# NORTHERN KENTUCKY LAW REVIEW

## Volume 4 1977 Number 1

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Exclusionary Rule: Down and Almost Out</td>
<td>1</td>
</tr>
<tr>
<td>Bernard J. Gilday, Jr.</td>
<td></td>
</tr>
<tr>
<td>Synergistic Jurisprudence and Eugen Ehrlich</td>
<td>21</td>
</tr>
<tr>
<td>Ovid C. Lewis</td>
<td></td>
</tr>
<tr>
<td>Professor Ehrlich's Czernowitz Seminar of Living Law</td>
<td>37</td>
</tr>
<tr>
<td>William Herbert Page</td>
<td></td>
</tr>
<tr>
<td>The Kentucky Long Arm Statute: How “Long” is it?</td>
<td>65</td>
</tr>
<tr>
<td>Kurt A. Philipps</td>
<td></td>
</tr>
<tr>
<td>Legitimizing the Administrative State: The Judicial Development of the Nondelegation Doctrine in Kentucky</td>
<td>87</td>
</tr>
<tr>
<td>Edward H. Ziegler, Jr.</td>
<td></td>
</tr>
<tr>
<td>Comments</td>
<td>121</td>
</tr>
<tr>
<td>A Constitutional Analysis of Kentucky’s Noncommercial Bail Bondsmen System</td>
<td></td>
</tr>
<tr>
<td>Transfer of Jurisdiction Under the New Kentucky Juvenile Court Act</td>
<td>141</td>
</tr>
<tr>
<td>SIXTH CIRCUIT NOTES</td>
<td></td>
</tr>
<tr>
<td>Constitutional Law—Search and Seizure—United States v. Carriger, 541 F.2d 546 (6th Cir. 1976)</td>
<td>161</td>
</tr>
<tr>
<td>BOOK REVIEWS</td>
<td></td>
</tr>
<tr>
<td>Research in Medical Literature as Trial Preparation.</td>
<td>183</td>
</tr>
<tr>
<td>By Wesley Gilmer, Jr.</td>
<td></td>
</tr>
<tr>
<td>For The Defense. By F. Lee Bailey</td>
<td>187</td>
</tr>
<tr>
<td>“... We are the Living Proof . . .” The Justice Model for Corrections. By David Fogel</td>
<td>190</td>
</tr>
<tr>
<td>Unequal Justice: Lawyers and Social Change in Modern America. By Jerold S. Auerbach</td>
<td>192</td>
</tr>
</tbody>
</table>
The views expressed in the articles appearing in the Review are those of the respective authors, and do not necessarily reflect the opinions of the administration, faculty, or students of Salmon P. Chase College of Law or Northern Kentucky University.

Contributing authors are expected to reveal personal, economic, or professional interests or connections which may have influenced the views taken or advocated in their articles. Each author impliedly represents that he or she has made such a disclosure by consenting to publication in this law review.
THE EXCLUSIONARY RULE: DOWN AND ALMOST OUT

Bernard J. Gilday, Jr.*

I. INTRODUCTION

For sixty-two years in the federal system and fifteen years in the states, the United States Supreme Court has required the pre-trial and in-trial suppression of evidence where such was searched for and seized in violation of constitutional rights based on the fourth and fifth amendments. This suppression is grounded on the principles that the government must play a fair game according to the rules, free of "cheap shots." Not even the government can sit at the table of justice with unclean hands, nor can the courts be accomplices in the willful disobedience of the Constitution they are sworn to uphold. The mandate, called the Exclusionary Rule, has provoked more controversy than any other constitutional interpretation. Since the exclusion of wrongfully seized, but otherwise credible and trustworthy physical evidence, frequently enables one factually guilty to escape conviction and penalty, courts at all levels have been aggravated, prosecutors incensed and frustrated, and members of law enforcement allegedly so handcuffed that, for at least some, perjury has become a way of life. In addition, aspiring law-and-order politicians and news commentators who castigated the "softhearted and softheaded" judiciary for enforcing the Exclusionary Rule have found themselves in new positions of popularity and power.

Indeed, constitutional mandates are subject to change. The pres-

* A.B., Xavier University; J.D., University of Cincinnati; Mr. Gilday is a member of the firm of Gilday, Jung, & Gilday, Cincinnati, Ohio.
1. U.S. CONST. amend. IV:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
2. U.S. CONST. amend. V:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
sure brought by critics, the ill-advised, and the opportunists succeeded in causing Richard Nixon to bring to the Supreme Court what he has described as the "strict constructionist," thereby causing a radical shift in the Court's approach to and perception of the Exclusionary Rule's constitutional status. Over a four year period, there has been a chipping away and casting aside of the considerations which support the principle of rejecting physical and testimonial evidence, unlawfully obtained or seized, and today we are but a few shovels away from burying the Exclusionary Rule. Substitutes have been proposed and offered which Chief Justice Burger has described as "reasonable and effective," but these are all "Ivory Tower" theories of the campus and are completely ineffective in practice.

II. THE BIRTH, DEVELOPMENT, AND DEMISE OF THE EXCLUSIONARY RULE

Three distinct theories spawned and nurtured the Exclusionary Rule. The first, known as "The Personal Right Theory," was announced in *Weeks v. United States*, the 1914 decision of Justice William R. Day. Grounded solely on the fourth amendment, the *Weeks* Court found that the rule of exclusion vindicated the victim's right of privacy and prevented a further invasion of his constitutional rights. This emphasis on the personal and individual rights of the accused was short lived. Thereafter the Court found that there was a close interlocking of the fourth and fifth amendments, and it adopted the 1886 reasoning of *Boyd v. United States*, that

> 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which . . . is condemned in the Fifth Amendment; . . . the Fifth Amendment, [therefore] throws light on the question as to what is an 'unreasonable search and seizure'. . . .

In 1928, in *Olmstead v. United States*, we found the Court's majority and Justice Brandeis' famous dissent basing the Exclu-

---

5. 232 U.S. 383 (1914).
7. Id. at 633.
8. 277 U.S. 438 (1928).
sionary Rule on two entirely different and distinct principles. The majority maintained that, by excluding evidence illegally obtained, the judiciary declined to legitimize the unconstitutional conduct. Thus was born the Judicial Integrity Theory. Brandeis penned the words which ultimately produced the only surviving reason for the Rule, as he wrote:

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.9

Justice Holmes agreed and said, “I think it a less evil that some criminals should escape than that the government should play an ignoble part.”10

Because of and through Brandeis and Holmes, the Court came to see that in pursuing the Judicial Integrity Theory, it was doing nothing more and nothing less than ostensibly preserving the judiciary’s constitutional “virginity.” Actually, the Court was totally concerned with its own image for more than thirty-five years. It was not until 1949 when Wolf v. Colorado11 was announced that the true basis for the Exclusionary Rule was born. What we know today as the Deterrence Theory sprang from Wolf, and, simply stated, it holds that evidence shall be excluded to deter police from violating constitutional privileges.12 The rationale assumes that the potential exclusion of items seized will discourage the police from employing unconstitutional methods to obtain evidence. The short-run objective is the deterrence of police misconduct; the long-run goal is an educational effect resulting in fewer fourth amendment violations. Indeed, reliable evidence is suppressed; the accused benefits; and

9. Id. at 485 (Brandeis, J., dissenting).
10. Id. at 470.
11. 338 U.S. 25 (1949). A majority of the Supreme Court, in an opinion by Justice Frankfurter, held that in a state court the fourteenth amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.
12. Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing Constitutional demands in his instructions to the police.
338 U.S. at 44 (Murphy, J., dissenting).
in the search for truth, truth is hidden. But police misconduct is condemned and the general public benefits, assured that fourth amendment transgressions will not be tolerated. There is no vindication of the accused, for the rule is calculated to prevent, not to repair. The purpose of the rule is to compel respect for the constitutional guaranty and to remove the incentive to disregard it. Mapp v. Ohio,\textsuperscript{13} with its rule that "[t]he criminal goes free, if he must, but it is the law that sets him free,"\textsuperscript{14} extended the Exclusionary Rule to the states, but Linkletter v. Walker\textsuperscript{15} refused to retroactively reverse state court convictions based on the use of illegally obtained evidence during the period between Wolf and Mapp - 1949 to 1961.

Opponents of the rule mustered quickly after the announcement of Mapp and maintained that if the Rule is simply a mechanism to insure conformance to the commands of the fourth amendment, it is constitutionally mandated only so long as it fulfills that function. They girded for battle, sought out their champion, and commenced assembling what they called "reliable empirical data" which, they contended, demonstrated that:

1. Police illegality is not deterred, while police perjury is actually encouraged.
2. Judicial reputations suffer because a patently guilty defendant escapes punishment.
3. Judges are placed in the position of declaring questionable searches valid in order to avoid suppressing physical evidence which can never lose any of its reliability.
4. The average police officer, operating under the pressures of his job, has neither the inclination, the desire nor the ability to determine correctly the lawfulness of his search procedures; therefore, the only person directly affected by the rule's operation is an innocent prosecutor who is denied damning evidence because of police behavior.\textsuperscript{16}

Search for a leader began and abruptly ended when the opponents of the Rule came upon, and widely publicized, the writings of Warren E. Burger, particularly his catchy-captioned article "Who Will

\textsuperscript{13} 367 U.S. 643 (1961).
\textsuperscript{14} Id. at 659.
\textsuperscript{15} 381 U.S. 618 (1965). In Linkletter the Court explained that the purpose of Mapp was to deter the lawless action of the police and that this purpose "will not at this late date be served by the wholesale release of the guilty victims."
Watch The Watchman," published three years after Mapp, where Mr. Burger, then an appellate judge, wrote:

The Public has accepted—largely on faith in the judiciary—the distasteful result of the Suppression Doctrine; but the Wrath of public opinion may descend alike on police and judges if we persist in the view that suppression is a solution. At best it is a necessary evil and hardly more than a manifestation of sterile judicial indignation.18

When Richard Nixon sought, at the insistence of loud politically powerful voices, a strict constructionist, and not another softheaded judge to grace the chair of Supreme Court Chief Justice, Judge Burger strode forward, was nominated by the President on May 21, 1969, confirmed on June 9, 1969, and seated on June 23, 1969. From that date to the present, the Chief has charted a course to find, in his words, "the true fourth amendment law."19 In his first major criminal law dissent in Coleman v. Alabama,20 he made clear his unbending position when he stated:

I will not join in employing recent cases rather than the Constitution, to bootstrap ourselves into a result. ... By placing a premium on "recent cases" rather than the language of the Constitution, this Court makes it dangerously simple for future Courts, ... to operate as a "continuing constitutional convention."21

The Warren Court, in one decade, had totally revolutionized criminal law. With the demise of Warren and the ascension of Burger, the question immediately raised was, how long will it take the "Minnesota twins"22 to undo all that was accomplished by the Warren Court? The answer came rapidly, as the Chief Justice mounted his assault for his primary targets - the fourth and fifth amendments. He commenced with two diversionary skirmishes on the fifth and sixth amendments.

1. In 1970, in Ashe v. Swenson,23 the Court held that the Double

18. Id. at 23.
19. Id.
20. 399 U.S. 1 (1970). The majority, in three separate opinions, agreed that failure to provide counsel at the preliminary hearing unconstitutionally denied the defendants assistance of counsel. In his dissent Chief Justice Burger argued that the Constitution did not require the assistance of counsel at the preliminary hearing.
21. Id. at 22 (Burger, C.J., dissenting).
22. The author collectively refers to Chief Justice Burger and Associate Justice Blackmun.
Jeopardy Clause incorporates the principle of collateral estoppel as a constitutional requirement. Burger stoutly, sharply, and critically dissented, saying: "the conviction . . . in this case . . . should not be held invalid by this Court because of a belief that the Court can improve upon the Constitution." 24

2. In 1970, in California v. Green, 25 Burger, with an able assist from Blackmun, dealt a death blow to our belief that confrontation meant cross-examination. To our amazement, he ruled that a prior statement given at a preliminary hearing which was then subject to cross-examination, was admissible at trial when the witness is not available and does not testify in trial.

Chambers v. Maroney, 26 justified a delayed police station search where a moving vehicle was stopped with probable cause to search and exigent circumstances. Chief Justice Burger, after testing the thrust of his rapier in Chambers, sliced at his objective with relish and vigor in two 1971 cases. He stung and staggered the fourth amendment in Bivens v. Six Unknown Agents. 27 In a nine page, scathing dissent, the Exclusionary Rule was characterized as "'capital punishment' we inflict on evidence [for] police error in its acquisition." The Chief Justice stated:

In characterizing the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement, I intend no reflection on the motivation of those members of this Court who hoped it would be a means of enforcing the Fourth Amendment. Judges cannot be faulted for being offended by arrests, searches, and seizures that violate the Bill of Rights or statutes intended to regulate public officials. But we can and should be faulted for clinging to an unworkable and irrational concept of law. My criticism is that we have taken so long to find better ways to accomplish these desired objectives. And there are better ways.

Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally inno-

27. 403 U.S. 388 (1971). Five members of the Court held that unconstitutional searches and seizures by federal agents gave rise to a federal cause of action for damages.
cent victims of official misconduct.

I do not propose, however, that we abandon the suppression doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. To overrule Weeks and Mapp, even assuming the Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed—that an open season on “criminals” had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be.29

In what has been called the extraordinary case of Coolidge v. New Hampshire,30 the Chief Justice, in his dissent, found that it was constitutionally permissible for the police, after arresting a most cooperative Coolidge at his residence for murder, to impound his driveway-parked Pontiac, vacuum his car two days later and again one year later at the police station, and use the sweepings in evidence. While Coolidge plainly dealt with a planned, warrantless search of a parked vehicle at a residence, with no justified initial intrusion as existed in Chambers, Chief Justice Burger stated:

“This case illustrates graphically the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves.”31

The Burger-influenced onslaught continued into 1972 and through 1974. In rapid succession appeared:

1. Cupp v. Murphy,32 which condoned fingernail scrapings taken

---

28. Id. at 419.
29. Id. at 420-21. Chief Justice Burger suggested that the suppression doctrine should be replaced by Congressional legislation which would provide for:

   (1) a waiver of sovereign immunity as to illegal acts of law enforcement officials;
   (2) a cause of action in damages for such illegal acts;
   (3) a quasi-judicial tribunal to adjudicate damage claims;
   (4) a statutory remedy in lieu of the exclusion of illegally seized evidence;
   (5) a provision directing that admissible evidence would not be excluded because of fourth amendment violations.

Id. at 423.
31. Id. at 493 (Burger, C.J., dissenting).
at the police station of one not under arrest, who appeared voluntarily to assist in the investigation of his wife's death;

2. *Cady v. Dombrowski,* which approved a warrantless trunk search of a vehicle towed to a service station after an accident in hopes of finding the service revolver of a police officer charged with driving while intoxicated as a "type of caretaking" search; 34

3. *United States v. Robinson,* and *Gustafson v. Florida,* which announced the rule that a custody arrest for a routine traffic violation justified an incidental search, and the blockbuster;

4. *United States v. Calandra,* where the team of Chief Justice Burger, Blackmun and Powell ruled that a grand jury witness may not refuse to answer questions on the ground that they are based on evidence obtained from him in an earlier unlawful search, noting that:

Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to prescribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

The Court tossed the defense a bone with the observation that the illegally seized evidence still cannot be used in a subsequent criminal prosecution of the search victim. But the handwriting was on the wall; the Exclusionary Rule was dying. Brennan said in his dissent, Marshall and Douglas concurring:

I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to . . . abandon altogether the exclusionary rule in search and seizure cases.

On the heels of *Calandra* came the Ohio-commenced case of *Cardwell v. Lewis.* The case raised the issue of the legality of a warrantless seizure of an automobile while the accused owner was in custody, and the scraping of paint from the exterior while the vehicle was impounded after its removal by the police from a public parking lot. With Stewart, Douglas, Brennan and Marshall dissenting, the majority, speaking through Justice Blackmun, held that:

33. 413 U.S. 433 (1973).
34. Id. at 447.
38. Id. at 348.
39. Id. at 365 (Brennan, J., dissenting).
Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action. 41

A requiem sounded in 1975, first on June 25th, with U.S. v. Peltier, 42 and then on December 1st with Texas v. White. 43 The former reached the Court on the question of retroactive application of the roving border patrol rule of Almeida-Sanchez. 44 The Peltier majority reversed the Ninth Circuit. The lower court had retroactively applied Almeida-Sanchez and required that marijuana seized from the trunk of a vehicle be suppressed. The border patrol had seized the evidence without probable cause to believe that the vehicle contained illegal aliens. Marshall, Douglas, and Brennan dissented from the holding. They sounded the sober note that: "When a suitable opportunity arises, today's revision of the Exclusionary Rule will be pronounced applicable to all search-and-seizure cases." 45 That revision is striking, significant and currently of great importance to all of us. The Rehnquist majority ruled:

If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. 46

As the dissent points out, this is "an entirely new understanding of the exclusionary rule," 47 for the majority's test requires probing the subjective knowledge of the searching officers. This is a new layer of fact finding, and courts will have to find whether the searching officers actually believed they were acting unconstitutionally and whether they should have known that they were doing so. The exclu-

41. Id. at 595-96 (citation omitted).
42. 422 U.S. 531 (1975).
43. 423 U.S. 67 (1975).
44. Almeida-Sanchez v. United States, 413 U.S. 266 (1973). In Almeida, the Court held that a warrantless automobile search conducted by the Border Patrol about 25 air miles from the Mexican border without probable cause was unconstitutional under the fourth amendment. The Court reasoned that the doctrine authorizing warrantless searches of automobiles did not do away with the requirement that probable cause for the search exist. Id. at 269-70.
45. 422 U.S. at 552 (Brennan, J., dissenting).
46. Id. at 542 (emphasis added).
47. Id. at 551.
The per curiam opinion in *Texas v. White*\(^{48}\) was the real egg-laying event of 1975. Amarillo police officers arrested White at 1:30 p.m. while he was attempting to pass false checks at a drive-in-bank window. Ten minutes before seeing White, the officers had been informed that one matching his description and the description of his vehicle had made the same attempt at another bank. White was ordered to park his car, and while he was doing so, was observed trying to "stuff" something between the seats. White went to the station in a police vehicle where he refused to consent to a search of his vehicle. Another officer drove White’s car to the station, searched it, and found four wrinkled, false checks.

The Texas Court of Appeals reversed a trial court order denying suppression. The United States Supreme Court reversed the appellate court with a complete acknowledgment that it does not understand nor does it choose to apply its holding in *Chambers v. Maroney*.\(^{49}\) With Marshall and Brennan dissenting, the Court tersely ruled:

In *Chambers v. Maroney* we held that police officers with probable cause to search an automobile on the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant. There, as here, '[t]he probable-cause factor that developed on the scene still obtained at the station house.'\(^{50}\) *Chambers* did not so state. It did authorize vehicle removal to the station house for search only when it is reasonable to take it to the station in the first place. But *Chambers* has now either been grossly extended or sub silentio overruled. We must now expect that station house, warrantless, vehicle searches, without consent, will be the fashion, so long as probable cause to stop the vehicle is present.

While 1976 generally found us in national celebration and somewhat resolved to do something about morals fallen too low and taxes grown too high, it was the year of the lengthening shadow for the Exclusionary Rule. It provided the opportunity for the Court to defrock the principle, again brand it as that "judicial device," and establish its time of death. In *United States v. Janis*,\(^{51}\) Los Angeles law enforcement authorities seized wagering records and cash while

---

50. 423 U.S. at 68 (citation omitted).
51. 96 S. Ct. 3021 (1976).
executing a defective search warrant, and state criminal proceedings ended when pre-trial suppression motions were sustained. A cash recovery action was promptly instituted in federal court by the owner of the money, and the Blackmun majority unartfully hammered out, in the words of Mr. Justice Stewart, a new “silver platter doctrine.” It held that the state-suppressed wagering records and cash should have been received in evidence in the federal civil suit. With obvious frustration, the opinion announced:

There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches. We find ourselves at that point in this case.

“Seize without concern” is now the theme where some factual guilt appears, and its melody includes the bar — just one bite of the apple for the accused — sung in Stone v. Powell. Since “societal costs” are paramount, the Court noted, “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted Federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.” The Powell majority also explained that the Exclusionary Rule is a disruption of the search for truth and justice, which is the primary purpose of a criminal trial, and that federal-state tensions are heightened by federal second-guessing of state court rulings. The Court must have applauded that portion of Mr. Justice White’s dissent which bluntly described his willingness “to join with four or more Justices” who would agree to denying the Exclusionary Rule “in those many circumstances where the evidence at issue was seized by an

52. Id. at 3036 (Stewart, J., dissenting).
53. Id. at 3034-35.
54. 96 S. Ct. 3037 (1976). Two prisoners convicted of homicide in state court sought federal habeas corpus relief on the ground that evidence introduced at their trial was obtained by an unconstitutional search and seizure.
55. Id. at 3052.
56. Id.
57. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for fourth amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.
58. Id. at 3072.
officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief.”

Thus, the moment of demise has been determined that day when the White invitation is accepted.

III. The End of *Miranda* May Be Near

Physical evidence ordinarily never loses any of its reliability, whether obtained lawfully or otherwise. Testimonial evidence, however, is far more susceptible of suspicion and thus the coerced confession area has never generated the debate produced by the fourth amendment rulings which concern only tangible evidence. The quality of police conduct and the omnipresence of some form of compulsion in the making of inculpatory statements predicted and led to the evolution of the *Miranda* Doctrine which has never meant very much to the Chief Justice. In 1969, as a Circuit Court Judge, Burger, in *Frazier v. United States*, wrote:

> The guidelines set forth in *Miranda* were means serving constitutionally prescribed ends; as artifices of implementation they are subordinate and only incidental to the rights they were designed to secure.
>
>
> The Fifth Amendment . . . serves neither to discourage nor to prohibit self-incrimination, it militates only against compulsory self-incrimination.

*Miranda* clearly mandated a policy of putting the accused on a more equal footing with the police at the interrogation stage, and required the prosecution to prove that not only were the rights given but that the accused actually understood them. In *Frazier*, Burger lifted this heavy burden from the prosecution and ruled that the government prevailed if it simply proved the capacity to understand. As an aside, I happily note that the Ohio Supreme Court, in 1974 in *State v. Jones*, rejected this approach. The court recognized that capacity to understand does not guarantee understanding, and required that comprehension and understanding of fifth amendment rights

---

59. *Id.*

60. 419 F.2d 1161 (D.C. Cir. 1969). In *Frazier* the District of Columbia Circuit Court held that the government did not sustain the heavy burden of proving that the defendant knowingly and intelligently waived his privilege against self-incrimination when the appellant was unnecessarily delayed in the arraignment process.

61. *Id.* at 1172-73 (Burger, J., concurring and dissenting).

exist in the particular person before and during interrogation.

While questions revolving about what constitutes custodial interro-
gation, waiver and consent, and eavesdropping on conversations reached the Supreme Court without seriously imperilling the principles of Miranda v. Arizona, the Chief Justice demonstrated his general disdain for Miranda in his 1971 majority decision in Harris v. New York. Justice Brennan, with three of his brothers in dissent, contended that:

[It is monstrous that courts should aid or abet the law breaking police officer. . . . The Court today tells the police that they may freely interrogate an accused incommunicado . . . and know that although any statement they obtain in violation of Miranda cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense.]

Chief Justice Burger held that a voluntary statement made to the police without adequate Miranda warnings could properly be used to impeach the credibility of a defendant who took the stand in his own behalf. The Chief Justice reasoned that the Miranda shield could not be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. The Chief Justice's disdain for the Miranda rights is found in his statement:

Assuming that the exclusionary rule has a deterrent effect on pro-
scribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

However, Miranda was explicit on the use of statements made without the warnings, holding that "the privilege against self-incrimination protects the individual from being compelled to in-
criminate himself in any manner. . . ."

Since Harris, much has occurred. On its face, Michigan v.
Tucker\textsuperscript{71} simply said that testimony of a prosecution witness, discovered by the police as a result of a pre-Miranda interrogation, without Miranda warnings, may be used in a post-Miranda trial. But ominous undertones are found in Justice Rehnquist's majority opinion when he states: "This Court has already recognized that a failure to give interrogated suspects full Miranda warnings does not entitle the suspect to insist that statements made by him be excluded in every conceivable context."\textsuperscript{72} In short, he was saying that the "fruit of the poisoned tree" rule of Wong Sun v. United States\textsuperscript{73} would not, in his judgment, be applied to the in-custody, rights-advised, voluntarily speaking accused. This prediction, if it can be called such, did not come true in Brown v. Illinois.\textsuperscript{74}

Brown was unlawfully arrested, and after two hours at the police station, made incriminating statements after being adequately advised of his rights. The Illinois Supreme Court, applying what is called the per se rule, held that the incriminating statements were admissible. The court held that the warnings broke the causal chain, that the unlawful detention, though unconstitutional, did not taint a voluntary statement, and that the unlawful arrest was not coercion. The United States Supreme Court reversed, rejected the per se rule, but declined to adopt any alternative "but for" rule. The Blackmun majority ruled:

[W]hether a confession is the product of a free will under Wong Sun must be answered on the facts of each case. No single fact is dispositive. . . . The Miranda warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances and particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution.\textsuperscript{75}

Of particular interest is the comment of Justice Powell, seemingly

\textsuperscript{71} 417 U.S. 433 (1974).
\textsuperscript{72} Id. at 451.
\textsuperscript{73} 371 U.S. 471 (1963). The Court in Wong Sun held that "verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." Id. at 485-86.
\textsuperscript{74} 422 U.S. 590 (1975).
\textsuperscript{75} Id. at 603-04 (citations and footnotes omitted).
shared by Justice White, who noted that "flagrantly abusive violation of Fourth Amendment rights, on the one hand, and 'technical' Fourth Amendment violations, on the other call for significantly different judicial responses." "Brown probably signals that on a case by case basis, depending upon the carefully developed facts in the record, the Wong Sun principle may or may not be applied in confession cases. Brown implies that, absent aggravating circumstances, a voluntary statement made after effective Miranda warnings is admissible. Trouble looms, for it appears that most, if not all, fourth amendment violations, except bad faith unlawful arrest, will be considered technical and without aggravation. One must wonder whether inadequate Miranda warnings will also soon be considered technical violations, insufficient to render inadmissible a voluntary confession. Whether any watering down or beefing up of the definition of voluntariness is forthcoming remains to be seen.

The State of Michigan provided the second vehicle the Court could ride to enter the Miranda compound in Michigan v. Mosely,"

---

76. Id. at 610. Justice Powell distinguished flagrant abuses from technical abuses as follows:

If, for example, the factors relied on by the police in determining to make the arrest were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, or if the evidence clearly suggested that the arrest was effectuated as a pretext for collateral objectives . . . or the physical circumstances of the arrest unnecessarily intrusive on personal privacy, I would consider the equalizing potential of Miranda warnings rarely sufficient to dissipate the taint. In such cases the deterrent value of the exclusionary rule is most likely to be effective, and the corresponding mandate to preserve judicial integrity . . . most clearly demands that the fruits of official misconduct be denied . . . .

At the opposite end of the spectrum lie "technical" violations of Fourth Amendment rights where, for example, officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional. . . .

. . . As we noted in Michigan v. Tucker: . . . "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence. Thus, . . . I would not require more than proof that effective Miranda warnings were given and that the ensuing statement was voluntary in the Fifth Amendment sense. Absent aggravating circumstances, I would consider a statement given at the stationhouse after one has been advised of Miranda rights to be sufficiently removed from the immediate circumstances of the illegal arrest to justify its admission at trial.

Id. at 610-12 (citations omitted).

77. 423 U.S. 96 (1975).
decided December 9, 1975. Mosely was a fully informed, arrested restaurant robber, who emphatically stated that he did not want to answer any questions about the robberies and was taken to his cell. Two hours later he was taken from his cell by another officer, advised of his rights, and questioned about an unrelated homicide that occurred three months before his arrest. Mosely made incriminating statements and was charged and convicted of first degree murder. The Appellate Court reversed the conviction and held that *Miranda* mandated a cessation of all interrogation of Mosely. In reversing the Michigan Court of Appeals, the Stewart speaking majority said that *Miranda* is silent as to a resumption of questioning and cannot be read to mean that one who has invoked his right to silence can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Any blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, the Court said, "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigatory activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests." 78 A most novel assessment of *Miranda* is found in the statement that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" 79 The decision prompted Justice White, while concurring, to state that:

I suspect that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant. I think the Court should say so now.

*Miranda*’s basic premise has been rejected, and a return to the “Voluntary-Trustworthy” rule is not far removed.

