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CRIMINAL CODES: KENTUCKY AND OHIO

By James K. Gaynor*

I. INTRODUCTION

Kentucky and Ohio have completely revised their criminal codes. The Ohio Criminal Code, adopted in December 1972,1 became effective January 1, 1974, except for a few provisions which became effective in March 1973. The Kentucky Penal Code was approved in March 1972.2 It will not become effective until July 1, 1974, so that the General Assembly may consider changes. Many proposed changes have been submitted for consideration.3

These states join more than a dozen others which in recent years have completely revised their laws of criminal offenses. A bill now is under consideration to revise the federal law of criminal offenses which is included in title 18 of the United States Code, but its adoption is not expected in the immediate future.4

The purpose here is to discuss, in somewhat generalized form, the new criminal codes of Kentucky and Ohio, and to compare their provisions with the laws which they replace.

II. BACKGROUND

Kentucky's substantive criminal laws have never been the subject of a complete revision but have simply developed over the years, generally following the common law.

The Kentucky General Assembly in 1968 ordered a study and revision of the commonwealth's criminal laws and this task was undertaken by two groups, the Kentucky Crime Commission and the Legislative Research Commission. At first they acted independently but in November 1971 issued a final report acting jointly.5

The present Ohio Revised Code was adopted in 1953 but this was a revision of the entire code without particular attention to individual subjects to the extent found in the new Criminal Code.

* B.S., J.D., Indiana University; LL.M., S.J.D., The George Washington University; Colonel, United States Army Retired; Professor of Law, Northern Kentucky State, Salmon P. Chase College of Law.

1. Amended House Bill No. 511, filed in the office of the Secretary of State on December 22, 1972.
2. 1972 HB 197, approved March 27, 1972.
3. Reproduction of the enactment, with proposed changes, issued by the Legislative Research Commission, December 1972.
4. A committee print of the Senate Committee on the Judiciary, unnumbered, was widely circulated after its issuance November 10, 1972. References herein to the proposed federal code will be to this committee print.
The new Ohio revision had its genesis with a House Resolution of the General Assembly adopted in June 1965. A Technical Committee was appointed which was assisted by the Legislative Service Commission. A final report of the Technical Committee was issued in March 1971.\(^6\) It gives the background of each new section, but in using this for legislative history, it will be found that some of the proposed sections are deleted from the enactment and others are inserted.

The new Kentucky Penal Code states that the Commentary published in November 1971 may be used as an aid in construing the provisions of the code in the event of ambiguity.\(^7\) The numbering scheme in the Commentary is different from that found in the enactment.

II. FORMAT

One of the most striking features of the new Kentucky Penal Code is the enumeration of the sections. The present code defines crimes in chapters 432 through 438 beginning with KRS 432.010. The new code will define them in chapters 433, 434, and 435, but the first two of these chapters are subdivided.

An example of the new citation is that of the statute of limitations which will be found in KRS 433A.1-050. An inquiry to a staff member of the Legislative Service Commission indicated that the scheme may be changed to that used in the remainder of the Kentucky Revised Statutes, but he cited as precedent the Insurance Code adopted in 1970 which begins with KRS 304.1-010.

The numbering scheme of the new Ohio code will follow that used throughout the Revised Code, the criminal provisions beginning with R.C. 2901.01.

If the bill to revise federal criminal law is enacted in the form now under consideration, the numbering scheme will be even more complicated. Presently, murder is prohibited by 18 U.S.C. § 1111. Under the proposal which has been circulated, it being under 18 U.S.C. § 2-7B.1\(^8\)

IV. CLASSIFICATION OF OFFENSES

Under the common law, offenses were classified as treason, felonies, and misdemeanors. In America, treason is defined by the Constitution of the United States\(^9\) and by the constitutions of some of the states. It is considered the most serious of the felonies.

The Model Penal Code prepared by the American Law Institute, which has not been adopted by any state but studied by those which have enacted penal codes in recent years, classifies offenses as felonies, misdemeanors, petty misdemeanors, and violations.

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\(^7\) Supra note 5.

\(^8\) Supra note 4.

\(^9\) Art. III, § 3.
Present Kentucky and federal laws and former Ohio law define a felony as an offense which may be punished by death or imprisonment in a penitentiary, and a misdemeanor as any other offense. Under the new Kentucky and Ohio codes, there will be various degrees or classes of felonies and misdemeanors.

Both Kentucky and Ohio formerly had minimum and maximum authorized sentences for felonies, and this is continued, although more discretion as to the minimum is given the trial court in Ohio. Present federal law and that of some of the states provide a maximum punishment but no minimum punishment for most offenses.

Presently, the criminal laws of Kentucky and the federal government and formerly Ohio law provide the authorized punishment in the section which prohibits the conduct. Under the new Kentucky and Ohio codes, a section prohibits conduct and then states the degree or class of felony or misdemeanor which it constitutes. One must look elsewhere in the code to determine the authorized punishment.

Kentucky will provide four classes of felonies, two classes of misdemeanors, and an offense known as a violation. The punishment for felonies is as follows:

- Class A felony, death or life imprisonment for some offenses, twenty years to life imprisonment for others.
- Class B felony, ten to twenty years of imprisonment.
- Class C felony, five to ten years of imprisonment.
- Class D felony, one to five years of imprisonment.

A fine may be imposed for a felony in double the amount gained, or not to exceed $10,000, which ever is the greater, if the felon is granted probation or conditional discharge.

The punishment for misdemeanors is as follows:

- Class A misdemeanor, maximum of twelve months of confinement and a maximum fine of $500.
- Class B misdemeanor, maximum of ninety days of confinement and a maximum fine of $250.
- Violation, maximum fine of $250.

Under the new Ohio code, one convicted of aggravated murder shall be punished by death or imprisonment for life, and he may be fined a maximum of $25,000. The penalty for murder is an indefinite term of confinement of fifteen years to life.

Penalties for other felonies under the new Ohio code are as follows:

First degree felony, four, five, six, or seven years to twenty-five years of imprisonment, and a maximum fine of $10,000.

Second degree felony, two, three, four, or five years to fifteen years of imprisonment, and a maximum fine of $7,500.

Third degree felony, one, one and a half, two, or three years to ten years of imprisonment, and a maximum fine of $5,000.

Fourth degree felony, one-half, one, one and a half, or two to five years of confinement, and a maximum fine of $2,500.

It has been explained that the multiple minimum sentences have been provided to give the trial court more discretion so that if there are two or more jointly accused persons, the court may provide one minimum for one accused and a different minimum for another. 15

The misdemeanor penalties under the new Ohio code 16 are as follows:

First degree misdemeanor, maximum confinement of six months and a maximum fine of $1,000.

Second degree misdemeanor, maximum confinement of ninety days and a maximum fine of $750.

Third degree misdemeanor, maximum confinement of sixty days and a maximum fine of $500.

Fourth degree misdemeanor, maximum confinement of thirty days and a maximum fine of $250.

Minor misdemeanor, a maximum fine of $100.

The proposed revision of federal criminal law would provide five classes of felonies, a misdemeanor, and a violation. 17

V. PARTIES TO A CRIME

At common law, anyone connected with treason was treated as a principal. There were four classifications of parties to a felony: (1) A principal in the first degree was the perpetrator, or the one who committed the crime. (2) A principal in the second degree was one who aided or abetted in the commission of an offense but did not actually commit the act. (3) An accessory before the fact was one who incited another to commit an offense. This would be the modern offense of solicitation. (4) An accessory after the fact was called the protector. Under modern statutes, he might be guilty of misprison of a felony. In the case of a misdemeanor, all were punishable as principals except the protector, and he was not punishable. 18

The new Kentucky code is not intended to change existing law as to the parties to a crime. 19 Existing law generally follows the common law

15. Supra note 6 at 286.
17. Supra note 4, § 1-4B1.
19. Supra note 5 at 30.
but has been judicially interpreted many times. The new code provides that a person is guilty of an offense committed by another if he solicits, commands, aids, counsels, agrees to aid, or attempts to aid in commission of a crime or if, having a legal duty to prevent commission of an offense, he fails to make a proper effort to do so.

Former Ohio law provided that one who aids, abets, or procures another to commit an offense may be prosecuted as a principal offender, but solicitation to commit an offense was not a crime except in specific instances such as soliciting a bribe or soliciting money from a convict on a promise to obtain a pardon. The provision relating to aiding, abetting, or procuring one to commit a crime has not been modified by the new Ohio code.

VI. INCHOATE CRIMES

Under the classification of “Inchoate Crimes,” the new Kentucky code clarifies the law of criminal attempts, solicitation, conspiracy, and facilitation, which usually is called aiding and abetting.

Present Kentucky law has a general statute relating to an attempt to commit a crime, and numerous statutes creating crimes involving particular attempts. There is no statutory provision for the offense of solicitation although it has been suggested that it exists as a common-law crime. There are two different ways in which conspiracy may be charged: under a statute, or as a common-law offense. There are numerous statutes relating to criminal facilitation.

The new Kentucky code brings this body of law together in ten sections and in the case of a criminal attempt or a conspiracy, the defense of renunciation is provided.

Former Ohio law had no general conspiracy prohibition although there were several provisions relating to particular conspiracies.

20. E.g., In Moore v. Commonwealth, 282 S.W. 2d 613 (Ky., 1955), it was held that mere acquiescence in the criminal act without cooperation in its commission is insufficient to constitute one an accomplice.


22. OHIO REV. CODE ANN. § 1.17 (Banks-Baldwin, 1965).

23. OHIO REV. CODE ANN. § 2917.01 et seq. (Banks-Baldwin, 1965).

24. OHIO REV. CODE ANN. § 2917.03, 2917.11 (Banks-Baldwin, 1965).


30. Supra note 5 at 91.


32. KENTUCKY REV. STATUTES ANN. § 433D.1-060 (Commonwealth of Kentucky, 1971).

33. Supra note 6 at 242.
was no general provision relating to attempts but there were prohibitions against attempting to commit some acts.\textsuperscript{34}

The new Ohio code does not have an all-embracing conspiracy provision as does the new Kentucky code, but in Ohio it is a crime to conspire to commit aggravated murder, murder, kidnapping, compelling prostitution, promoting prostitution, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, or the felonious unauthorized use of a vehicle.\textsuperscript{35}

The new Ohio code includes a general provision relating to an attempt to commit an offense,\textsuperscript{36} and although it was not included in the Technical Committee's draft, there is a provision which prohibits soliciting, procuring, aiding, or abetting the commission of an offense.\textsuperscript{37}

\textbf{VII. LIMITATION OF ACTIONS}

The present Kentucky law provides no statute of limitations for a felony, but a misdemeanor must be tried within one year.\textsuperscript{38} The new code is in substantially the same language but adds a subsection relating to a continuing act as constituting a crime.\textsuperscript{39}

Ohio did not have a statute of limitations for a felony, but a misdemeanor had to be tried within three years\textsuperscript{40} with three exceptions: a prosecution for betting on an election,\textsuperscript{41} or maliciously opening another's fence\textsuperscript{42} must have been begun within a year, and a prosecution for the use of profanity must have been begun within ten days.\textsuperscript{43}

The new Ohio code provides no limitation for aggravated murder, six years for any other felony, two years for a misdemeanor, and six months for a minor misdemeanor.\textsuperscript{44} The new code also provides that the period shall not run while the \textit{corpus delicti} of the offense is undiscovered, or while the accused absents himself from the state to avoid prosecution.\textsuperscript{45}

\textbf{VIII. COMMON LAW OFFENSES}

The present Kentucky code recognizes common law offenses\textsuperscript{46} but they are specifically abolished by the new code.\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{34} Id. at 245.
\item \textsuperscript{35} \textit{Ohio Rev. Code Ann.} § 2923.01 (Banks-Baldwin, 1971).
\item \textsuperscript{36} \textit{Ohio Rev. Code Ann.} § 2923.02 (Banks-Baldwin, 1971).
\item \textsuperscript{37} \textit{Ohio Rev. Code Ann.} § 2923.03 (Banks-Baldwin, 1971).
\item \textsuperscript{38} \textit{Kentucky Rev. Statutes Ann.} § 431.090 (Banks-Baldwin, 1963).
\item \textsuperscript{39} \textit{Kentucky Rev. Statutes Ann.} § 433A.1-050 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{40} \textit{Ohio Rev. Code Ann.} § 1.18 (Banks-Baldwin, 1965).
\item \textsuperscript{41} \textit{Ohio Rev. Code Ann.} § 2915.08 (Banks-Baldwin, 1965).
\item \textsuperscript{42} \textit{Ohio Rev. Code Ann.} § 2909.08 (Banks-Baldwin, 1965).
\item \textsuperscript{43} \textit{Ohio Rev. Code Ann.} § 2923.16 (Banks-Baldwin, 1965).
\item \textsuperscript{44} \textit{Ohio Rev. Code Ann.} § 2901.13 (Banks-Baldwin, 1971).
\item \textsuperscript{45} Id.
\item \textsuperscript{46} \textit{Kentucky Rev. Statutes Ann.} § 431.070 (Banks-Baldwin, 1963).
\item \textsuperscript{47} \textit{Kentucky Rev. Statutes Ann.} § 433A.1-020 (Commonwealth of Kentucky, 1971).
\end{itemize}
Ohio abrogated common law offenses by statute in 1806, and the new code reaffirms this in stating that no conduct constitutes an offense against the state unless defined as an offense by statute.

IX. CAPITAL PUNISHMENT

Kentucky and Ohio have had statutes authorizing the death penalty. Since the Supreme Court of the United States held in Furman v. Georgia that the death penalty is cruel and unusual punishment under some circumstances, these provisions no longer are valid. The Court of Appeals of Kentucky and the Supreme Court of Ohio have so held.

After the new Kentucky code had been enacted, an amendment was proposed to change the death-penalty provision in the light of Furman v. Georgia. It resembles the new Ohio provision.

Under the new Ohio code, the death penalty may be imposed for capital murder. The provision as enacted differs considerably from the final committee draft since the General Assembly had the opportunity to endeavor to conform with the rule of Furman v. Georgia.

Capital murder under the new Ohio code is either of two things. It is causing the death of another purposely and with prior calculation or design, or killing another under the felony-murder doctrine. Ohio thus retains the felony-murder doctrine, but it is not presently applicable in Kentucky nor will it be under the new code.

The new Ohio code defines the felony-murder doctrine as killing another while committing, or while fleeing immediately after committing or attempting, enumerated serious offenses: kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

The Supreme Court has held that under the former felony-murder statute in Ohio, the offense was committed if two or more persons were jointly committing a felony and while in flight, a short distance from the scene of the crime, one of the felons killed a person. There is no Ohio precedent for the more difficult problem of whether it applies if the

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48. Supra note 6 at 24.
49. OHIO REV. CODE ANN. § 2901.03 (Banks-Baldwin, 1971).
51. OHIO REV. CODE ANN. § 2901.01 (Banks-Baldwin, 1965).
52. 408 U.S. 238 (1972).
55. OHIO REV. CODE ANN. § 2929.02 (Banks-Baldwin, 1971).
57. State v. Habig, 106 Ohio St. 151, 140 N.E. 195 (1922); Conrad v. State, 75 Ohio St. 52, 78 N.E. 957 (1906).
killing is by someone other than the felon who set the chain of events in motion.\textsuperscript{58}

An indictment for capital murder must include an allegation of the aggravating circumstances.\textsuperscript{59} Such aggravation must have been any one of the following: (1) the victim was a person in a specified category; (2) the offense was committed for hire; (3) the offense was committed to escape detection, apprehension, trial, or punishment for some other offense; (4) the offense was committed while the accused was in penal confinement; (5) the accused was previously convicted of purposeful murder or attempted murder; (6) the killing was a part of a course of conduct involving the purposeful killing or attempting to kill two or more persons; (7) the victim was a law-enforcement officer, known to have been such by the accused; or (8) the offense was committed under the felony-murder doctrine.

Returning to the first subsection of this code provision, the specified victim must have been (1) the President of the United States, (2) someone in line of succession to the presidency, (3) the Governor or Lieutenant Governor of Ohio, (4) the President-elect or Vice President-elect of the United States, the Governor-elect or Lieutenant Governor-elect of Ohio, or (6) a candidate for any of these offices.

Even though aggravated murder has been charged in the indictment, the death penalty cannot be imposed if, considering the nature and circumstances of the offense, and the history, character, and condition of the accused, any of the following mitigating circumstances is established by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) the accused was under duress, coercion, or strong provocation; or (3) the offense was the product of the offender's psychosis or mental deficiency even though legally sane.

If the jury returns a verdict of guilty of capital murder, it must in a separate finding state whether any of the aggravating circumstances has been proved beyond a reasonable doubt. If a jury trial is waived, the trial must be by a three-judge panel which must make this determination.

After the jury has returned a verdict of guilty and found one of the aggravating circumstances, the trial court then must direct a psychiatric examination and then hold a separate adversary hearing to determine, by a preponderance of the evidence, whether any of the mitigating circumstances has been established. If none of the mitigating factors is found, the death penalty is mandatory.

\section{X. Homicide}

Presently, Kentucky law prohibits murder without defining it,\textsuperscript{60} volun-


\textsuperscript{59} OHIO REV. CODE ANN. § 2929.04(A) (Banks-Baldwin, 1971).

\textsuperscript{60} KENTUCKY REV. STATUTES ANN. § 435.010 (Banks-Baldwin, 1963).
tary manslaughter, homicide where there is an intent to injure but not kill and involuntary manslaughter, a common-law misdemeanor.

The new Kentucky code defines murder as intentionally causing the death of another or a third person, but exempts a killing under extreme emotional disturbance, and provides that wanton conduct creating a grave risk of death of another which causes death is murder. Manslaughter in the first degree is the causing of death while intending to cause serious physical injury, or that which would be murder except for extreme emotional disturbance. Manslaughter in the second degree is "wantonly" causing the death of another. Reckless homicide is engaging in reckless conduct which causes the death of another.

Ohio formerly had murder in the first degree, murder in the second degree, and manslaughter in the first degree, with separate sections relating to murder by obstructing or injuring a railroad, killing a guard, taking the life of a police officer, and malicious injury to property causing death.

Under the new Ohio code, the classifications are aggravated murder which was discussed with relation to capital punishment; voluntary manslaughter, which is causing death under extreme emotional stress brought on by serious provocation; involuntary manslaughter, which is a killing while committing or attempting to commit a felony or misdemeanor (it is a felony in the first degree if a felony is involved, and a felony in the third degree if a misdemeanor is involved); negligent homicide, which involves the negligent use of a deadly weapon; aggravated vehicular homicide, the killing by operation of a vehicle in a reckless manner; and vehicular homicide, which involves operation of a vehicle in a negligent manner.

64. KENTUCKY REV. STATUTES ANN. § 434A.1-020 (Commonwealth of Kentucky, 1971).
65. KENTUCKY REV. STATUTES ANN. § 434A.1-030 (Commonwealth of Kentucky, 1971).
68. OHIO REV. CODE ANN. § 2901.01 et seq. (Banks-Baldwin, 1965).
69. OHIO REV. CODE ANN. § 2903.01 (Banks-Baldwin, 1971).
70. OHIO REV. CODE ANN. § 2903.02 (Banks-Baldwin, 1971).
71. OHIO REV. CODE ANN. § 2903.03 (Banks-Baldwin, 1971).
72. OHIO REV. CODE ANN. § 2903.04 (Banks-Baldwin, 1971).
73. OHIO REV. CODE ANN. § 2903.05 (Banks-Baldwin, 1971).
74. OHIO REV. CODE ANN. § 2903.06 (Banks-Baldwin, 1971).
75. OHIO REV. CODE ANN. § 2903.07 (Banks-Baldwin, 1971).
XI. BURGLARY, ROBBERY, AND THEFT

Present Kentucky law provides a penalty for burglary but does not define it.\(^{76}\) It has been judicially defined as breaking and entering a mansion-house in the nighttime with intent to commit a felony.\(^{77}\) There presently are sections which prohibit burglary of a bank,\(^{78}\) armed burglary,\(^{79}\) housebreaking,\(^{80}\) storebreaking,\(^{81}\) and railroad station breaking.\(^{82}\)

The new code will provide three degrees of burglary and three degrees of criminal trespass. Burglary in the first degree is knowingly entering or remaining in a dwelling with intent to commit a felony at night and being armed with explosives or a deadly weapon, or causing physical injury to someone not participating in the crime, or threatening such a person.\(^{83}\) In the second degree, which reduces it from a Class B to a Class C felony, it need not be at night.\(^{84}\) Burglary in the third degree, a Class D felony, is knowingly entering or unlawfully remaining in a building with intent to commit a crime.\(^{85}\)

Criminal trespass in the first degree is knowingly entering or unlawfully remaining in a dwelling.\(^{86}\) As presently written, this section could be construed to mean that a person is guilty of an offense if he enters his friend's house, but certainly no such meaning was intended by the legislature. Obviously the intent was an entry without authorization.

Criminal trespass in the second degree is entering a building or premises where a notice has been posted that trespassing is not permitted.\(^{87}\) In the third degree, it is entering or remaining on premises unlawfully although no notice has been posted.\(^{88}\)

Burglary was formerly defined in Ohio as maliciously and forcibly breaking and entering an inhabited dwelling, at night, with intent to commit a felony or steal property of any value.\(^{89}\) There also were provisions which prohibited breaking and entering an uninhabited dwelling at

\(^{76}\) Kentucky Rev. Statutes Ann. § 433.120 (Banks-Baldwin, 1963).
\(^{77}\) Daniels v. Commonwealth, 9 Ky. L. Rptr. 276, 4 S.W. 812 (1887).
\(^{89}\) Ohio Rev. Code Ann. § 2907.09 (Banks-Baldwin, 1965).
night and malicious entry. There were a number of sections which relate to trespass of specified structures or areas as constituting offenses, but there was no general trespass provision.

Under the new Ohio code, there will be aggravated burglary, burglary, breaking and entering, and criminal trespass.

Aggravated burglary is by force, stealth, or deception, trespassing in an occupied structure with intent to commit a theft offense or a felony, and inflicting or threatening physical harm, or having a dangerous weapon, when the structure is the permanent or temporary habitation of a person, and someone is present or likely to be present in the structure.

The unaggravated form of burglary does not require the inflicting or threatening of physical harm, or having a dangerous weapon. Breaking and entering is a trespass upon the land or premises of another with intent to commit a felony. Criminal trespass is entering or remaining upon the land or premises of another without right to do so, or being reckless in determining whether one has a right to do so.

Robbery in Kentucky presently is the common-law offense with the penalty prescribed by statute. It has been defined as the "felonious and forcible taking from the person of another goods or money or any value by violence or putting him in fear." Other present sections relating to robbery are armed robbery, armed assault with intent to rob, bank robbery, robbery of certain instruments, robbery in a dwelling house, and attempted robbery in a railroad station.

The new Kentucky code will provide but two robbery offenses, that in the first degree, and robbery in the second degree. Robbery in the first degree is when a person in the course of committing a theft uses or threatens physical force intending to accomplish the theft, and either causes physical injury to someone not involved in the crime, or is armed with a deadly weapon, or uses or threatens the immediate use of a dan-

90. OHIO REV. CODE ANN. § 2907.10 (Banks-Baldwin, 1965).
91. OHIO REV. CODE ANN. § 2907.13 (Banks-Baldwin, 1965).
92. OHIO REV. CODE ANN. § 2911.11 (Banks-Baldwin, 1971).
93. OHIO REV. CODE ANN. § 2911.12 (Banks-Baldwin, 1971).
94. OHIO REV. CODE ANN. § 2911.13 (Banks-Baldwin, 1971).
95. OHIO CODE ANN. § 2911.21 (Banks-Baldwin, 1971).
96. KENTUCKY REV. STATUTES ANN. § 433.120 (Banks-Baldwin, 1963).
98. KENTUCKY REV. STATUTES ANN. § 433.140 (Banks-Baldwin, 1963).
100. KENTUCKY REV. STATUTES ANN. § 433.170 (Banks-Baldwin, 1963).
103. KENTUCKY REV. STATUTES ANN. § 433.200 (Commonwealth of Kentucky, 1971).
gerous instrument.\(^{106}\) Robbery in the second degree is the use or threatening of physical force with intent to accomplish a theft.

Former Ohio law defined robbery as stealing anything of value from the person of another by force or violence or putting a person in fear.\(^{107}\) Separate sections of the former code prohibited armed robbery\(^{108}\) and robbery of a financial institution.\(^{109}\)

The new Ohio code prohibits aggravated robbery\(^{110}\) and robbery\(^{111}\) Aggravated robbery is when one attempts or commits a theft offense, or in fleeing immediately after the attempt or offense, either has a deadly weapon or dangerous ordnance, or inflicts or attempts to inflict serious physical harm. In the unaggravated form, the accused need only use or threaten force in committing or attempting a theft offense, or while fleeing from one.

Presently, Kentucky follows the common-law definition of larceny in that it is the unauthorized taking and carrying away of the personal property of another,\(^{112}\) to which has been added the requirement that it be with the intent permanently to deprive the owner of the property.\(^{113}\) There are more than a score of separate sections\(^{114}\) involving theft such as grand larceny,\(^{115}\) petit larceny,\(^{116}\) and embezzlement.\(^{117}\)

The new Kentucky code has a general theft provision which includes the taking or exercising control over movable property of another with intent to deprive him of it, or obtaining an unlawful interest in immovable property of another.\(^{118}\) The present provision that if the value is $100 or more it is grand larceny is retained, in essence, by providing that if it is this amount or more it is a Class D felony whereas if it is less than this amount, it is a Class A misdemeanor.

The new Kentucky code also has provisions which prohibit the theft of lost or mislaid property or that which has been delivered by mistake,\(^{119}\)

\(^{106}\) It has been held that any object can be a deadly weapon if intended by its user to convince a victim that it is deadly, and the victim is in fact convinced. Merritt v. Commonwealth, 386 S.W.2d 727 (Ky., 1965).

\(^{107}\) Ohio Rev. Code Ann. § 2901.12 (Banks-Baldwin, 1965). The minimum authorized punishment is one year unless the victim is performing duties as operator of a motor vehicle, streetcar, or trackless trolley, in which case the minimum is three years.


\(^{110}\) Ohio Rev. Code Ann. § 2911.01 (Banks-Baldwin, 1971.)

\(^{111}\) Ohio Rev. Code Ann. § 2911.02 (Banks-Baldwin, 1971).

\(^{112}\) Supra note 5 at 166.

\(^{113}\) Hazel v. Commonwealth, 371 S.W.2d 635 (Ky., 1963).

\(^{114}\) Supra note 5 at 167.


theft of services,\textsuperscript{120} theft by extortion,\textsuperscript{121} and the unauthorized use of a vehicle.\textsuperscript{122}

The former basic larceny statute in Ohio simply stated, "No person shall steal anything of value," and then provided the penalty, making it a felony if the value was $60 or more and a misdemeanor if the value was less than that amount.\textsuperscript{123} Among the other provisions of former Ohio law were those relating to larceny by trick or the misuse of a credit card,\textsuperscript{124} horse stealing,\textsuperscript{125} and pocket picking.\textsuperscript{126} The former Ohio embezzlement provision enumerated fifteen classes of persons who may be guilty of the offense,\textsuperscript{127} and then had other specific sections relating to embezzlement.\textsuperscript{128}

The new Ohio theft provision is rather all-inclusive and provides that no person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over it in any of four manners: (1) without the consent of the owner or person authorized to give consent, (2) beyond the scope of the express or implied consent of the owner or person authorized to consent, (3) by deception, or (4) by threat.\textsuperscript{129}

The former value to constitute the offense a felony, $60 or more, was raised to $150. If it is that amount or more, it is grand theft, a felony of the fourth degree. Otherwise it is petty theft, a misdemeanor of the first degree.

Other theft-related offenses under the new Ohio code are the unauthorized use of an aircraft, motor vehicle, motorcycle, motorboat, or other motor-propelled vehicle;\textsuperscript{130} the unauthorized use of the property of another;\textsuperscript{131} issuance of a negotiable instrument with intent to defraud;\textsuperscript{132} various offenses relating to the use of credit cards;\textsuperscript{133} and various forms of fraud.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{120} Kentucky Rev. Statutes Ann. § 434C.1-060 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{121} Kentucky Rev. Statutes Ann. § 434C.1-070 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{122} Kentucky Rev. Statutes Ann. § 434C.1-080 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{123} Ohio Rev. Code Ann. § 2907.20 (Banks-Baldwin, 1965).
\item \textsuperscript{124} Ohio Rev. Code Ann. § 2907.21, 2907.201 (Banks-Baldwin, 1965).
\item \textsuperscript{125} Ohio Rev. Code Ann. § 2907.22 (Banks-Baldwin, 1965).
\item \textsuperscript{126} Ohio Rev. Code Ann. § 2907.29 (Banks-Baldwin, 1965).
\item \textsuperscript{127} Ohio Rev. Code Ann. § 2907.34 (Banks-Baldwin, 1965).
\item \textsuperscript{128} Ohio Rev. Code Ann. § 2907.37 et seq. (Banks-Baldwin, 1965).
\item \textsuperscript{129} Ohio Rev. Code Ann. § 2913.02 (Banks-Baldwin, 1971).
\item \textsuperscript{130} Ohio Rev. Code Ann. § 2913.03 (Banks-Baldwin, 1971).
\item \textsuperscript{131} Ohio Rev. Code Ann. § 2913.04 (Banks-Baldwin, 1971).
\item \textsuperscript{132} Ohio Rev. Code Ann. § 2913.11 (Banks-Baldwin, 1971).
\item \textsuperscript{133} Ohio Rev. Code Ann. § 2913.21 (Banks-Baldwin, 1971).
\item \textsuperscript{134} Ohio Rev. Code Ann. § 2913.42 et seq. (Banks-Baldwin, 1971).
\end{itemize}
XII. ARSON

Present Kentucky law relating to arson is very similar to the common-law definition.\textsuperscript{135} Two principal sections of the code are involved. The elements of the first are a willful and malicious burning of a dwelling house or outbuilding within the curtilage, and belonging to the accused or another.\textsuperscript{136} The second section prohibits the willful and malicious burning of some other structure.\textsuperscript{137}

Under the new Kentucky code, there will be three degrees of arson. In the first degree, it is intentionally damaging a building by starting a fire or causing an explosion when the accused knows or has reason to know that another person, not an accomplice, is in the building at the time.\textsuperscript{138} In the second degree, it is not necessary that another person be present in the building.\textsuperscript{139} Third degree arson involves reckless rather than intentional conduct.\textsuperscript{140}

The former basic Ohio statute prohibiting arson involved a willful or malicious act, or one with intent to defraud, of setting fire to or burning or causing to be burned, a dwelling house, kitchen, shop, barn, stable, or other outhouse that is parcel thereof, or belonging to or adjoining thereto, the property of the accused or another.\textsuperscript{141} There were a number of other offenses related to arson.\textsuperscript{142}

Under the new Ohio code, there are aggravated arson\textsuperscript{143} and arson.\textsuperscript{144} Aggravated arson is knowingly, by means of fire or explosion, doing either of two things: creating a substantial risk of serious physical harm to any person, or causing physical harm to any occupied structure.

Arson in its unaggravated form may be any of three things: (1) causing or creating a substantial risk of physical harm to the property of another without his consent; (2) doing such an act with the purpose of defrauding someone; or (3) doing the same act if the building is the statehouse, a courthouse, a school, or any other structure owned by the state or one of its political subdivisions or used for public purposes.

XIII. ASSAULT AND BATTERY

The present Kentucky statutes do not have an overall assault provi-
sion but there are sections relating to particular types of battery such as maiming, malicious shooting, and armed assault with intent to rob.\(^{145}\)

The new code will provide for assault in the first degree,\(^{146}\) assault in the second degree,\(^{147}\) and assault in the third degree.\(^{148}\) In the first degree, it is the causing of serious physical injury by means of a deadly weapon or dangerous instrument, or wantonly engaging in conduct which causes grave risk of death or causes serious physical injury. In the second degree, there either is no deadly weapon involved, or the injury caused is not serious. Assault in the third degree is reckless conduct or criminal negligence which causes an injury.

Former Ohio law had numerous provisions relating to assault and battery such as assault with dangerous weapon;\(^{149}\) assault upon a child under sixteen years of age;\(^{150}\) assault with intent to kill, rape, or rob;\(^{151}\) and assault in a menacing manner.\(^{152}\)

The new code consolidates these offenses into five sections: felonious assault,\(^ {153}\) aggravated assault,\(^ {154}\) assault,\(^ {155}\) aggravated menacing,\(^ {156}\) and menacing.\(^ {157}\) Felonious battery is causing serious physical harm to another. Aggravated battery is causing serious physical harm to another while under great physical stress, or while acting in a reckless manner. Battery is causing physical harm to another which is not serious. Aggravated menacing is causing another to believe that serious physical harm will be done to a person, his property, or a member of his immediate family. Menacing is the same offense but without the serious aspect.

XIV. SEX AND RELATED OFFENSES

Under present Kentucky law, rape is defined as carnal knowledge of a female over the age of twelve years against her will or consent, or by force or while she is insensible.\(^ {158}\) There are several degrees of statutory rape with the authorized punishment depending upon the age of the

\(^{145}\) Supra note 5 at 105.

\(^{146}\) KENTUCKY REV. STATUTES ANN. § 434A.2-010 (Commonwealth of Kentucky, 1971).

\(^{147}\) KENTUCKY REV. STATUTES ANN. § 434A.2-020 (Commonwealth of Kentucky, 1971).

\(^{148}\) KENTUCKY REV. STATUTES ANN. § 434A.2-030 (Commonwealth of Kentucky, 1971).

\(^ {149}\) OHIO REV. CODE ANN. §§ 291.241 (Banks-Baldwin, 1965).

\(^ {150}\) OHIO REV. CODE ANN. §§ 2903.01 (Banks-Baldwin, 1965).

\(^ {151}\) OHIO REV. CODE ANN. §§ 2901.24 (Banks-Baldwin, 1965).

\(^ {152}\) OHIO REV. CODE ANN. §§ 2901.25 (Banks-Baldwin, 1965).


\(^ {154}\) OHIO REV. CODE ANN. §§ 2903.12 (Banks-Baldwin 1971).

\(^ {155}\) OHIO REV. CODE ANN. §§ 2903.13 (Banks-Baldwin, 1971).

\(^ {156}\) OHIO REV. CODE ANN. §§ 2903.21 (Banks-Baldwin, 1971).

\(^ {157}\) OHIO REV. CODE ANN. §§ 2903.22 (Banks-Baldwin, 1971).

\(^ {158}\) KENTUCKY REV. STATUTES ANN. § 435.090 (Banks-Baldwin, 1963).
female, whether under eighteen, sixteen, or twelve years of age. Rape may be committed by a female upon a male.

The new Kentucky code provides three degrees of rape. Rape in the first degree is sexual intercourse by forcible compulsion, or with one who is incapable of consent because either physically helpless or less than twelve years of age. It is a Class B felony unless the victim suffers serious physical injury or is under twelve years of age, in which case it is a Class A felony.

Rape in the second degree is when a person eighteen years old or more engages in sexual intercourse with a person under fourteen years of age.

Rape in the third degree is sexual intercourse with a person incapable of consenting because mentally defective or mentally incapacitated, or a person twenty-one years of age or older engaging in intercourse with another person who is less than sixteen years old.

The new Kentucky code provides:

In any prosecution under this subtitle [which includes rape, sodomy, and sexual abuse] in which the victim's lack of consent is based solely on his incapacity to consent because he was less than sixteen years old, mentally defective, mentally incapacitated or physically helpless, it is a defense that the defendant at the time he engaged in the conduct constituting the offense did not know of the facts or conditions responsible for such incapacity to consent.

It has been held that it is a defense to statutory rape that the accused did not know that the female was an insane person or an idiot. However, present Kentucky law does not make ignorance of the victim's age a defense.

The quoted portion of the new code would seem to make it a defense that the accused did not know that the victim was under twelve years of age, but it may be speculated that this was not the intention of the legislature.

In the section of the new Kentucky code defining sexual offenses, the offense involving sexual intercourse with another does not apply if the persons are living together as man and wife, whether legally married or not, but marriage is not a defense to other sexual misconduct.

The former Ohio code had four sections relating to rape: carnal knowledge of a female, forcibly and against her will;¹⁶⁶ carnal knowledge of one's daughter, sister, or a female under twelve years of age;¹⁶⁷ carnal knowledge by a person over eighteen years of age with a female under sixteen years of age, with her consent;¹⁶⁸ and carnal knowledge by a person over eighteen years of age with a female under fourteen years of age, forcibly and against her will.¹⁶⁹ The fourth of these sections would seem to be unnecessary other than its provision for greater punishment than that authorized for statutory rape.

The new Ohio code defines sexual conduct as including sexual intercourse and any deviate sexual activity where there is a penetration.¹⁷⁰ The Technical Committee expressed the view that the former sections which limited sexual offenses to those involving a male and a female should be eliminated,¹⁷¹ and this has been done.

The new Ohio code defines rape, a felony of the first degree, as sexual conduct with another who is not the spouse of the accused under any of three conditions: (1) the accused compels the conduct by force or threat of force; (2) the accused substantially impairs the other person's judgment, to prevent resistance, by administering a drug or intoxicant, or by deception; or (3) the victim is under thirteen years of age, whether or not this is known to the accused.¹⁷²

Somewhat similar to rape under the new Ohio code is the offense of sexual battery, a felony in the third degree.¹⁷³ It consists of sexual conduct with another, not the spouse of the accused, under any of six circumstances: (1) coercion that would prevent resistance by a person of ordinary resolution, (2) the accused knows that the victim's ability to appraise the nature of the conduct or control it is substantially impaired, (3) the victim is unaware that the act is being committed, (4) the victim mistakenly believes the accused is his or her spouse, (5) the accused is the victim's parent or otherwise in loco parentis, or (6) the victim is in penal or mental custody and the accused is in a position of supervisory authority over the victim.

The statutory rape provisions of the new Ohio code, known as corruption of a minor, involve sexual conduct by a person eighteen years of age or older with another more than twelve but less than fifteen years old when the offender knows of this fact or is reckless in failing to determine it.¹⁷⁴

¹⁷¹. “Supra” note 6 at 100.
In still another section, termed gross sexual imposition, anyone having sexual contact with another who is under thirteen years of age is guilty of the offense whether the accused has or has not knowledge of this fact.\textsuperscript{175}

Present Kentucky law prohibits sodomy without defining it,\textsuperscript{176} and indecent or immoral practices with another if the accused is seventeen years of age or older.\textsuperscript{177}

Under the new Kentucky code, there are four degrees of sodomy, three degrees of sexual abuse, and the offenses known as sexual misconduct and indecent exposure.

Sodomy in the first degree\textsuperscript{178} involves deviate sexual intercourse with another by forcible compulsion or with one who is incapable of consenting because physically helpless or less than twelve years old. In the second degree,\textsuperscript{179} it is deviate sexual intercourse by a person eighteen years of age or older with another person less than fourteen years old. Sodomy in the third degree\textsuperscript{180} is deviate sexual intercourse under either of two circumstances: the victim is incapable of consent because mentally defective or incapacitated, or the accused is twenty-one years of age or older and the other person is less than sixteen years old.

