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FEDERAL ELECTION CAMPAIGN REFORM: 
IN THE TWILIGHT ZONE BETWEEN 
LEGITIMATE AND CRIMINAL ACTIVITY

Thomas C. Crumplar*

Past efforts to regulate federal campaign financing have been plagued by numerous statutory loopholes and indifferent enforcement. In 1974 Congress attempted to rectify both problems by enacting a tough, comprehensive statute, the Federal Election Campaign Act Amendments of 1974, which provides for an independent regulatory body. Fines range from $1,000 to $50,000, with prison terms of one to five years. As all but one of the violations constitutes a felony, an offender could even lose his right to vote. Finally, a candidate may be barred from running in all future federal elections for a period of up to seven years.

Unfortunately, the 1974 Amendments make the federal law of campaign financing exceedingly complex, and an honest candidate or contributor may often be uncertain as to whether he is in violation of the law. This article will attempt to delineate the often hazy line between legitimate and criminal activity. To do so it will be necessary to answer the following questions: What is the applicable

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5. E.g., Ky. Const. § 145(1).
6. See text accompanying note 54 infra.
mens rea? What is the liability of a candidate for his supporters’ errors? With what requirements must a contributor comply? What is the relationship between committee and individual liability? And finally, what is the effect of reliance on advice of counsel?

I. MENS REA AND CRIMINAL RESPONSIBILITY

Interpreted literally, present law would hold a candidate strictly liable for failing to correctly register, while excusing him for unknowingly exceeding the expenditure limitations. Terms describing the mens rea requirement, however, do not lend themselves to literal interpretation and are subject to widely varying construction throughout federal law. The only reliable means of interpreting the applicable mens rea is to look to the purpose of the statute and the context in which terms such as "willfulness" are used. As present law is a compilation of more than sixty years of legislation, it is necessary to trace the entire evolutionary process in order to understand the appropriate context and legislative purpose.

(A) Evolution of Federal Campaign Financing Legislation

The first federal act regulating campaign financing was passed in 1907. Its sole purpose was the prohibition of political contributions by banks and corporations. Any officer who consented to such a contribution was subject to a fine and imprisonment.

In 1910 Congress passed a comprehensive Federal Corrupt Practices Act which has formed the basis for all subsequent legislation. This law required every political committee to have a chairman and a treasurer and prohibited any receipt or expenditure of funds until these officers had been chosen. The Act dealt only with reporting and contained no expenditure or contribution limitations. Violations were actionable only if they could be shown to be willful. One year later the law was amended to include definite spending limits:

7. This problem has been recognized as one of the factors which led to creation of the proposed Federal Criminal Code. See, Hearings on the Reform of the Federal Criminal Law Before the Subcommittee on Criminal Laws and Procedure of the Senate Committee on Criminal Laws and Procedure of the Senate Committee on the Judiciary, 92d Cong., 1st Sess., pt. 1 at 129, 181 (1971).
10. The penalty for violation provided for up to one year imprisonment and a fine of up to $5,000, or both. Id.
12. Id. § 2.
13. Id. § 10.
$5,000 for the House, $10,000 for the Senate. Whereas the 1910 Act had dealt solely with the responsibilities of the chairman and treasurer of a political committee, the 1911 Amendments focused on the candidate and required him to verify the accuracy of any filed statement. Violations of the spending limits were restricted to those which could be proven willful.

The 1910 and 1911 laws had some effect in controlling campaign financing, as several senators resigned when it became known that their campaign expenditures had exceeded the statutory limits. The success of this legislation was short-lived, however, for in 1921 the Supreme Court, in Newberry v. United States, declared the 1910 and 1911 Acts unconstitutional to the extent that they regulated the financing of primaries. The concurring opinion of Justices Pitney, Brandeis and Clarke also exposed a rather significant loophole:

A reading of the entire act makes it plain that Congress did not intend to limit spontaneous contributions of money by others than a candidate, nor expenditures of such money except as he should participate therein.

The effect of this ruling was that any spending limitation could be avoided through creation of dummy committees which had no direct legal connection with the candidate or his principal campaign committee.

As a result of Newberry, Congress began studying proposals to revise the election laws. In hearings conducted shortly after the decision was announced, Representative Cable and others expressed the view that all expenditures should be included in the spending limits and that the responsibility for policing them should be placed on the candidate, regardless of knowledge.

The legislation subsequently enacted, the Federal Corrupt Practices Act of 1925, was not much different from the Act of 1910 and

15. Id. § 8.
16. Id.
17. Hearings on Proposing Limitations on Campaign Expenses and Providing for Publicity, Before the Committee on the Election of President, Vice President and Representatives in Congress, 67th Cong., 2d Sess., 28-31 (1921-22).
19. Id. at 294.
20. Hearings on Proposing Limitations on Campaign Expenses and Providing for Publicity, Before the Committee on the Election of President, Vice President and Representatives in Congress, 67th Cong., 2d Sess., (1921-22).
21. Id. at 31.
contained the same dummy committee loophole. The most significant change was the inclusion of a bifurcated penalty section which proscribed both willful and non-willful violations. In the first and only major prosecution brought under the 1925 Act, United States v. Burroughs, the court explained the difference between a simple and willful violation:

[T]he offense may be unlawfully but not willfully committed, as in case the treasurer fails to file the required statement solely through ignorance of the law, or through carelessness, inadvertence, neglect, or similar cause. It will always be presumed, however, that the treasurer possesses knowledge of contributions which are made to or for the committee and the distributions made by it in the course of its activities. But if the treasurer in any instance should have no knowledge of a contribution and could not have acquired knowledge thereof by the bona fide exercise of reasonable care and diligence in the performance of the duties of the office, the failure to file a statement of such contribution would be neither willful nor unlawful.

In addition to explaining that a simple violation required negligence, the court defined “willful” as requiring more than voluntary action. “Willful” denotes purposeful behavior, “a determination with a bad intent to do it.”

Prior to 1940, federal law only controlled expenditures. The Act of July 19, 1940, made it illegal for any person to make contributions in excess of $5,000 to any one candidate. There was no requirement that such a violation be willful. This law also restricted the maximum amount a political committee could receive or expend in any one year and seemingly imposed vicarious liability upon the chairman and treasurer, as “any violation of this section by any political committee shall be deemed also to be a violation of this section by the chairman and the treasurer of such committee.” Unfortunately, here, as in the entire history of campaign regulation, Congressional motives were extremely blurred. This particular revision was attached to the Hatch Act, and one commentator has stated that “there is little doubt that the motive of the amendment was

23. Id. § 318.
24. 65 F.2d 796 (D.C. Cir. 1933), rev’d on other grounds, 290 U.S. 534 (1934).
25. 65 F.2d at 801.
26. Id. at 800, citing Felton v. United States, 96 U.S. 699, 702 (1877).
28. Id. § 6. This provision could have been easily avoided through the use of dummy committees, since there was no limitation on general political contributions.
to kill the principal bill. . . . [Even] Senator Hatch, the sponsor of the main bill, voted against the amendment.\textsuperscript{30} The strategy backfired, however, and the provision became law.

In 1971 Congress passed the Federal Election Campaign Act of 1971.\textsuperscript{31} This legislation eliminated the loophole in the 1940 Act which made it a crime to give more than $5,000, but not one for a candidate to accept it.\textsuperscript{32} Such acceptance had to be done "knowingly."\textsuperscript{33} The legislation eliminated the bifurcated penalty provisions of the 1925 Act by dropping the penalty for willful violations of the reporting requirements.\textsuperscript{34} The 1971 Act eliminated some of the incentive to set up dummy committees by striking the farcical spending limitations of $10,000 for Senate, and $5,000 for House candidates.\textsuperscript{35} Finally, it repealed the vicarious liability language of prior law.\textsuperscript{36}

In adopting the 1974 Amendments, Congress made extensive changes in the law regarding federal campaign financing. The problem of dummy committees was met by limiting a contributor's total gifts to $25,000 and providing that contributions which are laundered through an intermediary are to be counted as if they were directly given to the candidate.\textsuperscript{37} Furthermore, all groups which support a candidate are required to report all contributions and expenditures to the candidate's principal committee.\textsuperscript{38} Thus, the excuse of knowledge is largely obviated.

The 1974 Amendments made no major changes in the mens rea requirement. There was an attempt to introduce the bifurcated penalty provisions for the reporting section but it was defeated.\textsuperscript{39} The willful standard was, however, included in a new public funding section.\textsuperscript{40}

(B) Mens Rea — Tentative Conclusions

Present federal campaign financing legislation deals with three

\textsuperscript{32} Act of July 19, 1940, ch. 640, § 4, 54 Stat. 767.
\textsuperscript{33} Id.
\textsuperscript{35} Id. tit. II, § 203, 86 Stat. 9.
\textsuperscript{36} Id. tit. II, § 204, 86 Stat. 10.
\textsuperscript{39} See \textit{S. REP. No. 1237, 93d Cong., 2d Sess. 1} (1974).
\textsuperscript{40} Id.
different levels of mens rea. First, failure to conform with the reporting and registration requirements is governed by a negligence standard. Secondly, a violation of the provisions providing for federal funding of political campaigns must be willful. And thirdly, a candidate’s acceptance of illegal contributions must be done knowingly, though it need not be done willfully.

The decision in *United States v. Burroughs* made it clear that the adjective "willful" mandates specific intent. *Burroughs* also established that a violation does not give rise to strict liability, but only creates the presumption of knowledge which can be rebutted by a showing of due diligence and a bona fide ignorance of the essential facts. If ignorance of the essential facts is a valid defense for a simple violation, what purpose is served by the addition of the adjective "knowingly" in the 1974 Amendments? The most logical explanation is that the use of the adjective "knowingly" places the burden of proof upon the government. Such a shift in the burden of proof is equitable, as it occurs in situations where the relevant facts are not readily available to the defendant. One cannot expect a candidate to thoroughly investigate every contributor before accepting a contribution, and thus it is the responsibility of the government to show that the candidate had no knowledge of the facts which made the particular contribution illegal. On the other hand, where the violation involves activities such as reporting (which is within the control of the candidate or treasurer) knowledge can be presumed. Similarly a contributor can certainly be presumed to have knowledge of his prior contributions, and thus for contributors there is no such qualification.

II. LIABILITY OF CANDIDATES AND COMMITTEE OFFICERS

(A) Application of the Mens Rea Requirement

Having reached the above conclusions as to the applicable mens rea, it is possible to make some specific observations regarding situations which are likely to confront a candidate and his campaign officers. Consider the following:

(1) Y offers candidate X a $1,000 contribution. After Y assures

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41. Violation of the corporate contributions provisions, 18 U.S.C.A. § 610 (Supp. 1975), amending 18 U.S.C. § 610 (Supp. III, 1973), is subject to two different levels of punishment depending upon whether or not the violation was willful.
42. 65 F.2d 796 (D.C. Cir. 1933), rev’d on other grounds, 290 U.S. 534 (1934).
43. 65 F.2d at 801.
him that he has made only a few other small contributions, X accepts. Y, however, has in fact made over 25 $1,000 contributions, all of which are recorded. Has X violated the law? The 1974 Amendments provide that "no candidate or political committee shall knowingly accept any contribution" which is in violation of the statute. The government would have to prove that X either had specific knowledge of the fact that Y had reached his limit, or demonstrate the candidate's reckless indifference to this fact. Although X clearly lacked knowledge he may be held responsible for not checking the contributor's record. Hopefully the Federal Election Commission will set up procedures for quick verification of the legality of a proposed contribution by the Commission. Of course once a report is in the Commission's files a candidate could be charged with constructive notice.

(2) Candidate X receives a $2.00 check from Z. Unknown to him Z is an alien. Has X violated the law? The 1974 Amendments prohibit a candidate from knowingly accepting a contribution from an alien. As in the first hypothetical, the government must prove knowledge. Here, however, there is no method whereby X can readily establish the legality of the contribution. Unlike the first hypothetical, X should be under no obligation to verify the nationality of his contributor unless he is put on some sort of inquiry notice, i.e., where the check is drawn on a foreign bank.

(3) X is planning to sponsor another fund raising party at the home of one of his supporters, R. The first party cost R $300, and he expects the second to cost the same. R has already contributed $1,000 to X. Any violations? The legality of both the candidate and the contributor's conduct is dependent upon the legal label which is attached to the parties. If they are aggregated and considered a contribution in kind, there will be a violation. The fact that neither X nor R considered the parties to be a contribution is irrelevant. They were fully aware of all of the facts and circumstances. Their ignorance of the law would go only to the willfulness of the violation, and here this is not a relevant concern.

(4) "Citizens for Good Government" releases a statement endorsing ten congressional candidates. "Citizens" had previously filed with the Commission as a political committee supporting nine of the

45. Id.
ten listed candidates. No change in the registration is made. Has the law been violated? The 1974 Amendments require that the Commission be given notice within ten days of any change in the registration statement.\(^4\) Presumably the chairman or the treasurer would have the responsibility for making the change. It seems clear that prior to taking any action a candidate or committee will first have to consider the potential legal ramifications.

(5) Candidate X holds a rally at which "the hat" is passed. After the rally X finds an envelope containing five one hundred dollar bills. What is his proper course of action? The 1974 Amendments prohibit contributions in currency over $100, but say nothing about acceptance.\(^5\) It would be best to place the money in a separate account pending an advisory opinion.

(B) **Delegation of Responsibility**

The elimination of the vicarious responsibility language\(^6\) and the repeal of the verification requirements\(^7\) indicate that a candidate and his campaign officers are not strictly liable for either the accuracy of reports or for the actions of their supporters. On the other hand, candidates and committee officers are given certain responsibilities which they should not be able to delegate without assuming the risk of nonperformance.\(^8\) Consider the following two examples:

(1) The treasurer of "Citizens for X" files an inaccurate report with the Commission. The error stems from the looseness with which several student members kept records pertaining to the expenses and income of X's campus operation. Has the law been violated? Although the treasurer is not the guarantor of the accuracy of the reports, he would have to show that he had set up all the necessary procedures to control expenditures and contributions and that the error was not of a kind that could have been easily detected.

(2) T contributes $1,000 to X's principal campaign committee four days before the election. Though he had received notice of the need to file, the treasurer simply forgot. What are the consequences for X? The 1974 Amendments provide that any candidate who fails

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50. 18 U.S.C.A. § 615 (Supp. 1975). This provision has no counterpart under prior law.
53. See United States v. E. Brooke Matlack, Inc., 149 F. Supp. 814 (D. Md. 1957), where the officers of a trucking firm were held responsible for the failure of their drivers to file daily logs as required by the Interstate Commerce Commission. Id. at 820.
to file a necessary report:

[S]hall be disqualified from becoming a candidate in any future election for federal office for a period of time beginning on the date of such finding and ending one year after the expiration of the term of the federal office for which such person was a candidate. 54

Conceivably, if X were a candidate for the United States Senate he could be barred from running for any federal office for the next seven years. While the imposition of such a penalty seems outrageous there is at least one similar case. 55

State ex rel. Lukens v. Brown upheld the imposition of a similar disqualification clause on the basis of strict liability and was cited as precedent for this section of the 1974 Amendments. 56 While the House Committee 57 and the Conference 58 qualified the provision’s scope by stating that it should not apply where the candidate could show that he did not receive timely notice of the approaching filing date, this qualification might not apply in our example. It is possible that Congress intended to restrict application to cases of blatant fraud. If so, X would have no problem. This is one of the many areas where regulations are greatly needed.

As political campaigns are frequently amateurish, ad hoc operations, it might be advisable to restrain from imposing criminal liability merely for improper management and imprudent delegation. 59

Johnson v. Harris, 60 and State v. Buchanan, 61 which involved prosecutions under a statute 62 which is much tougher than the federal law, suggest that campaign officials should not be held to the same standard as corporate officers.

In Johnson the candidate arranged for Mr. Crisp, a personal friend and an owner of an advertising agency, to handle all campaign publicity. Pursuant to the Florida statute, the treasurer and Mr. Crisp set up the necessary procedures for regulating expenditures. Despite this agreement, the court found that the publicity expenditures were handled loosely and not “strictly in accordance with the letter and spirit of the election code.” 63 The court, however,
did not find any conscious attempt on anyone's part to violate the law or to defraud the voters and affirmed the trial court's dismissal.63

In Buchanan the treasurer and candidate were charged with failing to list one $25,000 contribution and with listing a bogus $1,000 contribution. The statute required each treasurer to certify the correctness of the report and stated that "the candidate shall also bear the responsibility for the accuracy and veracity of each report."64 The court found that the candidate had no knowledge of the discrepancy. While it noted that a principal may be held criminally liable, regardless of knowledge or consent, for acts of his agent, it held that this statute should be strictly construed.65 As such, the dismissal of charges against the candidate was affirmed.

III. CONTRIBUTOR'S LIABILITY

The individual contributor is also subject to criminal liability under federal law. The 1974 Amendments require every person who makes a contribution or expenditure in excess of $100, other than by candidate or political committee, to file a statement with the Commission.66 The individual contributor is also limited to $1,000 per candidate and $25,000 per calendar year.67 There is no "knowingly" or "willfully" limitation on the prosecution of a contributor.

(A) Responsibility for Committee Actions

If a contributor engages in any concerted political activity he could conceivably be subject to liability for failing to conform with the rules regarding political committees. If his actions result in a formation of a political committee, he will be required to register the committee with the Commission68 and to refrain from making any expenditure or accepting any contribution until the committee has a chairman or a treasurer.69 He cannot disband the committee without giving the Commission formal notice.70 Failure to meet any of these requirements may result in criminal liability.71

63. Id. at 892-93.
64. Ch. 26819, § 8(c), [1951] Laws of Fla. (repealed 1973).
65. 189 So. 2d at 272.
70. Id. § 433(d).
In view of the above it becomes necessary to ask how a political committee comes into existence. Can it be created inadvertently? If so, does liability attach? Consider the following two hypotheticals: (1) Six members of a law firm jointly decide to each give candidate X $1,000; (2) Mr. D, his wife and four children jointly decide to each give X $1,000. If these groups are considered committees, not only have the registration requirements been violated, but also the expenditure limits, as committees are limited to contributions of $5,000.\textsuperscript{12}

The 1974 Amendments define a political committee as simply "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."\textsuperscript{13} In both hypotheticals there is a related group of persons (same law firm and family) who jointly decided to make political contributions. It appears that these groups fall within the literal definition of a political committee. Assuming that all contributions were reported as individual gifts it would serve no purpose to characterize these groups as political committees. The committee form is only valuable where it allows a person to give money in excess of what he could individually give. To the extent that a contributor seeks to exceed his maximum limitation by channeling funds through a committee he must comply with the relevant provisions. Where the contributor treats his gift as an individual contribution nothing can be gained by proving the gift was in fact an integral part of the joint effort.\textsuperscript{14}

Assuming that a political committee has been created, is an individual member liable for allowing the committee to violate the law? Both the prior case law and the terms of the 1971 and 1974 federal legislation suggest otherwise.

The 1971 and 1974 legislation emphasize the distinction between a committee's officers and its members. The 1974 Amendments make it clear that the officers are responsible for controlling expenditures and maintaining accurate records.\textsuperscript{15} The criminal liability


\textsuperscript{14} The committee can also be used as a conduit for individual contributions. See text accompanying note 83 infra.

provisions\textsuperscript{76} add the qualification that when a committee is being sued, liability attaches to the officers and the participating members. The reason the 1974 Amendments\textsuperscript{77} do not allow a committee to function without a treasurer or chairman is because no one else is responsible for ensuring that the committee is in compliance.

The case law on an individual member's responsibility for the committee's debts supports the conclusion that one does not become exposed to liability simply by having his name added to the committee roll.\textsuperscript{78} The court's statement in Bloom v. Vauclain\textsuperscript{79} is illustrative:

There was no doubt that some sort of a committee existed, but to affix liability on an officer, or one or all of its members, for acts done in its name, it must appear that it existed in some form of a substantial nature, not merely as a loosely formed, voluntary association . . . \textsuperscript{80}

Liability will exist only if there has been some sort of ratification.\textsuperscript{81} Such ratification must be done in a personal rather than a representative capacity.\textsuperscript{82}

(B) *Piercing the Committee Veil*

A contributor must also be circumspect in his use of the committee form lest the committee be held to constitute his alter ego. The 1974 Amendments provide that when the committee is no more than a conduit for the individual's funds, the Commission should disregard the committee and treat the money "as contributions from such person to such candidate."\textsuperscript{78} The conference report which accompanied the 1974 Amendments explains that this is to be done when the contributor exercises direct or indirect control over the committee's decision to make the contribution.\textsuperscript{84} What about the situation where three lawyers form and fund a "Good Government Committee" through which they intend to support several candi-

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\textsuperscript{79} 329 Pa. 460, 198 A. 78 (1938).

\textsuperscript{80} Id. at 461, 198 A. at 78.

\textsuperscript{81} Fennell v. Hauser, 145 Ore. 351, 27 P.2d 685 (1933).

\textsuperscript{82} American Art Works, Inc. v. Republican State Committee, 177 Okla. 420, 60 P.2d 788 (1936).


dates? Each of the three lawyers will certainly have a great deal of control over distribution of funds. Should this committee be considered merely a conduit and its contributions counted as being made by the individual members? The best interpretation is that Congress was attempting to limit the use of the committee form only where the donor retains legal control over his donation. This is evidenced by the conference's reference to the special corporate and labor funds where earmarking is prohibited as examples of legitimate committees.85

IV. RELIANCE ON ADVICE OF COUNSEL

In view of the complexity of the election laws, many candidates and contributors are likely to consult a lawyer before engaging in various activities. Would such precaution serve as a defense in a criminal prosecution? Probably not. Strictly speaking, reliance on advice of counsel is a defense only when the crime requires knowledge of the law.86 In crimes requiring willfulness or specific intent, reliance is admissible only as evidence of good faith.87 Where the government must merely establish knowledge of the essential facts and circumstances, reliance on an attorney's legal advice is worthless.

This does not mean, however, that reliance on an attorney's advice would never be important in a prosecution under a "knowingly" standard. Where the advice goes to the client's understanding of the facts rather than the law, it can be introduced to negate knowledge.88 Consider the following two situations: (1) The treasurer of a committee asks his attorney if certain pledges should be counted as contributions. (2) A candidate asks his attorney to run a check on certain contributors to verify that they are not aliens. In the first instance the attorney is merely telling his client the legal label to affix upon a known fact; in the second instance he is telling his client what the facts are. Reliance on advice of counsel would be relevant only in the second situation as it could be used to demonstrate a lack of knowledge.

An example of the above distinction can be found in two security

85. Id.
87. See Note, Reliance on Advice of Counsel, 70 YALE L. J. 978, 980-81 (1961).
88. Id. at 991-92.
cases, *U.S. v. Crosby* and *U.S. v. Hill.* In *Crosby* the defendants successfully defended a charge of underwriting an unregistered public offering. The key to the case was their lack of knowledge of the facts which caused them to be designated statutory underwriters. The court stated:

> Evidence is similarly lacking to refute appellants' apparent reliance on the representations of counsel. It is key here that the government nowhere showed that the brokers knew the details of the alleged transfer .... Thus there was no evidence that the brokers knew or should have known they were "underwriters" in terms of the Securities Act.

In *U.S. v. Hill,* the defendants relied on their attorney's representations as to the applicable law. They had proceeded with an unregistered offer after obtaining assurance from counsel that the statutory exemption was applicable. As there was no evidence that the defendants lacked an understanding of anything other than the law, the knowledge requirement was met.

In situations where reliance on legal advice is admissible, the defendant still must establish that the advice was actually followed and that it was requested in good faith. Anything less than full disclosure to the attorney will negate good faith. This was illustrated in *U.S. v. Jett,* which involved the prosecution of a sheriff for failing to pay taxes on campaign contributions which were diverted to his personal use. The defendant sought to resist the government's suit by pointing to his reliance on his attorney's statement that campaign contributions were not taxable. The court rejected this defense as the defendant had failed to provide his attorney with all the necessary facts, namely that some of the funds were being diverted for his personal use.

V. Conclusion

To date the major problem in analyzing criminal liability under

89. 294 F.2d 928 (2d Cir. 1961).
91. 294 F.2d at 942.
92. 298 F. Supp. at 1235.
94. 352 F.2d at 180-82. Even if the client in good faith believes the information to be irrelevant, nondisclosure may well taint his defense. As relevancy is a question of law peculiarly within the competence of an attorney, the client cannot assume the discretion to make such a decision without also assuming the risks. See Note, *Reliance on Advice of Counsel,* 70 YALE L.J. 978, 981 (1961).
the campaign financing laws has been the almost total absence of either administrative or judicial pronouncements. This problem was recently noted by the Fifth Circuit in *U.S. v. Insco,* where the lack of construction was held nearly to approach a violation of the constitutional requirement of fair notice. Relief may be forthcoming, however, as the 1974 Amendments require the Commission to issue advisory opinions regarding the legality of any proposed transaction or activity. Good faith compliance with such an opinion will create the presumption of compliance, "notwithstanding any other provision of law." Candidates and political committees would be well advised to make use of this mechanism. It should enable individuals to conduct campaigns with the assurance that they are in compliance with the law. On the other hand it will also permit the courts to deal more severely with those who claim that they were unaware that their actions were illegal.

95. 496 F.2d 204 (5th Cir. 1974).
96. Id. at 209.
98. Id. at § 437f(b).
I. INTRODUCTION

One would expect by now that the criteria and definition of death, both as a medical and a legal concept, would be well established. Until recently, death was considered a term so basic and well understood that a specific legal definition was considered to be unnecessary. For this reason the law has always accepted the criteria and definition established by the medical profession.¹

Death has generally been defined as the cessation of life or the ceasing to exist.² Medicine has traditionally established its occurrence clinically when there is a total stoppage of blood circulation and respiration, with a consequent cessation of breathing and pulsation. Since the heart had long been considered the central organ of the body, it is not surprising that the heart’s failure to function was thought to mark the onset of death.³

When man was aware only of the concepts of life and death, there were very few problems regarding the question of when death occurs. In the relatively few situations where the question arose, however, the courts looked to eyewitness accounts to establish the existence of life or death at a particular moment. Such sensory observa-

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² 3 M. Hours & I. Haut, COURTROOM MEDICINE § 102(2) (1974) [hereinafter cited as Hours]; Halley & Harvey, Medical vs. Legal Definitions of Death, 204 J.A.M.A. 423 (1968).

tions were used by courts in automobile accident cases and in other situations where survivorship was at issue, to determine whether the victim survived for any length of time. This type of evidence was hardly a satisfactory basis for deciding important questions of fact, and several jurisdictions responded with simultaneous death statutes.

The necessity for a more precise legal definition of death has resulted from the startling advances of modern medical technology. It is now possible to indefinitely maintain vital physical functions by the use of artificial support, and with the advent of organ transplantation, a number of challenging legal questions must be answered. Of critical importance in any civil or criminal case involving this new technology, is a standard definition of death which reflects the sophistication of contemporary medicine, and at the same time provides the ease of application so essential in the law.

II. Brain Death

(A) The Modern Medical Perspective

Although dying may be a continuous process, death itself is not. As a first consideration, it must be realized that there is no specific moment of death—rather, man dies in stages. During the ebbing of life there is an orderly progression from clinical death, to brain death, to biological death, to cellular death. Clinical death occurs when the body’s vital functions, respiration, and circulation cease. When the brain is deprived of oxygen because of cessation of blood circulation, brain death is inevitable. Brain death follows clinical death almost immediately unless resuscitative procedures are started promptly, since the human brain under normal temperatures cannot survive loss of oxygen for more than six to ten minutes.

7. E.g., KY. REV. STAT. ANN. § 397.101 (1972); N.Y. EST., POWERS & TRUSTS LAW § 2-1.6 (McKinney 1967); OHIO REV. CODE ANN. § 2105.21 (Page 1968).
If resuscitative measures are instituted at the moment of clinical death, the possibility exists that life can be restored and the patient will fully recover. However, it is also possible that, despite the attempts at reanimation, brain death will yet occur hours, even days or weeks later.

The brain dies in progressive steps. First the cerebral cortex, the site of the highest centers, ceases to function. Next, there is a failure of the cerebellum and the so-called lower brain areas. Ultimately the brain stem with the vital center dies. If there is irreversible destruction of the higher centers of the brain without damage to the vital centers, there is permanent loss of consciousness, but cardiorespiratory functions can go on. Sometimes such activities continue unaided, but most times only with mechanical assistance, so that the life of the body is maintained artificially. When the lower areas of the brain are irreversibly damaged along with the cerebrum, it may still be possible to maintain cardiovascular function for some time through stimulation of local vasomotor reflexes.

Ultimately, when all the components of the brain are dead, biological death, or permanent extinction of bodily life, occurs. Thereafter the process of cellular death begins and, because of differences in cellular composition, the death of different parts of the body occurs at different times and stages. For this reason, viable organs such as the heart and kidneys can be removed immediately after biological death and transplanted. The fact that, after biological death, organs within the lifeless body can be kept going for a time by means of mechanical and chemical sustainers, can thus be attributed to the "dying in stages" phenomena.