Two additional 1975 cases are worthy of mention. In *Oregon v. Hass* 81 the Court applied the *Harris* rule to those situations where a suspect upon being advised of his *Miranda* rights asserted those rights and insisted on a lawyer, which request was refused. Continued interrogation produced many incriminating statements, which a six to two majority ruled may be used to impeach. In dissent,

78. *Id.* at 102.
79. *Id.* at 104.
80. *Id.* at 108 (White, J., concurring).
Marshall and Brennan maintained that:

[A]fter today's decision, if an individual states that he wants an attorney, police interrogation will doubtless now be vigorously pressed to obtain statements before the attorney arrives.\(^{82}\)

It is clear that we shall soon experience some rebirth of law enforcement pressure, if, in fact, we were ever without it, the single obstacle to statement admissibility being voluntariness.

United States v. Hale\(^{83}\) is of interest, for its rule "under the circumstances"\(^{84}\) of the case is that "it was prejudicial error . . . to permit cross-examination of respondent concerning his silence during police interrogation."\(^{85}\) In his last criminal case statement as a member of the concurring Court, Justice Douglas said: "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it."\(^{86}\)

Our Chief Justice, in a concurring, separate opinion, viewed the case as "something of a tempest in a saucer."\(^{87}\) But silence is still golden, the Powell majority found, in Doyle v. Ohio\(^{88}\) as it surprisingly elevated the Hale rule to constitutional status. The Court held that a denial of due process and that fundamental unfairness result when the silence of the accused is the cross examiner's impeachment tool.\(^{89}\) Doyle, though, holds out no hope for Miranda; it simply says that for as long as Miranda withstands the test of time and seems beneficial to society, its mandate denies prosecutors the privilege of suggesting guilt from silence.

IV. THE "MEANINGFUL ALTERNATIVES"

To date as many as five separate substitutes have been urged as acceptable means of enforcing fourth and fifth amendment commands.\(^{90}\)

---

82. Id. at 725.
83. 422 U.S. 171 (1975).
84. Id. at 181.
85. Id.
86. Id. at 182 (Douglas, J., concurring).
87. Id. at 181 (Burger, C.J., concurring).
88. 96 S. Ct. 2240 (1976).
89. Id. at 2245.
I. Criminal sanctions against police officers—that opportunity
to earn a reputation as a cop-hating lawyer and to observe firsthand,
a prosecutor go into the tank.

II. The injunctive process with its contempt of Court slap on the
wrist—here is the opportunity for some shortsighted judge who
desires to return to an obscure private practice to regulate police
internal affairs through a finding of the presence of a program of
planned, police illegality.

III. Police Review Boards—those clubs staffed with aggressive,
sensitive senior officers, well versed in the Constitution, who would
never be vulnerable to the cover-up, and who never would hesitate
to punish a fellow officer for violating Constitutional privileges.

IV. Tort Liability against the officer—a picture of an unattrac-
tive plaintiff, fresh from a cell, attempting to convince a jury of his
peers that the protector of the peace, with ill will and malice, wrong-
fully seized reliable evidence, the kilo of coke or the arsenal and
explosives to be used to destroy the Supreme Court Chamber. Police
retaliation and the collection of the “substantial” verdict of one cent
are not to be ignored.

V. The American Law Institute “Substantial Violation” Doc-
trine—this, I believe, was borrowed from the gifted Professor
Charles Alan Wright, who asked: “Must the criminal go free if the
Constable blunders?”91 He answered: “The criminal is to go free if
the Constable has flouted the fourth amendment but not if he has
made an honest blunder.”92 The Professor and the American Law
Institute93 agree that a line can and should be drawn preserving the
Exclusionary Rule for cases like Mapp, but rejecting it unless there
has been a substantial fourth amendment violation. Proponents of
this substitute, including the Chief Justice, urge that trial courts
consider all the case circumstances, including but not limited to:

1. The extent of the deviation,
2. The extent of willfulness,
3. The extent to which privacy was invaded, and
4. The extent to which exclusion will tend to deter or prevent fu-
ture violations94 in determining whether or not the violation is sub-
stantial.

91. Wright, Must the Criminal Go Free if the Constable Blunders?, 50 Tex. L. Rev. 736
(1972).
92. Id. at 745.
94. 403 U.S. at 425 app. (Burger, C.J., dissenting).
V. Conclusion

As one critically or fondly considers the Exclusionary Rule, he is faced with the single and simple conclusion that there are unanswered questions in this area. How long will it take to discard it? What will take its place? That *Miranda* soon will be abandoned and replaced with a factual determination of voluntariness is abundantly clear. Indeed, no one fairly can doubt either the sincerity or the scholarly skill of Chief Justice Burger, just as one fairly cannot doubt that his decisions have been and will be controlled by his answer to the question, what effect will the ruling in this case have upon the practical demands of law enforcement? The words of the Constitution will not change, but in the future they will mean what he says they do. It is not reasonable to expect that the Burger Court will ever prefer the citizen to the police officer.
SYNERGISTIC JURISPRUDENCE AND EUGEN EHRlich

by Ovid C. Lewis*

Frequent complaints about the sterility and myopia of the legal mentality appear in the popular press and legal journals. One recent commentary noted the saying that a legal mind can think of something that is inextricably connected to something else without thinking about what it is connected to.1 Von Jhering satirically made the same point when he posited a test for admission to his heaven of juristic concepts on the basis of whether the applicant had the “ability to construe a legal institution without regard to its real practical significance, but purely on the basis of the concept itself or its original sources.”2 In actuality the legal mind, whether lawyer, judge, legislator, or law student, is today very much concerned with the functioning of the law and legal institutions—with the living law. And that concern is to a significant degree a result of the work of Eugen Ehrlich who heavily influenced American jurisprudents and jurists.3 Some of Ehrlich’s thought appears in the 1936 translation of his Grundlegung der Sociologie des Rechts (Foundation of the Sociology of Law) published as Fundamental Principles of the Sociology of Law.4 However, a most relevant aspect of Ehrlich’s

---

* LL.M., Columbia University; J.S.D., Columbia University. Professor of Law, Salmon P. Chase College of Law.

4. E. Ehrlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (W. Moll transl. 1936) [hereinafter cited as SOCIOLOGY OF LAW]. E. Ehrlich, FREIE RECHTSFUNDUNG UND FREIE RECHTSSWISSENSCHAFT (1903) has been partially translated by Ernest Bruncken: Judicial Freedom of Decision: Its Principles and Objects, in SCIENCE OF LEGAL METHOD 47-84 (1921), [hereinafter cited as Freedom of Decision]. In 1916 Professor Ehrlich wrote in English, Montesquieu and Sociological Jurisprudence, 29 HARV. L. REV. 582 (1916). In 1922, a posthumous translated publication appeared: Ehrlich, Sociology of Law, 36 HARV. L. REV. 130 (1922). Ehrlich’s publications include: Die Stillschweigende Willenserklärung (1893); BEITRÄGE ZUR THEORIE DER RECHTSGÜLLEN (1902); DIE RECHTSFAHIGKEIT (1909); “Replik” to (Kelsen’s criticism of Ehrlich’s subjective definition of law), ARCH FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK (1916); and Die juristische Logik (1918). A complete list of his publications appears in Translator’s Preface, SOCIOLOGY OF LAW, supra note 4, viii n.2, ix-xiii (1936).
work was his attempt to develop a seminar in which students would be trained in ascertaining the substance of the living law. Professor Herbert Page in 1914 provided a valuable commentary on Ehrlich’s seminal seminar in a paper appearing in the Annual Proceedings of the American Association of Law Schools. The decision to reprint Page’s piece was prompted not only by a desire to make it more accessible, but also with the intention of confronting the reader with the timeliness of Ehrlich’s turn-of-the-century views and the obvious failure of contemporary legal institutions to effectuate the synergistic rapprochment between legal goals and the living law that he envisioned.

For Ehrlich the jurist’s essential quest was to discover the living law, the trends of justice in society and the effects of legal propositions. The approach was functional:

It is the function of juristic science, . . . to record the trends of justice that are found in society, and to ascertain what they are, whence they come, and whither they lead; but it cannot possibly determine which of those is the only just one. In the forum of science, they are all equally valid. What men consider just depends upon the ideas they have concerning the end of human endeavor in this world of ours, but it is not the function of science to dictate the final ends of human endeavor on earth. That is the function of the founder of a religion, of the preacher, of the prophet, of the preacher of ethics, of the practical jurist, of the judge, of the politician. . . . That a certain thing is just is no more scientifically demonstrable than is the beauty of a Gothic cathedral or of a Beethoven sympathy to a person who is insensible to it. All of these are questions of the emotional life. Science can ascertain the effects of a legal proposition, but it cannot make these effects appear either desirable or loathsome to man. Justice is a social force, and it is always a question whether it is potent enough to influence the disinterested persons whose function it is to create juristic and statute law.

Ehrlich then was not proposing that jurisprudents determine what course of conduct should be imposed on society. But he did perceive that the legal proposition may be used as a lever for social development. Of course, only by studying the living law can the effect of legal propositions upon conduct be determined. Legal prop-

ositions are dependent upon society both for their existence and their content. They cannot come into existence until there are present in society the institutions to which they pertain, and they take their “content from the decision of conflicts of interests which come up in society and which for the most part have already found judicial solutions.”

Ehrlich advocated the method of “free decision” which is properly used only where no relevant legal provision provides a norm for the decision, or where the specific conflict of interest has not been previously resolved. Ehrlich writes on free decision:

Every species of legal science, ... tends to progress through the formulated law beyond the formulated law. The difference between free decision and technical decision is therefore not so much that the former may go beyond the statute, but lies rather in the manner of doing so. For the technical method requires that its work of art be achieved only by means of certain devices of legal thinking from which no variation must be permitted; while free decision counts also upon the element of creative thought by great individual minds.

The principle of free decision is really not concerned with the substance of the law, but with the proper selection of judges...
Ehrlich thus seemed to ascribe to the optimistic idea that strong and true judges will create just law. In fact, "there is no guaranty of justice except the personality of the judge" in discharging his duty.\textsuperscript{11} This requires a standard of mental and moral greatness far above the common average.

However, such a great judge would not exercise an arbitrary power. He would not render his own personal opinion, but rather one in conformity with the spirit of justice existing at that time.

A limitation exists, . . . beyond which the judge . . . must not go. [His] decision must be in harmony with the principles of the existing valid law and of juristic science. . . . The power of the judge is not sufficient to overcome the enormous powers of resistance inherent in society which would rise up in opposition to an attempt to place society on a new foundation by means of a judicial pronouncement; and a judge requires knowledge of the world sufficient to be able correctly to estimate these powers of resistance as well as his own power.\textsuperscript{12}

Ehrlich suggests that judges should first find the meaning of the applicable legal provision; then proceed to discover how it functions. That does not depend on its interpretation, but on its inherent force, the nature of the society for which it was made, and the characteristics of those who apply it. Where a prior decision bears on the issue at hand one must examine that decision to discover its true significance.

A legal decision is always the result of a number of factors influencing the judge; meaning and text of a rule is one of these factors, but not the only one. Every decision expresses some actually existing social movement . . . . One of the duties of legal science is to examine the origin, nature, effect, and value of the tendencies that become apparent in legal decisions, and thus to furnish a picture of what is going on in the administration of justice and what the cause thereof may be.\textsuperscript{13}

\textsuperscript{11} Freedom of Decision, supra note 4, at 73.
\textsuperscript{12} Sociology of Law, supra note 4, at 180-81.
\textsuperscript{13} Freedom of Decision, supra note 4, at 78-79. Haines cites Ehrlich and goes on to point out the importance of the personal element in his classic article on the idiosyncratic nature of judicial decisions. His statistics were especially persuasive. Haines, General Observation on the Effects of Personal, Political and Economic Influences in the Decisions of Judges, 17 Ill. L. Rev. 96, 102 (1922). The same idea has been expressed in Llewellyn, A Realistic
One must, therefore, determine what the living law is—what is the actual nature of the legal transactions taking place, what are the rules of conduct extant. The view expressed by Ehrlich on this point adumbrated Felix Cohen's early statement of the functional approach:

A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event. . . . Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. The decision is without significant social dimensions when it is viewed simply at the moment in which it is rendered. Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the meaning of the decision itself.14

For discovery of the living law Ehrlich recommends study of a variety of sources. First, there is the judicial decision. He writes: “The [French] judicial decision is in itself an expression of law, not as the legislator has put it forth, but as it has developed in the consciousness of the French judges during the hundred years that the French code has been in force.”15 Deductions may be made from the decision as to the relationships existing in the living law.

But a study of the living law from only this source would be incomplete. One of Ehrlich's basic objections was that jurists had occupied themselves too much with the legal provision and treated judicial decisions not as a witness to the living law, but as a piece of juristic literature which is to be tested not only by the truth of the legal relationships which are set forth therein, or by the living law which is deduced therefrom, but by the accuracy of the statutory interpretation which is contained therein, and of the juristic construction.16

---

15. Please refer to the reprint of Page, Professor Ehrlich's Czernowitz Seminar of Living Law, which immediately follows this introduction, infra at 45 [hereinafter cited as Reprint].
16. Id.
Another source is that of documents of every type that regulate human affairs: modern business documents, marriage contracts, contracts of purchase, of lease, loan, and succession. All these contracts have a typical though diverse content. It is the typical content of the document that is fundamentally important. As with judicial decisions, the living law must be extracted from the contents of the documents.

These documents should be evaluated from every point of view according to their social, economic, legislative, and political importance. Although taking them at large, they coincide in part, they are of very different kinds, in their details, according to neighborhoods, classes, circles of society, races and creeds, and one must examine each individual case. Then statistical analysis can proceed. Ehrlich admitted that in 1913 this could not be done, and development of an adequate method would be no easy task.

But again, documents do not reflect all of living law. The living law in the content of the document is not what the courts recognize as binding when they decide litigation, but only what the parties observe in actual life. 17

To discover the living law not expressed in judicial decisions or documents, the legal sociologist must become an observer of life. He must use questionnaires. "It is certainly a hard task for the jurist if we expect him to attempt to learn from actual observation and not from paragraphs of the code or from legal documents; but it is inevitable, and wonderful results can be achieved by this means." 18

The great majority of judicial decisions are based on the concrete usages, relations of possession, contracts, articles of association, and dispositions by last will and testament, that the courts have found to exist. If we would comprehend the universalizations, the reductions to unity, and the other methods of finding norms that the judge and the lawgiver employ, we must first of all know the basis upon which they were carried out . . . Does this not hold true for the law of our day? To this extent Savigny was right when he said that the law—and by law he means above all the legal proposition—can be

17. Id. at 39-40.
understood only from its historical connection; but the historical connection does not lie in the hoary past, but in the present, out of which the legal proposition grows.19

In investigating the living law it is important to distinguish between the actual customs by which the people live and their moral views, which may be very different from their actual customs, but which they are very likely to give as abstract propositions. "It is the actual practice of the community, and not its abstract moral standard, which the investigator is to ascertain."20 This apparent disregard for moral and spiritual values in regard to investigation of the living law is perhaps the cause of criticism such as that of Gurvitch that Ehrlich "has a too unilaterally realistic tendency, which takes account neither of collective psychology nor of the spiritual strata of social reality."21

Ehrlich admits the normative element via judges and legislators who must resolve conflicting interests. When the jurist is asked to draw the line between the conflicting interests independently, he is asked to do it according to justice. This implies something negative. He is asked to arrive at a decision without any consideration of expediency and uninfluenced by the distributions of power. Justice itself is a power wielded over the minds of man by society. The function of the jurist is merely to balance interests. There are trends caused by the interests that flourish in society which ultimately influence even persons that are not involved in these conflicting interests.22 The judge who decides according to justice follows the

19. SOCIOLOGY OF LAW, supra note 4, at 501-02. Ehrlich's concern with the present and immediate social matrix of law was roundly criticized by Vinogradoff:
   It is almost inconceivable how an author who rightly describes the conception of evolution as the basis of our outlook on life, who constantly refers to the state of law in early communities, could have treated ethnological, and, for that matter, anthropological investigations in such a superficial manner! What is the use of talking in a vague manner of the 'Sippe' or of the 'Gütergemeinschaft' of husband and wife among the peasantry, if the immense and invaluable materials supplied by the life of tribes whom we can observe with our own eyes and by the folklore of societies in various stages of development are neglected or confused?
   Vinogradoff, The Crisis of Modern Jurisprudence, 29 Yale L.J. 312, 318 (1920). Ehrlich's statement in the body illustrates that he is attempting to compensate for prior emphasis on the past. Also it has not been demonstrated that it is more profitable to study legal structure in primitive society than that of contemporary society. Experience shows that the primitive culture absorbs our technical and social devices rather than vice versa.
22. Ehrlich's concern with interests anticipated Pound's views. Ehrlich writes: "[S]ince,
tendency that he himself is dominated by. Justice, therefore, does not proceed from the individual, but arises in society.

The role of the person rendering the decision is of importance only inasmuch as, within certain limitations, he can select the solution which corresponds most nearly to his value system. But in doing this, he cannot disregard the social basis of the decision. Admittedly, a difficult task:

To render a decision of this kind is one of the greatest and most difficult tasks, and one most heavily freighted with responsibility. To answer questions of this kind means to be able to read the signs of the development of the future in the society of today, to sense its needs in advance, and to determine its order in advance. If we shall ever be able to attempt this on the basis of scientific knowledge . . . . [It] will be found that only an intellect equipped with the full armament of science can be called upon to perform this task. Meanwhile our sense of justice is merely one of those great indefinite divinings of hidden interrelations in the vast scheme of things, which, like religion, ethics, and perhaps art, lead mankind to distant unknown goals. In these paths the genius is the born leader of mankind. Even in the most primitive days, the legislator and the judge stand in the thoughts of men by the side of the founder of a religion, the prophet.

in the case of the norm for decision, . . . we are dealing with interests which are to be protected, . . . we must put the question thus: Which are the interests that are considered just?" Sociology of Law, supra note 4, at 214. Pound lists six classes of interests in his Survey of Social Interests, 57 Harv. L. Rev. 1 (1943). Ehrlich did not develop as refined a classification: "The interests that are considered worth protecting are the same as in earlier days, i.e., the state, the human body and human life, possession . . . ." Sociology of Law, supra note 4, at 215. Pound's system has the decided advantage of converting these interests to formulations with a common denominator—social interests, in an attempt to reduce prejudice generated by "public" vs. "private" interest formulations.

23. Cardozo eloquently expressed the same notion in The Nature of the Judicial Process (1925):

The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties and harmonize results with justice through a method of free decision.

Id. at 16.

Back of precedents are the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction they have modified in turn.

Id. at 19.

[Judge's] duty to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom. It is the customary morality of right minded men and women which he is to enforce by his decree.

Id. at 106. Ehrlich's influence is patent.
The poet. The genius is the more highly developed man in the midst of a human race that has remained far behind him; the man of the future, born, by a mysterious coincidence, into the present, who today thinks and feels as some day the whole race will think and feel.24

Since legislators cannot provide for unforeseen cases, frequently judges are the ultimate guardians of justice. They must take into account not only the living law of the present but that of the probable future, the economic, political, cultural, and ethical needs. It is the task of a sociology to provide judges and legislatures with the relevant data as a point of departure.

The social phenomena in the legal sphere, which are of importance for a scientific understanding of law, are first of all the facts of the law themselves, i.e. usage, . . . the relations of domination and of possession, agreements, articles of association, dispositions by last will and by other means, and succession. To these must be added the legal proposition, considered only as a fact, i.e., with reference to its origin and effect, not with reference to its practical application and interpretation, finally, all social forces, which lead to the creation of law.25

One of the social forces is the concept of the “ought” prevailing in society. While it is true that the sociology of law stresses the “living law,” Ehrlich certainly does not ignore the ethical dimension. This is to be stressed since it is a facet of his work often overlooked.26 Ehrlich concludes in the Sociology of Law:

Many decades ago Ofner of Vienna pointed out the possibility of instituting a direct investigation of the sense of law and right . . . by means of juristic experiment. A year ago Kobler discussed the idea in detail . . . , and actually instituted experiments . . . . Actual or fictitious law cases, even entire court proceedings, are being submitted to the persons who are being used for the experiment, who must

---

24. Sociology of Law, supra note 4, at 207.
25. Sociology of Law, supra note 4, at 474.
26. To Ehrlich, law should have its source and support in the moral principles inherent in the ‘living law,’ the rules of law emerging, as it were, from the early ordering of social groups. . . . Does the term ‘morals’ comprise the notions of good and bad that are implicit in customary behavior, as perhaps Ehrlich would view it?

Cohen, Robson, & Bates, Ascertaining the Moral Sense of the Community: A Preliminary Report on an Experiment in Interdisciplinary Research, 8 J. of Legal Educ., 137, 138 (1955) (emphasis added). The authors fail to recognize Ehrlich’s interest in present and express notions of good and bad, and then suggest an experiment much like that originally proposed by Ehrlich as described in the text.
not be jurists, and who are requested to express an opinion on them. They can do this only by relying on their sense of law and right. . . . [T]he attempt will produce valuable results, provided one does not forget about . . . sources of error.

Method is as infinite as science itself. 27

This cursory sketch of some of Ehrlich's major themes and a reading of the Page reprint demonstrates how his early innovative proposals are now commonplace and accepted. In the years since his Sociology of Law was published, the teachings of the realists, sociological jurisprudents, jurimetricians, and judicial behavioralists have compelled lawyers and judges to reject the notion that law is a discoverable entity and that judges arrive at decisions through mere manipulation of legal propositions. 28 Instead, the law is viewed from a functional perspective.

Today, Supreme Court Justices accept the notion that law is comprised of "a body of ideals, principles, and precepts for the adjustment of the relations of human beings and the ordering of their conduct in society." 29 For example, the Court's desire to trans-

27. Sociology of Law, supra note 4, at 506. Considering this concern with the ethical concepts of society, the concept of legal propositions as levers for raising standards of behavior, and Ehrlich's concept of justice (effectuated by legislators and judges) refute the often advanced criticism that Ehrlich idealizes the actual. He would agree that "the just may precisely be in advance of the prevailing concept of the group as to modes of ordering the relations among the members composing it." Fernando, Ehrlich's Philosophy of Law, 24 Philippine L.J. 849, 854 (1949).


29. R. Pound, Law Finding Through Experience and Reason 1 (1960). In a study conducted by the author in the summer of 1967, a questionnaire was submitted to all the State and Federal Supreme Court Justices and judges requesting that they indicate which of a series of definitions of law most adequately exemplified their view of the concept of law, which was least adequate, and the additions or corrections they would make to the definition selected. Approximately one-third of the judges and justices completed the questionnaire, and of them, 75 per cent selected a functional definition of law, while an additional 14 per cent chose H.L.A. Hart's language: "[L]aw consists of . . . (i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations . . . ." H.L.A. Hart, Concept of Law 3 (1961). In the quoted language, actually Hart was discussing the essential elements of a legal system, and added: "(iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones." Id. Hart views a fusion of primary and secondary rules as "the most fruitful way of regarding a legal system," id. at 114, but he never explicitly defines law. See King, The Basic Concept of Professor Hart's Jurisprudence, 21 Camb. L.J. 270, 271 (1963).
mute law-in-books into law-in-action—living law—was explicitly propounded in Griswold v. Connecticut, where Mr. Justice Douglas, for the Court, stated that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” These penumbral or peripheral rights constitute implementing rules that are “necessary in making the express guarantees fully meaningful.” Where the implementing rules are directed at deterring offensive police practices and not primarily at enhancing the reliability of the guilt-determining process, the Court has characterized the rules as prophylactic and extended them only as far as required to accomplish the degree of deterrence a majority of the Court deems desirable. In dealing with first amendment issues the Court has frequently based its decisions on its view of the dynamics of the particular component sub-system of the system of freedom of expression involved. Numerous examples undoubtedly come to mind that illustrate how contemporary courts fashion legal propositions with their social impact in mind. As Charles Evans Hughes, two years before becoming Chief Justice, observed, “[T]he protection both of the rights of the individual and those of society rests not so often on formulas...but on a correct appreciation of social conditions and a true appraisal of the actual effect of conduct.”

Yet it is clear that the Court often has inadequate, or even

30. 381 U.S. 479 (1965).
31. Id. at 484.
32. Id. at 483.
35. It is often suggested that the result-oriented Supreme Court has lost sight of its limited role as expositor of the text of the Constitution. See generally Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975).
inaccurate factual data when it decides cases. In fairness, one must admit that this is not necessarily due to an intentional ineptitude on the Justices' part. Whereas, failure to present the appearance of neutrality and objectivity, characteristic judicial virtues, is culpable, it is something else to make the optimal decision that will produce the best course of action in a given context. It is a tribute to the Court that it performs so well with such limited resources.


39. H.L.A. Hart, Ehrlich-like, emphasizes the judicial virtues of "impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision," H.L.A. HART, CONCEPT OF LAW 200 (1961). This is similar to Professor Wechsler's criterion for a principled decision, which is "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959).

40. See Ackoff, Towards a Behavioral Theory of Communication, 4 Management Sci. 218, 233 (1958). Modern decision theory itself constitutes "an attempt to find criteria for selecting 'optimal' decisions among a set of alternative actions—where optimality is based . . . on some measure of the values of various outcomes that may result from selecting each of the actions." Churchman, Science and Decision Making, 23 Philosophy Sci. 247 (1956). The difficulty (impossibility?) involved in defining rationality is illustrated by Mukerjee: "Rationality . . . consists in selecting and consciously striving for more adequate, enduring and harmonious values." Mukerjee, Values in Social Science, in A New Survey of the Social Sciences 221 (B. Varma ed. 1962). But why are some values more adequate, enduring, and harmonious than others? Because they are rational? One ought to act in a rational manner, and rationality consists of acting as one ought to act. Ergo, one ought to act as one ought to act. Rapaport views rationality operationally: "[I]f a man is faced with mutually exclusive alternatives, we will assume that if he is rational, he is able to arrange the alternatives in the order of preference, allowing, perhaps for indifference among alternatives." 1 Rapaport, Decisions, Values and Groups xiv (D. Willner ed. 1960). But is the ordering rational? See generally C. Churchman, Prediction and Optimal Decisions (1961).

Nonetheless, there is no way, given its limited resources, that it can properly acquire, assimilate, and evaluate the requisite relevant information. The Court, if it is to accomplish its avowed functional goal, must indeed engage in synergistic jurisprudence—a harmonizing of values implemented by rules operating within the context of transacting systems with complex feedback processes.42

What is much needed is a Bar more sophisticated and knowledgeable in the behavioral sciences—aware of the methodological issues just below the surface of most “scientific” behavioral studies. Geoffrey Hazard suggests that synergistic jurisprudence requires

a pervasive assimilation of social science and legal criticism, scholarship and education. If, as someone has observed, lawyers are social scientists of necessity, it is time that they became better ones than they have been. To do so entails more than taking findings from social science, as in taking findings from the weather bureau. It requires sympathetic . . . comprehension of the theory and ethos of social science disciplines, of the origins and development of the questions that concern them, of the premises and methodology of their processes of inquiry.43

If we now accept a concept of living law which assumes a constant recreation within the context of transacting legal, social, and behav-

---


[T]he Court's use of social science poses an intractable problem. No matter how intimate or distant the formal relationship between law and social science becomes, the Court will always have to cope with the underlying tension that is bound to exist between a discipline that prescribes what society ought to be and one that explains what society is. Whatever else the Court does, it still must reconcile the legal "ought" with the social "is." This reconciliation is achieved as the dialectical fruit of the process of judicial interpretation, wherein the precise meaning of the Constitution is hammered out in the context of specific fact situations. Accordingly facts or events will necessarily influence the precise meaning given to the Constitution, but the Constitution will also reshape social facts. In making constitutional law, the Court cannot simply follow the exact wording of the Constitution, nor can it be guided by facts alone. Yet the Court must be faithful to the spirit of the Constitution, just as it must define facts that accurately reflect empirical reality. For if the Court interprets the Constitution capriciously, or if it defines fact situations in a way that contradicts a systematic and comprehensive body of social science findings, its moral authority will surely be jeopardized. Therefore, the Court's permanent dilemma is that it must be faithful to both the Constitution and the facts, knowing all the while that its fidelity will be transmuted into new meanings for the Constitution and new social facts.


ioral systems, then how can most law schools adequately train lawyers when retaining a curriculum that deals so minimally with the relevant processes and variables? Some go so far as to suggest that the typical law school’s curriculum is “too rigid, too uniform, too narrow, too repetitious and too long.” How many schools offer courses that rigorously prepare the student to appreciate the relevance and validity of behavioral science findings and techniques for the determination of adjudicative and legislative facts (consider e.g., statistics and discrimination in selection of juries and in reapportionment; economic theory and antitrust violations; sociology and family law; linguistics and drafting techniques and interpretation of documents and legal communication). One can generate a myriad of illustrations of ways in which the lawyer must deal with scientific advances. Unfortunately, a survey of legal education reveals that the law schools are not doing the job.

As a profession, law is concerned, of course, with human relationships, and one might logically expect to find behavioral sciences treated as basic disciplines for the preparation of lawyers. Yet, for reasons that lie in the history of the legal profession and of university disciplines, law schools do not employ social scientists to any great extent, nor are they deeply involved in what is ordinarily considered social science research.