Sodomy in the fourth degree is deviate sexual intercourse with another person of the same sex.\textsuperscript{181} Thus Kentucky has not accepted the view of some jurisdictions that deviate sexual conduct between consenting adults of the same sex is not an offense. This provision was not recommended by the Committee but was included in the enactment.\textsuperscript{182}

The three degrees of sexual abuse involve sexual conduct not amounting to intercourse.\textsuperscript{183}

Sexual misconduct is engaging in sexual intercourse or deviate sexual intercourse without the consent of the other person.\textsuperscript{184} This offense would seem to be included in the rape and sodomy sections. The Commentary states that it may be useful in plea bargaining, since it is a Class A misdemeanor, and it may reduce the stigma when the “victim” has persuaded the accused to engage in the conduct.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{175} \textit{Ohio Rev. Code Ann.} § 2907.05 (Banks-Baldwin, 1971).
\item \textsuperscript{176} \textit{Kentucky Rev. Statutes Ann.} § 436.050 (Banks-Baldwin, 1963).
\item \textsuperscript{177} \textit{Kentucky Rev. Statutes Ann.} § 435.105 (Banks-Baldwin, 1963).
\item \textsuperscript{178} \textit{Kentucky Rev. Statutes Ann.} § 434A.4-070 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{179} \textit{Kentucky Rev. Statutes Ann.} § 434A.4-080 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{180} \textit{Kentucky Rev. Statutes Ann.} § 434A.4-090 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{181} \textit{Kentucky Rev. Statutes Ann.} § 434A.4-100 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{182} Supra note 5 at 134.
\item \textsuperscript{183} \textit{Kentucky Rev. Statutes Ann.} § 434A.4-110 \textit{et seq.} (Commonwealth of Kentucky, 1971).
\item \textsuperscript{184} \textit{Kentucky Rev. Statutes Ann.} § 434A.4-140 (Commonwealth of Kentucky, 1971).
\item \textsuperscript{185} Supra note 5 at 138-139.
\end{itemize}
Indecent exposure requires an intent to arouse or gratify the sexual desires of the accused or another.\textsuperscript{186}

The former Ohio provision relating to sodomy stated, "No person shall have carnal copulation with a beast, or in any opening of the body except sexual parts, with another human being."\textsuperscript{187} It was also an offense to solicit another to commit sodomy.\textsuperscript{188}

Under the new Ohio code, deviate sexual conduct is included in the provisions relating to rape if there is a penetration.\textsuperscript{189} Otherwise, it would be gross sexual imposition\textsuperscript{190} or sexual imposition.\textsuperscript{191} In either case, it must be with someone other than the spouse of the accused. The aggravated form involves the use of force or threat of force, or impairing the victim's judgment by drugs or intoxicants, or when the victim is less than thirteen years of age whether the accused knows it or not.

The lesser form of sexual imposition may involve any of four circumstances: (1) the accused knows that it is offensive to the other person or is reckless in that regard, (2) the accused knows that the other person's ability to appraise the nature of the conduct is impaired, (3) the accused knows that the other person is submitting because unaware of the act, or (4) the victim is more than twelve but not more than fifteen years old and the accused is at least eighteen years old and more than four years older than the other person.

It may be observed that the new Ohio code does not prohibit deviate sexual conduct upon the part of consenting adults. No comment upon this has been found in the Committee Report.

Ohio's former provisions which prohibited indecent exposure\textsuperscript{192} have been changed in wording and it is provided in the new code that the conduct must be reckless.\textsuperscript{193} A section has been added to prohibit trespass for the purpose of voyeurism or window peeping.\textsuperscript{194}

The present Kentucky provision relating to prostitution which defines it as giving the body for indiscriminate sexual intercourse for hire, or indiscriminate sexual intercourse without hire,\textsuperscript{195} has been changed to limit the offense to engaging in the conduct in return for a fee.\textsuperscript{196}

Ohio has followed the same course. The former provision which in-

\textsuperscript{186} KENTUCKY REV. STATUTES ANN. § 434A.4-150 (Commonwealth of Kentucky, 1971). This section will replace KENTUCKY REV. STATUTES ANN. § 436.140 (Banks-Baldwin, 1963) which makes it an offense to appear on a highway in a bathing suit.

\textsuperscript{187} OHIO REV. CODE ANN. § 2905.44 (Banks-Baldwin, 1965).

\textsuperscript{188} OHIO REV. CODE ANN. § 2905.50 (Banks-Baldwin, 1965).

\textsuperscript{189} Supra note 170.

\textsuperscript{190} OHIO REV. CODE ANN. § 2907.05 (Banks-Baldwin, 1971).

\textsuperscript{191} OHIO REV. CODE ANN. § 2907.06 (Banks-Baldwin, 1971).

\textsuperscript{192} OHIO REV. CODE ANN. § 2905-30, 2905-31 (Banks-Baldwin, 1965).

\textsuperscript{193} OHIO REV. CODE ANN. § 2907.09 (Banks-Baldwin, 1971).

\textsuperscript{194} OHIO REV. CODE ANN. § 2907.08 (Banks-Baldwin, 1971).

\textsuperscript{195} KENTUCKY REV. STATUTES ANN. § 436.075 (Banks-Baldwin, 1963).

\textsuperscript{196} KENTUCKY REV. STATUTES ANN. § 434G.2-020 (Commonwealth of Kentucky, 1971).
cluded the wording "the offering or receiving of the body for indiscriminate sexual intercourse without a charge" has been changed to define prostitution as engaging in sexual activity for hire.

XV. DISORDERLY CONDUCT

Present Kentucky law which prohibits disorderly conduct is substantially the same in the new code except that an "offensively coarse" utterance has been substituted for an "obscene" utterance. Although not included in the committee recommendations, under the new code one may be guilty of disorderly conduct for making unreasonable noise.

Ohio's former disorderly conduct provision was limited to the discharge of firearms unless it was group conduct, but the new code has a provision which makes it an offense for a person recklessly to cause inconvenience, annoyance, or alarm to another in any of five specified ways.

XVI. MENTAL RESPONSIBILITY

The Kentucky Court of Appeals, in 1963, adopted the test for mental responsibility recommended in the Model Penal Code of the American Law Institute. The new code adopts this test:

(1) A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

(3) Mental disease or defect, as used in this section, is a defense.

The Ohio rule is that announced by the Supreme Court in 1969:

In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence that disease or other defect of his mind has so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.

204. Terry v. Commonwealth, 371 S.W.2d 862, 864-865 (Ky., 1963).
The drafting committee included a provision very similar in substance to the new Kentucky provision,\textsuperscript{207} but this was not included in the enactment.

XVII. CONCLUSION

In this brief discussion, many offenses have been compared and discussed, but there has been no intention to make it exhaustive and include all of the crimes in the new enactments. Illustrative offenses have been chosen to emphasize the many departures from existing or former law in these two states.

It is the opinion of this writer that both of the new codes have been extremely well drafted. As this article goes to press, numerous amendments are under consideration by the Kentucky General Assembly. The form they will take will not be known until the legislature adjourns in March 1974, but it seems probable that there will be no major departures from the foregoing outline.

One may only speculate upon the future value of existing judicial precedent in these two states. Certainly it will not be without value, but it will take more than a few years to determine that which will be followed and that which will be considered obsolete.

Meanwhile, the practicing Bar may find ingenuous ways to endeavor to convince courts that the precedent of past years should or should not be followed.

\textsuperscript{207} Supra note 6 at 57.
I. INTRODUCTION

Civilization in our country is both highly productive and highly sophisticated. It is so productive that consumers can usually choose to buy identical goods from one of several manufacturers. These manufacturers have discovered economic advantage in distinguishing their goods, not in terms of price but rather by contents, quality and trade name. This qualitative distinction is publicized by advertising. Our civilization is so sophisticated that consumers rely on advertising as their chief source of information in making purchasing decisions. Advertising helps match our prolific array of products with an insatiable consuming public.

The most effective medium for advertising in our country is television. In 1974, the total amount to be expended for advertising in all media will be approximately 27 billion dollars; television’s share will be over 4 billion dollars or about 15% of the total. At the end of 1972, 61 million homes in this country had a total of over 96 million televisions. More homes have television than have children, telephones, refrigerators, or bathtubs.

The television commercial is a unique advertisement because it appeals to two of man’s senses: hearing and sight. Psychologists have shown that some men learn best by hearing, some by seeing, but that all learn best by a combination of hearing and seeing. Television has inherited all of the advantages of radio and perfected its own dominant characteristics of visual representation combining sight, sound, and motion. Its advertisement approximates face to face selling. It seizes the viewer’s attention, and allows the advertiser to exploit the viewer’s addiction by repeating the message over and over. Consequently, television, uniting the appeal of sight and sound, is a major stimulus to increased competition through advertising. It has also accounted for a multitude of prob-
lems with which the Federal Trade Commission and the courts must contend.

This article will discuss the various legal methods of consumer protection with particular attention to the authority and procedure of the protection of the public by the Federal Trade Commission; the issues of false advertising with which the Federal Trade Commission is involved; Federal Trade Commission protection against various kinds of advertising abuse; and, an examination and comment upon the success of the Federal Trade Commission in providing protection against false impressions by television commercials based on the rise of mock-ups.

II. CONSUMER PROTECTION
A. Action for Deceit
The first method of protection for consideration is an action by the consumer directly against the manufacturer for deceit or misrepresentation. To recover in this action, the consumer has to prove: (a) a false representation of fact;6 (b) scienter, i.e. knowledge on the part of the seller that the representation was false;7 (c) an intention by the seller to induce the purchaser to rely on the representation;8 (4) actual reliance;9 and, (e) damages resulting from such reliance.10 The cost and difficulty in establishing these elements, prevents all but the most persistent or most seriously injured consumer from using this action.11 And even when his damages are sufficient to justify the suit, a seller can often escape liability by claiming that his statements were not representations of fact, but were merely his opinions or "puffing".12 It is common knowledge that sellers tend to "puff" their wares; therefore, statements that goods are the best in the market, unsurpassed, or high class have been held mere seller's talk on which the buyer has no right to rely.13

B. Breach of Warranty
Closely related to the action for deceit is a suit for breach of warranty. In fact, the warranty action originated as a form of deceit, but by the beginning of the 19th century, it had become identified with the existence of a contract between the parties.14 Because of this close association with the law of contracts, a purchaser is required to meet many of the elements of a contract action in order to recover for breach of warranty. The element of privity is particularly difficult to prove when the purchaser has not dealt directly with the defendant. Although this element

7. Id.
8. Id.
9. Id.
10. Id.
has been eliminated in some states, and altered in others, it is still re-
quired by the majority.\textsuperscript{15} Other areas of contract law such as the statute
of frauds, the parole evidence rule, and the doctrine of merger, often
hinder recovery, too. And sometimes \textit{puffing} is successfully invoked as
a defense. Generally, private actions by consumers who have not suf-
fered personal injuries or severe property damage are simply not prac-
tical because of the difficulties of proof and the expense of the action
which usually are out of proportion to the monetary value at stake.\textsuperscript{16}

C. \textit{State Statutes}

Because it is so difficult for consumers to protect themselves, most
states have passed criminal statutes designed to insure truth in advertis-
ing. Many of these statutes imitated a model published in \textit{Printer's Ink}
Magazine. The model statute made it a misdemeanor to advertise a rep-
resentation that was "untrue, deceptive, or misleading."\textsuperscript{17} Since the adop-
tion of this model act, various other statutes dealing with advertising
have been passed by most states. The statutes usually provide for crim-
inal penalties and sometimes for the revocation of an offender's right to
do business.\textsuperscript{18} However, their effect as a deterrent has been virtually
eliminated by their lack of uniformity and indifferent enforcement. Too
often they are not enforced at all.

D. \textit{Advertising Codes}

There have been attempts by non-governmental agencies to regulate
deceptive advertising practices. One such attempt has been made by the
advertising industry itself. The Creative Code of the American Associa-
tion of Advertising Agencies includes the statement that its members
will not knowingly produce advertisement which contains false or mis-
leading statements or exaggerations, visual or verbal.\textsuperscript{19}

The Advertising Code developed by the Advertising Federation of

\footnotesize
\begin{itemize}
\item \textsuperscript{15} \textit{Stockton}, \textit{supra} note 13, at 85.
\item \textsuperscript{16} \textit{Oppenheim}, \textit{Unfair Trade Practices}, 283 (2nd Ed., 1965).
\item \textsuperscript{17} \textit{See Comment, supra} note 11, at 1019.
\item \textsuperscript{18} \textit{See Oppenheim, supra} note 16, at 280-81.
\item \textsuperscript{19} \textit{See Lindey, supra} note 2, at 497; \textit{see also} C. C. H. Trade Reg. Rep., Paragraph
\textsuperscript{7996}, (July 1971); where seven domestic and foreign automobile manufacturers
were ordered by the Federal Trade Commission to document their advertising claims. The
special-report orders were issued as a result of the Federal Trade Commission's pre-
viously announced resolution regarding advertising documentation. The advertising
claims deal generally with safety, performance, quality and comparative price of auto-
mobiles. The companies have been given 60 days to comply with the orders; General
Motors Corp. F. T. C., Paragraph 19, 698.
\item C. C. H. Trade Reg. Rep. (May, 1971); where sufficient quantities of advertised food
and grocery specials must be readily available in the advertisers' stores and they must
be sold at the advertised price or less under a Federal Trade Commission Trade
Regulation rule, which becomes effective July 12, 1971; open hearings on the impact of
advertising on consumers, with special attention to television advertising, have been
announced by the Federal Trade Commission. The F. T. C.'s current primary interests
are the following: to consider advertising addressed to children, to determine whether
technical aspects of the preparation and production of television commercials may
facilitate deception, and to consider consumers' physical, emotional and psychological
responses to advertising, as they may affect the standards by which advertising is judged.
\end{itemize}
America and the Advertising Association of the West provides: 

“... Advertising shall tell the truth and shall reveal significant facts, the concealment of which would mislead the public ...”

Such codes are of little value if they cannot be enforced; and the only means of enforcement available to these associations is moral persuasion. Both national and local Better Business Bureaus advocate voluntary discontinuation of deceptive advertisements. But without some means of enforcement, non-governmental bodies cannot effectively protect consumers from deceptive advertising demonstrations on television.

E. Federal Trade Commission

As the sophistication of promotional techniques increased, and with it the problems created by deceptive advertising, the inadequacy of private remedies, state statutes, and non-governmental regulation to deal with these problems became clear. The desirability of some uniform standard of regulation suggested the possibility of federal legislation designed to fill the need for comprehensive and effective control.

The first Congressional attempt at regulating deceptive advertising was the Federal Trade Commission Act. The Act authorized the establishment of a Commission to prohibit “unfair methods of competition in commerce.” This original grant of power restricted the Commission to acting upon false advertising only if it was likely to injure competitors of the advertiser. In 1938, the Wheeler-Lea Amendment was passed which extended the Commission’s authority over “unfair or deceptive acts or practices in commerce.” By this amendment, the Commission had power to prevent such acts or practices which were unfair to consumers. In other words, this amendment made the consumer, who might be injured by an unfair trade practice, of equal concern before the law with the merchant or manufacturer injured by the methods of a dishonest competitor. The amendment enabled the Commission to prohibit advertisements merely by showing an injury to consumers without first having to establish adverse effects upon competition in general.

The establishment of the Federal Trade Commission, coupled with the authority granted to it under the Wheeler-Lea Amendment, represented the first comprehensive plan for consumer protection that had the potential to be an effective deterrent against deceptive advertising.

III. FTC Regulation

A. Authority

The Federal Trade Commission Act states:

Unfair methods of competition in commerce are hereby declared unlaw-

20. See Lindey, supra note 2, at 498.
21. See Comment, supra note 11, at 1019.
22. Act of September 26, 1914, Ch. 311 § 5, 38 Stat. 717.
23. Id. at 719.
25. See Comment, supra note 4 at 146.
ful. The Commission is hereby empowered and directed to prevent
persons, partnerships, or corporations, except banks, and common
 carriers subject to the Acts to regulate commerce, from using unfair methods
of competition in commerce. . . . If upon such hearing, the Commission
shall be of the opinion that the method of competition in question is
prohibited by this Act, . . . it shall . . . issue . . . an order . . . to cease
and desist . . . .

This statute was amended to read:

"Unfair methods of competition in commerce, and unfair or deceptive
acts or practices in commerce, are declared unlawful . . . . If upon such
hearing, the Commission shall be of the opinion that the method of
competition or the act or practice in question is prohibited by this Act
. . . (it) shall issue and cause to be served on such person . . . an order
to cease and desist from using such method of competition or such act
or practice." 27

The early construction of § 5 of the Act by the Supreme Court resulted
in a barrier to the power of the Commission to control advertising. This
was apparent in *F. T. C. v. Gratz* 28 where Mr. Justice McReynolds stated
that: (a) the words unfair method of competition are not deferred by
statute, and their exact meaning is in dispute, and (b) it is for the
courts, not the Commission, ultimately, to determine as a matter of law
what they include. This position, however, was changed in 1934 by two
Keppel and Bros., Inc.* 30 The position, taken in 1934, is the present posi-
tion which was stated in *Kalwajtys v. F. T. C.* 31 as follows:

The meaning of advertisements or other representation to the public,
and their tendency or capacity to mislead or deceive, are questions of
fact to be determined by the Commission and should be upheld by a
reviewing court unless arbitrary or clearly wrong.

In *J. B. Williams Co. v. F. T. C.*, 32 the Court reiterated this position.

At first, the power of the Commission was restricted to permit the
Commission to act upon false advertising only if it was likely to injure
competitors of the advertisers. 33 Later the Commission's authority was
extended to any "unfair or deceptive acts or practices in commerce." 34
It has been stated that the *Federal Trade Commission Act* was moti-
vated by a desire to afford consumers greater protection from false
advertising. 35 *Handler* implies that as the statute is now worded, it is suf-

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27. Act of March 21, 1938, Ch. 49, § 3, 52 Stat. 111.
32. 381 F.2d, 884, 889 (1967).
33. *Raladam Co. v. F. T. C.*, 42 2d 430 (6th Cir., 1930), *aff'd on other grounds*,
283 U. S. 643 (1931).
34. Act of March, 1938, Ch. 49 § 3, 52 Stat. 111.
AND CONTEMPORARY PROBLEMS 91, 96 (1939).
sufficient justification for intervention by the Commission that the advertise-
mant is unfair or deceptive to consumers. The probable legislative
motive was to give the same protection to the injured consumer as given
the injured merchant or manufacturer.

B. Procedure

Investigation of a deceptive advertising practice is usually initiated by
a formal complaint by a member of the public, or upon the Commission's
own initiative. The Commission acts only in the public interest and its
proceedings are for the sole purpose of vindicating public rights. Having
made its investigation and having found a deceptive advertising practice,
the Commission will attempt to secure voluntary discontinuance of the
practice through an informal nonadjudicatory proceeding. If all parties
agree to a consent order that adequately protects the public rights, the
matter is then ended. If agreement is not reached, the Commission will
issue a complaint and the advertiser will answer it. An examiner is ap-
pointed to hold a hearing on the complaint. The examiner will weigh the
evidence presented and make a decision which will become final unless
a timely appeal is made to the Commission. If there is no appeal or if
the Commission, upon appeal, affirms the ruling of the hearing exam-
iner, a cease and desist order is issued. The order requires that the de-
defendant stop those acts which were declared to be unlawful. If the
defendant finds this order to be contrary to statute or unreasonable in
scope, he may appeal to a United States Court of Appeals where the
order will be affirmed, modified, or set aside. After a decision by the
Court of Appeals, either party may apply for certiorari to the Supreme
Court. And if the defendant ever violates the order once settled, the
Commission can bring an action through the Justice Department for the
recovery of civil penalties.

C. False Advertising

The definition of false advertising is as follows in § 15(a) of the
Federal Trade Commission Act:

The term false "advertisement" means an advertisement other than
labeling, which is misleading in a material respect; and in determining
whether any advertisement is misleading, there shall be taken into
account (among other things) not only representations made or sug-
gested by statement, word, design, device, sound, or any combination

36. Id.
Rec. 391-392 (1938) (remarks by Congressman Lea): The principle feature of the
Federal Trade Commission is in § 5. "One thing we proposel in the pending bill . . . is
that it is sufficient to establish the unfair practice without showing injury to com-
petitor . . . indeed, the principle of the Act is carried further to protect the consumer as
well as the competitor . . . and afford a protection to the consumers of the country that
they have not heretofore enjoyed."
38. See generally, 4 CALIMAN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND
thereof, but also the extent to which the advertisement fails to reveal (material) facts . . .

This definition was intended to be used in conjunction with § 12 of the *Wheeler-Lea Amendment* which prohibits the dissemination of false advertisements for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics. However, the above quoted portion seems equally applicable to any false advertisement which constitutes a deceptive act under § 5. The definition also includes misrepresentations caused by an omission of a material fact. In *P. Lorrilard Co. v. F. T. C.* the court said:

... 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.

It follows then that the definition of false advertising in § 15(a) of the F. T. C. act is actually the criterion used by the Commission to determine whether any advertisement is deceptive under § 5(a).

D. Material Issues

Discussed below are the several material issues that must be resolved to determine if an issue is unfair.

*The Doctrine of Caveat Emptor.* In a 1937 case, the Supreme Court said that the fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. This case resulted in a cease and desist order against encyclopedia companies using false testimonials and also falsely claiming that the set was free, and payment was necessary only for the extensions. The Court also said that laws are made to protect the trusting as well as the suspicious, and that the best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.

*An Intent to Deceive.* In *F. T. C. v. Balme,* the court laid to rest all doubt on this issue when it stated that the inquiry of whether there is actual confusion or a deliberate effort to deceive is not a necessary element in unfair competition. Also in *Gimble Bros., Inc. v. F. T. C.,* it was stated that the prevention of sale of commodities by false and mis-

41. Act of September 26, 1914, Ch. 311, § 5, 38 Stat. 719.
42. 186 F. 2d 52, 58 (4th Cir., 1950).
43. See, *Charles of the Ritz Distributors Corp. v. F. T. C.*, where the court said that "the important criterion is the net impression which the advertisement is likely to make on the general populace." 143 F. 2d 676, 679 (2nd Cir., 1944).
45. Id.
46. 23 F. 2d 615, 621 (2nd Cir., 1928).
47. Id.
48. 116 F. 2d 578 (2nd. Cir., 1941).
leading statement is in the public interest, and, hence, deliberate effort to deceive is not necessary to make out a case of using unfair methods of competition within the province of the Federal Trade Commission Act. In this case involving the mislabeling of goods, it was emphasized that the purpose of the statute is protection of the public, not punishment of a wrongdoer.\(^{49}\)

**Misleading.** A syllabus of the Kalwaitys v. F. T. C. case stated that: ... a statement may be deceptive within the Federal Trade Commission Act, even if constituent words thereof may be literally or technically construed so as not to constitute a misrepresentation. Statements in advertising are to be judged by the impression they are likely to make on the prospective purchaser.

In this case, the defendant asserted that they gave gifts to a few selected people as a promotional offer and maintained that (a) this was not deceptive advertising since the people were actually selected, and (b) few is an elastic term, and the offer was promotional since it was used to promote sales.\(^{51}\) The court disagreed, however, feeling that the sales scheme of the defendants was still misleading in spite of the out of context, technical definitions of the words used.\(^{52}\)

**Puffing.** Situations involving the "puffing" issue must be decided on a case by case basis. Generally, however, for the purposes of the F. T. C., puffing was stated in Gulf Oil Corp v. F. T. C.,\(^{53}\) to mean:

... 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 them benefits or virtues they do not possess.

In this case, an advertisement for an insecticide claimed that it would cause cows to give more milk a day in addition to giving the cow complete protection from insects. The court noted that the Commission had found that (a) there were a number of insects that were little affected by the spray ... and while dairymen and entomologists from various sections of the United States testified to the good results of the spray, it may not be denied that no one of them testified to results from its use as completely beneficial as those set forth in the advertisement; and (b) the statements of the advertiser could not be defended as mere puffing.\(^{54}\)

**Proof of Damage.** In Ford Motor Co. v. F. T. C.,\(^{55}\) the Federal Trade Commission found that the defendant represented to purchasers that they were offering a 6% plan for financing retail sales of automobiles when in actuality the interest rate was 11\(\frac{1}{2}\)% simple annual interest on the...

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\(^{49}\) Id.

\(^{50}\) 237 F. 2d 654, 656 (7th Cir. 1956), cert. denied 352 U. S. 1025 (1957); See also supra Note 7.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) 150 F. 2d 106, 109 (5th Cir. 1945).

\(^{54}\) Id.

\(^{55}\) 120 F. 2d 175 (6th Cir. 1941) cert. denied, 314 U. S. 668 (1941).
unpaid balance. Agreeing with the findings of the Commission, the court held that the Federal Trade Commission Act prohibiting unfair competition was a preventative one, and not a compensatory one and the alleged fact that no damage had been shown by the offense complained of to purchaser of manufacturer's automobiles or to a competitor was no defense. The court went on to say, that where misleading advertisements attract customers by means of deception perpetrated by the advertiser, it is presumed that business is thereby unfairly diverted from a competitor who truthfully advertises his process, methods, or goods.

IV. FTC PROTECTION IN FOUR AREAS OF ADVERTISING ABUSE

There are four generally recognized distinct abuses to consumers that the Federal Trade Commission has protected against. They are: (1) concealing latent dangers to consumers or misleading customers into thinking a dangerous product is entirely safe, (2) falsely claiming that which might induce a consumer to purchase a product being offered, (3) injuring competitors, (4) creating a false impression about the advertised product which might motivate the consumer to make a particular purchase, regardless of whether he ultimately acquires everything he fully expected.

A. Concealing Dangers

Advertisements that conceal dangers are obviously subject to F. T. C. attack. A representative case is Gelb v. F. T. C. where it was held that the makers of “Instant Clairol”, a hair dye, must disclose in their advertisements that the product could inflict skin irritation upon persons allergic to its ingredients, and blindness if used to color eyelashes or eyebrows.

B. False Claims

Examples of advertising of false claims involve effectiveness of a product, the location of the manufacturer of the product, and testimonials. The cases below discuss these types of false claims.

A representative case would be Carter Products v. F. T. C., in which

56. Id. at 182.
57. Id.
58. See Comment, supra note 4 at 148-150.
59. Id. at 148.
60. Id.
61. Id. at 150.
62. Id. at 149.
63. 114 F. 2d 580 (2nd Cir., 1944).
64. Id., See also, 3 C. C. H. Trade Reg. Rep., para. 19, 673 (July, 1971) The F. T. C.'s corrective advertising approach may be applied to television demonstrations. Because demonstrations for four consumer products allegedly used deception in comparing the products with competitive brands, the same kind of demonstration may have to be rerun, but in a "fair, accurate and non-deceptive manner." The products include a window cleaner, a spray starch, a floor wax and a roach killer. American Home Products Corp. V. F. T. C. See also, Zito, Regulation of Pharmaceutical Advertising, 20 CLEVELAND STATE L. REV. 339 (1971).
Carter was told to cease and desist from using the word "liver" in the trade name of its "Little Liver Pills", when it was shown that the product had no curative or active effects upon the liver.

The deception about the location of manufacture of the product can mislead consumers. In *Houbigant, Inc. v. F. T. C.*, a defendant was told to cease and desist from using names indicative of French or foreign origin without stating that toilet preparations were compounded in the U. S.

In *F. T. C. v. Royal Milling Co.*, the defendants were ordered to cease and desist from falsely importing to the seller that they manufactured the flour. The Court said in that case, "If consumers prefer to purchase a given article . . . because it was made by a particular class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good but having a different origin."

In *L. & C. Mayers Co., v. F. T. C.*, the deception was that the defendants represented themselves as wholesalers when, in fact, they were not.

In the area of testimonial advertising, the consumer is induced to purchase a product because of the opinion of someone he respects. If the testimonial is untrue, it would be deceptive since the consumer does not get what he expects in terms of popularity or prestige of the goods. In *Doeskin Products, Inc.*, it was deceptive to claim that "Sanapak" sanitary napkins were endorsed by a "famous New York Stylist" when the person referred to was actually the defendant's secretary who made no claim to be a stylist. In *Howe v. F. T. C.*, the defendants were asked to cease and desist from using the label "Howe's Hollywood, Favorite of the Stars", on cosmetics that were not endorsed by the stars of motion pictures.

C. Injuries to Competitors

This type of case involves a diversion of customers, upon a fiction communicated in the advertisement, rather than upon a superiority inherent in the goods. This type of injury was exemplified by *F. T. C. v. Algoma Lumber* where it was decided that using "white pine" on inferior wood was unfair competition because there is a kind of fraud involved in clinging to a benefit which is the product of misrepresentation.

66. 139 F. 2d 1019 (2nd Cir., 1944), cert. denied, 373 U. S. 763 (1944).
67. Id.
68. 288 U. S. 212 (1933).
69. 97 F. 2d 365 (2nd Cir. 1938).
70. 48 F. T. C. 1331 (1952).
71. 148 F. 2d 561 (9th Cir. 1945).
72. 290 U. S. 67 (1934).
In *Brown and Williamson Tobacco Corp. and Ted Bates and Co.*, the defendant pointed out that Life's filter absorbed drops of water, and tried to imply that Life gave less tars and nicotine. The complaint alleged that the demonstration did not prove what it purported to because there was no correlation between the liquid used and cigarette tars and nicotine. The cases ended in a consent decree, with no admission of violation of the law, but an agreement to discontinue the demonstrations.

*Aluminum Co. of America, Wear-Ever Aluminum, Inc., and Ketchum Mackod and Grove Co., Inc.*, involved another commercial that did not prove what it purported to, but this one was judged deceptive because

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September, 1969, Federal Trade Commission issued a complaint charging plaintiff with false, deceptive and misleading advertising as to the tar content of certain of its cigarettes, and asserting that plaintiff's act and practices in regard thereto were and are to the prejudice and injury of the public and of plaintiff's competitors, and constituted and now constitutes unfair methods of competition, and unfair and deceptive acts and practices in commerce in violation of § 5 of the Federal Trade Commission Act.

There is attached to the mentioned complaint of the F. T. C. against plaintiff a proposed order which would prescribe plaintiff from representing that the tar content of its cigarettes or the smoke produced by them is low or lower unless the following disclosures are also made: (1) the tar content in the smoke of the advertised cigarette, (2) the brand name and tar content in the smoke of any cigarette with which a tar content comparison is made, (3) the tar content in the smoke of the highest and lowest yield domestic cigarettes.

F. T. C. policy commissioner pointed out that the use of such adjectives as "low" and "less" when describing tar and nicotine content are imprecise and that their use, absent a full and fair disclosure of the basis of comparison, could lead to untrue conclusions by the members of the public as to the comparative tar and nicotine content of the advertised brand of cigarettes.

It was also pointed out by the Commission that the degree of imprecision so created would vary according to the actual tar and nicotine content of the cigarettes advertised, but that such imprecision can almost always be avoided if the representation is accompanied by clear and conspicuous disclosure of (1) the tar and nicotine content in milligrams of smoke produced by the advertised cigarettes, (2) the tar and nicotine content in milligrams of the lowest and highest yield domestic cigarettes.

C. C. H. Trade Reg. Rep., Vol. 3 para. 18, 769 (May, 1969). *The F. T. C.*, under provisions of § 6(b) of the Federal Trade Commission Act has ordered the National Broadcasting Company to submit a report of all commercials broadcast during each month for the next twelve months.

F. T. C. announced March 21, 1969, that it had initiated an intensified program for the monitoring of advertising on the national television networks and that the staff has been directed to obtain from the networks, on a voluntary but regular basis, copies of all network commercials used during a specified period in each month. They could not judge satisfactorily the impact of these commercials on the viewing public because they were shown to the Commission at a public hearing in a different setting than that involving the "average" viewer of the commercials . . .


of the use of the mock-ups to distort the test themselves. In the *Aluminum Co.* case, plaintiff’s aluminum wrap was compared to defendant’s wrap as to preserving properties, by wrapping them around hams. However, plaintiff’s wrap was subjected to abuse before the commercial, and the companies agreed to cease and desist from purporting to demonstrate the preserving properties of its wrap in this manner.

D. False Impressions

Illustrative of this kind of advertising is *F. T. C. v. Colgate-Palmolive Co.* The controversy which arose in this case concerned a series of commercials designed to prove Rapid Shave’s super moisturizing power. This case spawned five reported opinions, two of them by the Commissioner, two decisions by the First Circuit Court of Appeals, and ultimately a decision by the Supreme Court. The disputed commercial showed the lather being applied to tough, dry sandpaper and immediately thereafter a razor shaving it clean. The commission charged in its initial complaint that the advertisements were false and deceptive because the substance shown was not really sandpaper, but rather, a plexiglass “Mock-up” to which sand had been applied. “Even if sandpaper could be shaved as shown in the commercials,” the Commission said, “viewers had been misled into believing that they had seen it done with their own eyes.”

The summary of the sales pitch was:

If you have a tough ‘sandpaper’ beard, you need a shaving cream with super-moisturizing power. A shaving cream that is effective in quickly and cleanly shaving can do the same for your beard. RAPID SHAVE has such super moisturizing power, and we will prove it to you before your very eyes.

The following test was applied by the Commission to the statement made by Colgate: “If advertising tends unfairly to divert business from competitors or to induce customers to make purchases they might not otherwise make, it is certainly unlawful.” Both the misrepresentations in the visual demonstration offered as proof of such effectiveness were false advertising which tended unfairly to divert business from competitors or to induce customers to make purchases they might not otherwise make, and were thus unlawful.

Colgate argued that actually the customers got exactly what they bargained for, and thus were not deceived. The Commission countered this argument by offering an example. Suppose that faked before and after pictures are used for an obesity commercial. Even if the product could bring about the reduction in weight as represented by the pictures, the public, and honest competitors are entitled to the protection that the

75. 380 U. S. 374 (1965).
76. In the Matter of Colgate-Palmolive et al., 59 F. T. C. 1452 (1961) at 1461.
77. Id. at 1465.
78. Id.
79. Id. at 1461.
law gives against such unfair and deceptive advertising practices. The proof was a material element of the advertising; without it, the advertising might not have succeeded in selling the product, and the proof was not proof at all.  

When Colgate pleaded that technical limitations made it impossible not to use mock-ups in certain situations, the Commissioner showed impatience by saying:

"Stripped of its polite verbiage, the argument boils down to this, where truth and television salesmanship collide, the former must give way to the latter."

This was an indefensible proposition. And when Colgate questioned whether the Commission was prescribing a blanket denial of mock-ups, the Commission claimed that they only wished to deny the use of mock-ups when it is a misstatement of truth that is material to the inducement of the sale. The Commission said that an announcer may wear a blue shirt that photographs white; but he may not advertise a soap or detergent's 'whitening' qualities by pointing to the 'whiteness' of the blue shirt. In this case the Commission stated that the misrepresentation amounted to more than mere puffing.

The final conclusions made by the Commissioner were:

(1) The television commercials described are false, misleading, and deceptive, within the meaning of the Federal Trade Commission Act, in that they represent that the "moisturizing" properties of "Palmolive Rapid Shave" are such that it is possible immediately after application of Palmolive Rapid Shave to very coarse, dry sandpaper, to shave off the rough surface of that sandpaper with a single stroke, when this is not in fact possible and that sandpaper of the variety depicted is actually being depicted in the televised demonstration, when in reality the thing being shaved is a "mock-up" composed of plexiglass to which sand had been applied, especially made for use in the demonstrations depicted in these commercials.

(2) The television commercials lead people into thinking that the misrepresentations are true, and lead them to purchase Palmolive Rapid Shave.

Pursuant to these conclusions the Commissioner ordered Colgate to cease and desist from:

Representing, directly or by implication, in describing, explaining, or purporting to prove the quality or merits of any product, that pictures, depictions, or demonstrations . . . are genuine or accurate representations . . . of, or prove the quality or merits of, any product, when such pictures, depictions, or demonstrations are not in fact genuine or accu-

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80. Id. at 1466.
81. Id. at 1468.
82. Id. at 1469.
83. Id.
84. Id. at 1476-7.
85. Id. at 1477-8.
rate representations . . . of or do not prove the quality or merits of any such product.” (Emphasis added).

Colgate appealed this decision of the Commissioner and its broad cease and desist order. The case was heard before the First Circuit Court of Appeals. 86 That court agreed that the television commercials advertising the moisturizing qualities of the appellants’ shaving cream in which sandpaper was apparently shaved with a safety razor with a single stroke immediately following the application of the cream was subject to a cease and desist order. 87

The Court of Appeals, however, stated that a cease and desist order was proper because:

1. There was misrepresentation in that the cream did not permit the shaving of sandpaper of the quality apparently shown, nor in the interval of soaking time defined by the visual portrayal; 88

2. Colgate had not shown that they were prejudiced by the Commission’s failure to include the time element in the pleadings; 89

3. The misrepresentation amounted to more than mere metaphorical puffing; 90

4. Since the misrepresentation was calculated to affect a buyer’s judgment, it is immaterial that the cream may in fact have adequate sharing qualities; 91

5. The fact that little injury was done to the public by the misrepresentations is irrelevant. 92

The Court of Appeals nevertheless set aside the order because it was ambiguous, and might prohibit any demonstration, even if it did not misstate facts about, or misrepresent the appearance of the product, if the demonstration was not “genuine” in that the actual substance used in the studio (because of technical problems of photography) was not the product itself. While the Court of Appeals could understand why the Commission felt that substitutions of the actual product because of problems of photography was an unfair advertising practice, 93 the Court

86. Colgate-Palmolive Co. v. F. T. C., 310 F. 2d 89 (1st Cir. 1962).
87. Id. at 92.
88. Id. at 91.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id. at 93; E.g., on television, coffee looks like tea, tea like water, and orange juice like milk. “Demonstations” in Television Commercials, B. N. A. Antitrust and Trade Reg., Rep. 205 (June 15, 1965).

To be doubly sure our understanding of the Commission’s position was correct, we put the following case to its counsel. Suppose a prominent person is photographed saying, “I love Lipsom’s iced tea,” while, apparently he drinks a glass of iced tea. In truth the individual does like Lipsom’s Tea, and frequently drinks it, but for the above-mentioned technical reasons is then drinking colored water. What the viewer sees on the screen looks exactly as Lipsom’s iced tea does in fact look. Asked if this would be misconduct counsel replied that it was the Commission’s position that it would be, because the viewer has been led to believe he is seeing iced tea when in fact he is not.
of Appeals could not agree with this position. They did, however agree
with the Commission, that the customer was entitled to get what he was
let to believe he would get, whether he is right or wrong in thinking it
makes a difference.\textsuperscript{94} The Court of Appeals went on further to say that
there is no injury to the customer where the only untruth is that the sub-
stance he sees on the screen is artificial, and the visual appearance is
otherwise a correct and accurate representation of the product.\textsuperscript{95} More-
over, they pointed out that:\textsuperscript{96}

The viewer is not buying the particular substance he sees in the studio
but that he is buying the product. By hypothesis, when he receives the
product, it will be exactly as he understood it would be. There has been
no material deceit.

In a footnote the Court of Appeals attacked the Commission's reliance
on phony testimonial cases, in which there were correct claims that it is
an unfair advertising practice to publish purported testimonials when
none had been received, even if from the fact that the advertiser's sales
were high and constant, it must be obvious that he has many satisfied
customers.\textsuperscript{97} They pointed out that a more accurate analogy would be if
the advertiser did in fact receive a testimonial, but written in ink that
would not photograph.\textsuperscript{98} The Court of Appeals said:\textsuperscript{99}

Would the advertiser be guilty of deceit if he copied it over and photo-
graphed the copy? If an endorser may not be shown enjoying colored
water that looks like, but is not, iced tea, then seemingly, it would not
be "genuine" to photograph a copy as a testimonial leading viewers to
believe that it was an original document. It is difficult to think that the
Commission fully appreciated the principle it has espoused.

In setting aside the order the Court of Appeals directed that an entirely
new one be prepared, and offered the Commission two suggestions to
eliminate the fundamental error that permeated its first order.\textsuperscript{100} First,
the court directed the Commission to narrow the scope of its order since
there was not showing of any method or practice of misrepresentation,
but rather a single misrepresentation about a single product. Secondly,
they warned, absent a showing of knowledge of the falseness of the
claims made, on the part of Bates, the advertising agency, the portion of
the order affecting it should be less broad.

