id. at 747. 
\(^{61}\) In *Wood v. Strickland*, 95 S. Ct. 992, 1003 (1975) (an action for damages arising out of the expulsion of students who “spiked” punch at a school function in violation of a school regulation prohibiting the use of intoxicating beverages), which was decided after *Goss* was handed down, the Court held that a school board member enjoys a qualified immunity from liability for damages, under 42 U.S.C. § 1983, unless he knew or should have known that his official disciplinary actions would violate the constitutional rights of the student, or acted with malicious intent. The majority (White, J.) took the opportunity to reaffirm the traditional due process approach:

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school [citing *Tinker, Barnette* and *Goss*]. But § 1983 does not extend the right to litigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necessarily [sic] upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees [citing *Epperson* and *Tinker*].

\(^{62}\) See generally *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507, 508 (1969) (specifically exempting any relation which that case might have to the “regulation of the length of skirts or the type of clothing, to hair style or deportment. . . .”); *Olff v. East Side Union High School Dist.*, 404 U.S. 1042 (1972) (Douglas, J., dissenting); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.), cert. denied, 400 U.S. 850 (1970);
impact on the success of those cases which challenge corporal punishment or searches and seizures in the public schools. The Goss decision, however, is evidence that the Supreme Court is willing to extend constitutional protection to public school students in a proper case.

In perspective, Goss furthers the continuing erosion of the proposition that the constitutional rights of children are not co-extensive with those of adults. The concept that a public school student has interests which in a proper case may call forth the protection of the due process clause may promote the application and expansion of additional constitutional rights for minors. However, in continuing an assessment of the constitutional rights due to public school students, the courts appear destined to decide on a case by case basis.

While the Goss decision is not a "cure-all" for unjust and arbitrary suspensions of students from the public schools, it is to be expected that the requirements of procedural due process will at least curtail summary suspensions. Furthermore, the implication is that neither the Ohio school boards, nor the school boards in states similarly affected by the Goss decision, will be forced to seriously alter their administrative procedures in order to comply with the Supreme Court's mandate. The Court itself states, "we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions." Despite the minimal requirements involved in according due process, problems remain. Recent events indicate that disciplinary suspensions have been meted out for reasons which may appear upon their face to be arbitrary and unreasonable. These include suspensions based solely on race, under the guise of suspensions for truancy, and the increasing extent of reliance upon the right to suspend.


64 See generally Freels, Search and Seizure in the Public Schools, 11 Houston L. Rev. 876 (1974); Buss, The Fourth Amendment and Searches of Students in Public Schools, 59 Iowa L. Rev. 739 (1974).


67 See Washington Post, Jan. 17, 1975, at C-1, which reported that the NAACP Legal Defense and Educational Fund has filed suit alleging that disproportionate suspension figures in Prince George's County Schools present a pattern of racial discrimination in discipline. The news article states in pertinent part:

In past years, about one-third of those students suspended were suspended for truancy,.... At Benjamin Tasker Jr. High, for example, where 65.9 percent of the students suspended in 1972-73 were blacks, 71 per cent of the students suspended last year [1973-74] were blacks. Blacks make up 14 percent of the school's population.

68 See Goss v. Lopez, 95 S. Ct. 729, 745 n.10 (Powell, J., dissenting) (which makes reference to various suspension statistics contained in amicus briefs).
Now that they are under the scrutiny of the courts for the purposes of guaranteeing procedural due process, public schools presumably will be more cautious to avoid arbitrary and unreasonable deprivations of educational benefits. It is foreseeable however, that many more student rights cases will be brought into the courts on due process grounds.