44. This failure accounts in large part for much of the discontent with legal education expressed in recent years. Some students lament that law schools are “places where old men in their twenties go to die.” Savoy, Toward a New Politics of Legal Education, 79 YALE L.J. 444, 462 (1970). For a similar although less extreme critique, see Watson, Quest for Professional Competence: Psychological Aspects of Legal Education, 37 U. CIN. L. REV. 93 (1968). For an earlier comment on the failure of law faculties to apply basic learning principles in legal education, see Kelso, Science and Our Teaching Methods: Harmony or Discord?, 13 J. LEGAL EDUC. 183 (1960). See also Kelso, Behavioral Psychology: Springboard for Imaginative Legal Educators, 45 DEN. L.J. 313 (1968).

45. PROCEEDINGS OF THE AMERICAN ASSOCIATION OF LAW SCHOOLS, REPORT OF COMMITTEE ON CURRICULUM 1, 8 (1968). Last year, Francis Allen, President of the Association of American Law Schools, observed that “legal education is being discussed more frequently and with greater intensity than at any time in my experience.” Francis A. Allen, Message from the President, Association of American Law Schools News Letter, No. 76-2, May 12, 1976.

46. A survey by the author of 120 law schools (92 responding) in 1975 indicated that only 15 offered courses in linguistic theory using sophisticated materials such as Professor Walter Probert’s LAW, LANGUAGE AND COMMUNICATION (1972).


The time has arrived for the law schools to begin to prepare lawyers to effectuate Ehrlich’s goal—a synergistic jurisprudence—in which the goals of the law are attained, as nearly as possible, by a harmonious relating of all facets of the legal enterprise—an enterprise devoted to subjecting human conduct to the governance of rules for the common good.49

Professor Ehrlich's work has been done at Czernowitz, in the duchy of Bukowina. He has begun with the investigation of the

* This article is reprinted from 14 Association of American Law Schools Proceedings 46-75 (1914). The editors wish to extend their thanks to the A.A.L.S. for their permission to use this work. The following footnote by Professor Page appeared in the original printing:

As far as the limits of space have permitted, Professor Ehrlich's views are stated in his own language, either in exact quotation or in substantial paraphrase, so as to avoid the risk of unintentional misstatement through my own lack of complete and sympathetic understanding. His own statement is to be found in his *Grundlegung der Soziologie des Rechts*, especially in Chapter 21, "Methoden der Soziologie des Rechts: die Erforschung des lebenden Rechts"; and also in the material and questions which he has prepared for use in his seminar.

** William Herbert Page was a Professor of Law at Ohio State University from 1896 to 1917 and at the University of Wisconsin from 1917 until his death in 1952. Born in Ohio in 1868, he studied at Yale and received his law degree from Ohio State. He received his Doctorate in Jurisprudence from Harvard Law School. A prolific writer, he has published treatises on wills and on contracts. He also devised the structure for the current annotated statutes in Ohio. In addition he was on the committee that devised the Restatement of Contracts and the Restatement of Agency.

1. Eugene Ehrlich was an Austrian jurist who is now regarded as being one of the founders of sociological jurisprudence. Born in Czernowitz, Bukovina in 1862, he studied in Vienna and returned to the University of Czernowitz as a professor in 1897. In his writings Ehrlich sought to establish a "sociology of law" which was intended to serve the legal practice much as medical science serves the medical practice. In order to avoid the dangers of casual observation, Professor Ehrlich organized seminars in which his students investigated the practices and attitudes of nearby communities. These crude surveys often showed that local custom and the "national" code differed widely. Professor Ehrlich died in 1922. For further biographical data, please refer to the article by Edwin W. Patterson in 5 Encyclopedia of the Social Sciences 445 (1931).

2. In the sixty two years since this paper was written, many of the geographic names have changed, usually to the language of the power occupying Bukovina. In 1914, at the time of this publication, Bukovina was known by its German name Bukowina and its chief city was called Czernowitz. With the ratification of the treaty of St. Germain in 1919, Bukovina became part of Roumania (spelled Roumania at that time) and Czernowitz became Cernauti. After the Soviet occupation in World War II, the city and region were incorporated into the Ukrainian S.S.R. and the city is now known as Chernovsty. See 4 Encyclopedia Britannica 355 (1957).

3. Bukovina, which translated means "Beech Wood," derives its name from the massive Beech forest which covers approximately 50% of its territory. It is located near the border of Romania and the U.S.S.R. in eastern Europe, and is bounded by the Dneister River on the north and the Carpathian Mountains on the south. Originally a strategic link between Transylvania, Moldavia and Galicia, it was annexed by Austria as a means to control these three regions. It was made a grand duchy in 1849. Upon the collapse of Austria-Hungary in 1918, the region was occupied by troops of the new Kingdom of Roumania. In 1940 the northern
living law of the nations of that duchy. An understanding of the nature of his work and of the point at which he has begun his investigations is impossible without some understanding of Bukowina itself.

This duchy of Austria-Hungary lies to the east of Hungary, to the south and east of Galicia, and north of Roumania. It is inhabited by nine different races: the Armenians, the Germans, the Jews, the Roumanians, the Russians, the Ruthenians, the Slovaks (who are often reckoned as Poles), the Hungarians and the gypsies. The Ruthenians number about two-fifths of the entire population; the Roumanians about one-third; the Germans about one-fifth, and the Jews about one-eighth. These four races when added together considerably exceed 100 per cent of the total population, without making any allowance for the other five races. This is not a peculiarity of the arithmetic of Bukowina, but of their method of gathering statistics. We have here a cross classification. The Jews are counted as belonging to the race whose language they speak; for instance, if they speak German, they are counted among the Germans. At the same time they are counted again as Jews on the basis of creed. It will thus be seen that the Austrian Germans, after deducting the Jews, form a very small portion of the population of the duchy.

part of the province was incorporated into the U.S.S.R. as part of Stalin's strategic "cushion" against Nazi Germany. At this time all of the Germans of the entire region were forcefully repatriated to Germany. After the war the division was made permanent. The northern region became part of the Ukraine; the southern area containing most of the cultural heritage of the area went to Communist Romania. Id.; 2 ENCYCLOPEDIA BRITANNICA, Micropedia 355-56 (1974).

4. Galicia is situated to the northwest of Bukovina. Part of Austria-Hungary prior to 1918, it was returned to Poland in 1918, of which it had been a part in the Middle Ages. In 1940, the eastern sector of this region, like northern Bukovina was incorporated into the Soviet Union for its strategic purposes. 4 id. at 387.

5. Roumania is now spelled Romania, see note 2, supra.

6. Armenia is located in the Caucasus, the area between the Black and Caspian Seas. Originally an advanced culture, the Armenians found themselves in later times a subjugated people under, at one time or another, the Persians, the Turks, and the Russians. In 1915 the entire population was forcefully uprooted and transferred to Mesopotamia. As a result of the barbaric manner in which the move was carried out, over one third of the entire population perished. Many of the remainder were scattered over Eastern Europe. 1 ENCYCLOPEDIA BRITANNICA, Micropedia, 525 (1974).

7. Ruthenia is also known as the Carpatho-Ukraine. Part of Austria-Hungary until World War I, it became the easternmost province of Czechoslovakia upon the collapse of the empire in 1918. It was annexed, along with parts of Bukovina and Galicia, by Stalin at the onset of World War II. See note 3, supra. This territory has proven to be of great strategic value to its possessor, since most recently it served as the gateway for the Russian invasions of Hungary in 1956 and Czechoslovakia in 1968. 8 ENCYCLOPEDIA BRITANNICA, Micropedia 733 (1974).
The fact that the town and the duchy both bear Slavic names is very significant. The Slavs of the various races amount to between 75 and 80 per cent of the entire population.

While the Jews and Armenians are found almost entirely in the cities, the bulk of the remaining population live outside of cities, and are engaged chiefly in farming. They are, accordingly, conservative and relatively non-progressive.

This is the very place in which we would expect to find primitive institutions and customs and fragments of Archaic law preserved. Professor Ehrlich tells us that in Bukowina "the old law still survives. The old law which is the popular law and not the law of the jurists lives on under a thin veneer of modern statutes, and it dominates the transactions of people and their legal consciousness. The legal historian can find here not only much about which his sources are silent, but he can also get live points of view of many things which we generally believe to belong to a time which has long passed away." In actual practice, "the ancient principle of personality in law still operates; and it has been superseded by the principle of territoriality only on paper." It would seem inevitable, therefore, that any one who began to investigate the law of Bukowina as it actually is would be confronted first of all with the necessity of studying these surviving fragments of the old law which still persists among the people.

What is the living law which Professor Ehrlich studies and teaches?

The term "living law" as used by him has a very different import from the same term as used by the student of the common law. If we speak of the living law and are thinking of the orthodox analytical meaning of the term, we mean the law which is now enforced by the courts as distinguished from the law of the past which is now obsolete, and which is of value only as a matter of history.

Professor Ehrlich's idea of the living law is anything but this. He constantly speaks of the living law as being "in contrast to that which is in force merely in the courts and with the officials. The living law is that law which is not imprisoned in rules of law, but which dominates life itself. The sources of its knowledge are above all the modern documents, and also immediate study of life itself, of commerce, of customs and usage, and of all sorts of organizations, including those which are recognized by the law, and, indeed, those which are disapproved by the law." Even a hasty glance, Professor
Ehrlich tells us, would convince a jurist of the most extreme traditional tendencies that the races of Bukowina were governed in the relations of their daily lives by rules of law which were absolutely different from the rules of the Austrian civil code, which in theory is in force throughout Austria. If we turn our eyes from paper and look at persons, we see that while the courts and the officials may make use of the codes as the basis of their decisions, the codes do not tell us in the least what use the courts and the other officials make of these statutory provisions, a use which plainly varies from place to place, from day to day, and in a certain sense from man to man. Again and again Professor Ehrlich tells us that he regards the living law as law in the true sense of the term, even though it is not recognized by the courts or by the other officials.

If we speak of the living law and use the term in the historical sense, we think of it as law which has grown out of the past, which varies to suit the needs of society, which is ever changing and which is always uncertain just because it is alive and growing. Professor Ehrlich, however, regards the law which is enforced by the courts as law which is very likely not to be alive in his sense of the term, and, accordingly, he denies that the study of the development of the law which is enforced by the courts is a study of the living law. The energies of those who investigate the history of the law are directed to establishing the rules of law of the past, but these rules are not as readily accessible to us as those which are to be found in modern statutes. The scientific result of the work which is thus spent upon the laws of the past consists not only in the fact that we thus become acquainted with the evolution of our law, but also in the fact that we can thus get at an historical understanding of the present state of the law. This theory is radically wrong, according to Professor Ehrlich, in that it rests upon the tacit but absolutely erroneous assumption that the entire law is to be found in rules of law. This study of the so-called evolution of law is, then, really nothing but a study of the evolution of the rules of law; and the study of the true living law is thus excluded by this tacit, but erroneous, hypothesis.

So he tells us "the attempt to arrive at any understanding of the present by means of history or by a study of the prehistoric, that is, by ethnology, is doomed to failure, because of its very nature. To explain a thing is to work out a mystery to which we are not accustomed by means of a mystery to which we are accustomed. The present, however, always contains fewer mysteries to which we are not accustomed than does the past. The paleontologist understands
the nature and the functions of the organs of a fossil animal only by understanding the nature and organs of a living animal. The zoologist, however, does not learn from the paleontologist the physiology of the animal which he is obliged to investigate; but he uses paleontology only in order to get an idea of the evolution of the animals of the present day. We arrive at an understanding of the past by means of the present, and not vice versa. The history of the law and ethnological jurisprudence are, accordingly, of value only to study the evolution of the law.”

The term “living law” as used by Professor Ehrlich has a sociological rather than an analytical or historical sense. He regards the “rules of law” as the law which is enforced by the courts and the officials; and he regards the living law as something which is outside of these rules. This is the result of the historical development of law and also of the reasons by which the jurist is led to attack certain legal problems in preference to others. The codes now in force in Germany contain the entire law and the living law to a far less degree than did the earlier statements of the law, although these earlier statements are frequently far less pretentious in their character. “The men who composed the twelve tables, the lex Salica, and the Sachsen Spiegel, actually knew the laws of their own time, from their own point of view, and they tried to collect these very laws with which they dealt, and to put them into rules of law. This is not, however, even approximately the case in the most important part of the material of the law with which the jurists of the present day are concerned; that is to say, with the codes. For in contradiction to what must always be before the mind of the jurist, even if vaguely, those who compose modern statutes have as a rule not the slightest intention of trying to state the laws of their time and of their community. They take their material for laws, first, out of Justinian’s compilation, which gives of course another and a much earlier point of view than that of the laws of the eighteenth or nineteenth centuries from which modern law itself is descended directly; second, out of the older statements of law which do not come down to the time of the legislator, even if they were originally suitable for the time for which they were composed; and, third, from juristic literature, which is taken up chiefly with the exposition of the older laws and of the older codes, and in any case does not belong to the time of the statutes in question. The truth of this statement stands out in bolder relief in cases of the German civil codes, whose sources have been almost entirely works upon the
modern civil law, older German statutes and compilations of law, and foreign codifications. Accordingly, their codes are generally adapted to a much earlier time than our own, and all the juristic art in the world cannot avail to extract from them the real and vital laws of the present time, because it is not to be found there. But the scope of our codes is so immeasurably wider and the legal relations with which they have to do are so incomparably richer, more varied, and more kaleidoscopic than they ever have been before, that the mere idea of having a complete presentation of these things in a code would be a monstrosity. To attempt to confine the entire laws of a time or a race within the paragraphs of a code is just as vain a task as to turn a stream into a stagnant pond. The result of this is that there is no longer a living stream but stagnant water, and but little water ever reaches the pond."

The nature of the work of the jurist leads inevitably to partial and incomplete statements of law, even if the jurist is attempting to describe modern conditions as he sees them. "The rules of law are not intended to give a complete image of the condition of the law. The jurist composes the rules of law with reference to the practical necessities which are actually at hand, and with reference to what is of interest to him for practical reasons. He will not take the trouble to formulate rules of law with reference to objects which lie outside of this interest, perhaps only for the reason that they are not within the jurisdiction of the court before which he practices, or because they do not affect the interests of his clients. Since it was outside of the ordinary sphere of activity of the Roman jurists, we find in the Roman sources the most paltry commercial laws; and for the same reason, the Romans, and until a short time ago the recent writers, tell us scarcely anything about the laws with reference to labor."

As a result of the historical development of the law and of the practical limitation upon juristic writing, "the present condition of our law is, in a great measure, unknown to us as a matter of fact. We know practically nothing, not only of things which are more remote, but even of those which take place before our eyes every day. Almost every day brings to us some juristic surprise, which we owe to some lucky accident, or remarkable law suit, or to an item in the daily paper." This juristic surprise may involve tenant rights in Schwarzenberg, or peculiar rights which regulate the construction of buildings in Vienna, or remarkable instances of perpetual leases of farming land in Berhomet, in Bukowina. "Whoever has followed
life itself with careful attention knows that these are not isolated instances. Everywhere we grope in the dark. We have not the excuse which the legal historian has, that bits of the past have sunk beyond hope of recovery. We need only to open our eyes and our ears in order to learn everything which is of significance for the laws of our time."

The living law which dominates life is not in the least confined by the barriers of statute law. "Whether statute law has lost its mastery over life, or whether it never possessed it; whether life has grown away from statute law in its development, or whether it never corresponded to statute law, must remain an open question. But scientific investigation fulfills its task in teaching law very poorly if it merely sets forth what statute law prescribes and not what actually takes place."

This somewhat abstract statement of Professor Ehrlich's theories of the nature of the living law may well be illustrated and supplemented by some concrete examples. One of the most interesting instances of divergence between the law as it appears in the Austrian code and the law as it is actually lived by the people is the matrimonial community of goods, which is actually in force among the German-speaking peasants of Austria.

In the section of the Austrian civil code which deals with matrimonial contracts there are four small paragraphs, which, according to the marginal annotations, deal with the community of goods. Anyone who has ever had the opportunity of coming into contact with the German peasant of Austria knows that he lives almost entirely under a regime of matrimonial community of goods; but the matrimonial community of goods, which by his own free will is the predominant condition of property of the German peasant of Austria, has nothing to do with the community of goods with which the Austrian civil code deals, and the provisions of the civil codes are never employed, since they are always excluded by a marriage contract, which is agreed upon in due form. What value would a jurisprudence have which failed to recognize that the community of goods which is spoken of in all the civil codes enjoys an existence only on paper? What value would a jurisprudence have which thinks that its task is summed up in interpreting the intention of the legislator which is expressed in these four paragraphs, but which does not concern itself with the community of goods, which is set forth in documents which are readily accessible, and according to which nearly the entire German peasantry of Austria lives?

Another illustration is found in the code provisions concerning
agricultural leases which are derived from Roman law, which are absolutely unsuited to modern conditions, and which, accordingly, are superseded by the express provisions of the contract of lease in almost every instance.

Another example is found in the law of the family. The first thing that occurs to the investigator in this connection is the contrast between the actual arrangement of the family and that for which the code provides. There is scarcely a country in Europe in which the relations between husband and wife, between parents and children, or between the families and the outside world in the form which they actually take in life, correspond to the norms of statute law; or in which the members of the family attempt in the least to enforce against one another the rights which they have according to the words of the statute. It is evident that in this case, too, statute laws do not give any idea of what takes place in life itself. So much the less should scientific investigators and teachers restrict themselves to explanations of what is set forth in the statutes. They must pursue the actual forms which are essentially similar and typical, although differing in every social class and in every neighborhood.

The best example of all is the peasant law of succession in Germany (Sering), and in the German regions of Austria. This has been ascertained by investigation and by judicial decision. The whole work must be done over again for the other classes of society, and in like degree for the non-German peoples and districts of the Austrian monarchy. Our juristic literature is content with setting forth the well-nigh unrestricted freedom of testamentary disposition which appears in the code. Should it not ask, too, what use is made of this freedom in the different countries and in the different classes of society?

The only sphere of law, the scientific study of which is based throughout upon actual usage, and not merely incidentally, is commercial law. In this instance, it is first the custom and the usage of commerce that is taken officially as the object of scientific investigation. The organization of the great landed estate and of the factories, and even of the banks, is to this day to the jurist a book with seven seals; but he knows the chief outlines at least of the organization of the commercial house from the commercial code. He knows the position of the principal and of the agent; of the attorney-in-fact; of the firm's assistants in business; of the commercial traveler; and he knows the significance of the trading firm; of the book of accounts, and of business correspondence. All this must be estimated not merely from an economic, but also from a juristic side. The law of contracts of the modern commercial lawyer is not taken over from the corpus juris, nor is it a product of the industrious meditations of its author. What the commercial statutes and commercial codes tell us
about purchases, commissions, forwarding of goods, insurance, freight and banking transactions is for the most part something that is actually practised somewhere, even if possibly not to the same extent as they set it forth. In the same way the countless arrangements of business and especially the bourse have been plowed and harrowed carefully by the jurist. That it is hard to do this, for every nook and corner, is due in this case less than in others to the deficiency in ideas and in the understanding of the reality of the things, and more to the difficulty of the matters under consideration and their remarkably rapid development. The gigantic organization of the means of production, which is completing itself before our very eyes in trusts and combinations, all the achievements of modern commerce and the countless new discoveries, lead every moment to new forms of activity, which open up fresh fields of labor for the jurist.

From what sources will Professor Ehrlich learn the living law?

The most important source of the living law is the judicial decision; but not the judicial decision as it is ordinarily used by the jurist. It is ordinarily treated, not "as a witness of the living law, but as a piece of juristic literature which is to be tested not by the truth of the legal relationships which are set forth therein, or by the living law which is deduced therefrom, but by the accuracy of the statutory interpretation which is contained therein, and of the juristic construction. The comprehension of the French compilers of decrees is far deeper than that of the jurists, who regard it as their task to write explanatory notes to the decisions, which are published in the great collections of Dalloz, Sirey, and in the 'Journal du Palais.' The judicial decision is in itself an expression of law, not as the legislator has put it forth, but as it has developed in the consciousness of the French judges during the hundred years that the French code has been in force. In the words of Meynial, 'It is this notion which is given tacitly, but by general consent, which makes jurisprudence (i.e., case law) not only the servant, but the rival, and, as it were, the supplanter of the law.'"

A study of the living law from judicial decisions alone is, however, necessarily incomplete. The decisions do not give a perfect image of the life of the law. Only tiny selections out of real life come before the officials; and much is excluded from the ways of the law by its fundamental nature or as a matter of fact. Furthermore the legal relations which are involved in litigation show different and distorted features, which are foreign to the same relations when in repose. Who would judge our family life or the life of our clubs by the law suits which involve families and clubs? The sociological
method accordingly demands absolutely that the results, which are obtained from the decisions of the officials, should be completed by a direct observation of life.

The modern business document offers a foundation for this very method; and this can be at least as fertile as that of the preceding centuries. A look into the life of modern law shows that it is predominantly controlled, not by statutes, but by the business document. Law gives way and is excluded by the content of the document. In marriage contracts, in contracts of purchase, of lease, in building and loan contracts, in contracts of loan secured by hypotheca, in testaments, and in contracts of succession, and in the articles of the clubs and of the business partnerships, the living law must be sought and not in the paragraphs of the codes.

All these contracts have a typical though ever-varying content together with one which is individual and which applies only to the particular transaction. It is this typical content of the document that is the most fundamentally important thing about it. If our literary jurists were well advised they would occupy themselves with these documents in the first instance, like the Romans, who in their "Commentaries on the Edict and the Libris Juris Civilis," wrote long discussions over the ever-varying duplae stipulatio, and the institutio ex re certa. We would now have more monographs on the beer seller of the brewery, or on contracts for sugar beets made by manufacturers of sugar, or on the sale of the practice of a physician, than on the conception of the juristic person, or on the construction of a right of hypotheca in specific things. It is really an entirely new task for the jurist to make use of the modern documents for jurisprudence.

Above all, we must try to treat the documents as bits of the living law, and to achieve the living law out of their contents, as the Romans did in their law of contracts and of testaments. The titles of the Digest de contrahenda emptione, de actionibus emti venditi, de evictionibus et duplae stipulatione, pro socio, de stipulacione servorum, and those which deal with the law of testaments and legacies can be used as a model. If modern jurisprudence could occupy itself with modern contracts and documents, and not with those of Roman times, it would be a matter of the greatest importance. Our modern jurisprudence would have to test the documents according to their typical contents, of general import, but ever varying; to treat them juristically, and to evaluate them from every point of view according to their social, economic, legislative and
political importance. In this way we could at least get an idea of what is important for us in the sphere of documents. Although taking them at large, they coincide in part, they are of very different kinds, in their details, according to neighborhoods, classes, circles of society, races and creeds. It is necessary to perform the duties of a statistician of law by means of an investigation of documents. Without new methods this cannot be done at all, and it certainly will not be an easy task to devise such a method. But what splendid results here beckon to the jurist as soon as he succeeds in laying bare the historical, economical and social presuppositions of these differences.

But the documents would be greatly over-valued if we thought that we could learn the living law from them without anything more. They are not so arranged that the document according to its entire content is the supporter and the witness of the living law. The living law in the content of the document is not what the courts recognize as binding when they decide litigation, but only what the parties observe in actual life. The operation of transactions which are evidenced by documents cannot be learned out of their enforceable legal consequences without anything more. Could any one gather from the articles of a club or of a joint stock company that the collection of members which appears so all powerful on paper generally turns out to be an association of subservient members absolutely without any legal significance? But the content of the document which is operative in law gives no reliable information concerning its effect which was not intended by the parties, nor concerning its effect which was thus intended. Much of a document is simply traditional. The author writes it down from his copy, but it does not reach the consciousness of the parties. They neither demand nor grant the provisions that are set forth therein, and they are very much surprised to learn of them, whenever, in the event of litigation, the document comes into the hands of a jurist who can make it operative before the court. The parties allow other provisions to be incorporated into the documents only in order to be ready for the worst. It is a matter of course that no attention should be paid to them if the transaction is performed without any trouble. The other party understands this very well. He accepts the utmost rigors of a contract of this sort with equanimity, while he haggles most obstinately over everything in which it is meant in earnest. If we read a contract of lease prepared by the office of the stewart of the Prussian crown lands, or a lease of a Greek religious foundation,
we wonder how the lessee can move at all in the midst of these close barb-wire fences of paragraphs. In spite of this the lessee gets along very well. No use is ever made of all these contractual penalties, provisions for terminating the lease, notices to be given for short periods of time, penal bonds and compensation for injury, as long as it is possible to get along with the lessee at all. One who is engaged in practical matters wishes above all things to do business with people in a peaceful manner. He cares nothing about instituting litigation, even if he is bound to win. The sociological viewpoint of the law will accordingly have to survey not merely rules of law, but also the documents from life itself. Here, too, it must distinguish between law which is enforced by the courts and the living law. Law which is enforced by the courts (i.e., norms for judicial decision) is the entire valid content of the document, since the result of litigation depends thereon; but living law extends only as far as the parties regularly act with respect thereto when litigation is not involved. If we overlook these actual differences in the component part of documents they will give us a remarkably distorted and erroneous idea of life. This contrast is of the greatest importance for the administration of law and for legislation as well. It is certainly questionable whether they ought to be willing, without any conditions or reservations, to take as earnest that which was certainly not intended to be taken in earnest.

And the documents tell us, of course, about the living law only as long as this can be put in documentary form. How shall we collect the living law which is not in the form of documents, but which is nevertheless great and important enough? There is this one way of doing this: to open our eyes, to inform ourselves by careful observation of life, to ask the people, and to note down their answers. It is certainly a hard task for the jurist if we expect him to attempt to learn from actual observation and not from paragraphs of the code or from legal documents; but it is inevitable, and wonderful results can be achieved by this means.

What are Professor Ehrlich's theories as to the method of investigating the living law?

The life of the peasant of Bukowina is relatively simple. Life, even in the small cities of Bukowina, is relatively complex. For this reason, Professor Ehrlich has begun his investigations with the living law of the peasants. He does not, however, intend to restrict his investigations among the peasant classes to those who actually live by farming. For instance, he has discovered that among the Rou-
manians and the Ruthenians there is a numerous priesthood, which
is made up for the most part of the same families in which this office
is usually hereditary, and this priesthood, spread over a wide territ-
ory, forms a nation within a nation, which has its own traditions
and its own customs. Cases of this sort must be studied as well as
the living law of the community at large.

The greatest emphasis is to be laid upon the necessity of ascer-
taining the exact details of the living law. It is not possible to state
it in a few broad and comprehensive phrases. Its value depends
entirely upon its multiplicity of single instances. Abstraction is not
life, but is mere paper. The investigation of the living law must
begin in every instance with the concrete. The anatomist and the
physiologist do not begin with the study of animal life in the ab-
stract, but with the study of specific animals and specific tissues.
Only after a concrete observation is finished does the scientist ask
himself whether the principles which he has deduced from the spe-
cific observation hold true generally; and he can determine this fact
only by a series of concrete observations. "The same thing holds true
for the legal investigator. He must, at the outset, concern himself
with concrete practices, with relationships of sovereignty and of law,
with contracts, articles of association, and with testamentary provi-
sions; and he must investigate their general validity. It is not true,
therefore, that in the investigation of the living law we are dealing
merely with customary laws or with trade customs. Even if we un-
derstand anything at all from these words, which is by no means the
case, the question is not of the concrete, but of the universal in
application. But only the concrete usages of sovereignty and law,
contract, articles of association, and testamentary provisions give us
the rules of these matters according to which men govern their con-
duct; and it is only upon the basis of these rules that the norms of
judicial decision and the provisions of statutes exist, which, up to
this time, alone have occupied the attention of jurists. The great
multiplicity of judicial decisions rests upon the concrete usages
which have been established by the court; upon relations of posses-
sion, upon contracts, upon articles of association, and upon testa-
mentary provisions. If we wish to comprehend generalization, unity
and the other methods which the courts use in finding norms, we
must above all understand the basis from which this results. The
more we know of banks among the Romans, the clearer will the
receptum and the litteris contrahere be to us. Will not this be true
for the law of the present day? To this extent Savigny was right when he thought that the law (and law to him was above all the rules of law) was to be explained only by a historical comparison; but the historical comparison does not lie in a gray past, but in the present, out of which the rule of law is growing."

The investigator of the living law among the peasant communities is to begin with the older persons whose experience is greater. He must distinguish carefully between the actual customs by which the people live and their moral views, which may be very different from their actual customs, but which they are very likely to give as abstract propositions. They thus satisfy their ethical feelings by laying down this moral rule, while they actually live on a more practical basis, but on a lower grade of morality. It is the actual practice of the community, and not its abstract moral standard, which the investigator is to ascertain.

The law which is actually practised by a race must be distinguished carefully from its theoretical law. In theory, the Jews of Bukowina observe the rabbinical law. As a matter of fact, most of them are profoundly ignorant of this law; and actually observe a number of usages which they have built up in comparatively recent times; and which have nothing whatever to do with the rabbinical law, or else are based upon a misunderstanding of its provisions.