The Commission reconsidered the case.\textsuperscript{101} They agreed with the Court
of Appeals that if their order was interpreted to prohibit indiscriminately
the use of mock-ups or substitute materials in all television commercials

\textsuperscript{94} Id. at 94.
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} Id. n. 9.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id. at 94-5.
\textsuperscript{101} In the Matter of Colgate-Palmolive Co. and Ted Bates & Co., Inc., 62. F. T. C.
1269 (1963).
in every conceivable hypothetical situation that this would exceed the intended scope of the order. 102 To clarify its position, the Commission stated that it was unlawful for advertisers to stage television commercial demonstrations that purport to — but do not in fact, because of the undisclosed use of mock-ups or substitute materials — prove visually a quality or merit claimed for a product, regardless whether the product actually possesses such quality or merit. 103

In the Commission's view, the principles of the case were: 104 (1) A seller may not resort to material falsehoods in order to induce sales of his product; (2) A misrepresentation may be material in affecting a buyer's choice even though it does not relate to the product's quality or merits; and (3) The product may in fact be all that the purchaser thinks it to be; but if he has been induced to buy it by the seller's fraud, injury is done both to the advertiser's competitors and to the public.

As to the third principle, the Commission said that if there was a false claim that the product has the "Good Housekeeping Seal of Approval", it was no defense to say that the product met all of the standards required for that seal. 105 To allow such a defense would place a premium on false and a penalty on honest advertisement. 106 In regards to mock-ups, the Commission reiterated that if it is too difficult or even impossible in a particular medium to present a truthful demonstration proving a claim made for a product, the seller may be obliged to forego use of the demonstration form of advertising in that medium. 107

The Commission felt that Colgate was guilty of false advertising even if the shaving cream could sufficiently moisturize the sandpaper so that the commercial could be done in the living room just as depicted on the set. 108 By means of the sandpaper test demonstration, Colgate, in effect, stated to the viewing public: 109

Do you doubt that Rapid Shave really can shave sandpaper, and suspect that we may be exaggerating its merits? Well, see for yourselves, and your doubts will disappear. Here is a piece of tough, dry sandpaper. Look at how quickly and cleanly Rapid Shave shaves it. And Rapid Shave can do the same for you, even if your beard is as tough as sandpaper.

To avoid any possible misunderstanding of its position, the Commission emphasized that its proposed order would not prohibit per se the use of a mock-up television screen. Thus, according to the Commission, limitations of television photography might in some circumstances per-

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102. Id. at 1272.
103. Id. at 1273.
104. Id.
105. Id. at 1275.
106. Id.
107. Id.
108. Id. at 1272.
109. Id. at 1271.
mit use of such mock-ups, but it is one thing to use a mock-up merely as a substitute for an article whose image becomes distorted when photographed, and another thing to use mock-ups in a test or demonstration of the advertised products claimed qualities so as to represent it as being the genuine article.\textsuperscript{110} The Commission also said:\textsuperscript{111}

\ldots that the respondents went farther than merely using a mock-up. They made an affirmative representation that was false, namely, that they were presenting an actual test and giving actual proof of Rapid Shave's ability to shave real sandpaper, and that in the test, real sandpaper was being used. A misrepresentation would not have been greater or more material, but only more explicit if the announcer had said: This test is being made on real sandpaper, and not an artificial mock-up contrived to look like sandpaper. The point is, whatever the technical photographic reasons justifying use of a mock-up, there could be no justification for the false presentation to the public of proof that, in fact, was not proof.

In the second order of the Commission,\textsuperscript{112} Colgate was asked to cease and desist from:

Unfair or deceptively advertising 'any \ldots product by presenting a test, experiment or demonstration that (1) is represented to the public as actual proof of a claim made for the product which is material to inducing its sale, and (2) is not in fact a genuine test, experiment or demonstration being conducted as represented and does not in fact constitute actual proof of the claim, because of the undisclosed use and substitution of a mock-up or prop instead of the product, article, or substance represented to be used therein.

In addition, Colgate was asked to cease and desist from falsely representing in any respect material to inducing the sale of Palmolive Rapid Shave, its moisturizing properties, or other qualities or merits as an aid to shaving.\textsuperscript{113} An equally broad order was drafted with respect to Ted Bates and Company, Inc., since the Commission found as an issue of fact, that Ted Bates knew of and, in fact was an active participant in the deception.

In accordance with F. T. C. procedures Colgate then brought the case back to the Court of Appeals claiming that the Commission had failed to comply with the expressed views of the Court.\textsuperscript{114} The Appellate Court first made it clear that it had "\ldots reached a number of conclusions \ldots which the Commission was not free to disregard."\textsuperscript{115} Then the Court of Appeals agreed to re-examine the Commission's position on the merits since so much importance beyond this particular case had become attached to the Commission's antipathy to mock-ups.

\begin{footnotes}
\item[110.] Id. at 1272.
\item[111.] Id. at 1271.
\item[112.] Id. at 1282.
\item[113.] Id. at 1283.
\item[114.] Colgate-Palmolive Co. v. F. T. C., 326 F. 2d 517 (1st Cir. 1963).
\item[115.] Id. at 519.
\end{footnotes}
The Court of Appeals first considered what the Commission meant in its second order by the phrase "test, experiment or demonstration." In this order the F. T. C. defined demonstration as something which "proves visually a quality claimed for a product as distinguished from a casual or incidental display which is not presented as proof of the quality or appearance of the product." To test this definition the Court of Appeals asked counsel for the Commission whether the use of a mock-up of ice cream, that coincided exactly in appearance with the product, would be deceptive advertising. Counsel's reply was that this would be unobjectionable since "demonstration" in the Commission's order meant demonstration in the nature of a test or experiment so that the viewer would believe he has seen "proof" which transcends the advertiser's "word". Thus, the buyer would be indifferent to the mock-up. The Court of Appeals were not impressed with the strength of the difference that in a 'genuine' test the viewer has more 'proof' than the advertiser's word.

In setting aside the second order of the Commission, the Court instructed the Commission to enter an order confined to the use of a mock-up to demonstrate something which in fact could not be accomplished.

From this ruling the F. T. C. appealed and the Supreme Court in F. T. C. v. Colgate-Palmolive Co. granted certiorari to consider the Commission's conclusion that even if an advertiser has himself conducted a test, experiment or demonstration which he honestly believes will prove a certain product claim, he may not convey to television viewers the false impression that they are seeing the test, experiment or demonstration for themselves, when they are not because of the undisclosed use of mock-ups.

The Supreme Court stated that the Federal Trade Commission's judgment should be given great weight by reviewing courts especially in cases involving allegedly deceptive advertising. The Supreme Court stated that the Federal Trade Commission's finding that television commercials represented that the viewer was seeing the experiment for himself would be sustained since this was a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves. In sustaining the Commission, the Supreme Court reaffirmed the following rules: (1) It (is) a deceptive practice to state falsely that a product ordinarily sells for an inflated price but that it is being offered at a special reduced price, even if the offered price represents the actual value

116. Id. at 520.
117. Id.
118. Id.
119. Id. at 522.
120. Id. at 523.
122. Id. at 385-6.
of the product and the purchaser is receiving his money's worth;\textsuperscript{123} (2) It is a deceptive practice for a seller to misrepresent to the public that he is in a certain line of business, even though the misstatement in no way affects the qualities of the product;\textsuperscript{124} (3) It is a deceptive practice to fail to disclose that products are reprocessed even though the reprocessed products are as good as new;\textsuperscript{125} and (4) It is a deceptive practice to misappropriate the trade name of another.\textsuperscript{126}

The Supreme Court explained that in each of these situations the seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public — the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods and the desire for verification of a product claim. In these situations the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product performance of the product he receives.

The Supreme Court also considered two other rules: (1) It is a deceptive practice to state falsely that a product has received a testimonial from a respected source;\textsuperscript{127} and (2) It is a deceptive practice for sellers to falsely state that their product claims have been "certified."\textsuperscript{128} The Court found these two additional situations to be indistinguishable from that in the Colgate case since in all the situations there were: (1) an underlying true product claim, (2) experimental conduct by the seller sufficient to prove to himself the truth of the claim, (3) an averment by the seller that the public can rely on something other than his word concerning both the truth of the claim and validity of the experiment.\textsuperscript{129}

The Supreme Court also agreed with the Commission that the undisclosed use of plexiglass in the Rapid Shave commercials was a materially deceptive practice, independent and separate from other misrepresentations found.\textsuperscript{130} Moreover, the Court warned that if it becomes impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial and, that, if inherent limitations of a method do not permit its use in the way a seller desires, the seller cannot, by material misrepresentation, compensate for these limitations.\textsuperscript{131}

The Supreme Court authorized the F. T. C. upon discovery of deception in television commercials to infer, within the bounds of reason that the deception would constitute a material factor in a purchaser's decision.

\textsuperscript{123} Id. at 387.
\textsuperscript{124} Id. at 388.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.; See also Stipulation 9083, 55 F. T. C. 2101 (1958); Stipulation 8966, 54 F. T. C. 1953 (1957).
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 394.
Finally, the Court held that the final order of the Commission was capable of practical interpretation and was as specific as circumstances would permit. As regards the interpretation of the role, the Court said:

(1) Where the emphasis is on the seller's work, and not the viewer's perception the respondent need not fear that an undisclosed use of props is prohibited by the present order, but if there is an invitation for the viewer to rely on his own perception for demonstrative proof of the claim, the use of undisclosed props in strategic places might be a material deception; and (2) that if the respondents were sincerely unable to determine whether a proposed course of action would violate the present order, they may oblige the Commission to give them advice.

Finding that the cease and desist order was not too broad, the judgment of the Court of Appeals was reversed, and the case remanded for the entry of a judgment supporting the Commission.

V. THE COLGATE DECISION

A. Logical Consistency

Colgate was necessary, and logically consistent with F. T. C.'s established precedent on false advertising. By the use of the mock-up of the plexiglass and sand the advertiser deceived the viewing public into thinking that, within 60 seconds of an application of Rapid Shave, coarse sandpaper could be shaved. It was established that this could not be done. Therefore, Colgate engaged in deceptive advertising. The fact that this deception induced sales of Rapid Shave has never been questioned by any legal writer; and is not questioned by this article.

A problem, however, was created by the Supreme Court's hypothetical position that a mock-up used in a test, experiment or demonstration amounts to deceptive advertising, even if the mock-up was only to compensate for technical limitations, and even if the visual appearance is

132. Id.; See also F. T. C. v. Raladam Co., 316 U. S. 149, 152 (1941).
133. Id. at 394.
134. Id. at 393.
135. Id. at 394; This case has been cited as authority in the following cases: In Swift Company v. U. S., 393 F. 2d 247, 256 (7th Cir. 1968), in which it was stated, "If petitioners are in doubt as to the scope of the order, they may seek binding advice from the Dept. of Agriculture..." See also Purolator Products, Inc. v. F. T. C., 352 F. 2d 875, 886 (7th Cir. 1965).
136. Id.; The considerations of how broad a cease and desist order is, is a topic that I do not wish to go into this paper, but this case has often been cited for a broad cease and desist order. U. S. v. H. M. Prince Textiles, Inc. 262 Fed. Supp. 383, 387 (U. S. D. C., 1966). Also in Safeway Stores, Inc. v. F. T. C., 366 F. 2d 795, 806 (9th Cir. 1966) it was stated "... Congress has placed the primary responsibility for fashioning orders upon the Commission... the courts should not 'lightly modify' the Commission's orders." In Doherty, Clifford, Steers & Shenfield, Inc. v. F. T. C., 392 F. 2d 971, 975 (6th Cir. 1968) the reviewing courts were admonished "that in cases involving allegedly deceptive advertising the Commission's judgment is to be accorded special deference."
otherwise a correct and accurate representation of the product itself. Contrast this with the position of the Commissioner that not all mock-ups result in deceptive advertising. In fact, the Commission was very careful to say that mock-ups were not illegal per se.\textsuperscript{137} It was only those which prove visually a quality claimed for a product as distinguished from a casual or incidental display which is not presented as proof of the quality or appearance of the product which were considered as deceptive advertising by the Commission.\textsuperscript{138} At this point we need not consider whether this distinction is manageable, but rather that the Commission made a distinction. Apparently the Commission felt that some mock-ups would constitute a misrepresentation of a fact that would constitute a material factor in a purchaser's decision to buy, and others would not.

The Supreme Court pointed out that all concerned parties agreed that § 5 prohibited the intentional misrepresentation of any fact which would constitute a material factor in a purchaser's decision to buy.\textsuperscript{139} Undoubtedly they felt that tests, demonstrations, and experiments were material factors in inducing the sale of the products, whereas incidental displays were not. Being willing to recognize that within the framework of the commercial, certain mock-ups, namely incidental displays, did not materially induce purchases, the Court should have gone one step further. They should also have attempted to determine whether the impact of any particular deception upon consumers would materially induce purchases.

To determine whether a mock-up in a demonstration in and of itself is a deception, one must assume that the television commercial makes an implicit representation that the viewer is actually seeing the experiment for himself. The Supreme Court claimed that this inference must be accepted as a statement of fact since it was an inference that could reasonably be drawn by the Commission.\textsuperscript{140}

What deception results from this representation? The consumer is being told that he is seeing the demonstration before his eyes. Actually, however, he is seeing the demonstration with the substitution of a mock-up that compensates for technical problems. The experiment could have been performed in the person's living room with the same viewed results without the mock-up. The Court seemed to think that the viewer was being promised a demonstration, and was therefore deceived because he did not get one. Actually, the difference to the consumer is not between demonstration and not demonstration, but between a demonstration with a mock-up and demonstration without a mock-up. It is important to keep this distinction in mind.

\textsuperscript{137} In the matter of Colgate-Palmolive Co. and Ted Bates & Co., Inc. 62 F. T. C. at 1272 (1963).
\textsuperscript{138} 62 F. T. C. at 1272.
\textsuperscript{139} 380 U. S. at 386.
\textsuperscript{140} Id. at 392.
The Court likened its mock-up hypothetical\textsuperscript{141} to \textit{Kerran}\textsuperscript{142} where the public was not told that the oil being advertised, though equally as good as new, was reprocessed. But in fact, the two cases are distinguishable. In the \textit{Kerran} case, there was deception in the fact that it was not revealed that the oil was reprocessed. Had this fact been revealed, the consumer would not purchase the oil because his concept of reprocessed oil is inferior to new oil. If he were told that the quality of reprocessed oil is just as good as new oil he still would not purchase the reprocessed oil. Therefore, it could be said that the deception induced the sale. In the mock-up hypothetical of the Court, the deception would be in fact that an implicit representation was made, or that a demonstration was being seen before the viewer's eyes. However, as was pointed out above, the only thing that the viewer is being promised that he doesn't get, is a demonstration free of mock-ups. In this example the only deception is in failing to tell the consumer that a mock-up was used in the demonstration. It is not too likely that revealing this fact would keep any consumer from purchasing shave cream. It is doubtful that the mock-up present in this case where there is no deception as to the quality of the product, and where the mock-up could be performed in the viewer's living room exactly as viewed on the set, would materially affect the viewer to purchase the product. This type of analysis would also distinguish all of the other cases relied on by the Supreme Court.

The Court seemed to think that the mock-up materially induced some sales, because without the mock-up some sales would not have been made. It was certainly true that the mock-up induced some sales. But the fact that the viewer was not told that there was a mock-up present would not seem to materially induce any sales.

No case holds that any deceptive advertising materially induces the sale of products. In \textit{S. Bushbaum and Co. v. F. T. C.},\textsuperscript{143} it was held that a manufacturer would not be enjoined from using the trade name “Elastic-Glass” and the word “glass” in describing its product made of synthetic resin. The Court said that the consumer’s concept of the product would not be changed in any way by telling him that the product is not actually glass, so that calling the non-glass product “glass” did not materially induce sales.

The case of \textit{Carter Products, Inc. v. F. T. C.}\textsuperscript{144} shows that a court can find that a deception does not materially induce a sale, and is not viola-

\textsuperscript{141}. I will use the term mock-up hypothetical to characterize a situation in which the only deception is in using a mock-up in a test, demonstration or experiment, to compensate for technical difficulties. The reader should keep in mind that in this situation the viewer would see the same results if the test, experiment, or demonstration was performed in his living room without the mock-up. In other words, the only "...untruth is that the substance (the viewer) sees on the screen is artificial, and the visual appearance is otherwise a correct and accurate representation of the product itself..." 380 U.S. 374, 381.

\textsuperscript{142}. Kerran v. F. T. C., 265 F. 2d 246 (10th Cir. 1959), \textit{cert. denied}.

\textsuperscript{143}. 160 F. 2d 121 (7th Cir 1947).

\textsuperscript{144}. 323 F. 2d 523, 528 (5th Cir. 1963).
tive of the *Federal Trade Commission Act*. This was a case in involving a claim that ordinary shaving lathers dry out. This claim was made while there was shown a picture of a man tugging at his face in great discomfort. Afterward, a claim was made that "Rise" stays "moist and creamy" over the video of a man enjoying his shave. The record showed that ordinary lathers do not dry out, and that in this commercial, these ordinary lathers were made from a mock-up consisting of 90 percent water, 10 percent foaming agent and ultra wet 60L. It did not contain the soaps of fatty acids which are the ingredients used to keep shaving cream from breaking down. The Court found that there was deception in attributing characteristics to products that they do not possess.\(^{145}\) However, the Court felt that the use of mock-ups in television advertising was not violative of the *Federal Trade Commission Act* where the only deception was that the substance the viewer sees on the screen was artificial and the visual appearance was otherwise a correct and accurate representation of the product itself.\(^ {146}\)

To support their position the only possible way that the Supreme Court could characterize as deceptive the shaving cream hypothetical would be to make one of the following findings:

1. The ability of shaving cream to sufficiently moisturize sandpaper so that it can be shaved in 60 seconds is important to consumers, or

2. If the consumers know that there is a mock-up present, they will not believe that the sandpaper can be shaved as indicated, even if they are told the truth which is that the sandpaper can be shaved as indicated in their living room.

In (1) above, if consumers think that the sandpaper can be shaved as indicated, they will purchase the shaving cream because they think this is relevant to the quality of shaving cream. Therefore, if the sandpaper cannot be shaved as indicated, the consumer is deceived. This is, of course a perfectly correct position and is supported by the holding of the *Colgate* case.

As for (2) above, it would be similar to the *Kerran* case, but the material inducement to the consumer in the *Kerran* case would be more obvious than in the Court's hypothetical.\(^ {147}\) In *Kerran* the Court said that the consumer must merely disbelieve that reprocessed oil is not as good as new oil in order to be deceived.

**B. Mock-Up Hypothetical v. Testimonial**

The Commission felt that the mock-up illustration could be likened to a phony testimonial case, in which the quality of the product was unquestioned, but the seller purported to have a testimonial when, in fact none existed. Disagreeing, the Court of Appeals felt that Colgate's

\(^{145}\) *Id.*

\(^{146}\) *Id.*

\(^{147}\) See *supra* note 142.
ad would be more like a case in which the testimonial was received, but
due to technical difficulties, could not be accurately reproduced on tele-
vision. This later testimonial hypothetical would not be an unfair trade
practice according to the judges of the First Circuit. The Supreme Court,
however, agreed with the Commission. They felt that in both the mock-
up hypothetical and in the testimonial cases there was: (1) an under-
lying true product, (2) an experiment to prove the truth of the claim to
the seller, and (3) a claim by the seller that the consumer can rely on
something other than the seller's word.\textsuperscript{148} The reasoning of the Court
was, that this hypothetical was not like the case in which the testimonial
was true but could not be produced because in that case the objective
proof was the existing word of a celebrity that the experiment was con-
ducted while in the mock-up case the objective proof being offered
consumers did not in fact exist.\textsuperscript{149} Justice Harlan, dissenting, expressed
the better view on this point, saying:

In both cases the viewer is told to "see for himself" in the one case that
the celebrity has endorsed the produce; in the other, that the product can
shave sandpaper; in neither case is the viewer actually seeing the proof
and in both cases the objective proof does exist. . . . In neither case,
however, is there a material misrepresentation, because what the viewer
sees is an accurate image of the objective proof.\textsuperscript{150}

Differences and similarities can be argued back and forth without any
relevant conclusions unless the actual deception and its inducement of
sales is considered.\textsuperscript{151} The actual deception in the phony testimonial
case is that a person thinks that the product he is buying was approved
by someone when, in fact, it was not. When the consumer finds out that
the approval was not there, his concept of the product changes. Thus, it
can be said that the testimonial materially induced the sale.

In the case where there is a valid testimonial which can not be pro-
duced on television, the actual deception is that the consumer isn't being
told that a substitute is being shown him rather than the real testimonial.
The only difference between the substitute testimonial and the mock-up
hypothetical rests on whether the consumer's concept of the product
changes more in knowing that substitute sandpaper is being used or in
knowing that a substitute testimonial is being used. Perhaps there is a
distinction in these cases because consumers do care more about an
actual demonstration than they do about what someone says about the
product. However, to this author, it seems that the mock-up hypothetical

\textsuperscript{148} 380 U. S. 374, at 389, 90.
\textsuperscript{149} Id. at 390.
\textsuperscript{150} Id. at 397.
\textsuperscript{151} It was accurately pointed out in the Yale Law Journal — \textit{supra} note 4, "Except
for the injury caused by disparagement of competitors on their products, a protection
of consumers will afford full protection to competitors under § 5(a) . . . . The con-
sumer's injury is in acquiring a product that is different from what is advertised, (and
in this situation) the competitor is deprived of sales of factors other than actual dif-
ferences between his and the advertiser's products." The scope of this paper will not
include disparagement cases.
resembles this non-producible testimonial more than it does the non-testimonial case. However, in the mock-up hypothetical and the non-producible testimonial, the deception is in the manner of showing the advertisement on television screen, and not as to the quality of the product. True, it can be argued that the deception ultimately goes to the quality of the product, but the deception's effect upon the consumer's concept of the quality of the product seems so far removed that it would seem impossible to say that the deception materially induced the sale. There is no disputing that the Commission can infer, within the bounds of reason that the deception will constitute a material factor in a purchaser's decision to buy. However, it does not seem that the Commission is acting reasonably in inferring that the mock-up materially induces the sale.

C. Supreme Court Position as Precedent

In the Libbey-Owens-Ford Glass Company v. F. T C. case the following statement from Colgate was used as precedent: "Undisclosed use of mock-ups in television commercials is (a) deceptive practice even though (the) experiment of demonstration actually proves the product claim."

In that case, the defendant attempted to show the superiority of safety plate glass windows of General Motors cars, over safety sheet glass used in side and rear windows of non-General Motors cars. Mock-ups were used to help achieve this result. Different camera lenses, more acute angles, and taking pictures through an open window were used to distort the pictures and thus deceive the viewer. Other tricks used were streaking the windows with vaseline, and panning the camera from side to side to give the viewer the impression of walking past a home window.

Although the demonstration in Libbey might have proved the product claim, the mock-up was used in such a way that the consumer would see things on the television screen that could not be seen in real life. Using an open window to demonstrate the clearness of glass certainly did not give the consumer a picture of what the actual window was like, but instead was a material deception. This situation was very similar to the actual Colgate case, where the sandpaper could not be shaven as represented. It would not, however, be like the hypothetical where the sandpaper could have been shaven in the living room.

Although this is the only case where the Colgate case was cited as authority, or for the position that the use of mock-ups is deception despite the fact that the experiment of demonstration actually proves the product claim, the Colgate case is manifestly precedent for this point. Advertisers are perhaps avoiding demonstrations to avoid litigation. Or

152. 380 U. S. at 392.
153. 352 F. 2d 415 (1965).
154. Id.
perhaps other pressures have been put on advertisers to keep these mock-up demonstrations off the air.\textsuperscript{155}

\textbf{D. Social Policy Considerations}

To properly evaluate the social policy arguments, it is necessary to determine first whether advertising does fill a proper social function. A perfect market demands perfect enlightenment of those who buy and sell. One of the many imperfections of the real world is that, absent advertising, most buyers would have to go to a great deal of trouble to discover what is offered for sale. To the extent that advertising informs buyers about what is to be bought, and at what prices, advertising undoubtedly accelerates the distribution of goods and services.\textsuperscript{156} Pharmaceuticals, Inc., sponsor of the tremendously popular quiz show, Twenty-One, noted a sales increase of 68.9\% for Sominex during a twelve-week period of sponsorship, and a jump in sales of 71.4\% for Geritol during a three-week period.\textsuperscript{157} If television advertising were not so successful, it would be doubtful that one and one-half billion dollars\textsuperscript{158} would be spent on television advertising. The fact that one who is deprived of television advertising is at a serious competitive disadvantage, is beyond question. Psychologists have shown that some persons learn best by hearing, some by seeing but that all learn best by a combination of seeing and hearing.\textsuperscript{159} While it is certain that persuasive arguments can be made to the effect that advertising does not, in reality, quicken the stream of commerce, there is no disputing the fact that advertising does perform some communicating functions. It would be nonsensical and naive to argue for a discontinuance of all advertising.

Assuming that advertising is here to stay, many advertisers assert that everyone should have a right to use the television medium freely, compensating for technical problems in whatever manner they deem necessary. Their arguments are similar to that of the advertiser who "attempted to justify the use of a plexiglass mock-up and any resultant injury on the ground that problems of photography necessitated its substitution for real sandpaper."\textsuperscript{160} The Federal Trade Commission had a ready answer for the above argument. "Assuming it to be the fact that there are indeed such limitations in television photography, the Commission can appreciate that these 'technical' difficulties could give rise to problems for spon-

\textsuperscript{155} In a recent action by the F. T. C. involving Bristol-Myers and Ogilvy & Mather Inc., a New York advertising agency, an administrative law judge of the F. T. C. ruled that television \textit{demonstrations} purporting to show the dryness of Dry Ban compared with other deodorants was in violation of the F. T. C. Act. The \textit{Wall Street Journal}, December 10, 1973. See also \textit{ITT Continental Baking Co.}, D-8860, 10/19/73, 42 U. S. L. W. 2256 (U. S. Nov. 13, 1973).

\textsuperscript{156} Brown, \textit{Advertising and the Public Interest: Legal Protection of Trade Symbols}, 57 \textit{Yale Law Journal}, 1168 (1948).

\textsuperscript{157} Id. at 156.

\textsuperscript{158} Id. at 157.

\textsuperscript{159} See \textit{supra} note 4 at p. 145.

\textsuperscript{160} In the Matter of Colgate-Palmolive Co. et al. 59 F. T. C. at 1467 (1961).
sors and agencies in determining how most effectively to use television in advertising their products. The limitations of the medium may present a challenge to the creative ingenuity and resourcefulness of copywriters; but surely they could not constitute lawful justification for resort to falsehoods and deception of the public."\(^\text{161}\) The Commission went on to evaluate the advertiser's position, "Stripped of polite verbiage, the argument boils down to this: Where truth and television salesmanship collide, the former must give way to the latter. This is obviously an indefensible proposition."\(^\text{162}\) The Supreme Court agreed with the Commission that there are limits in the use of the medium. They pointed out: "If, however, it becomes impossible or impractical to show simulated demonstrations on television in a truthful manner, this indicates that television is not a medium that lends itself to this type of commercial, not that the commercial must survive at all cost. . . . All methods of advertising do not equally favor every seller. If the inherent limitations of a method do not permit its use in the way a seller desires, the seller cannot by material misrepresentations compensate for these limitations."\(^\text{163}\)

The author finds himself in complete agreement with the position of the Commission and the Court that material deceptions cannot be used to compensate for technical limitations. But in the mock-up hypothetical there is not a material deception. If advertisers cannot do a commercial without material deceptions, they should not do it at all. In the mock-up hypothetical there is no material deception — there the advertisers have used their creative ingenuity to overcome technical difficulties, but they cannot use the results since the courts feel that there is a material deception. They can, of course, use the mock-up so long as they disclose its existence.\(^\text{164}\) But this would put the advertiser using props or mock-ups to at least two disadvantages: (1) introducing another idea into a thirty-second commercial ruins the impact of the message; (2) introducing another idea in a conspicuous manner takes at least a few seconds, adding enormously to the cost of the commercial.\(^\text{165}\)

Granting that these arguments are poor ones applied to mock-ups that materially deceive, they are valid considerations when there is no material deception. It does not seem necessary to make advertisers go to the needless expense to disclose to the consumer that a mock-up was not a material deception.

An analogy may be drawn between the above arguments and a pronouncement by the National Association of Radio and Television Broadcasters deciding that it is not always necessary to disclose that a program

\(^{161}\) 59 F. T. C. at 1467, 68.
\(^{162}\) 59 F. T. C. at 1468.
\(^{163}\) 380 U. S. at 390, 91.
\(^{164}\) Id. at 157, m. 48.
\(^{165}\) Id. at 158, m. 481. Actually this article talked about a third disadvantage which is that the audience would be skeptical, but I don't feel that this would necessarily occur with proper disclosure.
was pre-recorded. "It is urged that both the public and the broadcasting industry will be served by the elimination of announcements where the program is recorded does not affect the value of the program or make any difference as a matter of public interest, convenience, or necessity; that such announcements serve only to cause repetitious interruptions of program continuity and program imbalance; that they are both an annoyance and a distraction to the listener or viewer and a costly and unnecessary burden on broadcasting stations and that they consume broadcast time which can be used by the station and public to better advantage."166

VI. SUMMARY AND CONCLUSIONS

The Federal Trade Commission has been effective in providing consumer protection against various kinds of deceptive advertising practices. The most recent success of the Commission was the regulation of the use of mock-ups on television commercials. Actually, the effect of this regulation, in practical terms, is to prohibit the use of mock-ups on television commercials.

It is perhaps arguable that it is very difficult for the Commission to determine if a mock-up is materially deceptive or not. Assuredly the policing function of the commission is made easier if no mock-ups are permitted in demonstrations. The Commission’s task would be made easier by placing the burden of going forward upon a party who uses a mock-up or make-up to show that there is no basic deception in its use.

The statement of the Supreme Court in the Colgate case that any mock-up used in a test, experiment, or demonstration is deceptive advertising, even if the viewed image was an accurate one, was an incorrect decision since this type of a mock-up does not materially induce any sales. In the mock-up hypothetical the concept of the product does not change upon discovery that a mock-up has been used, therefore material deception has not occurred.

Implying a representation that the viewer is actually seeing the experiment for himself does not lend to the conclusion that all mock-ups used in demonstrations, tests, or experiments are deceptive advertising. In the mock-up hypothetical the consumer is not being deprived of promised demonstration without a mock-up while going given a demonstration with a mock-up merely used to compensate for technical difficulties.

Possibly the Supreme Court in the Colgate case could have decided that using a mock-up for the sandpaper is deceptive advertising, even if the sandpaper could be shaved as represented in a person’s living room. However, to reach such a result would have necessitated the Commission’s finding that the non-disclosure of the mock-up materially induced sales. Instead the Court set up an arbitrary classification distinguishing between demonstrations, tests, or experiments and incidental displays.

166. Id.
They in effect found that all mock-ups used in tests, demonstrations, and experiments were deceptive per se because of an implied representation that the test, experiment, or demonstration was performed before the viewer's eyes. This approach prevented the Supreme Court from addressing themselves to the crucial issue, which was whether the use of the mock-up materially induced sales.

Although the Supreme Court's mock-up hypothetical is only dictum, it is of great relevance, because much of the impact of the Commission upon advertisers derives not from litigating particular cases but in discouraging advertisers from using types of advertising likely to be subject to a cease and desist order. Avoiding a cease and desist order by disclosing to the television audience that a mock-up is being used in a commercial is an expensive proposition which would detract from the impact of the commercial, and advertisers should not be forced to do it in the mock-up hypothetical. Difficulty of policing should not be a basis for the Supreme Court's decision which may have the effect of blanket prohibition of mock-ups. Rather the Court should adopt the more reasonable alternative of shifting the burden of coming forward to protect consumers against advertisements that materially deceive. One can readily see that in the mock-up hypothetical, the mock-up is not a material deception, therefore the Federal Trade Commission should not issue a cease and desist order pursuant to § 5 of the Federal Trade Commission Act against such a mock-up. Advertisers should be denied the use of television only if they cannot advertise their products without material deceptions, and in the mock-up hypothetical, there is not material deception.
THE "DEAD HAND" OF CHARITABLE INSTITUTIONS—OHIO'S STATUTE OF MORTMAIN

by

James P. Edmiston*

I have never been in favor of this statute, but, of course, as Probate Judge, I must enforce it. In my opinion, based on experience, it serves no useful purpose except to frequently deny worthy charities the benevolence of the testator. My estimate of ten percent as the number of persons who leave money to religious organizations in anticipation that that might help them in the life hereafter, is based on the given number of Roman Catholics (of which I am one) leaving money for masses to be said for the repose of the testator's soul.¹

This comment by an Ohio probate judge, was received in response to a questionnaire seeking judicial opinion on the value of Ohio's mortmain statute.² It reveals at once a negative and limited judicial response to legislation which attempts to circumscribe testamentary prerogatives.

Ohio has limited bequests and devises to charitable institutions by statute for one hundred years.³ The statute has been applied on numerous occasions in that period to invalidate testamentary gifts to charity. It has also been successfully circumvented by several techniques of avoidance.

The idea of preventing death-bed bequests and devises to the "dead hand" (hence, the name mortmain) of charitable institutions is certainly not unique to Ohio. Statutes attempting to control and restrict testamentary gifts to charities have been in effect for many years in California, Florida, Georgia, Idaho, Iowa Mississippi, Montana, New York, Pennsylvania and the District of Columbia.⁴ Although there are in some cases substantial differences between Ohio's mortmain statute and those of other jurisdictions,⁵ all mortmain legislation in the United States is based on English statutory precedents that are traceable back to the thirteenth century.⁶

* B.A. (Third year law student; B.A. History, St. Joseph's College (Ind.); M.A. Western Michigan University (Inst. Medieval Studies).

³. 71 Ohio Laws 48 (1874).
⁵. See Joslin, The Mortmain Act in Ohio 18 O.S.L.J. 210 (1957) for a comprehensive comparative analysis on this issue.
⁶. The first recognizable statue of mortmain was passed early in the reign of Edward I in 1279 (7 Edw. I. St. 2). Joslin, Supra note 5, attributed the first formalization of the English mortmain act to George II in 1736.
In this article, a broad review of the first mortmain legislation in England will be undertaken, followed by an analysis of case law interpreting Ohio's statute of mortmain.

In order to understand the reasons for the enactment of the first mortmain legislation in medieval England, it is necessary to analyze the political structure of England at that time. From the fifth to the eighth centuries, the barbarian invasions had devastated the European continent and had led to a general demand by local landowners for protection. At this time, there was no central monarchy on the continent capable of exercising effective control over vast areas. There were, however, local "strong men" capable of providing this protection—at a price. In return for protection, three things were demanded: loyalty, services and land. This system of "local rule," of a barter of services and land for protection, was known as feudalism. ⁷

Whereas, feudalism on the European Continent was a phenomenon occasioned by natural historical developments, its introduction to England was highly artificial and the result of military conquest.

English feudalism was a creation of the Norman Conquest. The system of feudal relations which existed in the duchy of Normandy was introduced into England by William the Conqueror. . . . It was developed by William's successors in the fullest possible manner, though always in such a way as to minister to the needs of the Crown. From the point of view of English law, the whole country became the property of the Crown, and allodial estates, over which the proprietor exercised full and unrestricted ownership, did not exist. . . . Every estate was regarded as a tenement held directly or indirectly of the king, and no form of holding could be ultimately independent of him. ⁸

While feudalism on the Continent was decentralized in structure, in England it was highly stratified and subject to the ultimate control of the king. In this vertical relationship, all services and fees from a lord-vassal relationship were ultimately owing to the king of England, who was at the top of the feudal pyramid. Typical of the incidents of feudal tenure which directly benefitted the king were the rights of primer seisin, consent, escheat, wardship, and marriage. ⁹ It was thus to the king's financial advantage to keep the system working properly.

9. B. Lyon, A Constitutional and Legal History of Medieval England 458 (1960). (hereinafter cited as Lyon). Primer seisin was the right of the king to take first possession (seisin) after the tenant's death. He could keep the heirs of the deceased tenant out of their lands for one year, or in lieu of this, extort one year's profit from the land. A fine was customarily levied for the lord's permission for the tenant to alienate the land (consent). If a tenant died without heirs, his land was forfeited to the crown (escheat). Wardship was the lord's right to retain profits from the land until the ward, who was to inherit the land through primogeniture, came of age. Marriage was the lord's right to select a mate for a deceased tenant's wife.
The practice of tenants granting their land to the church seriously impeded the effective functioning of the feudal system in England.

Because the church never died, never married, and never had children, none of the incidents of tenure could apply to this land. The land had been granted into a dead hand, in ‘mortmain’ as the records say.\textsuperscript{10}

It was to remedy this situation that Edward I enacted the \textit{Statute De Viris Religiosos} \textsuperscript{11} The statute was designed to prevent the alienation of land to the church by a tenant without the consent of the lord, on pain of forfeiture.

There were, however, several devices available to circumvent the prohibitive effect of the statute. Many lords, for example, were more than willing to give their permission for alienation in return for pecuniary consideration.\textsuperscript{12} Legal devices used to avoid the statute included the collusive lawsuit known as the “common fine and recovery,” and the practice of granting land to one individual for the use of another.\textsuperscript{13}

Subsequent legislation attempted to remedy these abuses.\textsuperscript{14} For example, a statute enacted during the reign of Henry VIII declared that any feoffment to uses for churches, fraternities, or charitable institutions was void.\textsuperscript{15}

It was not until 1736, however, that substantial revisions were made in the regulation of gifts to charitable institutions. In that year, a statute was enacted which provided that, in order to be valid, all gifts and conveyances for charitable uses had to be made by deed executed and

\textsuperscript{10} Id. at 459.

\textsuperscript{11} 7 Edw. I. Stat. 2 (1279). The statute recited:

"That it had been of late provided that religious men should not enter into the fees of any without license or will of the chief lord, of whom such fees be holden immediately, and notwithstanding such religious men have entered as well into their own fees as into the fees of other men, appropyring and buying them, and sometimes receiving of them the gift of others, whereby the services that are due of such fees, and which at the beginning were provided for the defence of the realm, are wrongfully withdrawn . . . (it is enacted) . . . That no person shall presume to buy or sell lands, or by any craft or engine to appropriate lands under pain of forfeiture of the same, whereby such lands may come into mortmain; if any person offend against this statute, it shall be lawful to lords of the fee to enter into the same within a year from the time of the alienation, and to hold it in fee, and if the chief lord immediate will not enter within the year, it shall be lawful for the next chief lord to enter within half a year next, and so every lord mediate may enter if the next immediate lord to him be negligent, and if all the lords of such fee which be of full age within the four seas, and out of prison be negligent, the king, after the year accomplished, shall take such lands, and enfeoff others therein by services for the defence of the realm, serving to the lords their escheats and services.

\textsuperscript{12} Lyon, \textit{supra} note 9 at 459.

\textsuperscript{13} Id. at 462, 63. Lyon illustrates the technique of feoffment to use as follows: "In a case where the intent was to avoid the statute of mortmain, L would convey the land to O, stating in the deed of conveyance that O should permit use of the land by the church. Though O has the legal ownership, he is trusted by L to let the church use the land and to derive all benefits from it.”

\textsuperscript{14} See generally, G. Duke, \textit{The Law of Charitable Uses}, 192-201 (1805) for a complete text of subsequent mortmain legislation in England.

\textsuperscript{15} 23 Hen. VIII c. 10 §1 (1532)
delivered in the presence of at least two credible witnesses at least twelve months before the death of the donor or grantor, and enrolled within six months after its execution. By the terms of the statute, the above conditions only applied to inter vivos gifts. All testamentary gifts to charities were still absolutely prohibited by the statute.

There is no doubt that the well-disposed benefactor made good use of the inter vivos gift to charity. As indicated in the Statute of Charitable Uses, such gifts were made,

.... some for relief of aged, impotent, and poor people, some for maintenance of sick and maimed soldiers and marines, schools of learning, free schools, and scholars of universities; some for repair of bridges, ports, havens, causeways, churches, seabanks, and highways; some for education and preferment of orphans; some for or towards the relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed; and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants....