Curiously, the Court places greater emphasis on a student's property interest in educational benefits than on a student's liberty interest in his or her reputation as calling forth the protection of the due process clause. The Court's rationale appears to be based on the idea that although a property interest in educational benefits is inherent wherever a state has enacted a compulsory education statute, a liberty interest in reputation may not be as clearly evidenced. In contrast to the property interest, the liberty interest in reputation is abstractly defined. Additionally, in any particular case the liberty interest in reputation may be safeguarded by the fact that the suspension resulting from charges of misconduct is not recorded, or that legislative enactments allow the parent or student to challenge the contents of such school files. However, if the liberty interest in reputation is to be as broadly construed as the Court appears more inclined to view it, an unconstitutional denial of an educational benefit which other students enjoy may be found. Wherever a student is deprived of an education for any period of time on charges of misconduct without procedural due process, when the charges could seriously damage the student's standing with fellow students and his teachers, an unconstitutional denial under the liberty interest may be in evidence.

The Goss decision fails to answer the question whether a public school student is entitled to due process prior to suspension, or as soon as is practicable thereafter, in the absence of a state compulsory education statute. The obvious answer under the Court's rationale appears to be that there can be no property interest in educational benefits without a state compulsory education statute and that a right under the due process clause to notice and a hearing could not be invoked. The question is not without merit. For example, Mississippi has neither constitutional nor statutory mandatory provisions for public education. It is arguable that in a case similar to Goss arising in such a state a liberty interest in reputation alone

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69 See, e.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972) ("In a constitution for a free people there can be no doubt that the meaning of 'liberty' must be broad indeed.").
70 E.g., Education Amendments of 1974, Pub. L. No. 93-380, 513, 88 Stat. 484 (Aug. 21, 1974) (parents and students are allowed access to certain public records under specific circumstances and may challenge the content of such records before they are released to employers or other schools).
72 Mississippi's statutory provisions which mandated public education were encompassed within Miss. Code Ann. § 6509, 6510, 6512-6517 (1942), but were repealed by ch. 288 of the 1956 session laws.
may be enough to invoke the minimal due process requirements of the
fourteenth amendment before a student may be suspended from a
public school on charges of misconduct.

Having expanded the *Roth* rationale to its logical limits, the Supreme
Court in *Goss* lends further authority to the proposition that governmental
infringement of any property interest granted by state law which is not
de minimus may, in a proper case, come under the protection of the due
process clause.73 However, the primary impact of the *Goss* decision is that
the courts are now in agreement that education is a property interest
protected under the due process clause of the fourteenth amendment. Thus,
a person cannot be arbitrarily deprived of an education, wherever the
right to that education is secured by a state compulsory attendance statute.
The Supreme Court appears to have gone as far as it can without
overruling *Rodriquez*74 and declaring education to be a fundamental right
protected by the United States Constitution.

GLENN W. SODEN

WRONGFUL DEATH: FETAL RIGHTS—CAUSE
OF ACTION GRANTED FOR FETAL DEATHS
UNDER WRONGFUL DEATH STATUTE

_Eich v. Town of Gulf Shores_, 300 So. 2d 354 (Ala. 1974)

A WRONGFUL DEATH ACTION, *Eich v. Town of Gulf Shores,*1 was decided
as a result of an automobile accident that occurred on March 2,
1974, near the small Alabama town of Gulf Shores. Although the facts
of the incident were not fully recounted, it appears that the plaintiff, who
was eight and one-half months pregnant at the time,2 was struck
by a negligently operated city police car and severely injured. Although plaintiff
recovered from her injuries, the child did not and was stillborn.3 Mrs. Eich
then sued, seeking damages for the death of the unborn child and basing
her action on an Alabama wrongful death statute, entitled "Suits for
injuries causing death of minor child."4 That statute reads in relevant

73 _E.g._, _Arnett v. Kennedy_, 416 U.S. 134 (1974), at 164 (Powell, J., concurring), and
at 171 (White, J., concurring and dissenting); _Connell v. Higginbotham_, 403 U.S. 207

74 _411 U.S. 1_, 35-36 (1973), and at 110-17 (Marshall, J., dissenting).

1 300 So. 2d 354 (Ala. 1974).

2 _Id._ at 355.

3 _Id._

4 The defense of governmental immunity had been waived. _Id._ at 355 n.1.

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When the death of a minor child is caused by the wrongful act, or omission, or negligence of any person...the mother...may sue...."