The transfer from one state of viability to another may be either slow or very rapid. This decline depends upon age, physical and environmental factors, as well as the nature of the extinguishing cause. In the sequence of dying there comes a point of irreversibility which physicians can safely diagnose as death. In many instances,

11. See Houts, supra note 1, at § 1A.02.


physicians can slow the process of dying but cannot prevent the ultimate conclusion—death. Physicians are obligated, ethically and legally, to prescribe ordinary remedies to sustain life, but are not always required to recommend or apply extraordinary therapies when the quality of life being sustained is not "human" according to accepted standards.14

When such a point is reached, the physician's decision assumes a perplexing medico-legal dimension. It is essential that the physician determine his course of action by carefully considering all facets of the individual case—the patient's age; his family and other personal obligations; and his financial resources. Also to be considered is the intensity, cost and likelihood of success with such therapy. There may even be social considerations, as where the welfare of third parties unrelated to the patient is involved.

(B) Development of the Brain Death Movement

For a quarter of a century, physicians have known that it is feasible to keep people "alive" by maintaining heart and lung functions artificially, even when recovery is impossible because of brain damage. With the advent of organ transplantation in the 1950's, knowing at what moment a patient was dead became a major concern. For these reasons, definitions of death in recent years have been directed at determining when brain death has occurred. As a result of both occasional errors incident to the use of the traditional test of death,15 and newly-acquired medical knowledge in the area of electroencephalographic monitoring, a new concept of death has been proposed: "irreversible coma," or "brain death."16

The original advocates of this concept contended that a flat or isoelectric electroencephalogram (EEG) denotes nonexistent brain activity, or brain death. This theory was considered to be true regardless of any evidence of continued circulatory and respiratory

14. See Hours, supra note 1, at § 1.01(4); Elkinton, The Dying Patient, the Doctor and the Law, 13 Vill. L. Rev. 740, 742 (1968); Wasmuth, The Concept of Death, 30 Ohio St. L.J. 32, 47 (1969).
15. See text accompanying notes 4-8 supra.
activity by means of artificial life support. Early studies on the use of electroencephalography indicated that revival of independently maintained human functions was impossible even with resuscitative measures after the EEG was found to be flat.\textsuperscript{17}

With the more extensive use of the EEG on comatose patients, and on the basis of recent technological discoveries, a movement developed within the medical world for the use and acceptance of a flat EEG as the standard criterion of "actual" death. Such physicians looked to the flat EEG as evidence of death since it appeared to be an accurate and objective method of ascertaining that death had finally occurred. Additional support was supplied by those performing organ transplants, since it had been shown that greater success in transplants is obtained when organs are removed "fresh," or as soon as possible after death can be said to have occurred.

In setting up the criteria for a determination of death of a transplant donor, a prime consideration is the limited period of anoxia\textsuperscript{18} that the organs and tissues can withstand. Some tissues, such as the brain, succumb within a matter of minutes.\textsuperscript{19} Others, such as the skin and cornea of the eye, may retain their viability for as long as 24 hours. The cells of the heart, lungs, liver and kidneys are only slightly more viable than the brain cells. If these organs are to be used as transplants, they must be removed as soon as possible after death. Some time can be gained by the use of hypothermia, reducing the body temperature to below 25°C or 90°F. This slows cell metabolism and lengthens the time an organ can survive without oxygen. Another survival technique is to keep the organ perfused with the patient's own blood. This can be done after removal of the organ but is most easily done by continuing the use of devices that support circulation and respiration in the patient after cerebral functions have ceased.\textsuperscript{20}

It is the hope of specialists in transplantation that the flat EEG will be regarded as absolute evidence of death despite the existence of respiratory and circulatory functions, so that further maintenance and resuscitative measures can be dispensed with.\textsuperscript{21} On the

\textsuperscript{17.} Id.

\textsuperscript{18.} Anoxia is the "condition in which the oxygen content of cells and tissues of the body is below normal." \textsc{Schmidt's Attorney's Dictionary of Medicine}, A-170 (1972).

\textsuperscript{19.} For a general discussion of the physiological effects of diminished brain activity see \textit{Irreversible Coma}, supra note 16.

\textsuperscript{20.} Id.

other hand, if strict adherence to the circulation-respiration formula is required, the physician need only disconnect the machines and allow these vital functions to cease. The physician can still fulfill the requirements of “heartbeat - pulse - respiration” and preserve the organs by one of two methods. He can either delay shutting off the machines until just before the transplantation is to be performed; or he can shut them off, allow circulation and respiration to stop, make a declaration of death, and then start them again.

It may take some time for the public to accept the idea that an organ may be taken from a patient who, with artificial assistance, is still breathing and maintaining heartbeat and pulse. This matter is best solved by public education rather than stringent legal requirements which may deter physicians from taking advantage of scientific advancements in the care of patients.

Because of its medico-legal implications, it is important to note the philosophical approach of the brain death advocates. They believe that physicians have the moral responsibility and legal authority to stop useless procedures once brain death has occurred. When a patient is on a resuscitator, a physician does not always have the duty to continue treatment until the inevitable biological death. Rather, the physician can morally and legally discontinue artificial sustainers of life when there is demonstrable evidence that they are ineffective. Furthermore, postponing clinical death can prove to be a very expensive and useless gesture which can impoverish the family and inhumanely prolong emotional stress.

Opinion as to the clinical value of the flat EEG in the diagnosis of brain death varies. The flat EEG is considered by some to be of great confirmatory and prognostic value only. They suggest that it should be employed only as a prognostic test as to the imminence of death. In this way the utility of resuscitative or life-supporting measures can be anticipated. Other proponents believe that the flat EEG should be required to confirm “apparent” death. Still others recommend that the flat EEG be used to diagnose death provided the following criteria are utilized:


(1) more than eight scalp interelectrodes;
(2) low resistance technique;
(3) touch electrodes;
(4) double interelectrode distances;
(5) recording with increased amplification;
(6) variation in the time constant;
(7) monitoring of the EEG with a "noise" test;
(8) a 30 minute EEG record;
(9) stimulation by pain, noise, and light; and
(10) repetition in 24 hours (or at least in six hours). 24

(C) The Harvard "Ad Hoc" Criteria

In an attempt to obtain a precise definition of death, a group designated as the "Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death" was created in 1968. The committee proposed a new set of criteria for death: (1) unreceptivity and unresponsibility; (2) no movement or breathing; (3) no reflexes; and (4) a flat EEG. 25 "Unreceptivity" and "unresponsibility" means there is a total unawareness of externally applied stimuli and inner need, and complete lack of response. 26 It has

24. See generally Cantu, Brain Death as Determined by Cerebral Arteriography, 1 LANCET 1391 (1973); Hamlin, Life or Death by EEG, 190 J.A.M.A. 112 (1964).
25. IRREVERSIBLE COMA, supra note 16. The text reads as follows:
   (A) Unreceptivity and Unresponsitivity.
   There is total unawareness to externally applied stimuli and inner need and complete unresponsiveness . . . . Even the most intensely painful stimuli evoke no vocal or other response . . . .
   (B) No Movements or Breathing.
   Observations covering a period of at least one hour by physicians is adequate to satisfy the criteria of no spontaneous muscular movements or spontaneous respiration or response to stimuli such as pain, touch, sound, or light. After the patient is on a mechanical respirator, the total absence of spontaneous breathing may be established by turning off the respirator for three minutes and observing whether there is any effort on the part of the subject to breathe spontaneously.
   (C) No Reflexes.
   Irreversible coma with abolition of central nervous system activity is evidenced in part by the absence of elicitable reflexes.
   (D) Flat Electroencephalogram.
   Of great confirmatory value is the flat or isoelectric EEG. . . . At least ten full minutes of recording are desirable but twice that would be better.

   All of the above tests shall be repeated at least twenty-four hours later with no change.
   Id.
26. Id.
been proposed that the requirements of no movement or breathing can be satisfied completely by observations covering a period of at least one hour by a physician. As far as the "no reflexes" requirement is concerned, the pupils should be fixed and dilated, and not responsive to a direct source of bright light, in addition to the absence of deep tendon reflexes. Swallowing, yawning and vocalization obviously should be absent. Further, there should be no uncertainty as to the presence of these findings.\textsuperscript{27}

In order to insure absolute reliability in establishing death, it was proposed that ocular movement and head turning be ascertained by the irrigation of the ears with ice water and, in addition, that blinking be absent. It is generally agreed that the first three tests announced by the Ad Hoc Committee are not particularly helpful in ascertaining death, as they do not provide the absolute accuracy desired. They are considered inferior by some physicians to the detection of death by traditional signs. Some of these criteria have not been accepted because they are awkward and difficult to perform.

Similar criteria without the use of the EEG were advanced by a group studying the problem at the University of Minnesota.\textsuperscript{28} Generally, it is agreed that the Ad Hoc Committee's measures are not necessary, but rather are to be employed rarely and only if there is serious doubt and uncertainty concerning the cessation of circulatory and respiratory functions. Cessation of heartbeat, pulse and respiration were still to be considered the fundamental signs of death, however.\textsuperscript{29}

\textsuperscript{27} Id.
\textsuperscript{28} CEREBRAL DEATH, supra note 16.
\textsuperscript{29} See also Wecht & Aranson, Medical-Legal Ramifications of Human Tissue Transplantation, 18 DePaul L. Rev. 488 (1969), which proposes the following elements:

I. Documentation of Death.
(A) Lack of responsiveness to external and internal environment.
(B) Absence of spontaneous breathing movements for three minutes . . .
(C) No muscular movements . . .
(D) Reflexes and Responses.
   1. Pupils fixed and dilated . . .
   2. Corneal reflexes absent.
   3. Supraorbital and other pressure response absent . . .
   5. No reflex response to upper airway stimulation.
   6. No reflex response to lower airway stimulation.
   7. No ocular response to ice water stimulation of inner ear.
   8. No deep tendon reflexes.
(D) The Empirical Findings

Investigators and clinicians who subsequently attempted to apply the Harvard criteria found deficiencies which included fluctuation of clinical signs, return or persistence of deep tendon reflexes, and in rare cases, the return of brain stem functions such as spontaneous respiration. It became increasingly obvious that the diagnosis of “brain death” by clinical signs is a highly complex and difficult task. 30

The problems inherent in the use of the EEG in diagnosing “brain death” are similarly complicated and fraught with difficulty. At the outset there were obvious fallacies in the flat EEG theory. It is well established that a flat EEG represents evidence only of absent cerebral activity. 31 Since the cerebrum is the site of the most complicated activity in the brain, a flat EEG represents at best only cerebral death. This is particularly true when the EEG is flat and there are persistent signs of circulatory and respiratory functions. These latter signs evidence continued activity in the brain stem, which controls these vital functions. Brain stem activity is not measured by the EEG, and it has been shown that the brain stem may continue to function for periods of time despite cerebral death and the flat EEG, particularly if circulation and respiration are artificially maintained. Furthermore, there may be a significant loss of brain substance even though the EEG continues to show electrical activity. Recent reports by a group of French researchers 32 and a study at Northwestern University 33 definitely indicate that a flat EEG is not even conclusive evidence of “brain” death, much less “actual” death. These investigators have shown that resuscitation is still
possible under these circumstances when the unconscious state is due to an overdose of tranquilizers, sedatives or narcotics. A study at Northwestern University indicates that revival is still possible in these types of cases during the first six hours, and possibly as long as 12 hours after the appearance of the flat EEG. Furthermore, the French group reports that a flat EEG is not absolute evidence of death unless the spinal fluid also shows abnormal elevations of certain chemical enzymes, lactase dehydrogenases-type 5, other transaminases and alkaline phosphatase. Even this conclusion is tempered by the fact that these chemical tests are fraught with significant technical and interpretive problems.

In 1969 investigators using cerebral blood flow and cerebral oxygen consumption techniques presented the absence of cerebral blood flow as the ultimate evidence of brain death. Even though a completely reliable method of ascertaining brain death, it was impractical because the technique involved an elaborate stationary instrument complex.

A long stride toward providing an answer to the question of when death occurs has been made by the National Institute of Neurological Diseases and Stroke after a nationwide collaborative study on cerebral death. The study involved nine institutions and 503 patients. Though it does not resolve all questions about how to determine as early as possible that a patient has suffered cerebral death, it provides good general guidance. The criteria developed in this study have pinpointed the occurrence of brain death with 100 per cent accuracy. It was found that unresponsiveness and apnea by themselves give about 91 per cent accuracy in predicting impending death, but not brain death. In the presence of these clinical findings, only 63 per cent of these patients who died lacked EEG activity, while 37 per cent who died did not. This demonstrates that a flat EEG does not by itself indicate whether or not a patient is certain to die.

Among other possible criteria for identifying a dead brain, the
absence of cephalic reflexes, pupillary and corneal reflexes, swallowing, response to noise, and similar reactions was found to be highly diagnostic. If the absence of cephalic reflexes were added to the first two criteria, it would be possible to predict brain death with about 97 per cent reliability. Where a flat EEG was added to the list of criteria, the accuracy of identifying a dead brain increased to 99.8 per cent. Of all the patients in the study only two survived who would have met all these criteria. Both were drug patients. The study highlighted the considerable difficulty in spotting drug intoxication and determining what role drugs play in the case of a comatose patient. Consequently, one more criterion, pupil dilation, was added. The correlation with brain death then became an absolute 100 per cent in the study. The previously mentioned drug patients had small, constricted pupils typical of intoxication.\(^39\)

It would appear from this study that if a physician were to rely on unresponsiveness, loss of spontaneous respiration, absent cephalic reflexes and a flat EEG, practically every patient who meets these criteria would have a dead brain. However, based on the results of this study, the physician cannot be absolutely certain of reversible drug intoxication. The directors of the study thought it advisable to add one additional factor: cerebral blood flow. Because blood flow is not affected by drugs, a suitably innocuous method is needed for determining whether blood is flowing to the brain.

There are various methods for detecting viable cerebral circulation. These include injection of a radioactive tracer, direct visualization of retinal arteries, and echoencephalography. Unfortunately, at present none is wholly satisfactory. The use of a radioactive tracer is invasive, carries risks, and the results are not 100 per cent reliable. Echoencephalography does not involve the hazards of invasive techniques but is only about 80 per cent accurate. Retinal artery visualization is only about 10 per cent accurate. At present there is no completely accurate and safe way to determine cerebral blood flow. However, because of the difficulty of detecting patients in coma due to drug intoxication, it is necessary to have some means of identifying a complete loss of circulation in addition to the criteria outlined above.

The study suggests that new, less rigid criteria for declaring death are required. The older criteria have been based on lack of clinical

\(^39\) Id.
evidence of responsiveness, complete absence of reflex activity and a flat EEG.\textsuperscript{40} The Harvard criteria require all of these for at least 24 hours.\textsuperscript{41} It is noteworthy that only 40 per cent of the 503 cases included in the study would have met these criteria.\textsuperscript{42} Current experience would suggest the Harvard criteria, including the waiting of 24 hours, are too strict and, under proper conditions, a diagnosis of cerebral death can be made earlier and with higher predictability.

A second group of criteria requires that the cerebral damage be lethal, in conjunction with essentially the same criteria as applied in the Harvard recommendations.\textsuperscript{43} Several groups have used this way of determining brain death, and some maintain that under these circumstances a flat EEG is unnecessary. When these criteria were applied to the 503 patients included in the study, all the patients who met them died. However, 8 per cent of the deceased had some EEG activity indicating that it is possible to have blood circulating through a "respirator brain." A third group of criteria includes a fall in blood pressure. Of all the cases in this study only a small percentage would have met these criteria since most did not have a fall in blood pressure despite the fact that they all died.\textsuperscript{44}

As a result of this study, medicine is now in a position to test criteria suggested by various groups. Previous criteria have, in general, been too restrictive.

One new set of criteria for brain death has been set forth by a group at Northwestern University.\textsuperscript{45} It concluded that if a patient is:

1. in coma;
2. totally unresponsive;
3. apneic for 15 minutes;
4. showing a flat EEG for at least 30 minutes;
5. without cephalic reflexes except vestibular;
6. showing dilated pupils over 4 mm;
7. recording a temperature above 90°F; and

\textsuperscript{40} See text accompanying note 24 et seq. supra.
\textsuperscript{41} See text accompanying note 25 supra.
\textsuperscript{42} NATIONAL INST. REPORT, supra note 37.
\textsuperscript{43} See text accompanying note 25 supra.
\textsuperscript{44} NATIONAL INST. REPORT, supra note 37.
\textsuperscript{45} Address by R. B. Jenkins, Irreversible Cerebral Injury: The Medical Basis for and Neurological Determination of Brain Death, Symposium on the Medical-Ethical-Legal Aspects of Organ Transplantation, Washington, D.C., October 12, 1974.
showing no signs of drug intoxication based either on the patient’s history or on clinical examination or tests, such a person is not likely to survive. If the patient shows evidence of drug intoxication despite the other criteria for cerebral death, and if his pupils are small, the patient has an opportunity for survival, often to a functional level. The same is true for patients with temperatures under 90°F.

As a result of this study physicians are advised to keep in mind certain propositions regarding brain death. First, one must be cautious when drawing conclusions about drug intoxication from clinical evidence or even from a chemical analysis of the blood. Even a small amount of a drug in the blood plus another insult may be sufficient to cause severe coma.

Second, physicians must be careful not to complicate the patient’s clinical state. One should not attempt to dilate pupils to examine the eye grounds; to do so would make it more difficult to check the state of the cephalic reflexes. Actually, it is possible to visualize the eye grounds sufficiently without trying to dilate them. A good rule is that if the eye grounds cannot be visualized without dilatation, it is better not to visualize them at all.

Third, taking an EEG on such patients is not a simple matter. Artifacts are introduced not only by the patient but also by the resuscitative equipment. Considerable expertise is needed to make a diagnosis of a flat EEG under these circumstances.

Finally, even if the physician finds all these criteria and can therefore make a diagnosis of brain death within an hour or so, in actual practice it may require repeated examination over six, 12 or even 24 hours before a final diagnosis of brain death can be made with absolute certainty. This may, however, defeat the purpose of organ transplantation.

The principal problem remaining is to develop a suitable noninvasive procedure for measuring blood flow. Until this information is available it seems unreasonable to conclude that a firm diagnosis can be made immediately.

III. Medical Fact — or Legal Fiction?

(A) The Statutory Response

On the basis of these studies it can be said conclusively that brain death is a medical fact and not a legal fiction. Although there still remain some few problems in establishing diagnosis with the facility
demanded by transplant physicians and the accuracy required by those concerned with its ethical implications, the end to these problems is in sight. Similarly, those involved with its practical cost-benefit value can expect a prompt resolution of the remaining problems based on the advances accomplished in the last decade.

Unfortunately, the intensive efforts of some physicians to have the flat EEG declared the universal criterion as evidence of death resulted in the securing of proponents and adherents from other disciplines as well as the public generally. Some members of the legal profession, also desirous of concrete definitions and standards, became advocates of this movement. As a result, efforts were undertaken to have this test accepted as the standard definition of death either alone, or in addition to signs of cessation of respiratory and circulatory functions.46

As further evidence of the development of this philosophy, it should be noted that it has been suggested that the law establish a statutory definition for death. A few states, Kansas,47 Maryland,48 Virginia49 and recently California,50 have adopted brain death as part of their death statutes. Opponents argued that this would create a very rigid definition of death resulting in significant legal problems.51 The prevailing opinion today is still that, when necessary, death should be established judicially on a case by case basis.52 This approach retains, however, the problem of uncertainty as to the time of death and all the legal implications incident to a lack of definitiveness. Medically unassailable criteria as the basis of a definition would therefore be helpful in safeguarding the rights of all who are concerned with the question of when death occurs.

Furthermore, three of the existing statutes defining death have

52. Id. and authorities cited therein.
been widely criticized for their alleged ambiguities. These laws, it is contended, postulate two separate kinds of death. They were drafted in response to the developments in both organ transplantation and medical support of dying patients. Basically, they provide alternative definitions of death. Under the first, a person is considered medically and legally dead if a physician determines that there is an absence of spontaneous respiratory and cardiac function and attempts at resuscitation are considered hopeless. In the second, death hinges on the absence of spontaneous brain function as evidenced by a flat EEG if, during reasonable attempts either to maintain or restore spontaneous circulatory or respiratory function, it appears that further attempts at resuscitation or supportive maintenance will not succeed. Finally, death is to be pronounced before artificial means of supporting respiration and circulation are terminated and before any vital organ is removed for the purpose of transplantation.

(B) The Case Law Reaction

The concept that the flat EEG evidences not only brain death but also death in its finality, has gained support in the last few years. In 1971, in a case involving this issue, a jury in Portland, Oregon, convicted a defendant of second degree murder. Its decision was predicated on the conclusion that the bullet wound had caused the

53. Id. California's new statute has not been the subject of wide criticism.
   A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous respiratory and cardiac function and because of the disease or condition which caused, directly or indirectly, these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation are considered hopeless; and, in this event, death will have occurred at the time these functions ceased; or
   A person will be considered medically and legally dead if, in the opinion of a physician, based on ordinary standards of medical practice, there is the absence of spontaneous brain function; and if based on ordinary standards of medical practice, during reasonable attempts to either maintain or restore spontaneous circulatory or respiratory function in the absence of aforesaid brain function, it appears that further attempts at resuscitation or supportive maintenance will not succeed, death will have occurred at the time when these conditions first coincide. Death is to be pronounced before artificial means of supporting respiratory and circulatory function are terminated and before any vital organ is removed for purposes of transplantation.
   These alternative definitions of death are to be utilized for all purposes in this state, including the trials of civil and criminal cases, any laws to the contrary notwithstanding.
55. Id.
56. Id. See also text accompanying notes 21-22 supra.
death rather than the removal of the victim's kidneys for transplantation. The kidneys had been removed when the victim demonstrated a flat EEG, even though respiration and circulation were continued by artificial means.\footnote{57}

In 1972 a Richmond, Virginia, jury accepted the concept of brain death.\footnote{58} The jury, in the course of deliberating several issues, decided that death occurs when the brain dies (as evidenced by the flat EEG) and not necessarily when circulation and respiration cease. Four physicians were consequently held not liable for medical malpractice in a civil suit brought by the family of the deceased donor for wrongful removal of the heart. In this case, supportive measures were promptly discontinued when the EEG became flat, with resultant immediate cessation of circulatory and respiratory functions. The transplant operation was immediately undertaken.\footnote{59}

Early in 1973, the family of a potential donor in Detroit withdrew permission to use his kidneys for the purpose of transplantation because they feared the state's case against the defendant might be jeopardized as a result.\footnote{60} Again the flat EEG was to be used as evidence of death even though circulatory and respiratory functions were to be continued by means of artificial support. The surgeons, on the other hand, were unwilling to delay the transplantation until these functions ceased normally because of the higher probability of failure with such delays.\footnote{61}

Whether the removal of a gunshot victim's beating heart for use in a transplant operation means that death was nevertheless caused by acts of violence was the key issue in two recent homicide trials in California.\footnote{62} The defendants in both cases were charged with homicide and pleaded not guilty. The defense in both cases was that the assailants had not actually killed the victims, as they were not legally dead at the time their hearts were removed for transplantation. In these cases the victims had flat EEG's but maintained breathing and heartbeat with the use of mechanical life-support

\footnote{57. American Medical News, Jan. 7, 1974, at 4.}
\footnote{58. Tucker v. Lower, No. 2831 (Richmond, Va., Law & Eq. Ct., May 23, 1972). See also CAPRON & KASS, supra note 46, at 98-100; Fattah, A Lawsuit that Led to a Redefinition of Death, 1 J. Legal Med. 30 (1973); Fletcher, From the Richmond Case: New Definition of Death, 2 PRISM 13 (1974).}
\footnote{59. Tucker v. Lower, No. 2831, at 4 (Richmond, Va., Law & Eq. Ct., May 23, 1972).}
\footnote{60. American Medical News, Jan. 7, 1974, at 4.}
\footnote{61. Id.}
\footnote{62. See American Medical News, Jan. 21, 1974, at 2.}
measures. The defense contended that a flat EEG in the presence of heartbeat, detectable pulse and breathing was not conclusive legal evidence of death. The importance of resolving these questions is vividly exemplified in these two cases. There were no statutory criteria of brain death in California at the time.\(^\text{63}\)

In the first California case the driver of a car was charged with manslaughter and felonious drunken driving after the death of the victim, a young girl. The charges were dismissed by the judge because the heart of the girl had been taken for transplant based on the medical diagnosis of brain death made by a neurologist. The diagnosis was made and the organ removal performed on the victim based on the flat EEG. Cardiorespiratory support had been maintaining the pulse, heartbeat and breathing. The judge, in dismissing the manslaughter charge, upheld the defense contention that death, according to traditional legal definition, is the total cessation of vital functions, including heartbeat, pulse and respiration, and not brain death, regardless of its ultimate diagnostic and prognostic value.\(^\text{64}\)

A completely opposite result was obtained in the second case, where the defendant was accused of murder.\(^\text{65}\) Despite a flat EEG, the victim’s heart and respiration were maintained artificially until the heart was removed for the transplant.\(^\text{66}\) Before sending the jury out to consider the case, the trial judge ordered it to accept irreversible cessation of brain function as the definition of death.\(^\text{67}\) The ac-

\(\text{63. The California statute was enacted shortly thereafter. See supra note 50.}\)
\(\text{64. American Medical News, Jan. 21, 1974, at 2.}\)
\(\text{65. People v. Lyons (Alameda County, Cal., Super. Ct., May 21, 1974) reported in, } 15 \text{ CR. L. Rptr. 2240 (1974).}\)
\(\text{66. See American Medical News, Jan. 21, 1974, at 2.}\)
\(\text{67. The court, Hayes, J., instructed the jury as follows:}\)
\(\text{As jurors, it is your exclusive duty to decide all questions of fact submitted to you.}\)
\(\text{On the basis of the evidence introduced in the case, the question of the proximate cause of the death of the victim, Samuel Mitchell Allen, Jr., also known as Samuel Moore, is not an issue of fact, but is a matter of law.}\)
\(\text{Death is the cessation of life. A person may be pronounced dead, if based on usual and customary standards of medical practice, it is determined that the person has suffered an irreversible cessation of brain function.}\)
\(\text{The usual and customary standards of medical practice involving determination of life or death, in the light of developments in the medical knowledge acquired by experiment, research, clinical practice and surgery in the past approximate 20 years, was the subject of testimony of preeminent medical experts in the field of cardiology, neurosurgery, cardiac surgery and electroencephalography [sic]. All of the experts were in agreement as to such standards.}\)
\(\text{The testimony of all experts was that the proximate cause of, and the time of the}\)
cused was convicted of voluntary manslaughter. It is noteworthy that the defense attorney suggested that perhaps the physicians involved in the case should be tried for homicide. 68

Legal problems involving the concept of brain death are not new. Actually, the first known instance where the question of criminal liability arose as a result of brain death and organ transplantation occurred in a 1968 Texas case. 69 The defendant argued that he was not guilty of homicide because the victim had, in fact, never died. He contended that since the victim’s heart was still functioning in a transplant recipient’s body, there had been no murder committed. The plea was withdrawn when the recipient died following rejection of the transplanted heart. 70

The advocates of statutory brain death cite those transplant situations where death is diagnosed by means of the flat EEG recorded over a sufficient period of time, to remove any doubt that brain death has occurred. 71 In the meantime, circulation and respiration are maintained artificially after pronouncement of death in order to preserve the donor’s organ while the recipient is prepared for the transplant. It is contended that the criminal defendant in such a case should not succeed in an attempted defense against a homicide charge on the basis that the patient was breathing and his heart beating when the operation was performed. Statutory adoption of the brain death concept recognizes that death occurs when the brain ceases to function (as evidenced by the flat EEG) notwithstanding the fact that the cardiovascular and respiratory systems have continued to function with artificial support. 72

Furthermore, if rigid adherence to the “heartbeat-pulse-
respiration” concept is required, and circulatory and respiratory function is artificially maintained, the longer such a situation continues the more difficult it becomes to prove that death was caused by the inflicted injuries and not by intervening causes. If the policy is to prevent the defendant from escaping a homicide prosecution in such cases, there must be a relaxation of the “heartbeat - pulse - respiration” concept. In addition, it is possible that if the machines were shut off and these functions permitted to cease, the accused would have the argument that the act of the physician and not his own was the cause of death.

Still another alternative would allow for dual definitions of death—brain death and cessation of circulation and respiration—a result which is possible under some of the present statutes. This creates difficulty in that it may leave the physician in a position to decide, by the action he takes with respect to his patient, whether a homicide has been committed. Moreover, it may present a court or jury with alternatives to be applied arbitrarily.

The concept of brain death has had impact on civil as well as criminal litigation. It is likely to become an issue in cases involving taxation, property rights, personal injuries, workmen’s compensation and insurance. In a recent Louisiana case the beneficiary sought recovery against an insurer under a double indemnity provision for accidental death. In this case, the deceased had been hopelessly ill and the attending physician discontinued the mechanical devices that were sustaining the patient when the EEG showed a flat reading. Circulation and respiration promptly stopped, the patient was pronounced dead, and the organs removed for transplantation. Implicit in this claim is the contention that the court must reject the proposition that brain death is synonymous with death in its totality.