This, then, is the English statutory background, in the context of which Ohio's mortmain legislation must be considered. Several conclusions can be drawn from the English experience with mortmain legislation:

(1) the purpose of preventing alienations to charities in England was mainly financial, since land not in mortmain was capable of generating greater revenues for the Crown;

(2) from the beginning, England's statutes of mortmain were rather successfully avoided;

(3) the term "charity" was broadly interpreted to include a wide variety of activities.

Prior to 1874, Ohio had no law regulating charitable bequests or devises. Although there were several early Ohio cases in which testamentary trusts for charitable purposes were challenged as being too indefinite, the Court adopted the policy of giving a liberal construction to the trust and upholding it if at all possible.

The original section defining the right of a testator to dispose of his estate by will was enacted in 1852. It contained, however, no limitation on bequests or devises to charities. Evidently in recognition of the need to place some controls on charitable testamentary dispositions, the Ohio legislature in 1874 passed an amendment to the original Wills Act of 1852 which provided:

16. 9 Geo. II, c. 36 (1736)
17. 43 Eliz., c. 4 (1601)
18. Landis v. Wooden, 1 Ohio St. 161 (1853); Miller v. Teachout, 24 Ohio St. 525 (1874)
19. 50 Ohio Laws 297 (1852)
that if such testator or testatrix shall die, leaving issue of his or
her body living, or their legal representatives, or shall leave an adopted
child or children living, or their legal representatives, and said will give,
devise, or bequeath such estate in whole or in part to any benevolent,
religious, educational or charitable purpose, or to any person in trust
for any of such purposes, whether the trust appears upon the face of the
instrument making such gift, devise, or bequest or not to the State of
Ohio, or any state or country, to any county, township, city, incorpo-
rated village, or other corporation or association, in this or any other
state or country, in such case said last will, as to such devise or bequest,
shall be invalid and void, unless such will (or if contained in a codicil
thereto, then such codicil) shall have been duly executed according to
law at least twelve calendar months prior to the decease of such testator
or testatrix.20

The subsequent legislative history of this statute shows that, with few
exceptions,21 it remained substantively the same until it was extensively
revised in 1965.22

Under Ohio’s original mortmain statute, three conditions had to occur
before the law would apply to invalidate a testamentary gift to charity:

1. the person had to die testate;
2. with a will executed less than twelve months prior to his death;
3. leaving issue of his body or an adopted child surviving him.

The statute was first tested in the case of Patton v. Patton.23 On Jan-
uary 29, 1878, Joseph D. Patton executed his will, by which he created a
life estate in all his real and personal property in his wife, and at her
death a life estate in the same property was to go to the testator’s grand-
son. The will further provided that if the grandson died leaving a surviv-
ing child or children, they were to take the estate in fee simple. But if
the grandson died childless, then the estate was to be paid to the Board of
Home and Foreign Missions of the Presbyterian Church for aid in carry-
ing on missionary work. The nature of the interest of the charities was
thus a contingent remainder.

Joseph Patton died within two months after the will was executed. His
widow died in 1880, and the grandson died childless and intestate in
1881.

In a subsequent suit brought by the brothers and sisters of the testator
against the Board of Missions and two aunts who were the next-of-kin of
the grandson, the court held that the attempted gift to the Missions in

20. 71 Ohio Laws 48, §1 (1874)
21. Ohio Rev. Stat. §5915 (Bates, 1898) omitted the word “void” from the original
enactment. Another change occurred in 1932, when the legislature changed “legal rep-
resentatives” to “lineal descendants,” apparently to clear up a problem as to whether
the statute was intended to apply to executors and administrators, Ohio Gen. Code
§10504-5 (Baldwin, 1934).
23. 39 Ohio St. 590 (1883).
the will was void since it violated the mortmain statute. Because of this void bequest, the court further held that the property at the testator's death descended to the grandson as intestate property.\textsuperscript{24} Thus, the real estate of which the grandson died seized passed as ancestral property to the brothers and sisters of the testator, and the personal property went to the aunts as next-of-kin of the intestate.

It was clear after the Patton case, that a testator could not avoid the prohibitory effect of the mortmain statute by making a contingent bequest or devise to charity. It was also established in that case that, although the primary purpose of the mortmain statute was to protect natural or adopted children of the testator against testamentary distributions to charities made just prior to death, collateral heirs could also attack the validity of charitable bequests and devises provided the lineal heir survived the testator and then died.\textsuperscript{25}

The court in the Patton case had held that a bequest or devise to charity which violated the mortmain statute was inoperative and void. Since the statute under which the case had been decided had expressly declared that gifts which contravened the statute were "invalid and void,"\textsuperscript{26} this result is not surprising. But when the act was printed as section 5915 of the Revised Statutes, the words "and void" were omitted.\textsuperscript{27} This omission caused much confusion as to whether a charitable gift violating the statute was to be considered "void" or "voidable."

This issue was first considered in the case of \textit{The Board of Trustees of Ohio State University v. Folsom}\textsuperscript{28} and \textit{Thomas v. The Trustees of Ohio State University}.\textsuperscript{29} Both cases involved the construction of the will of Henry F. Page. In his will, Page had devised certain property to Ohio State University for an endowment fund, and then provided that if for any reason the devise was declared invalid, the property was to go to the children of two of his deceased brothers. In a subsequent codicil, Page empowered his daughter, Isabel, to confirm and ratify the devise to the university in case he died within one year from the making of the will. Page died within twelve months from the execution of the will and codicil. The daughter then executed and delivered a deed for the property to the university just prior to her death.

In a subsequent action brought by the children of the testator's brothers, the court held that, although the devise itself fell within the purview of the mortmain statute, the power given to the testator's daughter to ratify the invalid devise (and to waive the benefits of the statute) was effective to vest the estate in the Board of Trustees of Ohio State University.

\textsuperscript{24} Id. at 596.
\textsuperscript{25} See also, \textit{Davis v. Davis}, 62 Ohio St. 411, 57 N.E. 317 (1900).
\textsuperscript{26} 71 Ohio Laws 48 (1874).
\textsuperscript{27} See n. 21, Supra.
\textsuperscript{28} 56 Ohio St. 701, 47 N.E. 581 (1897)
\textsuperscript{29} 70 Ohio St. 92, 70 N.E. 986 (1904)
Upon the death of the testator within twelve months from the date of the will the property devised and bequeathed to the trustees of the university immediately vested in the children of his brothers, subject to be divested by appointment to the trustees by the donee of the power. . . . From the death of the testator it was a future contingent estate in Isabel Page which might be made absolute by appointment to the object designated by the testator which would determine the interests of the children of the testator's brother. . . . This future contingent interest she might convey . . . , and if it became absolute thereafter the title would relate back to the time of conveyance. 30

The court thus considered the charitable devise to be "voidable" in the sense that the testator's lineal heir could ratify an invalid bequest or devise by the exercise of a power of appointment in the will, to the detriment of collateral heirs.

The holding that the mortmain statute could be avoided by providing for a general testamentary power of appointment was confirmed in the recent case of In Re Lowe. 31 Armstead Lowe had executed his will on January 28, 1922, and died within one year on December 22, 1922. He left surviving him his second wife (Eva) and a son (Charles) by his first wife. The will established a trust fund for the use of one Janet Bremner during her life, and gave Eva the power to designate and appoint the beneficiaries of the trust upon the death of Janet Bremner.

Eva Lowe executed her will on February 13, 1923, and died within one year, on March 21, 1923, without surviving issue, adopted children, or lineal descendants. In exercise of the power of appointment given to her by her husband's will, Eva's will directed that the residue of her deceased husband's estate be conveyed to the Cleveland Society for the Blind.

In a subsequent action brought by the surviving heirs-at-law and next-of-kin of Armstead Lowe, the court held that the exercise of the power of appointment by Eva was a valid gift, notwithstanding the fact that both she and her husband had died within one year of the execution of their respective wills.

If the mortmain statute can be avoided by the exercise of a power of appointment, can it also be waived by the person or persons whom the statute is intended to benefit? The "void-voidable" distinction is important here also, for if the bequest or devise is merely voidable, then the persons intended to be benefitted may waive its benefits and thus validate the charitable gift. If the gift is void, on the other hand, no act by the persons intended to be benefitted will validate it.

In Deeds v. Deeds, 32 the Probate Court upheld a bequest made to Denison University within one year of the testator's death because the

30. Id. at 112, 70 N.E. at 899, 900.
32. 42 Ohio Op. 384, 94 N.E. 2d 232 (P. Ct., 1950)
The testatrix' son and only heir had signed and filed a waiver and disclaimer of all rights given under the mortmain statute. The court stated that

... the waiver of the benefitted person's right may take the form of a testamentarily-conferred power of appointment (as in the Thomas case), or it may be in the form of a quitclaim deed, or in any other manner which the benefitted person may choose to relinquish his statutorily-given right.33

However, in *Kirkbride v. Hickok*,34 decided by the Ohio Supreme Court in 1951, it was held that a charitable gift in violation of the mortmain statute was absolutely void. There, the testator, by will executed within one year of his death, provided that substantially all his estate was to be held in trust for twenty years with the income payable to his son, daughter, and certain designated employees. At the expiration of that period, all the assets in the trust were to be distributed to twenty charities named in the will. The will further contained an "in terrorem" clause, which barred anyone who contested the will from taking anything by its terms. If the gift were construed as voidable, any action by persons named in the will would invoke the "in terrorem" clause, or any inaction would constitute a waiver of the benefits of the mortmain statute. If, however, the attempted gifts were void, subsequent action by the children would have no destructive effect on their right to take under the will.

In the subsequent suit brought by the executors to construe the will, naming the children as defendants,35 the court held that the gifts to charity were void. The court distinguished the *Thomas* and *Folsom* cases on the grounds that they did not involve a devise in trust for a charity, but only the mere power to appoint to a designated object.36 The court in *Kirkbride* further stated:

No action of testator's children made the gifts to the charities invalid; the statutory law of Ohio accomplished that. Invalid means void, or without validity...37

However, "invalid" meant "voidable" in the subsequent case of *Ireland v. Cleveland Trust Co.*38 In that case,39 the Probate Court again held that a waiver or disclaimer by the sole heir-at-law of the rights of the mortmain statute was effective to make a charitable gift in contravention

33. *Id.* at 390, 94 N.E. 2d at 237.
35. That this was a "friendly" lawsuit cannot be denied in light of the fact that the defendant — children in their answers admitted that Arthur Hickok died *intestate* as to certain portions of his estate that were to go to the named charities after the twenty-year trust period.
36. *Id.* at 301, 44 Ohio Op. at 300, 98 N.E. 2d at 819.
37. *Id.* at 302, 44 Ohio Op. at 307, 98 N.E. 2d at 820. The net result of this holding was that the children obtained a vested remainder in the assets of the trust at the expiration of the twenty-year period.
39. See n. 32, *supra*.
of the statute valid. The court distinguished *Kirkbride v. Hickok* without opinion, which would indicate that it was felt that the holding in that case was confined to the particular circumstances present there. No subsequent Ohio case has clarified this apparent conflict.

Besides providing for a waiver clause, Ohio testators have attempted several other techniques to circumvent the operation of the mortmain statute. In *Roenick v. Dollar Savings & Trust Co.*, the testator provided that the assets of a trust should vest in his grandson on reaching a prescribed age provided the grandson pay certain sums to designated charities. The court held that the condition was invalid as against the mortmain statute, where the testator died less than one year from the execution of the will.

On several occasions, Ohio courts have been faced with the issue of the effect under the mortmain statute of a codicil executed within one year of the testator's death, where the codicil affects charitable bequests. In *Ruple v. Hiram College*, the testator executed a will in 1903 which provided for the establishment of a trust for his wife and daughter for life, and at their deaths the residue was to be divided among several charities, subject to a specific bequest of $10,000 to A. W. Ruple, the testator's son-in-law. However, the $10,000 bequest was revoked in a codicil executed by the testator in 1909, less than one year before his death.

Ruple subsequently sued to have the codicil revoking the bequest declared invalid because it increased the residuum of the estate for the charities within the prohibitory period of the mortmain statute. The court upheld the codicil on the grounds that Ruple was not "issue of the body" under the statute, and even if he had been a proper party, he was barred by the statute of limitations which ran against the "constructive trust" that the will had established.

The validity of the holding in the Ruple case was recently questioned by the court in *Newman v. Newman*. In that case, the testator by will executed in 1961 had divided the residue of his estate, after making certain bequests, into two equal parts, with one-half to go to his heirs and one-half to certain named charities. In a codicil executed on May 14, 1963, (less than one year before the testator's death) the testator purported to "revoke" the clause distributing the residue, and to leave an increased portion of the estate to charities.

The provisions of the 1963 codicil were admittedly within the mortmain statute. The charities, however, argued that because the testator in the codicil had made similar gifts to exactly the same charities as in the will, this indicated that he wished the revocation in the codicil to be dependent upon the effectiveness of the gifts contained therein. Since the

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41. 35 Ohio App. 8, 171 N.E. 417 (1928).
42. 28 Ohio Op. 2d 154, 199 N.E. 2d 904 (P. Ct. 1964).
gifts in the codicil were never effective because of the mortmain statute, the conditions on which the revocation depended never arose, and the bequests in the will were still valid.

The court rejected this argument, holding that the doctrine of dependent relative revocation was not applicable in mortmain cases. Thus, the charities took nothing under the will because of the invalidity of the subsequently-executed codicil.

Another important issue regarding the judicial construction of Ohio's mortmain statute is the delineation of the scope of the class of individuals for whose benefit the statute was intended and who are entitled to claim its benefits. In Theobald v. Fugman the testatrix had, within one year of her death in 1894, executed a will which bequeathed certain monies to several Roman Catholic Churches for the saying of masses and named the pastor of St. Francis Roman Catholic Church as the residuary legatee of the estate. The testatrix was survived by Frank Held and Katie McGovern, to whom small specific bequests had been made in the will, and whom the testatrix had in 1891 designated as her heirs-at-law in the probate court of Hamilton County. Neither one was a blood relation of the testatrix, nor had they been legally adopted, although they had had their last names changed to Fugman. In a subsequent action brought by the designated heirs-at-law to have the gifts to the churches declared invalid by virtue of the mortmain statute, the court sustained the gift, holding that the plaintiffs did not fall into the category of persons expressly protected by the mortmain statute. This was in spite of the fact that the statute under which Frank and Katie Fugman were designated as heirs-at-law provided that

the person thus designated shall be deemed and held to stand in the same relation, for all purposes, to such declarant as he or she could, if a child born in lawful wedlock. . . .

In Barrett v. Delmore, the Ohio Supreme Court held that, where a person had been legally adopted in a sister state which permitted the adoption of adults, such a person was an "adopted child" within the meaning of the mortmain statute and could avail himself of the beneficial provisions of that statute.

In Central National Bank of Cleveland v. Morris, the testator on August 1, 1962, executed his will, which provided for the equal division of a trust among his twenty-two grandchildren. In a subsequent codicil executed less than two months before the testator's death, the trusts to the grandchildren were conditionally revoked and the testator directed the establishment of a charitable foundation out of the trust proceeds. The testator died survived by four children, who waived any objection to

43. 64 Ohio St. 473, 60 N.E. 606 (1901).
the charitable bequest in writing. In an action brought by the guardian ad litem of the minor grandchildren⁴⁷ to have the charitable bequest declared invalid, the court sustained the validity of the gift, holding that the grandchildren were not included in the class to be protected by the statute, since they would not have taken by intestate succession had the testator not left a will. Nor could the children of the testator have fallen within the provisions of the statute.

The children of the testator in this case, by waiver or otherwise, have no control over or rights of any kind to the residue. It is logical therefore that if the statute cannot protect those whom it was designed to protect it has no application.⁴⁸

Finally, an Ohio case has held that a person who would normally qualify as "issue of the body" for purposes of the mortmain statute can lose that status by a subsequent adoption out of the testator's line. In Campbell v. Musari Society,⁴⁹ the testator left one-half of a substantial residuary estate to five charitable institutions by a will and codicil executed within one year of his death. The only living person related by blood to the testator was Maria Lloyd, the granddaughter of the testator.⁵⁰ But three months before the testator's death, his granddaughter had been adopted by her stepfather who had married the testator's daughter-in-law after the death of the testator's son.

In a subsequent action brought to contest the validity of the charitable gifts, the court relied on an Ohio adoption statute which provided, inter alia, that:

For the purpose of inheritance to, through, or from a legally adopted child, such child shall be treated the same as if he were the natural child of his adopting parents, and shall cease to be treated as the child of his natural parents for the purposes of intestate succession.⁵¹

The probate court thus held that, since the child had been adopted, the testator died without issue or the lineal descendant of issue, and that the charitable bequests were valid and effective.

Another area of the mortmain statute open to judicial construction is

⁴⁷. The adult grandchildren had consented to the establishment of the foundation. In addition, the four children had waived in writing any right to object to the charitable gift. But the existence of the waivers was not the precise basis for the holding in this case. The court thus lost an opportunity to further elaborate the "void-voidable" conflict.
⁵⁰. The testator's son had predeceased his father by eleven months.
⁵¹. Ohio Gen. Code Ann. §3107.13 (Page 1951). This section was subsequently amended in 1961 (129 Ohio Laws 1566) to include the following: "... except where one of the natural parents of such child has died and his living parent remarries and such child is adopted by such stepfather or stepmother, in which case his right of inheritance from or through his natural parent or other natural kin shall not be affected by his adoption." With this amendment, the Campbell case would be decided differently today.
whether or not the legatee qualifies as a “charity.” By its terms, Ohio’s mortmain statute broadly defines a “charity” as any person or organization having a benevolent, religious, educational, or charitable purpose. Ohio case law has included within the purview of the mortmain statute gifts to the poor, foreign missions, for masses, and to hospitals. And in *Thomas v. Harrison*, the court indicated that testamentary gifts to the Cleveland Bar Association, the American Civil Liberties Union, the Cleveland Public Library, and the Consumer’s League of Ohio were charitable in nature within the meaning of the mortmain statute. In *Anderson v. Malone*, a testamentary gift to the Police Relief and Pension Fund of Dayton was held to be a gift for a “benevolent purpose” and thus subject to the conditions of the mortmain statute.

In response to growing criticism of its severity, Ohio’s statute of mortmain was extensively revised in 1965. The changes which the new statute makes can be summarized as follows:

52. See Annot., 111 A.L.R. 525 (1937) for an extensive discussion of this issue.
54. *Davis v. Davis*, 62 Ohio St. 411, 57 N.E. 317 (1900).
61. Ohio Rev. Code Ann. §2107.06 (Page, 1968) which provides:
(A) If a testator dies leaving issue and by his will devises or bequeaths his estate, or any part thereof, in trust or otherwise to any municipal corporation, county, state, country, or subdivision thereof, for any purpose whatsoever, or to any person, association, or corporation for the use or benefit of one or more benevolent, religious, educational, or charitable purposes, such devises and bequests shall be valid in their entirety only if the testator’s will was executed more than six months prior to the death of the testator. If such will was executed within six months of the testator’s death, such devises and bequests shall be valid to the extent they do not in the aggregate exceed twenty-five per cent of the value of the testator’s net probate estate, and in the event the aggregate of the devises and bequests exceeds twenty-five per cent thereof, such devises and bequests shall be abated proportionately so that the aggregate thereof equals twenty-five per cent of the value of the testator’s net probate estate.

(B) The execution of a codicil to the testator’s will within six months of his death shall not affect the validity of any such devises and bequests made by will or codicil executed more than six months prior to his death, except as the same are revoked or modified by the codicil. If a codicil executed within such period increases the aggregate of such devises and bequests to more than twenty-five per cent of the value of the testator’s net probate estate, such increase by codicil is invalidated to the extent that such increases, plus the aggregate contained in the will and not revoked by the codicil, exceeds twenty-five per cent of the value of the testator’s net probate estate; and the amount of the codicil’s increase of each such devise and bequest in the will and each such devise and bequest contained in the codicil which was not contained in the will shall be abated proportionately.

(C) The portion of any such devises and bequests which is invalid under this section shall be distributed per stirpes among such testator’s issue unless expressly otherwise provided in the will or codicil.

(D) As used in this section, “the value of the testator’s net probate estate” means the probate inventory value of all the testator’s assets which are subject to the jurisdic-
(1) the period within which a will making charitable bequests or devises must be executed prior to the testator's death in order to validate the entire gift has been reduced from twelve to six months;

(2) even if such a will is executed within six months of death, charitable gifts of up to twenty-five percent of the value of the testator's net probate estate are valid;

(3) if a codicil is executed within six months of death it will not invalidate a prior charitable gift by will executed more than six months before death, but the sums of gifts under codicils and will still cannot exceed twenty-five percent of the net probate estate.

(4) any invalid charitable gifts are equally distributed among the testator's issue unless provided otherwise by will or codicil.

Since the revision of the mortmain statute, there has been only one reported decision interpreting its terms. In *Balyeat v. Morris*, the testatrix executed her will on July 14, 1970, directing her executor to sell all her property and bequeathing the proceeds to several charities. Also in her will, the testatrix specifically disinherited her granddaughter and only living issue, because of the granddaughter's past indifference and lack of affection for the testatrix. The testatrix died on August 26, 1970, and the granddaughter sued to contest the validity of the charitable bequest. The court of appeals of Allen County held that, notwithstanding the fact that the testator had disinherited the granddaughter, she was still entitled to the excess of twenty-five per cent of the net probate estate. The rationale of the court was that the testatrix died intestate as to that portion of her estate which exceeded the twenty-five per cent allowable to charitable gifts, and that, as to the rest, the testatrix could not disinherit one of her lawful heirs in respect to property not disposed of by her will.

It remains to be seen how Ohio courts will interpret the remaining provisions of the new mortmain statute. One thing, however, remains fairly certain — it will be tested again in Ohio courts. Surviving descendents will continue to contest the deathbed desires of testators to buy their way into a better life hereafter.

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62. Thus the result in *Newman v. Newman*, *supra.*, n. 42, would be changed today.
THE JUVENILE AND HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL

By William A. Huddleson*

I. INTRODUCTION

The purpose of this article is to examine the reasons why the juvenile is afforded only limited constitutional rights and more affirmatively the reasons why a juvenile, contra to popular judicial opinion, should be afforded the right to a jury trial.

It is the opinion of the author that a juvenile charged with an act of juvenile delinquency, which is criminal in nature and which if committed by an adult would constitute a felony or misdemeanor, should be afforded his constitutional right to a jury trial. This principle is promulgated on the theory that the primary function of the jury is to act as a fact-finding entity. Proper adjudication of a criminal act however labeled requires an impartial fact-finder to insure fundamental fairness as guaranteed by the Constitution.

As an introduction to this concept the reader must keep in mind that the juvenile concept as it exists today is already an exception to the rules of criminal common law. Juvenile courts are creatures of statutes. These statutes were enacted to protect the juvenile from the stigma of "criminal". Since the juvenile court system already operates as an exception to the general rules of criminal common law there should be no objection to improving the existing statutory exception by employing fundamental constitutional guarantees, including the right to a jury trial.

II. HISTORICAL BASIS OF THE JUVENILE COURT CONCEPT

To understand why the present system exists and how it came about it is necessary first to look at its historical development.

At common law the plight of the juvenile was clear cut. Under common law a child over the age of seven years but under the age of fourteen years was presumed to be incapable of distinguishing between right and wrong and was therefore, because of the requirement of scienter, incapable of committing a crime. A child over the age of fourteen was treated as an adult. He was tried as an adult and if found guilty he was incarcerated with adults.

Although clear cut in its application the pitfalls of such a system are readily visible to a modern society whose conscience is trained on the theory of rehabilitating criminals, particularly juveniles. When this com-

* Fourth year law student; B.A., University of Cincinnati.

mon law concept of segregation by age was in prominence the purpose of incarceration was punishment alone, punishment for the sake of deter-
ence from future crimes, not punishment with a motive toward rehabilit-
atation.

The English criminal common law became even less realistic in its transmittal to the United States:

“Our common criminal law did not differentiate between the adult and the minor who had reached the age of criminal responsibility, seven at common law and in some of our states, ten in others, with a chance to escape to twelve, if lacking in mental and moral maturity.”

The result of such an approach was to criminalize the juvenile rather than to reform him. Placed among adult criminals, with the stigma attached thereto, the juvenile had an open invitation to learn the finer points of the trade and more often than not he accepted the invitation.

The need for reform was apparent. Reform did not materialize however until the turn of the last century. The first juvenile court statute was adopted in Illinois in 1899. Colorado was the second state to adopt reform legislation and soon after the turn of the century over thirty American jurisdictions, as well as Great Britain, Ireland, Canada and the Australian colonies followed suit.

The concept involved in all the reform legislation was basically the concept of parens patriae, i.e. the power of the state to look after its infant residents using as its standard that action which would serve the best interests of the child. Under the concept of parens patriae the juvenile criminal was removed from the realm of criminal law. Thereafter any proceeding involving a “juvenile”, was defined as a non-adversary proceeding. It was in the nature of a civil proceeding not subject to the due process requirements of criminal law necessary to deprive a man of his freedom.

A law review article written contemporaneously with the turn of the century reforms gives a definite insight as to the objectives the reform legislation was seeking. Mr. Julian M. Mack commenting on the case of People ex rel v. Turner stated:

“the Supreme Court of Illinois, in People ex rel. v. Turner, released a child from the reformatory on the ground that the reformatory was a prison; that incarceration therein was necessarily punishment for a crime, and that such punishment could be inflicted only after criminal

\[\text{(2) Mack, The Juvenile Court, 23 Harv. L. Rev. 104, (1909, 1910).}\]
\[\text{(3) Act of April 21, 1899, Ill. Laws 131.}\]
\[\text{(4) Supra note 2.}\]
\[\text{(6) 55 ILL 280 (1870) In this case the Supreme Court of Illinois released a child from a reformatory on the ground that the reformatory was a prison and that such a punishment could only be imposed pursuant to the constitutional requirements of due process.}\]
proceedings conducted with due regard to the constitutional rights of
the defendant. Whether the criticism be just or not, the case suggests
a real truth, and one which, in the enthusiastic progress of the juvenile-
court movement, is in danger of being overlooked. If a child must be
taken away from its home, if for the natural parental care that of the
state is to be substituted, a real school, not a prison in disguise, must be
provided. Whether the institutional life be only temporary until a foster
home can be found, or for a longer period until the child can be restored
to its own home or be given its complete freedom, the state must, both to
avoid the constitutional objections suggested by the Turner case, and in
fulfilment of its moral obligation to the child, furnish the proper care.
This cannot be done in one great building, with a single dormitory for
all of the two or three or four hundred or more children, in which there
will be no possibility of classification along the lines of age or degrees
of delinquency, in which there will be no individualized attention. What
is needed is a large area, preferably in the country,—because these
children require the fresh air and contact with soil even more than does
the normal child,—laid out on the cottage plan, giving opportunity for
family life, and in each cottage some good man and woman who will live
with and for the children. Locks and bars and other indicia of prisons
must be avoided; human love, supplemented by human interest and
vigilance, must replace them. In such schools there must be opportunity
for agricultural and industrial training, so that when the boys and girls
come out, they will be fitted to do a man's or woman's work in the world,
and not be merely a helpless lot, drifting aimlessly about.7

The humanitarian goals of Judge Julian Mack and the Jane Addams
School resulted in what has been described as a tidal wave of reform
legislation.8 Although hopes were high during the first half of the cen-
tury the results were disappointing.

With respect to constitutional rights for juveniles, they were practically
nonexistent. The consequence of the reform legislation was that juveniles
became "nonpersons" in the sense that basic fundamental rights such as
right to counsel, privilege against self-incrimination etc. were not avail-
able to them.9

The hope that such a reformed system would deter juveniles from
criminal conduct was also lost when statistics gathered in the 1960's
revealed that between 1960 and 1965 the arrests of persons under
eighteen years of age for major crimes, which if committed by an adult
would constitute a felony in most jurisdictions, rose fifty-two percent
while the arrests of persons over eighteen for the same offenses rose only
twenty percent.10 A statistical study conducted in the District of Co-
lumbia revealed that in the fiscal year 1966 approximately sixty-six per-

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7. Supra n. 2 at 114.
9. Id.
10. President's Commission on Law Enforcement and Administration of Just-
cent of the juveniles arrested in the sixteen and seventeen year old age category were second-time offenders.11

A great deal of the disappointment resulted from the role of the juvenile court judge as originally envisaged by Mr. Julian Mack12 and the image of the juvenile court judge realistically portrayed in such cases as *In re Gault*.13 One study indicated that of 2,987 juvenile court judges in 1964 only 213 were full-time juvenile court judges.14 Another report indicated that half of those judges had no undergraduate college degree, a fifth had no college education at all, a fifth were not members of the bar and three-quarters devoted less than one-quarter of their time to juvenile matters.15 Yet another study revealed that about one-quarter of the judges had no law school training, one-third had no probation or social work staff available to them and between eighty to ninety percent had no available psychologist or psychiatrist.16

The above statistics reveal that even assuming that good intentions and compassion were present the expertise needed to make the reforms work was lacking.

The disappointments of a judicial system that works in theory only led Mr. Justice Fortas to observe that the victim of said disappointments is the juvenile himself. In *Kent v. United States*17 he stated:

"While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. 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."18

III. DUE PROCESS AND THE JUVENILE ISSUE

The laissez-faire attitude toward juvenile justice postponed consideration of due process factors protective of the juvenile for over half a century. Not until 1948, and more frequently during the 1960's, did the

12. *Supra* n. 2.
14. *Id.* at ft. n. 14.
15. *Id.*
16. *Id.*
18. *Id.* at 555, 556.
United States Supreme Court began to come to grips with the lack of due process in the juvenile court system.

In 1948 the case of *Haley v. Ohio* involved a fifteen-year-old boy charged with first degree murder. The issue posed was whether in a state criminal court of general jurisdiction the confession of an accused was barred for noncompliance with the due process clause of the Fourteenth Amendment. Mr. Justice Douglas speaking for the majority held the confession inadmissible. In that opinion Mr. Justice Douglas stated:

"Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."

The case of *Gallegos v. Colorado*, decided in 1962, was to the same effect. This case involved a fourteen-year-old boy also charged with first degree murder. The court held that a formal confession given by the juvenile was in violation of due process standards and the court reversed his conviction.

In the case of *Kent v. United States* a juvenile, age sixteen, was charged with housebreaking, robbery and rape. The juvenile court waived jurisdiction so that the accused could be tried as an adult. The Supreme Court held that the order of the juvenile court waiving jurisdiction was invalid because it did not comply with the basic requirements of fairness and due process. The court further stated that the juvenile court's statutory authority to waive jurisdiction assumes procedural regularity sufficient to satisfy the Fourteenth Amendment. Mr. Justice Fortas speaking for the majority stated:

"The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is parens patriae rather than prosecuting attorney and judge. But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."

Following *Kent*, and in the shadow of *Miranda v. Arizona*, came the landmark case of *In re Gault*. *Gault* marked the real turning point for recognition of constitutional guarantees for the juvenile. The Court continued the general standard set out in *Kent* that juvenile proceedings must comply with the basic requirements of due process and fairness but the decision is broader in the sense that for the first time in a case involving a juvenile the court defined what the term "due process" meant with respect to the juvenile. Unfortunately however the specific requirements

20. Id. at 601.
23. Id. at 554, 555.
of due process that were outlined were limited to the issues raised in the petition. The issue of the right to a jury trial for the juvenile was not an issue in this case.\textsuperscript{26} Had it been an issue I feel this article would not be necessary.

The case came to the United States Supreme Court on an appeal from a judgment of the Supreme Court of Arizona\textsuperscript{27} affirming the dismissal of a petition for a writ of habeas corpus. The action had been brought by the parents of Gerald Francis Gault. Gerald Gault, age fifteen, was charged with making “Lewd Phone Calls”. He was found to be “delinquent” as that term is defined by Arizona statute\textsuperscript{28} and was committed to the State Industrial School for the period of his minority (six years) unless discharged sooner by due process of law. No appeal was permitted under Arizona law in juvenile cases. The Supreme Court of Arizona did recognize that the constitutional guarantee of due process of law was applicable to juvenile proceedings but held that Arizona’s Juvenile Code was to be read as “impliedly” implementing the due process concept.\textsuperscript{29}

The facts of the case patently reveal the lack of basic requirements of due process.\textsuperscript{30} On appeal Gerald Gault’s parents asserted that the Juvenile Code of Arizona was unconstitutional in that the following basic rights were denied:

1. Notice of charges;
2. Right to counsel;
3. Right to confrontation and cross-examination;
4. Privilege against self-incrimination;
5. Right to a transcript of the proceedings; and
6. Right to appellate review.\textsuperscript{31}

At this point it is again worthy to note that the parents of Gerald Gault had not requested a jury trial and therefore it was not an issue on appeal. Had the issue been raised whether or not the Supreme Court would have ruled that it was a basic requirement of due process, is a matter of conjecture based upon an interpretation of the case. However, in commenting on prior rulings of the Supreme Court involving basic

\textsuperscript{26} Id.
\textsuperscript{27} Application of Paul L. Gault and Marjorie Gault, father and mother of Gerald Francis Gault, a Minor, for Writ of Habeas Corpus, 99 Ariz. 181, 407 P. 2d 760 (1965).
\textsuperscript{28} ARS § 8-201-6(d).
\textsuperscript{29} Application of Paul L. Gault and Marjorie Gault, father and mother of Gerald Francis Gault, a Minor, for Writ of Habeas Corpus, 99 Ariz. 181, 407 P. 2d 760 (1965).
\textsuperscript{30} In re Gault, 387 U.S. 1, (1967). The facts show that when Gerald Gault was arrested no notice, nor attempt at notice, was given to his parents. The complaintant never appeared for questioning and therefore Gerald Gault never had the opportunity to confront his accuser irrespective of the opportunity to cross-examine. A complaint petition prepared by a probation officer setting out the charge was never served on Mr. Gault or his parents. None of the testimony given at his hearing was sworn and no transcript or recording was made. At a later disposition hearing a referral report prepared by probation officers was filed with the court but was not disclosed to the parents of Mr. Gault.
\textsuperscript{31} Id. at 10.
rights of juveniles and the fact that these cases involved limited issues the Court nevertheless did make known their general overall feelings in this area:

"Accordingly, while these cases relate only to restricted aspects of the subject, they unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."\(^{32}\)

One aspect of the case pointed to by the Court indicating the disparity of treatment between the juvenile criminal and the adult criminal, and thereby indicating the need for due process guarantees, was the fact that Gerald Gault was charged under an Arizona statute\(^{33}\) making it a misdemeanor for a person to use vulgar, abusive or obscene language in front of a woman or child. The statutory penalty for said misdemeanor if committed by an adult was a fine of $5.00 to $50.00 or imprisonment for not more than two months. Gerald Gault however, because he was a minor, was sentenced to the state school and therefore deprived of his liberty for a period of six years which was the balance of his minority. Had he been eighteen years old he would have qualified as an adult criminal.

The real contribution of the Gault case was that it took a realistic look at the juvenile court system. It segregated the dream from the reality:

"Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure but in arbitrariness . . . \(^{34}\)"

One of the basic reasons for implementing the juvenile system was to relieve the wayward juvenile of the stigma of "criminal". In fact this is one of the major tenets of those opposed to a jury trial in juvenile cases. Although this ideal is worthy of pursuit, what are in fact the realities of the situation? Is the juvenile really forgiven; is his brush with criminality really forgotten; is his record washed clean so that upon reaching his majority he can stand among other adults without the stigma of criminality? The majority opinion in Gault again spoke to the realities of the situation:

"As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.'"

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32. *Id.* at 13.
33. ARS § 13-377.
34. *In re Gault* 387 U.S. 1, 18, 19 (1967).
This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers. Of more importance are police records. In most States the police keep a complete file of juvenile 'police contacts' and have complete discretion as to disclosure of juvenile records. Police departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies.\textsuperscript{35}

In light of this kind of exposure one wonders what difference in severity there is between the label "criminal" and the label "juvenile delinquent". To a prospective employer who is not bound by legal definitions but makes his own word associations there may be no difference. The end result is that the juvenile delinquent is viewed in reality as a "juvenile criminal" with all appropriate stigmas attaching thereto. The one major difference however is that, as to the juvenile criminal, the stigma may be less justified because he has not been afforded the same procedural safeguards for proving his innocence. More specifically, he does not have the right to a jury trial. In short the stigma is less justified because less fundamental fairness has been utilized in the procedure which resulted in the stigma.

The court in \textit{Gault} did not favor abandonment of the juvenile court system. Quite to the contrary they felt that it was a worthwhile concept whose goals were worthy of pursuit. The court was careful to point out that a reform in procedure to bring it in compliance with basic constitutional safeguards would not require abandonment of the system. They felt that observance of due process standards, if intelligently and not ruthlessly administered, would enhance the system rather than hinder or displace any of the substantive benefits.\textsuperscript{36} On the other hand absence of due process standards would lead to arbitrariness and unfairness.\textsuperscript{37}

One of the problems which has plagued the juvenile system is semantics. Under the system a juvenile guilty of criminal conduct is not classified as a "criminal" but rather as a "delinquent". The practical benefits of the latter classification over the former are debatable especially when the delinquent reaches majority and seeks employment or is charged later in life with a second criminal offense and his record reveals prior criminal conduct. One of the historic reasons for this distinction, in theory at

\textsuperscript{35} Id. at 24, 25.
\textsuperscript{36} Id. at 21.
\textsuperscript{37} Id. at 18, 19.
least, was that the emphasis for the delinquent was on rehabilitation while the emphasis for the adult criminal was on punishment. Today it is well recognized that the emphasis for any criminal, regardless of his age, is rehabilitation. Though the positive aspects of this semantic distinction are questionable, the negative aspects are real. Because the juvenile is not a criminal he has not received procedural safeguards given to the adult criminal. For instance, assume two boys one age eighteen and one age sixteen jointly commit an act of burglary. Both boys are guilty of criminal acts and outside the legal definition of crime both boys are criminals, not because of their ages but because of the acts they committed. When brought to trial the elder boy will be entitled to a jury trial while the younger boy, because he is a juvenile delinquent, will not be so entitled. If the distinction is in fact beneficial, there is no reason why the classification of "juvenile delinquent" should not continue merely because procedural standards of due process are imposed. As the court enunciated in the Gault case:

"the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication."

The above distinction is a corollary to the distinction that juvenile proceedings were, and to a great degree still are, considered "civil" rather than "criminal" in nature. The basis of this distinction is that juvenile proceedings are non-adversary because the state proceeds as parens patriae. The unfortunate result was that since such proceedings were "civil" instead of "criminal" they were not subject to the requirements of due process of law which restrict the power of the state when it seeks to deprive a person of his liberty. To the juvenile faced with incarceration for five or six years it is no consolation that his sentence was the product of a civil rather than a criminal proceeding. Noting the confusion this ambiguous distinction generates the Court in Gault stated:

"juvenile proceedings to determine 'delinquency', which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self incrimination . . . ."

Much consideration has been given to the Gault decision because it is regarded as a landmark case in the juvenile area. It shed much light in the dark corners of realism and took the first major step toward implementing due process safeguards into the juvenile system. It is the foundation for numerous subsequent decisions extending due process guarantees to juveniles.

The decision however is disappointing because of its limited scope. It is natural that the decision was limited to the issues raised but it is dis-

38. See supra note 2 at 106, 110, 114.
39. 387 U.S. 1, 22 (1967).
40. Id. at 50.
41. Id. at 49.
appointing in the sense it revealed the tremendous need for procedural reform beyond the scope of the decision itself. A judge looking to the decision for his authority is confronted with a "sweeping rationale and a carefully tailored holding". The court ultimately held that due process for the juvenile required adequate written notice of charges; advice as to the right of counsel, retained or appointed; confrontation and cross-examination of witnesses, and the privilege against self-incrimination.

The case of In re Winship followed the Gault decision. There the court held that the burden of proof beyond a reasonable doubt of every fact necessary to constitute a crime is necessary to convict a juvenile of a crime with which he is charged. The court held this standard to be applicable during the adjudicatory stage of the juvenile proceeding. This case is important in that it extended further the basic rights of a juvenile charged with criminal conduct thereby insuring more fundamental fairness in the proceeding.