Wherever documents are involved, or statements of custom are put into writing, the investigator is urged to secure the originals or to get copies, if possible.

In an industrial neighborhood, Professor Ehrlich would urge the investigator to make an exhaustive study of the organization of the different forms of manufacturing and business which are carried on there.

The very provisions that the new German commercial codes contain in statutes concerning the bourse, banks, capital, inland navigation, and other matters, were full of gaps at their creation, and today they are for the most part antiquated.

The factories, the banks, the railroads, the labor union, the associations of contractors, and the thousand other forms of life have an order likewise, and this order has its own legal side, as well as that of the commercial houses, which are all that the commercial code deals with. In addition thereto, there are countless forms in which these associations manifest themselves externally; and above all, the contract. In studying manufacturing, the legal investigator must pursue the countless and manifold ways which lead from the acceptance of the order to the delivery of the finished product; the position of the
agent and the traveling salesman, the three bureaus in every manufacturing establishment, the sales bureau, the technical bureau, and the bureau of management; the arrival of the order, the preparation and preservation of the plans, the computation of the specific cost of the undertaking and of the selling price, and the subsequent calculation after the object is completed, the execution of the order in conformity to the plans, the duties of the bureau of management, of the masterworkman and of the foreman, and of the workman, the management of the freight warehouse, the computation of wages, where payment is made by the piece and by time, the distribution of wages among the different workmen, the significance of bookkeeping, taking inventories, regulating warehouses, keeping plans and models.

It is true that political economists have frequently occupied themselves with investigations concerning those matters which are here called for. The work of the jurist is not by any means rendered superfluous on that account. Jurists and political economists have to deal everywhere with the same social phenomena. Property, money, commerce, joint stock companies, credit, inheritance; there is scarcely an object which would not belong to jurisprudence as well as to political economy. It is, however, with absolutely different sides of the same social phenomena that the one science and the other concerns itself. The one concerns itself with their economic significance and importance, and the other with their legal control and their legal consequences. The jurist can learn as much from the political economist as the political economist can learn from the jurist. The questions which the same objects place for the investigation of their respective sciences are nevertheless absolutely distinct. For this very reason no part of the work which is necessary for both can be devolved upon one of them alone.

In the investigation of the living law neither the historical nor the ethnological method will of course be superfluous; for we can understand the law of the evolution of society only by consideration of historical and prehistorical (ethnological) facts. The historical and ethnological method is also indispensable in order to comprehend the conditions of modern law. It is true that we can never comprehend the past except by means of the present, but the road to understanding the inmost heart of the present always leads through a consideration of the past. The entire past is contained in every fragment of the present, and it is readily discernible to the eye that is able to look into these depths.

In order to understand the actual conditions of the law, we must investigate what society itself is doing, as well as public law, and the actual influence of the state upon the laws of society. We must know what kinds of marriage and family exists in a country; what
kinds of contracts are entered into and what content they have as a
general rule; what sort of testamentary declarations are drawn up;
how all this ought to be adjudged according to the law which is in
force before the court and with the magistrates; how it is adjudged,
and to what extent the judgments and other decisions are of actual
effect. Such an investigation will always show us that, although the
legislation of different countries, such as France and Roumania,
may coincide, nevertheless a very different law may prevail; and the
law in Bohemia, in Dalmatia and in Galicia is by no means the
same, although the same codes are employed by the courts and the
officials. Because of the diversity of this actual condition of our law,
regardless of the civil code, there is no uniformity of law even in the
different parts of Germany, apart from the particular variations of
legislation.

Of course our knowledge in this direction will always remain
full of gaps and meagre. And without doubt it is much easier and
much more pleasant to study through a code, together with its com-
mentary, than to ascertain the actual conditions of the law by tedi-
ous and industrious work. But it certainly is not the task of juris-
prudence to seek easy and pleasant tasks, but the great and produc-
tive ones. All our knowledge is patchwork, and jurisprudence is no
exception to this, but the less it is, the more scientific it will be. This
detailed discussion would completely fail of its purpose if anyone
were to understand that a methodology of the sociology of law could
be exhausted by the methods which have here been indicated. For
new scientific results, new methods always become necessary.

How far has Professor Ehrlich succeeded in making an actual
investigation of the living law?

The statement of Professor Ehrlich's theories as to the investi-
gation of the living law shows that his theories are very complete for
the class of the peasants in rural communities; and rather sketchy
for the investigation of industrial communities. This corresponds
exactly to the actual character of his investigations. As far as it is
possible to learn from what Professor Ehrlich has written, his inves-

8. Bohemia consists of the western portion of modern Czechoslovakia. A kingdom in the
Middle Ages, it was part of Austria-Hungary when this article was written. Since 1918, it has
been a part of Czechoslovakia and contains the national capital of Prague. 2 ENCYCLOPEDIA
BRITANNICA, Micropedia 1185 (1974).

9. Dalmatia is a component of modern Yugoslavia and includes the majority of Yugos-
slavia's coast on the Adriatic Sea. 3 id. at 356.
tigations have practically been limited to the class of the peasants of Bukowina. The actual scope of his work can be seen far better from the list of questions for his seminar in the study of the living law than by any abstract statement. A list of questions was prepared by Professor Ehrlich for his seminar a little more than a year ago.

They cover the following topics:

I. Personal Relations.
   A. Racial allegiance.
   B. Marriage.
   C. Relations between father and child.
   D. Guardianship.

II. Rights in family property.
   1. Marriage contracts.
   2. Rights of husband in property of wife.
   3. Rights of wife in property of husband.
   4. Rights of parents in property of children.
   5. Property of the aged.

III. Rights in property.
   1. Organization of interests in land.
   2. Organization of labor.
      a. Sales of immovables.
      b. Contracts of service.
      c. Contracts of lease.
      d. Contracts of partnership.
      e. Contracts of credit (loan).

IV. Succession.

V. Protection of the law.

Out of these I have selected, to give in detail as fairly typical, the question on marriage and on leases.

I-B. Marriage.
   1. Impediments to marriage.
      Is marriage regarded as forbidden on any other grounds than those prescribed by statute or by the church? Are there villages or separate families who do not intermarry?
      What influence has a difference in social rank?
      How about marriages with members of another nation (with Germans, baptized Jews, gypsies, foreigners)?

   2. What does the man think his rights are with reference to his wife?
Does he forbid her to leave the home?  
To visit the tavern?  
To associate with her women friends or with her male acquaintances?  
Does he impose tasks upon her?  
Does she obey his commands?  
Does he open her letters?  
Does he ever punish her?  
How?

3. What does the woman think her rights are with reference to her husband?  
Does he obey her commands?

4. Do divorces or separation occur?  
For what grounds do the spouses separate without divorce?  
For what grounds do they obtain divorce?  
What agreements do they make about the children?  
Do the sons go to the father and the daughters to the mother?

III.-3, c. Contracts of Lease.  
How is a contract of lease entered into?  
Orally, in writing, in the form used by the notary? and in what cases?  
Who is the lessor (the great landowner himself or his chief tenants)?  
Who are the lessees?  
Peasants, farmers, or only cottagers (who have only a house and garden)?  
Or persons who have no property?  
The objects of the contract of lease (land under cultivation, meadows, houses with gardens and small tracts of land under cultivation)?  
Content of the contract of lease (in all cases with copies of documents)?

In case of oral contracts of lease—  
When does the lease begin?  
How long does it last (a year? longer)?  
What rights has the lessee?  
Can he raise what crops he pleases or only certain kinds of crops?  
Can he drive cattle on the pasture-land if he has mowed the meadow and harvested the crop?  
When is the rent payable?  
In instalments?
All at once?
Can the lessee take the crop away before the rent is paid?
How much is payable in advance?
Is the lessee obliged to do anything else, besides pay the rent (services in the household or in the fields of the lessor)?
Personal services?
Or services of his wife and children?
Rent paid in kind (milk, eggs, butter)?
Are there instances of the *colonia partaria* (Tretyna) (The lessee does not have to pay rent in money but he must deliver a certain portion of the crop)?
Is the lessee bound to manure the fields?
As a general rule or only if it is expressly agreed upon?
Can the tenant claim an abatement of the rent in case of a bad harvest?
What happens if the lessee does not do any work upon the field?
Is a sub-lease permitted?
What happens if the lessor sells his property?
Especially if the land is leased for several years?
Does the sale end the lease?
Must the buyer at least permit the lessee to harvest what he has planted?
Is there a custom to pasture after harvest?
Can everybody in the village drive cattle on the pasture after the hay is mown (in leases of meadows) or after the harvest?
Or only certain persons?
How is the tract which is leased determined?
Is it pointed out by the lessor to the lessee?
Or is it surveyed?

To what extent can Professor Ehrlich's methods be applied in America?

Professor Ehrlich's work has been done in Austria. The history of German and Austrian law has been said to be a ghost story rather than such a sober bit of history as the history of the common law. The reception of the Roman law pushed the German law and the Slavonic law out of their places in the higher courts; while the old popular law survived among the people, and especially among the peasants. In time the Roman law was completed by the Austrian code, which was in theory a complete statement of the law, free from all gaps; from which by proper construction it was possible to de-
duce the solution of every legal question that ever could be raised. A judicial decision in theory was of no value as a precedent. Each new case as it arose was to be solved by recurring to the principles laid down in the code.

By the side of this condition of law the English law is relatively home-made, and not an imported article. Whatever the fact may have been at the beginning, juristic tradition has for the most part prevailed over popular tradition; and in applying the well-settled principles of the common law, our courts trouble themselves very little about whether the people understand the law which they are thus applying, or whether the law coincides with popular ideas. But at any rate, no complete foreign system was ever imported into England. The common law grew slowly, and if it pushed out the old Germanic law eventually, the people seem to have forgotten the old law almost as fast as the courts ignored it. Such traces of the old law as persisted in England persisted as local customs. The migration to America shattered these local customs. The attempt in many of the colonies to get along without a system of law, or in some colonies to employ the Bible as a corpus juris, which was to be received by the magistrates, broke down. The English common law was then received by the courts in a sense; but there was no pre-existing system of law for it to supplant or crowd out. The result is that our people may not understand our law, but they have no clearly defined systems of law of their own outside of the rules which are enforced by the courts.

Foreign immigrants bring with them few legal ideas. Even when they settle in masses, so as to give a distinctly alien tone to certain communities, they seem to forget their European ideals, legal and otherwise, more readily than they acquire ours. If we except isolated communities, which were founded deliberately and systematically, generally for religious motives, we would probably be safe in saying that in the greater part of America we would find none of the remnants of the old, dying law underlying our modern law, which Professor Ehrlich has discovered in Bukowina. Some exceptions to this might be shown to exist. It is possible that a close investigation of the Mexican population in the Southwestern part of the United States, or of the mountaineers of the Southern Appalachians, might disclose some interesting facts about the ability of law to persist under the most adverse circumstances. The most that we could hope for, however, would seem paltry by the side of the nine different races of Bukowina, with their systems of old popular law. The world
which Professor Ehrlich is investigating seems in some respects much like England between the reigns of William I and Henry II. There is vast confusion; there are competing systems of law; the principle of personality is still fighting with the principle of territoriality; and, while the law of the central courts is winning, it has not driven its antagonists off the field. While Austria is far ahead of us in legislative activity, its legislation far outstripped its internal juristic development; and took few of its materials from the actual life of the people.

Keeping in mind the difference between the legal situation of Bukowina and that of America, we might consider what we could have learned in the past or what we can now learn by Professor Ehrlich’s methods with reference to the divergence between the law of the statute book, the reports, or the text books, and the actual rules which are recognized by the people generally in their daily life.

In the past, from a study of pleadings and evidence, without investigating life itself, we would have discovered the legal fiction, such as trover, ejectment, or the fiction of the promise in assumpsit where the plaintiff is attempting to recover in what we now call quasi contract. We could have gathered from judicial decisions alone that restrictions upon property were not as rigid as they might appear at first glance; and this impression would have been confirmed if we had extended our investigations into real life. We would have discovered that the rights of the husband over his wife’s property which appeared in the common-law decisions and in the text books existed chiefly for those who were too poor or too improvident to secure legal advice and to have proper settlements made. The rule forbidding devises of land would be found applicable only to those who were so reckless as to keep the legal title to their own realty. In fact, wherever a rule of law lay across the path of human progress, or failed to give an adequate satisfaction for human needs, we may feel reasonably sure that human progress and human wants have found their way under its barrier by means of legal fiction or around it by equity. They have flowed over it sometimes in the form of legislation, but the barrier has rarely been so high and so strong in our race as to cause a pressure sufficient to result in revolution.

If we apply these methods to modern life we could make discoveries in this country of the same general type as those which Professor Ehrlich has made. As in Germany, we would find that the small corporation is very likely to be an individual or a partnership doing business under corporate guise for the purpose of evading personal
liability. In leases of buildings we would find that the common law rule that the destruction of the building did not discharge an express covenant to pay rent was generally avoided by the express provision of the lease. Under statutes for divorce, which specify identical grounds, such as extreme cruelty or gross neglect of duty, we will find the greatest diversity of opinion as to what facts constitute extreme cruelty or gross neglect of duty. Some states will be more liberal than others; some sections of the same state and some individual judges will differ greatly in their views of facts which establish these grounds. We need not restrict ourselves to the consideration of divorce. If we compare the records of litigation of all kinds, without going outside to life itself, we will find again and again that under rules of substantive law which, stated abstractly, are identical, widely different results are reached in fact; and this divergence is not only between different states, but between sections of the same state; between different judges, and even between different cases. Findings as to the weight and sufficiency of the evidence necessary to establish the ultimate facts frequently cover up great and real divergences and make it possible to reach opposite results on almost identical states of fact under absolutely identical rules of law.

It takes very little experience with the jury to see that in fact they persist in dispensing with the rules of law that do not fit the actual standards of the people. The law books may say that no insult by words can be a defense in case of assault and battery. The jury, however, will treat the insult, if it is extreme enough, as a defense in case of an assault, if it is not too extreme. Certain forms of insult are actual defenses which will secure a verdict of not guilty in an indictment for murder. Our law books may say that extreme need is not a defense in case of theft; but it is a sufficient defense with most juries and many police courts. It is not so good a defense if the crime is robbery rather than theft. In negligence cases, charges as to contributory negligence and the assumption of risk are likely to fall upon deaf ears.

These facts could be learned by a study of the records of the courts, although they would not ordinarily appear in written opinions. The extent of the divergence between the theory of law and its actual working outside of litigation could, of course, be determined only by an actual investigation into life itself.

A series of attempts to ascertain the views of businessmen as to the law which actually controls in case of business contracts has
given results that are largely negative. There are strong tendencies
to regard nothing as a contract that is not in writing; to regard
consideration as unnecessary where the promise is made in the line
of business, and to insist, on the other hand, that a contract is not
a binding promise at all, but a mere statement of present intention,
which is to be carried out if it proves convenient or reasonably
practicable. There is a rather strong feeling that the payment of a
part of a debt ought to be a discharge of the whole debt, if this was
the agreement of the parties, especially if the agreement was in
writing. Those who held this view were unable to see why resort
should be had to a court of bankruptcy to accomplish this result.
In the foregoing case it seems impossible to tell whether these repre-
sented real views as to the nature of the contract, or whether they
were merely excuses to evade a just liability or to impose a liability
which was understood at the outset to be moral and not legal. One
thing is plain. There is a real growing dissatisfaction with the an-
ers which the common law, and, for that matter, the civil law,
gives to the questions which grow out of the relations of employer
and employee in the great manufacturing industries and in the busi-
ness of transportation, and this has caused a number of states to
withdraw this entire subject from the sphere of judicial justice and
to revert to the primitive methods of executive justice and a tariff
for injuries.

There is no great gap in our law between the abstract state-
ments of a code and the practical questions from life itself that come
before the courts. To a very large extent it would seem that the facts
about the living law which were gathered in Professor Ehrlich’s
seminar would appear in our own reports of recent cases. Much the
same results could apparently be obtained from the study of the
recent problems of law and the attempts of the courts to apply
recognized legal principles to life. This is, of course, a mere conjec-
ture. A careful study of concrete cases and a tabulation of statistics
might show that many of our legal principles contradict the feeling
of the right of the people of their actual practice in real life. Nothing
short of an actual investigation could determine this. It may not be
necessary or desirable that our law should coincide with the feelings
of the people and be limited by them. In a complicated civilization,
law has to answer countless questions which the mass of people
cannot understand, far less answer. The laws which have limited
themselves to the feelings of the people and which have never been
developed by technical jurists have never gotten out of the lower
stages of development, and they have been superseded in advancing societies by systems of law which have gone through a technical juristic development. At the same time the more closely a technical system of law can be made to coincide with the actual feelings of the people, the greater power will the law have behind it for its enforcement—the greater the efficiency and the less the friction. In the words of Jellinek, "A law is guaranteed if the motive-creating power of its rules is so reinforced by social psychological forces as to justify the expectation that those rules are in position to assert themselves as a foundation of action as against opposing individual motives." "Non-legal guarantees alone, without the compulsion of the state, could not maintain legal order; but the state could not keep the legal order from collapsing if the non-legal forces were withdrawn."

At best there will be plenty of clashes with individual interests; but, if possible, the law should avoid a clash with the general moral, ethical, social or political feelings of the community.

The systematic study of our entire industrial and mercantile life from a juristic standpoint, which Professor Ehrlich has recommended, but which he does not seem to have accomplished, would seem to be of great value. The great defect in our administration of justice is the lack of breadth of view and of continuity of thought. Under our rules of evidence the courts permit the jury to hear merely fragments of all the facts, which both judge and jury would wish to know in real life, in order to determine an actual course of action. While possibly no harm resulted from these rules under the original power which the courts possessed over the trial of a case, and while they originally resulted in a great saving of time, the decadence of the power of the court and the persistence of these rules of evidence would make it impossible for a jury in many cases to understand the true facts in dispute, if it were not that these deficiencies were supplemented by the arguments of counsel on the admission or exclusion of evidence from which the jury can gather the general setting of the transaction and the real dispute.

The law as applied by the courts is frequently a mass of disjointed rules and fragments. The rules which the courts enforce are frequently very different from what they might have been if the judges who laid them down and developed them could have seen the whole subject. While the courts may not legislate, they undoubtedly make law; and it would save many false steps if they could see the end of the path, or even its general direction. Theories of public
policy, which often take on the rank and dignity of constitutional provisions, are generally due to the unconscious prejudice or bias of the court; and not to a scientific and systematic study of life itself. The acts or tendencies which the courts declare to be objectionable may really be better or worse than the courts believed; but they are almost invariably different from the results at which the courts guessed. It is a mere accident if the solution which is reached by the court on questions of this sort is the just and adequate one. For example, from the rule that they will not enforce an illegal contract, the courts have deduced that they will not allow either party to recover what he parted with under such a contract; a deduction which in some cases, as in monopolistic transactions, defeats the very object that was to be gained by classing the transaction as illegal, and which in some kinds of contracts, as in gambling contracts and in illegal sales of intoxicating liquors, has finally been altered by statute.

In divorce proceedings the decrees of divorce and alimony and awards of the custody of children are at best made along traditional lines, and at worst they are examples of the arbitrary and almost uncontrolled exercise of judicial power. Little attempt has ever been made to see how the various forms of decrees, and especially those which award the custody of children, actually work out in real life. It is possible that the courts and the legislators have, by accident, hit upon the very best kinds of decrees and orders; but, if so, it has been a lucky accident. A careful study of the effects and consequences of the different types of decrees might well lead to decided modifications. Criminal prosecutions and sentences upon conviction have all proceeded along traditional lines, with but little attempt to see if better methods of prosecution could be devised or to learn what happens after sentence has been inflicted.

These are merely concrete illustrations of the tendency of law to lay down its rules and to frame its judgments and decrees without thinking it necessary to see how the rules and decrees actually work in real life. The ordinary judge is surprised at the suggestion that the consequences of his decrees are any of his affair; and he generally resents it. At most he may concede that that sort of thing may be very well for the sociologist, but not for the lawyer.

Sporadic attempts have been made to ascertain the actual results of certain forms of administration and legislation.

In Germany, the results of social legislation, and especially of workmen's insurance, have been studied with some care.
The Court of Domestic Relations—branch number 8 of the Municipal Court of Chicago—has made a serious attempt to learn what has been the actual working of the laws concerning non-support, abandonment, delinquency and bastardy. Under the direction of the faculty of the Law School of the University of Wisconsin, an investigation has been made of the calendars of the circuit courts of two counties to determine the causes of delay in the trial of cases and the amount of time actually consumed in trial. Valuable as is the information which has thus been gathered, it is only enough to suggest how great would be the results of a systematic survey of modern civilization from a juristic standpoint.

It is true of America as it is of Germany that we live in the midst of sudden and enormous changes—changes in the theory of the family—in the kinds of contracts which are actually in use, and in the entire nature and organization of our commerce and manufacturing; and it is as true with us as it is in Germany that statutory changes, however great they may be, are of but little importance compared with these changes in the living law.

Professor Ehrlich feels that a study of the living law will convince the jurists of Germany that legal history did not end with the Romans nor with the Germans of the fourteenth and fifteenth centuries. A like study of conditions in America would convince all who are not already convinced that our legal history did not stop in the seventeen hundreds or in the early eighteen hundreds. An enormous wealth of material for the student and teacher of the law, for the judge and for the legislator would thus be brought to light. A study of legal history from this point of view would enable us to learn the past in order to understand the present and to guess at the future.

In an undergraduate course of three years we cannot use Professor Ehrlich’s methods directly. We cannot establish courses based upon them. We cannot displace courses in pleading, evidence, or property, in order to enable our students to investigate modern methods of production and distribution from a juristic standpoint. We can, however, teach in his spirit and modify our methods of teaching by his views of law. In teaching law we should, as I think we all do, attempt to show our students that the facts of our cases are little bits of real life, taken more or less at random; that they can be understood only in connection with the life out of which they have been taken, and that a careful understanding of the case as a recurring type is essential to its just comprehension. We can show them that the principle of law applicable to the case is not an
arbitrary rule, but a vital and growing principle, which should ever be applied so as to fit it to life itself. We can emphasize the necessity of securing just results in the solution of cases rather than making neat applications of abstract rules. In this way we can teach to the lawyers and the judges of the next generation the living law.

We may smile at the assumption of the framers of the German and Austrian codes that solutions of all possible legal problems, present, past and future, are contained in the provisions of the codes. As common law students, we will admit that this cannot be done by statute.

But the fundamental assumption of our lawyers and judges is that our unwritten law is a closed book, which contains all the principles possible to a system of law; that these principles may be developed further, and their respective provinces may be marked off more exactly, but that no principles can be added thereto; that everything found therein is reason, and that whatever is not found therein cannot be reason, and that our traditional analysis of law is an essential part of our legal order. In fact, the possibilities of our common-law system seem almost exhausted; and yet society is continuing to go ahead and does not seem willing to wait on the lagging steps of its slow-moving legal attendant. New materials must be sought for the revival and development of the common law, or for the codification which is the next step in an era of legislation; and a most fertile field for these materials is that which Professor Ehrlich calls the living law.
THE KENTUCKY LONG ARM STATUTE: HOW "LONG" IS IT?

Kurt A. Philipps*

I. INTRODUCTION

The increased mobility of American society, and interstate business influence, have caused the majority of states to enact long arm statutes. This step has been taken to insure a local forum for residents who have a claim against nonresidents. Traditionally, the test for exercising extraterritorial jurisdiction over a nonresident has been "minimal contacts." Kentucky, in enacting its long arm statute, has provided a local forum for residents who have litigious

* B.A., Southwest Texas State University; M.R.E., Southern Methodist University; J.D., Southern Methodist University. Assistant Professor of Law, Salmon P. Chase College of Law.


   (1) As used in this section, "person" includes an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who is a nonresident of this commonwealth.

   (2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

   1. Transacting any business in this commonwealth;
   2. Contracting to supply services or goods in this commonwealth;
   3. Causing tortious injury by an act or omission in this commonwealth;
   4. Causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth, provided that the tortious injury occurring in this commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the commonwealth;
   5. Causing injury in this commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this commonwealth when the seller knew such person would use, consume, or be affected by, the goods in this commonwealth, if he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this commonwealth;
   6. Having an interest in, using, or possessing real property in this commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a nonresident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated;
   7. Contracting to insure any person, property, or risk located within this commonwealth at the time of contracting.
interest with nonresidents arising out of “minimal contacts” with Kentucky.

Prior to the enactment of the current Kentucky long arm statute, a resident could maintain personal jurisdiction over a nonresident upon showing that the nonresident was a corporation doing business within the Commonwealth,\(^3\) or that the nonresident operated a motor vehicle\(^4\) or boat\(^5\) or that he engaged in authorized\(^6\) or unauthorized\(^7\) insurance business within Kentucky’s territorial boundaries. Although it seemed easy to apply,\(^8\) the “doing business” test was limited in application because it required the kind of

\(^{(b)}\) When jurisdiction over a person is based solely upon this section only a claim arising from acts enumerated in this section may be asserted against him.

\(^{(3)}(a)\) When personal jurisdiction is authorized by this section, service of process may be made on such person, or any agent of such person, in any county in this commonwealth, where he may be found, or on the secretary of state who, for this purpose, shall be deemed to be the statutory agent of such person.

\(^{(b)}\) The clerk of the court in which the action is brought shall issue a summons against the defendant named in the complaint and direct it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the secretary of state and shall also deliver with the summons an attested copy of plaintiff’s complaint. The secretary of state shall immediately mail the copy of the summons and complaint to the defendant at the address given in the complaint. The letter shall be posted by prepaid registered mail or by certified mail, return receipt requested and shall bear the return address of the secretary of state. The sheriff shall make the usual return to the court, and in addition the secretary of state shall make a return to the court showing that the acts contemplated by this statute have been performed, and shall attach to his return the registry receipt, if any. Summons shall be deemed to be served on the return of the secretary of state and the action shall proceed as provided in the Rules of Civil Procedure.

\(^{(c)}\) The sheriff serving the summons upon the secretary of state shall pay to him, at the time of service, a fee of four dollars ($4.00), which shall be taxed as costs in the action.

\(^{(4)}\) When the exercise of personal jurisdiction is authorized by this section, any action or suit may be brought in the county wherein the plaintiff resides or where the cause of action or any part thereof arose.

\(^{(5)}\) A court of this commonwealth may exercise jurisdiction on any other basis authorized in the Kentucky Revised Statutes or by the Rules of Civil Procedure, notwithstanding this section.


5. Id. § 454.270 (1970).

6. Id. § 304.3-230 (Supp. 1976).

7. Id. § 304.11-040 (Supp. 1976).

8. In WSAZ, Inc. v. Lyons, 254 F.2d 242 (6th Cir. 1958), a West Virginia television station was found to be “doing business” in Kentucky where it solicited advertising contracts in the Commonwealth and because its listening area included a portion of Kentucky.
KENTUCKY LONG ARM STATUTE

quantitative, mathematical analysis which was criticized in *International Shoe Co. v. Washington*. The most severe limitation of the superceded statute was that its application to foreign corporations not authorized to do business in Kentucky precluded in personam jurisdiction over nonresident individuals and noncorporate entities. Thus, a Kentucky citizen who was injured under circumstances that would not fit any of the statutory guidelines for personal jurisdiction had to go to the foreign corporation's domiciliary state to bring suit.

In 1968 the Kentucky General Assembly attempted to remedy these deficiencies by enacting Kentucky Revised Statutes section 454.210. Modeled after the *Uniform Interstate and International Procedure Act* section 1.03 and similar to Ohio's long arm statute, it broadened the concept of “doing business” and extended maximum constitutional interpretation to the traditional notion of “minimal contacts.” It also defined the nonresident “person” over whom jurisdiction could be exercised to include “an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity.” Under the statute a plaintiff can obtain personal jurisdiction over a nonresident if the party acts or causes a consequence within the Commonwealth and if the nonresident's forum-related activity comes within one of seven statutory categories. Although there is no formula or rule of thumb for determining “minimal contacts,” there are some guidelines, drawn from state and federal decisions, which can be used in determining the “reach” of this new statute.