Of particular concern is the difficulty certain to arise if the dual standard is applied in descent and distribution cases involving the death of relatives in a “common disaster” situation. Simultaneous death statutes apply only where there is no evidence from which a determination can be made as to who died first. Different dispositi-

73. See text accompanying note 21 et seq. supra.
74. See text accompanying notes 69-70 supra.
75. Address by G. R. Smith, Criteria of Death — A Definitional Dilemma, Third World Congress on Medical Law, Ghent, Belgium, August 24, 1974.
76. See text accompanying note 6 et seq. supra.
77. See, e.g., Ky. REV. STAT. ANN. § 397.010 (1972); N.Y. EST., POWERS & TRUSTS LAW § 2-
tions may therefore result, depending upon whether brain death or cessation of heartbeat and respiration is taken as controlling. The critical factor is the physician's decision as to whether resuscitative measures are to be used and how long they are to continue. If the physician takes the wishes of relatives into consideration (which may be influenced by the prospects of inheritance) he may unwittingly determine the disposition of the decedent's property.

In the past, courts held that any evidence of continued functioning of vital organs, no matter how slight, was sufficient to establish survivorship. Even though the desired effect of these cases was to put an end to controversy concerning decedents' estates, the opposite result could conceivably occur by arbitrarily setting cessation of the vital functions, circulation and respiration, or even brain death as the criterion.

(C) The Physician's Dilemma

A further consideration in brain death situations is the civil and criminal liability of the physician. One of the critical problems involves the physician's duty to treat. Is he required to treat even though, at best, the patient's vital functions will be maintained for only a short period of time? If the physician fails to institute or continue life-support measures, may he incur civil liability for negligence or criminal liability for homicide? The problem of criminal

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1.6(a) (McKinney 1967); OHIO REV. CODE ANN. § 2105.21 (Page 1968), construed in, Henry v. Central Nat'l Bank, 16 Ohio St. 2d 16, 242 N.E.2d 342 (1968).

The Ohio statute is characteristic of most:

When there is no evidence of the order in which the death of two or more persons occurred, no one of such persons shall be presumed to have died first and the estate of each shall pass and descend as though he had survived the others. When the surviving spouse or other heir at law, legatee or devisee dies within thirty days after the death of the decedent, the estate of such first decedent shall pass and descend as though he had survived such surviving spouse, or other heir at law, legatee or devisee. A beneficiary of a testamentary trust shall not be deemed to be a legatee or devisee within the meaning of this section. This section shall prevail over the right of election of a surviving spouse.

This section shall not apply in the case of wills wherein provision has been made for distribution of property different from the provisions of this section. In such case such provision of the will shall not prevail over the right of election of a surviving spouse.

OHIO REV. CODE ANN. § 2105.21 (Page 1968).

liability is of particular concern when discontinuation of treatment is promptly followed by transplant surgery.

As has been pointed out, when considering the problem of whether to institute or maintain supportive measures in situations involving a flat EEG, the physician is faced with several conflicting interests. There must be a balancing of the duty to relieve pain and save life with the correlative duty not to prolong life when it is hopeless to do so. There are conflicting reports as to what physicians should do in such circumstances. It appears that most physicians institute and maintain supportive measures until circulatory and respiratory functions also cease. Furthermore, the choice of whether to continue treatment imposed on a relative is often as devastating as seeing him linger in unrelenting agony. In addition, patients who might be helped medically may be denied admission because a brain death patient is occupying bed space and hospital personnel. These difficult decisions would be eliminated by acceptance of the brain death concept together with the right of the physician to stop treatment when the EEG is flat.

One of the more formidable problems created by the acceptance of brain death is the course to be followed in the care and management of patients with coma lasting for months or years. The coma in this situation is usually caused by irreversible damage to the higher centers of the brain without destruction to the lower levels of the nervous system. It usually follows head injury, cardiac arrest, prolonged anoxia, hypoglycemia, carbon monoxide and other forms of poisoning, and certain cerebral vascular lesions. Although recovery of consciousness is impossible, there is no doubt that the “body” is alive. If the EEG is not flat or isoelectric and the vital functions continue, why not declare such a person dead?

The brain death advocates, however, provide four major reasons why such a patient cannot be certified dead. First, aside from unconsciousness, all vital signs of life are present. The suggested cri-

79. See text accompanying note 23 supra.
80. This sensitive issue revolves around the question of whether euthanasia should be tolerated. For a general discussion see Holder, The Right to Refuse Necessary Treatment, 221 J.A.M.A. 335 (1972); Kane, When Patients Have the Right to Die, 41 MOD. MED. 64 (1973); Comment, Legal Aspects of Euthanasia, 36 ALBANY L. REV. 674 (1972); Sharpe & Hargest, Lifesaving Treatment for Unwilling Patients, 36 FORD. L. REV. 695 (1968).
82. See Sackett, I’ve Let Hundreds of Patients Die, Shouldn’t You?, 4 MED. ECON. 92 (1973).
teria for brain death are absent, for while the EEG may show extensive cortical damage, it is not isoelectric. Second, to declare a human dead because his life has been deemed devoid of value is a judgment they claim no person has the right to make. Third, there are certain basic principles of the physician-patient relationship that cannot be overlooked. A sacred position of trust exists between physician and patient which, if undermined significantly, will harm both society and the medical profession. Finally, physicians are painfully aware of the fact that it may amount to homicide under the law to hasten death even where demise through sickness or injury will ultimately occur.

Proponents of the brain death concept want the law to recognize the suggested criteria just as it has accepted medicine's traditional definition based on the permanent cessation of spontaneous heartbeat and respiration. They point out that death is a natural phenomenon, and when there is no longer any possibility of preventing it, it should be allowed to run its course. It must be acknowledged that it is now known that death begins to take up residence in the body during the dying process and before all life is extinguished. Thus, as the end of life approaches, life and death actually coexist. The rationale of the brain death devotees is based on the premise that brain death can be diagnosed with the same certainty with which biological death can be pronounced. They contend that it is no longer necessary to await biological death, since brain death is equally conclusive.

The primary objective of medicine has always been to abolish pain, to eradicate disability, to restore health and to prolong life. When life is threatened by the failure of a bodily organ, it can be prolonged by transplantation. At the same time it is equally necessary to safeguard the rights of the dying as those who are being helped to live.

There is also the question of the cost of maintaining a person in a vegetative state for a prolonged period. The cost of medical care during this period is often extremely high and could be avoided by withholding treatment after making the diagnosis of brain death. If the patient is responsible for payment, a modest estate may be dissipated. The patient might prefer that the funds be preserved rather than expended for continuing obviously ineffective measures to prolong life. If a relative is responsible for expenses, he may well be bankrupted by them. There is a further difficulty, namely that
the physician may be loathe to attempt forcible collection of a bill which the obligor refuses to pay on the ground that the costs were unnecessary and gratuitously undertaken.

There is always the possibility that a scientific breakthrough will revive those who are being sustained artificially. In some cases the pain and suffering of a patient can be relieved by proper medication. In addition, many are concerned with the possibility of setting a precedent for this practice in situations where there is less certainty of death, or as a pretext in others.84

As to the patient, there is a recognized right to refuse treatment and die with dignity.85 Much of the controversy concerning the "pulling-the-plug" approach revolves around the concept of the "right to refuse treatment" and the "right to die with dignity." If the patient is legally incompetent the relatives may have the prerogative to decide.86 In any event, implicit in any decision is the requirement that the physician satisfy the legal requirement of informed consent,87 since the patient is invariably incapable of giving consent in these situations. The physician must abide by the decision of the next of kin, or retire from the case if it violates his sense of medical ethics.

IV. Conclusions

(A) The EEG Question

One of the most troublesome problems created by the evolution


85. See Holder, The Right to Refuse Necessary Treatment, 221 J.A.M.A. 335 (1972); Sharpe & Hargest, Lifesaving Treatment for Unwilling Patients, 36 FORD. L. REV. 695 (1968); cases cited id.


87. This requirement has been the subject of continuing case law development and has been codified in several recent state medical malpractice statutes. See, e.g., OHIO REV. CODE ANN. § 2317.54 (Page Supp. 1975).
of the brain death concept is the role and usefulness of the EEG. The use of the EEG as a means of determining prognosis, the reasonableness of continuing treatment, and the diagnosis of death, is an intriguing and provocative medical question. The decision of whether death has occurred can generally be made on the basis of clinical evidence. It is only in the minority of cases where heroic measures may succeed and would thus be continued. It is here that the EEG could be called upon to play a determining role.

However, it must be remembered that in some situations reliance cannot be placed on the EEG alone. If anesthetics or central nervous system depressants (tranquilizers, barbiturates, narcotics) have been used; if hypothermia is present (body temperature below 90°F or 32.2°C; or if the patient is a child, it may be difficult or impossible to determine whether the flat EEG tracing is the result of brain death or merely depression of the central nervous system by the drugs or hypothermia. In other situations use of the EEG would be superfluous. In cases of decapitation, severe brain injury, or high spinal cord severance, the situation is obviously incompatible with continued life and needs no confirmation by EEG. Brain function ceases simultaneously or very shortly after the injury.

Finally, the situation in which the determination is made must be considered. When a patient is dying because of disease or injury to vital organs other than the brain, it is almost inconceivable that the patient would be considered as a potential donor. This would be true in any clinical situation demanding application of the finer criteria for determining death, as opposed to conventional observation that heartbeat, pulse, and respiration have ceased.

The EEG seems useful (if its results can be validated) where the patient is dying from massive brain injury, and consideration is given to the use of his organs for transplant purposes. Accurate and prompt determination of the occurrence of brain death in such cases becomes more significant, both for the protection of the patient and for the assurance that viable organs are obtained for transplantation. It must be emphasized that in this respect brain death is not meant to be determined solely on the basis of whether there is central nervous activity. Indeed, the concept of brain death is itself the recognition of brain function as one of the crucial factors in the determination of life and death. Any pronouncement of death is a

88. See text accompanying note 31 et seq. supra.
statement of the impossibility of continued brain function, the return of consciousness and the interaction of the patient with his environment. This is true irrespective of whether the determination is based on clinical observations of cessation of heartbeat, pulse, and respiration, or on facts obtained by more modern and sophisticated methods such as the EEG, the validity of which is not completely established.

Perhaps the best statement regarding the usefulness of the clinical criteria for the diagnosis of brain death comes from the Ad Hoc Committee of the Harvard Medical School. The criteria recommended by the committee places emphasis on clinical evidence of unresponsivity and unreceptivity to external stimuli, absence of breathing and absence of reflexes. The EEG is useful only in those circumstances where the flat or isoelectric EEG tracing has been recorded for a minimum of 30 minutes on two occasions six to 24 hours apart. These requirements diminish some of its most obvious advantages in the transplantation situation. Furthermore, the recent attempts, both medical and legal, to utilize the flat EEG as evidence of death have brought forth evidence that it is fallible. Perhaps new techniques which are claimed to be flawless in detecting brain death will provide the necessary accuracy in diagnosis.

(B) The Legal Question

The logical purpose of a definition is to make a complex term more definite and understandable in analysis, and to enable it to be restated in words that are simpler and better known. Death obviously is no longer a simple and basic term. Although what death involves is not a mystery, how, why or when it occurs may sometimes be difficult to define. The attempt to define death by statute has brought about the exact opposite of a definition: instead of clarity and simplicity, it has brought about uncertainty.

There are those who believe that a legal definition may be confusing rather than enlightening. They believe that, given the present state of medical knowledge, a flat EEG is only confirmatory evidence of death and should be employed only after the cessation of respiratory and circulatory functions. Furthermore, they contend that a legal definition is not required at present. The interim proposal is to apply the traditional definition or, in certain enumerated

89. See text accompanying note 25 supra.
90. See text accompanying note 30 et seq. supra.
situations, the brain death test, on a case by case basis.

There are still others who believe that despite the gray areas, brain death should be incorporated into state statutes. They assert that the diagnosis of death should be based on the judgment of the physician. Statutory brain death allows the physician crucial alternatives and legal protection.

In the meantime, medicine and the law must seek to resolve the problem so that physicians will know the proper course of action, and lawyers will be able to apply the law with certainty. For the time being, where there is no statutory brain death, both the physician and lawyer are best advised to rely only on conventional criteria of death-cessation.
SPEEDY TRIAL—THE SEARCH FOR WORKABLE CRITERIA

Lawrence J. Sandell*

I. INTRODUCTION

Although long a part of Anglo-American law, the right to a speedy trial has yet to mature into a precise legal formula. On one hand it is enshrined as “one of the most basic rights preserved under our Constitution,” but somehow it is “different from any of the other rights” therein. As one measure of the “difference” between this “basic right” and others is the fact that the Supreme Court has dealt with it head-on in very few cases, none of which arose prior to 1905. The latest of these—Barker v. Wingo—made “an attempt” to establish working criteria once and for all, but the effort was far short of satisfactory and even required federal legislation for specificity.

There is no end to the lip service paid by courts and legislatures

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1. In 1215 the Magna Carta set forth as a basic principle the idea that “to no one will we sell, to no one will we . . . delay right or justice.” See 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 45 (1642). One early manifestation was the Habeas Corpus Act of 1679, 31 Charles II, ch. 2 (1679). See 4 W. BLACKSTONE COMMENTARIES 438. The Virginia Declaration of Rights of 1776 provided in § 8 that “a man hath a right . . . to a speedy trial . . . .”

2. “In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial.” U.S. CONST. amend. VI.


5. Justice Powell, who wrote the majority opinion in Barker, pointed out that “in none of [the cases preceeding Barker] have we attempted to set out the criteria by which the speedy trial right is to be judged.” Id. at 516. See also Note, The Lagging Right to a Speedy Trial, 51 VA. L. REV. 1587 (1965). A detailed discussion of such prior cases is set out at note 36 et seq. infra.


7. See id. at 516.


to the necessity for a speedy trial guarantee of some kind. It is universally agreed that prolonged pretrial incarceration is fundamentally unjust—there must be protections against prosecutorial refusal to bring a case to trial, and the defendant must be insured the opportunity to present a meaningful defense. But while all parties agree that the extreme cases are entitled to relief, there is a natural resistance on the part of courts to order dismissal where there has been no inquiry into the question of guilt or innocence. It was argued that the speedy trial guarantee is "generically different" from other constitutional rights because of compelling "societal" interests in the preservation of public order. Consequently, no time limit was fixed as a measure of "speediness," and the courts were left to fashion general standards for case by case application.

In accommodating the individual's sixth amendment guarantee and society's interest in bringing defendants to trial, courts developed the demand-waiver rule, wherein "a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial." With no definitive Supreme Court guidance, the demand-waiver doctrine was applied narrowly in most cases, with wide variation from court to court. As criticism mounted the Court took several hesitant stands on the issue, and finally endeavored "to trace . . . [the] contours" of speedy trial in the Barker case. The result was a specific holding that mere failure to demand a trial was not a per se waiver of sixth amendment rights. The Court also announced a balancing test to determine whether there has been an impermissible delay. It mandated a consideration of four key elements: the length of delay; the reason for delay; the efforts of an accused to assert his speedy trial right; and the degree of prejudice to the accused resulting from the delay.

As case law subsequent to Barker indicates, the historical vagueness of the speedy trial guarantee has not been eliminated by use of the balancing test. Courts continue to speak in terms of waiver,

11. See 407 U.S. at 519.
12. Id. at 525.
13. See text accompanying note 63 et seq. infra.
14. See text accompanying note 36 et seq. infra.
16. 407 U.S. at 528.
17. Id. at 530.
and the prejudice factor is frequently used to cover a variety of sins. In short, Baker has failed to take the "slipperiness" out of the speedy trial right, and defendants are just as likely to suffer extended pretrial incarceration today as they were in 1905. Although the Speedy Trial Act of 1974, which specifies the kind of absolute time period rejected by Barker, promises to bring relief in federal criminal proceedings, the fact remains that Baker is still controlling authority on the states through the fourteenth amendment.20

This article will examine the pre-Baker treatment of speedy trial in state and federal courts, and analyze the decision itself in terms of the demand-waiver rule. The impact of Baker on subsequent cases will also be evaluated, together with the federal Speedy Trial Act. Particular emphasis will be placed on the waiver principle and the prejudice factor, both of which play predominate roles.

II. WAIVER OF CONSTITUTIONAL RIGHTS

Prior to the 1972 decision in Barker, courts found a waiver of the right to a speedy trial with dismaying frequency. Other fundamental Constitutional rights were protected by a developing judicial reluctance to find waiver, but such stringency was never applied in the case of speedy trial. The assumption was that delay worked largely to the advantage of the accused, and the presumption against waiver was therefore inapplicable.21

The Supreme Court promulgated general principles governing the waiver of constitutional rights in Johnson v. Zerbst:22

"[C]ourts indulge every reasonable presumption against waiver of a fundamental constitutional right and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."23

The Supreme Court has often repeated and expanded upon the

18. See id. at 522.
22. 304 U.S. 458 (1938).
Zerbst standards in subsequent cases. In *Carnley v. Cochran*, a defendant was unrepresented by counsel and the record did not indicate that counsel had been offered by the judge and refused by the defendant. The state court presumed a waiver since the defendant was without counsel. The Supreme Court held that presuming waiver from a silent record is impermissible. The record must show that the defendant intelligently and understandingly rejected an offer of counsel, or there can be no valid waiver. In *Miranda v. Arizona*, the Supreme Court stated that "a valid waiver will not be presumed simply from the silence of the accused . . . ." *Von Moltke v. Gillies* also involved the waiver of the right to counsel. The Supreme Court clearly indicated that for waiver of a constitutional right to be effective it must be intelligent and competent, and that it is the trial judge's responsibility to insure that the record clearly shows a valid waiver:

To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances . . . .

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24. E.g., *Glasser v. United States*, 315 U.S. 60 (1942), where the Court observed that "[t]o preserve the protection of the Bill of Rights for hardpressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Id.* at 70.


28. *Id.* at 475.


30. 332 U.S. at 723-24. One writer points out that the concept of waiver is utilized in various contexts in the criminal justice process, and suggests that rigid standards, such as those outlined in *Von Moltke*, need not be uniformly applied in every waiver situation. He mentions three different contexts in which waiver is utilized: (1) relinquishment of rights or
The Supreme Court has been equally zealous in protecting other sixth amendment rights. In *Hodges v. Easton* the trial judge in a civil suit submitted some issues to the jury and decided the remainder himself. Although there was no objection to this procedure at trial, the Court refused to find a waiver of the right to trial by jury merely from the fact of silence alone. The Court stated that every reasonable presumption should be indulged against the waiver of a fundamental guarantee. In *Hopt v. Utah* the defendant failed to object when his challenges to jurors were tried outside the courtroom and out of his presence. The Supreme Court held that the mere silence of the accused does not act as a waiver of the statutory requirement of his personal appearance at the entire trial.

The Supreme Court has properly required higher standards for the waiver of sixth amendment rights than for others. By the time a citizen is concerned with sixth amendment rights he is deeply enmeshed in the criminal justice process. There is little possibility that, like a mere suspect in a *Miranda* setting, he may win his freedom on the spot by “clearing up a few things.” In the speedy trial context, however, there was no such parallel development.

III. THE SUPREME COURT AND SPEEDY TRIAL

The Supreme Court’s first speedy trial case, which qualified the right and set the trend which other courts followed, was not decided until 1905. *Beavers v. Haubert* involved a defendant who appeared in a New York court to plead to an indictment. The district attorney announced that he would not proceed with the trial, but would institute proceedings to remove the defendant to the District of Columbia to be tried on outstanding indictments there. The Court rejected the defendant’s argument that removal would violate his

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privileges, including right to counsel at one end of the scale, and the right of cross-examination at the other; (2) legitimizing government conduct that would otherwise infringe upon constitutional rights, such as consent to a warrantless search or confession in the absence of counsel; and (3) enforcement of procedural rules governing objections to unconstitutional government action, which includes failing to object to the introduction of illegally seized evidence. See Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 *Minn. L. Rev.* 1175, 1208-09 (1970).

32. *Id.* at 412.
33. 110 U.S. 574 (1884).
34. *Id.* at 579.
36. 198 U.S. 77 (1905).
right to a speedy trial in New York. The reasoning has been quoted in hundreds of subsequent speedy trial cases as justification for almost any delay not directly caused by the accused:

The right of speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. . . . 37

The Court next considered a speedy trial claim in 1957 in Pollard v. United States.38 Relief was denied because the government delay was not "purposeful or oppressive."39 The majority did not undertake an analysis of the speedy trial right, but Chief Justice Warren, writing for four dissenters, emphasized that speedy trial is a basic right, not a mere ceremonial to be neglected at will in the interests of a crowded calendar or other expediencies.40 Smith v. United States,41 decided two years later, did not involve speedy trial directly, but has often been cited in speedy trial cases. Smith was tried for a capital offense based on an information rather than an indictment. He appealed his conviction, contending a denial of due process because there was no grand jury indictment. The government argued that it was actually to the defendant's benefit that an information was used, because it accelerated his trial date. The Court rejected this reasoning, holding that "[w]hile justice should be administered with dispatch, the essential ingredient is orderly expedition and not mere speed."42

In 1966 the Court, in United States v. Ewell,43 examined the nature of speedy trial in more detail than it had previously. The defendant was originally convicted in 1962 but the conviction was vacated in 1964 because of a defective indictment. He was reindicted later in 1964, and succeeded on a motion to dismiss alleging denial of his speedy trial right. The state appealed and the Supreme Court reversed.

The Court first observed that the passage of 19 months between the original 1962 arrest and the 1964 hearings on the later indictments, was not in itself enough to demonstrate a violation of the sixth amendment.44 Under these facts the Court was correct. In the

37. Id. at 87.
39. Id. at 361.
40. Id. at 364 (Warren, C.J., dissenting).
41. 360 U.S. 1 (1959).
42. Id. at 10.
44. Id. at 120.
first place seven months had elapsed before the defendant was ever aware of the defective indictment. His appeal was decided within six months, and only three months thereafter he was rearrested. The chronology here does not suggest undue delay, and there was no indication of prosecutorial conspiracy.

Unfortunately, however, federal courts have taken this reading of the Ewell facts and tortured it into a general principle. The Ewell opinion has been variously cited for the proposition that the mere passage of time does not amount to a violation of the speedy trial right. Courts have apparently overlooked the Supreme Court's qualifying statement in Ewell that whether delay in completing a prosecution amounts to an unconstitutional deprivation depends on the facts in each case. The Court also noted that the requirements of due process mandate that the procedures for criminal prosecution be calculated to move at "deliberate" speed. To require speed for its own sake would be deleterious both to rights of the accused and to the need for effective prosecution. In addition, the Court identified three important safeguards which the speedy trial right was designed to protect:

- Undue and oppressive incarceration prior to trial,
- Anxiety and concern accompanying public accusation and the possibilities that long delay will impair the ability of an accused to defend himself

The significance of Ewell lies in the fact that it was the first Supreme Court opinion which analyzed the meaning of speedy trial in a due process perspective.

In 1967, in Klopfer v. North Carolina, the Supreme Court finally acknowledged the importance of the sixth amendment guarantee of speedy trial, describing it as one of the most basic, fundamental rights in the constitution. The Court held that the right to speedy trial is binding on the states through the fourteenth amendment. Two years later in Smith v. Hooey, the Court decided that the speedy trial provision applied to a defendant already in jail and

45. See, e.g., Hodges v. United States, 408 F.2d 543, 549 (8th Cir. 1969); United States v. Beard, 381 F.2d 325, 328 (6th Cir. 1967); Fleming v. United States, 378 F.2d 502, 504 (1st Cir. 1967); Hampton v. Oklahoma, 368 F.2d 9, 12 (10th Cir. 1966).
46. 383 U.S. at 120.
47. Id.
48. Id.
49. 386 U.S. 213 (1967).
50. Id. at 226.
awaiting trial on an unrelated charge in another jurisdiction. The Court held that a prisoner could suffer substantial prejudice, in addition to incarceration, by a delayed trial on a pending charge.\(^{52}\)

In *Dickey v. Florida*,\(^{53}\) decided in 1970, the Court held that a federal prisoner who spent seven years urging a state to try him on pending state charges had been denied a speedy trial. The majority emphasized that speedy trial was not merely an abstract right, but one based on the need to have charges promptly exposed; to afford the accused an opportunity to meet the charges when the case is fresh; and to avoid having to litigate stale claims.\(^{54}\) The opinion observed, without any supporting citations, that many accused persons seek to delay in-court confrontation as long as possible. Nevertheless, stated the Court, the right to a prompt inquiry into criminal charges is fundamental, and it is the duty of the prosecution, not the defendant, to provide a prompt trial.\(^{55}\) The opinion did not make clear, however, whether the government had an affirmative duty even without a demand for trial.

Justice Brennan wrote a concurring opinion which is significant for its discussion of many of the most troublesome questions surrounding the right to a speedy trial. He posed, as examples, four questions which the *Dickey* majority did not answer: (1) whether the speedy trial provision applied only to post-arrest or post-indictment delays; (2) whether a defendant waived his right of speedy trial by failing to demand it; (3) whether a defendant must prove actual prejudice to his defense; and (4) whether the delay must have been deliberately caused by the prosecution.\(^{56}\) Brennan alluded to the weaknesses of *Ewell, Klopfer* and *Hooey* as going to the fundamentals of the constitutional guarantee. He also spoke of societal interests in effective prosecution of criminal cases; prevention of official abuse; and reinforcement of criminal process as a deterrent to crime.\(^{57}\)

The Brennan concurring opinion in *Dickey* was influential in raising speedy trial to the level of other guarantees in the Bill of Rights.\(^{58}\) Brennan questioned the basic assumption in the demand-

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52. Id. at 378.
54. Id. at 37.
55. Id. at 38.
56. Id. at 40.
57. Id. at 41-43.
58. Justice Powell, who wrote the majority opinion in *Barker v. Wingo*, referred to the
waiver rule that delay always benefits the accused, and expressed reservations over precedent which permitted less stringent proof of waiver. 59

When the Court was next faced with a speedy trial case, it was required to answer only one of the questions raised by Justice Brennan, and it added nothing to his previous analysis. In United States v. Marion, 60 several persons were indicted in 1970 for fraudulent conduct covering the period 1965-67. The defendants moved to dismiss the indictments, claiming that their right to a speedy trial had been abridged by the failure to commence prosecution within a reasonable time after the alleged crime occurred. The defendants claimed they would not be able to remember many specific acts and conversations which occurred several years earlier. The Court ruled that the speedy trial provision provides no protection against pre-arrest or pre-indictment delay: it does not apply until a defendant in some way becomes an accused, which in this case occurred only when the defendants were indicted in 1970. 61 The Court acknowledged that an accused is under no obligation to move his case to trial, and declared that the sixth amendment “would appear” to guarantee at a minimum an early prosecution. 62 Like its predecessors, however, Marion approached speedy trial at the theoretical level and failed to produce guidelines for determining when relief is appropriate.

IV. Pre-Barker Application of Waiver Doctrine

Until the middle of 1972, Supreme Court decisions had no measurable effect on either the general manner in which state and federal courts approached the speedy trial problem, or the specific application of the doctrine of waiver to the speedy trial right. The majority of courts seemed to resent the right, or to resent the fact that dismissal was the only appropriate remedy. A two-pronged approach was developed to defeat speedy trial claims. The first, and most widely used, was to find that an accused had waived his right to a speedy trial by failing to demand an early trial. 63 For those

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59. 398 U.S. at 39 et seq.
60. 404 U.S. 307 (1971).
61. Id. at 313.
62. Id.
63. See generally Note, The Right to a Speedy Criminal Trial, 57 COLUM. L. REV. 846, 853 (1957); Note, The Right to a Speedy Trial, 20 STAN. L. REV. 476, 478-79 (1968); Note, The
defendants who demanded a trial, the courts developed a second prong: a due process approach to denying speedy trial claims.\textsuperscript{44} Waiver was only one of the factors which the courts considered. They also felt obligated to inquire into the reasons for the delay and the absence or presence of prejudice.

(A) Application of Waiver by State Courts

State court decisions have made it abundantly clear that speedy trial is not a "favored right,"\textsuperscript{64} even though every state has a constitutional speedy trial guarantee similar to that contained in the sixth amendment.\textsuperscript{66} Because speedy trial, like obscenity, is difficult to define, several states have enacted legislation to supplement the constitutional provisions.\textsuperscript{67} The statutes differ in detail, but provide essentially that a court must dismiss a prosecution if, through no fault of his own, an accused is not brought to trial within a prescribed time, or within a certain number of terms of court, after he has been indicted or arrested, unless the prosecution can show good cause for the delay.\textsuperscript{68} The statutory periods represent a legislative

\textsuperscript{44} Lagging Right to a Speedy Trial, 51 VA. L. Rev. 1587, 1601-02 (1965).


\textsuperscript{65} Such was the language used by the court in People v. Wilson, 60 Cal. 2d 139, 383 P.2d 452, 458, 32 Cal. Rptr. 44, 50 (1963).