IV. DUE PROCESS AND THE JURY ISSUE

The concept of the jury can be traced back to medieval times. It was a concept brought to America by English colonists and has been a part of American jurisprudence since its inception. The right to a jury trial in federal prosecutions is guaranteed by the Sixth Amendment to our Constitution. In criminal prosecutions the primary purpose of the right to a jury trial is to give the accused a safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge. Traditionally the jury meets this role by acting as the trier of fact.

In recent years the most important decision involving the right to trial by jury in criminal cases was the case of Duncan v. Louisiana. In that case the court held that the Sixth Amendment was made applicable to the states by the Fourteenth Amendment and therefore, the Fourteenth Amendment guarantees an accused the right to a jury trial in all criminal cases which, were they tried in a federal court, would come under the Sixth Amendment's protection. The decision was limited by the ruling of the court that such right did not extend to petty offenses, however,

43. 387 U.S. 1 (1967).
44. 397 U.S. 358 (1970). This case involved a twelve-year-old boy who was charged with stealing money from a woman's purse. The act rendered him liable to confinement for a period of six years.
45. Id.
48. 391 U.S. 145 (1968). In this case the accused was convicted of a simple battery which under Louisiana law constituted a misdemeanor punishable by two years imprisonment and a $300.00 fine. The accused was denied his request for a jury trial because under the Louisiana Constitution jury trials were granted only in cases in which capital punishment or imprisonment at hard labor could be imposed.
this was changed in a later decision\(^{49}\) which extended the right to a jury trial to any crime carrying a possible penalty in excess of six months.

Following the *Duncan* decision the issue of whether states were required under the Sixth and Fourteenth Amendments to extend the right to a jury trial to juveniles was raised in the case of *DeBacker v. Brainard*.\(^{50}\) The case afforded an excellent opportunity for resolving the issue but the Supreme Court conveniently avoided the issue by holding that the appellant's juvenile court hearing was held prior to the *Duncan* decision and that decision was held to have only prospective application.\(^{51}\)

Although the *DeBacker* decision left the issue unresolved as to the states, the case of *Nieves v. United States*,\(^{52}\) decided prior to the *DeBacker* case, held that a juvenile did have a constitutional right to a jury trial in federal prosecutions. The decision has since been commented upon by a higher court.\(^{53}\)

The issue in the *Nieves* case involved the constitutionality, under the Sixth Amendment, of a provision of the Federal Juvenile Delinquent Act (hereafter referred to as F.I.D.A.).\(^{54}\) Under this act the Attorney General, in his discretion, could preclude resortment to the act by directing the juvenile be tried as an adult.\(^{55}\) Whenever the Attorney General did not so direct however, the juvenile had the option of choosing between a normal adult trial and the F.I.D.A. proceedings which contained obvious advantages.\(^{56}\) In order to gain the advantages of the F.I.D.A. proceedings however, the juvenile was required to consent thereto and his consent was deemed a waiver of trial by jury.\(^{57}\) The court held that this option was an impermissible choice violative of the Bill of Rights and therefore unconstitutional.\(^{58}\) The court held that the Bill of Rights (Sixth Amendment) and not due process governs federal juvenile court proceedings.\(^{59}\) In this manner they avoided the argument that juvenile proceedings are civil rather than criminal in nature.\(^{60}\) They held that the Bill of Rights applies to every individual within territorial jurisdiction of the United States, irrespective of age and that the Constitution contains no age limits.\(^{61}\)

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59. Id. at 1004.
60. Id. at 1004.
61. Id. at 998.
It appears therefore that the Supreme Court had both an opportunity and a rational basis on which to decide the jury issue in the DeBacker case. One reason for letting the issue remain unresolved as to the states may have been the closeness in time of the DeBacker and Gault decisions. The Justices, realizing the procedural ramifications and readjustments implicit in the Gault decision may have felt that loading a decision with the impact of the Nieves decision on top of the Gault decision would make the burden of change too heavy for the juvenile court system to bear. Had the court decided the DeBacker case in favor of a guaranteed right to a jury trial for juveniles the entire future of the juvenile court system could have been great endangered. This of course was not the intent of the Gault decision. The timing of the DeBacker case however was unfortunate because by the time the issue was again raised the structure of the Court had changed considerably from the time of the Gault decision.

V. THE McKEIVER V. PENNSYLVANIA CASE

The specific issue of the constitutional right of a juvenile to a jury trial in state courts was again brought before the Supreme Court in the case of McKeiver v. Pennsylvania. Joseph McKeiver, then age sixteen, was charged with robbery, larceny and receiving stolen property, felonies under Pennsylvania law, as acts of juvenile delinquency. He had participated with twenty or thirty youths who pursued three young teenagers and took 25 cents from them. His request for a jury trial being denied, he was found guilty and placed on probation. On appeal the Superior Court of Pennsylvania affirmed without opinion. The Supreme Court of Pennsylvania granted leave to appeal but affirmed the judgment.

In light of the decisions in Duncan and Gault and numerous later
cases extending constitutional protections to juveniles it would seem that the *McKeiver* case would fall in logical progression by granting the right to a jury trial to juveniles. The same reasoning used in the *Nieves* case, though limited to federal courts, is equally applicable to state courts. Instead of extending such rights however by granting a right to a jury trial the *McKeiver* case ruled against any such right and apparently the perimeter of due process for juveniles now appears delineated.

The Court in its consideration of the issue, examined the opinion of Judge Roberts who delivered the opinion for the Supreme Court of Pennsylvania. Judge Roberts in his opinion felt that the primary issue was whether there are elements in the juvenile process which rendered the right to a jury trial less essential to the protection of an accused's rights in the juvenile system than in the normal criminal process for adults. The problem with this type of approach is that it tends toward justification of an inadequate system rather than correcting the inadequacies by imposing new standards based on due process and fundamental fairness. An inadequacy that can be justified stands little chance of immediate correction.

Judge Roberts was willing to concede that the juvenile system fell far short of its goals and that its reality was far more harsh than its theory but he felt that the end result of a declaration of delinquency was different from and less onerous than a finding of criminal guilt. Whether in fact such a declaration is less onerous for the juvenile is debatable. Is it less onerous with respect to future employment for the juvenile? Is it less onerous when viewed for purposes of sentencing in a later criminal action after the accused has reached the age of majority?

A final justification of Judge Roberts for denying a jury trial in the adjudicative stage of a juvenile proceeding was that of all the possible due process rights which could be applied in the juvenile courts the right to a jury would be the most disruptive of the uniqueness of the juvenile process. The fallacy of this argument is that it presupposes the jury concept is an inflexible concept which is not the case.

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70. Id.


72. Id. at 539.

73. Id. at 540.

74. Id.

Mr. Justice Blackman, writing for the majority opinion of the United States Supreme Court, began his consideration of the issue by recognizing the right to an impartial jury "in all criminal prosecutions" under federal law as guaranteed by the Sixth Amendment. He also recognized that through the Fourteenth Amendment this requirement was imposed on the States in all criminal cases which, were they to be tried in federal court, would come within the Sixth Amendment's guarantee. Also considered was the nebulous distinction between what is a "civil" and what is a "criminal" prosecution:

"the juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment, and also has not yet been regarded as devoid of criminal aspects merely because it usually has been given a civil label . . .

"Little, indeed, is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal.'"

The Court in essence recognized that a juvenile proceeding, wherein the juvenile is charged with a criminal act, which if committed by an adult would be either a felony or misdemeanor and if convicted or declared delinquent his liberty of person may be deprived, is not "civil" in nature. What the Court did not overcome however was its reluctance to label such a proceeding "criminal" or even "quasi-criminal". If the Court would recognize the criminal implications of the proceeding, logic and the Duncan decision would dictate a constitutional right to a jury trial under the Sixth and Fourteenth Amendments. Some would argue that such a recognition for Sixth Amendment purposes would result in destruction of the juvenile court concept and a return to the complete adversary system with the end result of initial goals being forgotten. This argument ignores the fact that courts are dependent upon the State legislatures for their authority. There are in every state controls on the judicial system. The juvenile court system itself is a creature of statute. If such a proceeding must be classified, could it not be classified as "quasi-criminal"? Such a classification would relieve some of the fears of proponents of the system and at the same time classify the exact nature of the proceeding to allow the same due process guarantees allowed the adult criminal. The same rationale used in extending other due process guarantees to the juvenile applies equally as well to the right to a jury trial:

"the observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.""

In the instant case the basic contention of the appellant was that he

76. U.S. Const. amend. VI.
78. Id. at 545.
was tried in proceedings substantially similar to a criminal trial and therefore should have the same right to a jury trial. The proceedings were similar with respect to initiation by a petition charging a penal code violation in the compulsory language of an indictment, detention of the juvenile prior to trial, plea bargaining, motions to suppress, the usual rules of evidence, press coverage, public trial and confinement upon conviction.

The next issue examined by the Court was the necessity of a jury as a fact-finding body. In general terms the issue was decided:

“One cannot say that in our legal system the jury is a necessary component of accurate factfinding . . .”

The Court in quoting the Duncan decision stated:

“We would not assert . . . that every criminal trial — or any particular trial — held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.”

In the converse it is arguable that every case held before a judge is not necessarily fair. The adult criminal has an option. He can waive his right to a jury trial and if he does so he has no cause to complain. The juvenile on the other hand has no such option. Under the present status of the law in most state courts he must be tried before a judge. In jurisdictions where there is only one juvenile court judge and the accused has been brought before him on previous occasions, the judge's interpretation of the facts might be consciously or unconsciously biased. In an adult criminal trial even if the accused is brought before the same judge on two separate occasions the adult has the option of having a jury act as a buffer between himself and the judge. It is this option which is at the basis of the concept of fundamental fairness. The closer the contact between two individuals the greater the chance of bias and prejudice. Fundamental fairness is not grounded on the assumption that all judges are by nature of their office competent fact-finders. Add to this the fact that in many jurisdictions juvenile court judges are elected and the opportunity for bias becomes greater, especially in small jurisdictions.

At the same time the Court ruled a jury was not a prerequisite to fairness, they held the jury was not an inflexible concept thereby providing a premise upon which to base a conclusion that a jury trial need not spell doom for the unique juvenile system. A jury of less than twelve members is feasible as is the idea of an advisory jury. Instead of giving the option of a jury trial to the juvenile however the Court gave the option to the States:

“If, in its wisdom, any State feels the jury trial is desirable in all cases,

81. Id.
82. Id. at 543
83. Id. at 543.
or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation."

Another reason advanced by the Court for denying a jury trial was the feeling that if the jury trial were imposed on juvenile proceedings as a matter of right it would bring with it into the system the traditional delay, the formality and the clamor of the adversary system. Answering this contention it can only be said that the constitutional rights of the juvenile should not be made to suffer merely because of administrative difficulties in the judicial system which he is not responsible for solving. If speedy adjudication is important in juvenile proceedings accomplishing this goal by bypassing due process guarantees is not the answer.

The Court concluded by holding that both the Gault and Duncan decisions interpreted together did not require a jury trial in the adjudicative stage of juvenile proceedings. They felt that the imposition of a jury trial would not strengthen greatly, if at all, the factfinding function and would limit the ability of the juvenile court to function in a unique manner. In short they recognized the defects in the system but felt the requirement of a jury trial would not remedy them.

The decision was not without its dissenters. Mr. Justice Harlan, though he rendered a concurring opinion, stated that had he supported the Duncan decision he would have to say that the Sixth and Fourteenth Amendments would require a constitutional right to a jury trial for juveniles:

"If I felt myself constrained to follow Duncan v. Louisiana, 391 U.S. 145 (1968), which extended to Sixth Amendment right of jury trial to the States, I would have great difficulty, upon the premise seemingly accepted in my Brother BLACKMUN'S opinion, in holding that the jury trial right does not extend to state juvenile proceedings. That premise is that juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials. But see my concurring and dissenting opinion in In re Gault, 387 U.S. 1, 65 (1967). If that premise be correct, then I do not see why, given Duncan, juveniles as well as adults would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose. When that time comes I would have no difficulty in agreeing with my Brother BLACKMUN, and indeed with my Brother WHITE, the author of Duncan, that juvenile delinquency proceedings are beyond the pale of Duncan.

'I concur in the judgments in these cases, however, on the ground that criminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process. See my con-

86. Id. at 547.
87. Id. at 550.
88. Id. at 545.
89. Id. at 547.

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Marshall concurred, delivered a dissenting opinion in which he felt the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, required a jury trial in juvenile proceedings.91

As a reason for extending the right to a jury trial the dissenting opinion pointed to the realistic fact that in the present case imprisonment or confinement up to ten years was possible for one child and each child faced at least a possible five-year incarceration period.92 The dissenting opinion noted that no adult could be denied a jury trial under the same circumstances.93 The dissenting opinion looked directly at the language of the Fourteenth Amendment and interpreting that language in relation to the case of In re Winship,94 they stated:

"The Fourteenth Amendment, which makes trial by jury provided in the Sixth Amendment applicable to the States, speaks of denial of rights to 'any person' not denial of rights to 'any adult person;' and we have held indeed that where a juvenile is charged with an act that would constitute a crime if committed by an adult, he is entitled to be tried under a standard of proof beyond a reasonable doubt."95

In reply to the reasoning of the majority opinion on the practical considerations justifying denial of a jury trial Mr. Justice Douglas, in an appendix to his dissenting opinion, offered an eloquent opinion of Judge De Ciantis of the Family Court of Providence, Rhode Island.96

One of the major contentions of the majority opinion was that imposing a jury trial on juvenile proceedings would bring with it traditional delays and unnecessary formalities.97 Judge De Ciantis feels there is a positive aspect to this delay and formality:

"In fact the very argument of expediency, suggesting 'supermarket' or 'assembly-line' justice is one of the most forceful arguments in favor of granting jury trials. By granting the juvenile the right to jury trial, we would, in fact, be protecting the accused from the judge who is under pressure to move the cases, the judge with too many cases and not enough time. It will provide a safeguard against the judge who may be prejudiced against a minority group or who may be prejudiced against the juvenile brought before him because of some past occurrence which was heard by the same judge."98

90. Id. at 557.
91. Id. at 558.
92. Id. at 560.
93. Id.
96. Id. at 563.
Judge De Ciantis also addressed himself to the reluctance of juvenile courts to label certain juvenile crimes as "criminal" in nature:

"The argument that the adjudication of delinquency is not the equivalent of criminal process is spurious . . . Because the legislature dictates that a child who commits a felony shall be called a delinquent does not change the nature of the crime. Murder is murder; robbery is robbery—they are both criminal offenses, not civil, regardless and independent of the age of the doer."99

Historically the juvenile court judge has been looked to as a person with special abilities.100 A man whose position demanded knowledge of sociology and psychology in addition to his knowledge of the law. He was envisioned as a man who could sift out the real problems behind the juvenile's misconduct and render a decision that would be in the best interests of the child and to pursue this goal it was felt he could not be shackled by the formalities of an adult criminal proceeding where punishment alone was the singular goal. Those opposed to a jury trial for juveniles feel that this noble purpose would be destroyed.101

To examine this argument more closely one must ask the question, "What should be the judge's expertise?" The answer is that the sociological and psychological expertise of the juvenile court judge relates to his disposition of the case rather than the guilt-determination phase of it. Viewing the juvenile proceeding in two completely distinct phases, adjudicative and dispositional, eliminates the supposed threats to the unique talents of the juvenile court judge.102 The adjudicative phase would be concerned exclusively with fact-finding and guilt-determination and during this phase the juvenile would be permitted to have a jury trial upon request.103 The special expertise of the judge would then relate exclusively to the dispositional phase after there is an affirmative finding of guilt rendered in the adjudicative stage.104 Thus, the judge may still employ his talents and the talents of agencies of the court in determining what disposition is in the best interests of the child. Instead of posing a threat the jury trial may thus be viewed as a promise of objectivity.

This solution was suggested by Judge De Ciantis and he is quoted in the appendix to the dissenting opinion:

"The Court is also aware of the argument that the juvenile court was created to develop judges who were experts in sifting out the real problems behind a juvenile's breaking the law; therefore, to place the child's fate in the hands of a jury would defeat that purpose. This will, however, continue to leave the final decision of disposition solely with the judge.

99. Id. at 571, 572.
100. Supra n. 2.
102. Supra n. 69 at 144.
103. Id.
The role of the jury will be only to ascertain whether the facts, which give the court jurisdiction, have been established beyond a reasonable doubt. The jury will not be concerned with social and psychological factors. These factors, along with prior record, family and educational background, will be considered by the judge during the dispositional phase.

"Taking into consideration the social background and other facts, the judge, during the dispositional phase, will determine what disposition is in the best interests of the child and society. It is at this stage that a judge's expertise is most important, and the granting of a jury trial will not prevent the judge from carrying out the basic philosophy of the juvenile court.

"Trial by jury will provide the child with a safeguard against being prejudged. The jury clearly will have no business in learning of the social report or any of the other extraneous matter unless properly introduced under the rules of evidence. Due process demands that the trier of facts should not be acquainted with any of the facts of the case or have knowledge of any of the circumstances, whether through officials in his own department or records in his possession. If the accused believes that the judge has read an account of the facts submitted by police or any other report prior to the adjudicatory hearing and that this may prove prejudicial, he can demand a jury and insure against such knowledge on the part of the trier of the facts." 105

In weighing the above statement it must be remembered that Judge De Ciantis is not a mere outside commentator, rather, he is a juvenile court judge himself and his opinions are founded upon experience.

VI. CONCLUSION

It appears that as much as juvenile rights were broadened by the decision of In re Gault, they have now been delineated by the decision of McKeiver v. Pennsylvania. State courts, reluctant to change, have given the Gault decision a narrow interpretation and the United States Supreme Court has sanctioned this approach.

The Gault decision, if logically interpreted in light of Duncan v. Louisiana106 and the Sixth Amendment, necessarily points to a constitutional right to a jury trial for juveniles. The Sixth Amendment pertains to "all criminals"107 and does not differentiate as to age. The Duncan decision makes the Sixth Amendment guarantees compulsory upon the States via the Fourteenth Amendment. The fact that the proceedings are theoretically labeled as "civil" in nature does not alter the real fact that the proceedings are "criminal" in nature, complete with the aspect of possible deprivation of personal liberty.

There is the argument by opponents that of all the possible due pro-

105. Id.
107. U.S. CONST. amend VI.
cess guarantees which could be imposed upon the juvenile court system the guarantee of a right to a jury trial would be the most destructive of the system's goals. Again, this is speculation and has not been proven to be the necessary result. Some states do permit jury trials in all juvenile court cases with the result that few jury trials are requested and those that are have not hampered the system of juvenile justice. Indeed the Supreme Court in the *McKeiver* case ruled that the decision was optional with respect to individual states thereby indicating that there are no constitutional barriers to its implementation.

Many cases, decided both before and after the landmark *Gault* decision, have extended numerous constitutional rights to the juvenile. These cases involved individual freedoms constitutionally guaranteed under the Fourth, Fifth and Sixth Amendments. What the Court has ignored in the *McKeiver* decision is the fact that the freedoms guaranteed under these separate amendments are interrelated and to a large extent overlapping. For example, the privilege against self-incrimination has less meaning and significance in a forum which denies the right to a jury trial because the judge who decides the aspect of guilt-determination has access to data which, under the rules of evidence, could not be viewed by a jury. The legality of a search and seizure is another example. It is true that the judge makes the initial determination as to the legality of the search but the jury can review his decision as they perceive the facts and can voice their decision in the form of a verdict. Fundamental fairness is the theme of the entire Bill of Rights and it is this theme which makes the individual amendments interrelated within the Fourteenth Amendment.

Until the Supreme Court is willing to view the juvenile proceeding in two distinct phases, adjudicative and dispositional, the status of the juvenile's right to a jury trial will remain unchanged.

It would appear that what the juvenile court system has to fear most is its own reluctance to change. The loss of historic goals due to the implementation of a jury trial presupposes lack of administrative control. Opponents of the jury concept, looking at the trees instead of the forest, sometimes fail to visualize the juvenile court system for what it is, namely a creature of statute. The administrative controls needed to preserve the goals and at the same time guarantee due process standards are inherent in the legislative bodies which created the system. If the goals are lost it will not be because due process guarantees destroyed them.

A juvenile who is denied his full constitutional rights as a citizen and is granted constitutional guarantees piecemeal retains the status of a "nonperson."
NEW COMMON LAW LIABILITY OF THE 
OHIO LIQUOR VENDOR

By John K. Hurd*

I. INTRODUCTION

In the two recent cases of Mason v. Roberts¹ and Taggart v. Bitzenhofer² the Supreme Court of Ohio has announced a doctrine of common law liability of liquor permit holders or proprietors of business establishments that dispense alcoholic beverages for consumption upon the premises. This doctrine is contra to the previous existing law as presently understood in Ohio. These decisions, if followed in similar situations, will permit the imposition of liability upon tavern owners in Ohio where, in the absence of statute, none previously appeared.

It is the purpose of this article to review these two new cases, to briefly review the background of the common law liability and the statutory law liability of liquor vendors in Ohio and elsewhere, to discuss the probable impact of these cases on the status of liability of liquor vendors in Ohio, and briefly to discuss what extensions may feasibly be contemplated from these cases beyond the liability of liquor vendors imposed therein.

II. THE RECENT CASES

In the case of Mason v. Roberts³, the plaintiff, as administrator, brought an action in the Court of Common Pleas of Ashland County for the wrongful death of one Mason, a patron of a tavern known as the Corner Bar. It was alleged that Robert Lee Roberts, one of the defendants, had entered the Corner Bar and was served and consumed intoxicating liquors which had been served and sold to him by defendant Dorothy Tester and her agents. Plaintiff contended that Roberts then became intoxicated and that defendant Tester continued to sell liquor to him in violation of Ohio Revised Code § 4301.22 (B) and Ohio Revised Code § 4301.22 (C),⁴ and thereafter that Roberts physically assaulted Mason who was a patron at that time in the Corner Bar, thereby causing his death. It was further alleged that defendant Tester was the aunt of defendant Roberts and that she and her employees knew or should have known that Roberts, when intoxicated, became violent, abusive, and disorderly to the point of being dangerous to the physical welfare of others. At the

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¹ B.S., Miami University; Senior law student, NKSC, Salmon P. Chase College of Law.
² See note 9 infra.
³ 33 Ohio St. 2d 29, 294 N.E. 2d 884 (1973).
⁴ See note 9 infra.
time of the alleged incident there was a Dram Shop Act in force in Ohio which has generally been interpreted to permit a civil damage action only where the intoxicated tort-feasor has been blacklisted by the issuance of an order of the Ohio Department of Liquor Control that such person should not be served. Ohio's Dram Shop Act has even been referred to as "the Black List Law."

The tavern keeper filed a motion for summary judgment along with affidavits which stated that no notice was received by the employees or owner of the Corner Bar of the issuance or existence of any order made by the State of Ohio, Department of Liquor Control, prohibiting the sale or gift of intoxicating liquor as is contemplated by Ohio Revised Code § 4399.01 and Ohio Revised Code § 4301.22. The defendant Tester filed a certificate by the Director of Liquor Control in which the director stated that he had checked the records of his department and as a result of such check the name of defendant Roberts did not appear on any "black-list" issued by his department pursuant to Ohio Revised Code § 4301.22 (C). The defendant's motion for summary judgment was sustained by the trial court on the grounds that plaintiff's petition failed to state a cause of action under Ohio Revised Code § 4399.01 and that that statute was the exclusive remedy for a claim as had been alleged by the petition.

The plaintiff appealed to the Court of Appeals of Ashland County which reversed the Court of Common Pleas on the ground that there existed a "genuine dispute" of those allegations in the petition not ad-

5. Ohio Rev. Code Ann. § 4399.01 (Page 1965): A husband, wife, child, parent, guardian, employer, or other person injured in person, property, or means of support by an intoxicated person, or in consequence of the intoxication, habitual or otherwise, of a person, after the issuance and during the existence of the order of the department of liquor control prohibiting the sale of intoxicating liquor as defined in Section 4301.01 of the Revised Code to such person, has a right of action in his own name, severally or jointly, against any person selling or giving intoxicating liquors which cause such intoxication, in whole or in part, of such person.


9. The preamble and relevant subsections of Ohio Rev. Code Ann. § 4301.22 (Page 1965) are reproduced below:

Sales of beer and intoxicating liquor under all classes of permits and from state liquor stores are subject to the following restrictions in addition to those imposed by the rules, regulations, or orders of the department of liquor control:

(B) No sales shall be made to an intoxicated person.

(C) No intoxicating liquor shall be sold to any individual who habitually drinks intoxicating liquor to excess, or to whom the department has, after investigation, determined to prohibit the sale of such intoxicating liquor, because of cause shown by the husband, wife, father, mother, brother, sister, or other person dependent upon, or in charge of such individual, or by the mayor of any municipal corporation, or a township trustee of any township in which the individual resides. The order of the department in such cases shall remain in effect until revoked by the department.

mitted by defendant's answer. The Supreme Court, on a motion to certify the record, affirmed, finding: 1) that the Ohio Dram Shop Act does not provide the exclusive remedy against a liquor permit holder, in order to recover damages for the death of a bar patron, 2) that the liquor vendor owes a duty to members of the public when they are in his establishment to exercise reasonable care to protect them from physical injury as a result of violent acts of third persons, and 3) that certain facts alleged and whether or not the defendant acted reasonably under all the circumstances are ordinarily issues to be resolved by the jury.

The second case cited, though somewhat different factually, was decided one week after the Mason case and presented the same arguments. Here the Supreme Court in a per curiam opinion affirmed the judgments of the Court of Appeals of Hamilton County which had reversed the Court of Common Pleas, stating only that "Upon the basis of Mason v. Roberts ... the judgments of the Court of Appeals are affirmed."12

The facts of Taggart as alleged were that one Rohe entered the Bachelor's III Cocktail Lounge around 1:15 a.m. on December 9, 1969, and was patently intoxicated at that time; that Rohe was served alcoholic beverages by Alice Losito, a bartender-waitress, even though Rohe was boisterous and unruly; that Rohe openly displayed a pistol in Losito's presence and threatened to shoot Hayes and Taggart, patrons of the bar; that no warning was given by Losito to Hayes or Taggart to leave nor did she notify law enforcement officers or ask Rohe to leave but continued to serve Rohe alcoholic beverages and that approximately 35 minutes after Rohe had made his threat, Rohe shot and killed Taggart and wounded Hayes inside the lounge. The above facts were recited in the petitions in separate actions by the administrator of the estate of Taggart, and by Hayes and his wife, against defendants Bitzenhofer, Behr, and McKesson as individuals; against Bitzenhofer-Behr-McKesson, Inc., as owners of Bachelor's III; against Alice Losito, the bartender-waitress; and against Rohe, the tort-feasor.

In order that the apparent impact of these two cases may be better understood, a brief review will be made of the common and statutory law in Ohio and elsewhere prior to the time these cases were decided.

III. COMMON LAW ACTIONS

Traditionally, at common law no liability was imposed on a liquor vendor who sold intoxicating liquors to a subsequent tort-feasor for the injuries sustained by a third person injured by the actions of such tort-

12. Id. at 36, 294 N.E. 2d at 227.
This view was supported by several theories, the most common being that it is the drinking of liquor and not the serving of it that is the proximate cause of intoxication and subsequent injury. Also, it is contended that the injury to a patron or some third party is not a foreseeable result of the serving of the liquor, leaving the tavern owner’s act of supplying the intoxicants as too remote from the injury to place such liability on the supplier. In addition the theory that the patron’s own failure to exercise ordinary care by his voluntary consumption of the intoxicants prohibits placing liability upon the vendor for any injury resulting from the patron’s intoxication.

Recently, beginning around 1959 with the case of Waynick v. Chicago’s Last Department Store, recovery by third persons has been permitted at common law on the basis of foreseeability and proximate cause and several states have permitted recovery to the inebriate himself in various factual situations. While it appears that the trend is to allow recovery at common law in those jurisdictions that have recently had the opportunity to consider the issue, there are a few jurisdictions which have completely rejected recovery, and they still probably represent the majority view. In some states an action is permitted by the injured person under statutory provisions better known as Dram Shop Acts, the next topic to be discussed herein.


14. Note, supra note 6, at 252, n. 5-6.

15. Id.


17. 269 F. 2d 322 (7th Cir. 1959) cert. denied, 362 U.S. 903 (1960).


IV. DRAM SHOP ACTS

A Dram Shop Act or Civil Damage Act is a statute which imposes civil liability upon an innkeeper for damages which are caused by the illegal sale of intoxicating liquor, where none existed previously at common law. One author reports that some twenty states have some form of a dram shop act and that the remedies vary greatly among these states.

It is not the purpose of this article to discuss the statutory liability of liquor vendors other than in the narrow scope that the Supreme Court of Ohio did in Mason v. Roberts where it declared Ohio's Dram Shop Act to be a non-exclusive remedy. For the interested reader several sources are available which trace the development of Dram Shop Acts.

V. OHIO'S NEW POSITION

Under the Dram Shop Act

Until the recent decision of Mason v. Roberts and Taggard v. Bittenhofer the liquor vendor in Ohio was not subject to liability for the acts of their patrons either at common law or under Ohio's Dram Shop Act except where the patron had been blacklisted per the statute. Generally, in the few cases litigated in Ohio, unless plaintiff's complaint alleged that the drunkard was blacklisted, he had no cause of action under the statute and none was apparently available at common law until the Mason case was decided March 14, 1973. In Mason, The

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24. Id. at 70 n. 21 and accompanying textual material.
25. 33 Ohio St. 2d 29, 294 N.E. 2d 884 (1973).
27. See note 36 and accompanying textual material, infra.
29. 33 Ohio St. 2d 29, 294 N.E. 2d 884 (1973).
35. To state that the issue of common law liability has never been litigated in Ohio is debatable since the case of Ramon v. Spike, 92 Ohio App. 49, 109 N.E. 2d 327 (1951) discussed only statutory law as did Love v. Fountas, 119 Ohio App. 501, 200 N.E. 2d 715 (1963). However, no cause of action was permitted in either case; and, by a negative implication, one could argue that these cases were authority for denying any cause of action except under the Ohio Rev. Code Ann. § 4399.01 (Page 1965). In Christoff v. Gradsky, 140 N.E. 2d 586 (Ohio C.P. 1956), the court quoted extensively from secondary authorities on the denial of any action at common law as the prevailing rule of
Court of Common Pleas' assumption that the Dram Shop Act\textsuperscript{36} provided the exclusive remedy for the recovery of a wrongful death action brought against a liquor permit holder, was reversed by the Supreme Court which stated:

...[T]o hold that the enactment of R.C. 4399.01 had the effect of prohibiting any other cause of action from being asserted by a third person against a dispenser of intoxicating beverages, for harm caused by the recipient of those beverages, would serve to distort the purpose of the Dram Shop Act.\textsuperscript{37}

The Court then explained the purpose of such statutes as being remedial in nature; thus, they are to be construed liberally and, in effect, should permit a cause of action wherever the pleadings require one. Quoting from the appellate judge's decision of the Court of Appeals for Ashland County,\textsuperscript{38} the Court agreed that the purpose of the Dram Shop Act was to provide protection to the public in the instances that arose under such statute, but that the statute in its narrow sense, could not be interpreted to permit its use as a shield by wrongdoers to limit their liability in all instances.

The Court did not change the previous law under the Dram Shop Act, but rather agreed that Ramon v. Spikes\textsuperscript{39} was still good law in that no action against a liquor vendor will lie if brought under R. C. § 4399.01 unless the name of the allegedly intoxicated patron appears on the requisite order set forth by the Department of Liquor Control.\textsuperscript{40} Thus the statutory liability of an Ohio liquor vendor remains the same. However, as well next be discussed, there is now a liability of the liquor vendor at common law.

\textit{At Common Law}

The Court explained that the common-law principle (no cause of action) was based on the presumption that the consumption and not the sale of the liquor was the link in the chain of causation leading to a finding of proximate cause,\textsuperscript{41} but declared “This principal has diminished over the years, culminating in at least two possible exceptions, both of which are raised by the petition.”\textsuperscript{42}

\begin{itemize}
\item \textsuperscript{36} OHIO REV. CODE ANN. § 4399.01 (Page 1965).
\item \textsuperscript{37} Mason v. Roberts, 33 Ohio St. 2d 29, 32, 294 N.E. 2d 884, 887 (1973).
\item \textsuperscript{38} “The manifest purpose of the enactment of the so-called blacklisting statutes was to increase public protection by imposing absolute or strict liability in those cases. It defeats the real purpose of the enactment of the blacklisting statute to twist it into an immunity bath for all other cases.” \textit{Id.} at 32, 294 N.E. 2d at 887.
\item \textsuperscript{39} 92 Ohio App. 49, 109 N.E. 2d 327 (1951).
\item \textsuperscript{40} Mason v. Roberts, 33 Ohio St. 2d 29, 32, 294 N.E. 2d 884, 887 (1973).
\item \textsuperscript{41} \textit{Id.} at 33, 294 N.E. 2d at 887.
\item \textsuperscript{42} \textit{Id.} at 33, 294 N.E. 2d at 887.
\end{itemize}
In discussing the first of these two exceptions, the Court stated that where the allegations declare that the purchaser's will to refrain is so impaired that he cannot abstain from drinking the served liquor, the issue of proximate cause is properly left to the jury. The Court referred to an analogous Ohio Supreme Court Decision involving the negligent sale of morphine to one who was incapable of self-restraint and, by doing so, adopted a common-law recovery rationale as one basis for a similar action in the Mason case against a liquor vendor.

In discussing the second exception, the Court stated that proximate cause may alternatively be shown where the sale of the intoxicants has been determined to be contrary to statute, i.e., illegal, pointing out that, "R.C. 4301.22 (B) and (C), respectively, prohibit the sale of beer or intoxicating liquor to 'an intoxicated person' or 'to any individual who habitually drinks intoxicating liquor to excess.' "

Thus, the Court has declared that causation is present in at least the above two situations to allow an action at common law. Although not specifically discussed, it seems that the Court at least implied that since the sale is the act which sets off the chain of events leading to the ultimate injury, the subsequent consuming of the liquor is not an intervening act which would break the chain of causation. However, the Court did not rest there but stated:

Furthermore, the permit holder's liability herein does not rest solely on the question of whether the alleged sale and subsequent consumption of alcohol caused the ultimate conduct of the assailant. We see no reason why the proprietor of a business establishment wherein alcoholic beverages are dispensed for consumption on the premises should be held to a lesser duty than the proprietor of premises being used for other business purposes.

The Court went on to state that the pleadings warranted a determination that the issue of such a duty was controverted, and where that and other issues of fact are controverted, a summary judgment will not lie. This holding affirmed the Court of Appeals which, in effect, permitted the action to go to trial placing before a jury the specific questions of fact alleged in the pleadings. Thus Ohio now recognizes a common law duty of a liquor vendor to exercise reasonable care to protect members of the public from physical injury by third persons while they are in his place of business.

43. Id. at 33, 294 N.E. 2d at 887, where the Court refers to the case of Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102 (1912). (Recovery allowed against a vendor of morphine to one known to be so weak in mind as to be unable to refuse it).
44. Mason v. Roberts, 33 Ohio St. 2d 29, 33, 294 N.E. 2d 884, 887 (1973). The complete statutory sections referred to by the Court are printed at Note 9 supra.
45. Either where the purchaser is unable to abstain or where the sale is illegal.
47. Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E. 2d 884 (1973). (See the Court's second Syllabus).
However, it seems certain that the Court was basing this rule of law only on the pleaded facts in both Mason and Taggart and that it was unwilling to go beyond those facts until such circumstances are presented. It seems clear that the Court would not distinguish between a tortious act which occurred within the premises from one which occurred without, providing that in both circumstances there occurred either a negligent sale to one who was unable to abstain or an illegal sale as outlined in Mason and followed in Taggart. It is likely that many litigated circumstances would involve a tort-feasor who leaves the tavern and subsequently drives his automobile negligently causing a third person's injuries. Following the holding in Mason, it would seem that an action at common law would be permitted against the liquor vendor based on his duty to protect the members of the public from physical injury by third persons, not only when such members are in his place of business, but also when they are outside his place of business.

Trend

Although it is often unwise to speculate on future trends in the law, it is difficult to foresee a retreat from the Mason holding and far easier to foresee an expansion beyond the circumstances peculiar to Mason and Taggart to include a duty at common law by a liquor vendor to protect members of the public wherever they may be victims of the violent acts of third persons. Ohio's new position in allowing an action at common law even where there exists a Dram Shop Act, though inapplicable, is a small step toward placing the cost of injuries caused by the negligent or illegal serving of alcoholic beverages more squarely on the one who should bear it, i.e., upon the liquor vendor, who, in turn, can raise his prices to spread the risk among the liquor-consuming public. Placing the liquor vendor on the same level as other business proprietors when negligence is in issue, more nearly conforms to modern theories of equality and justice.

Two states have extended this theory of liability even beyond the liquor vendor to include social hosts by interpreting their respective Dram Shop Acts to include such hosts. It is not suggested that Ohio should follow their example of strict liability but only that Ohio should require that all persons who dispense liquor, whether by sale or by giving it gratuitously, do so by reasonable standards of care as is required in other similar situations where negligence is the standard by which liability is measured.

V. CONCLUSION

In the two cases of Mason v. Roberts and Taggart v. Bitzenhofer,
the Supreme Court of Ohio has announced a new liability of liquor vendors at common law. The Court, in declaring that Ohio’s Dram Shop Act is not the exclusive remedy against a liquor permit holder in an action to recover damages for the death and injuries of a bar patron, has opened new avenues of legal liability. Although these cases are admittedly narrow in scope in that they both involve pleadings alleging injuries received while inside the respective defendants’ establishments, it seems illogical that the Court, when presented with a proper case, would limit the liquor vendor’s duty to the public to those third persons “in his place of business.” Rather, in light of the prevalence of intoxicants in our society today, and their known effects, it is certain that the Court would not hold that the chain of causation is broken if, by circumstance, the intoxicated person steps outside to commit his assault on the plaintiff. It would appear that so long as the act of serving the liquor was either done negligently to one who could not refuse, or done illegally, there now exists a common law cause of action notwithstanding the existence of a Dram Shop Act which permits a civil action under certain circumstances.

It is hoped that Ohio, when presented with a proper case, will permit civil liability to be imposed upon tavern keepers, based upon a duty to protect the public not only within the establishment’s walls, but also more equitably, even beyond those walls where such liability is based on duty, proximate cause, and foreseeability of harm. It is unclear where the Mason and Taggart cases will lead, but it is urged that Ohio follow the more liberal trend and permit a cause of action against liquor vendors who knowingly contribute to the intoxication of tort-feasors.

VESTIGES OF SEXISM IN OHIO AND KENTUCKY
PROPERTY LAW; A CASE OF
DE FACTO DISCRIMINATION

by
Charlotte L. Levy*

I. INTRODUCTION

Although sex-based discrimination in property law is sometimes masked by ambiguous statutory language, sexism is still prevalent. The current thrust toward equal rights for women often obscures the fact that in dealing with property, discrimination frequently victimizes the male spouse.\(^1\) As the quest for equal civil and political rights for females has progressed, there have been overriding priorities such as equal economic opportunities, equal educational opportunities, and equal credit rights.\(^2\) Such practical objectives are certainly justifiable but some of the existing discrimination derives its 
raison d'etre \(5\) from cultural lags originally promulgated in the area of property law. For example, in the fight for credit for married women, reluctance on the part of merchants and money lenders stems from confusion in the area of legal property rights and liabilities of women in the United States.\(^3\) The prevailing confusion concerning property law in the United States is compounded by the fact that it is in the area of state law that property rights are defined.\(^4\) Whether the state law is derived from the English common law or the Spanish community property law,\(^5\) various legal disabilities or restrictions still limit the prop-

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\(^*\)Third year law student; B.A., University of Kentucky; M.L.S., Columbia University; Law Librarian, Northern Kentucky State College, Salmon P. Chase College of Law.