The trial court dismissed the case, and the appeals court affirmed, holding that the term "minor child" cannot be construed to include children yet unborn. The Alabama Supreme Court did not agree however, and in Eich v. Town of Gulf Shores held that a cause of action for prenatal wrongful death does exist under the Alabama statute.

In so holding, the Alabama Supreme Court joins a growing number of courts that have broadened judicial construction of wrongful death statutes, to allow the prosecution of wrongful death actions in cases involving fetal deaths. In this respect Eich is not unique. However, the rationale used to support this decision is unique and appears highly unsatisfactory.

Perhaps the most widely recognized rule of statutory construction is that statutes in derogation of the common law are to be strictly construed, and wrongful death statutes are in derogation of the common law rule that a cause of action in tort dies with the victim. In examining the statute relied upon in Eich it would seem apparent that the result should turn upon the meaning of the term "minor child." Should it be construed so as to include a fetus? The defendant argued that selection of this term indicated legislative intent to limit the cause of action granted to children born alive, and pointed for support to the decisions of other courts construing similar language, which have held that fetal deaths are not encompassed by such language, and that only the legislature can properly extend a wrongful death statute to include such a cause of action.

The Eich court was unimpressed, however, stating that "it is often necessary to breathe new life into existing laws less [sic] they become stale and shelfworn," and asserting that it felt responsibility to "insure the necessary growth of the law in this vital area." Thus, having stated its

6 300 So. 2d 354, 355 (Ala. 1974).
7 Id.
12 300 So. 2d 354, 357 (Ala. 1974).
13 Id.

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objective the court proceeded to justify its granting a cause of action in this case, without ever touching directly upon the central issue, i.e., the true meaning of the term “minor child” in the context of the statute at hand.14

To justify this action the court pointed to the underlying purpose of the statute which was perceived as being the preservation of human life through the punishment of wrongdoers, rather than the awarding of compensation to survivors.15 According to the court, damages recoverable under the wrongful death statute “are entirely punitive and are based on the culpability of the defendant and the enormity of the wrong, and are imposed for the preservation of human life.”16

By emphasizing this retributive purpose the court was able to resolve what it felt was an inconsistency under prior law whereby recovery was allowed where injury occurring during pregnancy caused the death of a child after a live birth, but was denied where the injury caused the immediate death of the fetus.17 The court pointed out that to deny recovery in Eich “would only serve the tortfeasor by rewarding him for his severity in inflicting the injury.”18 The prospect of punishing a tortfeasor in a situation where the child was born alive, but subsequently died because of the injury, and denying a cause of action where the wrongful act prevented live birth so impressed the court that it considered itself compelled by “logic, fairness and justness” to recognize a cause of action for prenatal wrongful deaths.19

Although recognizing such a cause of action may lead to a just result, basing this result on a theory of retribution presents certain problems. One such problem was raised in the dissenting opinion. The homicide statutes of Alabama, which also have as their purpose the preservation of human life, have been construed so as to prevent the conviction for murder or manslaughter of a person who has killed a fetus that was stillborn.20 The rationale behind this interpretation of the homicide laws is the axiom that one cannot kill someone who is already dead.21 This inconsistency between interpretations of the wrongful death statute and the homicide statute22 is

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15 The inapplicability of the concept of compensatory damages with respect to the Alabama death statutes was determined in 1912 in Louisville & Nashville R.R. v. Bogue, 177 Ala. 349, 58 So. 392 (1912).
17 300 So. 2d 354, 355 (1974).
18 Id.
19 Id.
21 Id. at 378.
22 This inconsistency can also occur under Ohio law. The Ohio wrongful death statute, OHIO REV. CODE ANN. § 2125.01 (Page 1968), allows recovery for a stillborn child as shown by Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959). However, under the Ohio vehicular homicide statute, OHIO REV. CODE ANN. § 2903.06 (Page
particularly troublesome because, logically, the punitive purpose behind a homicide statute should a fortiori be stronger than for a wrongful death statute, especially with respect to homicides that involve a willful or malicious destruction of life.