II. TRANSACTING BUSINESS

When a nonresident transacts any business within the Com-

---

11. Act of March 21, 1968, ch. 46, 1968 Ky. Acts 152. In *Rose v. E.W. Bliss Co.*, 516 S.W.2d 329 (Ky. 1974), the court applied the new long arm statute where the action was filed after the effective date of the statute even though the cause of action arose before the statute became effective.
monwealth, he falls into the first category. The defendant must meet three requirements before he is deemed to have transacted business. First, he must purposefully avail himself of the privilege of acting or causing a consequence in Kentucky. Second, the cause of action must arise from the defendant's forum activities. Third, the acts or consequences originating with the defendant must have such a substantial connection with Kentucky that the exercise of personal jurisdiction is reasonable.15

This tripartite test was used by the Sixth Circuit in *Davis H. Elliot Co. v. Caribbean Utilities Co.*,16 in which the court noted that the Kentucky high court had not yet had an opportunity to address itself to this section of the long arm statute; therefore, it determined Kentucky would use the tripartite test when given the opportunity. The Sixth Circuit ruled that where the officers, directors and three stockholders resided in Kentucky, and defendant Caribbean Utilities Company performed a portion of its business activities from one of the directors' offices using a Lexington address on its letterhead, the company was transacting business in Kentucky even though it was an alien corporation organized under the laws of the British West Indies engaging in electrical power distribution solely on Grand Cayman Island in the Caribbean Sea. The court observed that Caribbean did engage in purposeful activity within Kentucky and could have foreseen a reasonable impact on Kentucky commerce.17 It was noted that, although Caribbean was an alien corporation and the nature of its business was beyond the territorial limits of Kentucky, its officers voluntarily and routinely made business decisions within the Commonwealth.18

The plaintiff's cause of action in *Elliott* was for breach of an oral termination agreement which had been negotiated in an effort to wind down an original written contract that the parties had mutually rescinded. The termination agreement was negotiated within Kentucky and confirmed by a letter mailed in Kentucky on the defendant's stationary listing the Lexington business address.19 Had the plaintiff sought specific performance or alleged breach of the

15. Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968). This was the test employed by the Sixth Circuit in interpreting the Ohio long arm statute. In *Flight Devices Co. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972).
16. 513 F.2d 1176 (6th Cir. 1975).
17. *Id.* at 1181.
18. *Id.* at 1182.
19. *Id.* at 1178.
original contract which was to be performed outside Kentucky and
was executed by the plaintiff outside of Kentucky territorial limits,
he would have been hard pressed to argue that the defendant was
transacting business within Kentucky and still meet the constitu-
tional minimal contact restraints which preclude personal juris-
diction where the contacts are casual and insubstantial. A non-
resident who is incorporated in another state with the thrust of his
business operations there will thus be amenable to process within
Kentucky if the Commonwealth is used as a base of operations.

One month after Elliot the Kentucky Supreme Court addressed
itself to the “transacting business” subsection of the long arm stat-
ute. In Bowen v. Eastside Jersey Dairy, the court refused to over-
rule the trial court’s decision to quash a summons for a nonresident
defendant’s employee whose automobile collided with plaintiff’s
automobile in Indiana. The plaintiff contended that the defendant
transacted business in Kentucky by sending two letters to plaintiff
and his attorney in Louisville requesting that a repair estimate of
defendant’s truck be delivered to plaintiff’s insurer. The court dis-
missed this argument noting that the lawsuit did not arise from the
alleged business transaction but from an event which preceded the
receipt of the demand letters. Thus, in the only case in which the
Kentucky Supreme Court has been faced with an interpretation of
subsection 1, it has given a strict interpretation requiring that the
cause of action arise from purposeful activity in the forum. This case
may be limited in application to its facts. The court expressly re-
served ruling on the constitutional question of amenability to pro-
cess when the only forum activity is an assertion by mail of a claim
arising from past transactions in another state. It is interesting
that the court in Bowen did not rely upon the extensive federal case
law which had earlier interpreted Kentucky’s nonresident process
statutes.

The resident plaintiff in Bowen sought to create a cause of
action with in personam roots in Kentucky by use of Kentucky Civil

20. 521 S.W.2d 822 (Ky. 1975).
21. Id. at 822-23.
22. Id. at 823.
23. Id.
24. E.g., Davis H. Elliot Co. v. Caribbean Util. Co., 513 F.2d 1176 (6th Cir. 1975); In
v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968).
Rule 22\textsuperscript{25} in alleging that the mailing of the two demand letters to Louisville by the defendant in fact was asserting a transitory action which should be asserted as a compulsory counterclaim. The Kentucky court, in refusing to accept the specious argument and obvious misplaced reliance on Civil Rule 22, reaffirmed the requirement that personal jurisdiction must be derived from facts contained in the complaint which allege a local cause of action and not from a discretionary counterclaim.\textsuperscript{26} Thus, a nonresident defendant cannot be compelled to bring suit in the Commonwealth merely because he has demanded settlement by correspondence sent to the Kentucky plaintiff.\textsuperscript{27} The same logic would apply where a defendant conducts settlement negotiations in Kentucky because the negotiations are unrelated to the facts giving rise to the cause of action. Of course, presence within a forum might be construed as transacting business if Kentucky courts were to give this concept a liberal interpretation. This liberal view would be particularly applicable if the settlement negotiations are protracted, as opposed to an isolated trip into Kentucky for the express purpose of settlement.

One such case interpreting a provision identical to the Kentucky “transacting business” subsection was \textit{In Flight Devices Corporation v. Van Dusen Air, Inc.},\textsuperscript{28} in which the Sixth Circuit analyzed the Ohio statute.\textsuperscript{29} The court determined that personal jurisdiction was properly invoked where defendant Van Dusen, which was incorporated and maintained its principal place of business in Minnesota, negotiated a contract in Ohio for the manufacture of custom-made aircraft parts. The defendant was made even more amenable to process by a showing that the parts were to be manufactured in Ohio. This factor alone would be sufficient to support

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{25} Ky. R. Civ. P. 22 states:
    \begin{itemize}
    \item \textbf{Interpleader.} — Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in Rule 20.
    \end{itemize}
  \item \textsuperscript{26} 521 S.W.2d at 823.
  \item \textsuperscript{27} See id.
  \item \textsuperscript{28} 466 F.2d 220 (6th Cir. 1972).
  \item \textsuperscript{29} \textit{Ohio REV. CODE ANN.} § 2307.382 (Page Supp. 1975).
\end{itemize}
\end{footnotesize}
in personam jurisdiction over a nonresident defendant, even if the negotiation had taken place outside of the forum state. This case supports the extension of the Kentucky "transacting business" provision to an out-of-state defendant who never enters the Commonwealth, but who has a substantial connection because he solicits and negotiates an executory contract to be performed locally.

Other requirements for "minimal contacts" by a nonresident can be gleaned from federal decisions interpreting the existing Kentucky long arm statute and its predecessor. A nonresident who voluntarily makes business judgments within Kentucky is subject to personal jurisdiction, even though the effects of the business judgments are in another state. A "single act" within the Commonwealth may be sufficient if the qualitative analysis of the "act" indicates a substantial connection with Kentucky or its residents. On the other hand, the mere occurrence of an injury within Kentucky without other forum activity will not support personal jurisdiction. In Irby v. All State Industries, a New Jersey swimming pool manufacturer was not considered to be doing business in Kentucky where the only contact was an injury occurring in one of its pools located in the Commonwealth. The court ruled the defendant could not possibly have foreseen the installation of its pool in Kentucky where it did not send salesmen or repairmen into the Commonwealth before or after the installation. However, a foreign gun distributor who sold his guns to local retailers via mail orders sent to Kentucky was subject to a local action where one of its guns was used in a local assault. The trial court hesitantly expanded section 454.210(2)(a)(1) to the facts of the case. In Bennet v. Cincinnati Checker Cab Co., the critical factor seemed to be that the gun used in the assault was one of many which had been shipped to Kentucky by the gun distributor. He was involved with the forum through actions freely and intentionally done. Had the sale of the gun been

30. 466 F.2d at 227.
34. Id. at 774.
37. In Bennet the court did not actually reach a decision on the jurisdiction since the plaintiff had failed to state a claim upon which relief could be granted. Id. at 1210. However,
an isolated event, clearly in personam jurisdiction would not exist under this subsection. If the forum activity is a "single act," the qualitative analysis of the act must indicate substantial impact vis-a-vis Kentucky.\textsuperscript{38} Non-business or causal activity within the Commonwealth will not support in personam jurisdiction under this subsection.\textsuperscript{39}

The Kentucky Business Corporation Act\textsuperscript{40} may provide some guidance in determining whether a foreign corporation has transacted business. The purpose of the Act is to define what activities qualify a foreign corporation for a certificate of authority to transact business locally. Although, for the purpose of qualification, transacting business is different from determining amenability to a local action, the forum activities set out in the statute could arguably be asserted for the proposition that substantial contacts, rather than minimal contacts, are necessary to transact business in Kentucky. The Act specifies ten activities, any of which singularly are not transacting business for qualification purposes:

1. maintaining or defending any action or suit or effecting settlement thereof,
2. holding directors' or shareholders' meetings,
3. maintaining bank accounts,
4. maintaining offices or agencies for the transfer, exchange, and registration of its securities,
5. effecting sales through independent contractors,
6. soliciting orders which require acceptance outside Kentucky before becoming binding contracts,
7. creating evidence of debts, mortgages, or liens on real or personal property,
8. securing or collecting debts,
9. transacting any business in interstate commerce, and
10. conducting an isolated transaction of less than 30 days' duration.\textsuperscript{41}

How far the Kentucky Supreme Court will extend the reach of the transacting business provision can only be surmised. If the court chooses to give a literal interpretation to the statute, transacting

\textsuperscript{38} See 355 U.S. at 223.
\textsuperscript{41} Id. § 271A.520(2).
business may prove to be a means by which even casual business contact will subject a foreign defendant to in personam jurisdiction. This suggestion is particularly cogent considering that in Bowen the court reserved the opportunity to rule that a letter sent locally from out-of-state may subject the nonresident to a local action if a cause of action arises from the mailing and receipt of the letter. Subsection 1 should not be read so literally that the interpretation of "transacting business" violates the constitutional limits of "minimal contacts" requirements. Although the requirements for personal jurisdiction have been attenuated by some courts in an effort to provide local forums for local residents, Kentucky courts should not stretch minimal contacts so as to violate "traditional notions of fair play and substantial justice."

III. **CONTRACTS TO SUPPLY GOODS OR SERVICES**

To fall within the second category requires that a nonresident contract to supply goods or services in Kentucky. In *Post v. American Cleaning Equipment Corp.*, a New York manufacturer was "doing business" in Kentucky by contracting with a Kentucky distributor to sell its vacuum cleaners. Although construing the former "doing business" statute, which was generally more restrictively applied, the *Post* court recognized that a defendant who furnishes goods for sale within Kentucky is amenable to process even though there is no written contract. The court's strict reading of section 454.210(2)(a)(2), the current statute, would subject nonresidents to Kentucky courts if the contract, although executed in another state, is for goods to be supplied or for services to be rendered in Kentucky. It would be immaterial that the contract is executory if its terms dictate that the goods or services have Kentucky as their destination. Subsection 2 on its face goes beyond subsection 1 by requiring that the only "minimal contact" be the agreement to supply goods or services in Kentucky. In *Bennet* the District Court applied subsection 2(a)(2) to support personal jurisdiction of a foreign gun dealer even though the only "contact" was correspondence with

---

42. Bowen v. Eastside Jerey Dairy, 521 S.W.2d 822, 823 (Ky. 1975).
43. 326 U.S. at 316.
44. 437 S.W.2d 516 (Ky. 1968).
46. 437 S.W.2d at 519.
independent Kentucky merchants. In *Penker Construction v. Finley*, the nonresident defendant was amenable to process where it manufactured a tilt cylinder, a component part of a tractor manufactured by International Harvester. The plaintiff was injured when the cylinder collapsed, sending a large stone crashing upon him. The court applied the old service of process statute because the injury occurred before the enactment of the existing law, yet it used language which could be easily applied to subsection 2(a)(2). In refusing to quash the summons, the court observed that a manufacturer who places merchandise on the consumer's market in Kentucky via mail orders and sends company representatives locally is subject to service of process.

The clear advantage of subsection 2 over the other provisions of section 454.210 and the other nonresident statutes is the absence of a requirement that the nonresident be present in the state or perform some overt act or cause some consequence in the Commonwealth. A literal reading of this provision only requires that the written or parol agreement be to perform services or to deliver goods in Kentucky. Of course, one seeking to assert personal jurisdiction solely on an oral agreement negotiated and executed outside of the Commonwealth may be hard pressed to prove the necessary elements of an enforceable contract. Negotiations outside of Kentucky not resulting in a contract will not meet the language of the statute. It assumes that an enforceable contract is a jurisdictional fact which must be proven before a nonresident is amenable to Kentucky process. It would appear immaterial that a Kentucky resident solicited the nonresident to contract for services or goods. The crucial and perhaps most difficult fact to prove is the enforceable promise to deliver goods or furnish services in Kentucky. Even though the contract commodity never reaches this jurisdiction, an action may nevertheless be initiated under the "contract" provision of the long arm statute if there is a meeting of minds to deliver goods or furnish services in Kentucky.

48. 485 S.W.2d 244 (Ky. 1972). The nonresident defendant (Drott) manufactured and supplied tilt cylinders to International Harvester. International assembled the tractors outside of Kentucky. Drott was brought into the suit by a fourth party complaint and served process through the Secretary of State. *Id.* at 247.


50. 485 S.W.2d at 249.


52. *See generally* Annot., 23 A.L.R.3d 551 (1969). This annotation deals with the inter-
IV. CAUSING TORTIOUS INJURY BY AN ACT OR OMISSION

The third provision of the long arm statute contemplates that the nonresident cause a tortious act or omission in the Commonwealth. The drafters of the provision singled out the “tortious act” as the jurisdictional fact on which the due process considerations of minimal contacts are based. The “tortious act” provision of the statute is important because it fills the jurisdictional void which exists when plaintiffs seek to obtain jurisdiction over non-domiciliaries who come here and cause injury by a single isolated act not arising out of the operation of an automobile or a boat.

Section 454.210(2)(a)(3), which is the tort provision of the long arm statute, separates “act” from “injury” with the essential jurisdictional element being the causal act. Neither causing injury nor causing damage can be construed to be an act or omission, because the place of injury is immaterial. However, in most situations the place of injury and the place of the tortious act will be the same. Some courts may attempt to “bootstrap” in applying this provision by fictitiously imposing the place of the “act” in Kentucky when the only conduct which can be attributed to the foreign tortfeasor is that Kentucky was the forum in which the consequences of his out-of-state tort occurred. Although expedient for the injured resident, this misapplication of the subsection is perhaps unnecessary because, as with subsections 4 and 5, there are other provisions which specifically apply where an out-of-state tort causes injury or damage within Kentucky. Applying the subsection in this manner eliminates any need for subsections 4 and 5. This, clearly, is not the intent of the legislature.

Ultimate liability is not a jurisdictional fact under this subsection. However, a plaintiff, on whom the burden rests to establish personal jurisdiction, must allege in his complaint not only that there was an act or omission, but also that the injuries sustained were the proximate cause of the “tortious act.” Therefore, one seeking to subject a nonresident to local jurisdiction under this subsection is forced to muster proof that the nonresident conduct was not that of a reasonably prudent person acting under the same or similar...
circumstances and that such conduct was the cause of the tort. The allegation in the complaint should be supported by affidavits or deposition testimony in order to make a prima facie showing of personal jurisdiction of the foreign tortfeasor. Once it is shown that the injured party's cause of action arises out of some local "tortious act or omission," the court acquires a basis for personal jurisdiction, and any further question as to the legal sufficiency of the plaintiff's claim goes to the merits of the case and not to the jurisdiction of the court. Thus, when a nonresident voluntarily enters Kentucky and invokes the protection of its laws, traditional notions of fair play and substantial justice are not offended by requiring that party to answer to a local action arising out of the commission of a tort within the Commonwealth.

V. Tortious Injury by an Act or Omission Outside of the Commonwealth

The essential element upon which personal jurisdiction rests under section 454.210(2)(a)(4) is "tortious injury" within Kentucky. The inclusion of the phrase "by an act or omission outside the Commonwealth" makes subsection 4 obviously distinguishable from subsection 3. Personal jurisdiction can be sustained over a nonresident tortfeasor if the plaintiff can allege and prove an injury which occurs in Kentucky as a result of an out-of-state tortious act. The degree of proof necessary to support jurisdiction under subsection 4 is greater than that necessary under subsection 3. Subsection 4 grants jurisdiction when a local injury occurs if plaintiff also alleges and proves that the defendant:

1. engaged in regular solicitation of business in the Commonwealth, or
2. pursued any other course of conduct, or
3. derived substantial revenues from goods used or services rendered locally.

The purpose of these three additional jurisdictional requirements is to avoid the injustice where a foreign manufacturer, without any intent or actions on his part, finds one of his products in Kentucky

58. See, e.g., Elkhart Eng'r Corp. v. Dornier Werke, 343 F.2d 861, 868 (5th Cir. 1965); see also Annot., 25 A.L.R.2d 1202 (1952).
60. Id.
under fortuitous circumstances. The additional requirements of regularity, persistency, or substantiality of contact serve to check the possibility of basing personal jurisdiction on local injuries alone.

The application of this subsection will probably occur in the area of products liability when an unreasonably dangerous product finds its way into Kentucky commerce. The difficulty in applying this provision will depend upon whether the Kentucky Supreme Court gives a liberal or conservative interpretation to the substantiality requirement. Judge Swinford, in Miller v. Trans World Airlines, Inc., upheld service of process over the manufacturer of a defective altimeter on a TWA airliner which crashed at the Greater Cincinnati Airport in Boone County. The court found that the defendant had derived substantial revenues from the use of its altimeters in Kentucky because all commercial airliners landing in the Commonwealth had the defendant’s product on their instrument panels. Judge Swinford observed that it was not necessary to prove that the goods were sold locally, only that substantial revenue was derived from Kentucky markets.

As is true with subsection 3, it is not enough to allege the statute verbatim in order to maintain personal jurisdiction under subsection 4. The pleading must be corroborated by sufficient proof of a persistent course of business conduct or substantial revenue directed towards, or derived from, Kentucky markets. Thus, a plaintiff’s discovery should inquire about the presence of salesmen, office equipment, management personnel, business contracts, past marketing efforts or earlier sales. A plaintiff who is unable to prove persistent business conduct by the nonresident should ascertain particular goods and services which the defendant has placed in Kentucky. Plaintiff’s counsel should also keep in mind that subsections 1 and 2 also operate if the “tortious injury” arises out of the transacting of business or contracting to supply services or goods locally. If it does, it must arise out of the defendant’s intentional contact with the Commonwealth. Under these circumstances, requiring the defendant to defend a local action is not unreasonable or beyond the constitutional limits of due process. Although subsec-

---

62. Id. at 177.
63. See Bush v. Service Plastics, Inc., 261 F. Supp. 136 (N.D. Ohio 1966). In Bush similar factors contained in the Ohio statute were found to be pertinent in determining whether service would be allowed.
tions 1 and 2 are commercial in nature, they can support a theory of recovery sounding in tort. The use of subsections 1 and 2 will also serve to avoid the onerous requirement of subsection 4 which requires proof that the tortious injury arise from the three alternative factors of persistency, regularity, and substantiability. The practical effect is to require the local injury to have a direct causal nexus with the defendant's regular forum activities. It forecloses personal jurisdiction where the nonresident causes a local injury by shipping a new or experimental product where there has not been an opportunity to market it locally. Requiring the local injury to arise out of the persistency, substantiality and regularity of a course of business greatly limits the application of subsection 4. The Kentucky legislature can be assured that the deletion of the "arising out of" provision of this subsection will bring it into conformity with the long arm statutes of other jurisdictions and still not violate the constitutional limits of due process.

VI. CAUSING INJURY BY BREACH OF IMPLIED OR EXPRESS WARRANTY

The jurisdictional fact paramount to finding personal jurisdiction under Kentucky Revised Statutes section 454.210(2)(a)(5) is a local injury arising from a breach of implied or express warranty of goods sold outside of Kentucky. The out-of-state seller must have foreseen that local residents would use, consume, or be affected as a predicate to imposition of personal jurisdiction. Thus, as was true in subsection 4, if a local injury is the result of a fortuitous placement of a product in Commonwealth markets, jurisdiction will not be imposed. In addition, the persistency, regularity, and substantiality requirements applicable to subsection 4 are also required in subsection 5. A plaintiff faced with a tortious or commercial injury arising from the breach of warranty of an out-of-state product must allege and prove:

1. the existence of an express and implied warranty,
2. the cognitive state of mind of the foreign seller sufficient to prove reasonable expectation of the use of his product in Kentucky,

64. Uniform Interstate and International Procedure Act § 103. Comment. This section authorized the multiple theory of coverage. The Commissioner's notes interpreting the act states that each of the subdivisions will support a cause of action under any theory of law.

65. These additional factors are not present in the Uniform Act or Ohio statute. See id. § 103(a)(4); Ohio Rev. Code Ann. § 2307.382(A)(4) (Page Supp. 1975).
(3) one of the three forum activities previously discussed, and
(4) a local injury.
Each is a jurisdictional fact and the failure to allege and prove any
one will preclude in personam jurisdiction.66

It could be argued that, in a products liability suit, an injured
plaintiff cannot recover either economic or commercial damages.67
A Kentucky plaintiff who sustains economic or commercial dam-
ages arising out of a products liability suit can rely upon subsection
5 to recover fully because the nature of injury in breach of warranty
cases is generally a loss of profits, value depreciation or some other
consequential damage. In contrast, the "tortious injury" in subsec-
tions 3 and 4 contemplates plaintiff's recovery of medical expenses,
of expenses for pain and suffering, for loss of earnings, and for loss
of consortium. Although the warranty section of the long arm stat-
ute probably includes damages for personal injuries as well as com-
mercial or economic injuries, the inclusion of subsection 5 in the
long arm statute insures recovery for the economic injuries if they
arise from a breach of warranty.

Subsection 5 suffers from the same limitation as subsection 4
wherein one must prove not only that the injury arose from a breach
of warranty of goods which the seller knew would affect local com-
merce, but also that the nonresident derived pecuniary benefit from
Kentucky markets. In an effort to avoid situations where a court
acquires jurisdiction because of a fortuitous injury, the legislature
has overlooked the obvious. Constitutionally, it is enough that the
nonresident could foresee his product's use in Kentucky.68 To saddle
a plaintiff with additional proof of persistency, regularity, and sub-
stantiality is to protect the nonresident at the expense of local liti-
gants. Fortunately, the only decision interpreting the pecuniary
benefit proviso did not give a strict interpretation and ruled that the
pecuniary benefit can be directly derived from local sales by the
nonresident or indirectly as a result of sales of the nondomiciliary's
distributors and retailers.69

The forseeability proviso, which restricts application of subsection
5 to defendants who knew local consumers would use, consume,
or be affected by his product, will most probably be satisfied by

67. See generally Prosser, The Assault Upon the Citadel, 69 YALE L.J. 1099, 1143-46
(1960).
69. See Post v. American Cleaning Corp., 437 S.W.2d 516 (Ky. 1968).
inferential or circumstantial evidence because defendants faced with an out-of-state suit will not readily admit a design or plan to sell their goods in Kentucky. In *Miller* the defendant denied that any of its salesmen entered Kentucky for any purpose, however, it boldly admitted it knew of no airplane in which its instruments were not installed. The District Court noted that the defendant "must have known that buyers of its products . . . would sell airplanes . . . which would fly into Kentucky, and consequently must have known that plaintiff's decedent would 'use, consume, or be affected by' the goods in Kentucky." To require this cognitive state of mind will probably not limit the application of subsection 5 as much as the substantiality, persistence, and regularity requirements. By including both requirements, the legislature has saddled this provision of the long arm statute with jurisdictional facts going beyond the restraints of minimal contacts.

VII. HAVING AN INTEREST IN, USING, OR POSSESSING REAL PROPERTY IN THE COMMONWEALTH

The sixth provision of the long arm statute operates to invoke jurisdiction where a nonresident has voluntarily acquired an interest in or possesses Kentucky real property. Subsection 6 further requires that the nonresident knowingly or voluntarily engage in conduct out of which the cause of action arises. It should be kept in mind that this subsection does not provide in rem or quasi in rem jurisdiction. Rather, it provides in personam jurisdiction over nonresidents but only as to a cause of action arising from a nexus with local property. Perhaps the chief question of this proviso is, "What causes of action arise from an interest in, use, or possession of real property?" The first statute using the ownership of property as a basis of jurisdiction was enacted in 1937 and was limited to accidents arising from the nonresident's ownership. The Kentucky statute is broader, and although it does not contemplate a cause of

---

71. *Id.* at 177.
73. Law of July 2, 1937, no. 558, § 1, 1937 Pa. Laws 2747 (amended 1972) (now codified as Pa. Stat. Ann. tit. 12, § 336 (Purdon Supp. 1976)). This law, known as the "Nonresident Owner of Real Estate Act," was designed to serve as a protective device to prevent nonresidents from escaping liability for acts of negligence in the care and maintenance of local property. Today, it is basically unchanged from the original statute except it now covers injuries arising from the violation of municipal ordinances.
action arising from ownership of personal property it does provide coverage for any cause of action or claim arising from an interest in, use or possession of real property. Thus, accidents caused by the negligent maintenance of local property are cognizable under this subsection. The Kentucky provision also provides contractual protection to local residents where a nonresident defaults on mortgage payments on local property, even though foreclosure proceedings are instituted when the defendant is outside of the Commonwealth.

The usefulness of this section is limited because it is not enough that the defendant voluntarily acquired or possessed the property; he must also have acted or failed to act in such a way that the cause of action arose from the act or omission. Thus, there are three jurisdictional requirements which must exist under this subsection:

1. ownership or possession of real property,
2. which was voluntarily acquired, and
3. the defendant acted or failed to act.

The third requirement seems to go beyond the constitutional requirement of minimal contact. The application of the statute to voluntary ownership and possession of realty appears to be sufficient. One who knowingly acquires an interest in Kentucky realty can hardly complain when asked to defend a suit arising from such property, since the defendant has "purposefully availed" himself of contact with the forum by his ownership or possession of real property.

Fortunately, any limitations of this subsection are minimized by the likelihood that actions arising out of ownership or possession will be covered by another subsection of section 454.210. Personal injuries arising out of local property will probably be covered by subsection 3 and a breach of contract will probably be covered by the "transacting any business" provision.

An interesting problem arises in the application of the venue provision of section 454.210 as it applies to subsection 6. Under the general venue scheme in Kentucky a real property action is main-
tainable in the county of the property’s situs and the defendant is amenable to process in that county. However, if the cause of action arises from a breach of a partially performed contract to sell realty, the action is transitory and maintainable only where the defendant resides or where summons is served. Section 454.210(4), the long arm venue provision, authorizes suit in the county where the plaintiff resides or where the cause of action arises. Thus, if a nonresident contracts to buy local realty and subsequently defaults, under the general venue scheme, an action for specific performance is transitory and maintainable in the county where the nonresident resides or is served. Because the foreign defendant is unlikely to enter the jurisdiction and be served, the plaintiff is left with no alternative but to sue in his home county or where the property is situated. Although a suit for specific performance is transitory, it may not be feasible to apply the venue provision for transitory actions. Section 454.210(4) applies when property is owned by a nonresident. It creates an exception to the general rule that transitory actions are litigated where the defendant resides or is summoned. However, if a Kentucky citizen and nonresident are joint purchasers the transitory action places venue in any county where the resident defendant resides or is served.

VIII. CONTRACTING TO INSURE ANY PERSON, PROPERTY OR RISK LOCATED WITHIN THE COMMONWEALTH

Subsection 7 is the final provision of the statute and permits in personam jurisdiction where a nonresident insurer contracts to insure "any person, property or risk," and the insured or the insured risk is located in Kentucky at the time of the insurance contract. This provision should be the easiest to apply because it is a statutory codification of McGee v. International Life Insurance Co. In this case a Texas insurance company sought to avoid an action in California on a life insurance policy of an insured who lived in Kentucky at the time of the insurance contract.
California and paid premiums by mail from his home state. The crucial jurisdictional fact for subsection 7 is the presence in Kentucky of a risk, of property, of a person at the time of contracting. If the insured or insured property is subsequently moved into Kentucky before the issuance of the policy, jurisdiction cannot be founded on this subsection. This provision should permit local suits against foreign insurance companies who solicit either by mail or by newspaper advertisements if the insured is located in Kentucky at the time of the execution and acceptance of the policy. Some questions may arise of whether “time of contract” occurs when the company issues the policy or when the insured signs the application and the local agent accepts his initial premium. However, time of contracting has been interpreted to mean at the time of the issuance of the policy or execution of the insurance contract. The reference to “time of contracting” may limit this subsection; however, as is true with the other provisions of the statute, some other jurisdictional basis may exist under one of the other long arm categories.

IX. Venue Under Section 454.210

A plaintiff has an advantage when resorting to the long arm statute because the liberal venue provision permits suit in any county where the plaintiff resides or where all or part of the cause of action arises. Although, traditionally venue is predicated on the defendant’s residence, enactment of section 454.210(4) was necessary because the nonresident defendant will not normally be found within the territorial limits of Kentucky nor will he have a local residence or agent for process. In Ford Motor Credit Co. v. Nantz, the Kentucky Supreme Court permitted an action for wrongful repossession to be maintained in the county of plaintiff’s residence.