2. Credit rights can obviously be construed as a category of property rights. Based upon the modern American way of life enabling a purchaser to obtain both personal and real property through various credit devices, the inequalities of men and women in obtaining credit is evidence that men and women are still considered unequal in terms of property rights.


4. Id. at col. 5.

5. It is not within the scope of this paper to discuss property rights and sexism where the community property system obtains. Since the English common law was adopted by the majority of American state jurisdictions (42), the following discussion will be limited to property law in Anglo-American jurisdictions in general and in the state jurisdictions of Kentucky and Ohio specifically. It should be noted, however, that the states of Arizona, California, Idaho, New Mexico, Texas and Washington, and to a more limited extent, Oklahoma, developed systems of community property law. The legal ramifications of property law within those states are considerably different from those of the American jurisdictions which adopted the English common law.
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Property rights of married women. Such an anachronistic state of affairs in twentieth century America seems incredible at first glance. Yet, an investigation of the origin and development of United States property law explains (though does not totally justify) such quaintness.

The purpose of this paper is twofold. First, the paper will examine the historical development of American property law affecting women generally and married persons specifically. Second, it will compare the Kentucky and Ohio laws affecting spouses' property rights in order to exemplify how de jure and de facto discrimination still exist in American jurisdictions.

II. HISTORICAL BASIS FOR DISCRIMINATION

English Common Law

Discrimination toward all women has its antecedents in early Roman law. Women were defined as minors according to Roman law. This Roman legal tradition became known as the "perpetual tutelage of women" and has been transmitted in modified form to the present day. In fact, before the Married Woman's Acts, all women — married and unmarried — were treated as perpetual minors who could only act legally under the name of a male guardian. Simone De Beauvoir has stated that woman's fate has been inextricably wound up with private property since patriarchal time and classical antiquity:

Woman was dethroned by the advent of private property, and her lot through the centuries has been bound up with private property: her history in large part is involved with that of the patrimony. It is easy to grasp the fundamental importance of this institution if one keeps in mind the fact that the owner transfers, alienates, his existence into his property; he cares more for it than for his very life; it overflows the narrow limits of this mortal lifetime, and continues to exist beyond the body's dissolution — the earthly and material incorporation of the immortal soul. But this survival can only come about if the property remains in the hands of its owner: it can be his beyond death only if it belongs to individuals in whom he sees himself projected, who are his. To cultivate the paternal domain, to render worship to the manes of the father — these together constitute one and the same obligation for the heir: he assures ancestral survival on earth and in the underworld. Man will not agree, therefore, to share with woman either his gods or his children. He will not succeed in making good his claims wholly and forever. But at the time of patri-

8. 2 W. LECKY, DEMOCRACY AND LIBERTY 538 (1903) [hereinafter cited as Lecky].
archal power, man wrested from woman all her rights to possess and bequeath property.\textsuperscript{9}

Even if one disagrees with the tone of De Beauvoir's invective, it is not possible to totally dismiss her theory. For, until the statutory modifications of the common law in the form of the Married Woman's Acts, there were inequalities in England in the disposition of property by will to male and female heirs. There was liberty of bequest in England so that it was unusual that the same amounts of property were given to males and females. One writer has stated the reason for this inequality: "The boy perpetuates the name and maintains the family of his parents; while it is the usual lot of the girl to bear another name, to pass into another family, to be supported by another man."\textsuperscript{10} The disadvantages of women in inheriting property had been removed in a large part of Europe by the law of compulsory equal division of property after death. These inheritance laws gave women an equal inheritance with their brothers and discouraged primogeniture and agglomeration of property.\textsuperscript{11}

It is necessary to probe the English common law in order to understand male and female rights to property in the United States. This requires categorizing women according to their marital status because there were distinct legal bases for property rights of unmarried and married women.

\textbf{Single Women}

As a matter of law, single women had equal property rights with single men. Unmarried women were defined as \textit{femes soles}. Although a \textit{feme sole} was considered an infant until she reached majority, once she reached such an age she was entitled to full possession and control of her property.\textsuperscript{12} Under the laws of England an unmarried woman's property rights were legally unambiguous as evidenced by the fact that unmarried female property owners were considered competent voters. Single women voters were subject to the freehold requirement as were men.\textsuperscript{13} Yet, a single woman was in a less than credible social position. An unmarried woman occupied an unimportant place socially; thus, her other activities suffered as a consequence.\textsuperscript{14} And, women who were wealthy enough to own property felt the greatest effect of this social castigation. If a woman was rich, it was hardly reputable that she remain single unless she became a nun. It was an act of defiance for her not to marry; but, if she

\begin{itemize}
\item \textsuperscript{9} S. De Beauvoir, \textit{The Second Sex} 82 (1968).
\item \textsuperscript{10} Lecky, \textit{supra} note 8, at 540.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} R. Grant, \textit{Law and the Family} 5-6 (1919) [hereinafter cited as Grant].
\item \textsuperscript{13} P. Davis, \textit{A History of the National Woman's Rights Movement} 101 (1871).
\item \textsuperscript{14} M. Benson, \textit{Women in Eighteenth-Century America} 224 (1935) [hereinafter cited as Benson].
\end{itemize}
persisted in defying social sentiment and did not marry, the law protected her ownership of property.15

Another category of single women was that of the widow. Interestingly enough, widows were not hamstrung by the "protective laws" designed for married women. Nor were they social pariahs as were their never-married sisters. Widows were socially acceptable *femes soles* who were often in business for themselves, or who continued in their deceased husbands' businesses. They were afforded the full privileges which the law offered.16 Widows were perhaps the only women who enjoyed equal protection of the law without being subjected to certain social pressures and restrictions.

**Married Women**

Whatever the unwritten restrictions of *femes soles*, married women were infinitely more oppressed at English common law because such oppression was sanctioned and even sanctified by the law. A married woman was known as a *feme covert* — a status which carried severe legal disabilities, known as the "disabilities of coverture," as part of its baggage. "Of every human status devised by civilisation that of *femme covert* was the most ignominious, though it wore the air of chivalrous concern for the inherent helplessness of women."17 At a certain point in history, coverture was undoubtedly a symbiotic relationship for both spouses. During an era of agrarian economies and large families, a division of labor and an acceptance of distinct and reciprocal roles were necessary. The married woman's sphere was considered the home where it was her duty to cater to her husband, rear the children and preserve peace and harmony.18 Thus the English common law considered the marriage a partnership, a complete merger of two individuals into one unit. Because of this unity theory, it was necessary that the couple assume one identity which was invariably that of the husband. The married woman's former identity was totally merged with that of the husband and submerged into the unit which was the husband's sphere.

It followed that married women's property rights under the common law were drastically affected by such merger of identities. In the area of personal property, all the wife's personality at the time of marriage vested absolutely in the husband. All intangibles which belonged to the woman upon marriage also vested in the husband merely by his exercising some act of ownership over them.19 Even personal property which was bequeathed to the wife after the marriage was legally the husband's if the property exceeded £200. The husband also had complete control over the

15. GRANT, supra note 12, at 6.
16. BENSON, supra note 14, at 224.
17. GRANT, supra note 12, at 6-7.
income derived from the wife's real estate during his lifetime. Furthermore, any money which a married woman earned or inherited during the marriage could be taken to pay the husband's debts.

**Husbands' Rights At English Common Law**

Upon marriage, a husband gained an estate in all present freehold estates of which the wife was seised. Such estate was known as *jure uxoris*. In addition, he acquired the same rights in any present freehold estate of which the wife became seised during the marriage. Such rights remained in the husband until either spouse died, until divorce, or until a child was born alive. When a child was born alive, whether or not it lived long after birth, the husband was entitled to an estate for life in his wife's lands, the measuring life of such estate being the life of the husband. This second type of estate in the wife's lands of which she was seised during coverture in fee simple or fee tail and to which the husband was entitled was termed curtesy initiate. *Jure uxoris* terminated with the wife's death and the estate of curtesy initiate likewise terminated with the wife's death. However, at the time of the wife's death, assuming that the husband survived the wife, the estate changed its name to curtesy consummate and continued for the duration of the husband's life. The only requirement therefore, to change the husband's rights from *jure uxoris* to curtesy initiate was the birth of a child capable of inheritance.

There was one technical distinction made between the two estates. Before the birth of issue, the husband was said to have an estate through the right of his wife; thereafter however, he supposedly held in his own right as if his wife had conveyed the estate to him for a valuable consideration. Actually, curtesy attached to all the wife's lands which she possessed at any time during marriage as had the estate of *jure uxoris*. Both estates included the wife's joint ownership of property, her life

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20. Lecky, supra note 8, at 537.
22. Day, Rights Accruing to a Husband upon Marriage with Respect to the Property of his Wife, 51 Mich. L. Rev. 863-64 (1953) [hereinafter cited as Day].
23. Id. at 864.
27. 2 W. Blackstone, Commentaries *126.
28. Scurlock, supra note 26, at 280.
estates, and estates held by the husband and wife by the entirety.\textsuperscript{30} Under both \textit{jure uxoris} and curtesy the husband had ample rights to his wife's property. He had the absolute right of alienating the wife's lands without her concurrence;\textsuperscript{31} he was singly entitled to the rents and profits of all such lands during the spouses' joint lives;\textsuperscript{32} and, all the wife's lands were subject to the husband's creditors' claims.\textsuperscript{33} Therefore it has been said that a woman lost all property rights and underwent "civil death" upon marriage.\textsuperscript{34} After marriage the woman was not resurrected because anything which she acquired by her labor, service, or act became the legal property of the male.\textsuperscript{35}

\textit{Wives' Rights At English Common Law}

Under the English common law the wife's rights in the husband's lands were limited to what was called dower rights.\textsuperscript{36} Dower was an estate for life acquired by a widow in one-third of all lands of which the husband was seised in fee simple or fee tail during the marriage.\textsuperscript{37} The term dower encompasses three grades: 1) inchoate, which occurs after seisin of the husband and during coverture; 2) dower consummate, which is the state after the husband's death but prior to its assignment; and, 3) assigned or vested dower, which occurs when the widow enters into possession of the estate assigned to her.\textsuperscript{38} Dower was originally limited to lands held by the husband upon marriage, but the Magna Carta extended such right to all lands of which the husband was seised during coverture.\textsuperscript{39} It should be emphasized that at common law, the rights of a woman were those of a widow rather than a wife.\textsuperscript{40} Since the dower right only vested upon the death of the husband, the wife's only restriction upon her husband's land during his life was that he could not alienate the wife's one-third interest without her concurrence.\textsuperscript{41} Since the woman only had a survivor's right in her husband's property it has been reasoned that the only

\begin{thebibliography}{99}
\bibitem{30} 4A G. Thompson, \textit{Commentaries on the Modern Law of Real Property} §1904, at 52-53 (1961) [hereinafter cited as Thompson].
\bibitem{31} 2 F. Pollock & F. Maitland, \textit{The History of English Law} 403-04 (2d ed. 1898) [hereinafter cited as Pollock & Maitland].
\bibitem{32} Thompson, \textit{supra} note 30, §1904, at 51.
\bibitem{33} Day, \textit{supra} note 22, at 864.
\bibitem{34} K. Millett, \textit{Sexual Politics} 67 (1970).
\bibitem{35} Id.
\bibitem{37} S. Doc. No. 270, \textit{supra} note 29, at 147.
\bibitem{38} 28 C. J. S. Dower §3 (1941).
\bibitem{39} Thompson, \textit{supra} note 30, §1911, at 95.
\bibitem{40} Schouler, \textit{supra} note 36, §1374, at 1627.
\bibitem{41} Pollock & Maitland, \textit{supra} note 31, at 404.
\end{thebibliography}
basis for dower was to provide an assured means of support to the surviving wife should she outlive her husband. 42

**English Common Law Curtesy And Dower Rights Compared**

Under the early common law of England, a man on marriage lost control of his lands only to the extent required for the protection of the wife's right to dower . . . . Thus the husband's decrease in capacity was slight. At that same time a woman, on marriage, lost all power to control or to deal with her land interests. By virtue of the mere fact of marriage, the man acquired, in the woman's lands, an estate measured by the joint lives of the two spouses and on the birth of a child an estate for life measured by the husband's life. These acquired interests the husband could convey without the consent of the wife. If larger interests were to be conveyed in the woman's lands, the wife had no power to make such a conveyance; but the husband with the wife's concurrence could make the transfer. The wife's decrease in capacity was very great. 43

It can therefore be seen that the husband's right of curtesy in the wife's land was at least three times, and in fact more than three times, more valuable than the wife's right of dower. 44 But at least one authority disagrees as to the inequality between dower and curtesy rights:

Dower, to be sure, gave the widow only a life interest, to the extent of one third, while curtesy gave the surviving husband the full life interest. But on the other hand, dower became absolute in the widow when she outlived her husband while curtesy, as we have seen, never attached at all unless the husband outlived his wife and was fortunate enough to have had a child by her besides. 45

Notwithstanding acceptance of one view or the other, marriage did take away property rights of both spouses and created a situation in which neither spouse could act freely and independently of the other with respect to his or her own property.

**Doctrine Of Separate Use**

In order to modify the harsh inequities toward the wife concerning property at common law, the English Court of Chancery stepped in. 46

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42. THOMPSON, *supra* note 30, §1911, at 97.
46. "The motion of an equitable separate estate free from the claims of the husband was avowedly introduced in order to evade the harsh and unjust dogmas of the law, and, in direct antagonism to the common-law theory which completely merges the legal personality of the wife in that of her husband, equity regards and treats the married woman, with relation to such separate property, in many respects as though she were unmarried." 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, §1098, at 289-90 (5th ed. 1941) [hereinafter cited as POMEROY].
Since the English Court of Chancery was an organ for realizing social demands to which the conservatism of the legislators failed to respond, it was natural for the recognition of the independent existence of the wife to come first from customary rather than statutory sources of legislation.47

Once personal property began to assume importance, the Court of Chancery began to recognize the wife’s equity to a settlement out of her personal property which the husband had the legal right of reducing to his possession and ownership.48 However, in the beginning, this doctrine of equity to a settlement was invoked only in the event that a husband found it necessary to appeal to the Court of Chancery to gain possession of the wife’s personal property.49 Later the doctrine of the wife’s equity to a settlement afforded relief to the husband if either the wife’s personal or real property was involved. But, the burden was upon the husband when either he or one claiming under him came into equity for the purpose of relief.50

The exact origin of the woman’s equity to a settlement is not readily ascertainable. Since it was created by a Court of Equity it may be said that the doctrine was grounded upon natural justice.51 It has been suggested that the doctrine was a kind of parental care, which equity exercised for the benefit of orphans and that “[A]s a father would not have married his daughter without insisting upon some provision, so a Court of Equity, which stands in loco parentis, will insist on it.”52 Since the wife’s separate estate was a well settled doctrine of equity by 169553 it is not surprising to find that such theory of the origin of the doctrine equates a woman with an orphan and suggests that women were considered minors in need of indefinite parental care and supervision.

It was eventually recognized that the wife’s equity to a settlement afforded but imperfect protection to the wife so that the Court of Chancery gradually developed a system of separate property rights for the married woman.55 Such rights were settled in the wife by judicial decree, by act of the husband, or by the intervention of a third party.56 Property thus settled received the designation of the wife’s “sole and separate estate” and was termed her “equitable separate estate.”57

47. I. LOEB, THE LEGAL PROPERTY RELATIONS OF MARRIED PARTIES 125 (1900) [hereinafter cited as LOEB].
48. Id.
49. Id. at 126.
50. TIFFANY, supra note 25 §485, at 335. It is to be stressed that the wife’s equity to a settlement was exclusively a remedy in equity and that such doctrine was never applied by the common law courts.
51. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §1407 (1836).
52. Id.
53. POMEROY, supra note 46, §1098, at 289 n. 17.
54. TIFFANY, supra note 25, §485, at 335.
55. LOEB, supra note 47, at 126.
56. Id.
57. TIFFANY, supra note 25, §485, at 335.
The wife's equitable separate estate was really a particular instance of trusts whereby the ordinary marital rights of the husband over his wife's property were excluded. Particular words were not needed to bring the estate into existence. The only requirement necessary to invoke the doctrine was that the property be designated expressly or impliedly by the terms of the transfer that such property was for the separate use of the wife. An express or implied designation was mandatory, however, because even after the doctrine of separate use was recognized, the husband continued to obtain his marital rights in ordinary trusts for the benefit of the wife and she continued to have her equity to a settlement as had previously been the case. Once the doctrine of the woman's separate estate was established, such estate included every species of property, real and personal. In the final analysis the purposes of the equitable separate estate were to exclude the husband's control of the wife's property, to free the property from liability for the husband's debts, and to secure the wife's beneficial ownership. These goals were not uniformly successful however.

**English Statutory Law And Property Rights**

Until the nineteenth century, inequalities in terms of interspousal property rights persisted. The legal incapacity of married women could not last. Since the judicial devices of equity to a settlement and the doctrine of the separate equitable estate were not totally effective in eliminating the husband's control of the wife's property, statutory modifications became necessary. The first statutory changes came about in 1857 but were of limited scope. In 1870 there followed another act which was likewise limited. The English act, popularly referred to as the Married Women's Property Act, was passed in 1882 and became effective after January 1, 1883. This Act gave married women the rights of

58. POMEROY, supra note 46, §1098, at 289.
62. Id. at 870.
63. POMEROY, supra note 46, §1098, at 292.
64. BISHAM, supra note 59, §98, at 179.
65. POWELL, supra note 24, ¶117, at 448: "Doubtless many women resented their status of weakness before the law ... Probably, more significant, in the early decades of this movement for a change in the law, was the dissatisfaction of wealthy older males at handing over control of their wealth to these recently acquired sons-in-law."
66. For a detailed discussion of these nineteenth century statutory modifications see volume 19 of HALSBURY'S LAWS OF ENGLAND 822-29 3d ed. 1957).
68. Married Women's Property Act, 33 & 34 Vict., c. 93 (1870).
69. Married Women's Property Act, 45 & 46 Vict., c. 75 (1882).
single women in the enjoyment and disposition of their property. Several twentieth century English acts which affected women's rights have further extended the principles first formulated in the acts of the nineteenth century. Although the passage of Married Women's Acts occurred in some of the United States jurisdictions before the actual English codifications, there was much more uniformity in the British legislation. This served to abrogate existing discrimination in England, whereas the laws of the United States lagged behind. The reasons for such lag are obvious. The composite product of historical and social factors stressing differently the entity or individuality of married persons, coupled with the special peculiarities of homestead and community property law in the various jurisdictions, resulted in a hodgepodge of individual married persons' property laws in the several jurisdictions. In Great Britain, the movement was characterized by greater conservatism and the resulting statutes were therefore more harmoniously framed and more consistent than their American counterparts.

American Developments In Property Law Affecting Married Persons

Thus the English law had freed itself of de jure discrimination concerning women's property rights. But the American colonies had adopted most of the common law from England, including property laws. For example, not until 1776 did Virginia, under the leadership of Jefferson, abolish the age-old English custom of securing the continuance of property through the law of entail. And in 1785 Virginia enacted the important statute concerning the descent of lands. Under the old colonial law of inheritance, the father's estate descended upon the eldest son. Not until 1785 then, under the general principle of succession formulated by Jefferson, did the land of the decedent pass equally to his children. Other states followed the abolition of inheritance laws which disfavored female children. But, as in England, once the female became entitled to land interests, such interests could be practically stolen from her by marriage.

Actually there were more reasons why married women should have

71. Married Women's Property Act, 7 Edw. VIII, c. 18 (1907); Law of Property Act, 15 & 16 Geo. V, c. 20 (1925); Law Reform (Married Women and Tortfeasors) Act, 25 & 26 Geo. V., c. 30 (1935); Married Women (Restraint upon Anticipation) Act, 12, 13 & 14 Geo. VI, c. 78 (1949).
72. Powell, supra note 24, ¶118, at 453.
73. Loeb, supra note 47, at 129-30.
74. Since the property laws of the American jurisdictions were so diverse, the discussion of American developments will be limited to general evolution in the United States. A more detailed analysis of specific property rights will be reserved for the comparison of property laws affecting women and married persons in general in Kentucky and Ohio.
75. 1 S. Fess, Ohio 77 (1937).
had control of their own property in America than in England. Due to
England's historical development during the days of feudalism, the entire
country and its political and economic structure were based upon land
ownership. The landed gentry was entitled to rights and privileges which
were not granted to the common man. But in the early days of America,
no such system was entrenched. Rather, in Colonial America women
participated in securing the frontier and that fact made for a kind of
rough equality. In addition, American women had to be more indepen-
dent than British women who owned land. For example, there were
many widows due to the rugged life and the Indian Wars. These widows
were forced to support themselves and their children by becoming inn-
keepers, storekeepers or by continuing a former husband's business.

There was a labor shortage in the United States and therefore there were
no taboos serving to keep women idle. "But in spite of their role as equal
partners in the home and farm, women in America fared little better
legally than their European sisters. English common law prevailed in
America. Property rights were restricted. . . ." Although a woman's
position differed from one colony to another, there were restrictions im-
posed as to land conveyances by married women in all the colonies. It
was not unusual to find the husband's joinder in the conveyance vital
or to have safeguards on the woman's property embodied in special
provisions concerning the form or manner of her acknowledgment of the
conveyance's execution.

Equity devices were applied in the United States as they had been in
Great Britain. Equity to a settlement was widely recognized in the United
States prior to the enactment of the Married Woman's Property Acts.

But, as had been the case in England, American courts found that the
wife's equity to a settlement did not provide adequate protection. Therefore,
the second device of equity, the "equitable separate property of
married women" or the "separate-use doctrine" was employed. This
device also failed to give complete protection in the United States as it
had in England. And, the doctrine had far more uniform acceptance in
the various American jurisdictions.

76. J. Harris, A Single Standard 35 (1971) [hereinafter cited as Harris].
77. Id.
78. Id. at 35-36.
79. Powell, supra note 24, ¶117, at 450.
80. 1 American Law of Property §5.54, at 765-66.
81. Id. §5.55.
82. Loeb, supra note 47, at 127-28:
The operation of the English system, even after the establishment of the married
women's equitable separate estate, revealed its radical defects. The wife, however
extensive the property which she had brought to the husband, has no legal claim to
be heard in the matter of its disposition or enjoyment. However industrious and
economical she may be, she can not claim the fruits of her activity, or the results of
her savings. The husband, however extravagant, dissipated or worthless, has a legal
right to all the acquisitions which proceed from the personal industry of the wife.
83. Powell, supra note 24, ¶117, at 450.
It was not until the nineteenth century that actual statutory changes in married women's property rights succeeded in mollifying the harsh treatment of women which had come about as a result of the common law's adoption by the American colonies. The first acts in American jurisdictions granted married women certain rights of independent legal activity in case a woman had been deserted by her husband. These acts were followed by statutes which recognized the wife's separate rights in particular classes of property such as life insurance policies and deposits in savings banks. Such property was then exempt from the husband's disposition as well as from liability for his debts.

In 1848, New York State gave women the right to control property. By 1860, women in New York had the right to own property, collect their own wages, sue in court, and receive a fair share of their husband's estate if they were widowed. Other states followed the New York example in liberalizing their property laws and women began to see the end of "civil death."

These state statutes were generally referred to as the married women's property acts or married women's rights acts and under them the wife's property — other than her separate equitable estate — became known as her separate statutory property or separate statutory estate.

Advocates of these statutory reforms brought the question of married women's property rights before state legislatures and constitutional conventions and "succeeded in having clauses inserted in the body of the organic law making it mandatory upon the legislative body to provide a system of separate property rights for married women or to exempt their property from the husband's disposition or from liability for his debts." Thus there was a gradual emancipation from the legal disabilities of women resulting from marriage and concerning land as the legislative bodies of the fifty states responded to local pressures by enacting widely differing statutes.

These local pressures were as varied as were the eventual state statutory enactments. One theory as to the impetus behind the statutory enactments was the increasing number of landowning, thrifty wives in the eastern states whose husbands had become convicts, or were ne'er-do-well profiteers and runaways who found an outlet for their interests in the trek of

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84. LOEB, supra note 47, at 128.
85. Id.
88. HARRIS, supra note 22, at 44-45.
89. Day, supra note 22, at 874: "This separate statutory property exists by virtue of the statutes in question and is to be distinguished from the separate equitable estate which arises when the title is vested in someone for the separate use of a married woman."
90. LOEB, supra note 47, at 128-29.
91. POWELL, supra note 24, ¶117, at 451.
the white settlers to the Mississippi River and beyond. In addition, local law-making bodies felt the pressures exerted by the nineteenth century women's suffrage movement. The mid-nineteenth century feminists placed their main emphasis on winning legal and political rights. Some of the feminists considered women's legal rights the first priority. For example, Lucretia Mott was more interested in legal rights than in the vote. Elizabeth Cady Stanton believed that husband and wife should be equal which meant first of all giving married women rights over their property and children. It has been said that the feminists did not take the necessary time to investigate the legal status of women and that they continually misstated legal sources. One of their primary targets was Blackstone. In misstating Blackstone, who had himself misstated the English law, they compounded several errors. But, whatever their shortcomings and misuse of dogma, the nineteenth century feminists had far-reaching effects in bringing about social, political and legal reforms in America. Their influence would have probably been even greater had their efforts not been interrupted by the American Civil War. "[A]s the nation became increasingly torn apart over the issue of slavery and the most important issue of all — whether or not the Union was to endure — women's rights became a minor priority.

At any rate, by 1900, state legislatures had responded so that only seven states did not have some provision for women to enjoy some control of their property. Despite the divergence among the state laws, their general purpose was the same. The Married Women's Acts of the forty-two states which have a common law basis for distributing marital property have modified the common law principles which gave the husband complete control of his wife's property and the productions of her labors. The statutes deprive the husband more or less completely of his common

92. Id.
93. R. Riegel, American Feminists 155 (1963). However, as the movement continued into the twentieth century, efforts were devoted almost exclusively to attaining suffrage. Although the women were concerned with increased opportunities in every phase of life, they tactically chose the single and limited objective of suffrage as the key to unlocking the doors to emancipation for women. Id.
94. Id. at 23.
95. Id. at 59.
96. Id. at 3:
American states had generally adopted the English common law as interpreted by Blackstone, and the first mistake was the failure to realize that Blackstone as an unyielding conservative had misstated the legal situation in England. The second mistake was in not recognizing that the Blackstone principles concerning women had been vastly modified in the United States by statute law, by equity law, and by the use of pre- and post-nuptial agreements. The third error was to assume that the most objectionable of the Blackstone ideas were quite generally put into effect. Women were in fact far from the slaves that the feminists depicted with their quotations from Blackstone.
97. Harris, supra note 76, at 45.
law marital rights in his wife's property, provide that her property shall not be liable for his debts without the wife's specified type of assent, and give the wife at least partial control of her property. 99

With certain exceptions these statutes give a woman the right to control property she owned before marriage as well as property she earns or receives by gift or devise during marriage. Except for qualifications relating to the right of a surviving spouse to inherit, therefore, each spouse now owns his or her separate property free of legal control of the other spouse. 100

Some state statutes permit a married woman to convey, transfer or encumber her separate statutory property of all types as though she were a feme sole; in a number of jurisdictions her power is less extensive. 101 Several states have established a statutory procedure whereby a married woman, under certain circumstances, can be declared a free dealer or feme-sole trader and can thus acquire greater contractual capacity than she would ordinarily have. 102 It is perhaps the variegated effect of the many state statutes and the resulting confusion in women's status that has led one author to observe that "[d]espite the passage of Married Woman's Property Acts and much other legislative relief during the nineteenth century, the core idea of the Common Law remains." 103 While the common law ideas do seem to persist, 104 attitudinally at least, with respect to women and the law in general, it must also be noted that the early Married Woman's Property Acts tended to remove some of the common law disabilities of women without likewise removing the common law obligations placed upon men. 105 The later legislation did, however, resolve

100. Brown, supra note 98, at 948.
102. Id. at 877.
103. Freeman, supra note 7, at 210.
104. See e.g., Lawler v. Merritt, 182 Misc. 648, 48 N.Y.S. 2d 843 (Sup. Ct. 1944), aff'd 269 App. Div. 662, 53 N.Y.S. 2d 465 (1945) stating that, "The concept of the common law by which husband and wife were regarded as one person is still deeply rooted in our law, and it persists notwithstanding . . . the 'Married Women's Act'" (emphasis added).
105. LOEB, supra note 47, at 13:
In the early acts no attempt was made at a general revision and codification of the law governing the economic relations of married parties . . . . The married women's acts confined themselves to the removal of the disabilities of the wife. They did not, in general, deprive her of the exemptions and privileges which she had enjoyed on account of these disabilities, nor was the husband relieved of his previous duties and burdens. As a result, the matrimonial property systems became characterized by gross inequalities and inconsistencies. The husband, though he received no property from the wife, might be held liable for her ante-nuptial debts. His creditors could not obtain satisfaction out of the wife's property, even though, as a matter of fact, the debts had been contracted for the support of the wife. Under the new conditions it was possible for a woman possessing considerable property in her own right to obtain a divorce on the ground of lack of support. A married woman who had been accorded full capacity for carrying on legal proceedings might still be able to plead the fact of coverture as a bar to the running of the period of the limitation of actions. Moreover, while the husband had been deprived of rights in the property of his wife, the latter retained the privileges which she had possessed in his real property.
many of these statutory inconsistencies and generally tended to carry out the strict principles of equality in defining the legal economic relations of married parties.\textsuperscript{106}

If \textit{de jure} discrimination was indeed abolished in the state jurisdictions, why does \textit{de facto} discrimination relating to married persons' property persist? The reasons are primarily sociological and comparable to the abolition of legal discrimination against Black Americans which nevertheless has not abolished \textit{de facto} discrimination.

Furthermore, a comparison of various state statutes points out that the statutory language of some state laws promotes sexism in several ways. First of all, there is generally the basic principle explicit or implicit in the state codes that the man is head of the household. Secondly, state codes often provide one statute after another which are explicitly protective toward women and restrictive toward men in that such statutes carry with them obligations which the husband must meet in order to maintain his implied position of superiority over his wife.

For the purpose of illustration, the current statutory provisions affecting the property rights of married persons in the states of Kentucky and Ohio will be compared and analyzed below. It should be noted that Ohio has progressed much further than has Kentucky in eliminating implied discrimination toward married persons by modifying statutory language and thereby almost eliminating protective provisions for married women. This is not surprising since Ohio property law followed that of other northern industrial states, whereas Kentucky adopted part of the southern states' legacy which was more landed property oriented.\textsuperscript{107}

\section*{III. Statutory Property Law Discrimination in Ohio and Kentucky}

"The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto."\textsuperscript{108} The modern Ohio statute has not changed the common law\textsuperscript{109} in that the husband may choose any reasonable place or mode of living and the wife must accept that choice. This provision is the first basis for sexism which still exists in the Ohio statutes. Although the statutory language is modified by the word "reasonable," such language is ambiguous and the mandatory stipulation that the wife \textit{must} conform to the husband's choice implies that the choice of utilizing existing property is generally

\textsuperscript{106}Id. at 14.

\textsuperscript{107}For example, Kentucky has applied the separate-use doctrine, as had the courts of the Southern states generally, due to: 1) the aristocratic element of society in the South; and 2) a prevalent disposition of family entails, marriage settlements and fetters upon the transmission of landed property. On the other hand, in Ohio, which was formerly part of the Northwest Territory, society was modeled more after New England and there was no clear recognition of the wife's equitable separate use. See \textit{Powell}, supra note 24, \textit{\textsuperscript{\textcircled{\small{\textit{supra}}}}}, at 450-51 n. 10.

\textsuperscript{108}\textit{Ohio Rev. Code Ann.} \textsection{3103.02} (Page 1954).

in favor of the male. In addition, the choice insures the male better potential earning capabilities in order that he may acquire property in the future. He may choose to live where he can acquire money for the future acquisition of property. This precludes equal consideration of the wife’s potential earning power.

There does not seem to be sufficient reason why language could not be changed to the following: The husband and wife are a community. They may jointly choose a place and mode of living with due regard to the comfort, health, welfare, safety and peace of mind of each party. Until there is such a statutory provision for joint actions by the husband and wife, the existing statute smacks of sexism by promoting the dominance of the male spouse. The present statute leaves the woman in the precarious position of being somewhat of a chattel subject to the good faith and good judgment of her husband. In exchange for this position of dominance the husband must support himself, his wife and his minor children from his property or by his labor. If the husband becomes unable to provide the necessary support, the wife must assist him if she is able to do so. Once again the implication is that the wife is in a secondary and subordinate position. This kind of language casts doubt upon the fact that women are capable of rendering such assistance, much less providing the entire support.

In Kentucky there is no explicit statutory provision which suggests that the wife must conform to the husband’s wishes as to place and mode of living. Nevertheless, the woman is still considered secondary and subordinate to the desires of the husband’s choice of domicile according to Kentucky case law. In Kentucky the marital relationship is based upon

110. See Burke v. Burke, 36 Ohio App. 441, 173 N.E. 637 (1930) which states that the husband must act in good faith and with due regard for his wife’s comfort, health and welfare in choosing the place or mode of living.
111. OHIO REV. CODE ANN. § 3103.03 (Page 1954).
112. OHIO REV. CODE ANN. § 3103.03 (Page 1954).
113. It may be the case that the majority of American women are still not in as good a position as their respective spouses to provide support. However, it seems as reasonable to assume that, considering the increasing level of education which American females receive, they could be in as advantageous a position as their husband to provide support were existing barriers of unequal pay and unequal hiring practices abolished. For the law to imply that women are secondary and subordinate vis-a-vis their husbands only perpetuates the fable that women are less capable of earning a living and less capable of dealing with earnings in the form of property, real and personal. In addition, such language does not take the many instances of the wife’s superior education and earning possibilities into consideration. In relation to the male spouse, the law implies that he is somehow remiss in his duties unless he is capable of providing support. The law makes an inherent value judgment that every married male must be a superman and that it is less than masculine for a male to depend upon his wife for support.
114. See Gallup v. Gallup, 312 S.W.2d 889 (Ky. 1958), which held that the husband has the right to choose the marital domicile and, if such be suitable, the wife is not justified in abandoning that home for personal preferences regarding climate and customs; Thomas v. Thomas, 320 S.W.2d 803 (Ky. 1959) holding that “It is the wife’s duty to go wherever the husband provides a home, and her refusal to do so without justification constitutes abandonment.” Here the husband was assigned to duty at Fort Knox and his wife and child did not join him there, but stayed at the wife’s parents’
an implied contract of mutual duties toward one another. For the wife's
domestic services the husband has a duty to support his wife.115 The only
remaining statute upon which such right to support is based states that
the husband "shall be liable for necessaries furnished to her after mar-
rriage."116 Although the term necessaries is not defined by statute, the
case law provides guidelines. "The common law must be looked to in the
absence of a statutory definition thereof, to determine what is included by
the statutory term 'necessaries.' "117 A married woman is considered
secondarily liable for necessaries if she actually makes the purchase, pro-
cures the service, or makes the contract, and credit is extended to her,
and charged to her. The husband is considered primarily liable and only
if he fails to pay will the wife be required to do so.118 Once more the
wife has a secondary place (here obligation) according to statute and by
judicial interpretation thereof. This can only result in fostering the
inequality of the spouses. It is therefore suggested that in order to achieve
equal rights to property, statutes which make one spouse and not the
other liable for the other's debts be either equalized or abrogated. That
is, unless there is a corresponding statute making the wife liable for her
husband's debts, the existing statute is discriminatory toward the wife by
attributing need of protection to her and discriminatory toward the hus-
band by obliging him to perform a function which the wife need not
likewise perform.

Perhaps the optimal solution to the intertwined duties of whither the
husband goes, the wife goes, and in turn wins his support, for which he is
then awarded her services in carrying out domestic duties is found in a
recent Ohio case. In Porter v. Porter119 it was held that a wife who
breaches her duty to conform to her husband's place of living may not
claim the benefit of Ohio Revised Code Section 3103.03 which imposes
upon a husband the absolute right to support his wife and family. If

cited as Petrelli]; Johnson v. Johnson, 255 S.W.2d 610 (Ky. 1953); Faulkner v.
Faulkner, 246 Ky. 238, 54 S.W.2d 905 (1933).
118. Petrelli, supra note 115, §16.4. See also Underhill v. Mayer, 174 Ky. 229, 192
S.W. 14 (1917) where it was held that the husband was not entitled to reimbursement
from his wife's separate estate for the amount he had paid for certain necessaries
(medical bills) because the husband had procured the services of a doctor and thus the
credit was extended to the husband and not the wife.
statutes prescribing distinct “duties” and “benefits” for one spouse and not the other were abrogated, it could be said that a spouse has no duty to conform to the place of living of the other and may not claim support benefits. In the absence of statutory provisions the spouses would be free to mutually agree upon their dwelling place and means of support without being coddled or penalized by the law.

In Ohio, the Married Woman’s Act\(^\text{120}\) did nullify the common law doctrine of the unity of husband and wife and removed many of its accompanying disabilities:

The legal effect of the statutes as to the property rights of married women is to place the husband and wife upon an exact equality as to the property of each other; that is, neither husband nor wife has any interest in the property of the other except as to dower, distribution, and support. . . . Specifically, a married woman can now bind herself by contract, take, hold, and dispose of property without consent of her husband, and sue or be sued alone.\(^\text{121}\)

The Ohio Revised Code Section 3103.04\(^\text{122}\) would be basically free of sexist language or implication were it not for the exceptions of dower, distribution and support. After the passage of the Ohio Married Woman’s Act, the Ohio case law recognized that a married woman was no longer under the disabilities of coverture. Rather, her property rights became the same as those of a man or unmarried woman.\(^\text{123}\) Thus the acts and their subsequent codifications did away with the common law interests and rights of the husband and wife in each other’s property.\(^\text{124}\)

There is not an exact equivalent provision of Ohio Revised Code Section 3103.04 in the Kentucky statutes. The Kentucky statute which is the partial equivalent of Ohio Revised Code Section 3103.04 is sexist by omission; it does not discuss interests or lack of interests of both spouses in the property of each other.\(^\text{125}\) The statute simply negatives the existence

\(^{120}\) 84 Laws of Ohio 132 (1887). This act was actually the culmination of a series of relatively minor legislative reforms; it practically emancipated wives from the control of their husbands, 28 0. Jur. 2d Husband and Wife §21 (1958). For a discussion of the various legislative reforms (1824-1887) see Dillingham v. Dillingham, 9 Ohio App. 248, 28 Ohio Ct. App. 49, 30 Ohio C. Dec. 6 (1917).

\(^{121}\) 28 O. Jur. 2d Husband and Wife §21, at 138 (1953). These acts affecting married women’s property rights have been incorporated in various provisions of the Ohio Revised Code. These provisions will be considered and compared with the corresponding Kentucky statutes, infra.

\(^{122}\) Ohio Rev. Code Ann. §3103.04 (Page 1954) provides:

Neither husband nor wife has any interest in the property of the other, except as mentioned in section 3103.03 of the Revised Code, the right to dower, and the right to remain in the mansion house after the death of either. Neither can be excluded from the other’s dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction.


of the husband's estate or interest in the wife's real or personal property which she owns at the time of marriage, or acquires after the marriage, and gives the wife exclusive and separate use of her estate, "free from the debts, liabilities or control of her husband."\textsuperscript{126} Kentucky Revised Statute Section 404.010 (1) encompasses the Kentucky Married Woman's Act. But, it does not extend as liberal an attitude as its approximate Ohio equivalent. The Ohio statute negates the interests of both parties in the property of one another whereas the applicable Kentucky statute relates only to the wife's property.