Another problem left open by the Eich court's reliance upon a theory of retribution is precisely when the state's interest in the life of a fetus begins for purposes of applying the wrongful death statute. If the Eich court had squarely faced the problem of defining a "minor child" under the statute, the problem of determining when the state's interest begins would have been resolved. However, since according to the Alabama Supreme Court wrongful death damages are to be determined solely "by reference to the quality of the tortious act," the implication is strong that the life rights of a fetus, for purposes of applying the statute, emerge at the moment of conception. If the emphasis is truly to be placed on the punishment of those who interfere with potential human life, then it can be argued that the same standard for recovery employed in an action involving an eight and one-half-month-old fetus should be used in an action involving a recently fertilized egg. But, if this be the case, how would the court handle the complicated problems of proving causation that would surely ensue?

Apparently, the Alabama Supreme Court would recognize a wrongful death action in the case of a fetus that is considerably younger than eight and one-half months, since the Eich opinion contains references to a state interest in fetal deaths at earlier stages of pregnancy. In particular, the court pointed out a provision of Alabama law requiring that a "death certificate must be registered for all fetal deaths where the fetus was advanced to or beyond the twentieth week of uterogestation," as expressive of a public interest in fetal deaths. In addition, the Eich court cited the decision of the United States Supreme Court in Roe v. Wade for the proposition that "a potential future human life is present from the moment of conception and the state's interest and general obligation to protect life thus extends to prenatal life."

It would appear from a close reading of Roe v. Wade that the Eich court's reliance on this case for direct support is somewhat shaded for the 1973 Special Supplement), there was no conviction for killing an unborn fetus, since the unborn fetus was held not a "person" in State v. Dickinson, 23 Ohio App. 2d 259, 263 N.E.2d 253 (1970). 23

24 The practical problems of proving causation increase dramatically with less developed fetuses. However, as the Eich court points out, modern technology has made it easier to prove the cause of death through the testimony of expert witnesses. 300 So. 2d at 358.


27 300 So. 2d 354, 357 ( Ala. 1974).
Supreme Court, when referring to the legitimacy of recoveries in wrongful death actions for fetal deaths, spoke in terms of actions to "vindicate the parents' interest" in the loss of the potential child. The court in Eich, on the other hand, was not necessarily concerned with the personal loss to the parents, but rather was concerned with the culpability of the tortfeasor and the use of punishment as a means to promote the preservation of human life.

Nevertheless, there appears to be no direct conflict between the result in Eich, and the Roe holding that a state may not outlaw abortion during the first trimester of pregnancy. In Roe v. Wade states were restrained from regulating abortions in the first trimester of pregnancy because the mother's right to privacy was considered to outweigh the state's interest in preserving fetal life. While the state must subordinate its interest in the preservation of human life in the first trimester of pregnancy when confronted with the mother's right to privacy, the state would not appear to be precluded from asserting this interest as against a third party tortfeasor. Consequently, there would seem to be no reason why Eich and Roe need interfere with one another, since in the case of the tortfeasor there is no countervailing interest equal to a mother's right to privacy.

Although the retributive rationale of Eich need not conflict with abortion decisions, the traditional civil law rule on punitive damages raises one further problem. In Kelite Products v. Binzel, the United States Court of Appeals for the Fifth Circuit, in applying this rule, summarized the Alabama cases on punitive damages and noted: "To subject a wrongdoer to punitive damages, the jury must find that he acted with actual malice... or conscious disregard of consequences to others." It was thus recognized that something more than the mere commission of a tort is necessary for an award of punitive damages.

Therefore, it seems strange that the concept of punitive damages should be applied to an ordinary case of vehicular negligence simply because an action is brought under a wrongful death statute on behalf of a decedent. Nor does it seem proper to base such a result on the theory that a reasonable man would be "doubly careful toward a woman who is obviously pregnant." Certainly the potential tortfeasor in an accident involving two or more vehicles is most often not in a position to discern the maternal condition of potential victims. Thus, it would seem that no matter how compelling the equities in favor of allowing a cause of action for a fetal death under a wrongful death statute, the theory of retribution set forth in Eich does not provide a proper basis for such a cause of action.