83. See Prewitt v. Great S. Life Ins. Co., 350 F. Supp. 73 (E.D. Ky. 1972). In this case it was found that the fact a beneficiary was a local resident was in itself insufficient “minimal contacts.”
84. In Cincinnati Ins. Co. v. Clary, 435 S.W.2d 88 (Ky. 1968), a homeowner was permitted to recover for fire loss to his home when the agent of the defendants sent the first year’s premium and issued a temporary binder. The fire loss occurred after the company rejected the application, but before the homeowner was notified of the rejection. See W. MEYER, LIFE AND HEALTH INSURANCE LAW § 5:9-10 (1972). Exactly when the insurance contract takes effect is uncertain with some decisions turning on the question of issuance of a conditional receipt granting coverage while the application is processed.
85. 516 S.W.2d 840 (Ky. 1974).
even though the foreign defendant had appointed a resident agent for process pursuant to section 271.385. Plaintiff elected to serve the foreign defendant under the long arm statute via the Secretary of State rather than by personal service of the resident agent as required by section 452.450. By doing so the plaintiff was authorized under the long arm statute to sue in his home county. The court refused to limit application of section 4 to those situations where venue was not possible under one of the other venue provisions. Thus, a plaintiff faced with service of a nonresident corporation who has appointed a resident agent has an option to serve the resident agent or the Secretary of State. Which option to choose should be clear in light of Nantz because service under the long arm statute places venue in plaintiff's county of residence or where the action arose.

X. THE NEED FOR A MARITAL LONG ARM STATUTE

Kentucky does not have a marital provision which would subject a nonresident to personal jurisdiction for purposes of child custody, support, maintenance, and property distribution. The marital provision is important because a Kentucky court cannot otherwise acquire personal jurisdiction over a spouse who leaves the state to avoid payment of maintenance or child support. The concept of "divisible divorce" limits jurisdiction over the absent spouse for purposes of any legal problems incident to divorce, unless the petitioner is able to assert quasi in rem jurisdiction. Even this method is unsatisfactory where the petitioner is seeking a personal maintenance decree or a child custody order. Such relief cannot be

---

86. Id. at 842. See also Enfant, Civil Procedure, 64 Ky. L.J. 357 (1975), where the argument is made that a foreign corporation which has appointed an agent for process should be treated as a resident, thereby limiting his rights to being sued exclusively under Ky. Rev. Stat. §§ 452.450 et seq. (1970).


88. Ohio R. Civ. P. 4.3(8) is an excellent example of a marital long arm statute. This rule reads:

Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state.


90. 334 U.S. at 546.
granted when jurisdiction is limited to the value of the property attached. It cannot possibly be stretched to impose personal jurisdiction for a valid custody or maintenance decree.91

The enactment of a marital long arm provision would serve to permit out-of-state service in property, child custody, child support and maintenance disputes in addition to subjecting the absent spouse to general personal jurisdiction. The crucial jurisdictional requirement is that the couple be living together as husband and wife in Kentucky. Either by marrying locally or marrying in another state and moving to Kentucky, the couple may avail themselves of the privileges and benefits of Kentucky law. The marital jurisdiction also answers the fear of Judge Osborne in Batchelor v. Fulcher92 that a spouse may “seize and run” to another jurisdiction taking with him children and marital property.

The concept of marital long arm jurisdiction is not without its constitutional problems. An argument can be made that to permit in personam jurisdiction over an absent spouse in a custody suit where the spouse has taken the child beyond Kentucky boundaries is to violate the principles set out in May v. Anderson.93 Also, it may be argued that rendition of a maintenance decree without local service is contrary to Estin and its progeny.94

Faced with these arguments, the Nevada Supreme Court had no hesitation in giving full faith and credit to a California alimony decree following out-of-state service on the absent spouse. Nevada recognized the decree because California permitted a personal judgment for alimony where the absent spouse had acquired a marital domicile there prior to the separation.95 The court noted that the state issuing the support order has sufficient contacts if it is the marital domicile of the parties before their separation. The court stated:

If such contacts are in fact present, then the extension of in personam jurisdiction beyond the borders of the forum state may prove to be a sensible step in solving some of the hardships arising from family separations.96

92. 415 S.W.2d 828, 831 (Ky. 1967).
93. 345 U.S. 528 (1952).
96. 439 P.2d at 680.
The enactment of a marital long arm statute would serve the purpose of protecting domiciliaries who find themselves abandoned by a spouse who has fled the jurisdiction to avoid his financial obligations. Kentucky, as the matrimonial domicile, has an optimal interest in its citizens and a legitimate purpose in enacting a legislative scheme which would protect them from financial uncertainty. 97

XI. Conclusion

The lawyer who seeks to use the provisions of section 454.210 should always remember that there are two standards involved in exercising in personam jurisdiction over nonresidents. The ultimate standard, of course, is the one imposed by the Due Process Clause of the fourteenth amendment. The other is in the long arm statute. 98 Satisfaction of one does not carry with it the other. Some states have assumed that their long arm statutes have merged the two standards and made the court's power coincide with that allowed by due process. 99 Whether this interpretation will be allowed by the Kentucky courts remains to be seen. The Kentucky courts have shown a propensity to interpret a statute that has been copied from another jurisdiction in the same manner as the courts of that jurisdiction have interpreted it. 100 Since this act is virtually the same as the original long arm statute adopted by Illinois 101 and by Ohio, 102 the courts of this state will probably lean heavily on the decisions of those states. The Illinois and Ohio decisions have tended to be very liberal. 103 Until the Kentucky Supreme Court has had an opportunity to act, only calculated assumptions can be made as to how far the court will extend the reach of the long arm statute.


100. Conner v. Parsley, 192 Ky. 827, 836, 234 S.W. 972, 976 (1921).


LEGITIMIZING THE ADMINISTRATIVE STATE: THE JUDICIAL DEVELOPMENT OF THE NONDELEGATION DOCTRINE IN KENTUCKY

Edward H. Ziegler, Jr.*

The trend of the last two or three decades toward paternalistic control and regulation of commercial transactions, nurtured by increasing complexity of life and business, has raised serious and difficult questions of delegation of governmental power to administrative agencies. . . . 'Administrative boards and Commissions have undoubtedly become an essential part of our governmental structure . . . .' But neither wisdom of policy nor demands of expediency . . . should be allowed to lead the courts away from basic constitutional processes, or sound judicial construction of statutory authority. There is danger in a departure from the fundamental doctrine that 'Ours is a government of laws and not of men.' This concept is clearly expressed in the Constitution of Kentucky.¹

I. INTRODUCTION

Early in the rise of the Administrative State,² the legislative delegation to administrative agencies of discretion to "make law" was attacked on the ground that legislative and judicial powers could not be delegated. The "separation of powers" provisions found in our federal and state constitutions were coupled with the common law principle of agency, "delegata potestas non potest delegari,"³ in an attempt by lawyers to formulate a doctrine that courts might use to strike down increasing delegations of power to administrative agencies.⁴ That effort eventually led to judicial pronouncements to the effect that a legislative body cannot delegate its authority to any other person, body, or agency. This nondelegation doctrine was theoretically based on the notion that, since our three traditional

* B.A., University of Notre Dame; J.D., University of Kentucky; LL.M. George Washington University; Assistant Professor of Law, Salmon P. Chase College of Law.

¹ Bloemer v. Turner, 281 Ky. 832, 837, 137 S.W.2d 387, 390 (1939) (citations omitted).


³ A power originally delegated may not be redelegated. Hackney v. Fairbanks Morse & Co., 143 S.W.2d 457, 467 (Mo. App. 1970).

⁴ See generally B. Schwartz, Administrative Law 31-59 (1976) [hereinafter cited as Schwartz].
branches of government exercise legislative, executive, and judicial power constitutionally delegated by the people, those institutions, in order to insure that they remain the sole repositories of such power, should not be permitted to further delegate their authority.\(^5\)

The early Pennsylvania case, "Locke’s Appeal,"\(^6\) frequently cited in Kentucky delegation cases,\(^7\) expressed this theory:

That a power conferred upon an agent because of his fitness and the confidence reposed in him cannot be delegated by him to another, is a general and admitted rule. Legislatures stand in this relation to the people whom they represent. Hence it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to any other body or authority.\(^8\)

The nondelegation doctrine was hardly well suited for an industrial period which required increasing government regulation and administration in increasing areas of social and economic life. The doctrine was formulated and embraced at a time when the constitutional philosophy of most courts still reflected the laissez-faire theory of nonregulated contractualism.\(^9\) As positive intervention by government became more widely accepted, the theoretical prohibition of delegation was relegated by some courts to the constitutional graveyard.\(^10\) The doctrine as originally formulated is often resurrected at times in dicta, although it now seldom reflects the actual holdings of the cases.\(^11\) However, as recent court decisions in

---

\(^5\) Id.

\(^6\) 72 Pa. 491 (1873).

\(^7\) See, e.g., Ashland Transfer Co. v. State Tax Comm’n, 247 Ky. 144, 154, 56 S.W.2d 691, 695 (1932).

\(^8\) 72 Pa. at 494. Another early treatise is repeatedly quoted by Kentucky courts. 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 224 (8th ed. 1927) states:

One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.


\(^11\) Id. at 26-28.
Kentucky\textsuperscript{12} and other jurisdictions\textsuperscript{13} indicate, the doctrine is still alive, though cast in a new mold.

The nondelegation doctrine has developed in Kentucky through the three following chronological stages: (1) the theoretical prohibition of all delegations of legislative or judicial powers;\textsuperscript{14} (2) the prohibition of delegations of authority only when a delegation is not accompanied by definite standards to guide the agency's exercise of such power;\textsuperscript{15} and (3) the allowance of delegations of authority even when not accompanied by definite standards so long as other general safeguards exist to check the exercise of such delegated power.\textsuperscript{16} To say that development occurred through fixed stages is to oversimplify. In Kentucky and other states, a proper understanding of the doctrine requires a study of its judicial development, and of its application to different types of delegation issues.

This essay is an attempt to sketch the judicial development of the nondelegation doctrine in Kentucky. Section II presents the context in which the issue arises, and Section III considers the development of that doctrine as applied to delegations of power to public administrative agencies. Section III also discusses the doctrine's application to delegations to other sovereigns and notes further how that doctrine has been applied to delegations of power to private individuals and groups. Section IV concludes the essay with a summary of the development and present status of the nondelegation doctrine in Kentucky.

II. THE CONTEXT

John Locke's statement that "[w]here-ever law ends tyranny begins,"\textsuperscript{17} is often used as a shorthand phrase intended to express our belief that, in a republic, the difference between democracy and tyranny is the protecting "rule of law."\textsuperscript{18} This statement is not out

\begin{itemize}
  \item \textsuperscript{12} Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976).
  \item \textsuperscript{14} Hydes & Goose v. Joyes, 67 Ky. (4 Bush) 464 (1868).
  \item \textsuperscript{15} Ashland Transfer Co. v. State Tax Comm'n, 247 Ky. 144, 56 S.W.2d 691 (1932).
  \item \textsuperscript{16} Butler v. United Cerebral Palasy of N. Ky., Inc., 352 S.W.2d 203 (Ky. 1961).
  \item \textsuperscript{17} J. LOCKE, TWO TREATISES OF GOVERNMENT book 2, ch. XVIII, § 202 (P. Laslett ed. 1960).
  \item \textsuperscript{18} A "republican structure of power" can be equated with the "judicial character" of the overall "constitutive order." H. LASSWELL & A. KAPLAN, POWER & SOCIETY 232 (1952). A governing structure "is 'juridical' in the degree that the political formulae provide opportunity for the effective challenge of decisions; and otherwise tyrannical." \textit{Ibid.} Freidrich's definition
of step with the guarded popular faith. Perhaps the most sacred precept of the American credenda is that "Ours is a government of laws and not of men." As any lawyer who has practiced before an administrative agency knows, however, ours has become, to a significant degree, "a government of men and not of laws." The "men" referred to are those nameless bureaucrats at every level of government whose discretionary domain now includes practically every aspect of American life.

The habitual legislative delegation of broad discretionary authority to administrative agencies to regulate and adjudicate in the public interest has unmistakably, and perhaps permanently, altered our constitutional governing structure. The Administrative State is now our entrenched ruling regime. Ours have truly been "living constitutions." On this point Robert Lorch writes:

Among the revolutions of our time is an administrative revolution. Administrators are no longer merely administrators in the old sense of the word. They are now heavily involved in doing what the Fathers of the Republic surely would have called legislative and judicial. Anyone who still believes that law-making is mostly done by legislatures or that controversies are mostly settled in the courts, is far behind the times.

Today in fact, administrative rules and decisions by far outnumber statutes and judicial decisions.

More importantly, the incidental power to advise, investigate,
threaten, negotiate, settle, and supervise is generally more pervasive and often more significant than either administrative rulemaking or formal adjudication. It has even been suggested that the most significant twentieth-century change in our legal system is the tremendous growth of discretionary power delegated to administrative agencies, and, no doubt, delegated discretion will continue to grow. Ours is likely to be increasingly an existence at the end of an administrative tether.

Bureaucrats, though, would protest the notion that this development necessarily results in a step further along "the road to serfdom." Professor Kenneth Davis comments:

I think that in our system of government, where law ends tyranny need not begin. Where law ends discretion begins, and the exercise of discretion may mean, either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.

The real issue is how "to confine to structure and to check necessary discretionary power." In this view, now expressly adopted by the Supreme Court of Kentucky, the "rule of law" is endangered only when discretion is delegated unnecessarily or when effective safeguards do not exist to check the abuse of the discretion delegated.

In recent decades the popular wisdom has been that broad delegations of power are necessary if regulation is to be effective and legislative objectives accomplished. Judicial acceptance, legitimizing the Administrative State both in Kentucky and at the federal level, is clearly seen in the development by courts of the nondelegation doctrine. The development of this doctrine illustrates one attempt by courts to accommodate the Administrative State within our traditional constitutional framework. This central problem has not, as yet, been finally resolved. At issue is the ability to adapt the "rule of law" concept to the primary characteristic of the Adminis-

27. See generally F. Hayer, The Road to Serfdom (1944).
29. Id. at 4.
31. For a discussion of the development of the nondelegation doctrine at the federal level, see Schwartz, supra note 4, at 31-48.
trative State—the exercise of broad delegated governing discretion by nonrepresentative institutions.

III. DELEGATION OF POWER TO STATE ADMINISTRATIVE AGENCIES

(A) The Authoritative Basis of the Doctrine

The following sections of the Kentucky constitution have been used by lawyers to attack legislative delegations of power to state administrative agencies: (1) the “separation of powers” provisions of sections 27, 28, and 29; 32 (2) section 60 which provides that “no law . . . shall be enacted to take effect upon the approval of any other authority than the General Assembly;” 33 and (3) section 2 which prohibits the existence of the state of “absolute and arbitrary power over the lives, liberty and property of freemen. . . .” 34 The

32. Ky. Const. § 27 states:
The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Ky. Const. § 28 states:
No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Ky. Const. § 29 states:
The legislative power shall be vested in a House of Representatives, and a Senate, which, together, shall be styled the ‘General Assembly of the Commonwealth of Kentucky.’

Sections 27 and 28 of the Kentucky Constitution are reputed to have been written by Thomas Jefferson for the Kentucky delegates who visited him shortly after Kentucky had achieved statehood. Sibert v. Garrett, 197 Ky. 17, 21, 246 S.W. 455, 457 (1922). Sections 27, 28 and 29 have generally been used to attack delegation of power to public administrative agencies. E.g., Craig v. O’Rear, 199 Ky. 553, 251 S.W.2d 828 (1923). These sections have also been used to attack delegations of power to other sovereigns. Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958).

33. Ky. Const. § 60 provides in part:
No law, except such as relates to the sale, loan or gift of vinous, spirituous or malt liquors, bridges, turnpikes or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the General Assembly . . .

This section of the Kentucky Constitution has primarily been used to attack delegations of power to private individuals and groups. E.g., Columbia Trust Co. v. Lincoln Inst. of Ky., 138 Ky. 804, 129 S.W. 113 (1910).

34. Ky. Const. § 2 states:
Absolute and arbitrary power over the lives, liberty and property of freemen exists
effect of the doctrine on each section of the state constitution has varied with the development of delegation theory and with the type of power transfer involved.

Besides specific provisions contained in the Kentucky Constitution, the Kentucky courts have employed the "lack of intelligibility" rule as a device for testing statutory delegation of power. This theory will invalidate an attempted delegation if either the nature of the duties transferred or the manner in which they are to be exercised are so obscure that legislative intent cannot be determined. Use of "lack of intelligibility" must be distinguished from the stage in the evolution of nondelegation theory which requires "adequate standards" to accompany statutory delegations. The Supreme Court of Kentucky has expressly rejected an "adequate standards" requirement for legislative delegations of power and has adopted instead a general "safeguards" test, which includes within its scope the "lack of intelligibility" rule.

(B) The Fiction of the Early Per Se Rule

The nondelegation doctrine was originally framed in the form of a rigid maxim prohibiting the delegation of essentially legislative functions. At the federal level, this early form of the doctrine was described by Justice Harlan in 1892: "that Congress cannot delegate legislative power... is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." An equally strict version of the doctrine is found in the 1895 Kentucky case Brown v. Hollard wherein the Kentucky court states that "[t]he general rule that the legislature cannot deputize others to perform its governing functions is well settled." Several Kentucky cases rigidly applied the theoreti-
cal prohibition of this early version of the doctrine. The court in the 1868 case of *Hydes & Goose v. Joyes*\(^4\) held that a Louisville ordinance which delegated to the city engineer the discretion to supervise sidewalk improvements, including such technical items as grade was an unconstitutional delegation of the city council’s legislative authority. The court observed that the “power to pass ordinances for improving streets is legislative, and cannot be delegated.”\(^4\) The court’s concern centered on the absence of safeguards to control the city engineer’s discretion, although it was aware of the practical benefits that might result from such a delegation of authority. The court believed that the grant of discretion conferred “vast power over the rights and property of the citizen, and whilst necessary to the growth and convenience and commerce of the population of a large city and the public generally, . . . such power should be exercised as the law directs, and strictly confined within legal limits.”\(^4\) The court continued, “to allow such an ordinance to bind the property holder is to destroy all the safeguards thrown around him by the law”\(^4\) and that “the great security of the citizen, at least, is always to be found in strictly limiting official power within rigid legal bounds.”\(^4\)

Later Kentucky cases continued to articulate this particular interpretation of the nondelegation doctrine. However, it was a rule honored more in its breach than its observance. Statutes delegating broad rule-making and adjudicative powers to public administrative agencies were held not to authorize legislative or judicial powers but to allow them merely “ministerial discretion”\(^4\) to determine “facts upon which the laws . . . become operative in given instances.”\(^4\) This obvious fiction was devised by the court because it perceived a practical necessity to sustain such delegations.

The first important Kentucky case dealing with the delegation of powers to a state administrative agency, *State Racing Commission v. Latonia Agricultural Association*,\(^4\) decided in 1909, contains a

---

41. 67 Ky. (4 Bush) 464 (1868).
42. Id. at 467.
43. Id. at 468.
44. Id. at 469.
45. Id. at 471.
47. Id. at 192, 123 S.W. at 687.
classic statement of the fiction of the early per se nondelegation rule. At issue in this case was the constitutionality of a state statute creating a state racing commission and delegating to that commission broad rule-making, licensing, and adjudicative powers over all horse racing within the state. The court concluded that the act in question did not delegate either legislative or judicial powers to the commission. In the opinion of the court, the commission's power to make binding rules and regulations and to grant and revoke licenses involved only the exercise of "ministerial discretion." The court expressly reiterated the per se nondelegation rule that "[t]he Legislature cannot delegate to another body the power to make laws," but it found nothing inconsistent between that doctrine and the statutory delegation at issue in the case. The commission could select "the persons by whom, and the times and places when and where, and the conditions upon which, the thing to be regulated, may be done." The court reasoned:

It is difficult to set down in terms of exact definition the dividing line between legislation and discretionary regulation. That the two are not the same thing is known by everybody. The practice, the immemorial custom, is to commit to some administrative official or body the detail of execution in matters of police regulation, where the thing is not prohibited altogether. Some statutes confer more, some less, discretion upon the administrative official. Some limit the discretion to the ascertainment of a fact upon which the legislation is to become effective. Some in addition confer the duty and power to determine the propriety, or necessity, of permitting the thing. In all cases the Legislature selects the subject, and indicates the public policy with respect thereto. . . . The selection of the persons, places, and times, and the regulation of the conditions upon which it is to be exercised, are matters of executive detail, which may be, and which are always, delegated to the ministerial body.

However, no express legislative policy to guide the exercise of Commission discretion accompanied the statutory delegation. To ac-
commodate its own reasoning, the court was forced to read into the statute an implied legislative policy to "promote the breeding of thoroughbred horses, and the conducting of legitimate races, and to prohibit the evil of unlawful gambling." This broad undefined statement of implied legislative purpose was, in the reasoning of the court, the only "law" the statute had created or authorized. Regulations and orders of the Commission were held to be mere "matters of executive detail."

Such reasoning obviously requires an unorthodox definition of "law" and a sprawling concept of "ministerial discretion." Without expressly rejecting the per se nondelegation rule, the court could sustain statutory delegations of what it plainly felt were necessary regulatory powers. Otherwise, all government would have to be by the Legislature, requiring it to be in constant session. Nor then would the government be so efficient, elastic, and practical as is the existing system which deems rules of boards and official discretion are not laws, but are facts upon which laws may depend to become operative in given instances.

The dictum of the same case contained a discussion of other previously unquestioned statutory delegations to administrative agencies. While the case did not decide the validity of those particular delegations, their mention clearly illustrated that at least as early as 1909 the Administrative State had already received a certain legitimacy within Kentucky's constitutional system.

Later Kentucky cases cited and followed the holding in *Latonia*. While lip service continued to be paid to the early nondelegation rule, these cases generally sustained the delegation of broad powers to an increasing number of state administrative agencies.

In the 1913 case of *Louisville Henderson & St. Louis Railway v. Lyons*, the Kentucky court upheld the constitutionality of a stat-

---

Id. at 178, 123 S.W. at 683.
54. Id. at 189, 123 S.W. at 686.
55. Id. at 188, 123 S.W. at 686.
56. See *Davis*, supra note 23, at 33.
57. For a discussion in the *Latonia* decision on the public interest relative to "the horse" being an appropriate subject for regulation, see 136 Ky. at 178-81, 123 S.W. at 683.
58. Id. at 192, 123 S.W. at 687.
59. Id. at 190-91, 123 S.W. at 686-87 (dictum).
60. E.g., Louisville, H. & St. L. Ry. Co. v. Lyons, 155 Ky. 396, 403, 159 S.W. 971, 975 (1913).
61. 155 Ky. 396, 159 S.W. 971 (1913).
ute delegating to county physicians the power to determine and prohibit employment in those occupations considered to be dangerous to the health, morals, or lives of children under age sixteen. The court reasoned: "When the Legislature confided to the physician . . . the right to say whether an employment was dangerous or not, it merely conferred upon this officer the authority to find the existence of a fact, and upon his findings the legislative act becomes operative." The court in dictum again went on to express its approval of other recent statutes delegating regulatory powers to public boards in the areas of insurance, railroads, dentistry and medicine. It noted that "these agents do not exercise any of the powers of the Legislature. They do not make any laws. They merely find the existence of certain facts . . . ."

Ten years later the per se nondelegation rule was stated differently in Craig v. O'Rear. At issue in this case was the validity of a statute authorizing the speaker of the state house of representatives and the president of the state senate to appoint the members of a commission that would establish two colleges, one in the western part and one in the eastern part of the state. The statute was attacked on the ground that it delegated legislative power in violation of sections 27, 28, and 29 of the Kentucky Constitution, and that it was void under the "lack of intelligibility" rule because legislative intent could not be ascertained from the vague, indefinite language. The court rejected both arguments and upheld the validity of the statute. On the "lack of intelligibility" issue, the court concluded that the statute was not unconstitutionally vague or incomplete, applying the maxim, "[t]hat is certain which may be rendered certain." It explained that

even in the present benighted state of education in this commonwealth, the members of the commission might discover an old map that was not too faded to furnish the desired information. Not only so, but the members of the commission actually located one of the schools in the eastern part of the state and the other in the western part of the state, and it would be verging on the absurd for us to say that no one could tell with reasonable certainty what was intended

62. Id. at 403, 159 S.W. at 975.
63. Id. at 402-03, 159 S.W. at 974-75 (dictum).
64. Id., 159 S.W. at 975.
65. 199 Ky. 553, 251 S.W. 828 (1923).
66. Id. at 564, 251 S.W. at 833.
by the act, when those charged with its administration found no
difficulty whatever in deciding that question.\footnote{Id.}

Denying that the statute delegated a legislative function to the com-
mission, the court concluded that the mere acts of selecting sites for,
and establishing the two schools, were not in themselves legislative
acts. Instead, the discretion delegated to the commission was only
the administration of law already established by the legislature. The
court simply rephrased the per se nondelegation rule in a way that
reflected the practical application that it would now be given:

It is next insisted that the act is void as a delegation of the func-
tions of the Legislature. It must not be overlooked that Legislatures
are not continuous bodies. As a rule, they are in session for only a few
days each year, or every two years, as in the case in Kentucky. Of
necessity such bodies cannot undertake to determine all facts inci-
dent to the administration of the laws which they enact. Therefore
when we say that the Legislature may not delegate its powers, we
mean that it may not delegate the exercise of its discretion as to what
the law shall be, but not that it may not confer discretion in the administra-
tion of the law itself.\footnote{Id. at 560, 251 S.W. at 831 (emphasis added).}

Once again, the statute in question failed to set out any express
legislative policy to guide the exercise of commission discretion.
Justice Moorman pointed out in his dissenting opinion that:

The commission is not required to locate the schools at the most
suitable places, nor to consider the accessibility of the sites, the pur-
poses of the law, or the educational interests of the state, but in utter
disregard of all these matters it is left to its own purpose and will,
and given the arbitrary power of establishing the schools, without any
guide or chart by which the educational interests of the state might
be served.\footnote{Id. at 576, 251 S.W. at 838-39 (Moorman, J., dissenting).}

He agreed that the nondelegation rule had been correctly stated by
the Kentucky court in *Latonia* but disagreed with the majority opin-
ion because no legislative “law” existed that might operate upon
the “facts” found by the commission. Justice Moorman therefore
concluded that the act had unconstitutionally delegated a legisla-
tive function and granted arbitrary power to the commission.

Later Kentucky cases\footnote{E.g., Guthrie v. Curlin, 263 S.W.2d 240 (Ky. 1953); Board of Educ. of Bath County v.} cited and relied on *Craig v. O’Rear*\footnote{Id.} when
sustaining legislative delegations of both rule-making and adjudicative powers, on the ground that such powers involved simply the "administration of the law" as declared by the legislature. The statutes at issue in later cases often failed to provide any hint of the legislative "law" that the agencies were to administer. But, by the simple technique of classifying even the broadest of delegated powers as "administrative" rather than "legislative," the fiction of the early per se nondelegation rule was preserved.

Two cases dealing with the powers delegated by statute to the Kentucky Alcoholic Beverage Control Board illustrate the judicial construction that was, in some cases, given to the per se nondelegation rule after the decision in Craig. The statute[7] which created the Kentucky Alcoholic Beverage Control Board established one of the most comprehensive regulatory schemes ever enacted. In addition to the power to grant and revoke liquor licenses, the statute delegated to the board the authority to make rules and regulations "for the supervision and control of the manufacture, sale, transportation, storage, advertising and trafficking of alcoholic beverages."[72.1] In Keller v. Alcoholic Beverage Control Board,[73] the constitutionality of the statute was attacked on the ground that it granted judicial powers to the board in violation of sections 27 and 28 of the Kentucky Constitution. Upholding the constitutionality of the statute, the court stated that:

Administrative boards and commissions have undoubtedly become an essential part of our governmental structure. That there are both advantages and disadvantages inherent in the system is admitted. That the legislative branches of government have granted to many of those bodies powers which in some respects combine judicial, executive and legislative action, notwithstanding the fundamental separation of the trinity, is not questioned. . . . But agencies must of necessity be established by and through which the state must function in the exercise of the constitutional and police powers, and those agencies must of necessity be given discretion in performing their duties of administering the law. . . .[74]

---

Goodpaster, 260 Ky. 198, 84 S.W.2d 55 (1935); Bloxton v. State Highway Comm’n, 225 Ky. 324, 8 S.W.2d 392 (1928).
71. 199 Ky. 553, 251 S.W.2d 828 (1923).
72.1 Id. § 241.060(1).
73. 279 Ky. 272, 130 S.W.2d 821 (1939).
74. Id. at 277-78, 130 S.W.2d at 824 (emphasis added).
In the 1949 case of Kentucky Alcoholic Beverage Control Board v. Klien, the constitutionality of the statute was attacked on the different ground that it unlawfully delegated legislative powers to the board. Citing Craig, the court upheld the constitutionality of the statute with the simple statement that "[h]ere the Legislature has exercised its discretion as to what the law shall be, and has delegated to the Alcoholic Beverage Control Board the administration and enforcement of the law." 78

(C) The Adequate Standards Requirement

As late as 1957 cases were still being resolved on the basis of the Craig "legislative" versus "administrative" rule. However, starting about 1930, the majority of decisions employed an "adequate standards" test. Following the lead of earlier United States Supreme Court and sister state cases, the Kentucky court said that when delegating regulatory powers to an administrative agency, "the legislature must lay down policies and establish standards." 80

Unlike the fiction of the early per se rule, the adequate standards version of the nondelegation doctrine attempted to do more than simply recognize the practical necessity of establishing the Administrative State as a fact of modern life. It sought to legitimize that development within the theoretical confines of the traditional "rule of law" framework. 81 Accordingly, the rule required that the legislature at least set out an intelligible policy for the agency to follow. The legislature would theoretically remain the primary lawmaker since its policies would always constitute the primary regulation with the administrative promulgations serving as mere secondary or subordinate rules. 82

Obviously, the adequate standards version of the nondelegation doctrine was entirely inconsistent with several previous Kentucky decisions. In Latonia, for instance, no guiding standard had been

75. 301 Ky. 757, 192 S.W.2d 735 (1946).
76. Id. at 762, 192 S.W.2d at 738.
77. See, e.g., Sturgill v. Beard, 303 S.W.2d 908 (Ky. 1957).
80. Youngs v. Willis, 305 Ky. 201, 205, 203 S.W.2d 5, 7 (1947).
81. See Justice, supra note 24, at 44-45.
82. Id.
established by the legislature in the delegating statute. This fact, however, was not of major concern to the Latonia court and that body simply reaffirmed. A further complication was that as early as 1901 the Kentucky court had already used a much stricter version of the adequate standards rule to strike down a statute which delegated to the State Board of Health the power to revoke a physician's license. In the case of Matthews v. Murphy, the statute provided that a physician's license be revoked by the board whenever it found that he had engaged in "grossly unprofessional conduct of a character likely to deceive or defraud the public." The court had held that this statutory standard was not an adequate basis for administrative action and that arbitrary power had been conferred on the board since "the statute prescribes no rule which is to govern the conduct of the medical profession or the state board of health in adjudging its effect."