In addition, Kentucky Revised Statute Section 404.010 (2) is explicitly discriminatory.\textsuperscript{127} Under Kentucky law, although a married woman has full contractual capacity in general, she is with some exceptions prohibited from being a joint maker on a note or surety on any bond or obligation of another unless her husband joins in the note or surety. However, a married woman may become a surety for her husband's debts even though she may not serve in such capacity for the debts of another.\textsuperscript{128} One Kentucky case has asserted that a woman may not be a surety if she is married because the purpose of the Married Woman's Act was to protect married women. Therefore, by extending the general power of married women to become sureties, the act's purpose to enlarge and not restrict the powers of married women would have been defeated.\textsuperscript{129} It would seem however, that ample time had passed since the passage of the Married Woman's Property Act to extend married women property rights without simultaneously restricting such rights by perpetuating paternalistic protective legislation.

The Ohio code section which affects contracts of husbands and wives provides that either spouse may enter into engagements or transactions with each other or with any third party as if each were unmarried. This provision is only limited by the general rules of confidential relationships.\textsuperscript{130} The Ohio section relates to property in that a woman does not need her husband's consent to render services outside the home in order to recover compensation for such services in her own name and for her own use.\textsuperscript{131} However, if a married woman acquiesces in permitting her husband to claim the right to compensation for her services, the husband may assert his common law right and the fact that the wife is entitled to

\textsuperscript{126} KY. REV. STAT. § 404.010 (1) (Bobbs-Merrill 1972).
\textsuperscript{127} KY. REV. STAT. §404.010 (2) (Bobbs-Merrill 1972) provides: A married woman shall never be the joint maker of a note or a surety on any bond or obligation of another, other than her husband, without the joinder of her husband with her in making such contract unless her separate estate has been set apart for that purpose by mortgage or other conveyance . . .
\textsuperscript{129} Mundo v. Anderson, 109 Ky. 147, 58 S.W. 520 (1900).
\textsuperscript{130} OHIO REV. CODE ANN. §3103.05 (Page 1954).
compensation will not be a defense to the husband's suit for his wife's compensation. 132

The Kentucky statute relating to contract rights considers property rights of married women as well. 133 It will be noted once again that Kentucky Revised Statute Section 404.020 (1) specifically refers to married women and defines their rights rather than considering the rights of both married parties. 134 As it concerns contract rights, the statute permits married women to make contracts as if single, except in cases where it is provided otherwise by statute. 135 At least one case has held that even an oral contract between spouses releasing their rights in each other's property was valid. 136 The statute affects improvements of a married woman's property by permitting her to contract for such improvements in her own name without her husband being named her agent. 137 For example, a wife can contract for a house upon her property without the consent of her husband. 138

It has further been held that a married woman may contract for necessaries for which a husband would have been liable under the common law. 139 In the Underhill case the distinction was made that during coverture a married woman who personally makes a contract for her own necessaries may be held liable therefor even though her husband is still primarily liable. 140 This change in the common law, which considered the note of a married woman void, was effected by Kentucky's Weisinger Act of 1894. 141 After the act was passed, a wife could by contract make a debt for her necessaries her own debt. 142 Atkins v. Atkins' Adm'r 143 held in particular that an antenuptial contract providing that the parties to it as between themselves shall be liable for their respective necessaries is not void as against public policy.

133. Ky. Rev. Stat. §404.020 (1) (Bobbs-Merrill 1972) which reads:
A married woman may acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and may, in her own name, as if she were unmarried, sell and dispose of her personal property. She may make contracts, and sue and be sued, as a single woman, but may not make an executory contract to sell or convey or mortgage her real estate, unless her husband joins in the contract. She may rent out her real estate, and collect, receive and recover in her own name the rents thereof, and make contracts for the improvement thereof.
134. In order to retain a logical sequence, the statutory modification of married women's property rights will be discussed infra in conjunction with Kentucky Revised Statutes Section 404.030.
138. Ware v. Long, 24 Ky. L. Rptr. 696, 69 S.W. 797 (1902).
140. Id. at 231, 192 S.W. at 15 (dictum).
143. Id.
In Ohio, the Ohio Revised Code Section 3103.07 provides that "[a] married person may take, hold, and dispose of property, real or personal, the same as if unmarried." As a self-contained provision, the code section is void of sexist language; it refers to both husband and wife as married persons and does not thereby single out one spouse or the other for particular consideration. In order to assess the code section's true meaning and construction it is necessary to look to Ohio case law for judicial interpretation.

In a 1922 opinion, *Board of Education v. Boal*, the Ohio Court discussed the power of a married woman to hold property. The Court said:

The rights of a married woman in this state have been extended by express provisions of our laws... These modern statutes relating to the property rights of married women are generally intended to cut off the common-law rights of the husband to the personal estate of the wife. They have been construed to constitute as her separate estate a separate business or trade which she may carry on, and all the property incidental thereto. Under the provisions referred to, the earnings of a married woman, or property acquired by her labor, constitute her separate property, and no part thereof or interest therein can in any wise be claimed by the husband as against her... If... the enjoyment of the fruits of her employment, is to be denied or limited, such denial or abridgment thereof must be found in some express provision of the legislation of the state. It cannot be imposed by action of the court.

Thus the Court disentangled itself from the statute's possible ramifications by authorizing reliance upon the statute itself.

In *Shafer v. Shafer*, it was held that upon provisions of Ohio statutory law the Legislature's intent was the complete emancipation of the wife, in so far as her separate property is concerned, except as to dower rights. The court thus granted a wife's partition against the husband in real estate which they jointly owned. The court found that there was sufficient consideration for its granting partition in that the half interest of the wife was supported by sufficient evidence that her interest was a gift from the husband. In the subsequent case of *Shively v. Shively*, the court held upon appeal that a husband too was entitled to seek partition of jointly owned real estate of husband and wife.

It may be seen then that the Ohio statutory provision affording the same property rights to married persons as to single persons has been uniformly applied and accepted. The statute's judicial acceptance is evidenced by the fact that there have been no recent court cases attempting
to contest the settled doctrine of separate and equal property rights of married parties according to Ohio Revised Code Section 3103.07.

In Kentucky, basic property rights of married parties are defined and controlled by Kentucky Revised Statutes Sections 404.020 and 404.030. The applicable Subsection of Kentucky Revised Statutes 404.020 is as follows:

A married woman may acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and may, in her own name, as if she were unmarried, sell and dispose of her personal property. She . . . may not make an executory contract to sell or convey or mortgage her real estate, unless her husband joins in the contract. She may rent out her real estate, and collect, receive and recover in her own name the rents thereof. . . . 149

Before discussing the sexist implications of the particular statute, it should be noted that in 1942, Kentucky Revised Statutes Section 404.020 (1) relating to the liability of a married woman to convey, sell or mortgage her real estate unless her husband joined in the executory contract was impliedly repealed by amendment to the statute which is currently Kentucky Revised Statutes Section 404.030.150 Before the 1942 amendment a married woman in Kentucky had certain statutory property rights according to Kentucky Revised Statutes Section 404.020 (1). For example, she was entitled to own real and personal property.

In Dawson v. Dawson,151 an action between divorced parties, a wife brought a claim against her former husband to recover on his note to her. The wife had lent her husband $500 and had secured his note therefor. The husband subsequently refused to repay his former wife on the grounds that he had repaid her since she had taken monies from his grocery store business and he had turned rents from certain of his real estate over to her in payment of the note. The court held for the plaintiff/wife, one of the bases for its decision being that a married woman may own money or personal property just as a single woman. Since the $500 was the wife's money when she lent it to her husband and since he accepted the money as a loan, he could not thereafter maintain that the note was without consideration.

In a 1953 case, Brown v. Gosser,152 a wife brought a negligence action against her husband for injuries she had sustained while riding in his automobile which he was driving. At the time of the accident the parties were not yet married and the suit was commenced prior to their marriage.

150. Ky. Acts ch. 152, §4 (1942) amending Carroll's Ky. Stats. §2129 (1936) which read: "Husband and wife may sell and convey her lands and chattels real, but the conveyance must be acknowledged and recorded in the manner required by the chapter on conveyances." Kentucky Revised Statutes Section 404.030 will be considered in detail infra.
151. 226 Ky. 750, 11 S.W.2d 933 (1928).
152. 262 S.W.2d 480 (Ky. 1953).
The court held for the wife under the Married Woman's Act, Kentucky Revised Statutes Section 404.020. In support of the court’s contention that a husband or wife may sue one another for a tort against the other's person, the court pointed out the Kentucky position that a wife may sue her husband for torts affecting her property interests. For example, she may sue him for conversion, detention of chattels, fraud, trespass to land, waste, or in actions of unlawful detainer. The fact that a woman might sue or be sued includes suit against or by her husband as her property rights are concerned. The importance of the Brown case in relation to property rights of a married woman is its position that:

[The Legislature has spoken on this subject. It has enunciated the public policy on this subject in this state by saying a married woman may sue and be sued as a single woman. It is not the function of the courts to enunciate a contrary policy.]^{153}

Under Kentucky Revised Statutes Section 404.020 a married woman was given the power to create liens upon her property for its improvement,^{154} to be the grantee in a deed after her marriage,^{155} and to independently acquire title to property by adverse possession.^{156} According to this section, a wife might sue her husband for any debt which he owes her,^{157} and she might sue him for judicial sale of their jointly owned land if the property cannot be divided and they cannot mutually agree upon the terms of a judicial sale.^{158}

These advances, in a married woman’s position with respect to her property, afforded by the Weisinger Act of 1894,^{159} which has subsequently been incorporated into various provisions of Kentucky statutory law, were significant. Prior to its enactment the wife was primarily bound by the common law disabilities of coverture. Despite some statutory provisions which were engrafted onto the Kentucky General Statutes before 1894, the husband retained most of his common law rights and the wife could only regain power to deal with her realty during the husband’s life by 1) divorce a vinculo; 2) divorce a mensa and toro; 3) decree in an equitable action against her husband resulting from abandonment, insufficient maintenance, his being confined to a penitentiary for more than one year, or his becoming permanently deranged; or, 4) judgment, on joint petition of husband and wife, or wife against husband, giving the wife all or some of the powers of a feme sole as to property and contracts

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153. Id. at 484. See also Hays v. Hays' Adm'r, 290 S.W. 2d 795 (Ky. 1956) upholding the Brown v. Gosser decision that the court has examined the effect of the Married Woman's Act of 1894 and has held that the legislature has spoken in removing the common law disability of coverture as to married women generally.
155. Shoptaw v. Ridgeway's Adm'r, 22 Ky. L. Rptr. 1495, 60 S.W. 723 (1901).
156. Big Blaine Oil & Gas Co. v. Yates, 182 Ky. 45, 206 S.W. 2 (1918).
providing that she either had property to manage or had the ability to carry on some business.¹⁶⁰

Kentucky case law prior to 1894 is evidence of the legal disabilities of women in relation to property of the female spouse. For example, an 1837 case pronounced the husband's right during his life to demand and receive anything due the wife as distributee and as soon as he received such it became his property.¹⁶¹ Another case held that upon marriage, an estate for life in slaves belonging to the woman vested absolutely in the husband.¹⁶² However, it was held that a woman did have the equity rights afforded by the doctrine of separate use if her property was designated as property for her separate use, and if the husband permitted the wife to trade for herself and to deal with property as if she were unmarried.¹⁶³

Kentucky case law has further held that a vested remainder in property held by a woman at the death of her father became a vested interest in her husband when she married.¹⁶⁴ Her personal property rights belonged to the husband. Rawlings' Ex'r v. Landes¹⁶⁵ held that a husband is absolutely entitled to his wife's personal property which he may, upon marriage, possess or which he may subsequently reduce to possession. And, Flanagan v. Thurman¹⁶⁶ reaffirmed the husband's rights to his wife's personal property, holding that a wife's personal property belongs to the husband and is free from the wife's control for the duration of their relationship as husband and wife.

Futhermore, women who were married prior to the Weisinger Act of 1894 did not obtain retroactive relief from their prestatutory disabilities as femes coverts. Fowler v. Fowler¹⁶⁷ upheld the husband's rights discounting the enlargement of the woman's rights by the Weisinger Act. The case stated that the husband acquired absolute title to his wife's personal property which she owned before the enactment of the Weisinger Act and which he had reduced to possession prior to 1894. Moreover, the court upheld the husband's right to receive rents and profits from the wife's real estate which he had previously acquired.

However, Kentucky Revised Statutes Section 404.020 notwithstanding, a married woman in Kentucky still endured severe limitations upon her property prior to 1942. The Kentucky statute provided that a married woman "may not make an executory contract to sell or convey or mortgage her real estate, unless her husband joins in the contract."¹⁶⁸

¹⁶⁰. L. Dembitz, Kentucky Jurisprudence 318 (1890).
¹⁶⁵. 65 Ky. (2 Bush) 158 (1867).
¹⁶⁷. 138 Ky. 326, 127 S.W. 1014 (1910).
¹⁶⁸. It should be observed that even though this express disability has been repealed by Ky. Acts ch. 152, §§4, 5, 7 (1942), enacted Ky. Rev. Stat. 404.030 (Bobbs-Merrill 1972), the exact language remains an integral part of Ky. Rev. Stat. §404.020 (1) (Bobbs-Merrill 1972).
Therefore, it has been held that an instrument by a wife to convey her property, although signed by her husband but failing to name him as grantor, was void for all purposes due to the lack of proper execution by the husband.\textsuperscript{169} In 	extit{Jetter v. Weber}\textsuperscript{170} even though a married couple was separated, the court found that since the wife was without the powers of a \textit{feme sole}, she could not convey realty without her husband's joining in the deed. And, in \textit{Brvon v. Allen},\textsuperscript{171} the court decided that an executory contract of a married woman to sell her real property was absolutely void without her husband having joined in writing although the contract was made in contemplation of divorce and such divorce was obtained before the date of performance of the contract.

In 1942, the remaining limitation whereby a wife could not sell, convey or encumber her real estate without her husband joining except to release his right of curtesy, was supposedly repealed. The present Kentucky statute which incorporated the 1942 amendment reads as follows:

A married woman may sell, convey or encumber any of her lands and chattels real, but such sale, conveyance or encumbrance shall not bar the husband's right to curtesy unless he joins in the instrument of sale, conveyance or encumbrance or leases his right to curtesy by separate instrument.\textsuperscript{172}

In construing the 1942 Act, the court stated in \textit{Schaengold v. Behen}:\textsuperscript{173} The effect of the 1942 Act is to place a married woman on an equality with a married man in the conveyance of her real estate and that appears to have been the intention of the legislature. Whereas previous to that Act, he could convey his property without his wife joining, except to release her dower, and she could not do likewise with reference to her property, after the Act, she could convey her property without her husband joining, except to release his curtesy.\textsuperscript{174}

The court in its opinion recognized the resulting conflict between Kentucky Revised Statutes Sections 404.020 and 404.030. That is, the Act did not directly repeal that part of Kentucky Revised Statutes Section 404.020 which states that a married woman may not make an executory contract to sell, convey or mortgage her real estate without her husband's joining in the contract. In the \textit{Schaengold} opinion, the court therefore held that the appropriate part of Kentucky Revised Statutes Section 404.020 was repealed by implication. In its statement in favor of repealing all restrictions upon the real property of married women, the court judicially resolved the conflict between the two sections in this manner:

[Where the provisions of a statute cannot have their force and effect without the repeal of another statute, or parts thereof, those conflicting

\textsuperscript{169} Franklin County v. Bailey, 250 Ky. 528, 63 S.W.2d 622 (1933).
\textsuperscript{170} 241 Ky. 96, 43 S.W.2d 514 (1931).
\textsuperscript{171} 204 Ky. 76, 263 S.W. 717 (1924).
\textsuperscript{172} KY. REV. STAT. §404.030 (1) (Bobbs-Merrill 1972).
\textsuperscript{173} 306 Ky. 544, 208 S.W.2d 726 (1948).
\textsuperscript{174} Id. at 549, 208 S.W.2d at 729.
statutes, or parts thereof, must be deemed repealed by implication. We think the Act of 1942 presents such a situation. The purpose of that Act apparently was to wipe out the last remaining restrictions on the sale and conveyance by a married woman of her real estate. What advantage would it be to her if she could make such a sale or conveyance as of today but could not enter into an agreement to do so as of tomorrow? . . . It would seem to be unduly restrictive on a married woman's property rights to say, as the Act of 1942 did, that she could "sell, convey and encumber her lands" and yet to keep in effect the clause in the older Act which forbade her from entering into an executory contract to do the same thing tomorrow or next week or at some other future time. As long as a wife could not sell, convey or mortgage her property without her husband joining, as she could not prior to the Act of 1942, it was logical to hold that she could not enter into an executory contract to do the same thing. But when the Act of 1942 gave her the right to sell, convey or mortgage her property without her husband joining, it is logical to hold that the Act intended to give her the right to enter into an executory contract to do the same thing. Otherwise, it would have been extending her a right but withholding from her the thing by which she could, in practical effect, benefit by that right. We think that when the legislature in 1942 gave a married woman the right to sell, convey or encumber her lands without her husband joining, it gave her the right to enter into an executory agreement to do so without her husband joining and we so hold.175

On the same day that the Kentucky court decided the Schaengold case (February 10, 1948), it also decided Turner v. Smith.176 In that case a wife had entered into a written executory contract with a third party to convey land to the third party. However, the wife died and her husband and sole survivor did not wish to carry out the contract. He had not joined in his wife's conveyance and asserted that according to Kentucky Revised Statutes Section 404.020, a wife may not make an executory contract to convey her real estate without her husband joining in the contract. The court upheld the Schaengold opinion in favor of the third party.

The Schaengold construction of Kentucky Revised Statutes Sections 404.020 and 404.030 has not been contested where an executory contract has been made after the 1942 Act. Therefore, by judicial opinion, the remaining common law vestiges in Kentucky which restricted a married woman's rights to deal with her real estate have been judicially abolished. The only subsequent restriction in view of the 1942 Act has been where a wife made an executory contract prior to the 1942 Act. In May v. May,177 it was held that a wife's deed was void because her husband had not joined in the deed; thus, the deed of a third party back to the husband and wife conveyed nothing.

175. Id. at 549-50, 208 S.W.2d at 730.
176. 306 Ky. 551, 208 S.W.2d 731 (1948).
177. 311 Ky. 74, 223 S.W.2d 362 (1949).
It would seem, considering the conflict as to women's property rights arising from Kentucky Revised Statutes Sections 404.020 and 404.030, that the legislature has had sufficient time to repeal the outmoded and confusing sexist provision of Kentucky Revised Statutes Section 404.020. The legislature's inaction keeps the law "on the books" and thereby continues to perpetuate sexist attitudes de jure in spite of judicial interpretation resolving the conflict.

Both Ohio and Kentucky explicitly authorize a married woman to sue or be sued as if unmarried. These statutory provisions affect the property rights of married women in that by statute, married women are permitted to bring actions in their own names to recover property as to third parties. And, married women may bring suits against their husbands to recover property. The respective state statutes also permit the suit against a married woman to recover property or money which she owes. Ideally, the state code provisions allowing women to be parties to civil actions should be incorporated into general code provisions stating generically who may sue or be sued without mentioning the sex of those parties. It is unnecessary to maintain separate code provisions which are applicable to married women without promulgating equal separate provisions relating to married men. Such exceptions as to married women are anachronistic and should be eliminated from the state statutes.

At the present time, the only statutory encumbrance upon the estate of one spouse by the other is the statutory dower right of each spouse in the other's estate.

In Ohio the statute concerning dower rights provides generally that each spouse shall have an estate for life in one-third of the real property of which the spouse was seized through inheritance at any time during the marriage. However, such dower interest is terminated upon the death of either spouse except:

(A) To the extent that any such real property was conveyed by the deceased consort during the marriage, the surviving spouse not having relinquished or been barred from dower therein;

(B) To the extent that any such real property during the marriage was encumbered by the deceased consort by mortgage, judgment, lien, except tax lien, or otherwise aliened by involuntary sale, the surviving spouse not having relinquished or been barred from dower therein. If such real property was encumbered or aliened prior to decease, the dower interest of the surviving spouse therein shall be computed on the basis of the amount of the encumbrance at the time of death of such

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179. Ohio Rev. Code Ann. §2103.02 (Page 1954) as follows:
A spouse who has not relinquished or been barred from it shall be endowed of an estate for life in one third of the real property of which the consort was seized as an estate of inheritance at any time during the marriage . . . .
consort or at the time of such alienation, but not upon an amount exceeding the sale price of such property. . . .

The Ohio code section pertaining to dower is a superannuated statute because of the Ohio laws of descent and distribution. Ohio Revised Code Section 2103.02 further provides that "[i]n lieu of such dower interest which terminates pursuant to this section, a surviving spouse shall be entitled to the distributive share provided by section 2105.06 of the Revised Code." By 1932, the Ohio legislature intended to terminate dower interests as such but the movement met with such strong opposition in local and regional hearings concerning the dower statute that the Code Revision Committee became convinced that the people of Ohio were not ready to abolish dower. The resulting current dower statute was a compromise measure to insure the preservation of inchoate dower and to abolish vested dower except as provided in Sub-sections A and B. The apparent concern of the legislature was that if dower were completely abolished one spouse might take unfair advantage of the other in disposing of his or her real property during coverture. It was thus assumed that each spouse had a rightful interest in real property owned by the other.

In order to preserve a common law cultural lag based upon the sexist and protective theory that one spouse has inherent rights in the property of the other, the present Ohio dower statute has led to inconsistencies and paradoxical effects. The dower statute should be abolished in order to totally obviate the sexist view that one spouse has certain automatic rights in the property of the other. Each spouse should be able to control and alienate his or her property without the ancient bar of dower.

The equivalent Kentucky dower provisions are found in Kentucky Revised Statutes Sections 392.010-392.140. Although the spouses' interests in each other's property are the same in the case of husband and wife, the surviving spouse is privileged to an estate in fee of one-half of the surplus real estate of which the other spouse or anyone for the use of the other spouse was seized of an estate in fee simple at the time of death; an estate for life in one-third of any real estate of which the other spouse or anyone for the use of the other spouse was seized of an estate in fee simple during coverture but not at the time of death, unless the

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180. OHIO REV. CODE ANN. §2103.02 (Page 1954).
181. OHIO REV. CODE ANN. §2103.02 (Page 1954). OHIO REV. CODE ANN. §2105.06 (Page 1968) provides for the statutory descent and distribution of real and personal property, ancestral and nonancestral. It basically gives the surviving spouse an outright one-third of the estate if there is more than one child and one-half the estate if there is only one child.
184. 18A O. JUR. 2d Dower §7 (1972).
survivor's right to such interest has been barred, forfeited or relinquished; and, an absolute estate in one-half of the surplus personalty left by the decedent.\textsuperscript{186}

The Kentucky statute thus retains vested dower by one spouse in the property of the other since such rights do not terminate upon the death of the spouse who owns the property. The Kentucky dower statute retains vestiges of sexism as does the Ohio statute because the dower rights bar free and exclusive use and alienation by the spouse of his or her individual property. In addition, the Kentucky statutes explicitly provide that the husband's interest in the wife's realty is equal to the wife's interest in the husband's estate.\textsuperscript{187} The purpose of the statute was to place the surviving husband or wife in the same position in relation to interests in the properties of each other.\textsuperscript{188} Thus we find yet another example of one spouse's rights being based upon legal anachronisms and law-makers perpetuating myths of inequality by singling out one sex in an attempt to reiterate the equality of both spouses.

Furthermore, the section of the Kentucky dower statutes which relates to dower rights in the event of bigamy is blatantly sexist. The section reads:

If the violator of KRS 436.080 is a man, his first wife shall, on his conviction, be endowed of one-third ($\frac{1}{3}$) part of his real estate for life and an absolute interest in one-third ($\frac{1}{3}$) part of his other estate, to be allotted and recovered as dower in other cases. If the violator of KRS 436.080 is a woman, she shall forfeit her claim to dower in her first husband's estate.\textsuperscript{189}

Therefore, a bigamous male's estate is subject to his first wife's dower right whereas the statute is silent as to the first husband's dower right if the woman is bigamous. The statute also provides that a bigamous wife shall forfeit her dower right in her first husband's estate but makes no provision as to forfeiture by a bigamous husband in his first wife's estate. In the absence of litigation based upon the statute, it is only possible to ascertain sexism inherent in the statutory language and not possible to determine potential judicial construction. However, the statute is but another example of the legislature's dealing with one spouse's rights and not the other's. The statute itself places one spouse at an unequal vantage point vis-a-vis the other spouse.

IV. CONCLUSION

The foregoing comparison between the property rights of married

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\item \textsuperscript{186} KY. REV. STAT. §392.020 (Bobbs-Merrill 1972).
\item \textsuperscript{187} KY. REV. STAT. §392.010 (Bobbs-Merrill 1972) which reads: "All the sections of this chapter, except KRS 392.100, that relate to the wife's dower or interest in the deceased husband's estate, shall apply in all cases, so far as may be, to the husband's interest in the wife's estate."
\item \textsuperscript{188} Brand’s Ex'r v. Brand, 109 Ky. 721, 22 Ky. L. Rptr. 1366, 60 S.W. 704 (1901).
\item \textsuperscript{189} KY. REV. STAT. §392-100 (Bobbs-Merrill 1972).
\end{itemize}
persons according to the current state statutes of Ohio and Kentucky leads to the inexorable conclusion that vestiges of sexism exist in the codified law of the two states. In Kentucky, this is basically due to the phraseology of the Kentucky statutes which continually refers to the wife's rights as opposed to the "spouses' rights" or "married persons' rights." Even though Ohio has made a notable attempt to eradicate sexist language from its statutes, certain provisions are in themselves sexist. For example, the husband's right to choose the domicile of the spouses can affect the woman's potential earning capabilities and thus ultimately her property rights. Both states still provide for dower rights even though Ohio recognized in 1932 that such provisions are undoubtedly anomalous considering current societal and legal developments.

It is therefore suggested that the code revision committees of each state meticulously inspect their respective statutes pertaining to property rights between married persons, in order to eliminate any sexist language or specifically discriminatory provisions, even if such statutes are allegedly based upon "protection" of one spouse or another. Due to centuries of the common law heritage during which women were thought to be in need of some male's aegis, a woman is still impliedly the subordinate and less capable of the spouses. As a result her property rights are often jeopardized. And, the husband may thereby be expected to assume an inordinate proportion of the burden with respect to providing for and supporting his wife and family with his personal and real property.

If the state statutes were reconstructed so that neither spouse had any interest in the property of the other, each spouse would have to provide for himself or herself and share the mutual responsibilities for any children or other dependents which the married parties might have or choose to support. Each party should be expected to maintain himself or herself in order to totally free themselves of potential exploitation by the other spouse. At least this should be the case according to law. Such changes would not negate the possibility of one spouse choosing to provide for the other. That choice could be accomplished legally by the same means that individuals may now elect to support or provide for any third party or any institutional entity. Any measures short of complete self-reliance cannot succeed in changing attitudes which foster basic inequality between the sexes. Until such changes are implemented, the majority of American women will continue to find themselves cast into the roles of irresponsible and incompetent stereotypes. The inescapable conclusion that women are not capable of dealing with property has not changed to date. The current opinion in some quarters was aptly described by one author in the early years of the twentieth century thus:

In spite of the revolution in public sentiment concerning what woman is free to do and ought to know, property in the sense of anything larger than a purse or very moderate bank-account remains virtually a sealed book to her. It compares with a Sacred White Elephant — a tutelary
divinity, but august and unapproachable. Moreover, this awesome attitude is encouraged by prevalent masculine opinion, which, if invited to decide by a referendum whether she would do better as a bishop or a banker, would declare that, though out of place as either, she could not do much harm as a bishop, but as a banker would inevitably make a mess of things. Indeed, the blue line in Durham Cathedral beyond which no woman was allowed to pass has proved with the march to time a far more evanescent prejudice than the taboo of money-changers. Men still hug the tradition that in money matters women are constitutionally helpless and need looking after.\textsuperscript{190}

\textsuperscript{190} Grant, supra note 12, at 4-5.
THE KEEPING OF COMPUTERIZED CRIMINAL HISTORIES: AN OVERVIEW OF THE PROBLEM, WITH SOLUTIONS

By Daniel J. Schlueter* and James W. Schlueter**

I. INTRODUCTION

There comes a moment in each of our lives, when we enter an informational system for the first time; for instance, that first loan application, in seeking employment, and for some of our number, that first contact with a law enforcement agency. From an initial contact and inclusion into a particular data system, a lifetime of injustice may be borne. An individual may suffer injustices that range from the merely inconvenient, to the most serious imaginable, some for which at this time, a remedy may not exist.

This article shall endeavor to focus on criminal information systems and the increasing numbers of problems and accompanying injustices presented as law enforcement and administration move from manual data systems to computerization in the United States.† The first part of this article will discuss case law and commentary as to what extent criminal information about an individual is protected against unwarranted collection and dissemination, and also, what steps are available to aggrieved individuals to correct patent informational inaccuracies, and to supplement or clarify misleading information. The problems associated with arrest records help to identify the existing right of privacy as a remedy in solving those harms that accompany the computer age. The question is posed: Will the traditional concept of the right of privacy be sufficient to protect the privacy rights of an individual who is somehow damaged through the improper dissemination or other misuse of his criminal record?

This first part will conclude with a study of our own not so fictional Mr. Smyth, and some hypothetical harms that he may be made to suffer as a result of criminal record inaccuracies, unnecessary recordation of an arrest, wrongful access to Mr. Smyth's criminal record; types of cause and effect situations that cannot be sufficiently considered in the immediately preceding case law discussion.

* B.A. — University of Cincinnati; Fourth Year Law Student.
** B.A. — University of Cincinnati; Fourth Year Law Student.
† We gratefully acknowledge the assistance of Ohio State Senator Stanley J. Aronoff, a member of the Secretary's (Health, Education and Welfare) Committee on Personal Data Systems, in the preparation of this article.
An old Michigan case, Miller v. Gillespie¹ is a good beginning to introduce the type of problem that we are involved with here. The plaintiff in that case, a father of nine children with no previous arrests, was charged with simple larceny. Through either ignorance or the personal malice of the prosecuting witness, a charge was brought. The case was soon dismissed. This plaintiff thereafter brought an action seeking to have his complete criminal record consisting of this single episode removed from the police department's records, stating that to keep his record was "... a distinct, personal, continuing wrong, for which a court of equity should afford a remedy."² In denying relief, the court made a statement that today invites closer scrutiny and suggests an area of law where an individual's rights are sadly lacking. The court said it would deny relief, unless: "it can be said that the mere preservation in the files of the police department of a report proper to be made in the first instance — a true report — exposes a plaintiff to ridicule, obloquy or disgrace."³ It is undoubted that today ridicule and disgrace are the minimal harms that are being done daily due to the unwarranted and unnecessary keeping of certain arrests in a person's criminal record, and the dissemination of that data. It will be the purpose of the first part of this article to expose these types of wrongs, i.e. arrest related, and unequivocably demonstrate the need for remedial legislation.

This type of criminal record problem is compounded with the advent of the computer age, and the differences between the manual recording systems of the past, and the modern computerized information systems are becoming increasingly evident. The Final Report of the Secretary's Committee on Automated Personal Data Systems⁴ recently addressed itself to the problem as it relates to the broad subject of information systems in general, including such data systems as are used in the fields of health, academics, and business. Among the differences they recognized, the following, which are summarized here, appear relevant: (1) the radical increase in the volume of information, and the uses to which it is put, (2) the translational difficulties of misperception and misdefinition in determining everyday facts from computer language, (3) the increase in the risk of character injury to individuals from negligence or purposeful acts by record-keeping personnel, and lastly, a factor obviously present in manual systems, but amplified in computer operations,

¹. Miller v. Gillespie, 196 Mich. 423, 163 N.W. 22 (1917). This case is undoubtedly one of many that have reached the same result. In many cases when the defendant is denied relief, the issue is not carried further. The heavy costs of appeal, and the fact that most arrestees are members of lower economic classes, contribute to this situation. See Infra, note 15 and corresponding text.
². Id at 426, 163 N.W. at 23.
³. Id at 428, 163 N.W. at 23.
the shrinking number of opportunities that a person may have to make a new start unconcerned about a record of his past activities.5

There is a very serious lack of statutory authority in the United States to protect the rights of individuals to whom an injustice is dealt. A cry for legislation has been seen in decisions from many courts faced with the problem of expunging a criminal record, or amending it.6 However, there is a notable increase of case law where criminal arrests have been expunged, these decisions being supported on various grounds. It it indeed questionable if the fact of an arrest not resulting in a conviction should be included in a record of an individual. The potential for harm is enormous.7 Consider for example that in California, and there is no reason to suggest that this figure is far from being representative of the nation as a whole, an estimated fifty percent of those arrested are released outright, dismissed, or acquitted.8 No doubt, a legitimate need exists for an accurate and complete criminal history system, but only if the files comprising that system are, in fact, criminal histories, and “necessary to the protection of society.”9

In the second part of this article, there will be a presentation of various remedial proposals from such diverse sources as Congressional Committees and student authors. Those proposals will be compared and criticized, with an emphasis on what we, the authors of this article, have found to be the most practical and justice-oriented solutions.

A disclaimer of sorts is necessary here. As one reads this article he should keep in mind that by no means does this writing attempt to examine the maze of statutory law that presently exists in various states, although it may relate, and in some instances effectively remedy the problems to be discussed. Since we have concluded that the answer to these problems lies in preemptive federal legislation it was deemed unnecessary to develop the topic of state legislation beyond occasional references in our case law study.

II. CASE LAW AND COMMENTARY

A. The Problem: Rights in Conflict.

Obviously, a great many people fear that when they have been arrested and charged, and then later acquitted, or had their charges dropped (nolled), they may at some time in the future sustain an injury because of that arrest recordation, or misuse of that record. When one observes the uses and abuses of the records that an arrest brings, one is better able to see the problem.

When a person is arrested, the police officers generally obtain a num-

5. Id at 12, 13.
7. A. R. Miller, THE ASSAULT ON PRIVACY 33, 35 (1971). Miller various works in the area of privacy are of particular competence and worthy of special note.
ber of identifying bits of information usually in the forms of photos, fingerprints, social security number, address, name, age, certain familial relationships, where he works, education, and other data, which, because of the ease of recording is better able to be kept on file now than at any time in the past. In many parts of the United States, this information is fed into a computer which may be interfaced with either a statewide criminal information system, or the national criminal data system of the FBI known as the National Crime Information Center, or N.C.I.C. At this point, it is appropriate to explain in layman's terms, the operation of the N.C.I.C. as a computerized information system. There are basically two divisions to the N.C.I.C. computer operation. The first is the computerized index of stolen, missing or recovered guns, stolen personal property, wanted persons, stolen vehicles, stolen license plates, and stolen or missing securities. This file is on line to more than six thousand law enforcement agencies in the United States and Canada. The second on line computer file division is the criminal history file which is available to law enforcement agencies, and is used most often in criminal investigation, and presentence reports. This file requires that entries be made separately, i.e. an entry of arrest that operates to remove the name of a person from the file of wanted persons, will not operate to enter an arrest to the criminal history file. The information contained in the history file is a summary of the personal identification data of the individual, with such arrest and dispositional data that has been entered into the N.C.I.C. files.

Continuing with the chronological description of what happens to the arrested individual, and understanding that the procedure varies among states, it is enough to say that the individual is either held until he can post bond, or is released on his own recognizance. Of course, if there are other warrants outstanding for that individual's arrest, or a "holder" has issued, i.e. a request from an agency or jurisdiction to hold an individual until a positive identification can be made, or some disposition of his other pending criminal matters may be achieved. In many jurisdictions, that arrest record is immediately placed in the memory bank of that arresting entity, and the criminal history is begun.

10. FED. BUR. OF INVESt., N.C.I.C. — A Tribute to Cooperative Spirit 2 (1972) (Reprinted from FBI LAW ENF. BULL.). Computerization has caused a vast increase in available storage space of information. In 1967, the N.C.I.C. had a computer which could contain 128,000 pieces (128 K bytes of core) of information; 1968 brought with it an IBM 360 Model 50 Computer with a core (memory) of 512 K bytes or 512,000 bytes of information. As of February 1972, the N.C.I.C. computer is an IBM 360 Model 65, with a memory of 2 million bytes complete with disc pack retrieval equipment, for speedy recovery of sought information. Considering yearly budgetary consideration by Congress, it is unlikely that the FBI will ever be without sufficient computer hardware.

12. FED. BUR. OF INVESt., supra note 10, at 3.
13. Id at 5.
Approximately sixty percent of white males, and eighty to ninety percent of black males in the urban environment will, at some time in their lives, be arrested on a non-traffic charge. Of those arrested, only about fifty to sixty percent will be convicted and the other forty to fifty percent will be discharged, acquitted or summarily dismissed. Thus the forty to fifty percent figure represents the number of those arrested who may feel the unwarranted effects of a criminal history in their everyday lives. There stands an excellent chance that the disposition of the pending charge will not be recorded on a man's record, meaning that a person having access to the record will only know that the person was arrested for the crime charged, and be left to speculate on the disposition of the matter. It can be easily seen that if employers of the nation in the public and private sectors have access to these reports and decide to use them in a summary manner in the denial of a property right (jobs), injustices will follow. It is unquestioned, however that the hiring authorities of the nation do have access to these arrest records.

Juvenile records which are held to be non-criminal in most states are often times included in the FBI "rap sheets". Because of inadequate safeguards, poorly written statutes, administrative procedures, personnel, hard and software computer program inconsistencies and poor design the practice of sealing or expunging criminal records is a failure. Although some states have sealing or expungement statutes, they are not uniform in dealing with the purported objectives for which they were drafted.

If, then, as seen above, there seems to be readily available the most inflammatory types of information about a person that can be imagined, there should be no need for prospective employers to ask questions about

17 A. R. Miller, supra note 7, at 34; PRESIDENTS COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: Science and Technology, 76 (1967). Thirty-five percent of arrest records of the FBI show no disposition.
21. B. Kogon & D. L. Loughery Jr., Criminology, Sealing and Expungement of Criminal Records — The Big Lie, 61, THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE 378 (1970). For an example of an expungement statute, consider Cal. Penal Code Sec. 851.7, which provides that the sealing of an arrest or detention record of a minor may occur under the following circumstances: (1) if the minor was released from custody because the arresting officer determined there was insufficient grounds for making a criminal complaint, (2) if proceedings were dismissed, or discharged without conviction, or (3) if the minor was acquitted. Considering that the above statute does not apply to juvenile offenses involving sex perversion, narcotics, or offenses which relate to the operation of motor vehicles, one can see how ineffectual, and perhaps worthless, this type of statute has been.
a person's criminal past on job application forms. But of course there is
the standard question on nearly every application form, asking whether
or not that individual has ever been arrested for a crime. Thus, the
employer has many means available to him in his quest for information
about an individual, many times leading to the summary refusal to con-
sider a person who had the misfortune to have been merely arrested for
a crime but never convicted.

B. The Right of Privacy: An answer to the problem?

One's Right of Privacy, the "right to be let alone" has been defined
as the power of an individual to determine the extent to which another
individual or group may obtain his ideas, writings, or other indicia of
his personality; obtain or reveal information about him; and intrude
into his life space. It is the right "to be free from unwarranted pub-
licity, the right to keep private that which the public has no legitimate
concern." Dean Prosser has defined the right to include four related
torts, that are said to be the law that represents the "fairly clear boun-
daries within which courts operate" those being: (1) an appropriation
of another's name or likeness for personal advantage, (2) intrusion
upon a person's seclusion or private affairs, (3) publicly embarrassing,
or disclosing private facts about a person, or (4) creating publicity that
misrepresents a person's public image.