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29 Id. at 163.
30 224 F. 2d 131 (5th Cir. 1955).
31 Id. at 143.
As alluded to earlier, other courts faced with similar issues have achieved like results without resorting to the *Eich* court's questionable and confusing reliance on a punitive rationale. The majority of such courts have straightforwardly ruled that the language of the statute involved does include a fetal death, basing that decision on the rationale that the statute is compensatory in nature, and the survivor has as much right to compensation for a life prevented, as for a life lost.

Furthermore, these courts have presented identifiable guidelines for recovery bearing upon the problem of proving causation, by ruling that wrongful death actions should result in recovery only in cases where prenatal death had been inflicted on a fetus that was viable (capable of life outside the womb) at the time of the injury. The rationale is that the probability of continued survival once this stage of development is reached is great enough to outweigh lack of proximate cause arguments based upon the probability of miscarriage or other natural causes of stillbirth.

Basing recovery on viability of the fetus at the time of the injury has been viewed as a convenient answer to the troublesome hypothetical first mentioned in *Stidam v. Ashmore*, wherein an Ohio Court of Appeals posed the situation of twins who are wrongfully injured during pregnancy whereupon the one born alive and who subsequently dies is allowed recovery, but the one stillborn is denied recovery. Presumably, if viability was the only factor determining recovery, the death of both twins would result in recovery.

Indeed, the viability concept provides a rational demarcation point for courts faced with the issue of when a fetus is to be recognized as a person in any context. As a matter of law, a court can readily draw the line between recovery and no recovery when it is determined that a

33 See cases cited note 8 supra.


36 See cases cited notes 8 & 34 supra.


38 See cases cited note 35 supra.
particular fetus was not viable at the time of injury. If the determination of viability was not made at the trial level, a higher court may remand a case for an examination of a fetus' ability to live independently of its mother at the time of the injury.

As pointed out by the Supreme Court of Oregon in *Libbee v. Permanente Clinic,* the United States Supreme Court's abortion decision in *Roe v. Wade* contains important language bearing on the role of the viability concept in determining the rights of a fetus:

... a fetus is not a "person" for the purpose of the Fourteenth Amendment of the Constitution of the United States ... after a fetus has become "viable" a state may prohibit abortion altogether, except those necessary to preserve the life or health of the mother and ... "State regulation protective of fetal life after viability ... has both logical and biological justification."

Perhaps the greatest difficulty stemming from the *Eich* decision is its failure to explain why the viability concept, with its "logical and biological justification," should have no bearing even as to a wrongful death statute that is based solely on a punitive purpose.

Not only does recognition that the Alabama statute has "always been held to be punitive only" obscure application of the widely accepted viability concept, but it runs contrary to the fundamental concept of tort law that instead of directing punishment against a wrongdoer, it is more important to provide "compensation to an innocent plaintiff for the loss that he has suffered."

It would seem that the punitive nature of the Alabama statute is purely a product of judicial construction, since a simple reading of the statute reveals that it is phrased in much the same language as is used in the wrongful death statutes of states that adhere to the compensation concept. In light of the principle that punitive damages should be awarded only where there is actual malice or its equivalent, the concept of punitive damages should logically apply only under a wrongful death statute that provides for separate causes of action that distinguish between purely negligent killings and wanton or intentional killings. Without such

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42 410 U.S. 113 (1973).
44 300 So. 2d 354, 356 (Ala. 1974).
a distinction justification of an award based on compensatory damages becomes logically compelling.

Even the court in Eich could not completely divorce itself from the concept of compensatory damages, for in countering defendant's argument that allowance of a wrongful death action in cases involving fetal deaths would make for a double recovery, the Alabama court referred to the existence of an injury to two different persons, but pointed out that the plaintiff should be given relief for her physical and mental injuries, and punitive relief "derived through her right to maintain the wrongful death action for the loss of her minor child." 47 (Emphasis added.)

Such language clearly indicates an intent to compensate the survivor; and, for the reasons outlined above, it appears that a less confusing result and more justifiable opinion would have resulted from a formal recognition of the compensatory concept in Alabama wrongful death statutes.