The court had required in the delegating statute a legislative formulation of detailed rules rather than the mere statement of a guiding policy. However, the later, more typical construction of the adequate standards requirement would have probably upheld the validity of the statutory standard in Matthews. In fact, in the later case of Ashland Transfer Co. v. State Tax Commission, decided in 1932, the court noted that its decision in Matthews "may have gone beyond the correct rule measuring the validity of such provisions."

In Ashland the state statute was contested which delegated to the State Highway Commission and county judges the discretion to reduce speed and load limitations on their respective roads when such action is "necessary to provide for the public safety and convenience on said highways or roads" was contested. A trucking company brought suit attacking the statute as an unconstitutional delegation of legislative power on the ground that the standards

84. Id.
85. 23 Ky. L. Rptr. 750, 63 S.W. 785 (1901).
87. 23 Ky. L. Rptr. at 750, 63 S.W. at 785.
88. Id. at 754, 63 S.W. at 787.
89. But see Justice, supra note 24, at 44:

I know of no single American judicial decision, federal or state that has ever taken such an extreme position in a holding forbidding the delegation of power unless rules fixed and announced beforehand existed.
90. 247 Ky. 144, 56 S.W.2d 691 (1932).
91. Id. at 160, 56 S.W.2d at 698.
92. Id. at 153, 56 S.W.2d at 695.
established for measuring the delegated authority were so indefinite that the statute had effectively conferred arbitrary power. Responding to this argument, the court first reaffirmed, in dictum, prior decisions such as Craig, where the constitutionality of statutory delegations of power had been upheld despite legislative failure to establish a policy to guide the exercise of the authority so transferred. In doing so, the court relied, as it had originally, on the "legislative" versus "administrative" fiction of the early per se non-delegation rule. The court was, however, more candid in its rationale. It noted that "the disposition in more recent times has been to regard such provisions less critically and to classify them as regulatory whenever possible instead of legislative in character." The court's holding implied that a statutory standard must be established by the legislature whenever the regulatory powers delegated are likely to affect private rights rather than the administration of public property, but that the standard need not consist of detailed rules that were required thirty years earlier in Matthews. The much stricter version of the adequate standards rule that had been imposed in the earlier case was discarded with the simple statement that

because of the complexity of the facts entering into their proper administration, the courts have shown a disposition to uphold such delegated regulatory provisions whenever it is possible to do so, and to somewhat relax the early rule on that subject.

For a statement of the adequate standards requirement, the court cited the United States Supreme Court case Mutual Film Corp. v. Industrial Commission:

Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

93. Id. at 157, 56 S.W.2d at 695.
94. Id.
95. Id. at 160-61, 56 S.W.2d at 698.
96. Id.
97. 236 U.S. 230 (1915).
98. Id. at 245.
Applying this concept the Kentucky court concluded that the standards “to protect the public safety and convenience on . . . highways or roads” set out in the statute indicate “the general policy of the government and administrative officers, within narrow limits, to administer the details so as to make the law practically effective.” The court further pointed out that “it would be difficult to conceive how the Legislature could have constructed more definite and particular standards for the guidance of the two agencies.”

Another case which illustrates the usual interpretation given to the adequate standards rule in Kentucky is Youngs v. Willis, decided in 1947. In that case a statute delegated to a wage board, whose membership was appointed by the Governor, the power to establish minimum fair wages for women and children. The owner of a dry cleaning store who employed both women and children attacked the statute as an unconstitutional delegation of legislative power in violation of section 60 of the Kentucky Constitution, which states that no law shall take effect “upon the approval of any other authority other than the General Assembly.” The statute did not define minimum fair wages, but it did provide that:

The Commissioner shall present to a wage board promptly upon its organization all the evidence and information in the possession of the Commissioner relating to the wages of women or minor workers in the occupation or occupations for which the wage board was appointed, and all other information which the Commissioner deems relevant to the establishment of a minimum fair wage for such women and minors . . . .

The Kentucky court ruled that “in the establishment of such administrative boards and agencies the legislature must establish the principles and policies, and leave to such agencies only the details of administration,” concluding that the statute met this requirement since it established “policies” and “standards” by which “the Wage Board must abide.” The court explained:

99. 247 Ky. at 159, 56 S.W.2d at 697, citing Contract Cartage Co. v. Morris, 59 F.2d 437, 446 (E.D. Ill. 1932).
100. Id. at 157-58, 56 S.W.2d at 697.
101. 305 Ky. 201, 203 S.W.2d 5 (1947).
102. Ky. CONSTR. § 60.
104. 305 Ky. at 205, 203 S.W.2d at 7.
105. Id.
We think the act under consideration fairly states the subject, nature and extent of its operation. It declares its policy and prescribes standards for the guidance of the administrative agency. We think these standards are such that the courts and the public can ascertain whether the Commissioner, in the performance of his duties, has conformed thereto. This being true there was no failure of the performance of the legislation function.106

Following the distinction originally formulated by the Kentucky court in *Ashland Transfer Co. v. State Tax Commission*,107 later Kentucky cases refused to apply the “adequate standards” requirement to delegations of authority which affected only the regulation or handling of state-owned property and not the rights of private individuals. In *Commonwealth ex rel Meredith v. Johnson*,108 the court held that the 1943-44 budget appropriating funds to be expended by the Governor for “ordinary recurring and extraordinary expenses deemed emergencies”109 by the governor did not unlawfully delegate legislative powers in violation of sections 27, 28, 29, and 60 of the Kentucky Constitution. The court reasoned that the authority delegated was “strictly administrative.”110 The 1953 case of *Guthrie v. Curlin*,111 a statute authorizing the Commissioner of Highways to grant or refuse licenses to operate businesses along the right-of-way of toll roads was held not to violate sections 2, 27, 28, and 29 of the Kentucky Constitution. The court concluded that section 2 dealt only with “the exercise of arbitrary power over the lives, liberty and property of individuals, and not with the handling of state property or funds.”112 Responding to the argument that the statute violated sections 27, 28, and 29 of the Kentucky Constitution since it had failed to set out any standard to guide the Commission’s exercise of discretion, the court pointed out that “the powers in question are not legislative powers, but are inherently executive or administrative.”113

The Kentucky high court has also held administrative regulations invalid using a similar “standards” version of the nondelegation

106. *Id.* at 206, 203 S.W.2d at 8.
107. 247 Ky. 144, 56 S.W.2d 691 (1932).
108. 292 Ky. 288, 166 S.W.2d 409 (1942).
110. 292 Ky. at 300, 166 S.W.2d at 415.
111. 263 S.W.2d 240 (Ky. 1953).
112. *Id.* at 244.
113. *Id.*
doctrine.\textsuperscript{114} In \textit{Henry v. Parrish},\textsuperscript{115} decided in 1948, it invalidated a regulation of the Louisville Board of Health requiring the payment of a fee for issuance of a retail food establishment permit. The regulation was based on the agency’s general grant of rule-making authority, and the fees generated were intended to defray the administrative cost of inspecting retail food establishments. The court here ruled that the fixing of such a fee is incidental to the exercise of the police power to regulate, and that while “the Legislature may authorize a board or administrative officer . . . in charge of some governmental affairs, to make police regulations, . . . it cannot abdicate its own police power on any subject and confer such power on an officer or a board to his or its uncontrolled discretion.”\textsuperscript{116} The court found that the regulation in question constituted the creation of a “paramount” rather than a “subordinate” rule since no specific authority for the collection of such a fee had been delegated. It concluded that since the broad power to promulgate the rule involved was “subject to no legislative standard or guide, [it] could not be delegated to the Board under fundamental constitutional limitations.”\textsuperscript{117} To rule otherwise would be to allow the Board to invade “a new field of compulsory contribution where the ground has not been broken by a legislative body.”\textsuperscript{118}

In the 1939 case of \textit{Bloemer v. Turner},\textsuperscript{119} the Kentucky court held that the director of an administrative agency could not, by regulation, make it a crime to violate agency-created food labeling requirements which were in addition to labeling requirements specifically established by statute. The regulation was held invalid since it had not been issued pursuant to a “standard or guide”\textsuperscript{120} established by the legislature. Relying on sections 27, 29, and 60 of the Kentucky Constitution, the court ruled that the agency’s general grant of rule-making authority was limited by, and must yield to, the specific labeling requirements established by the legislature in the delegating statute. The court said that if the Director “may not by regula-
tion subtract” from specific statutory requirements “then he may not by regulation add” to such requirements.\textsuperscript{121}

Later cases in Kentucky, such as the 1954 case of Union Light, Heat & Power Co. v. Public Service Commission\textsuperscript{122} and Roppel v. Shearer,\textsuperscript{123} decided in 1959, continued the practice of striking down administrative regulations inconsistent with specific provisions established by the legislature in delegating statutes. The rule from these cases, which remains yet good law, is that any regulation that amends, alters, enlarges, or limits the specific terms of a statute is not “administrative” but “legislative in character” and is therefore invalid as an attempt to exercise a legislative perogative. The Kentucky court cited the following passage from American Jurisprudence as support:

Since the power to make regulations is administrative in nature, legislation may not be enacted under the guise of its exercise by issuing a ‘regulation’ which is out of harmony with, or which alters, extends, or limits, the statute being administered, or which is inconsistent with the expression of the lawmaker’s intent in other statutes. The administrative officer’s power must be exercised within the framework of the provision bestowing regulatory powers on him and the policy of the statute which he administers.\textsuperscript{124}

Except for the holding in Henry v. Parrish,\textsuperscript{125} the reasoning in these cases was not that administrative regulations must be issued pursuant to a statutory standard but that if specific statutory standards exist, a regulation is invalid that either adds to, subtracts from, or is inconsistent with that standard.

The Kentucky court has never decided, however, a case comparable to the holdings of the United States Supreme Court in Panama Refining Co. v. Ryan\textsuperscript{126} and A.L.A. Schechter Poultry Corp. v. United States\textsuperscript{127} where a delegating statute itself was held unconstitutional because of its failure to set out adequate standards.\textsuperscript{128}

\textsuperscript{121} Id. at 840, 137 S.W.2d at 392.
\textsuperscript{122} 271 S.W.2d 361 (Ky. 1954).
\textsuperscript{123} 321 S.W.2d 36 (Ky. 1959).
\textsuperscript{125} 307 Ky. 559, 211 S.W.2d 418 (1948).
\textsuperscript{126} 293 U.S. 388 (1935).
\textsuperscript{127} 295 U.S. 495 (1935).
\textsuperscript{128} See generally SCHWARTZ, supra note 4, at 35-38.
one statute which delegated regulatory powers to an administrative agency of statewide jurisdiction was ever held unconstitutional by the Kentucky court under the adequate standards theory of the nondelegation doctrine. Even in cases where no statutory standard had been established by the legislature and where the rights of private individuals were likely to be affected by the discretion delegated, the Kentucky court, rather than find the statute unconstitutional under the adequate standards test, would instead uphold the constitutionality of the statute by relying on the "legislative" versus "administrative" fiction of the early per se nondelegation rule. Nevertheless, the adequate standards version continued, until 1961, to be the test generally used for determining the constitutionality of delegations of power.

(D) The Present "Safeguards" Test

In the 1961 case of Butler v. United Cerebral Palsy of Northern Kentucky, Inc., the court repudiated the adequate standards requirement and adopted a general "safeguards" test for determining the constitutionality of statutes delegating discretion to administrative agencies. The court upheld the constitutionality of a statute authorizing public aid to private institutions for the education of "exceptional children." The determination of eligibility and the regulation of recipient schools was delegated to the State Board of Education. The statute was attacked as an unlawful delegation of legislative powers in violation of sections 27 and 28 of the Kentucky Constitution on the ground that the statute failed to prescribe "definite standards" to guide the Board's exercise of discretion. Writing for the Kentucky court, Judge Palmore first noted that much of the discussion of standards in decisions of courts of last resort in this country has been characterized as "mumbo-jumbo." Judge Palmore then cited approvingly the statement from Professor Davis' Administrative Law Treatise that "The need is usually not for standards but for safeguards." Explaining the reasoning of the

129. See, e.g., Sturgill v. Beard, 303 S.W.2d 908 (Ky. 1957).
130. 352 S.W.2d 203 (Ky. 1961).
131. Id. at 207-08.
133. 352 S.W.2d at 207.
134. Id., citing 1 K. Davis, Administrative Law Treatise § 2.15, at 151 (1958) [hereinafter cited as TREATISE].
Kentucky court adoption of a general “safeguards” test, Judge Palmore quoted the following passage from Professor Davis’ treatise:

The typical opinion of a state court on a delegation problem is quite unfortunate both in what it says and what it fails to say. It says that (1) legislative power may not be delegated, (2) that ‘filling up the details’ is not an exercise of legislative power, (3) that legislative power is not delegated if the Legislature has laid down a standard to guide the exercise of the power, and (4) that presence or absence of vague verbalisms like ‘public interest’ or ‘just and reasonable’ make all the difference between valid legislation and unlawful delegation.

The typical state court opinion on delegation fails to say anything about (1) the reasons for the legislative choice to make the particular delegation, (2) the practical consequences of allowing the Legislature to do what it is trying to do, (3) the usual lack of practical advantage in compelling the Legislature to dress up the statute with vague verbiage that the judges call standards, (4) the question whether in the circumstances good government calls for a headlong choice of policy by the legislative body or whether it requires the working out of policy by case-to-case adjudication conducted by those who have the advantage of knowing the facts of particular cases, (5) the need for protection against unfairness, arbitrariness, and favoritism, (6) the importance of procedural safeguards, or opportunity for a judicial check, and in some circumstances of a proper legislative or even administrative supervision or check, or (7) the need for providing help to the Legislature in its search for practical and efficient ways of accomplishing legislative objectives . . . . The notion that a standard would be required started out rationally; the belief was that the legislative body ought to state an ‘intelligible principle’ and that the administrative authority would merely ‘fill in the details’. . . . The difficulty is that it is often affirmatively desirable for the legislative body to avoid either an intelligible principle or a clear delineation of the general policy, for the simple reason that many questions of basic policy may better be worked out by an agency than by a legislative body.135

The statute was then examined “in terms of the practical needs of effective government, and in terms of safeguards against abuse and injustice.”136 The court concluded that since the legislature met only sixty days every two years, that body possessed “neither the time, facilities nor qualifications”137 to do more than it had already done.

---

135. 352 S.W.2d at 207, citing 1 TREATISE, supra note 134, at 148-49.
136. Id. at 208.
137. Id.
in providing for the administration of the program by delegating to the State Board of Education the authority to establish necessary policies and procedures. Sufficient safeguards existed for the following three reasons: (1) since the State Board of Education is “one of the most responsible and long-established agencies of the state government,”\(^\text{138}\) the court found it unlikely that the Board would abuse the discretion conferred upon it by the statute; (2) since the exercise of arbitrary power is prohibited by section 2 of the Kentucky Constitution, any discriminatory treatment or abuse of discretion by the Board would be “inherently reviewable by the courts;”\(^\text{139}\) and (3) since the statute itself requires the State Board of Education to promulgate standards by formulating reasonable rules and regulations, determinations of eligibility would not be left to “the untrammeled discretion”\(^\text{140}\) of the Board. In this landmark decision the court looked past the theory to the actual holdings of its prior delegation decisions. On this point, Palmore again cited Professor Davis, “The correlation between the theory and the holdings is characteristically low, and when it is high the holdings have been unfortunate when examined in the light of practical needs of effective government.”\(^\text{141}\) This correlation had always been low in Kentucky. But most delegation decisions depended upon the “practical needs of effective government” to uphold delegations of power.\(^\text{142}\)

A reading of Judge Palmore’s opinion leaves the impression that the very concept of “safeguards” sprang full blown from the juristic heaven of Professor Davis’ treatise. The fact is that the court, in upholding the constitutionality of delegating statutes, had often expressly mentioned “safeguards” used to check the abuse of delegated powers.\(^\text{143}\)

The shift from adequate standards to a general safeguards test was reaffirmed two years later in *Commonwealth v. Associated In-

---

138. *Id.*
139. *Id.*
140. *Id.* at 205.
141. *Id., citing 1 Treatise, supra* note 134, § 2.07, at 103-04.
That case involved a state statute which effectively delegated governing discretion to other sovereigns rather than a mere Kentucky administrative agency. The State Commissioner of Economic Security was authorized by statute to enter into reciprocal agreements whereby other states and the federal government could, by their laws fix the eligibility criteria for, and the amount and duration of unemployment compensation benefits for Kentucky citizens under an interstate unemployment compensation plan.\(^{145}\) Earlier cases in Kentucky had upheld the constitutionality of state statutes which adopted as Kentucky law existing or prospective statutes and regulations of other states and the federal government.\(^{146}\) However, in 1958 the Kentucky court in *Dawson v. Hamilton*\(^{147}\) reversed those prior rulings in holding unconstitutional as a delegation of legislative power a state statute which adopted as time standards for Kentucky those existing or to be fixed by statutes of the United States Congress or by regulations of the Interstate Commerce Commission.\(^{148}\) The statute in that case made the violation of time standards so adopted a penal offense. The statute was held unconstitutional on the ground that "it is the continuing duty and responsibility of the Kentucky legislature to determine what is for the best interests of Kentucky in the light of current conditions" and "[w]hat conduct shall in the future constitute a crime in Kentucky or be subject to severe penalties is a matter... that may [not] be delegated to the Federal Congress or to the I.C.C."\(^{149}\)

However, in *Associated Industries*, the court again reversed itself, holding directly that the Kentucky Constitution does not prohibit the legislature from delegating a portion of its legislative power to other sovereigns so long as the legislature "retains the right to revoke the power."\(^{150}\) On this point, Judge Moorman wrote:

> The wrong (and the hypocrisy) lies in affirming the truth of the catch phrase while at the same time denying its existence by a devolution

---

144. 370 S.W.2d 584 (Ky. 1963).
147. 314 S.W.2d 532 (Ky. 1958).
149. 314 S.W.2d at 536.
150. Commonwealth v. Associated Indus. of Ky., 370 S.W.2d at 588.
of the power. The plain realities of recent cases show that rarely enactments involving this question are held defective.\textsuperscript{151} The court found "the laws of other states or of federal government to be a sufficient and effective safeguard"\textsuperscript{152} against the abuse of the powers delegated.

Tracing the "rather obscure origin"\textsuperscript{153} of the doctrine, the court pointed out that although Judge Cooley in his treatise, Constitutional Limitations is often given credit, he relies on a statement in Two Treatises where John Locke states, "The Legislative neither must nor can transfer the Power of making Laws to any Body else, or place it anywhere but where the People have."\textsuperscript{154} However, even the court expressed the belief that "the experience of the last several centuries would have caused him to repudiate this idea . . . [because] . . . experience has demonstrated some of the power must be invested in other bodies so that the government may function in a world that progressively is becoming more complex."\textsuperscript{155}

The court also observed, however, that most courts still pay lip service to the nondelegation rule:

The pressures and the practicabilities of administration of modern government have led the courts to the continuous affirmation of the existence of this judge-made rule while at the same time denying its existence by the holding or decision in nearly all cases. This has sometimes been done by holding where "standards" are set up—however vague or general they may be—that legislative power has not been delegated because only details of the policy were devolved. We will not, however, examine that pretense here.

We have decided we will meet this problem with full recognition that legislative power often has been delegated, with full court approval, and it is not necessary to disguise such action in form of expression or words which have no verity.\textsuperscript{156}

Relying on the statement from Associated Industries that there is "nothing wrong" with such delegations so long as the legislature "retains the right to revoke the power," the court in two later cases,
Lovern v. Brown and Southside Liquor Inc. v. Maberly again upheld the constitutionality of statutes delegating power to state administrative agencies.

Other delegation cases decided shortly after Associated Industries generally added little to an understanding of how the safeguards test was being applied. Statutes were held constitutional, but the court did not specifically discuss what safeguards actually existed in each particular case. In the 1969 case of Ezelle v. City of Paducah, however, the court in dictum indicated that even under the safeguards test, a delegation of policy-making authority to a private individual or group would still be likely to be held unconstitutional as had been the result in most of the earlier Kentucky cases.

The Kentucky court had stated in 1949 that "neither the Legislature nor any political subdivision possessing legislative power may delegate the exercise of such power to private persons or corporations." Such delegations had been held to violate sections 27, 28, and 29 of the Kentucky Constitution. Reaffirming those earlier decisions, the court in Ezelle indicated in dictum that while the government "may choose a private institution as an instrumentality for the accomplishment of a public purpose" even Professor Davis in his Administrative Law Treatise concedes "that there may be areas of major policy determination into which delegation should not extend."

In the 1976 case of Miller v. Covington Development Authority, the Kentucky court for the first time relied on the safeguards test.

---

157. 390 S.W.2d 448 (Ky. 1965).
158. 396 S.W.2d 45 (Ky. 1965).
159. E.g., Holsclaw v. Stephens, 507 S.W.2d 462 (Ky. 1973); Commonwealth Dept. of Child Welf. v. Lorenz, 407 S.W.2d 699 (Ky. 1966); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); Stovall v. Eastern Baptist Inst., 375 S.W.2d 273 (Ky. 1964).
160. 441 S.W.2d 162 (Ky. 1969).
161. Id. at 164. See McCown v. Gose, 244 Ky. 402, 51 S.W.2d 251 (1932); Commonwealth v. Beaver Dam Coal Co., 194 Ky. 34, 237 S.W. 1086 (1922); Owensboro & N.R.R. v. Todd, 91 Ky. 175, 15 S.W. 56 (1891). But see Beacon Liquors v. Martin, 279 Ky. 468, 131 S.W.2d 446 (1939); Whitaker v. Green River Coal Co., 276 Ky. 43, 122 S.W.2d 1012 (1938).
163. 441 S.W.2d at 164.
164. Id.
165. 539 S.W.2d 1 (Ky. 1976). Prior Kentucky decisions had also held that major policy determinations affecting private rights could not be delegated by local governing bodies. E.g., County Bd. of Educ. v. Durham, 198 Ky. 733, 249 S.W. 1028 (1923); Zable v. Louisville Baptist Orphans' Home, 92 Ky. 89, 17 S.W. 212 (1891). See Kerr v. City of Louisville, 271 Ky. 335, 347, 111 S.W.2d 1046, 1052 (1937). But see O'Bryan v. City of Louisville, 382 S.W.2d 386, 389 (Ky. 1964) (dictum).
to hold a statute invalid which delegated powers to independent local development authorities in first and second class cities. By statute, the authority consisted of a mayor and seven commissioners appointed by the mayor, and granted extensive discretionary powers to this board to undertake “the preservation and revitalization of historically or economically significant local areas.” The statute did not require that a development authority’s exercise of the delegated powers be subject to approval by a municipality’s governing body. The Miller court stated that the statute violated sections 27 and 28 of the Kentucky Constitution because the powers delegated exceeded “the scope of mere details” in their execution since major policy determinations were involved. The court further found that such determinations were not restricted by any standards or safeguards in the statute. The exercise by the agency of its delegated powers only in those areas that the agency itself determines to be historically or economically “significant” was found by the court not to be a sufficient safeguard against any abuse of the discretion delegated. The provision for historical areas was held to be “of dubious practical importance,” and, the court pointed out, that there is hardly “any real estate, or any area, within a city that is not ‘economically significant.’” It noted that the safeguards provided by a delegation to a “long established administrative agency . . . with a track record of experience and expertise in a well recognized field” did not exist under the statute involved. However, the court emphasized that “the practical needs of effective government” did not require such a broad delegation of powers, and that “there is no substantial reason for the ultimate choice not to be made by the legislative body, as it must be made, for example, in the case of zoning or urban renewal.” The court explained as follows:

The Constitutional authority of any administrative agency to make a final decision on any question that lies within the authority of the direct representatives of the electorate to decide owes its existence to

167. Id. § 99.610.
168. 539 S.W.2d at 4.
169. Id.
170. Id. (emphasis in original).
171. Id.
172. Id.
one of two pragmatic factors. Either, as in the instance of activities usually labeled "ministerial," the matters decided are not of sufficient public importance or impact to warrant the day-to-day attention of "the boss" (the legislative body) or, if they are of such importance, for some practical reason or reasons identifiable by the exercise of common sense they cannot be effectively handled by the legislative body itself. In theory if not in fact, the major administrative agencies that conduct substantial segments of government today live by virtue of the latter supposition. Since however, this basis for administrative authority runs counter to the idea of unfettered democratic choice, and removes the exercise of discretion one step beyond that which is contemplated by representative government through elected legislators, we think that sound jurisprudence must confine it to instances of clear necessity.1

The safeguards test was applied to administration regulations in the case of Kentucky State Board of Business Schools v. Electronic Computer Programming Institute, Inc.1 In that case the regulation was held by the Kentucky court to be within the scope of specific authorizing provisions established by the legislature in the delegating statute. The court pointed out that:

The main safeguard against the abuse of delegation of legislative power is found in our courts, and our courts have not hesitated to set aside any rule, regulation, or action of any administrative body where, after judicial review, the administrative action is found to be beyond the scope of the delegated administrative authority.1

Agency regulations "must meet the test of being (a) reasonable, (b) issued pursuant to proper procedure, and (c) within the granted power."1

But, if adequate standards are no longer required in a delegating statute, how can a court determine that a regulation exceeds the granted powers? Or what, if anything, is to prevent the legislature from delegating powers so broad and undefined that, to paraphrase Justice Cardozo, the discretion conferred is not canalized within intelligible banks?1

---

173. Id. at 4-5 (footnote omitted).
174. 453 S.W.2d 534 (Ky. 1970).
175. Id. at 536.
176. Id.
tempted to deal with such situations by its formulation and use of the "lack of intelligibility" rule.

(E) The Lack of Intelligibility Rule

A long standing principle of statutory construction in Kentucky, the "lack of intelligibility" rule was verbalized in the 1950 case of Folks v. Barren County where the Kentucky court upheld the validity of a statute delegating discretion to County Boards of Education. It stated the rule as follows:

[W]here the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designed to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared to be inoperative and void.

However, in that case, the court pointed out that a broad statutory delegation of power which prescribes a rule of action only in general terms should be held invalid under the lack of intelligibility rule "only where the court is unable by the application of known and well accepted rules of construction to determine with any degree of certainty [its] meaning and intent . . . because of vagueness, incompleteness or irreconcilable conflict in its provisions." The court further noted that "[c]larification may be had by considering the character and nature of the statute, and the purpose to be accomplished."