\textsuperscript{66} E.g., KY. CONST. § 11; IND. CONST. art. 1, § 12; OHIO CONST. art. 1, § 10.

\textsuperscript{67} E.g., KAN. STAT. ANN. § 62-1431 (1964); MASS. GEN. LAWS ANN. ch. 277, § 72A (1968); OHIO REV. CODE ANN. § 2945.71 (Page 1975).

\textsuperscript{68} Consider the Ohio statute:

(A) A person against whom a charge is pending in a court not of record, or against whom a charge of minor misdemeanor is pending in a court of record, shall be brought to trial within fifteen days after his arrest or the service of summons.

(B) A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:

(1) Within forty-five days after his arrest or the service of summons, if the offense charged is a misdemeanor of the third or fourth degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than sixty days;

(2) Within ninety days after his arrest or the service of summons, if the offense charged is a misdemeanor of the first or second degree, or other misdemeanor for which the maximum penalty is imprisonment for more than sixty days.

(C) A person against whom a charge of felony is pending:

(1) Shall be accorded a preliminary hearing within fifteen days after his arrest;

(2) Shall be brought to trial within two hundred seventy days after his arrest.

(D) For purposes of computing time under divisions (A), (B) and (C) of this section, each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days. \textit{Id.}
definition of what is a reasonable delay in bringing an accused to trial. Although these statutes are clear and unambiguous, a majority of the courts have refused to abandon the demand-waiver rule. 69

The Supreme Court of Minnesota echoed the views of most state courts in *State v. McTague*. 70 After having been tried and convicted on one of four indictments, the defendant was sentenced to the penitentiary. Five years later he moved, pursuant to the Minnesota statute, to dismissed the other indictments, alleging that the state's failure to prosecute him, without good cause, had denied him his right to a speedy trial. The court commented that even though the speedy trial provisions are for the protection of the defendant, it does not always follow that the state is the only one with the duty to hasten the cause to trial. The court held that where the accused does not demand a trial, resist postponement or take some action indicating his assertion of the speedy trial right, the defendant will be deemed to have waived his right through acquiescence. 71 The court reasoned that delay was invariably to the benefit of the accused, and refused to consider the possibility of a prosecutorial motive for repeated continuances.

Some courts developed the theory that a mere allegation of unconstitutional delay results in a presumption of waiver. 72 A showing of silence on the part of the defendant is conclusive proof of waiver. However, even when an accused has taken some affirmative action, the courts have denied relief on procedural grounds. The Supreme Court of Iowa stated that despite a defendant's oral request for a prompt trial, his failure to move for dismissal is fatal and constitutes a waiver of the speedy trial right. 73 In *State v. Peterson*, 74 the defendant was arraigned in October, 1968, and filed a motion to dismiss for lack of speedy trial together with several other motions. The trial court ruled on all but the speedy trial motion in July, 1969. On the day of his trial the accused again unsuccessfully moved for dismissal on the ground that he had been denied a speedy trial. On appeal the court ignored the defendant's earlier motion to dismiss

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69. *E.g.*, Kelley v. Commonwealth, 474 S.W.2d 63 (Ky. 1971); Blair v. Commonwealth, 458 S.W.2d 761 (Ky. 1970).
70. 173 Minn. 153, 216 N.W. 787 (1927).
71. *Id.* at 154, 216 N.W. at 788.
74. 189 N.W.2d 891 (Iowa 1971).
and held that since he had done nothing to bring his case to trial after making the initial motion, he had waived his right to a speedy trial.\footnote{75. Id. at 893-94.}

Some state courts require more than a simple demand, while others will ignore a demand that is not addressed to the proper person. Thus, when the defendant is required to make a demand for trial on the court, neither a demand on the prosecuting attorney\footnote{76. E.g., State v. Fogg, 79 S.D. 576, 115 N.W.2d 889 (1962).} nor an oral request of the judge in chambers\footnote{77. E.g., McCandless v. District Court, 245 Iowa 599, 61 N.W.2d 674 (1953).} will suffice to avoid a finding of waiver. In \textit{State v. Stoeckle},\footnote{78. 41 Wis. 2d 378, 164 N.W.2d 303, appeal dismissed, 396 U.S. 10 (1969).} the accused moved at his preliminary hearing for dismissal because the hearing had not been held within the time prescribed by statute. The court found that the defendant's motion to dismiss for lack of speedy trial was not a demand for a speedy trial.\footnote{79. 41 Wis. 2d at 390, 164 N.W.2d at 309. This finding was unnecessary since the trial was delayed by the accused's attempts to appeal the denial of his preliminary hearing motion. This would have been sufficient for the court to deny the speedy trial argument without reaching questions of demand and waiver.} In Ohio, neither a letter to the prosecuting attorney nor one to the clerk of the court are considered a demand on the court.\footnote{80. State v. Doyle, 11 Ohio App. 2d 97, 228 N.E.2d 863 (1967).}

\textit{People v. Prosser}\footnote{81. 309 N.Y. at 353, 130 N.E.2d 891 (1955).} is the leading state case in support of the minority position that an accused is not required to take any affirmative action to preserve his speedy trial guarantee. The defendant pleaded guilty to several indictments in 1946 and was sentenced to prison. In 1952 the state rearraigned him on one of the indictments to which he had previously pleaded not guilty. He unsuccessfully moved to dismiss the indictment on the basis that he had been denied a speedy trial. The appellate division had held that the accused waived his right to a speedy trial by failing to invoke the statutory remedy of a motion to dismiss when he was not tried during the term of court after the term in which the indictment was handed down.\footnote{82. People v. Prosser, 285 App. Div. 997, 138 N.Y.S.2d 45 (1955).}

The New York Court of Appeals reversed.\footnote{83. 309 N.Y. at 353, 130 N.E.2d at 891.} The court rejected the premise that the accused has the obligation of securing a speedy trial, and the theory that it would be unfair to permit a defendant
to sit back and do nothing until the government is ready for trial, and then claim he should be discharged because of undue delay.\textsuperscript{84} The opinion emphasized that the state has the duty to see that a defendant is speedily brought to trial. It follows that the mere failure of the defendant to take affirmative steps to prevent delay may not, without more, be construed as a waiver. Judge Fuld stated that:

As for the asserted danger that a defendant may sit back and, if the prosecution fails for one reason or another to move the indictment for trial expeditiously, claim his right to a speedy trial and go free, it is somewhat less than real. Overlooked is the fact that the district attorney may at any time have the case placed on the calendar for a particular day. The defendant and his counsel will be in court and, if at that time the People seek a postponement and the defense fails to oppose or object, its failure will probably import consent to the ensuing delay and bar any later claim that the defendant's right to a speedy trial had thereby been denied.\textsuperscript{11}

Prior to \textit{Barker v. Wingo} the courts indulged in several presumptions relative to the demand-waiver rule. The first of these is that where an accused does not ask for a speedy trial, he does not want one, because he will invariably benefit by the delay. There is no evidence to support this supposition since defense witnesses suffer from fading memories to the same extent as others. Another presumption involves state statutory guarantees. Courts conditioned application of strict time period requirements on demand by the defendant, regardless of the unqualified language of the statutes. Furthermore, the courts presume a knowing and intelligent waiver of the speedy trial guarantee, but require an affirmative showing by the prosecution for other constitutional rights. There is no language in the sixth amendment to justify special treatment for speedy trial, and such freewheeling suppression of a fundamental right is without precedent in other areas of criminal law.

\textbf{(B) Application of Waiver by Federal Courts}

Federal courts have been no less vigorous than state courts in protecting the right of society to bring defendants to trial. In the absence of specific time limits,\textsuperscript{85} the government was required by the

\begin{itemize}
\item \textsuperscript{84} 130 N.E.2d at 894.
\item \textsuperscript{86} The Speedy Trial Act of 1974 has instituted absolute limits for the first time in federal cases. \textit{See} note 193 \textit{et seq. infra.}
\end{itemize}
Federal Rules of Criminal Procedure to bring cases to trial "without unnecessary delay." Although recognizing the deterrent purpose served by this provision, federal courts persisted in construing it as narrowly as possible.

During the years immediately preceding *Barker*, the keystone of the demand-waiver doctrine was the case of *United States v. Lustman*. The defendant was indicted in August, 1951, and tried in November, 1956. The court found that 18 months of the delay was reasonable, but that there was an "undue delay" of five years during which nothing was done to bring the case to trial. Although admittedly enamored with Judge Fuld's position in *People v. Prosser*, the court felt bound by several earlier federal decisions which "clearly establish" that the right to a speedy trial is the defendant's personal right and is deemed waived if not promptly asserted. Since Lustman did not properly assert his constitutional right until just a few months before trial, he could not attack the judgment of conviction.

Precedent cited in *Lustman* held that the right to a speedy trial is waived if not promptly demanded. But an analysis of a case not cited—*Phillips v. United States*—illustrates the baselessness of the federal demand-waiver rule.

Four years after his indictment the defendant in *Phillips* moved to dismiss his case for lack of a speedy trial. The court equated the accused's failure to ask for a trial with acquiescence in the delay, and refused to permit him to benefit by the delay and move for

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87. FED. R. CRIM. P. 48. Dismissal. (b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

88. *E.g.*, *Ex parte Altman*, 34 F. Supp. 106 (S.D. Cal. 1940). The court stated that:

> We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to bring them to trial. And yet, if the prosecutor should refuse to try them, and the court acquiesce, they would be at his mercy. The constitutional guarantee of speedy trial . . . would be brought to naught . . . Id. at 108.

89. 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958).

90. 258 F.2d at 477.


92. 258 F.2d at 478.

93. Frankel v. Woodrough, 7 F.2d 796 (8th Cir. 1925); Worthington v. United States, 1 F.2d 154 (7th Cir.), *cert. denied*, 266 U.S. 626 (1924).

94. 201 F. 259 (8th Cir. 1912).
dismissal. The court stated that the defendant had a duty to ask for a speedy trial, "and we must presume that he would have been granted an earlier trial if he had so asked. . . ."66 No citations were given for any of the court's assumptions. Nevertheless, based upon the unsupported presumption of Phillips that an accused would be given a trial whenever he asked for one, the demand-waiver rule was unquestioningly adopted by subsequent decisions. The courts, up to and including the Lustman decision, regularly equated a defendant's silence with acquiescence, and held that one who concurred in the delay had waived his right to insist upon a speedy trial.67

Nevertheless, the fact that an accused has consistently demanded a trial during the delay does not necessarily insure the mantle of judicial protection for his speedy trial right. The Lustman court also decided United States ex rel. Von Cseh v. Fay.68 The defendant was indicted and arraigned in October, 1953, and all preliminary matters were disposed of by May, 1954. The trial was set for January, 1955, but was adjourned three times thereafter because a prosecution witness was unavailable. The accused made unsuccessful motions to dismiss the indictment in April, 1956, April, 1957, and again at trial in May, 1957.

On appeal the court held that although there had been repeated demands for a trial, the measure for determining when relief is appropriate is whether the delay precluded a fair determination of the charges. The court listed four factors which it felt were pertinent to a consideration of whether denial of a speedy trial assumed due process proportions: length of the delay; reason for the delay; prejudice to the defendant; and waiver by the defendant.69 The court declared that the state's inability to subpoena its chief witness from India was a valid reason for the delay of over four years, and that the defendant had not waived his right to a speedy trial. However, the court held that he was not entitled to relief because there was no showing of prejudice to his defense. The defendant's inability to

66. Id. at 262.
67. E.g., In re Sawyer's Petition, 229 F.2d 805 (7th Cir.), cert. denied, 351 U.S. 966, rehearing denied, 352 U.S. 860 (1956); Chinn v. United States, 228 F.2d 161 (4th Cir. 1955); Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953); Sherperd v. United States, 163 F.2d 974 (8th Cir. 1947); Danziger v. United States, 161 F.2d 299 (9th Cir. 1947); Pietch v. United States, 110 F.2d 817 (10th Cir. 1940); O'Brien v. United States, 25 F.2d 90 (7th Cir. 1928); Poffenbarger v. United States, 20 F.2d 42 (8th Cir. 1927); Daniels v. United States, 17 F.2d 339 (9th Cir.), cert. denied, 274 U.S. 744 (1927).
68. 313 F.2d 620 (2d Cir. 1963).
69. Id. at 623.
maintain gainful employment, and the mental anguish he suffered did not present the type of prejudice contemplated by the fourteenth amendment. It is not the purpose of the due process clause, noted the court, to defend an accused against public opprobrium.\(^9\)

Applying the four factors announced in *Von Cseh*, the court in *United States v. Mann*\(^1\) found a totally unjustified delay of over nine years. With respect to prejudice the court said:

Where delay is as long and as goundless as that revealed here, prejudice may fairly be presumed simply because everyone knows that memories fade, evidence is lost, and the burden of anxiety upon any criminal defendant increases with the passing months and years ....\(^1\)

In this case the accused's failure to demand trial during the nine year delay was not fatal to his appeal. The court deemed it unrealistic to require a defendant to disturb an inactive prosecution, and unacceptable to condition the enforcement of a constitutional right on a request by the defendant.\(^2\)

Encouraged by the lead set in cases such as *Mann*, some courts began to chip away at the precedent set by earlier decisions.\(^3\) The fact that defendants are hesitant "to disturb the hushed inaction by which dormant cases have been known to expire,"\(^4\) resulted in an unwillingness to hold the defense solely responsible for trial promptness. It was at this point—when the demand-waiver rule was showing signs of wear—that the Supreme Court handed down its decision in *Barker*.

V. *Barker v. Wingo—An Analysis of an Analysis*

(A) The Facts

Willie Barker and Silas Manning were arrested for a double murder in July, 1958, and were indicted by the Commonwealth of Ken-

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\(^9\) Id. at 624.
\(^1\) 291 F. Supp. 268 (S.D.N.Y. 1968).
\(^2\) Id. at 271.
\(^3\) Id. at 274-75.
tucky in September, 1958. Counsel was appointed by the court and trial set for the following October. The prosecutor had a stronger case against Manning, and believed that Barker could not be convicted without Manning's testimony. Manning was unwilling to incriminate himself, so it was necessary to try him first. On the first day of Manning's trial the prosecutor requested and obtained, without objection, the first of a series of 16 continuances of Barker's trial.

Manning's first trial ended in a hung jury, and the conviction following his second trial was reversed by the Kentucky Court of Appeals. The same thing happened after Manning's third trial, and his fourth trial resulted in a hung jury. Finally, in March, 1962, Manning was convicted of murdering one victim, and at his sixth trial in December, he was convicted of murdering the other.

During this time Barker was released on bail after ten months in jail, and he made no objection to any of the 11 continuances requested by the prosecution. After the prosecutor made his 12th motion for a continuance in February, 1962, Barker's counsel filed a motion to dismiss the indictment. The motion was denied and the prosecutor's motion for a continuance was granted. Thereafter, two more continuances were granted without objection. On March 19, 1963, the day set for trial, the prosecutor again moved for a continuance because of the illness of a material witness. Barker objected unsuccessfully to this request. The case was continued once more over Barker's objection, and on October 9, 1963, Barker's motion to dismiss for lack of a speedy trial was denied and his trial began. With Manning as the chief prosecution witness Barker was convicted and given a life sentence.

The Kentucky Court of Appeals affirmed Barker's conviction, and his subsequent petition for habeas corpus relief in federal court was rejected without a hearing. The Court of Appeals for the Sixth Circuit affirmed, ruling that Barker had waived his speedy trial claim for the entire three year and seven month period before he filed his first motion to dismiss the indictment. The court of appeals

106. Id.
111. Barker v. Wingo, 442 F.2d 1141 (6th Cir. 1971).
also decided that the additional 20 month period was not unduly long; that the illness of the prosecution witness was a valid justification for the delay; and that Barker had shown no resulting prejudice. The Supreme Court granted certiorari in 1972, fully 14 years after the defendant’s arrest.

(B) Speedy Trial is “Different”

The Supreme Court discussed several reasons for its initial declaration that the right to a speedy trial is “generically different” from every other constitutional right for the protection of the accused. First, there is a concurrent societal interest in providing a speedy trial quite apart from that of the accused. Citing the large backlog of cases, the Court pointed to the opportunity for the defense to “manipulate the system,” and to the frequency of bail jumping.

Its second basis was the effect of delay on the chances for a successful prosecution. Noting that pretrial delay is not, as many cases had held, a per se advantage to the accused, the Court acknowledged the need for fresh memories and witness availability. Its third reason in support of according “different” treatment to speedy trial was that it is “impossible to determine with precision when the right has been denied.” Rejecting the opportunity to establish arbitrary time periods, the Court felt obligated to do no more than “generalize” about the speedy trial guarantee.

The result was a “balancing test,” in which the conduct of both the prosecution and the defendant are weighed. The factors determining the outcome are: length of delay; the reason therefore; whether the defendant asserted his rights under the sixth amendment; and whether there has been prejudice to the accused.

112. 404 U.S. 1037 (1972).
113. 407 U.S. at 519.
114. Id.
115. See text accompanying note 41 supra.
117. Although pointing out that the Second Circuit Court of Appeals had promulgated rules of court which specified time periods, the Court rejected such an alternative because it “would require this Court to engage in legislative or rulemaking activity.” Id. at 523. Rigid time limits have been set by the Supreme Court in other contexts, most notably in Roe v. Wade, 410 U.S. 113 (1973), concerning the point at which states may regulate abortions. The Court has also been known to indulge in rulemaking, as it did in Miranda v. Arizona, 384 U.S. 436 (1966), when it detailed a list of warnings which police officers must give before taking a confession. Id. at 479.
118. 407 U.S. at 522.
119. Id. at 530.
120. Id. See also Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476 (1968), which
though substantially identical to those listed by Justice Brennan in his concurring opinion in *Dickey v. Florida*,\(^\text{121}\) the factors in *Barker* were drawn less closely to traditional notions of due process.

For example, in the second factor prosecutorial misconduct in the form of tactical delays are to be “weighed heavily against the government.”\(^\text{122}\) In *Miranda v. Arizona*,\(^\text{123}\) however, the Court found presumptive misconduct in the practice of extended prearraignment questioning, and fashioned a rule of total exclusion. The *Barker* opinion also minimized the possibility of “negligence or overcrowded courts” as reasons for delay, ascribing “less weight” to them than deliberate delay. In other contexts administrative convenience\(^\text{124}\) and simple bungling\(^\text{125}\) are given less salutary treatment. Furthermore, the Court cut off speedy trial arguments in cases where there is no “presumptive delay.”\(^\text{126}\) This so-called “triggering mechanism”\(^\text{127}\) puts a premium on the amount of pre-trial delay in a quantitative sense which, in light of the careful rejection of fixed time periods, is at odds with the Court’s desire to be flexible. The result of such a presumption is that relatively short delays, even if there is strong weight against the government in the other three factors, could preclude a defendant from presenting his speedy trial argument.

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the Court cited as a slightly different approach. 407 U.S. at 530 n.30.
122. 407 U.S. at 531.
124. In Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974), the Court held that “administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law.” *Id.* at 647. See also *Stanley v. Illinois*, 405 U.S. 645 (1972), where in dictum it was stated that:

The Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the due process clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from overbearing concern for efficiency and efficacy . . . . *Id.* at 656.

In *Mayer v. Chicago*, 404 U.S. 189 (1971), the Court rejected the state’s argument that the inconvenience of providing trial transcripts to indigents was too heavy a burden on the public. *Id.* at 197.

126. 407 U.S. at 530.
127. *Id.*
(B) Prejudice and Waiver

The third and fourth factors—whether the defendant asserted his speedy trial right, and whether his defense was prejudiced by the delay—constitute the truly substantive part of the balancing test. At the outset, there was unqualified rejection of the previous practice of presuming waiver in cases of defense inaction. However, the Court chose not to scrap the demand-waiver rule altogether, treating it simply as one factor to be considered in the balancing test. In discarding the traditional presumptive effect of the demand-waiver rule, the Court recognized the fundamental inconsistency between the demand-waiver doctrine and the due process standards of waiver in other constitutional areas. Nevertheless, the result was far short of the requirement of affirmative showing of voluntariness by the prosecution:

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right. This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. . . .

Accordingly, the Court, although disclaiming any departure from established rules respecting waiver of fundamental rights, memorialized the very vagueness of speedy trial which it had set out to remedy. Instead of rejecting the demand-waiver rule it merely lessened its presumptive effect, leaving to lower courts the task of ascribing due process justification to the old practice. To this extent, Barker does not represent a significant departure from earlier holdings: speedy trial is still a second-rate constitutional right, and defendants must still demand its protections. At all times the persistence of the demand is ultimately subject to the balancing procedure, and it is clear that assertion of sixth amendment rights is not in itself determinative.

The Court fell short of actually requiring that the defendant affirmatively show prejudice to his defense as a consequence of delay.

128. See text accompanying note 64 supra.
129. See text accompanying note 22 supra.
130. 407 U.S. at 528.
131. Id. at 529.
132. Id. at 531-32. The Court all but precluded relief where no demand is made: "[w]e emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." Id. at 532.
Prejudice is presumably treated as simply one factor, but the Court cited the "minimal" showing of prejudice by Barker as a factor outweighing his claim to relief. The Court defined "prejudice" as a violation of a protected interest such as: (1) oppressive pre-trial incarceration; (2) anxiety and concern suffered by the accused; and (3) impairment of his defense. In identifying these areas of possible prejudice the Court provided precious little elaboration. It offered no guidelines to be applied by courts in assessing the degree of prejudice, and gave no indication as to whether prejudice not directly resulting from the source of the delay is to be considered. The Court must have know that the "anxiety and concern of the accused" interest is meaningless, since the likelihood of a court ascribing weight to it in view of the overriding societal interests, is obviously remote. All pre-trial incarceration during a "presumptively prejudicial delay" is bound to be "oppressive," and the need for such qualification is dubious. Moreover, when a court applies the first of the four balancing factors and finds a presumptively prejudicial delay, will such a finding also satisfy the fourth factor? If not, what else, exactly, must be shown?

(C) Balancing the Factors

After setting forth the balancing test and discussing the constitutional policy governing speedy trial, the Court turned to the facts in the Barker case. The Court admitted that the delay of over five years between arrest and trial was "extraordinary." The illness of a witness and the need to use codefendant Manning's testimony to convict Barker were held to be excusable sources of delay. The fact remained, however, that four years of the delay was left unjustified. The length of the delay and the reasons therefor weighed heavily in Barker's favor, but the Court found two counterbalancing factors which outweighed them. The first was that prejudice was minimal. The Court acknowledged but brushed aside Barker's ten months in jail and his five years of anxiety, not to mention an additional nine years getting to the Supreme Court. There was no claim that any of Barker's witnesses died or otherwise became unavailable. The Court mentioned that only two very minor lapses of memory by a

133. Id. at 534.
134. Id. at 532.
135. See text accompanying note 126 et seq. supra.
136. 407 U.S. at 533.
defense witness were indicated in the trial transcripts.\textsuperscript{137} It is interesting that the Court would look to the trial transcript to buttress its finding of minimal prejudice. Earlier in its opinion the Court had observed that "[[L]oss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."\textsuperscript{138}

What weighed even more heavily was "the fact that Barker did not want a speedy trial."\textsuperscript{139} The Court determined that Barker, while represented by competent counsel who was notified of all prosecution requests for a continuance, took no action for nearly four years which could be construed as an assertion of the speedy trial right.\textsuperscript{140} Such inaction strongly suggested to the Court that Barker hoped to take advantage of the delay and that he had acquiesced in it. The Court cited as support an ambiguous statement made by counsel at oral argument which could just as reasonably have meant that Barker was simply afraid of a trial.\textsuperscript{141}

Clearly, Barker was denied relief because he failed to demand a speedy trial. Such silence, according to the Supreme Court, indicates that the accused did not want a speedy trial. And one who does not want a speedy trial will not later be found to have been deprived of that right:

We do not hold that there may never be a situation in which an indictment may be dismissed on speedy trial grounds where the defendant has failed to object to continuances. . . . But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. . . .\textsuperscript{142}

Justice White, in his concurring opinion, underlines the significance of the defendant's failure to demand trial in the Court's decision: "it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case, the results would have been

\textsuperscript{137} Id. at 534.
\textsuperscript{138} Id. at 532.
\textsuperscript{139} Id. at 534.
\textsuperscript{140} Id.
\textsuperscript{141} Counsel stated as follows:
Your honor, I would concede that Willie Mae Barker probably—I don't know this for a fact—probably did not want to be tried. I don't think any man wants to be tried. And I don't consider this a liability on his behalf. I don't blame him. Id. at 535.
\textsuperscript{142} Id. at 536.
otherwise. . . .”

In concluding that Barker did not want a speedy trial, the Court interpreted the scarce facts and their reasonable inferences strictly against the defendant and in favor of waiver. By burdening the defendant with the responsibility for asserting his speedy trial right, the Court has relegated that right to a level lower than other constitutional rights which a defendant is not required to assert to preserve. The fact that speedy trial may be “generically different” from other constitutional rights does not dictate that the standards for waiver should be lowered. A tactical decision not to press for trial should never be equated with not wanting a trial. The Court characterized Barker’s first motion to dismiss the indictment as “pro forma,” but it is just as likely that Barker was sincere in his desire to nudge the prosecutor into moving more swiftly. Faced with an ambiguous and factually sparse record, the Court presumed a waiver that was not clearly demonstrated.

VI. POST-BARKER APPLICATION OF WAIVER

(A) Waiver in State Courts

A survey of state cases subsequent to Barker v. Wingo reveals the following unsurprising developments: (1) expressly or by implication, precedents established prior to 1972 were overruled where the demand-waiver rule was followed; (2) there was no decrease in the rate at which speedy trial arguments were denied; and (3) the effect of Barker v. Wingo was that it was frequently cited, but rarely as authority for startling change.

A number of courts applying the third factor in the Barker balancing test have slipped back into the demand-waiver rule. For example, the Oklahoma Court of Criminal Appeals held that a defendant must demand a trial or otherwise resist continuance of his case in order to rebut the presumption of waiver. The Supreme Court of Arkansas held that no relief is available in the absence of a request for trial. The Supreme Judicial Court of Maine continues to

143. Id. at 537 (White & Brennan, JJ., concurring).
144. See text accompanying note 22 et seq. supra.
145. 407 U.S. at 536.
147. State v. Davidson, 254 Ark. 172, 492 S.W.2d 246 (1973). But see People v. Anderson, 53 Ill. 2d 437, 292 N.E.2d 364 (1973), where, consistent with Barker, the court held only that the demand, if made, has to be based on the desire for a prompt trial.
equate a defendant’s failure to assert his right to a speedy trial with acquiescence, holding that the failure to demand amounts to a waiver.\footnote{148. State v. Carlson, 308 A.2d 294 (Me. 1973).}

Procedural barriers have also been erected by courts to deny the sufficiency of a trial demand. The defendant in Harris v. Tyson\footnote{149. 267 So. 2d 390 (Fla. 1972).} filed a printed form styled “Notice of Intention to Plead Not Guilty,” to which he added a typed paragraph stating that he requested a speedy trial. The court refused to recognize the request as a proper demand because it was embodied in another instrument and the prosecutor may not have seen it.\footnote{150. Id. at 393.} In Michigan a request by counsel for trial at the earliest possible date was construed as nothing more than a request, not an assertion of the right to speedy trial.\footnote{151. People v. Butcher, 46 Mich. App. 40, 207 N.W.2d 430 (1973).} Trial courts in Massachusetts were warned to be alert for a defendant who may only be interested in laying the groundwork for a dismissal in the event of a subsequent delay. Where a motion for trial is filed but the defendant does not seek action on the motion, the court held that an inference arises that the defense prefers no trial, and has waived its sixth amendment rights.\footnote{152. Commonwealth v. Home, 291 N.E.2d 629, 633 n.1 (Mass. 1973).}

In Colorado even the reasonable aspects of the Barker decision were ignored. The supreme court declared that the constitutional “right to a speedy trial means a trial consistent with the court’s business.”\footnote{153. 502 P.2d 422, 424 (Colo. 1972).} The burden is on the defendant who asserts a denial of a speedy trial to show facts which establish that, consistent with the court’s trial docket conditions, he could have been afforded an earlier trial. Since there was no evidence that the trial docket was not congested during the delay, the defendant was denied relief.\footnote{154. The Barker opinion specifically mentioned court congestion as partial justification for delay. 407 U.S. at 531. The Colorado court, however, looked to it in the context of the first factor, the triggering mechanism, and not as an element of the second factor, the reason for delay, as mandated by Barker. 502 P.2d at 424.}

In computing the length of delay in Davidson v. State,\footnote{155. 18 Md. App. 61, 305 A.2d 474 (1973).} the Maryland Court of Special Appeals adopted an unusual approach. A few days after his arrest in December, 1970, the defendant escaped and fled to Delaware where he was jailed for another offense in January, 1971. The defendant wrote to Maryland officials re-
questing a prompt trial in that state, but through the negligence of Delaware officials, his application was not processed until 16 months after the date of his second arrest. The Maryland court refused to take this 16 month period into account in hearing the defendant's motion to dismiss. It concluded that since Delaware, not Maryland, officials were responsible for the delay, the prosecution was not at fault.\textsuperscript{156} A similar result was reached by other courts,\textsuperscript{157} despite the fact that \textit{Barker} and other Supreme Court cases spoke of the speedy trial right in terms of total delay.\textsuperscript{158}

Several courts continue to declare that there is no burden on the prosecution to explain inordinate delays. The \textit{Barker} opinion stressed the need for flexibility in its balancing test, and suggested that the prosecution must justify the delay.\textsuperscript{159} A number of court opinions nevertheless have placed the burden on the defendant to establish prosecutorial neglect or willful delay.\textsuperscript{160}

(B) Application of Waiver by Federal Courts

\textit{Barker}'s impact on subsequent federal cases was no less dramatic than in state decisions. Courts no longer hold that an accused waives his speedy trial right simply by failure to demand one, but the practice of finding an inadequate demand continues.