It should be pointed out, however, that adoption of the compensatory standard, in and of itself, does not solve the problem of the amount of damages that should be awarded for fetal deaths in an action based upon a wrongful death statute. This problem has so perplexed a few courts that they have simply denied recovery on the ground that the wrongful death damages are too speculative. 48

Perhaps the most ingenious attempt to measure the monetary loss occasioned by the death of a fetus is presented by the Federal Court of Appeals for the Third Circuit in Gullborg v. Rizzo. 49 There the court adopted an elaborate formula by which monetary damages were arrived at by subtracting the anticipated maintenance expenses of the child from the present value of the child's prospective earnings for the balance of its life expectancy after the age of 21. 50 Pursuant to this formula the court determined from actuarial tables that a female child would have 53 years of earning capacity and that a jury award of $5,000 or even $10,000 for the loss of a fetus was not excessive. 51

Other less adventuresome courts might well conclude, as the Oregon court in Libbee v. Permanente Clinic, 52 that a recovery should not be limited to the pecuniary value of the lost child's life, but rather should simply reflect the "value of life lost."

47 300 So. 2d 354, 358 (Ala. 1974).
50 331 F.2d at 560.
51 Id. at 561.
Perhaps this disparity could be resolved by turning away from the wrongful death statutes themselves as the vehicle through which such awards are delivered. As long as courts are “breathing” into the law why not cast the wind in another direction and recognize that the reason a mother should be allowed a recovery beyond her immediate physical and mental pain and suffering is because she has suffered a very special kind of loss—one that goes beyond ordinary concepts of pain and suffering.

If one were actually to make a serious attempt to quantify such a loss for the purpose of making a monetary award, the best place to start would be considering that in spite of the many thousands of dollars that a child costs its parents during its years of dependency, the value of the child to its parents must be an amount even greater, for if this were not true, parents given the choice would not elect to have children in the first place. Exactly how much more children are worth than their “maintenance cost” is anybody’s guess. At any rate, it hardly seems likely that the answer to this question is any more difficult than the determination of how much money allows for an adequate punishment under a theory of wrongful death.53

In any case the question will be further complicated by the possibility that the fetus, had it been left unharmed, might not have been born alive in any event. Naturally, the older the fetus is, the more likely it is to survive. This factor is no doubt responsible for decisions that allow recovery only if the fetus was viable when the injury occurred.54 However, the difficulty with the viability theory is that undoubtedly a great number of fetuses that are killed before they become viable could have reached a live birth. Thus, a Georgia court of appeals, recognizing that the viability point does not fully account for the potential for live birth inherent in most fetuses at earlier stages of development, has allowed recovery for death caused at any time after a fetus has become “quick” or capable of movement.55

It seems logical that if a court is willing to go this far, it could allow recovery for any death from the moment of conception and permit the technical difficulties of proof of causation to weed out claims for the wrongful killing of fetuses only a few days or weeks old. Consequently, if the age of the fetus is to have any bearing at all, it stands to reason that it should simply be another factor to consider in assessing damages. All other factors being equal, it seems logical that the younger fetus, being less capable of surviving independently of its mother and thus being subject to a greater risk of nonsurvival, should be the subject of a lesser award.

53 Consider what amount of money is proper to punish a motorist whose negligent making of a left-hand turn causes the death of a fetus he did not know existed in the womb of a woman riding in a car he did not see until after the accident occurred.
54 See cases cited note 35 supra.
55 The court in Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100, 102 (1955), recognized that the question of whether a fetus was “quick” is one for a jury. In this case a fetus was deemed “quick” after only 1½ months of pregnancy.
Whatever the method used to calculate the monetary loss engendered by the killing of a fetus, it is the loss itself, however elusive to define, coupled with the fact that the tortfeasor has caused this loss, that should serve as the basis for recovery. To the extent that the decision in Eich allows recovery in a wrongful death action where a tortfeasor has caused a mother to suffer this special kind of loss, the decision is just and logical. But, it is hoped that other courts facing this issue will reach their result in a more acceptable manner.

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