Libel and slander laws in the United States are the most often used
devices to protect individuals from the damaging results that go hand
in hand with most credit agency reporting methods. There are court
decisions on such matters as privilege to disclose information on an indi-
vidual, malice as a prerequisite to recovery, privity of contract, dis-
claimers, and waiver. In this connection, it is unlikely that any of the
above mentioned torts are relative to the problems of databank informa-
tion systems and injustices will result in the protection of a person's
rights. Taken in order of mention, (1) The appropriation of one's image
is not applicable to the threat of an improper use of data. This theory
has traditionally been used when a picture of a person, or one's state-
ments are used without permission. (2) Item two, intrusion, is more
closely aligned with the injustices spoken of here, i.e. wrongs that can
be done to people by the use and dissemination of material that may
be false or inflammatory. However, this idea cannot be used in the

22. Hess & LaPoole, Abuse of the Record of Arrest Not Leading To Conviction, 13
Crime and Delinquency, 494, 495 note 6 (1967). This exhaustive review is con-
sidered by many to be the last word on the subject of record abuse, especially involving
employment practices.
24. Comment, Credit Investigation and The Right to Privacy: Quest For a Remedy,
26. A. R. Miller, supra note 7 at 172.
28. See Comment, supra note 24 at 513, 523.
case of arrest records or other personal data that happens to be a matter of public record. A new theory is required. Credit agencies have always enjoyed the privilege of doing business because they offer a valuable and necessary societal function, that is, they provide reports on individuals concerning their credit stability. Life insurance companies need the data that these gathering agencies provide in determining the fitness of a particular candidate for insurance on many occasions. A common practice is to have the applicant, be it for insurance or another type of business transaction, sign a waiver, giving permission to the company with which he is doing business, to investigate him. Injustices and overbroad investigations by these investigating companies is indeed difficult to stop under these circumstances. The waivers are usually couched in such terms as to give the investigating agency wide powers in conducting their credit investigation. Hence, the intrusion theory cannot be relied upon to protect a person from his most private relationships including his manner of living. With regard to item three, concerning public disclosure, the defense of truth is a perfect defense at common law in cases of defamation. In many states, arrest and conviction information are matters of public record, and therefore can be used in many ways, assuming they are accurate. Even if the reporting of a person's arrest record is accurate, there is presently no machinery to insure that it shall be reported completely, i.e. from arrest to disposition, nor supplemented by explanatory remarks. It is easy to conceive of a person being reported as having a past record of public disorder, when in fact, that person had a relatively innocent college demonstration arrest. Consider the report of a crime in a person's criminal record that has long since lost its significance as a serious crime, perhaps a crime no longer considered a felony. Indeed, as many people have discovered, an arrest record carries a red flag. In light of this sensitivity, it is clear that no reliable or adequate remedy exists at this time. Item four concerns publicity that puts a person in a false light and is open to a wide range of definitions bearing upon what is false. Truth is a defense but problems of proof arise. Interpretations of the alleged violations of this tort that Dean Prosser has identified include the requirement that the material be published. This requirement can in some cases be met with the utterance to one other person. However, there are also cases where publication must be more extensive before a tort has been perpetrated, and even then, the tort action is not based on Prosser's ideas of Privacy, but on the traditional tort of defamation.

The "right to be let alone" is probably the most nebulous statement of the right of privacy, or, should we say, what should be included in the right.

When one surveys this area of the law of privacy and defamation, it is astoundingly clear, that, in reference to computers and data banks,

29. A. R. Miller, supra note 7 at 177.
there must be new definitions of what society considers to be an invasion of these rights. To provide the basis for a lawsuit, there must be defined those elements of prohibited activity within the computer field. The elements of the above identified definitions, of what the rights of a person are, differ in each of the fifty states. In contrast, the Supreme Court in *Curtis Publishing Co. v. Butts*30 determined a national requirement in those cases involving alleged defamation of public figures in the media. Actual malice must be proved for there to be a recovery. At least in one area of defamation and privacy, some semblance of national consistency has appeared. It can be done.

**C. Cases and Commentary.**

The keeping from the public of that which the public has no legitimate concern is a very good platitude for men of good will to follow, but private reports that deprive people of jobs,31 insurance,32 and a whole range of other human pursuits must be remedied through the law. It is the private dealings between organizations and employers (dossier compilers and employers) that are so difficult to stop, even after there has been shown a clear detriment to the plaintiff. In some cases, the courts have not allowed the plaintiff, through discovery, to obtain the reports that the plaintiff has alleged caused the injury.33 The types of cases resulting in no recovery for the plaintiff, at least in civil cases, have been remedied through passage of The Fair Credit Reporting Act,34 which provides for the disposal of obsolete information in credit reports, disclosure to those persons who come within its provisions, and damages to those persons who suffer as a result of wilful or negligent noncompliance.

*Wheeler v. Goodman*35 presents an interesting series of legal controversies. The important facts are these; twelve “hippies” were occupying a home in North Carolina, and peacefully carrying on their lives. These people became the subject of a concentrated effort by the police department including harassment, searches, seizures and more. Finally, the “hippies” were driven out of their home and arrested on charges of vagrancy under the laws of North Carolina.36 The plaintiffs in the *Wheeler* case sought to have the North Carolina statute declared unconstitutional, and other relief, notably, expungement of their arrest records. The “hippie” plaintiffs cited a total of fifteen instances of harassment by the police, saying there was no probable cause for the arrests, and that no crime had been committed except in the nature of the alleged viola-

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tion of the vagrancy statute. The District Court held that the North Carolina statute was void for vagueness, and that the rights of the plaintiffs, as guaranteed by the 1st, 4th, 5th and 14th Amendments to the Constitution of the United States were violated. The plaintiffs requested to have their arrest records, as related to the vagrancy charge, expunged upon the authority found in the Civil Rights Act of 1964. The Act allows a court to grant such equitable relief as might return a plaintiff to the position he was in before his rights were violated. The court in Wheeler stated the general rule to be: "an Equity Court should not order expunction unless extreme circumstances exist — for example, where the records do not serve to protect society, or their future misuse is likely." Among the authorities cited in the case was a U.S. District Court decision, United States v. Kalish, in which arrest records of a person who refused to step forward to be inducted into the armed forces of the United States were expunged from the records of the FBI. That was the only known instance of a person achieving an expungement of his FBI arrest record.

The Kalish case mentioned immediately above, involving the reluctant inductee, held that the government's position was founded upon the fact that there is no Congressional statute authorizing the return or destruction of the criminal identification information of persons eventually found innocent or who are discharged without conviction. The court stated its conclusions as to the rights of the plaintiff and all persons similarly situated:

"... when an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded as long as the Justice Department retains 'criminal' identification records, 'criminal' arrest fingerprints and a rogue's gallery photograph." The result of Kalish was the finding that the record, consisting of prose, photographs, and fingerprints and all copies thereof was not to be sent or transmitted to any agency of law enforcement, and that the same was to be destroyed, with the time and place of the destruction to be reported to the court. Chief Judge Cancio in his opinion asked some very telling questions. Among them were: "Should a citizen be haunted by fingerprints labeled "criminal" or a rogue's gallery photograph, when he has no charges pending against him? I think not. The preservation of these

37. 306 F. Supp. at 61.
41. Notes, supra note 19, 996.
42. 271 F. Supp. at 969.
43. Id at 970.
44. Id at 971.
records constitutes an unwarranted attack upon his character and reputation and violates his right of privacy; it violates his dignity as a human being."45

The fact that the power and precedent for the court to take the action observed in the above cases was not specifically based on statutes or any great volume of case law cannot be stressed enough. In many cases there have been unsuccessful attempts to have the record changed.46

In the case of Menard v. Mitchell,47 the U.S. Court of Appeals for the District of Columbia reversed and remanded a case where the plaintiff sought to have his arrest record expunged, and was denied relief. The simplified facts of the case were that the plaintiff was arrested and detained without having been charged with a violation of law, all of this occurring in California. The Appeals Court held that the mere fact that the plaintiff had been arrested did not justify the maintenance of the arrest and fingerprint records. On remand, the U.S. District Court remarked:

"Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in this land. If information available to Government is misused to publicize past incidents in the lives of its citizens the pressures for conformity will be irresistible. Initiative and individuality can be suffocated and a resulting dullness of mind and conduct will become the norm.48

The court then added to the opinion of the Appeals Court by holding that the criminal record of the individual could not be disseminated to any organization other than one involved in law enforcement or to federal agencies.49

As pointed out above in the Wheeler case, the Civil Rights Act of 196450 has been used to return plaintiffs to their status quo prior to the actions complained of in the suit. However, it should be noted that this type of relief is available only to those who can invoke the authority of the Civil Rights Act in a complaint alleging that those rights have been violated. Companion cases invoking the Act were United States v. Dallas County and United States v. Blanchard McLeod.51 The facts of these cases were especially applicable to the provisions of the Civil Rights Act. The United States complained of conduct perpetrated by the officials of Dallas County, where 29 blacks had been arrested and detained while a voter registration drive was being held. The court held that there was

45. Id at 970.
47. 430 F. 2d 486 (D.C. Cir. 1970).
49. H. S. Miller, supra note 15 at 152.
50. Supra note 38.
51. 385 F. 734 (1967).
strong inferential evidence that the defendants were intimidating the blacks to prevent them from exercising their franchise in the upcoming election. The court awarded attorney's fees and other relief stating:

"The Court can and must, however, do all within its power to eradicate the effect of the unlawful prosecutions in this case. We therefore hold that the district court should enter an order requiring the appropriate officials of Dallas County to return all fines, and to expunge from the record all arrests and convictions resulting from the prosecutions which form the basis for these suits . . . The district court should take whatever additional action is necessary to return individuals to their status quo ante."52

Another reason for the granting of the same type of relief as found in the above cases can be seen in Morrow v. District of Columbia.53 Here, the U.S. District Court of Appeals found that the inherent federal supervisory power of the Court of General Sessions over the police department, as seen in its order not to disseminate to anyone the arrest records of one Morrow, was within the ancillary jurisdiction of that court. The facts show that the Court of General Sessions of the District of Columbia had found the defendant not guilty. The defendant then asked the court for an order to the effect that his criminal record not be disseminated. The court so ordered, and the Government appealed. The U.S. District Court of Appeals for the District sustained the original court order on the jurisdictional question saying:

"... for all courts, absent some specific statutory denial of power, possess ancillary powers to effectuate their jurisdiction . . . Ancillary jurisdiction has been referred to as a 'common sense solution' of the problems courts, especially courts of limited jurisdiction, face in attempting to do complete justice in the premises."54

An important key in Morrow was the fact that the result reached was in compliance with the stated aims of the Duncan Report,55 which concluded that the dissemination of arrest records to employers and others represented a real or potential harm to the citizenry of the District. The provisions of that report were made law in the District of Columbia after the court had issued the order for which an appeal was taken in the Morrow case. The Duncan Report however, did not go so far as the court, recommending that the arrest records be given to law enforcement officials and agencies. In remanding the case, the U.S. District Court of Appeals agreed that: "... in the District of Columbia restraints may be put on dissemination of arrest records in cases which do not

52. Id at 750.
54. Id at 737, 738.
55. COMM. TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS OF EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA, REPORT OF COMMITTEE TO BOARD OF COMMISSIONERS OF THE DISTRICT OF COLUMBIA, (Oct. 31, 1967). This Report was subsequently passed into law. See D.C. CODE § 4-134a (1967).
result in convictions or forfeiture of collateral. We do not decide what
the proper scope of such restrictions should be; the D.C. Court of Ap-
peals will make that determination." 56 The original order was vacated
on remand by the D.C. Court of Appeals, because other relief was
available. 57

The majority of courts in nearly all jurisdictions reject the view that
relief should be available for a variety of reasons; lack of jurisdiction,
lack of statutory authority, insufficient damages etc. 58 In a clear opinion
citing lack of statutory authority to expunge records, the court in Kolb
v. O'Connor, in reference to the retention of the records of arrest, such
as photos, and fingerprints said:

"... in city police files for exhibition to victims of crime for identifica-
tion purposes did not constitute such invasion of privacy as would entitle
persons, to whom such records pertained, to return thereof after acquittal
or release without conviction, in absence of specific legislative man-
date." 59

In Spock v. District of Columbia,60 the District of Columbia Court of
Appeals, undoubtedly a court that had reached a certain level of ex-
pertise in this field by 1971, held that the plaintiff's record should not be
expunged. In that case, the records consisted of arrests in a mass demon-
stration where 75 people were arrested with only 5 of their number ever
tried, they being acquitted. At that time, however, it must be mentioned
that the records of arrest were available only to law enforcement person-
nel for their use in official business. 61 This fact leads us to an important
question worthy of some explanation.

What probative use, value or importance does the record of arrest
have to anyone, especially law enforcement, when that arrest does not
result in conviction or collateral forfeiture? The plaintiffs in the Spock
case obviously wanted to be able to state, with absolute truth, that they
had never been arrested. Concomitant with this need was a desire for
the arrest information never to be used against them for any reason,
most importantly in the areas of credit, life insurance and day to day
day routine examinations of their existences. In many criminal prosecutions
brought by state and federal justice departments the court is confronted
with the positive needs of keeping arrest and disposition records, and the
accompanying identification data, and recognizes the valid needs of law
enforcement versus the privacy rights of an individual. Thus, it is re-
quired that the court contrast the need for those records by law enforce-
ment, with the specific countervailing demands and complaints of the

56. 417 F. 2nd at 741.
58. Supra note 19 at 996.
60. 283 A. 2d 14 (1971).
defendant. In *Miller v. Gillespie* and *State ex rel Mavity v. Tyndall*, the courts held that (1) society at large has a substantial need for the information contained in arrest records, and (2) that the persons seeking to have the records not disseminated or expunged had not suffered a compensable injury. To these arguments many courts add that there is no inherent power under the laws of the particular jurisdiction to allow them to prohibit the dissemination of arrest records. Perhaps the case of *State of Ohio v. Pinkney* will represent a changing tide of judicial progress. The defendant was tried on a charge of first degree murder and the jury could not agree. While awaiting retrial other persons confessed and the prosecuting attorney asked the court to nolle the charges against defendant Pinkney. The court nolled the charges and the defendant filed a motion to expunge the records of the arrest, detention, and trial of the defendant. Common Pleas Court Judge White found the motion well taken and granted the requested relief, basing his decision on the inherent ancillary jurisdiction of the court.

With the general expansion in the sixties of the role of the judiciary, and the general awareness of human and natural rights there came a rekindling of a need to protect the innocent. The federal courts, with the able assistance of the U.S. Supreme Court, have granted extraordinary relief in a number of cases where the authority has not been derived from statute. For instance, much extra-statutory activity has been seen in the area of school busing.

In a case couched in the language which should be developed in the seventies, the court in *Schulman v. Whitaker* said that an injunction would issue to protect a plaintiff's "personal rights" where an inspector of the police department had used the plaintiff's picture in a set of rogue's gallery photos that were to be shown to victims of crime. The key in this case was the fact that the plaintiff had never been convicted of a crime, although he had been oft times arrested. He could not be considered a fugitive, criminal, nor an undesirable character.

A case that echoed many authoritative statements, to the effect that "The low income slum resident often will find that youthful misdeeds or a few minor arrests are sufficient to bar him from public housing" was seen in *Maningo v. New York City Housing Authority*. The court found that the Housing Authority had the right to exclude the plaintiff because the pattern of his life was a proper subject of investigation by

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66. 117 La. 704, 42 So. 227, (1906).
the authority granting housing rights and privileges. The plaintiff was
suing to be allowed to enter public housing but was denied because of
his juvenile record. The court, even though it held adversely to the
plaintiff, agreed that: "... adjudication of a person as a youthful
offender or juvenile delinquent, cannot be utilized to operate as a for-
feiture of any right or privilege, nor to disqualify that person from cer-
tain rights . . . "69 It is sometimes difficult to fathom the instances where
injustices are seen and undeniably recognized, but are allowed to con-
tinue in the name of "life patterns", knowing full well that the underlying
cause of the injustice is the individual's arrest record.

Gregory v. Litton Systems, Inc.70 is a case precisely in point to the
problems presented in this article. This case involves the fact that em-
ployers, usually without more than a quick look, utilize the arrest rec-
dords of their prospective employees as a basis for denying them employ-
ment. In addition this case points to the fact that a black person is far
more likely to have an extensive arrest record that does not end in con-
viction than does the average white person. The court found that this
type of discrimination is prohibited by the Civil Rights Act of 1964
under Title VII, and ordered Litton to desist from asking any questions
about the applicant's arrest record in its job application form. The fact
that Litton can get the information it desires from numerous other
sources was not considered in the decision. The Ninth District Court of
Appeals affirmed but modified the decree decision by denying injunctive
relief as to Litton's future employment questionnaire practices.

Other possible effects of the readily available arrest record are re-
ported in Walter J. Karabian's fine article.71 Among them, is the fact
that recently several hundred employees of a New York Securities firm
lost their jobs because they had been arrested, even though about half of
them had never been convicted. Mr. Karabian's article also reveals a
study of employment agencies which shows that about 75% of them will
not refer a client if he has been arrested.72

Mr. Arthur R. Miller, in his highly regarded article The Assault on
Privacy73 has referred to the problem of the lifetime arrest record as a
"record prison",74 which prescribes the limits within which a person may
obtain a loan, an insurance policy, or success itself.

The problems being discussed here would not exist, were it not for the
fact that criminal arrest information is included in numerous social and
business records, with inevitable misinterpretation and misuse. Employ-
ers, credit managers, actuaries, the general public, and the law

69. Id at 831, 273 N.Y.S. 2d 1005.
71. Karabian, supra note 8 at 22, 23.
72. Id at 23.
73. A. R. Miller, supra note 7 at 1.
74. Id at 39.
enforcement agencies will not understand that an arrest does not mean
that a person is guilty. A person that has not considered the caveat that
a person is innocent until proven guilty, will not conform to the message
that this cardinal precept of the law demands. The Fair Credit Reporting
Act of 1970\textsuperscript{75} requires that a person who has been refused credit, or has
had other adverse effects because of a credit report must be notified of
such. The relevant question which must be asked in relation to this article
however, is what has the Fair Credit Act done to gain privacy for per-
sons who have been arrested and not convicted? The answer? Absolutely
nothing! The Credit Act says nothing about what arrest information may
be included in the credit report of an individual. The actual information
in the report, if factual and not an obvious invasion of privacy, is
unregulated.\textsuperscript{76}

D. The Not-So-Fictional Mr. Smyth.

Take, for instance, the not-so-fictional Mr. Smyth. Mr. Smyth was sit-
ting quietly in his home one summer evening, when the police knocked
at his door and placed him under arrest for armed robbery. He was taken
to the station, fingerprinted, photographed, questioned and jailed. Later,
in a line up, he was identified as the person who committed the act, and
was indicted by the grand jury on the charge. Mr. Smyth, an electrical
engineer was barely able to convince a judge that because of his nine to
five job, home ownership and family ties that he was unlikely to jump
bond. While out on bond, Mr. Smyth was able to develop evidence to
support his alibi, and was tried on the charge three months later. A jury
acquitted ‘him. Later, an entry appears in Mr. Smyth’s dossier that Mr.
Smyth was arrested for a crime (armed robbery), but somehow no entry
recognizing the acquittal is entered. Mr. Smyth goes to see a prospective
employer, or to an insurance company, or a bank for a loan, and is
turned down on all fronts. Would you hire Mr. Smyth? Most employers
would not! Would you as an actuary of an insurance company, after
investigating Mr. Smyth’s mode of living and consulting his “friends” in
the neighborhood, recommend that he be allowed to get insurance,
even though he is in perfect health? Most would not. Would you as a
public official appoint Mr. Smyth to the board of some governmental
operation? Would you as head of an employment agency refer Mr.
Smyth to a job, any job? Most would not.

As long as that arrest record exists in the criminal record file, Mr.
Smyth will be at the mercy of the information gatherers and users, such
as the credit agency mentioned above, which undoubtedly cringes at the
sight of that “armed robbery arrest”. Everybody knows, muses the credit
manager, that he was guilty and probably got off on some legal techni-

\textsuperscript{76} Countryman, The Diminishing Right of Privacy; The Personal Dossier and The
cality. Just look at what some of his friends say about him. How many times will Mr. Smyth be required to explain his side of the story? How many times will he have to answer that “Yes” he had been arrested?

III. RECOMMENDATIONS

With regard to the criminal area of personal data systems, many recommendations have been proposed to provide the answers to the type of problems discussed. These recommendations come from many and diverse sources, with admittedly varying degrees of expertise. The following proposals, taken substantially from project SEARCH publications, represent what must be regarded as one of the leading sources of information. It is worthy of analysis. It may properly be said that SEARCH proposals are the foundation upon which legislation and administrative guidelines shall be drawn.

Project SEARCH, an acronym for System for Electronic Analysis and Retrieval of Criminal Histories, was created in July of 1969, and is funded by a number of participating states and the Law Enforcement Assistance Administration (LEAA). One of SEARCH's objectives is to "provide a dynamic framework of essential elements of security and privacy for any future national system which may develop as a result of project SEARCH."77 Project SEARCH is intimately involved with the creation of a national computerized information system, having as its primary goal the following objectives: "(1) To evaluate the technical feasibility and operational utility of a cooperative interstate transference of criminal history data, and (2) Demonstrate the capability to automate state-collected criminal statistics for retrieval by selected state and federal agencies."78 In other words, project SEARCH was commissioned to create a prototype informational system to learn about the coming difficulties in moving towards a national criminal data system.

SEARCH's Technical Report No. 2 presents recommendations which would hopefully solve the problems of access, audit, update, data content, dissemination, purge, and challenge of one's data.79 Technical Report No. 380 is titled "A Model State Act for Criminal Offender Record Information." It takes the knowledge gained from compiling previous reports and presents it in statutory form. It is important to note here that the model legislation is designed and recommended for state action, not federal.

For purposes of this article, the relevant sections of SEARCH's Technical Report No. 2 will be summarized, and accompanied by what we...
consider constructive commentary. SEARCH endorses the possibility of purging a data system's files at regular intervals, for three reasons; (1) to eliminate information that is either inaccurate or unverifiable, (2) to eliminate information that is thought to be an unreliable guide to the subject's present attitudes or behavior, and (3) to allow an offender to ignore long past criminal wrongdoing.\textsuperscript{81} SEARCH further believes "that the best answer is to ask each participating agency to follow the law and practice of any state of entry which has adopted purging rules."\textsuperscript{82} The fallacy of that suggestion is readily ascertainable. The purging of criminal records is not available in most states,\textsuperscript{83} a fact which, under the SEARCH guidelines, leads to an operational inconsistency within the system. Problems should not be built into the system, enough will occur naturally. Some states allow the deletion of an arrest record under certain circumstances,\textsuperscript{84} while other states vigorously oppose any attempt to allow the expungement of criminal information. Indeed a heated controversy is waged over this problem,\textsuperscript{85} a problem not to be solved by state legislation. That work, it is our belief, is the business of the legislature. If a truly fair and properly administered interstate data system is to grow and become a reality, the input must be of a standard quality, therefore national legislation is a must.

Closely allied with the purge question, is the question of what type of information may be included in a subject's record. The National Crime Information Center's Working Committee and Advisory Board has recommended that arrest data concerning juvenile offenders be excluded, as well as charges of vagrancy, certain public order offenses, such as disturbing the peace, and others.\textsuperscript{86} The practice today in the automated criminal data field is consistent with the N.C.I.C. recommendation. Juvenile information is not generally included in our transmissions or records.\textsuperscript{87} However, it remains uncontroversial that certain levels of law enforcement and administration would oppose deleting, or never including certain offenses in the record of an individual, using the standard arguments of the public's need to know, and other arguments that no doubt are valid and must be considered. In broader terminology, we are discussing the problem of privacy, that is, consistent with an individual's

\begin{itemize}
  \item \textsuperscript{81} SEARCH, TECH. REP. 2 at 20, 21.
  \item \textsuperscript{82} Ibid.
  \item \textsuperscript{83} B. Kogon & D.L. Loughery Jr., supra note 21 at 381, 382.
  \item \textsuperscript{84} See note 21, and accompanying text.
  \item \textsuperscript{85} B. Kogon & D. L. Loughery Jr., supra note 21 at 383; Pettler & Hilmen, Criminal Records of Arrest and Conviction; Expungement from the Public Access, 3 CALIF. WESTERN L. REV. 121, 129 (1967). After having recited the inborn problems and potential societal harms of record expungement, the article sums up: "The very existence of these areas makes expungement in the sense of erasure or destruction impractical as well as inadvisable."
  \item \textsuperscript{86} FED. BUR. OF INVES., supra note 10 at 6.
  \item \textsuperscript{87} Interview with Donald Willmes, Supervisor of Systems of Hamilton County, Ohio Regional Crime Information Center, in Cincinnati, Ohio, Oct. 10, 1972.
\end{itemize}
personal rights, what type of information should be included in an individual's criminal identification or history file? There is no doubt in our mind that a national policy is needed before a national criminal data base can be a reality. This belief prompted a leader in the privacy and computer field to write: "It seems inconceivable that courts or state legislatures, either by developing legal remedies or expanding constitutional safeguards, will establish this concept in time to meet the dangers of the computerized dossier. Only the Congress seems capable of acting within the requisite speed." 88

Some of the cases and comments found in the first part of this article were involved with the problems an individual may experience when he has an arrest on his record which has come to be known in some circles as an "unearned arrest". This arrest lies in wait on the record of the innocent individual ready to rise to the occasion on that day when a prospective employer somehow gets a look at his criminal data sheet. Recognizing the statutory deficiencies in this area today, what does the future hold? The SEARCH proposals give the answer in broad terms, suggesting deletion of information thought to be "an unreliable guide to a subject's present attitudes and behavior." 89 This test, if it can be called that, is couched in such broad terms, that it would become virtually useless if adopted. SEARCH's Model State Act provides the answers only if supplemented with the proper type of guidelines for protecting the rights of individuals. Certain mandatory deletions of "facts" from a person's criminal record must be granted and routinely performed. Part Six (Data Verification and Purging) of the Model State Act for Criminal Offender Record Information under paragraph (a) allows the respective states to determine regulations for a continuing program of data auditing and verification to assure the accuracy and completeness of criminal information. 90 As these regulations are drafted, assuming passage of the Model Act, they must provide clear and concise, essentially automatic devices to clear a person of such an "unearned arrest" record. There is clearly no valid state interest in continuing to subject a person to the problems that such information inevitably carries. A simple answer to the problem would involve two interlocking steps. First, expunge the record of individuals who have not been convicted of the offense charged, thereby permitting them to answer freely that they have no record of arrest, detention custody or confinement. Second, restrict the accessibility of these records to the prospective employer by defining precisely the term "confidential" and provide penalties for a breach of this confidence. 91 Though our proposals, found at the end of this article, differ significantly with those immediately above, it is im-

88. Countryman, supra note 75 at 868.
89. SEARCH, TECH. REP. 2 at 21.
90. SEARCH, MODEL ACT at 19.
important to consider the alternatives, and point out that such proposals are capable of being stated simply, in unambiguous terms.

In addition to the automatic expunging of certain data and ruling out accessibility to that information, the SEARCH Model Act creates another means of correcting or amending criminal data (Part 11, “Right of Access and Challenge”). An individual who, after inspecting his record, feels that his information is either inaccurate or incomplete, may request the agency to purge, modify, or supplement them.

There we have it, the SEARCH proposals would provide us with essentially automatic expungement under certain limited circumstances, the right of access and challenge, and data update and verification.

A. What Must Be Done — Solutions.

The problem has been identified. We cannot here present all the answers to all the problems in this field. We are able however, to present recommendations, which, if created through appropriate statutory and administrative enactments and followed on a national scale, would lessen the severity of the problem. There are many technical problems that can only be solved by the work of teams of systems analysts in the area of software products, e.g. programs, security devices, access safeguards etc. We do not present answers to the questions that surround the technology of the computer. These problems are solvable and should be kept in mind while reading the following proposed solutions. Here again, it should be noted that the problem can only be attacked on a national scale, that is, federal legislation is necessary.

1. Information in the System.

It is clear that with regard to the national attitudes, and state practice, juvenile records should not be included in the arrest or history record of the individual. The differing standards of guilt, evidence, representation and the array of differing state laws as compared to adult criminal practice demand nothing less. The fact that juvenile procedures are not criminal in most states shows that a minor is not held culpable for an action which might be considered criminal for an adult. No juvenile arrest, adjudication, or other disposition should be included in the computer history records of the FBI's National Crime Information Center.

Only serious misdemeanors and felonies should be entered in the computer criminal history file kept by the FBI. A serious misdemeanor is defined as a crime carrying a penalty of at least six months of incarceration in a municipal, state, or federal corrections institution.

A computerized criminal history is not to be established in memory banks of computers unless an individual is arrested and convicted of a crime. No records of arrest should be maintained in the history file until that person has been convicted of a crime which meets the entering

92. SEARCH, Model Act at 24.
criteria of A. (2) above. Once a file is established in the computer, any arrest may be entered, as verified, even if that person were to be acquitted of the charge. The reasoning behind this should be clear. Once a person is convicted of a serious crime he becomes culpable as an offender against society. This is to the detriment of the convicted person, yes, but it is equally clear that law enforcement officials must have this information available to assist in matters of investigation of criminal activities.

The National Crime Information Center must be allowed to keep intact, its on-line file of wanted persons, stolen property, license numbers, and other data currently held to be used by local law enforcement agencies. This is a very efficient system as is.

All criminal dispositions should, by statute, be required to be entered into the computer criminal history within a reasonable time after the clerk of courts, having jurisdiction over that criminal case, relays such information to the N.C.I.C.

2. Access to Information.

The N.C.I.C. is a dedicated computer system that is under the control of the federal authorities at the present time. "Dedicated" means that the system is, in essence, the property of, and is controlled by, the users of it. No other agencies other than those who make up the system have access to the information. The United States government should not be asked to provide an informational system for the use and benefit of private industry, including companies, or employers. It is of the utmost importance that private persons and organizations never have access to the information contained in the history files of the N.C.I.C. The fact that the private sector of the economy has its own computers available for its use and control is horrifying enough, without supplying information to these organizations in the name of the federal government. The only personnel that must be allowed access are those involved in the criminal justice system of the United States, and local officials to whom credentials would be issued through a national licensing network. A computer program can be easily made to require access identification numbers that must be used by all persons having access to the terminals of the system. Such governmental agencies of civilian regulation and control, as for example the Civil Aeronautics Board, the Department of Health, Education and Welfare, (but excluding the Central Intelligence Agency or Department of the Treasury, i.e. agencies and divisions dealing in law enforcement and compliance) should be denied access.


The General Accounting Office (GAO) should be designated by statute to oversee the validation and checking of the system of safeguards designed for the computer operations. Although this would be a new task for the GAO, there is no doubt that this requirement would contribute greatly to the integrity of the system. The GAO, as an independent
agency, has shown in the past that it can handle the important job of making certain the laws are followed, and would perform this added function in stride.

4. Update.

Integral to the statutes suggested above, there must be designated time intervals within which a particular history file must be completed. A final disposition should be shown as soon as available. This would create a new responsibility for the court system and its support personnel, and would require that the courts of the nation be modernized and made more efficient. A change in a person's status must be entered without delay, for the system must be accurate above all else. Concomitant with the integrated, truly national crime information center would be the requirement that the court systems attain a degree of sophistication equal to that enjoyed in law enforcement. Most communities of fairly high populations are already turning to computers for the control of their courts. A national guideline is called for specifically setting forth those minimal requirements that must be met by the state courts and law enforcement agencies before they qualify for LEAA funding, as well as, access to the N.C.I.C. computer operation. These suggested proposals demand increased efficiency on the part of law enforcement and the courts.

5. Purge.

All juvenile records in the N.C.I.C. system should be removed forthwith. These records are not efficacious for any reason in the administration of criminal justice. These records are currently used by courts in sentencing criminal defendants, only because that information appears on the FBI "rap sheet".

A national debate should be called to examine the question of whether or not a person who has paid his debt to society, should be allowed to have his record purged, eliminated, or sealed. These individuals should recommend that criminal arrest and conviction entries over ten years of age should be sealed unless the conviction was a felony, punishable by imprisonment exceeding ten years. This record, however, should remain inaccessible unless special requirements of the administration of the system are met. These requirements should allow sentencing judges, and few others access to the information.


Every person, upon request, should receive a copy of his computerized criminal history. He should have the right to a hearing if he disputes its accuracy or completeness. There must be an easily available appeal to a court of competent jurisdiction to determine the rights of parties in disputes of this sort, as required by the due process standards.
BOOK REVIEW


Keeton's *Trial Tactics and Methods*, 2d ed. 1973, should be required reading for every lawyer before he or she is allowed to try cases. Perhaps it would be a reasonable requirement that seasoned trial lawyers periodically reread the book, or subsequent editions of it. All law students and lawyers can utilize the updated information which it contains. Keeton points out that apart from the numerous changes occasioned by current developments in the law, and some editorial changes, this edition is essentially the same book as was the first edition. Three new developments which the 1973 edition reflects are:

(a) The United States Supreme Court's revision of the federal discovery rules.
(b) The American Bar Association's new Code of Professional Responsibility, including the standards bearing on techniques of advocacy.
(c) Rules of Evidence for United States Courts and Magistrates.

The entire book is directed toward a lawyer's preparing himself for effective trial advocacy. There is one chapter concerned with advance preparation out of court, specifically the investigation of law and facts. Among other worthwhile pieces of advice, Keeton says in this regard:

Urging wholly untenable propositions interferes with your advocacy of those more tenable; your more tenable propositions lose emphasis in the mass, and the judge who has found you wrong in one contention may be inclined against you on another when there is doubt. You therefore need to test each of your legal theories by constructing the best arguments that you would use to support it. If, in doing so, you find that the theory that you were considering is plainly insupportable, abandon it for the sake of improving your chances of success on those with a better basis. As to those theories that you retain for use, your anticipation of the response of your adversary and your planning for meeting that response will obviously improve the effectiveness of your advocacy during trial.

A large portion of the book interweaves law and tactics via factual examples. This is a comprehensible, realistic, and attention holding style of presentation. The author utilizes the examples to discuss and illustrate the points which he makes. The book is copiously filled with cross-references. There are instances, however, in which it would have proven
more useful to the reader if the author had cited cases, rather than 
referring to Wigmore's *Treatise on the Law of Evidence*. Some law stu-
dents and many lawyers do not have Wigmore within easy access. Keeton 
also includes a table of common objections to evidence. Practicing attor-
neys are likely to find this table valuable, particularly when they are 
searching for an objection to evidence which they believe is likely to be 
offered, and which they believe should be excluded.

The book is divided into eleven chapters. They embrace the entire 
litigation process, as indicated by the following chapter titles:

I. What Makes a Trial Lawyer Effective?
II. Direct Examination
III. Cross-Examination and Impeachment
IV. Objections to Evidence
V. Motions During Trial
VI. The Charge
VII. The Jury
VIII. The Nonjury Case
IX. Preparation for Trial
X. Pleadings
XI. Proceedings Before Trial

In the chapter concerning the Nonjury Case, the author interestingly 
compares the potential hazards to impartial justice under law in a jury 
trial and in a nonjury trial.

Keeton vividly explains the importance of the pleadings. As an ex-
ample of this he states:

From your point of view as an individual lawyer, preparing pleadings in 
a particular case, your aims include these: (1) stating a legally sufficient 
claim or defense; (2) providing support for every theory that you may 
wish to urge — to support all the evidence you may wish to offer, all 
the theories you may wish submitted in the charge to the jury, and all 
the theories you may choose to urge in motions for judgment; (3) mak-
ing a statement that is designed to convince the jurors of the merits of 
your client's position; (4) conforming with and contributing to your 
overall plan of developing the case in the most favorable manner. Your 
consideration of these potential aims of your pleading will influence the 
decisions you reach concerning the tactical problems of pleading, in-
cluding those discussed in this chapter and any others that may arise. 
These different aims sometimes come into conflict with each other, 
necessitating a compromise or choice between them.

Similarly, again concerning pleadings, he notes that a factor affecting 
the desirability of joinder of more than one of the potential defendants 
is the effect upon either jurisdiction or venue. As examples of this, he 
states:
Frequently the state courts are preferable to the federal courts from the point of view of the plaintiff, and occasionally the reverse is true. A plaintiff’s lawyer who prefers the state court may, by joining the resident servant as a codefendant, prevent removal to federal court by a nonresident master (or other joint tortfeasor), in the absence of a ‘separate and independent claim or cause of action’ against the nonresident. Conversely, a plaintiff’s lawyer who prefers the federal court may find it necessary to omit a resident defendant in order to preserve complete diversity of citizenship to support federal jurisdiction. The joinder or omission of a defendant may have similar effects upon venue in some jurisdictions.

The entire book demonstrates the need for trial counsel to be quick-witted. For example, the author describes the problems involved in determining whether counsel should respond to questions from a witness. Sometimes the best application of quick-wittedness is to say nothing. As a sample of that application, Keeton advises that when the judge is arguing with your opponent, and in your favor, the best thing that you can do is keep yourself quiet.

A veteran of the courtroom and law teaching, Professor Keeton has authored other works, perhaps one of his best known being his work with Jeffrey O’Connell, Basic Protection for the Traffic Victim (1965). Keeton’s Trial Tactics and Methods demonstrates an unusual insight into the realities of the courtroom and the intense preparation necessary before a lawyer enters it on behalf of his client. Trial advocates with various degrees of experience, law students, novices, and veterans, will find this book interesting and helpful. If for no other reason, it will serve to remind them of the better ways of accomplishing what they are about.

Wesley Gilmer, Jr., M.S.L.S., J.D.
Member of the Kentucky and Ohio Bars.
Assistant Law Librarian; Lecturer on
Law and Legal Bibliography, University
of Cincinnati, College of Law

“There is a tact and skill and a happy manner with some persons, which render them successful as negotiators; while others of equal learning, attainments and intellectual ability fail for the want of those qualities,” so Mr. Justice Stephen Field in Forsyth v. Doolittle, 120 U.S. 73, 74, told lawyers years ago. Perhaps, unmindful or unheeding, Christopher Columbus Langdell pursued another course, and, thus misguided, formal legal education has largely ignored the development of “those qualities.”

The author, successful himself as a self-educated negotiator, is engaged in this book in an objective and pragmatic examination of the purposes and processes of negotiation. Crucial in negotiation, of course, are the functions of the representatives of the adverse parties. To be performed effectively, these functions, once properly ascertained, require the development of skill. “As gold which he cannot spend will make no man rich, so knowledge,” Dr. Johnson warned, “which he cannot apply will make no man wise.”

The author begins his analysis at the beginning, as Holmes advised, “to doubt one’s first principles.” For, “to be completely honest with oneself, “as Freud observed, “is the very best effort a human being can make.” In his beginning, basic conflict generates fear of failure and greed for victory, unrestrained by common sense and unguided by common goals.

If the author’s analysis is sound, and his philosophy too, successful negotiation is not the trial of an issue of fact. Nor is it a game of checkers. Clearly, parties to negotiation are not obliged to jump. Neither party is obliged to position itself for the division and destruction of opposing forces. In this sense, win-or-lose, all-or-nothing, is not the true beginning, nor the true end, of successful negotiation. Instead, as the author advocates, successful negotiation must be the joint process of discovering each other’s needs and the appropriate ways to satisfy them. By this means each party, and both parties, in the short and long run may win-and-lose.

Practically, the test of this view is its application to the common strategies and tactics in the course of lawsuits, labor disagreements, corporate reorganizations, real estate transactions, and commercial contracts. Realistically, in such business affairs, the strategies and tactics of opposing forces are evaluated for: 1) motivation, 2) persuasion, and 3) acceptance. He concludes that those strategies and tactics that are motivated by mutuality are necessarily the most persuasive and acceptable to the parties concerned. Indeed, if only for the author’s clear analysis of the strategies and tactics of interrogation, this book would commend itself.
No other portion of his analysis dramatizes the doctrine of mutuality so effectively.

Fortunately, as the author sees it, many conflicts, seemingly hopeless or unduly fault-finding, are subject to creative and effective negotiation. And, fortunately, creative negotiators are made, not born. Query, should lawyers be trained in this vital part of their craft, or should only a few continue to develop "those qualities"? Where there is such "Forsyth", why must legal education continue to "Doolittle"?

Sherman S. Cohen
A.B., University of Rochester
J.D., Columbia University
LL.M., New York University