For instance, in \textit{United States v. Jones},\textsuperscript{161} 15 months of a 25 month delay were attributable to a single trial judge's "heavy involvement" in other litigation. Relying heavily on \textit{Barker}, the court emphasized that Jones' failure to request trial was equally responsible for his not being tried. The court found that the accused had not been denied a speedy trial, reasoning that "it is impossible to say that, despite the attendant difficulties, appellant would not have obtained an earlier trial had he asked for it."\textsuperscript{162} The decision reinforced the \textit{Barker} holding that a defendant has some responsibility for asserting his right, but also absolved the government from all responsibility for securing a prompt trial.

\textsuperscript{156} \textit{Id.} at 69-72, 305 A.2d at 480-82.
\textsuperscript{158} See Strunk v. United States, 412 U.S. 434 (1973), where the Court observed that the defendant was responsible for ten months of delay, but did not subtract this in computing the time necessary for "presumptive prejudice."
\textsuperscript{159} 407 U.S. at 531.
\textsuperscript{161} 475 F.2d 322 (D.C. Cir. 1972).
\textsuperscript{162} \textit{Id.} at 681.
Heavy emphasis is still placed on whether the defendant requests a trial. In *Arrant v. Wainwright*, the court granted defendant’s petition for a writ of habeas corpus, finding that he had been denied a speedy trial by virtue of a two year delay. One of the reasons motivating the decision was that the defendant’s repeated demands for a speedy trial were met by silence or deliberate inattention. As other cases illustrate, the fact that the accused asserted his right may still be “counterbalanced” by other factors, and courts continue to deny relief. But the *Arrant* court may have been influenced by the state’s reason for delay: the case was fairly weak, and the prosecutor did not want to see the defendant acquitted.

The Court of Appeals for the Seventh Circuit recognized the injustice of a rule which penalizes an accused who fails to demand a trial. The court cited the fact that defendants often “nourish the hope that the government will decide not to prosecute,” and refused “to force a prospective criminal defendant to seek his own prosecution.”

Other courts, however, have found that certain defendants do not want a trial, as the Supreme Court concluded in Barker’s case. In *United States v. Saglimbene*, there was a six year delay between indictment and trial, but the defendant did not request a speedy trial until one month before his trial. The delay was caused by the government’s desire to first try a codefendant who had fled the jurisdiction. Despite the lack of any supporting evidence, the court had little trouble concluding that the failure to demand trial was the defendant’s own decision made in his self-interest. The defendant believed, reasoned the court, that the government would not press for his trial as long as his codefendant was at large. There are at least two basic weaknesses in the court’s reasoning. First, the

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163. 468 F.2d 677 (5th Cir. 1972), cert. denied, 410 U.S. 947 (1973).
164. 468 F.2d at 681.
166. 468 F.2d at 681.
168. *Id.* at 753.
169. 471 F.2d 16 (2d Cir. 1972).
170. *Id.* at 18.
facts do not reveal whether the defendant even knew that his codefendant had fled, or if that was the reason for the delay. Second, the reasoning fails to take into account the public's interest in the prompt disposition of criminal cases.

In a similar fact situation, a four year delay between indictment and trial was caused by the government's inability to locate its chief witness. The defendant did not assert his speedy trial right until after the case was finally set for trial. The facts did not reveal whether the defendant was aware of the missing witness, but the court declared:

We are thus left with the impression that he . . . never wanted a speedy trial at all since he might reasonably have hoped that the principal government witness would never be found.

VII. PREJUDICE AS A FACTOR IN SPEEDY TRIAL CASES

One noticeable result of the Barker balancing test is that more and more courts rely on the absence of prejudice to deny speedy trial claims, particularly when they cannot rely instead on the absence of a demand for trial. Prejudice to the defense was always recognized by the Supreme Court, but as pointed out in United States v. Marion, it was never given preeminence:

The major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.

Prejudice is taken most seriously when a defendant can show that

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172. Id. at 718. See also United States v. Burnett, 476 F.2d 726 (5th Cir. 1973).
175. Id. at 320. The Second Circuit flirted briefly with a different view in United States v. Lustman, 258 F.2d 475 (2d Cir.), cert. denied, 358 U.S. 880 (1958):

The government argues that appellant has not made a convincing demonstration that the delay prejudiced him in the presentation of his case and, although we agree, we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment. 258 F.2d at 477-78.

This soon gave way in United States ex rel. Von Cseh v. Fay, 313 F.2d 620 (2d Cir. 1963), where the court held that the defendant:

[H]as not demonstrated that any prejudice resulted from the delay. He was [released] on bail during the entire period in question. He does not contend that the delay interfered in any way with the preparation or presentation of his defense. We do not think that [his] general allegations regarding his inability to maintain gainful employment or regarding his mental anguish or that of his family present the type of prejudice contemplated by the Fourteenth Amendment. Id. at 624.
delay has impaired his defense. 176 The Court has, however, found prejudice in other situations; i.e., where there is long-term pretrial incarceration; 177 where a prisoner may lose his chance to serve sentence on the untried charges concurrent with previous ones; 178 and where there is public scorn, deprivation of livelihood or denial of first amendment rights. 178

Most lower courts followed the Supreme Court, finding prejudice even where there was no showing of an impaired defense. 180 A few went further and presumed the existence of prejudice from a long unjustified delay. 181 In applying the Barker balancing test, however, most courts found no such presumptive prejudice to the defense. 182 To some courts the existence of prejudice had become a sine qua non for finding that a defendant has been deprived of a speedy trial. 183 As the Supreme Court made clear in Moore v. Arizona, 184 however, prejudice to the accused is not essential in establishing a speedy trial claim.

The proper role of prejudice in speedy trial determinations is a question desperately in need of an answer. Justice Brennan raised this point in Dickey, 185 but the Court chose to ignore it in Barker.

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177. Id. at 120. The Court in Ewell denied relief on this ground, holding that no prejudice could be found in a 19 month delay because it was "insubstantial, speculative and premature." Id. at 122.
184. 414 U.S. 25, 26 (1973). The only factor equipped with presumptive effect is the first, the length of delay. See 407 U.S. at 530.

In Hoskins v. Wainwright, 485 F.2d 1186 (5th Cir. 1973), the court stated with respect to prejudice that "there must be some point of coalescence of the other three factors in a movant's favor, at which prejudice—either actual or presumed—becomes totally irrelevant . . . ." Id. at 1192.
185. 398 U.S. at 52 (Brennan, J., concurring).
The opinion in *Moore* foreclosed the possibility of treating prejudice as an indispensable element, but the fact remains that it will be weighed in the balance. In addition, the fact of prejudice or its absence can rarely be satisfactorily demonstrated. The Court has recognized the difficulty of proof in other sixth amendment contexts. A defendant generally does not have to show he was prejudiced by denial of counsel, public trial, impartial jury, or the right of confrontation. Because substantial prejudice inheres in the denial of any of these safeguards, and because evidence that their denial caused substantial prejudice is often unavailable, prejudice must be assumed, or constitutional rights will be denied without a remedy. The *Barker* Court ignored Justice Brennan's troublesome questions, and used the prejudice factor in further estranging speedy trial from other sixth amendment rights.

Prejudice should be a neutral factor in adjudicating speedy trial claims. In the face of an unreasonable delay, it ought to be presumed. There are several criteria which can be considered in adjudicating the reasonableness of a delay: (1) condition of the local trial docket; (2) manpower and caseload in the prosecutor's office; (3) defense requests for delay; and (4) nature of the case.

Several factors can be considered in the fourth criterion. In most cases the investigation will have been completed at the time of arrest or indictment, so the complexity of the case may not justify additional post-indictment delay. But the courts can legitimately consider that new or related offenses requiring investigation came to light after the arrest. Additional delay would be justified by the convenience of disposing of all known offenses at a single trial. The courts can also consider that an arrest and indictment may be necessary to toll the statute of limitations in the very early stages of the investigation of an offense of which the government was only very recently apprised.

186. See id. at 53.
187. E.g., Hamilton v. Alabama, 368 U.S. 52 (1961), where the Court specifically rejected a prejudice requirement. The same rule was adopted in Chewning v. Cunningham, 368 U.S. 443 (1962).
192. The *Barker* opinion indicated that the circumstances of the case are to be considered in weighing the prejudicial effect of the "length of delay" factor. 407 U.S. at 531.
With these criteria it would be feasible, for example, for a court to conclude that, in a particular jurisdiction, it is reasonable to try a robbery or burglary case within 60 days or 90 days of indictment. If a case were tried within that period and a defendant still wanted to raise a speedy trial claim, he would bear the burden of proving that the delay was unreasonable. But if the delay exceeded reasonable limits then the government would have the burden of showing that the additional delay was reasonable. The controlling factor is not the presence or absence of prejudice, but rather the reasonableness of the delay. If the delay is reasonable, then the defendant has not been deprived of a speedy trial. But the converse must also be true, regardless of the prejudice factor.

VIII. STATUTORY SOLUTIONS: THE FEDERAL SPEEDY TRIAL ACT

The Barker decision rejected as a "rigid rule" the suggestion that the Court interpret the sixth amendment in terms of specified time periods. Although recognizing that such rulemaking would more clearly identify instances of speedy trial violations and provide ease of application, the Court proceeded to announce its balancing test.

The imprecision inherent in the Barker test was subsequently recognized by Congress in its deliberations on federal speedy trial legislation. The House Committee on the Judiciary found the test unwieldy and incapable of insuring fair results in all cases. It stated that the Barker test provides:

[N]o guidance to either the defendant or the criminal justice system. It is, in effect, a neutral test which reinforces the legitimacy of delay.

Accordingly, Congress passed the Speedy Trial Act of 1974,

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194. Id. at 523.
196. Id.
197. It must be noted that the Barker decision was not the sole impetus for Congressional action. The House specifically found that Rule 50(b) of the Federal Rules of Criminal Procedure, which required each district court to adopt a plan for prompt disposition of criminal cases, was inadequate. This criticism was based on the lack of uniformity of enforcement inherent in permitting broad discretion for extending time limits, and on the fact that no sanction was specified for failure to comply with such rules. See H.R. Rep. No. 1508, 93d Cong., 2d Sess. 11-13 (1974). It is possible, then, that Congress was also concerned with unmanageable caseloads, and that the Speedy Trial Act was calculated to deal with problems not directly related to Barker.
which sets forth uniform time limits for the disposition of federal speedy trial claims.

The Act mandates that all criminal cases brought to federal courts must proceed to trial within a specified time after arrest. In all cases involving misdemeanors, the indictment or information must be filed within 30 days of arrest; in the case of felonies, there is an additional 30 day period if there is no grand jury in session.\textsuperscript{199} Arraignment must occur within ten days of the filing of the indictment or information, with trial 60 days thereafter if a plea of not guilty is entered.\textsuperscript{200}

The Act goes further and enumerates certain causes of delay which will take a case out of its operation.\textsuperscript{201} For example, physical and mental examinations of the accused, trial on other charges, interlocutory appeals, or hearings on pre-trial motions constitute permissible delay.\textsuperscript{202} Proceedings wherein the accused has been joined for trial with a codefendant are also permitted.\textsuperscript{203} Where, however, the prosecution, the court on its own motion, or the accused requests a continuance, the court may grant the request and exclude the time from computation if "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."\textsuperscript{204} The Act specifies three factors to be considered in such a determination,\textsuperscript{205} and expressly excludes any

\begin{itemize}
\item \textsuperscript{199}18 U.S.C.A. § 3161(b) (Supp. 1975).
\item \textsuperscript{200}Id. § 3161(c). In the event of a mistrial or order for a new trial, retrial must take place within 60 days of the order. Retrial following appeal or collateral attack must occur within 60 days unless the court, in its discretion, extends the period because of absent witnesses or other factors. Id. § 3161(e).
\item \textsuperscript{201}Id. § 3161(h). The effect of such causes is that the time thus spent will not be included in the computations which, in all other respects, remain subject to the provisions of § 3161(a) et seq.
\item \textsuperscript{202}Id. § 3161(h)(1).
\item \textsuperscript{203}Id. § 3161(h)(7).
\item \textsuperscript{204}Id. § 3161(h)(8)(A).
\item \textsuperscript{205}The factors are:
\begin{enumerate}
\item Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
\item Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.
\item Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government. Id. § 3161(h)(8)(B).
\end{enumerate}
\end{itemize}
consideration of crowded dockets, unavailable witnesses or the government’s lack of “diligent preparation.”

The force of the Act is found in the presence of sanctions by which the charge against an accused may be dismissed. If no indictment or information is filed within 30 days, the charges shall be dismissed or otherwise dropped. The failure to come to trial within 60 days following arraignment will result in dismissal of the indictment or information upon motion by the defendant. Thus, automatic dismissal will only occur where no indictment or information is secured within 30 days of arrest. If the defendant fails to move for dismissal prior to the trial date or entry of a plea, he will be held to have waived his right.

In either case, the court may dismiss “with prejudice.” The court is given discretion on this point, but must consider three factors: the seriousness of the offense; the facts and circumstances which led to dismissal; and the fundamental notions of justice and policy expressed in the Act. This provision offers the court and the government wide flexibility which is likely to develop into a major loophole for appeals to “societal interests” in the prosecution of criminal defendants. However, legislative history indicates that Congress intended simple dismissal to serve as a bar to all future prosecution based on the same conduct. A dismissal with prejudice, on the other hand, was intended to permit reprosecution only with respect to criminal conduct which: (1) occurred prior to such dismissal; (2) was unknown to the prosecution when the original indictment was filed; and (3) can be proved by evidence which was reasonably discoverable by due diligence. If courts follow the legislative intent of Congress, defendants will be protected from reprosecution on lesser-included offenses and other statutory violations arising out of the same occurrence. This will prevent the government from drawing its indictments in such a way as to enable it to circumvent the sanctions.

206. Id. § 3161(h)(8)(C).
207. Id. § 3162(a)(1). Note that the sanctions are not effective until July 1, 1979. See note infra.
208. Id. § 3162(a)(2).
209. Id.
210. Id. § 3162(a).
211. Id.
213. Id.
The time limits and sanctions of the Act were expressly designed to go into effect gradually so as not to "empty the jails" with one stroke. This "phase-in period" covers a span of four years and implements the Act on a step by step basis.214 There is also the requirement of a "planning process"215 reminiscent of the now-discredited Rule 50(b).216 The purpose of this latter devise is to implement a scheme through which the ability of the individual courts to conform to the requirements of the Act will be reported to Congress. Thereafter, Congress will be in a position to accurately assess the impact of the Act and take whatever steps necessary in the form of remedial legislation.217

While the Speedy Trial Act gives every indication that it will undo the injustice inherent in the Barker decision, its effects will not be fully felt until after July 1, 1979. The necessity of the phase-in period and the moratorium on sanctions is obvious, given the likelihood of a systemic breakdown had immediate imposition been ordered by Congress. In the interim period, however, the Barker decision, with its inadequate treatment of waiver and prejudice, will remain a stumbling block for state and federal criminal defendants.

IX. CONCLUSION

In all fairness to the Supreme Court, it must be said that the issue it faced in Barker was extraordinarily difficult. Aside from abstract notions of due process, there is compelling reason in the rule which balances the speedy trial guarantee against society's abhorrence of the remedy of dismissal. Unlike the situation involving coerced confessions, where evidence is excluded but trial proceeds,218 complete

214. The first provision to go into effect is an interim 60 day time limit for the period between arrest and indictment, effective July 1, 1976, through June 30, 1977. The specified time then drops to 45 days until June 30, 1978, and 35 days until June 30, 1979. Thereafter the 30 day limit applies. 18 U.S.C.A. §§ 3161(f), 3163(a)(1) (Supp. 1975).

The time limits for the period between arraignment and trial go into effect on July 1, 1976, providing for a 180 day limit until June 30, 1977. The time drops to 120 days commencing July 1, 1977, until June 30, 1978, and then 80 days until July 1, 1979, when the phase-in period ends and the 60 day limit goes into effect. Id. §§ 3161(g), 3163(a)(2).

The sanctions provision does not go into effect at all until July 1, 1979. Id. § 3163(c). The House Judiciary Committee rejected interim sanctions, expressing the hope that "each district . . . attempt to do all it can to meet the time limits," and thus hasten implementation. H.R. Rep. No. 1508, 93d Cong., 2d Sess. 32 (1974).

215. Id. § 3165 et seq.

216. See note 197 supra


dismissal is the only practical relief available. The federal Speedy Trial Act is a model of due process protection, and with its slow implementation, the criminal justice system will be able to adjust to the change and protect both the defendant’s and society’s interests.

In the meantime, however, Barker is law, and for countless defendants in state courts the Speedy Trial Act will have no effect. The sixth amendment right to speedy trial will continue to afford protection in only the most extreme cases, as courts have applied Barker with “freakish” inconsistency.

One of the major problems with the Barker balancing test is that the inquiry is focused too heavily on “presumptive delay,” and the question becomes whether or not the delay has a substantial relationship to the ability of the accused to defend himself. The emphasis is thus centered on the prejudice factor, with the result that courts are actually determining whether there has been a due process violation under the fifth or fourteenth amendment. The unqualified language of the sixth amendment should never have been confused with due process, especially where the standards are vague and ill-defined.

That waiver is given special treatment under one “fundamental” right and not others is one indication that Barker is heavily result-oriented and that it cannot withstand critical analysis. Barker purported to reject the demand-waiver rule, but simply replaced it with the “failure to assert” factor which changes only the means but not the end of prior doctrine. Its greatest failing is that prosecutors are under no increased pressure to dispose of criminal cases, and there is no certainty in result.

It can fairly be said that the Supreme Court has not yet defined the contours of the speedy trial guarantee. Speedy trial is, as Barker declared, “slippery” and “vague,” but so are the Court’s standards for determining when it has been violated. If being vague and slippery sets speedy trial apart from other rights, it should be separate but at least equal.
RECENT DEVELOPMENTS IN THE NEGLIGENT INFILCTION OF EMOTIONAL SHOCK

Murray Greyson*

I. INTRODUCTION

Historically, the courts have been reluctant to afford remedies for negligently inflicted emotional harm. Although many courts have been willing to allow recovery for mental damages from wanton, willful and reckless acts, with or without physical impact on a plaintiff, negligence claims for mental damages have been dismissed for a variety of reasons, which have included: the damages are not measurable in terms of money; are too trivial; are too remote; and are not susceptible to clear proof, and allowing such claims would open the door to vexatious litigation. In recent years, however, the willingness of courts to impose liabilities for mental damages has increased significantly—due in part to an increasing societal awareness that emotional illness can be as debilitating as many physical injuries or illnesses, and to the fact that emotional illness can now be demonstrated by relatively clear and convincing proof.

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An excellent and brief summary of the historical development of case law in this area is also given in W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 54 (4th ed. 1971) (hereinafter cited as PROSSER).


4. See generally Comment, Negligently Inflicted Mental Distress: The Case for an Inde-
Unfortunately, this area of tort law is still beset with conflict. Although the long-term directions in which courts appear to be moving are clear, a great deal of uncertainty still exists about the short-term response of the courts to mental damage claims. Thus, it is of interest to examine this area of tort law in relation to recent cases which have significantly affected it.

The purpose of this article is to examine the law affecting the liabilities imposed for the negligent infliction of emotional shock. Part II provides an analysis of the historical development of this cause of action from its earliest appearance to its general recognition.

5. At the time of the publication of his HANDBOOK in 1971, Prosser indicated that 12 states (Arkansas, Florida, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Missouri, Ohio, Virginia, and Washington) still required a physical impact in order for a plaintiff to recover damages for emotional harm with subsequent physical consequences. Prosser at 331, n. 64. An additional state not mentioned by Prosser—Georgia—also followed the “impact” rule. In the period since, Maine, in Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970); Michigan, in Daley v. LaCroix, 384 Mich. 4, 179 N.W.2d 390 (1970); and Virginia, in Hughes v. Moore, 214 Va. 27, 197 S.E.2d 214 (1973), have specifically abolished the “impact” rule. However, Florida, in Johnson v. Herlong Aviation, Inc., 291 So.2d 603 (Fla. 1974); Georgia, in Massey v. Perkerson, 129 Ga. App. 895, 201 S.E.2d 830 (1973); and Indiana, Jeffersonville Silgas, Inc. v. Wilson, 290 N.E.2d 113 (Ct. App. Ind. 1972), have specifically re-emphasized the requirements for physical impact for recovery.


The foregoing, although differing on the validity of a basis for a cause of action, uniformly require some showing of physical injury resulting from the mental shock before a recovery will be permitted.
as a mature legal doctrine.7 Part III discusses recent case law which has dealt with three critical problem areas: the requirement that there be associated physical injuries; the requirement of physical impact on the plaintiff; and the question of liability arising from harm or peril to third persons. The article concludes in Part IV with a discussion of the present state of the law, and possible future case law developments.

II. HISTORICAL OVERVIEW

(A) The English Approach

In 1888, Mary Coultaas and her husband approached a railroad crossing in a horse-drawn buggy. The gatekeeper raised the gate on their side of the railroad crossing, and as they started to cross, a train approached the crossing. Instead of quickly opening the gate on the other side to let them through, the gatekeeper called to the husband to go back. The husband, instead of going back, drove the buggy close against the closed gate, shouting at the gatekeeper to open it. Although the gate was not raised, there was sufficient room for the train to pass without hitting the buggy. Mary Coultaas was terrified by the incident and sustained a nervous shock with alleged physical consequences. She and her husband were awarded damages for the mental shock incurred in the incident.

On appeal, the judgment was reversed.8 The appellate court held that damages arising from mere sudden terror, nervous and mental shock, unaccompanied by actual physical injury, could not under any circumstances result from the gatekeeper's negligence. It further stated that difficulties in determining whether such injuries were caused by the negligent act, a problem which was encountered in alleged physical injury cases, would be greatly increased, and a wide field would be opened for imaginary claims.

Thirteen years later, in Dulieu v. White & Sons,9 this decision was reversed. In Dulieu the plaintiff allegedly became ill and delivered a baby prematurely because of the fright suffered when a horse-drawn van was negligently driven into a building in which she was tending bar. She was awarded damages for the mental shock and consequential physical injuries. The court stated that fear taken

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7. The status of case law prior to 1970 is well documented in Prosser, supra note 2, at § 54.
alone falls short of being actual damages, since fear can only be proven by the physical effects it produces. But the fear that produces actual physical injury does provide a basis for a cause of action, even where there has been no physical impact from the negligent act. In an important caveat, the court stated that it was not prepared to hold that a plaintiff was entitled to maintain an action for damages in situations in which emotional shock to an individual resulted from observing damage to a third person, or to a plaintiff’s property.

A basis for the award of damages for the emotional shock caused by witnessing a peril to a third person was established in *Hambrock v. Stokes Bros.* 10 Here, the plaintiff sued for compensation for the loss of his wife, who allegedly died as a result of nervous shock caused by a runaway lorry that ran into a house close to where she was standing. The issues in the case were somewhat clouded, since it was not clear whether the wife’s shock was due to a fear of injury to herself or to her children, who were on their way to school on the street when the incident occurred. The court concluded that a cause of action would have existed in either case. It stated that a cause of action would lie in any situation in which the plaintiff proved that the death of his wife resulted from the shock caused by her fear of physical injury to herself or to her children. An important caveat in the opinion was that the wife would have to see or be aware of the danger with her own unaided senses and not from something told to her by someone else in order to recover.

In *Owens v. Livermore Corp.*, 11 the concept of emotional damage was carried somewhat further. In this case, a hearse transporting a coffin which was being followed by a vehicle carrying the plaintiffs (the mother, uncle, and cousin of the deceased, and the wife of the cousin) was struck by a tram car. The hearse was badly damaged, however the coffin was not ejected from the vehicle. Only one of the plaintiffs, the uncle, saw the actual impact. The other three saw its effects immediately after the collision. The suit for damages alleged that the plaintiffs had witnessed and were horrified by the accident, and that the deceased’s mother had suffered from severe shock and collapse as a consequence of the accident.

The appellate court stated that mental or nervous shock, if caused by the defendant’s negligent act, was as real a damage as a broken

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limb and as ascertainable by a physician. It cautioned that alleged shock resulting from apprehension about something less important than human life might well be a material factor in considering whether an allegation could be proved. However, the court went on to state that the fear of unfounded claims should not be a bar where the facts alleged are by their nature susceptible of being proved. Accordingly, it affirmed the judgment. The basis for its holding was that the plaintiffs might have been of a class of persons particularly susceptible to shock from a disruption of their mourning activities, and that since the lower court had found that they were, the judgment would not be disturbed.

The recovery of damages for the negligent infliction of emotional shock arising from injury to a third person was sharply limited by an English court in Bourhill v. Young. A young woman alighting from a tram car witnessed the gruesome collision of a motorcycle and an automobile some 40 feet from where she stood. She sued for shock and fright, alleging that the shock from the sight of blood at the scene of the accident was the cause of her having delivered a stillborn child about a month after the accident. Since her fright did not involve fear of immediate personal bodily harm, she was denied recovery. In an opinion affirming the lower court decision, the appellate court held that the issue in the case was whether there was a duty owed by the defendant's deceased to the plaintiff. It concluded that there was none, since no physical injury to the plaintiff could reasonably have been anticipated by the deceased from his negligent act.

The liability for emotional shock arising from injury to a third person was further limited in King v. Phillips. In this case, a taxi-cab struck plaintiff's son who was on a tricycle. The boy and his tricycle were only slightly injured, and the boy immediately ran home. Plaintiff, the boy's mother, heard his screaming, looked out from an upstairs window some 70 yards from the accident, and saw the tricycle under the cab. She did not see the boy. As a result of the incident, she alleged that she suffered nervous shock and trembling fits, and had to consult her physician for approximately three months.

The lower court denied recovery because the plaintiff was wholly outside of the area and range of reasonable anticipation. In dismis-

12. [1943] A.C. 92 (1942) (Scot.).
ing the appeal, the court stated that the taxicab driver had a duty to the boy and other people on the street in the vicinity, but not to the mother in the window. She was not on the highway; he could not know she was at the window; and there was no reason for him to anticipate that she would see the taxicab at all. One judge distinguished this case from *Hambrook* on the basis that the defendant in *Hambrook* admitted negligence, an admission which presupposed a duty towards the plaintiff. The second judge distinguished the case from *Hambrook* in terms of foreseeability, i.e., the taxicab driver could not reasonably be expected to foresee that backing the vehicle might seriously shock a mother in the area of danger.

Further clarification of the third-person problem was set forth in *Boardman v. Sanderson.* Here, the defendant crushed the foot of plaintiff's eight-year-old son while pulling his car out of a commercial garage. The parties had gone to the garage together, and the boy had been left unattended while the father paid the garage bill. When his son screamed, the plaintiff dashed out of the garage office and saw the boy with his foot under the car wheel. The plaintiff later developed symptoms of shock and, together with his son, brought an action for damages.

In affirming the judgment for the father, the court reinforced the concept of foreseeability, stating that the defendant could reasonably have foreseen that, were he negligent, the father, who was only a few yards away, would immediately move to the scene of the accident, and might be shocked by the event. The court also held that a duty would be owed by the defendant to the son as well as near relatives of the boy whom the defendant knew were on the premises, within earshot, and likely to come upon the scene if any injury befell the child.

Thus, by 1964, English case law had developed four significant rules. First, a cause of action existed for the negligent infliction of emotional shock in situations in which physical symptoms arose out of the emotional shock. Second, physical impact against the plaintiff was not a requirement for recovery. Third, a near relative could recover for emotional shock arising out of injuries to a third person, provided that the relative observed the incident with his or her own senses, and the emotional shock could reasonably be foreseen by the defendant to be a consequence of his negligent act. Fourth, damages for emotional shock arising out of apprehension of danger to other

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than human life might be recovered if a sufficient basis for the susceptibility of the plaintiff was established.

(B) The American Approach

Case law in America in the area of negligent infliction of emotional shock closely followed the English example. After Victorian Railways Commissioners v. Coultas, the early American cases completely rejected recovery for the physical consequences resulting from the negligent infliction of emotional shock. Among the reasons given were: mental disturbance could not be measured in terms of money and so could not of itself serve as a basis for recovery; the physical consequences of mental damage were too remote and therefore not proximately caused by the negligent act; and a flood of litigation would follow decisions permitting recoveries in such situations. However, as with the English experience, these decisions were to undergo significant changes over the next 70 years. To discuss these changes, it is necessary to treat them separately under three distinct headings: mental disturbance alone; mental disturbance with associated physical injury; and mental disturbance arising from harm or peril to a third person.

(1) Mental Disturbance Alone

With respect to pure mental disturbance without some associated physical injury or physical consequence, it was generally held before 1970 that recovery would not be permitted for fright, annoyance or mental distress caused by an unpleasant incident, or an emotionally disturbing contact with the person of the plaintiff. However, recovery has been allowed for pure mental disturbance arising out of negligent acts in three areas: wanton, willful and reckless torts, the negligent transmission of messages, and the negligent treatment of corpses. As has been stated by Prosser, all of the cases in which recovery has been permitted appear to have "... an especial likelihood of genuine and serious mental distress, arising from the special

15. The American case corresponding to the English decision in Hambrook is Dillon v. Legg, 69 Cal. Rptr. 72, 441 P.2d 912 (1968). A period of 43 years elapsed between the two.
18. PROSSER, supra note 2.
19. See cases cited supra note 1.
20. PROSSER, supra note 2, at 329.
21. Id. at 329-30.
circumstances, which serves as a guarantee that the claim is not spurious.” The theory in these cases is based on the idea that the nature of the invasion of the individual’s person, security or property insures that a claim is not fraudulent.

(2) Mental Disturbance Associated with a Physical Injury

Where a physical injury has been associated with an emotional shock, much more liberal treatment has been afforded the plaintiff. When a physical injury from some physical impact with the plaintiff has accompanied the emotional damage, courts have almost universally permitted recoveries for “parasitic” emotional effects, including fright, concern as to the effects of the injury, nervousness, and humiliation caused by the physical disfigurement of the injury. Here, as in the physical invasion cases, the physical injuries constituting the primary cause of action appear to insure that the mental injury is not spurious. However, when there was no physical impact with the person of the plaintiff, the decisions prior to 1970 were in conflict. Following the early English cases, the majority of American courts initially refused to permit recovery. However, to alleviate the harshness of the impact rule, many courts held that impact could consist of “... a slight blow, a trifling burn or electric shock, a trivial jolt or jar, a forcible seating on the floor, dust in the eye, or the inhalation of smoke.” The utter foolishness of the application of the requirements for impact was reflected in a 1928 case, Christy Bros. Circus v. Turnage, in which impact was found when a horse evacuated its bowels into the lap of the plaintiff. By 1970, only 13 states still maintained a requirement for physical impact with the plaintiff.

(3) Emotional Shock Arising from Injury or Peril to a Third Person

Where mental disturbance and its physical consequences were not caused by fear for the plaintiff’s own safety, but by the injury or peril of harm to a third person, there was almost universal agreement prior to 1968 that there could be no recovery. Those courts in which impact was required naturally denied recovery. However, even in state courts in which there was no impact requirement, the
general reaction was to deny recovery. Typical of the reasons usually given for the denial of recovery are those contained in Waube v. Warrington,28 Cote v. Litawa,29 and Bourhill v. Young.30 In these cases, it was held that since the defendant could not reasonably foresee any harm to the plaintiff, he owed no duty to him. In a limited number of situations, where the plaintiff himself was in peril by the defendant's negligent act, and suffered mental shock and associated physical consequences as a result of his fear for another, some courts recognized a right to recovery.31 Prosser has explained such cases on the basis of a breach of duty to the plaintiff, i.e., once an initial duty to the plaintiff has been breached by placing him in peril from the negligent act of the defendant, the problem becomes one of the manner in which the foreseeable harm occurs.32 The acceptance of this view for recovery has not been universal.

The landmark case of Dillon v. Legg,33 decided in 1968 in California, marked the first major breakthrough in the area of third party injury. Here, the plaintiff sued for emotional and physical shock after seeing her child run down and killed while crossing a street. The mother herself was at no time in peril from the negligent acts of the defendant. In reversing the judgment of the lower court, Judge Tobriner stated that the concept of duty was imposed by courts in the 19th Century in an effort to curtail the propensity of juries toward liberal plaintiff verdicts.34 He also stated:

In the enclosed feudal society, the actor bore responsibility for any damage he inflicted without regard to whether he was at fault or owed a "duty" to the injured person.35

This statement, implying that a person has a duty to the whole world provided the damage resulting from his negligent acts is foreseeable, resembles that of Judge Andrews in Palsgraf v. Long Island R.R. Co.36 In permitting the cause of action, Judge Tobriner defined the considerations that must be used to determine liability as:

(1) The location of the plaintiff with respect to the accident,

28. 216 Wis. 603, 258 N.W. 497 (1935).
30. [1943] A.C. 92 (1942) (Scot.).
32. PROSSER, supra note 2, at 333.
33. 69 Cal. Rptr. 72, 441 P.2d 912 (1968).
34. Id. at 76, 441 P.2d at 916.
35. Id.
i.e., was the plaintiff located near or far from the accident?
(2) The manner in which the plaintiff learned of the accident, i.e., did the plaintiff learn or become aware of the accident through his own contemporaneous observations or through his own senses, or was the plaintiff informed of the event by someone else?
(3) The relationship of the plaintiff to the injured party, i.e., was the plaintiff closely or distantly related to the injured party?

In evaluating the facts of the situation, the court concluded that the negligent driver should have reasonably foreseen that the mother of a young child would be nearby and that she would be shocked by any injury to the child.

The decision in Dillon was followed in California in Archibald v. Braverman, where plaintiff sued for emotional damages which were the result of having seen her son's hideous wounds following a gunpowder explosion. Plaintiff had not seen the actual explosion, but saw her son moments after the blast. Citing Dillon, the court concluded that the tortfeasor might have reasonably expected the mother of a thirteen-year-old child to be close by and suffer emotional trauma upon observing such an event. With respect to the requirement for contemporaneous observation, the court held that the shock of seeing the child immediately after the accident was as profound an experience as the witnessing of the actual accident and therefore could be considered a contemporaneous observation of the event. It should be noted that in dicta, the court observed that selling gunpowder was unlawful in California, and that California law would permit recovery for emotional trauma resulting from trespass or nuisance, even without physical injury. This comment might indicate the reasons for the extension of the Dillon tests by the court.

The concept formulated in Dillon and Archibald was not quickly followed elsewhere. By 1970, three states, New Hampshire, Tennessee, and Vermont had rejected the California rule.

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(C) Negligent Infliction of Emotional Shock as of 1970

Despite conflicting jurisdictional views, the trend and general state of the law affecting the negligent infliction of emotion shock were relatively clear by the end of 1970. In the area of pure emotional shock, it was generally agreed that except for wanton, willful or reckless acts negligently perpetrated, recovery would be denied if no physical injury or consequence accompanied the emotional shock. However, a number of case decisions had appeared in which some of the language provided a basis which would permit recovery for pure emotional shock in situations in which the damage was susceptible to clear determination. Where emotional shock was accompanied or followed by physical consequences, there was general agreement that recovery would be allowed, depending on the requirements for physical impact. With regard to physical impact, the 37 states that had abolished the impact requirement were joined by Michigan and Maine. California remained the only state that would permit the recovery of damages for emotional shock arising from injuries or peril to a third person, where the plaintiff himself was not endangered.

III. Recent Case Law Developments

(A) Mental Disturbance Alone

Recent cases dealing with pure mental disturbance are in dispute. In Wetzel v. Gulf Oil Corp., a 1972 case decided under Arizona law, the court held that injuries incurred were trivial and that injuries not associated with physical injuries or consequences were not compensable. However, later in the opinion, the court cited the Restatement view:

"[A] long continued mental disturbance, as for example in the case of repeated hysterical attacks, or mental aberration, may be classified by the courts as illness, notwithstanding their mental character." Sometime later, in Valley National Bank v. Brown, in an action

41. Petition of the United States, 418 F.2d 264 (1st Cir. 1964); Wallace v. Coca-Cola Bottling Plants, Inc., 269 A.2d 117 (Me. 1970).
45. 455 F.2d 857 (9th Cir. 1972).
46. RESTATEMENT (SECOND) OF TORTS § 466 A, comment c (1965).
47. 455 F.2d at 861-62.
arising out of a wrongful garnishment of funds, an Arizona state court declared that where no malice is shown, no damages can be recovered except where there is a physical invasion of the person or the person's security. The words "personal security" were not defined.

In California, the holdings of the courts have been far more definitive. In *Capelouto v. Kaiser Foundation Hospitals*, the court denied recovery for a claim of mental damages arising out of a third-party situation. The court cited *Dillon v. Legg*, stating that there can be no recovery where there are no physical manifestations of the alleged emotional injury.

Florida also appears to deny recovery where there are no physical symptoms. In *Arcia v. Alttagracia Corp.*, the plaintiff instituted suit for mental distress arising out of an accident in which the ceiling of a bathroom collapsed. The court denied recovery stating that there was neither physical injury nor shock. The opinion held that there must be physical injuries associated with mental shock.

Damages for embarrassment or mental anguish without physical injuries are recoverable in Louisiana when such damages arise out of a wrongful seizure of property, or occur while an ordeal caused by the negligent act of the defendant is in progress. In the case of the "ordeal in progress" holding, the plaintiff suffered fear and mental anguish when his boat almost sank as the result of a defect in construction. A similar result was reached in *McClellan v. Highland Sales & Investment Co.*, where a widow recovered damages for mental anguish caused when she discovered that the grave site next to her husband's, reserved for herself, was occupied by another body. The court predicated recovery on a showing that plaintiff's fear and anguish occurred while the ordeal was in progress.

Recovery for mental damages not associated with physical injury has been specifically rejected in the District of Columbia, Rhode Island, Virginia, Wisconsin, Nebraska, and Delaware. How-

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49. 103 Cal. Rptr. 865, 500 P.2d 880 (1972).
50. 69 Cal. Rptr. 72, 441 P.2d 912 (1968).
54. 484 S.W.2d 239 (Mo. 1972).
ever, in both Nebraska and Delaware, the courts, in rejecting the mental damage claims, commented that recovery for the grief associated with a wrongful death would probably be allowed. In the Delaware case the court stated:

The debilitating effect of grief and its resultant depression, however, are no less real than pecuniary losses. . . .

Louisiana also permits recovery for the mental suffering associated with a wrongful death by the highest ranking survivor.

The growing dissatisfaction with the older rules denying recovery for mental damages unless associated with physical consequences is illustrated by the opinions in three cases. In Wilson v. Lund, a 1971 wrongful death action in Washington state, the court talked about the fact that there was no longer a substantial justification for the denial of recovery for purely emotional injuries. The court noted that:

Modern-day, advanced psychiatric-psychological knowledge discounts former somewhat limited and provincial limitations surrounding proof or disproof of such injuries. And, it should be emphasized that 'intangible-emotional' injuries can and do constitute real and significant harms.

A federal district court in Louisiana, applying maritime law to a situation in which survivors of a collision between two vessels claimed damages for emotional trauma, held that the physical damages of the survivors were minimal and that the emotional trauma and its lasting impact on the survivors were of much more significance. Perhaps the clearest application of recovery for pure emotional damages was demonstrated in Toms v. McConnell, a Michigan case, in which the court, in allowing recovery for emotional damages in a third-party injury case, held that the "inability of plaintiff to function and her continued state of depression" were clearly compensatory.

58. Redepenning v. Dore, 56 Wis. 2d 129, 201 N.W.2d 580 (1972).
61. Id. at 812.
63. 80 Wash. 2d 91, 491 P.2d 1287 (1971).
64. Id. at 97, 491 P.2d at 1291 (emphasis in original).
65. In re Sincere Navigation Corp., 329 F. Supp. (E.D. La. 1971). Note that in this case the survivors suffered very minor physical damages, i.e., red and irritated eyes, etc.
67. Id. at 657, 207 N.W.2d at 145.
Recent commentary has suggested that emotional well-being is a critical requirement for modern living. In a recent article commenting on mental shock as an independent tort, the author stated:

In our increasingly complex society, the orderly and normal functioning of a man's mind is as critical to his well-being as physical health. Indeed, a sound mind within a disabled body can accomplish much, while a disabled mind in the soundest of bodies is rarely capable of making any substantial contributions to society. It would seem logical, therefore, that the same protections extended to physical well-being also should be accorded mental equilibrium.

The author went on to point out that modern medical science has the capability of "satisfactorily establishing the existence, seriousness, and ramifications of emotional harm." In view of this, courts can no longer deny recovery on the strength of precedents which point to the difficulty of proving emotional damages.

Some of the more recent decisions, although still representing a very small minority view, appear to reflect a changing attitude of the courts toward pure emotional shock. It is evident that there is a growing concern and dissatisfaction with the old rules and indications are that the future treatment of negligently inflicted emotional shock will increasingly be dealt with on the basis that such harm can be objectively evaluated by the courts.

(B) The Impact Rule

In recent decisions the impact rule continues to be eroded. In *Johnson v. Herlong Aviation, Inc.*, Florida completely rejected the requirement for physical impact. Plaintiff's mental damage resulted from fright produced by severe vibrations which developed in an aircraft during a flight. In its opinion, the court held that the impact rule no longer served a useful purpose.

North Dakota also rejected the rule. In a third-person injury case, the court, although denying recovery, held that a sufficient basis for a cause of action would exist if the plaintiff were in the "zone of danger" created by the defendant's negligent act.

The most recent holding rejecting the impact rule was handed
down in Virginia. The plaintiff in this action was frightened when a truck collided with her front porch. She was standing in a doorway to the house when the accident occurred. She alleged that, as a result of the incident, she suffered mental shock which prevented the continued nursing of her baby. The court held that physical impact with the plaintiff was no longer required. However, the court limited the rule to situations in which the plaintiff was not an unusually sensitive person, or where the defendant had prior knowledge of such sensitivity and in which a relatively normal person would have been adversely affected.

Indiana and Georgia continue to maintain a requirement for impact. The Indiana court held that Indiana law does not recognize mental damages as an independent tort unless accompanied by a breach of some other duty to the plaintiff. In the Georgia situation, the court reiterated a requirement for physical contact except in cases of willful or wanton negligence.

(C) Mental Shock Arising from Peril or Injury to Third Person

The application of Dillon to emotional shock arising from the contemporaneous observation of injury or peril to a third person has undergone continual development in California since 1970. In Deboe v. Horn, in which the plaintiff alleged mental shock from seeing her injured husband in the hospital emergency room, the court denied recovery, holding that there was no contemporaneous observation by the wife of the husband's injury, and that no liability would lie where the wife was informed of the injury and summoned to the hospital by someone else. Recovery was also denied in Wynne v. Orcutt Union School District, in which a father suffered alleged mental injuries when a teacher disclosed to the son's classmate that the son had a fatal disease, and the classmate in turn related the information to the father.

Recovery was also denied in Capelouto v. Kaiser Foundation Hospitals, in which the parents of a terminally ill child suffered distress from observing the child's slow deterioration in the hospital. The denial of recovery was based on the Dillon tests which require

75. 16 Cal. App. 3d 221, 94 Cal. Rptr. 77 (1971).
77. 103 Cal. Rptr. 865, 500 P.2d 880 (1972).
that the mental damage be accompanied by physical consequences. In *Jansen v. Children's Hospital Medical Center*, recovery was denied because the mental damages did not result from the contemporaneous observation of a sudden and brief event in which the child was injured. In *Jansen*, the illness of the child was erroneously diagnosed, and the mother allegedly suffered mental damage from observing the child waste away and die while in the hospital.

Perhaps the most confusing result of the application of *Dillon* was in *Rodriguez v. Bethlehem Steel Corp.*, a 1973 case. In this action a wife was denied recovery for personal grief, fear, and mental and emotional distress suffered because of an injury to her husband. It is not evident from the opinion whether recovery was denied for lack of physical consequences, noncontemporaneous observation of the injury, or the lack of closeness of the relationship of the husband and wife.

Outside of California there has been significant application of *Dillon*. In *Toms v. McConnell*, a Michigan court held that the mother of a child struck and killed by a panel truck, who had suffered mental anguish from observing the incident, could recover. In its opinion, the court held that the plaintiff did not have to be in the zone of danger if the mental or emotional damage occurred from observing an injury to an immediate member of the plaintiff's family. In this situation the mother observed her nine-year-old daughter being struck by the truck as the child alighted from a school bus. The court cited *Dillon* and stated that the damage to the mother was foreseeable.

A district court in Rhode Island, applying Rhode Island law in *D'Ambra v. United States*, also looked to the *Dillon* case. However, it redefined one of the foreseeability considerations of *Dillon*, i.e., the foreseeable presence of the party suffering the mental damage in witnessing the injury to the third person. In *D'Ambra*, the court held that the factors that should be considered are the age of the injured party; the character of the neighborhood and defendant's familiarity with the neighborhood; the time of day of the accident; and all other circumstances that would put the defendant on notice that a parent or close relative would be in the vicinity. The

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court held that the presence of the parent in the vicinity could not be presumed from the relationship of the mentally damaged party and the injured person.

In *Schurk v. Christensen*, 82 a Washington court denied recovery to a mother whose child was sexually molested by a babysitter. In its opinion, the court, citing *Dillon*, noted that the parent was not near the scene of the molestation, did not observe the act contemporaneously, and had been informed of it at a later date by someone else.

*Dillon* has also been used as a test in actions to recover mental damages under federal tort actions. In *Beauland v. Chicago R.I. & P.R.R.*, 83 the court held that the foreseeability of mental damage to the plaintiff from the injury to the third person was an essential ingredient for recovery. Citing *Dillon* and *D’Ambra*, the court denied recovery to the plaintiff for mental damages arising from injuries incurred by a co-worker in a train accident. The court held that the plaintiff did not observe the injuries as they happened and that there was no basis to argue that the friendship was close enough to warrant recovery under the *Dillon* test.

The language in a New Mexico case also appears to draw support from *Dillon*. 84 In this case the plaintiff brought suit for the mental damages arising from the death of her offspring bicyclist caused by the negligent act of the defendant. The plaintiff in this situation did not see the accident, but heard the impact of the vehicle against the child and saw his body fly through the air. The court denied recovery because the plaintiff did not allege any physical consequences. In its opinion the court made specific reference to *Dillon* three times, but found the situation distinguishable from the *Dillon* case.

The third-person concept of *Dillon* was examined and implicitly rejected in Louisiana, 85 Nebraska, 86 New York, 87 North Dakota, 88 and the Virgin Islands. 89 However, in the Louisiana, Nebraska, and Washington cases cited, and in a Delaware case, 90 the opinion of the

82. 80 Wash. 2d 652, 497 P.2d 937 (1972).
83. 480 F.2d 109 (8th Cir. 1973).
courts contained comments to the effect that the grief suffered by an individual from the wrongful death of a relative could provide a basis for the recovery of damages for emotional harm.

Application of the Dillon concept requires the absolute rejection of not only the requirement for impact, but also the requirement that the plaintiff be in the zone of danger created by the defendant's negligent act. Although a majority of the states have rejected the impact rule, only a few have rejected the "zone of danger" tests. The application of Dillon also requires a broad concept of duty as reflected in the opinions that accept the Dillon test of foreseeability of mental damage to the plaintiff. Thus, if the courts can deduce that a defendant could have reasonably foreseen the impact on the plaintiff, a preexisting duty will have existed that can provide a basis for a cause of action.

The other requirements for an application of Dillon, i.e., nearness to the scene of the accident; contemporaneous observation of the event; traumatic nature of the event; and close relationship of the parties, all appear to be related to proximate cause and insure that the damages incurred by the plaintiff are not too remote from the negligent act. It can be concluded that the stringency of these requirements is due in part to the continuing fear that recovery for fraudulent claims will occur. This argument has not been substantiated by the experience of those states which have permitted recovery.

A recapitulation of the recent experiences indicates that the majority of the states still do not accept, or have not had an opportunity to deal with a Dillon-like situation. For those states which do accept Dillon, the tests can be stated as they were in Dillon. However, as in the Rhode Island situation cited earlier,91 the presumption of proximity of the near relative due to the closeness of the relationship must be subjected to further tests relating to the circumstances of the accident.

A critical question which arises in relation to the mental damages which might arise from the contemporaneous observation of injury or peril to a third person, and one which has not been adequately dealt with by the courts that have permitted Dillon-like recoveries, is the nature of the relationship which must exist between the plaintiff and the injured party. It is clear that the blood relationships of

91. See text accompanying note 81 supra.
parents and minor children are sufficient and, intuitively, that the husband-wife relationship is also sufficient. It is not clear, however, that sibling relationships, adoptive relationships, friendships, or premarital relationships would be sufficient. It is also not clear that contemporaneous observation includes only the actual observation of the event at the time it occurs, i.e., what is the situation if a parent observes injury to a minor child for the first time on a television news broadcast, or is informed of the event for the first time by a photograph of the injured child at the scene of the accident?

IV. Present and Possible Trends

The present state of the law in America is clear, but the law appears to be undergoing changes at a relatively rapid pace. The requirement for physical damages associated with the negligent infliction of emotional shock is for nearly every jurisdiction an essential ingredient for recovery. In a minority of jurisdictions, the definition of physical consequences has been extended to cover severe or long-lasting emotional disorders, which prevent the plaintiff from coping with his or her environment, or require some form of institutionalized treatment. Where the emotional injury has been caused by wanton or willful negligence, courts still permit recoveries without associated physical injuries. Such recoveries have also been permitted in a few states for the mental damage associated with torts against property.

The impact rule has been completely abolished in all but eight states, and a number of these states have even gone as far as to reject the “zone of danger” test for recovery. This fact is particularly true in those states which have accepted the Dillon view and permit recoveries for mental damages arising from the injury or peril to a third person who is a close relative.

With respect to the recovery of mental damages arising from the injury or peril to a third person, there appears to be a growing acceptance of the concept laid down in Dillon. However, such recoveries are still permitted in only a small minority of the states and the federal courts.

Based on the developments in this area of case law, there is a growing awareness on the part of the courts that mental damages are extremely debilitating and are subject to independent and objective medical proof. It is also apparent that the courts have been dissatisfied with the existing state of the law. Accordingly, it is safe to conclude that the near future will see significant changes and a
greater willingness to accept not only a broader definition of physical consequences which will include severe long-lasting emotional effects, but also the concept that individuals can suffer such damages and should be permitted recoveries for damages suffered when third persons have been injured or imperiled by the negligent acts of a defendant.

It is clear that such recoveries will have to be limited to prevent fraudulent claims from being granted, and also to insure that the mental injuries which occur are not too remote and are proximately caused by the negligent act of the defendant. Accordingly, future developments in this area of tort law will probably see developments in the concept of foreseeability as illustrated in D'Ambra.\textsuperscript{92} Such developments will probably also include further definitions of the relationships that are required to allow recovery. Sibling, adoptive and premarital relationships may be included in the groups that are permitted to recover. It is not clear whether close friendships will be among the recognized relationships.

As for contemporaneous observations with the plaintiff's own senses, it is evident that recovery will depend completely on the factual situation that is encountered. However, it can be concluded at this time that the arbitrary requirement for simultaneous observation of the accident by the plaintiff will be somewhat relaxed as the courts gain experience with the problem. Such relaxation has already been observed in the Archibald\textsuperscript{93} situation.

Beyond dispute, however, is the conclusion that negligent infliction of emotional shock has emerged as an independent tort, and has rapidly developed into a universally recognized theory of recovery. While its scope and application have not yet been fully defined, there can be no doubt that the legal concept of "injury to person" has, however reluctantly, kept apace with modern attitudes toward mental health.

\textsuperscript{92} Id.

\textsuperscript{93} See text accompanying note 37 supra.
SIXTH CIRCUIT NOTES

ATTORNEYS' FEES—CIVIL RIGHTS—LIABILITY OF STATE OFFICIALS FOR
ATTORNEYS' FEES WHEN SUED IN THEIR INDIVIDUAL CAPACITY—Taylor
v. Perini, 503 F.2d 899 (6th Cir. 1974), vacated, 95 S. Ct. 1985
(1975).*

On September 17, 1969, one J. B. Taylor, an inmate of the Marion
Correctional Institution of Ohio, filed a class action suit with the
United States District Court for the Northern District of Ohio. The
suit was filed on behalf of Taylor and his fellow inmates against E.
P. Perini, Superintendent of the prison. Counsel was appointed by
the court to represent Taylor while Perini was represented by the
Attorney General of Ohio.

Plaintiff's counsel filed a first amended complaint seeking injunc-
tive relief from allegedly unconstitutional conduct and conditions in
the prison, including racial discrimination and segregation, obstruc-
tion of access to courts and lawyers, and deprivation of substantive
and procedural due process in the administration of discipline, as
well as infliction of cruel and unusual punishment.† On September
12, 1972, the district court executed a journal entry and order which
had been negotiated and agreed to by counsel for both sides, grant-
ing nearly all the relief requested, including attorneys' fees and
expenses, and providing that the court would retain continuing ju-
risdiction to implement its order.

Subsequent negotiation between the parties resulted in an agree-
ment in December, 1972, as to the amount to be paid for attorneys'
fees. However, on February 26, 1973, the Attorney General's office

* Subsequent to the decision in Taylor v. Perini, the United States Supreme Court in
Alyeska Pipeline Service Co. v. The Wilderness Society, 95 S. Ct. 1612 (1975), rendered a
further decision regarding attorneys' fees. The Court reversed a lower court award of attor-
neys' fees which was based on the "private attorney general" rationale. The Court held that
in the absence of a legislative exception, the "private attorney general" approach could not
be used to award attorneys' fees against private parties. Id. at 1627.

† The opinion did not discuss, nor were the facts concerned with the situation where an
official is sued as a result of acts he executed under the cloak of public authority. Although
the Alyeska decision criticizes Taylor specifically, id. at 1628 n.46, it remains unclear, due in
part to the rather unusual fact situation presented, whether Alyeska will have any effect on
the Taylor decision.

† Taylor v. Perini, 503 F.2d 899, 900 (6th Cir. 1974).
informed plaintiff's counsel that no attorneys' fees would be willingly paid in compliance with the order of September 12, 1972, and plaintiff's counsel thereupon filed a motion for a determination of fees due.\textsuperscript{2} The defendant countered with a motion under Rule 60 (b)\textsuperscript{3} seeking to vacate that portion of the order of September 12, 1972, granting attorneys' fees, on the grounds that such an award was prohibited by the eleventh amendment.\textsuperscript{4} The district court denied the defendants' motion to vacate, holding that the eleventh amendment was no bar to such an award.\textsuperscript{5} The court then set the amount of the award and ordered it paid.\textsuperscript{6} The defendants thereupon appealed the dismissal of their motion to the Sixth Circuit Court of Appeals. The Sixth Circuit framed the issue thus:

[W]hether a United States District Court may hold either a prison warden, in his personal capacity, or the state of Ohio, or both, liable for attorneys' fees to an attorney whom the Court appointed to represent a prisoner in a 42 U.S.C. § 1983 lawsuit against the warden.\textsuperscript{7}

Judge Celebrezze delivered the opinion of the court, holding that the assessment of attorneys' fees against a state or its public officers acting in their official capacity is barred by the eleventh amendment.\textsuperscript{8} The court stated, however, that the district court on remand

\begin{itemize}
\item \textsuperscript{2} Id. at 901.
\item \textsuperscript{3} FED. R. Civ. P. 60. Relief from Judgment or Order.
\textsuperscript{b} Mistakes; Inadvertance; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; . . . (6) any other reason justifying relief from the operation of the judgment.
\item \textsuperscript{4} U.S. Const. amend. XI states that: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state or by Citizens or Subjects of any Foreign State.
\item \textsuperscript{6} 359 F. Supp. at 1187. The amount awarded was $21,055.07.
\item \textsuperscript{7} Taylor v. Perini, 503 F.2d 899, 901 (6th Cir. 1974), 42 U.S.C. § 1983 (1970) provides that:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\item \textsuperscript{8} 503 F.2d at 901, citing Jordon v. Gilligan, 500 F.2d 701 (6th Cir. 1974).\
\end{itemize}
could consider whether recent Ohio legislation which waived state immunity would be determinative of the issues on appeal. With regard to the award of attorney fees against Perini in his individual capacity, the opinion stated that such an award was not barred by the eleventh amendment and could be proper under certain circumstances to be determined by the lower court. Judge Weick concurred in a separate opinion in which he stated that attorneys' fees could be awarded against Perini individually if he had acted in bad faith. Judge Edwards dissented stating that there was no reason to remand the case and that attorneys' fees should be awarded.

**The Historical Perspective**

This case was the third of a series of four recent cases which presented the question of whether attorneys' fees can be awarded to a successful plaintiff seeking injunctive relief against a state or its officials for violation of constitutional rights. The question was first presented in *Jordon v. Gilligan*, a 1974 case involving a reapportionment suit against the Ohio Apportionment Board. As in the present case, the District Court of the Northern District of Ohio awarded attorneys' fees to the successful plaintiff. On appeal the Sixth Circuit Court of Appeals reversed. It stated that the eleventh amendment was a jurisdictional bar against the recovery of attorneys' fees from the state or its officers in their official capacities, in an action brought under 42 U.S.C. § 1983 to vindicate constitutional rights.

In the period which elapsed between the decision of the district court in *Jordon* and its consideration by the Sixth Circuit, the United States Supreme Court handed down a decision which explored the question of how far a litigant could go in seeking relief which would ultimately be extracted from the public treasury. This decision, *Edelman v. Jordan*, affirmed a doctrine which had remained essentially untouched since 1798.

One of those involved with the founding of the United States,
Alexander Hamilton, made these comments on the subject of immunity for the state and its officials:

It is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union . . . .

The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will . . . .

From these sentiments developed the eleventh amendment, which was finally ratified after a number of early Supreme Court decisions had held in favor of private individuals bringing lawsuits against the states. From the ratification of the amendment in 1798 up to the present time, the Court has consistently found that, although the eleventh amendment was not an outright bar against suits aimed at a state, a nonconsenting state was immune from suits brought in federal courts by her own citizens as well as by citizens of another state. From these decisions was derived the conclusion that a suit by private parties, seeking to impose liability on public funds, was barred by the eleventh amendment.

In one significant area, however, an exception was created. The

19. For the exact wording of the amendment see note 4 supra.
20. 415 U.S. at 662.
21. See Chisholm v. Georgia, 2 Dall. 419 (1792); and Van-Stopphorst v. Maryland, 2 Dall. 401 (1791). In the discussion in Chisholm, Chief Justice Jay expressed the following sentiments on the right of an individual to sue a governmental unit:

I wish the state of society was so far improved, and the science of government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. 2 Dall. at 478.

22. The Court did modify this doctrine somewhat in Hall v. Cole, 412 U.S. 1 (1973), which permitted an award of attorneys' fees "when the interests of justice so require." Id. at 4, 5. For further elaboration on this case, see text accompanying notes 36-41 infra.
23. 415 U.S. at 663.
24. See, e.g., Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973); Parden v. Terminal R. Co., 377 U.S. 184 (1964); and Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944). Cf. Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). Ford held that even if a state is not named as a party to an action the eleventh amendment will bar the suit if money is sought which would ultimately be paid by the state, even though individual officials are the nominal defendants. Id. at 464.
Supreme Court, in *Ex parte Young*, provided for an equitable remedy in cases brought by private parties seeking to force state officials to comply with the thirteenth, fourteenth and fifteenth amendments in their future conduct. Attempts by lower courts to turn *Ex parte Young* into a bridge for private suits seeking damages from the public treasury were rebuffed in *Edelman*, in which Justice Rehnquist, speaking for a 5-4 majority, reiterated that such suits were subject to the prohibitions of the eleventh amendment. In reversing the district court decision in *Jordon*, the Sixth Circuit cited this most recent Supreme Court authority in justifying its decision.

Later in the same year, the Sixth Circuit was again faced with the issue of seeking attorneys' fees ultimately payable from the public treasury in *Milburn v. Huecker*. In that case a class action was brought against the Commissioner of the Kentucky Department of Economic Security for recovery of wrongfully withheld welfare benefits. The court cited *Edelman* as controlling and held that the eleventh amendment barred jurisdiction to hear suits against the state, but, contrary to *Jordon*, went on to hold that the eleventh amendment did not bar recovery of attorneys' fees. The court adopted the Fifth Circuit view that a trial court's denial of attorneys' fees must be accompanied by findings of fact sufficient to permit review. The court then remanded for such a finding. Although the court offered no detailed reasoning for its decision, it stated that the district court should consider the guidance of the Supreme Court in *Hall v. Cole*, in which the Court announced:

> Although the traditional American rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interest of justice so requires.

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27. Id. at 664.
29. Id. at 666, 667.
30. 500 F.2d at 705.
31. 500 F.2d 1279 (6th Cir. 1974).
32. Id. at 1281.
34. 500 F.2d at 1282.
35. Id.
37. 412 U.S. at 4,5. The Court was confronted with the question of whether attorneys' fees
The Court stated that an award of costs and attorneys' fees is appropriate where "overriding considerations indicate the need for such a recovery," and set forth three situations where an award of attorneys' fees would be appropriate:

1. "[T]o a successful party when his opponent has acted 'in bad faith';" 39
2. Where the successful plaintiff confers "a substantial benefit on members of an ascertainable class" in cases "where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them;" 40 and
3. Where a party acts "as a private attorney general: vindicating a policy that Congress considered of the highest priority." 41

The decisions in Jordan and Milburn are consistent in that they hold that the eleventh amendment is a jurisdictional bar to suits against a state. 42 However, Jordan differs from Milburn in that it holds that the Hall doctrine of awarding attorneys' fees is applicable only where a court has the requisite jurisdiction to make such an award. 43 The Milburn court, on the other hand, held that attorneys' fees could be recovered notwithstanding the jurisdictional bar to suit, as long as prospective relief was possible. 44

The Taylor Case

Against these developments, the decision in the present case held that attorneys' fees are recoverable when state officials are sued in their individual capacity. 45 The court held that, in the absence of consent 46 or waiver, 47 the award against the State of Ohio could not

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38. Id. at 5.
39. Id.
41. 412 U.S. at 6 n.7.
42. See Jordan v. Gilligan, 500 F.2d 701, 706 (6th Cir. 1974); and Milburn v. Hueckar, 500 F.2d 1279, 1281-82 (6th Cir. 1974).
43. 500 F.2d at 709, 710.
44. 500 F.2d at 1282.
45. 503 F.2d at 905.
46. See Grandle v. Rhodes, 169 Ohio St. 77, 79, 157 N.E.2d 336, 338 (1959). The Ohio Supreme Court held that to constitute consent, an award of attorneys' fees which comes from state funds must be authorized by a two-thirds vote of the Ohio General Assembly.
47. Murray v. Wilson Distilling Co., 213 U.S. 151 (1909). The Court announced that waiver will be found only "if exacted by most express language or by such overwhelming implications from the text as would leave no room for any other reasonable construction." Id. at 171.
stand. However, as to an award of attorneys' fees against Perini, the court found that such an award was not barred by the eleventh amendment. In making this latter determination, the court enumerated two considerations which were necessary to determine if such an award was valid: whether Perini was immune from liability under the theory of common law executive immunity, and whether an award of attorneys' fees was equitable.

With respect to executive immunity, the Sixth Circuit relied upon *Scheuer v. Rhodes,* decided by the United States Supreme Court on April 17, 1974. Mr. Chief Justice Burger delivered the unanimous opinion of the Court, holding that while damages from the public treasury were barred, "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." The Court reasoned that a remedy in damages can be as effective of a deterrent in preventing the infringement of constitutional rights as injunctive relief. The Court placed emphasis on the public interest which requires decisions to enforce laws for the public's protection, and went on to hold that immunity of state officials and officers was not absolute, but qualified, depending:

[U]pon the scope of discretion and responsibilities of the office and all circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.

48. 503 F.2d at 902.
49. Id.
50. 416 U.S. 232 (1974). Plaintiffs, as personal representatives of students killed at Kent State University, brought suit under 42 U.S.C. § 1983 against the Governor of Ohio, the Adjutant General of the Ohio National Guard, various officers and enlisted members of the Guard, and others. The complaint accused those officials acting under color of state law of "intentionally, recklessly, willfully and wantonly causing an unnecessary Guard deployment and of ordering the Guard to perform illegal acts resulting in the deaths of the students." The district court dismissed for lack of jurisdiction, since the respondents were sued in their official capacities. The court of appeals affirmed on these grounds and in the alternative on the basis of executive immunity. Id.
52. 416 U.S. at 238.
53. See id.
54. Id. at 241.
55. Id. at 247-48.
In applying the Scheuer rationale to the question of when the eleventh amendment may be invoked, the Sixth Circuit found that the result depends on three factors: the scope of the official's authority; the existence of reasonable grounds to justify his conduct; and the exercise of good faith in the performance of his duties. The court determined that such an award against Perini in his individual capacity was not barred by executive immunity.

The court then explored the second issue: whether the award of attorneys' fees in this case was equitable. In disposing of this question the court looked to the categories set forth in Hall v. Cole for guidance. It found that the record was unclear on the issue of bad faith and remanded for more complete findings. Since the possibility of judgment against Perini would not spread the cost of litigation over a group, the court held that the "common benefit" exception was inapplicable. As to the "private attorney general" theory, the court found that Taylor, in bringing the action, "vindicated constitutional rights strongly favored by constitutional policy." It reasoned that by awarding attorneys' fees, parties were being encouraged to bring suits which vindicate important rights. The court remanded the case to the district court for a determination as to whether the award of attorneys' fees was appropriate, emphasizing that reasons must be given for granting or denying such an award.

From the Sixth Circuit's resolution of the Jordan-Milburn dichotomy there emerges a method which de facto permits a litigant to recover costs from a governmental unit. In the scheme created by Taylor, sovereign immunity remains a bar to suit directly against the state but recovery is not thereby foreclosed, since relief may be obtained by suing the state official in his individual capacity. The doctrine of executive immunity will protect the official from liability only when he is acting within the scope of his authority; when his actions are shown to have been based on reasonable grounds; and when he has acted in good faith. The lack of any one element

57. Id. at 903.
58. Id. at 904.
59. 412 U.S. at 5,6. See text accompanying notes 39-41 supra.
60. 503 F.2d at 905.
61. Id.
62. See id. at 902.
63. Id. at 902, 903.
will permit a suit to be brought against the transgressing official, with judgment being paid out of such public funds as are under his control.\textsuperscript{64} Once it is shown that jurisdiction over the individual is proper, the plaintiff must establish that there is an equitable basis for judgment. If he can show bad faith, "common benefit" or the vindication of important constitutional rights, he will be awarded attorneys' fees.\textsuperscript{65} Other factors involved in judging the propriety of awarding attorneys' fees include: the defendant's good faith in implementing the decree;\textsuperscript{66} the effect of the award on the defendant's ability to operate effectively;\textsuperscript{67} and the reasonableness of attorneys' fees.\textsuperscript{68} These factors were emphasized in a subsequent case decided by the Sixth Circuit.\textsuperscript{69}

The \textit{Taylor} case settled the conflict between \textit{Jordon v. Gilligan} (denying attorneys' fees) and \textit{Milburn v. Huecker} (awarding attorneys' fees) by combining two principles. The court coupled the \textit{Hall} proposition that federal courts, as part of their equitable power, may award attorneys' fees in a proper situation regardless of state authorization or consent,\textsuperscript{70} with the \textit{Scheuer} doctrine that damages may be awarded in some limited circumstances against public officials.\textsuperscript{71} By fusing together these doctrines, attorneys' fees can be recovered in individual or class action suits brought against state or local officials, where injunctive relief is sought to enjoin a public official who has acted improperly in depriving a class or individual of important constitutional rights. Courts in the Sixth Circuit are now able to bypass the dual obstacles of sovereign and executive immunity. This will have the practical effect of encouraging class actions under Rule 23(b)\textsuperscript{72} by providing for the possible recovery of

\textsuperscript{64} See Incarcerated Men of Allen County v. Fair, 507 F.2d 281, 289 (6th Cir. 1974). \textit{But see} 503 F.2d at 903-05.
\textsuperscript{65} \textit{Id.} at 904.
\textsuperscript{66} See Hill v. Franklin County Bd. of Educ., 390 F.2d 583, 585 (6th Cir. 1968).
\textsuperscript{69} Incarcerated Men of Allen County v. Fair, 507 F.2d 281, 289 (6th Cir. 1974).
\textsuperscript{70} 503 F.2d at 904.
\textsuperscript{71} \textit{Id.} at 902.
\textsuperscript{72} FED.R.Civ.P. 23. Class Actions.
(b) Class Actions Maintainable. An action may be maintained as a class action if
\textsuperscript{ . . . (2) the party opposing the class has acted or refused to act on the grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .}
costs of litigation. In addition, it will encourage individuals to seek enforcement of constitutional rights which have been denied to them.

The court further clarified the mechanics for suits against public officials in *Incarcerated Men of Allen County v. Fair*, the fourth and most recent case on this subject by the Sixth Circuit. The court held that when an individual has acted in bad faith "before or during litigation, an award of attorneys' fees against him 'individually' is proper." The court further stated that the fact that he is reimbursed by his insurance company or his employer is of no concern in the determination of whether such an award should be made. Where bad faith is shown, the official can be held personally liable, with the award being paid out of his individual assets. "The basis for a 'bad faith' award is punitive, as it serves to deter and punish unwarranted personal conduct, both before and during litigation." In the absence of bad faith the court announced that there could be liability in an official capacity, with the award to be paid out of public funds under the individual's control. The rationale underlying such an award is that the public is the beneficiary of the suit, and therefore the public should bear the costs of litigation.

The court then considered whether there was an equitable basis for an award of attorneys' fees, thus operating as an exception to the general rule against such awards. The court noted that such an exception is grounded in the traditional equitable powers of federal courts to shift litigation expenses from one party to another. The court decided that this case fits into the "private attorney general" exception, since the inmates' suit served the public interest by protecting important constitutional rights. Emphasis was placed on the fact that the purpose of an award of attorneys' fees is to "prevent

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73. 507 F.2d 281 (6th Cir. 1974). Plaintiffs, inmates of the Allen County jail, brought a class action suit alleging lack of blankets, severe overcrowding, lack of sunlight and medical care and prevalence of scalp disease and lice. The inmates were represented by Advocates for Basic Legal Equality (A.B.L.E.), an organization receiving public funds. After obtaining injunctive relief, A.B.L.E. sued Allen County and its sheriff, Edward Fair, who was responsible for the jail's operation, seeking recovery of attorneys' fees. In line with the previous cases, the court held that the award against Allen County could not stand, but stated that a suit against the County Commissioners would be permissible. Id. at 289.

74. Id. at 286.
75. Id. at 284.
76. Id. at 287.
77. See id. at 288.
worthy claimants from being silenced or stifled because of a lack of legal resources—whether it goes to private or 'public' counsel.'

CONCLUSION

It is now clear that individuals deprived of important constitutional rights, though they are precluded from seeking relief from the "King," may instead bring an action against the "King's men." Suits may be permitted where such an official has exceeded his authority; executed his duties unreasonably; or acted in bad faith before or during litigation, or in implementing an earlier decree. Successful litigants, after obtaining the proper injunctive or declaratory relief, are entitled to reasonably-incurred attorneys' fees, regardless of contrary state statutes, when justice so requires.

In suits where the grounds are based upon "bad faith," the type of conduct required for such a finding is yet unclear. The philosophy behind the determination of such liability is one of deterrence and of punishment for those public officers who exceed or abuse their authority. The goal is to hold those in positions of power accountable for their conduct.

Where "bad faith" is lacking, but where the litigant is seeking to vindicate important rights, a suit may be brought against a public officer in his official capacity. Any resulting recovery can be satisfied from the public treasury. The policy behind this type of suit is to provide wronged individuals a method for securing fundamental rights without being inhibited by the cost of enforcing such "guaranteed" freedoms. Without such a provision many litigants would find themselves effectively prevented from securing valuable constitutional rights, and the rights involved begin to assume the characteristics of privileges. The value of Taylor is that it removes the economic obstacle and, in effect, encourages such suits. Still unknown is the ultimate effect of this doctrine on government efficiency and

78. Id. at 285, 286. See Note, Award of Attorney's Fees to Legal Aid Offices, 87 Harv. L. Rev. 411 (1973).

79. This phrase alludes to the ancient expression "The King can do no wrong," a leftover from the days of divine right monarchs. For further elaboration on the "King's" perfection see 1 BLACKSTONE, COMMENTARIES 246.

80. See Hall v. Cole, 412 U.S. 1, 5-6 (1973). These standards are also discussed in the text accompanying notes 39-41 and 59 supra.

81. 412 U.S. at 4,5.


public funds. There are those who paint a bleak picture of unnecessary burden, an "albatross" upon the best interests of public policy. 84

Of the three categories available as justification for the awarding of attorneys' fees, the most potentially useful is the "private attorney general" concept—those who seek to vindicate important rights which Congress regards as having special value are consequently entitled to restitution for protecting a public interest. 85 The extent of rights protectable under this concept is yet unclear, although it would seem at a minimum to include the Bill of Rights and the thirteenth and fourteenth amendments. 86

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84. See Hans v. Louisiana, 134 U.S. 1, 20-21 (1890).
86. See 503 F.2d at 900. See also Ex parte Young, 209 U.S. 123 (1908).
Constitutional Law—School Desegregation—State-Created District Lines can be Disregarded where there is Evidence that they have been Crossed to Perpetuate Dual School Systems—Newburg Area Council, Inc. v. Board of Education, 510 F.2d 1358 (6th Cir. 1974), cert. denied, 95 S. Ct. 1658 (1975).

Newburg Area Council, Inc. v. Board of Education, and its companion case, Haycraft v. Board of Education, are two consolidated school desegregation cases remanded to the Sixth Circuit Court of Appeals by the United States Supreme Court for reconsideration in light of its intervening opinion in Milliken v. Bradley. Plaintiffs sought a finding that both school systems had failed to eliminate all vestiges of state-imposed segregation. As a remedy, plaintiffs in the Louisville case requested a county-wide desegregation plan which would also include the third district within the county, the small Anchorage Independent School District. After separate trials, the district court found no constitutional violation and dismissed both actions. Plaintiffs appealed to the Sixth Circuit Court of Appeals.

In its first review of the case, the court of appeals unanimously reversed the district court, dismissing the two consolidated class actions alleging discrimination in Jefferson County schools. In so holding, the court of appeals stated that neither the Jefferson County nor the Louisville city school district had attained a unitary school system. Black children were still denied the right to an equal education as they had been under previous Kentucky law in the

1. 418 U.S. 918 (1974). Justices Douglas, Brennan, White, and Marshall would have granted certiorari and without further briefing or oral argument would have affirmed the judgment. Id. at 919.


3. This district, located in the southeast portion of Jefferson County, Kentucky, operates only one elementary school. It is an all-white enclave. Plaintiffs in the Haycraft case had sought to join the district and its superintendent as defendants. However, when the district court ruled in a pretrial order that it did not have power to disregard school district lines in providing a remedy, it dismissed the action against the Anchorage District. See Newburg Area Council, Inc. v. Board of Education, 489 F.2d 925 n.1 (6th Cir. 1973). Although that order was not appealed, the court of appeals authorized the district court to consider the Anchorage District in fashioning an appropriate remedy. Id. at 932.

4. 489 F.2d 925 (6th Cir. 1973).


(1) Each board of education shall maintain separate schools for the white and colored children residing in its district.

(2) No person shall operate or maintain any college or institution where persons of both the white and colored races are received as pupils.
years prior to Brown v. Board of Education.\(^6\)

In the predominantly white Jefferson County School District,\(^7\) the court found evidence of continued segregation in the fact that the Newburg Elementary School, which was designated for blacks in pre-Brown days, had remained all-black.\(^8\) Conversely, the virtually all-white status of elementary schools surrounding Newburg had continued unaltered.\(^9\) Newburg and two other elementary schools\(^10\) contained 56 per cent of the black students in the district.\(^11\) While two of these schools were underutilized, white schools in the district were overcrowded.\(^12\) The court concluded that the board had engaged in constitutionally impermissible conduct in maintaining Newburg as an all-black school and in failing to take affirmative action to prevent the other two schools from becoming racially identifiable.\(^13\) It rejected the argument of the board that "white flight" was responsible for these developments.\(^14\)

Evidence of a large number of racially identifiable schools in the Louisville school district\(^15\) gave rise to a presumption that it too had

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\(^6\) No instructor shall teach in any college, school or institution where persons of both the white and colored race are received as pupils.

\(^7\) Approximately 4 per cent of the 96,000 students in the district are black. 489 F.2d at 927.

\(^8\) See Newburg Area Council, Inc. v. Board of Education, 510 F.2d 1358, 1361 (6th Cir. 1974).


\(^10\) One of these is Price Elementary School, constructed in 1969 within one mile of Newburg. When Price opened in 1969-70, 33.1 per cent of its students were black. By 1972-73, the percentage had increased to 54.3 per cent. The other is Cane Run Elementary School, located in the northwest portion of the district close to the Louisville city limits. In 1966-67, the black student population was 1.2 per cent. By 1972-73, the figure had grown to 49 per cent. Cane Run was rebuilt on the same site in 1972 despite the large increase in black enrollment. Id.

\(^11\) Id.

\(^12\) The enrollment at Newburg and Price Elementary Schools has remained at less than capacity, while several racially identifiable white schools have been forced to use portable classrooms or operate double shifts. Id. at 928-29.

\(^13\) The court cited Green v. County School Board, 391 U.S. 430, 438 n.4 (1968), and Robinson v. Shelby County Board of Education, 442 F.2d 255, 258 (6th Cir. 1971), which held that school boards must adopt effective plans not only to eliminate the effects of past discrimination, but also to bar future discrimination.

\(^14\) 489 F.2d at 928.

\(^15\) Id. at 930. The court found that 80 per cent of the Louisville schools were racially identifiable. This included five of six high schools, nine of 13 junior high schools, and 40 of
not eliminated all vestiges of state-imposed segregation.\textsuperscript{16} In attempting to demonstrate the contrary, the board argued that prior to the 1956-57 school year it had adopted a desegregation plan based upon geographic attendance zones with an open transfer policy.\textsuperscript{17} The court found this program unacceptable both as a matter of law, citing the decision of the United States Supreme Court in \textit{Davis v. Board of Commissioners},\textsuperscript{18} and as a matter of fact, since the practical consequences of the plan was an exodus of whites from pre-\textit{Brown} schools.\textsuperscript{19}

The court of appeals held that, "where there are separate school districts within a single county and the districts are not unitary systems, a federal district court may fashion an appropriate remedy without being constrained by school district lines created by state law."\textsuperscript{20} The court reasoned that since district lines had been crossed in pre-\textit{Brown} days to maintain segregated schools,\textsuperscript{21} the same method could now be utilized to dismantle them.\textsuperscript{22} The defendants then appealed to the United States Supreme Court.

While the board's appeal was pending before it, the Supreme Court handed down its decision in the Detroit desegregation case, \textit{Milliken v. Bradley}.\textsuperscript{23} By a 5-4 margin, the Court rejected a desegregation plan which involved 53 school districts in a three-county area proposed as a remedy for de jure desegregation in the Detroit Public School System. In the exercise of its equitable powers the district court had included these school systems based upon its finding that a Detroit-only plan had no hope of achieving actual desegregation.\textsuperscript{24}

\textsuperscript{16} Of 56 pre-\textit{Brown} schools, 35 had retained the same racial composition. 
\textsuperscript{17} \textit{Id.} at 930. See also \textit{Swann v. Charlotte-Mecklenburg Board of Education}, 402 U.S. 1, 26 (1971), and \textit{Northcross v. Board of Education}, 466 F.2d 890, 893 (6th Cir. 1972). 
\textsuperscript{18} 489 F.2d at 931.
\textsuperscript{19} 402 U.S. at 33. The Court held that "such programs are not 'per se' adequate to meet the remedial responsibilities of local boards." According to the Court, "the measure of any desegregation plan is its effectiveness." \textit{Id.} at 37.
\textsuperscript{20} \textit{Id.} at 932. See also \textit{Wright v. Council of the City of Emporia}, 407 U.S. 451 (1972); and \textit{United States v. Scotland Board of Education}, 407 U.S. 484 (1972). In these cases, the Supreme Court enjoined state and local officials from creating a new school district from a larger pre-existing one, where the effect would have been to impede the dismantling of a dual school system. 
\textsuperscript{21} 489 F.2d at 932. Black high school students in the Jefferson County system attended Louisville's Central High School on a tuition basis. 
\textsuperscript{22} \textit{Id.}
In the majority opinion, Mr. Chief Justice Burger stated that remedies for racial segregation could not ignore state-created boundaries unless the court could find "a constitutional violation within one district that produces a significant segregative effect in another." Since no such violations had been found in the suburban districts and those violations within Detroit were not responsible for urban-suburban racial imbalance, the remedy ordered by the district court and affirmed by the Sixth Circuit Court of Appeals was held to be improper.

The Chief Justice also relied on several equitable considerations in rejecting the multidistrict plan. A multitude of administrative and financial problems would be created once students were compelled to attend schools outside the district wherein they reside, and the district court would have to become a "de facto legislative authority" to resolve them. Such a situation would deprive the people of local control over the operation of schools through their elected representatives.

ON REMAND

Shortly thereafter, the Supreme Court remanded the appeal in Newburg to the Sixth Circuit for reconsideration in light of Milliken v. Bradley. In its second opinion, the court of appeals addressed itself only to its prior holding "that the district judge in approving or formulating a plan of desegregation for Jefferson County, Kentucky, would have the power to require that state-created district lines could be disregarded." The court found nothing in the Milliken decision or in the Supreme Court's order of remand in Newburg that would require it to reconsider its previous conclusion that the Louisville and Jefferson County school districts were operating dual school systems.

The court of appeals affirmed the interdistrict remedy ordered in its prior decision, distinguishing Milliken on the basis of both legal

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25. 418 U.S. at 745. The Chief Justice also makes reference to his opinion in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), in which he states for the unanimous court that "the nature of the violation determines the scope of the remedy." Id. at 16.
26. 418 U.S. at 745.
27. Id. at 743-44.
29. 510 F.2d at 1359.
30. Id.
and equitable considerations. In *Milliken*, while de jure segregation was shown to exist in Detroit, there was no evidence of purposeful discrimination in the outlying school districts. In its original opinion, the court of appeals found that both Louisville and Jefferson County had "failed to eliminate all vestiges of state imposed segregation," and were therefore guilty of maintaining dual school systems.

Furthermore, unlike Michigan, school district lines in Kentucky had been ignored in the past for the purpose of aiding and implementing continued segregation. As noted in the original *Newburg* opinion, black high school students prior to *Brown* were sent out of Jefferson County and into the Louisville School District. Although this particular practice has been discontinued, the court in the present case pointed to several other instances where school district lines were being disregarded. For example, Atherton High School is part of the Louisville School District, but is located outside the boundaries of that district and within the Jefferson County School District. Students from both districts have been permitted to attend the school. In *Milliken* only two of 52 potentially affected school districts were involved in crossing district lines. The present case involves at least two of the three school districts (and by far the two largest districts) located within the geographic boundaries of Jefferson County.

The present course of the boundary between the Louisville School District and the Jefferson County School District is another factor which impedes the dismantling of the dual city school system. The boundaries of the city are not coterminous with those of the school district. This permits approximately 10,000 Louisville children, mostly white, to attend school in the county district.

31. *Id.*
32. *Id.*
33. *Id.*
34. 489 F.2d at 932.
35. 510 F.2d at 1360-61.
36. Prior to its annexation with the nearly all-white suburban Oak Park School District in 1960, Carver School District, a predominantly black suburban district, contracted to have black high school students sent to a predominantly black school in Detroit. The Supreme Court found evidence to indicate that the crossing of school district lines in that instance "may have had a segregatory effect on the school population of the districts involved." 418 U.S. at 749-50. Yet, the Court concluded that such an isolated instance did not justify a metropolitan remedy. *Id.*
37. The other is the Anchorage Independent School District. See note 3 *supra.*
38. 510 F.2d at 1361.
The principal equitable consideration which the court relied upon is that interdistrict relief "would not be likely to disrupt and alter the structure of public education in Kentucky or even Jefferson County."39 The remedy here involves only two and possibly three school districts in a single county. In *Milliken*, it included 53 school districts in a three-county area. In Kentucky, counties are already established by statute as the principal school district units.40 The state legislature has also referred to the boundaries of school districts as "artificially drawn school district lines."41 Michigan has no statutes of this character,42 and consequently they were not considered by the Supreme Court. Moreover, the administrative problems involved in consolidated school districts in Kentucky are minimal, since merger could be effectuated under the express provisions of existing state statutes.43

The court of appeals concluded in view of all these factors "that the school district lines in Jefferson County, Kentucky, had been crossed for the purpose and with the actual effect of segregating school children among the public schools of the county on the basis of race."44

*Milliken* Distinguished

The significance of the Sixth Circuit's decision in *Newburg* lies in the fact that, for the first time since *Brown* rejected the "separate but equal" doctrine,45 a federal court has issued a definitive order disregarding school district lines in order to remedy prior racial discrimination. Similar relief was sought, but denied in cases involving schools in Richmond, Virginia,46 Detroit,47 and Indianapolis.48

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39. *Id.* at 1360.
40. Ky. REV. STAT. § 160.010 (1971), which provides that:
   Each county in this state constitutes a county school district, except that in counties in which there are independent school districts the county district consists of the remainder of the county outside of the boundary of the independent school district.
41. *See also* Thomas v. Spragens, 308 Ky. 67, 213 S.W.2d 452, 453 (1948).
42. Although one might argue that in Mich. Comp. Laws Ann. §§ 340.401 - 340.468 (1967), which authorize consolidation and annexation of school districts and transfer of territory between them, Michigan also recognizes by implication that school districts are "artificially drawn."
44. 510 F.2d at 1361.
48. United States v. Board of School Commissioners, 503 F.2d 68 (7th Cir. 1974), cert.
There are several important factors which distinguish the Newburg decisions from the others. The most important is that in Newburg, state-created racial imbalance pervaded the schools not only in the city district but also in an adjacent county district. Another crucial difference lies in the court of appeals' conclusion that the boundary lines, together with the transportation of pupils across them, aggravated the racial imbalance which had already existed within the districts. Approximately 10,000 Louisville children, mostly white, attended the county schools because the boundary of the city was not coterminous with its school district. Students from both districts attended Atherton High School, belonging to the city system but located within the county district.

The court of appeals did not, however, establish that the state or its agents had created this situation with a constitutionally impermissible intent, which Milliken indicates to be necessary. In Milliken, Mr. Chief Justice Burger, writing for the majority, states that interdistrict relief requires a "showing that there has been a constitutional violation within one district which produces a significant segregative effect in another." Newburg relies instead upon Wright v. Council of the City of Emporia. In that case the United States Supreme Court prohibited the restructuring of school districts where the effect would have been to retard the dismantling of a dual school system even though the motivation (to create a separate city school district) may not have been discriminatory. Similarly, the effect of about 10,000 white children from the city of Louisville attending school in the county, and other children from within the Louisville School District attending Atherton High School, regardless of its motivation, impeded the creation of a unitary school system in both Louisville and the county.

The suggestion in Newburg that the district court could join the Anchorage Independent School District in a county-wide remedy presents this case with an additional problem in conforming to Milliken. The Milliken decision limits interdistrict relief to those

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denied, 95 S. Ct. 1654 (1975).
49. 510 F.2d at 1359.
50. Id. at 1360-61.
51. 418 U.S. at 745.
52. 407 U.S. 451 (1972), cited with approval by the court of appeals at 510 F.2d 1361.
53. 407 U.S. at 462.
54. 510 F.2d at 1361.
55. Id. at 1360 n.1.
districts which, through some action of their own, have contributed to the creation of a dual system elsewhere or have helped to perpetuate one. Therefore, unless the district court finds that the Anchorage District acted in such a manner, it cannot be included in the newly created district without a departure from *Milliken*, even though to do so might contribute to a more effective desegregation plan for the county.

*Newburg* and *Milliken* may effectively limit interdistrict remedies to Southern states. Because of de jure segregation prior to *Brown*, presumptions arise against Southern school systems which make it easier, as in *Newburg*, to find both urban and outlying districts in violation of the Constitution. But in the North, while one district may be found guilty of de jure segregation, finding adjacent districts guilty of such practices is relatively difficult. Nevertheless, *Milliken* leaves future plaintiffs seeking interdistrict relief with no alternative except to prove either that suburban districts participated in constitutionally impermissible conduct, or that the state contributed by purposeful discriminatory use of housing and zoning laws.

There is a good chance that constitutional violations will be remedied in Jefferson County, Kentucky, as a result of *Newburg*. In Northern districts such as Detroit and Indianapolis, however, “white flight” in subsequent years may render meaningless the rem-

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56. 418 U.S. at 745.

57. See Judge Winter’s dissenting opinion in Bradley v. School Board, 462 F.2d 1058, 1071-80 (4th Cir. 1972). He distinguished Spencer v. Kugler, 326 F. Supp. 1235 (D. N.J. 1971), aff’d 404 U.S. 1027 (1972), where the court denied a request to join separate school districts, on the grounds that the *Spencer* case arose in New Jersey, which did not have a history of state-imposed segregation as did Virginia. 462 F.2d at 1079.

58. 489 F.2d at 930.

59. See United States v. Board of School Commissioners, 368 F. Supp. 1191 (S.D. Ind. 1973). The district court judge concluded that there was little evidence that the suburban districts added as defendants had the opportunity to commit overt discriminatory acts because the black population residing within their borders ranged from slight to none. *Id.* at 1203.

60. *Milliken* v. Bradley, 418 U.S. 717, 744-45 (1974), and *id.* at 753 (Stewart, J., concurring). The dissenting opinions of Mr. Justice Douglas, *id.* at 757-62, Mr. Justice White, *id.* at 762-81, and Mr. Justice Marshall, *id.* at 781-815, point out that the fourteenth amendment ultimately places the responsibility for providing an equal education upon the state government, and that discriminatory acts of school boards as its agents can be imputed to it. The courts should, he asserts, join the state as a defendant in these cases and require it to participate in devising an ample remedy by the use of its power to restructure school districts. For further discussion of this concept, see Oliver, *Interdistrict Segregation: Finding a Violation of the Equal Protection Clause*, 23 Am. U. L. Rev. 785 (1974); Note, *Consolidation for Desegregation: The Unresolved Issue of the Inevitable Sequel*, 82 Yale L.J. 1681 (1973).
edies limited to the urban districts. The Supreme Court majority in *Milliken* seems to have placed a higher priority on local control of education and restraint in the use of equitable powers by the federal courts.

But interdistrict remedies can preserve the principle of local control of education. The essential elements of local control are popular election of officials responsible for the management and policies of the schools (a school board or its equivalent), and participation either directly or indirectly in the decision-making process that determines how local tax dollars will be spent for the education of children. The alteration of district boundaries should not destroy these elements. Local control, moreover, should not require that school district lines be coterminous with any other political subdivision with a state. Indeed, the flexibility of school district lines is recognized by state statutes which provide procedures for their alteration.

Furthermore, if constitutional liberties are to be preserved, the equity power of the federal court must extend as far as is necessary to remedy constitutional violations. To protect the principle of "one man, one vote," it is not beyond the scope of the equity power of the federal courts to order and examine state-wide legislative reapportionment plans. Why then should it be improper for them to order and examine school redistricting plans which involve more than one district or one county within a state, when such is required to protect the constitutional rights of black children to an equal education?

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Because of the already high and rapidly increasing percentage of Negro students in the Detroit System, as well as the prospect of white flight, a Detroit-only plan simply has no hope of achieving actual desegregation. Under such a plan white and Negro students will not go to school together. Instead, Negro children will continue to attend all-Negro schools. The very evil that *Brown I* was aimed at will not be cured, but will be perpetuated for the future. *Id.* at 802.


63. 418 U.S. at 762-81 (White, J., dissenting).

64. See note 42 supra.


67. See the dissenting opinions of Mr. Justice White and Mr. Justice Marshall in the
CONCLUSION

As a result of the decision of the Sixth Circuit Court of Appeals in Newburg Area Council, Inc. v. Board of Education, a black child in Louisville may soon realize his right to an equal education. A black child in Indianapolis or Detroit may not have the same expectation if the federal district courts have concluded correctly that plans limited to the urban district have no hope of achieving actual desegregation. It may be difficult to explain to those black children that the difference is what did or did not happen in the school district next door.

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68. See note 61 supra.

The city of Cincinnati, Ohio, is served by two major daily newspapers, The Cincinnati Enquirer and The Cincinnati Post and Times Star. At one time the controlling interest in both papers was owned by the E. W. Scripps Company. In 1964 the Department of Justice initiated an antitrust action against that company, aimed at Scripps’ total control of the Cincinnati newspaper market. That action was ultimately resolved with the execution of a consent decree ordering the E. W. Scripps Company to divest itself of controlling interest in The Cincinnati Enquirer within 18 months.1

Early in 1970, the Enquirer management, supported by a majority of the minority stockholders, submitted a bid to Scripps to purchase Scripps’ 60 per cent share of Enquirer stock. The two parties subsequently entered into a complex stock transfer plan.2

In October of 1970, Jean Ramey initiated a stockholder derivative action against the Enquirer to have the stock purchase plan rescinded.3 In the complaint Ramey alleged that the plan would be illegal because, among other things, the proxy statement contained untrue and misleading statements of material fact and the plan violated various provisions of state and federal law.4

The resulting trial lasted two months but before an opinion could be issued, Scripps unilaterally withdrew from the agreement, thereby rendering the litigation moot.5 The district court judge

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2. This plan provided that the Enquirer would purchase all Enquirer stock currently owned by Scripps-Howard at $35 per share. There was to be a cash payment of $11,569,530 for 330,558 shares, of which $10,500,000 was to be borrowed by the Enquirer from the Prudential Life Insurance Co. The balance of the shares was to be purchased by the Enquirer through issuance and exchange of 60,000 shares of convertible preferred stock. Scripps then agreed to sell the stock to Prudential, by separate contract, for $6,000,000 in cash. In return the Enquirer agreed to redeem a minimum of 3,000 shares a year at $110 a share. 508 F.2d at 1191.

3. Along with Ramey were two other stockholders, Morelli and Harris. In November of 1970, another stockholder, Schoen, filed suit. Along with the Enquirer as defendants were: the E. W. Scripps Co., Scripps-Howard Investment Co., Jack Howard, and the American Financial Corporation. Id. at 1190 n.2, 1191.

4. Id. at 1191.

5. Scripps exercised an escape clause in the acquisition agreement. The termination was
wrote an informal opinion outlining the findings of fact and conclusions of law he would have made had the litigation not been mooted, and thereafter heard arguments for the decided questions concerning an award of attorneys' fees. 6 The district court concluded that (1) the proposed plan would change the Enquirer stock from "safe" to "risky;" 7 (2) the plan could possibly have been in violation of the Ohio "Impairment of Capital" statute; 8 (3) the proposed acquisition was "thin" both financially and legally; 9 (4) although unique in nature, the case performed a significant service and there was strong evidence of economic benefit for both the Enquirer, the stockholders, and Scripps; 10 (5) there were inaccuracies in the proxy statement which would have required preparation of an amended proxy and a resubmission of it to the shareholders; 11 and (6) there was no identifiable fund from which attorneys' fees could be paid. 12 The district court judge made no findings of deliberate concealment or fraud, 13 nor did he expressly label the violations as being of a material nature. 14 On these findings he ordered an award of $750,000 in attorneys' fees. 15

ATTORNEYS' FEES—SUBSTANTIAL BENEFIT

Although a number of issues were presented on appeal, two questions predominated. First, did the litigation produce such a benefit as to justify an award of fees, and second, were the fees awarded reasonable? 16

prompted by a bid of $35 per share from a California company, Blue Chip Stamps. Subsequent to that offer the American Financial Corporation offered $40 per share for its 60 per cent interest in the Enquirer's stock and the same amount per share to all of the minority stockholders. Scripps accepted the offer and the American Financial Corporation proceeded to acquire the entire Scripps interest and ultimately all the minority shares. Id. at 1192.

6. Id.
7. Id.
9. As stated by an Enquirer director, "it was no deal for 'widows or orphans.'" In addition it was found by the district judge that "[t]he purchase by a corporation of its own shares has a potential for abuse . . . ." 508 F.2d at 1192.
10. Id. at 1193.
11. Id. at 1194.
12. Id. at 1193.
13. Id. at 1194.
14. Id.
15. Id. at 1193. The district court also awarded $115,000 of prejudgment interest. Scripps was ordered to pay $326,290.90, the Enquirer, $393,333.60 plus $35,115.95 expenses, and American Financial Corporation, $145,375.50. Id.
16. Id. at 1194. Also at issue were the justification and reasonableness of the prejudgment
In framing its decision the court of appeals acknowledged the complexity of facts and the voluminous character of the evidence and concluded:

There was testimony before the District Judge from which he could have concluded, as he did, that the Enquirer's management was proposing a high risk plan. The cash payment of over one million dollars would have depleted the Enquirer's working capital, thereby impairing liquidity. The ... obligation to Prudential, including the loan and the preferred stock, was about equal to the total asset value of the Enquirer ... It is clear that such a highly leveraged capital structure could bring about a financial disaster if the Enquirer suffered even a temporary decline in revenues ... Finally, we note that the plan of acquisition would have produced no corporate benefit for the Enquirer commensurate with the substantial debt that it would have assumed.  

Affirming the findings of the lower court, the Sixth Circuit followed the traditional principle that a trial judge can best determine the law based upon the facts of a particular situation. The court went on to find that:

As we see the matter, plaintiffs' derivative suits succeeded in delaying consummation of a risky repurchase plan until two other companies made offers that would have accomplished the Scripps-Howard divestiture without the adverse effect upon the Enquirer's capital structure. Further, insofar as the derivative actions exposed inaccuracies and misleading statements in the proxy materials, this litigation constituted "corporate therapeutics," which benefits both the corporation and its stockholders.

In effect, the district court found, and the court of appeals agreed, that without the institution of the derivative actions and the situation these actions created, Scripps would have been unable to withdraw from the purchase plan. Thus, the better offers could not have been tendered, and the adverse effects on the Enquirer's capital would have become a distinct possibility. In affirming, the court of appeals stated: "[o]n the record before us, we cannot hold clearly erroneous the findings of the District Court that the plaintiffs' suits resulted in a substantial benefit to the Enquirer."
The mere determination that the institution of the derivative actions had conferred a substantial benefit upon the corporation offers no guidance as to what type of relief should be granted where no identifiable fund had been produced. The court held that the awarding of fees was controlled by the leading case of Mills v. Electric Auto-Lite Co. in which the United States Supreme Court outlined the definitive view on awarding attorneys' fees in situations similar to those presented in this case.

In Mills the Supreme Court was faced with a stockholder derivative action which sought to have a merger set aside. The petitioners claimed that because of an omission, the proxy materials were materially misleading. The district court had concluded that the omission was of a material nature; that the necessary causal relationship between the suit and the benefit conferred upon the corporation was present; and that relief (i.e., attorneys' fees) should be granted. The Seventh Circuit Court of Appeals affirmed the lower court's conclusion as to materiality of the omission, but reversed on its finding that there was no causal relationship.

In vacating the court of appeals' decision, the Supreme Court issued a carefully reasoned opinion dealing with the award of attorneys' fees in situations where the litigation has produced no fund. This opinion was an extension of the "common fund theory" which calls for the awarding of attorneys' fees when an individual litigant's success produces a fund and confers a substantial benefit on an ascertainable class. In the exercise of the court's equitable power, fees can be awarded in order to spread the costs incurred by the litigant among those who derived a benefit from his efforts. The Mills court concluded:

While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff

20. Id.
22. 508 F.2d at 1194-95.
23. 396 U.S. at 378.
24. Id. at 379-80.
25. Id. at 391-92.
has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. . . .27

. . . "[T]he foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation."28

Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class. . . . For example, awards have been sustained in suits by stockholders complaining that shares of their corporation had been issued wrongfully for an inadequate consideration. A successful suit of this type . . . does not bring a fund into court or add to the assets of the corporation, but it does benefit the holders of the remaining shares by enhancing their value. . . .29

In Ramey v. Cincinnati Enquirer, Inc.,30 the court of appeals found that derivative suits had a beneficial effect for the Enquirer as a corporation and for the minority shareholders. Although no fund was produced and the fixing of an exact monetary value for attorneys' fees would be impossible,31 the services performed justified an award.32 The rationale of Mills clearly dictates such a result.33

In Mills the Supreme Court acknowledged that attorneys' fees should be permitted in successful suits.34 Moreover, the Court did not require such suits to be adjudicated before they could be deemed successful.35 The Court elected to follow a common sense, practical approach. If adjudication were required, the corporate directors could withdraw a plan.36 Such precipitate withdrawal without the award of fees would have the effect of discouraging investigation by those outside the corporate inner sanctum.37

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29. 396 U.S. at 393-94.
31. 508 F.2d at 1194.
32. Id.
34. 396 U.S. at 392.
35. Id. at 389.
37. See Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2d Cir. 1968).
in encouraging "fair corporate suffrage as an important right that should attach to every equity security bought on a public exchange" would be thus undermined.

The Ramey court followed this logic, holding that "[s]o long as a substantial benefit is conferred upon the corporation, it is not necessary that the litigation be brought to a successful completion." It is now clear in the Sixth Circuit that once a case has been determined to be meritorious, attorneys’ fees will not be denied despite a subsequent termination of the litigation.

The finding for an award of fees did not resolve the issue of whether the fees as set by the trial judge were reasonable. The court again expressed its confidence in the discretion of the trial judge:

The trial judge in determining the value of services rendered by lawyers who have tried a case before him ordinarily has an infinitely better opportunity to evaluate those services than does an appellate court. Therefore, appellate courts hold that the trial judge’s determinations on legal fees should not be set aside unless there is a clear abuse of discretion.

The court also relied upon an earlier Sixth Circuit decision, Denny v. Phillips & Buttorff Corp., in which a derivative suit was initiated to set aside a stock transfer plan. In Denny the directors rescinded the plan, thus rendering the litigation moot while it was still pending. The court held that "[i]t cannot be said that the cancellation of the purchase of the ... stock did not result from the action of the minority shareholders ..." The court thereupon awarded attorneys’ fees. A finding of constructive fraud gave further support to the conclusion that the suit was successful and that fees were in order. The Ramey court employed certain factors which the Sixth Circuit has developed in order to deal with cases of this nature and decided that counsel should be rewarded for their efforts.

38. 396 U.S. at 381.
41. 508 F.2d at 1196. See Trustees v. Greenough, 105 U.S. 527 (1881).
42. 331 F.2d 249 (9th Cir.), cert. denied, 379 U.S. 831 (1964).
43. Id. at 251.
44. Id. at 250.
45. 508 F.2d at 1196. The court cited six factors:
1) the value of the benefit rendered to the corporation or its stockholders, 2) society’s stake in rewarding attorneys who produce such benefits in order to maintain an incen-
In *Ramey* the Sixth Circuit reinforced the doctrine of trial court discretion by observing:

The District Judge in the instant case found on substantial evidence that this was difficult and complex litigation, that the public had a stake in this and similar litigation, that the lawyers on both sides were competent and of high standing in their profession, and that plaintiffs’ lawyers had contingent agreements that could not possibly compensate them (or encourage others) in relation to the services performed.\(^46\)

\[\ldots\]

It does not appear to this court that the defendants ever really anticipated escaping from payment of substantial attorney fees. \ldots As we have pointed out, the District Judge found that defendants’ benefit from this litigation was substantial. He did not pin a specific figure upon the benefit, but he had before him testimony that would have allowed a finding of between $7,500,000 and $17,500,000. We find no abuse of discretion in the District Court’s award of the sum total of fees.\(^47\)

Having found that the defendants had failed to sustain their claim that the fees were unjustified and unreasonable, the court affirmed the lower court’s assessment of fees but ordered that the *Enquirer* alone should pay them.\(^48\)

**CONCLUSION**

The district court was confronted with a complex and serious situation: the plaintiffs’ allegations lodged serious charges against the management of the *Enquirer*. Although the extended trial was dismissed as moot, it would have been unjust to deny an award of attorneys’ fees to those who had diligently spent many hours to prepare and argue a case which exposed deficiencies in the proposed sale. Even the defendants did not anticipate a total escape from payment of substantial attorneys’ fees.\(^49\) Thus, the essence of *Ramey*...
concerns the means which the court employed to reach the end, i.e., the award of attorneys' fees based upon the substantial benefit conferred upon the corporation.

As noted at the outset, Mills outlined the definitive view in awarding attorneys' fees based upon a substantial benefit conferred upon a corporation by a stockholder derivative action. The Court in Mills set forth two requirements that must be met before suits alleging inadequacies in the preparation of proxy vote materials are to be deemed successful as establishing a cause of action. First, the violations must be material:

Where the misstatement or omission in a proxy statement has been shown to be "material," as it was found to be here, that determination itself indubitably embodies a conclusion that the defect was of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote. This requirement that the defect have a significant propensity to affect the voting process is found in the express terms of [Securities and Exchange Commission] Rule 14a-9, and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial . . . .

The second requirement demands that the proxy vote solicitation be essential to the completion of the contested transaction:

Where there has been a finding of materiality, a shareholder has made a sufficient showing of causal relationship between the violation and the injury for which he seeks redress if, as here, he proves that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction . . . .

It is evident that both requirements must be met before relief (whatever form it may take) will be granted:

Our conclusion that petitioners have established their case by showing that proxies necessary to approval of the merger were obtained by means of a materially misleading solicitation implies nothing about the form of relief to which they may be entitled . . . .

Clearly not at issue in this particular case is the second requirement of Mills. However, the issue of materiality is in dispute though its presence is not as visible as the necessity for the proxy solicitation.

50. 396 U.S. at 391-94.
51. Id. at 384 (emphasis in original).
52. Id. at 385. See generally J.I. Case Co. v. Borak, 377 U.S. 426 (1964).
53. 396 U.S. at 386.
A careful reading of Ramey discloses a strong implication that the defects in the proxy were material:

It also is clear that although appellants describe the violations... as "technical," none the less they would have served to require disclosures that would have altered the Enquirer's minority stockholders further concerning the financial burden that their corporation was undertaking to assume.54

It is clear that the court felt that the alleged "technical"55 violations were of a more material nature.56 What remains unclear is whether these violations possessed a character which would have been considered important by a typical shareholder attempting to decide how to vote.57 The materiality standard of Mills, namely that the defects have a significant influence on the voting process,58 has now been expanded to include defects which created inaccuracies and misleading assertions in the proxy statement.59 However, requirements detailing what will be regarded as a "misleading statement" are not disclosed.

As a result of Ramey the Sixth Circuit Court of Appeals has clouded this area by its failure to issue a definitive opinion enumerating what is required before a stockholder derivative action is deemed successful, and thereby requiring relief. Perhaps Ramey represents the minimum that must be established before the courts can determine whether a substantial benefit has been conferred upon a corporation. Undoubtedly the court will be faced with the question again. At that time it will be necessary for it to set forth much clearer guidelines detailing what must be established in a stockholder derivative suit before a remedy will be awarded.

Richard P. Ferenc

54. 508 F.2d at 1194.
55. Id.
56. Id.
57. 396 U.S. at 384.
58. Id.
59. 508 F.2d at 1194.
BOOK REVIEWS


Reviewed by James R. Scholles*

The author states in his "foreword" that this little book is intended to provide instant answers to legal questions which are likely to confront a physician in the course of daily practice. The book is a useful reference which explains the in's and out's of a variety of legal problems peculiar to medical practice. Mercifully, it is not designed for the physician who takes a "Popular Mechanics" approach to the legal implications of his practice — instead, it assumes the reader has the good sense to retain a lawyer.

The author first deals with the partnership agreement, a device gaining in popularity as a mode of practice. A superficial outline of a typical agreement is first presented, followed by a discussion of the relative advantages and disadvantages that such a "marriage" among doctors creates. Freedom, better care for patients, and continuity of practice are among the advantages of forming such arrangements. Conspicuously omitted, however, are the disadvantages, which include personality conflicts, loss of independence and identity, and productivity problems between the individuals involved. In addition, there is a surprising dearth of materials on the question of noncompetition compacts.

There is also an excellent explanation of the structure and operation of Keough Plans, although the author's sentiments are typical of those found in other treatises. The health profession is continually bombarded with proposals citing the advantages of Keough Plans, but is rarely informed of their very real drawbacks. The author continues to memorialize Keough even when he describes, in his very comprehensive and understandable manner, professional incorporation. The relative merits of corporate profit sharing and pension plans are contrasted for their value as vehicles for the retirement of the incorporated physician. The author assumes that de-

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spite the costs of incorporation, increased business operations and employee contributions, the practitioner will be able to accumulate surplus income to save for the future tax-free. However, the physician will have to balance the tax savings and retirement benefits with the possible penalties: whether the employees will find retirement benefits a more lucrative alternative to salary increases and, depending on the number of employees, whether employee compensation will offset the tax savings.

There is also a good analysis of income tax. It is a straight-shooting approach which points out the accepted practice, and will undoubtedly provide new insight for a lot of physicians. Curiously, however, there is no discussion of entertainment expenses or investment credit. The chapters dealing with multiplying dollars, tax shelters, insurance, and estate planning provide good basic information, but it would have been useful to provide references for more in-depth information.

The author highly endorses medicare, even going so far as to call it a "phenomenal" success. Given the sudden escalation of social security taxes, the inevitable bungling of government bureaucrats, and professional resistance to socialized medicine, his credibility with his readers is likely to suffer measurably. The author's chances for a standing ovation at a medical academy meeting will certainly be in jeopardy.

This legal handbook touches many subjects, and its value lies in the service it performs for the average doctor. It is, of course, no all-purpose security blanket for the legal practitioner. But the lawyer on retainer who finds himself exasperated by daily inquiries may want to recommend this book to his physician client.


*Reviewed by William A. Stearns*

CBS News correspondent Dan Rather and his colleague, Gary Paul Gates, have put together an analysis of what they believe to be the major causes of the downfall of Richard Nixon from the office of President of the United States.

To a public which was not privy to the day by day workings of the Nixon White House, this volume provides several hours of enjoyable reading. The accounts of the rise and fall of cabinet mem-

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bers and advisors such as Moynihan, Finch, Hickel and Burns, are especially noteworthy and give the reader insight into the way in which these men, though ostensibly promoted by the Nixon White House, were actually demoted. For example, after Finch was decorously relieved of his cabinet post and "elevated" to another position, "it became evident what Finch's 'higher' calling was to be. Along with his fellow counselor Moynihan, he was put on short rations, left to scrounge for whatever scraps there were to be found on the back burner."

The biographical data on the Nixon staff proves to be very valuable when one looks at the whole range of events, starting with Nixon's election, through the Watergate hearings, and culminating in his resignation. The authors deal with Erlichman, Mitchell, Kissinger and other familiar actors in the Nixon drama. The most revealing portrait is that of Haldeman, who once responded to a memo from one of his staff members with the symbol "TL?"—too little, too late. He epitomizes efficiency at its worst, which is characterized by his response of "Wait until he dies" to a request that the President call a dying Senator's wife. "The idea of two telephone calls for one dying Senator apparently offended his sense of efficiency."

However, when one gets beyond the background material, the book falls far short of providing detailed analysis of the downfall of Richard Nixon as President. His resignation was brought about by a myriad of causes and not solely, as the writers propound, by surrounding himself with an arrogant and ruthless staff responsible only to Richard Nixon and not the public. It is well known that the staff was not even responsible to Richard Nixon at all times, and that it operated with virtually unfettered authority. Rather and Gates seem to be saying that Richard Nixon was manipulated by the ringleader of the staff and the ultimate victim: H. R. (Bob) Haldeman. If, in fact, Haldeman did have the power to which the authors allude, it was the shrewd veteran politician Richard Nixon who unleashed it.

While this book fails to provide any profound insight into the complexities of Richard Nixon's political demise and sometimes reads like a glib gossip column, it nevertheless provides a worthwhile viewpoint different from that gleaned from the daily newspaper or the evening news.

Reviewed by William J. Wehr*

At a time when the professions of law and medicine are increasingly forced into co-existence, this latest volume by the Health Law Center is introduced to the reader as a single volume which explores "the critical legal issues faced by hospitals." To those even remotely aware of the problems in this area, such a goal appears unrealistic — yet the editors seem to have found the true meaning of the word "brief" and have met the user's expectations. It is not a volume intended for leisurely reading but rather for use as a reference tool. It is not addressed solely to the legal profession; in fact, its main thrust is toward those who, both in administration and patient care, direct the operation of hospitals.

One familiar with the first edition of this volume will immediately note that the authors have expanded its coverage, as well as improved and updated the original materials. For example, current cases have been introduced as illustrations of the support being gained in negligence actions for a more expansive rule of due care, as opposed to the now largely discredited "same locality" standard. The doctrine of respondeat superior is another area which has received a great deal of justifiable attention. Although the application of the doctrine to hospital negligence cases is common, it is one of the least understood by hospital personnel. A separate chapter, predominantly dealing with a nurse's tortious conduct either in direct actions or as a supervisor, is devoted to individual liability.

Another area of current interest to both hospital personnel and health law practitioners revolves around the issue of implied consent. The text defines it as "that consent which is obtained after the patient has been given sufficient information so that he understands substantially the nature of the procedure to be performed, the risks and consequences associated with it, and the courses of action open to consideration other than the contemplated procedure." It is pointed out that hospitals as well as physicians may be liable for failure to obtain such consent, either because of the patient's status as an invitee, or as a result of the respondeat superior doctrine in cases where the physician is a hospital employee.

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The authors also explore such things as religious beliefs and blood transfusions; the type of consent required for emergency and mental patients; consent forms; and blood tests ordered in criminal cases. The concept of implied consent is also examined in cases where a contemplated medical procedure must be modified or extended during surgery. The related problem of a patient seeking to be discharged when still in need of further attention is given excellent treatment.

Government controls within the health care industry are also treated. The section on financial management has been broadened in scope to include such relevant areas as planning legislation and the Hill-Burton Act; hospital rate setting; and medicare and medicaid legislation. Drug laws such as the Controlled Substances Act are discussed, as are the key provisions of recent amendments to the Social Security Act dealing with review of professional standards. Labor laws at both the state and federal level are also included with the exception of the 1974 amendments to the National Labor Relations Act which bring all hospitals under most of its provisions.

The book is primarily a reference tool, with a pleasing accommodation between the need to be thorough, and the necessity for condensation. Like most highly specialized reference works it captures the esoteria of a limited field, but its practicality for counsel to hospital administration should not be overlooked. The information contained is accurate and indicates the competence of those who wrote the chapter drafts. Once again, the Health Law Center has made an important contribution in making such material accessible to an ever-growing audience.