In Kerth v. Hopkins County Board of Education, decided in 1961, the Kentucky court relied on the lack of intelligibility rule to hold invalid a statute delegating to the Department of Industrial Relations the power to determine prevailing wage rates. The wage rates were to be included as specifications in public contracts. The statute had not defined "prevailing wages," nor had it set out factors for the Board to consider in determining such wages. The court therefore concluded that:

There is simply nothing in this legislation which offers any clue to what the legislature intended should guide and control the Board's

---

178. 313 Ky. 515, 232 S.W.2d 1010 (1950).
179. Id. at 519, 232 S.W.2d at 1013.
180. Id.
181. Id. at 520, 232 S.W.2d at 1013.
182. 346 S.W.2d 737 (Ky. 1961).
determination of proper "prevailing wage" rates. Not only is the Board left completely adrift with respect to how it should go about establishing prevailing wages for a particular contract, but no one, including this court, is furnished any criteria by which to determine whether the Board is carrying out the assumed legislative policy as the legislature intended or whether a particular action of the Board properly protects or actually impairs the legal rights of interested parties.\textsuperscript{183}

Such a deficiency the court held was "within the scope of the rule that where the intention of the legislature is so obscure as to defy a rational meaning, the law cannot be given effect."\textsuperscript{184} Although the adequate standards delegation decisions of the United States Supreme Court in \textit{A.L.A. Schechter Poultry Corp. v. United States}\textsuperscript{185} and \textit{Panama Refining Co. v. Ryan}\textsuperscript{186} were discussed in the Kerth opinion, the court pointed out that the case raised no constitutional delegation of powers issue.

The question is not whether the legislature illegally delegated its powers but whether it failed to delegate any power in this respect by failing to prescribe the manner of its exercise. In other words, we have no more than a general indication of legislative policy without implementation which would enable the administrative agency to function according to law.\textsuperscript{187}

Even after the shift in the nondelegation doctrine from standards to safeguards, the Kentucky court continued to apply the lack of intelligibility rule to statutes delegating power to administrative agencies. In 1967 in \textit{Murphy v. Cranfill}\textsuperscript{188} a statute was held invalid which delegated to county judges the power to grant parole to persons convicted of a misdemeanor. The statute provided that parole was to be granted "under the same terms and conditions as parole may be granted for conviction in felony cases."\textsuperscript{189} The court reasoned that while "a program of parole for misdemeanants may be desirable,"\textsuperscript{190} the legislature "failed to provide any machinery or method to carry out this objective"\textsuperscript{191} since "[t]he words 'terms and condi-
tions' as they pertain to granting parole, from either a practical or legal standpoint, are meaningless." 192 It was further noted that "[i]f, under this act, the county judge is subject to any restrictions, or is required to follow any procedures, we cannot comprehend what they are." 193 The language of the statute was here found by the court to be "so ambiguous as to completely obscure the legislative intent and to defy rational meaning," and it was therefore held to be "simply inoperative as a law." 194 As the above cases indicate, the lack of intelligibility rule has been used by the Kentucky court, and is likely to continue to be used as a safeguard against the legislative delegation of vague and undefined powers that would not be effectively reviewable in the courts.

IV. Conclusion

Because it perceives a practical necessity to uphold statutory delegations of power, the Kentucky court since the beginning of the twentieth century has sought to legitimize the Administrative State within the theoretical framework of Kentucky's constitutional governing structure. The nondelegation doctrine was at first made compatible with this development through the fiction of the early per se nondelegation rule. Broad delegated governing powers were simply considered by the Kentucky court to be "administrative" rather than "legislative" in character. Later, in an attempt to formulate a "rule of law" framework for delegated discretion, the court adopted the generally accepted "adequate standards" requirement for determining the constitutionality of delegating statutes. Under this version of the nondelegation doctrine, administrative regulations were considered only subordinate rules which "filled in the details" of an established legislative policy. The adequate standards rule, however, existed more in theory than in fact and did not check the increasing growth of delegated discretion in Kentucky.

The adequate standards requirement was expressly rejected in 1961 when the court in Butler v. United Cerebral Palsy of Northern Kentucky, Inc. 195 realistically adopted a general safeguards test for determining the constitutionality of statutes delegating powers to

---

192. Id. (emphasis in original).
193. Id.
194. Id. at 364.
195. 352 S.W.2d 203 (Ky. 1961). See text accompanying note 130, supra.
administrative agencies. In that case, the Kentucky court became one of the first courts in any state to expressly adopt the general safeguards delegation test popularized by Professor Davis in his treatise on administrative law.\textsuperscript{196} Under the present “safeguards” test the Kentucky court has considered the following factors in ruling on the constitutionality of delegating statutes: (1) whether provisions exist in the delegating statute sufficient to determine that the powers delegated are confined to a specific area of authority or are at least within an ascertainable scope of authority;\textsuperscript{197} (2) whether the delegation is to a newly created agency or to a long established agency with a record of experience and expertise in the field;\textsuperscript{198} (3) whether significant decisions will be left to the untrammelled discretion of the agency or if the agency is required to establish criteria for its decisions by issuing regulations;\textsuperscript{199} (4) whether agency decisions affecting the rights of individuals are inherently reviewable by the courts in Kentucky;\textsuperscript{200} and (5) whether the delegation is necessary in light of the practical needs of effective government.\textsuperscript{201}

The delegation of powers to an administrative agency can be so vaguely defined that they are not effectively channeled within intelligible banks. Such a statute could be successfully attacked by use of the case law in Kentucky on the lack of intelligibility rule.\textsuperscript{202} This rule might well prove to be the standard that ultimately measures the breadth of the “chancellor’s foot.”\textsuperscript{203} Even under the present

\textsuperscript{196} See text accompanying note 134, supra.
\textsuperscript{197} E.g., Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976); Holsclaw v. Stephens, 507 S.W.2d 462 (Ky. 1973); Hofgesang v. McMakin, 457 S.W.2d 950 (Ky. 1969); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964).
\textsuperscript{198} E.g., Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976); Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d 203 (Ky. 1961).
\textsuperscript{199} E.g., Stovall v. Eastern Baptist Inst., 375 S.W.2d 273 (Ky. 1964); Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d 203 (Ky. 1961); see Hofgesang v. McMakin, 457 S.W.2d 950 (Ky. 1969).
\textsuperscript{200} E.g., Kentucky St. Bd. of Bus. Schools v. Electronic Computer Programming Inst., Inc., 453 S.W.2d 534 (Ky. 1970); Southside Liquor, Inc. v. Moberly, 396 S.W.2d 45 (Ky. 1965); Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d 203 (Ky. 1961).
\textsuperscript{201} E.g., Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976); Southside Liquor, Inc. v. Moberly, 396 S.W.2d 45 (Ky. 1965); Commonwealth v. Associated Indus. of Ky., 370 S.W.2d 584 (Ky. 1963); Butler v. United Cerebral Palsy of N. Ky., Inc., 352 S.W.2d 203 (Ky. 1961).
\textsuperscript{202} E.g., Murphy v. Cranfill, 416 S.S.2d 363 (Ky. 1967); Kerth v. Hopkins County Bd. of Educ., 346 S.W.2d 737 (Ky. 1961).
\textsuperscript{203} See generally B. Schwartz, Administrative Law § 22, at 53-56 (1976); Schwartz, Comparative Television and the Chancellor’s Foot, 47 Geo. L.J. 655 (1959).
safeguards test, however, it is not likely the Kentucky court will find that "the practical" needs of effective government require a change in prior holdings that regulations are invalid which add to, subtract from, or are inconsistent with specific statutory standards or provisions established by the legislature.\textsuperscript{204} Likewise, it is doubtful that effective government at either the state or local level should require agencies ever to be permitted to create or define crimes,\textsuperscript{205} or that they be permitted to compel the payment of fees without express authorization to do so.\textsuperscript{206} The Kentucky court is also likely to continue to hold invalid statutes which delegate policy-making authority to private individuals or groups.\textsuperscript{207} The decisions in these areas are sound precedent and deserve to be followed.

Years ago, Justice Cardozo discussed the difficulties courts faced in abandoning judge-made laws which no longer seemed valid. The process, he observed, was invoked by drawing "distinctions" which "supply for a brief distance an avenue of escape."\textsuperscript{208} But a point "is at length reached when their power is exhausted. Then the antiquated rule will not budge unless uprooted."\textsuperscript{209} When the Kentucky court adopted the general safeguards test for determining the validity of statutory delegations of power it uprooted nearly a century of various "mumbo-jumbo" versions of the nondelegation doctrine. The decision in \textit{Miller v. Covington Development Authority}\textsuperscript{210} indicates that the present safeguards test may prove to be more than just another "distinction" which will "supply for a brief distance" a theoretical legitimization of the Administrative State in Kentucky. If consistently applied, it could have the beneficial effect of forcing both the legislature in drafting delegation schemes and

\textsuperscript{204} See, e.g., Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959); Robertson v. Schein, 305 Ky. 528, 204 S.W.2d 954 (1947).

\textsuperscript{205} See, e.g., Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959); Dawson v. Hamilton, 314 S.W.2d 532 (Ky. 1958); Bloemer v. Turner, 281 Ky. 832, 137 S.W.2d 387 (1939).

\textsuperscript{206} E.g., Kesselring v. Wakefield Realty Co., 312 Ky. 334, 227 S.W.2d 416 (1949); Henry v. Parrish, 307 Ky. 559, 211 S.W.2d 418 (1948).

\textsuperscript{207} E.g., McCown v. Gose, 244 Ky. 402, 51 S.W.2d 251 (1932); Commonwealth v. Beaver Dam Coal Co., 194 Ky. 34, 237 S.W. 1086 (1922); see Southside Liquor, Inc. v. Moberly, 396 S.W.2d 45, 46 (Ky. 1965); Baughn v. Gorell & Riley, 311 Ky. 537, 542, 224 S.W.2d 436, 438 (1949) (dictum); cf. Department for Nat. Res. & Environmental Protection v. Number Eight, Ltd. of Va., 528 S.W.2d 684 (Ky. 1975) (delegation to private land owner held to violate due process of law).

\textsuperscript{208} B. Cardozo, \textit{A Ministry of Justice}, in \textit{Selected Writings of Benjamin Nathan Cardozo} (M. Hall ed. 1947).

\textsuperscript{209} Id. at 359-60.

\textsuperscript{210} 539 S.W.2d 1 (Ky. 1976).
agencies in implementing such schemes to higher standards of performance.

"Administrative government" as William O. Douglas wrote over a generation ago, "is here to stay. It is democracy's way of dealing with the overcomplicated social and economic problems of today." The development of government by administration is not likely to be reversed. Governing discretion will, no doubt, continue to be delegated to nonrepresentative institutions. Most state courts and the Kentucky court until recently, have behaved, in recognizing that development, much like Byron's Julia who, "whispering 'I will ne'er consent,'—consented." The nondelegation theory now adopted by the Kentucky court, however, at least seeks to insure that power is not delegated unnecessarily and that where delegation is necessary to meet the practical needs of effective government, the discretion conferred is not unbridled in its scope or in its exercise. In this respect, it ultimately seeks to safeguard both the institutional integrity of Kentucky's constitutional governing framework and individuals likely to be directly affected by the exercise of agency discretion. The adoption by the Kentucky court of this nondelegation concept is clearly a necessary step toward interjecting at least a modicum of both "legitimacy" and "law" into a development that has for years threatened to allow wholesale delegations of power to effectively erode the authoritative structure of Kentucky's constitutional governing framework.

COMMENTS
A CONSTITUTIONAL ANALYSIS OF KENTUCKY'S NONCOMMERCIAL BAIL BONDSMEN SYSTEM

I. INTRODUCTION

House Bill 254, popularly known as the Bail Bondsmen Act, was approved by the General Assembly of Kentucky on February 10, 1976 to become effective on June 19, 1976.1 The Act provides, in essence, that commercial bail bonding is illegal and that Kentucky trial courts, guided by rules or orders of the state supreme court, have the responsibility of providing bail bonding services to those accused or convicted of crime.2

In the preamble to the Act, the Kentucky General Assembly sets forth its reasons for the enactment:

WHEREAS, the people of the Commonwealth of Kentucky by ratification of the Judicial Article mandated a reform in the administration of justice including the pretrial release of citizens charged with bailable offenses; and

WHEREAS, the present system providing for the pretrial release of persons charged with criminal offenses, including traffic offenses and other misdemeanors, was designed to fulfill the constitutional mandates that bail shall be allowed in all cases, other than capital offenses, in an amount to insure the presence of the defendants as ordered by the court; and

WHEREAS, bail bondsmen have, in large part, preempted those constitutional mandates and have reaped huge profits from the bail bonding business to the detriment of the rights of many citizens and have been a major cause of corruption in the administration of justice; and

WHEREAS, the present system has become so dominated by the bail bondsmen that pretrial release of defendants on their own recognizances in cases involving minor offenses has been discouraged without regard to the likelihood that most defendants will appear as or-

2. Id.
ordered by the court if released on their own recognizances, all for the purpose of creating profits for the bail bondsmen; and

WHEREAS, in many instances the present system financially burdens lower income persons charged with minor offenses by virtually requiring them to pay for the services of a bail bondsman without regard to the likelihood that they will appear as ordered by the court if released on their own recognizances; and

WHEREAS, the present system has otherwise fostered wide-spread abuse of the laws and of the rights of the citizens of this Commonwealth through the corruptive influences of the bail bondsman in violation of the spirit of the Kentucky Constitution guaranteeing the equal administration of justice; and

WHEREAS, it is the intent of the General Assembly of the Commonwealth of Kentucky to provide for a uniform workable system for affording persons charged with bailable offenses their constitutional rights to pretrial release that will insure appearances as ordered by the courts without imposing undue hardships upon those persons 

The preamble explicitly recognizes the constitutional right to bail. This right comports with the general right of individual liberty and the specific presumption of innocence afforded an accused prior to trial. The purposes of bail, then, are generally twofold: to assure the presence of the accused at trial or when required by the court and to prevent the punishment of the accused before conviction.

The preamble points to the corruption of the commercial bail bonding system which denies this right to bail by requiring bail in minor offenses without any regard to the likelihood of appearance in court by the accused after release on his own recognizance. Central to the logic of the preamble is an understanding of the basic commercial bail bonding transaction. The trial court judge sets the amount of bail, usually guided by a bail schedule. The accused may raise the money himself or, more often than not, require the services of a commercial bail bondsman who will act as surety on the bond. The bondsman may choose those for whom he will act as surety. For his services he exacts a premium, usually ten percent of the bail, for which he may require collateral. It is apparent that such a system which allows a commercial bail bondsman to determine those

4. Id.
5. P. WICE, FREEDOM FOR SALE 1 (1974) [hereinafter cited as WICE].
who will be able to leave the jailhouse works to the disadvantage of the indigent.⁶

The commercial bail bonding community responded to the Bail Bondsmen Act predictably and unfavorably. A suit was brought in Jefferson County Circuit Court by the Bonding Association of Kentucky and others against the Commonwealth Attorney of Jefferson County challenging the Act, particularly the section which prohibits the activity of bail bonding, as unreasonable and arbitrary under the fourteenth amendment of the Constitution of the United States and section 1 of the Constitution of Kentucky.⁷ The Attorney General of the Commonwealth was permitted to intervene. The trial court agreed with the Bonding Association and held the Act, inasmuch as it prohibited the business of commercial bail bonding, unconstitutional.⁸

The Supreme Court of Kentucky, considering the challenges under the fourteenth amendment of the Federal Constitution and section 1 of the Kentucky Constitution, reversed the trial court and held that the prohibition of commercial bail bonding by the state was a reasonable exercise of the state’s police power and was not violative of either constitution.⁹ The court’s opinion recognized that the decision that a particular activity is inimical to the public welfare was properly a legislative one. The court then drew upon literature which supported the conclusion that commercial bail bonding was an activity harmful to the public and stated that the state’s police power is “as broad and comprehensive as the demands of society make necessary. It must keep pace with the changing concepts of public welfare. Certainly the legislature could take cognizance of the inherent evils and abuses of the compensated surety in the bail bond system.”¹⁰ Recognizing that the police power may not only regulate but may also prohibit certain businesses, the court concluded that the prohibition of commercial bail bonding “violates neither the 14th Amendment of the U.S. Constitution nor Section I of the Kentucky Constitution.”¹¹

---

6. For a discussion of the commercial bail bonding system in Kentucky and the abuses it created, see Comment, Bail and Bail Bondsmen: Need for reform in Kentucky, 61 Ky. L.J. 601 (1973).
8. Id. at 581.
9. Id. at 584.
10. Id. at 583.
11. Id. at 584.
The following sections will explain the contents of the Bail Bondsmen Act, discuss the constitutional issues raised by the Act, and make a brief assessment of the new bail bonding system in operation.

II. THE PROVISIONS OF THE BAIL BONDSMEN ACT

The Bail Bondsmen Act contains ten sections. Section 1 prohibits commercial bail bonding; sections 2 through 8 set up the state bail bonding structure; section 9 provides for penalties; and section 10 repeals all inconsistent provisions of prior statutes regulating commercial bail bonding.

Section 1 of the Act states in part:

It shall be unlawful for any person to engage in the business of bail bondsman as defined in KRS 304.34-010(1), or to otherwise for compensation or other consideration:

(a) furnish bail or funds or property to serve as bail; or
(b) make bonds or enter into undertakings as surety; for the appearance of persons charged with any criminal offense or violation of law or ordinance punishable by fine, imprisonment or death, before any of the courts of this state, including city courts, or to secure the payment of fines imposed and of costs assessed by such courts upon a final disposition.

Section 1, then, makes illegal the business of commercial bail bonding. Under section 9, anyone who violates any provision of the Act shall be guilty of a Class A misdemeanor for the first offense, and guilty of a Class D felony for each additional offense. Thus, anyone who violated section 1 of the Act prohibiting commercial bail bonding would be subject to substantial criminal sanctions. Section 1 also provides that bail bondsmen will remain responsible for all outstanding obligations at the effective date of the Act. To enforce this, the section dictates that each bail bondsman shall give to the Commissioner of the Department of Insurance his daily bond register; the Commissioner will retain the securities until obligations of the bail bondsman have been satisfied.

The general responsibility for the administration and authority for the funding of the new bail bonding structure is set by section 2. The trial courts of the Commonwealth shall provide “such pre-
trial release investigation and services as necessary”15 and the Kentucky Supreme Court “may by appropriate rule or order . . . provide for such pre-trial investigation and release services and the costs thereof shall be . . . payable from the state treasury.”16 The new bail bonding system, as it is now operating, will be discussed in a later section of this comment.17

Consistent with the purpose of the right to bail as a safeguard of individual liberty and an implementation of the legal presumption of innocence, section 3 of the Bail Bondsmen Act states the two primary methods of securing the pre-trial release of those accused of crime: “Any person charged with an offense shall be ordered released . . . on his personal recognizance or upon the execution of an unsecured bail bond . . . unless the court determines . . . that such a release will not reasonably assure the appearance of the person as required.”18 The section thus attempts to place primary responsibility for the appearance of the accused, in most cases, on the accused himself. This proposition strikes at the heart of the old abuses outlined in the preamble to the Act and is central to the idea of bail reform. Bail reform projects in many cities and counties have proven the thesis that many defendants who are kept in jail under the traditional system of commercial bail bonding may be released on their own recognizance with little risk that they will fail to appear at court when required.19 Bail reform is therefore particularly important to the indigent or the low income defendant because he is the one most likely to suffer under the traditional commercial bail bonding system.

If the court does determine that the two primary procedures will not assure the presence of the accused as required, section 3,20 read in connection with sections 521 and 6,22 provides other methods to be used in place of or in addition to the two primary methods by allowing the court to impose any of a number of “conditions of release.” The court may place the accused in the custody of a designated group or organization; or may place restrictions on the travel,
association or place of abode of the accused; or may require the
execution of a bail bond with sufficient personal surety, or with a
deposit of ten per cent of the bond with the court, or with the deposit
of cash or stocks and bonds equal to the amount of the bond, or
secured by real estate situated in the Commonwealth having an
unencumbered equity with a fair market value at least twice the
amount of the bond. Neither the stocks and bonds nor the real
estate need be owned by the accused, but the owner, if not the
accused or his relatives, cannot have used the stocks and bonds or
the real estate as security for bail within the previous twelve
months. This precaution militates against the possibility of anyone
getting into the business of commercial bail bonding quietly within
the letter of the law. Section 3 also allows the court to impose any
other condition deemed reasonably necessary.

It is provided in section 3 that a person who is unable to meet the
conditions imposed may, after twenty-four hours, petition the court
to have the conditions reviewed. In addition, if there is a material
change in the circumstances of the accused after release, the trial
court may order his arrest, or may issue an order requiring the
accused or his sureties to show cause why the bail bond should not
be forfeited or the conditions changed.

Section 4 of the Act sets the standards for the amount of bail:

The amount of the bail shall be:

(a) Sufficient to insure compliance with the conditions of release
set by the court;
(b) Not oppressive;
(c) Commensurate with the nature of the offense charged;
(d) Considerate of the past criminal acts and the reasonably an-
ticipated conduct of the defendant if released; and
(e) Considerate of the financial ability of the defendant.

Studies have shown that, under traditional circumstances, the most
important factor in the judicial decision setting the amount of bail
has been the seriousness of the offense. Such a criterion was simple
and easy to apply but it did not include any consideration of indi-
vidual factors pertaining to the particular defendant. Two lesser
factors weighed by judges have been the defendant’s criminal record

23. Id.
24. Id. § 431.520.
25. Id. § 431.525.
and the strength of the government's case. The present section may be read as an attempt to broaden the scope of the judge's inquiry and to make the bail-setting decision something more than a perfunctory exercise. This section affords the defense attorney criteria upon which he can base an argument if he decides to avail himself of the opportunity, provided in section 3, to petition the trial court within twenty-four hours for a review of conditions imposed. Of course, the section 4 standards apply only to the amount of bail and not to other conditions which might be in effect.

Section 4, in addition to setting standards for the amount of bail, applies those standards to two concrete situations by providing that the bail in the case of an offense punishable by fine only shall not exceed the maximum penalty plus costs, and that bail in the case of a conviction, where a fine only has been imposed, shall not exceed double the amount of the fine.

Section 7 of the Act provides that the supreme court may, by rule or order, set a uniform schedule of amounts of bail for designated offenses. An individual court is not bound to follow the schedule, but, if it departs from the amount prescribed, it must set forth its reasons for such departure in writing.

Under section 8 of the Act, a defendant who skips bail or who violates any of the conditions of bail is subject to forfeiture of the bail and prosecution for bail-jumping.

III. THE CONSTITUTIONAL ISSUES

(A) Due Process

One of the two principal attacks upon the Bail Bondsmen Act in the trial court was that the prohibition of the activity of commercial bail bonding, as provided in section 1 of the Act, is a violation of the Due Process Clause of the fourteenth amendment to the Federal Constitution as an unreasonable deprivation of liberty, namely, the liberty to pursue a lawful occupation. The Supreme Court of Kentucky found itself, then, facing the twisted history and myriad policy considerations revolving around the strange animal of

26. WICE, supra note 5, at 25 et seq.
28. Id. § 431.540.
29. Id. § 431.545.
**substantive due process** in the area of economic regulation. The very words conjure up the spectre of judicial activism with courts coming to the aid of businesses threatened by meddling legislatures.\(^{31}\)

The growth of the creature may be traced by an initial consideration of the concept of natural law which dictated that fundamental rights were discovered and not created by written laws or constitutions. One of the most important of these fundamental rights was the right to property:

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature . . . . \(^{32}\)

Laissez faire economics and social Darwinism were both nineteenth century expressions of the belief in fundamental rights and liberties which allowed the man of merit to rise above the decaying remnants of privilege. Such was the stuff of the old liberalism.\(^{33}\) Of course, the right of private property would be an empty right without the liberty to attain property. Thus, freedom of contract became fundamental to the enlightened nineteenth century mind. If these personal rights and liberties are, in some sense, absolute, then government has no power to interfere with them without great justification. If government attempts to interfere, then the judiciary, as the guardian of these rights and liberties as expressed in constitutions, must strike down the statutes allowing such interference.\(^{34}\) This was the rationale of substantive due process at the beginning of the century; the doctrine amounted to a policy of judicial intervention and activism through use of the fourteenth amendment.

The early cases dealing with a state’s attempt to regulate its economic affairs generally found the courts striking down the regulatory statute.\(^{35}\) Of course, not all state economic regulatory statutes

---

31. For an excellent survey on the decline and fall of substantive due process, see P. Brest, Processes of Constitutional Decision-Making 705 (1975) [hereinafter cited as Brest].
32. 1 W. Blackstone, Commentaries * 138.
33. See E. Encyclopedia of the Social Sciences 4-5 (1931); & 9 id. at 15-20.
34. See The Federalist No. 78, at 544-45 (C. Scribner ed. 1863) (A. Hamilton).
35. In the case of In Re Jacobs, 98 N.Y. 98 (1885), the New York Court of Appeals struck down a statute prohibiting the manufacture of cigars in tenements; In Godcharles v. Wige man, 113 Pa. 431, 6 A. 354 (1886), the Pennsylvania Supreme Court struck down a law requiring mining companies to pay wages in cash instead of vouchers. In the latter case, the right of contract was heavily emphasized.
were rendered void. The Supreme Court, in *Munn v. Illinois*, upheld an Illinois statute which limited rates charged by Chicago grain storage warehouses. The Court concluded that the authority to regulate in this case was based on the fact that the statute dealt with a business “affected with a public interest.” This idea was reinforced when the Court, years later, upheld state regulation of railroad tariffs. It is important to point out, however, that the upholding of such regulation was the exception and not the general rule in the early part of this century. The activity regulated had to be one which had a substantial effect on the community at large to be “affected with a public interest.”

The major thrust of the judiciary’s stance in regard to state economic regulation during this early period can be seen in the case of *Lochner v. New York*. That case dealt with an attempt by New York to limit by statute the number of hours which could be worked by bakery employees. The court struck down the statute, stating:

“The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.”

This was hardly language of judicial deference to the legislature. Justice Holmes dissented, stating the case against judicial intervention in pursuit of substantive due process:

“This case is decided upon an economic theory which a large part of the country does not entertain. . . . I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally . . . interfere with the liberty to contract.”

36. 94 U.S. 113 (1876).
37. *Id.* at 126.
39. 198 U.S. 45 (1905).
40. *Id.* at 57-58.
41. *Id.* at 75.
Lochner and its progeny\textsuperscript{42} were the initial skirmishes in the political battle which was to take place in the early 1930's between the Court and President over programs regulating the economy in the wake of a national economic disaster. The outcome, which was to lie on the side of Holmes' dissent and the President's programs, was foreshadowed by the case of \textit{Nebbia v. New York}\textsuperscript{43} which upheld a state statute setting retail prices for milk. Finally in \textit{West Coast Hotel Co. v. Parrish},\textsuperscript{44} the Court specifically overruled a case\textsuperscript{45} which was squarely in the mainstream of the substantive due process decisions by upholding a state minimum wage law. The Court then began to pass on much of the New Deal legislation favorably.\textsuperscript{46} The idea of judicial deference to the legislature became firmly rooted. A policy of judicial non-intervention was to be preferred.\textsuperscript{47} Such a policy became so firmly established that Justice Black could write for the Court in 1963:

The doctrine that prevailed in \textit{Lochner, Coppage, Adkins, Burns}, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . ‘We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.’ Legislative bodies have broad scope to experiment. . . .\textsuperscript{48}

The standard which emerges from this tangled history is, at most, one of minimum rationality. The Court will not strike down a state regulatory statute in the sphere of economics if there is any possible rational explanation for the statute as it relates to the areas within the police power of the state. In \textit{Williamson v. Lee Optical Co.},\textsuperscript{49} a

\begin{itemize}
\item \textsuperscript{42} See Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908).
\item \textsuperscript{43} 291 U.S. 502 (1934).
\item \textsuperscript{44} 300 U.S. 379 (1937).
\item \textsuperscript{45} Adkins v. Children's Hosp., 261 U.S. 525 (1923), had invalidated a District of Columbia minimum wage law for women.
\item \textsuperscript{46} See Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
\item \textsuperscript{49} 348 U.S. 483 (1955).
\end{itemize}
case dealing with an Oklahoma statute which prohibited any person to engage in the business of fitting eye lenses without being licensed by the state, Justice Douglas, concluding that the regulation did not violate the Due Process Clause of the fourteenth amendment, stated: "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."  

When the Bail Bondsmen Act is measured against this history, it is difficult to perceive it as violative of the Due Process Clause of the fourteenth amendment. The Act is an economic act in that it prohibits a commercial activity, namely, commercial bail bonding. It falls squarely within the type of economic regulation which has been the subject matter of cases dealing with substantive due process. The Supreme Court of Kentucky took notice of and documented the many evils connected with commercial bail bonding. It is, of course, a legitimate end of the legislature and within the police power of the state to make laws addressing these evils to safeguard the constitutional rights of citizens and the integrity of the judicial process. There have, in fact, been statutes regulating the activity of commercial bail bonding in Kentucky for a number of years. In order to find that the Act violates the fourteenth amendment Due Process Clause, it would be necessary to find that there is no possible rational relation between the prohibition of commercial bail bonding and the elimination of the evils connected with it. The rational relation seems evident.

If it is emphasized that section 1 of the Bail Bondsmen Act does not regulate commercial bail bonding, but prohibits it, the argument might be advanced that prohibition, as distinguished from regulation, is completely irrational and therefore violative of the fourteenth amendment Due Process Clause, even under the minimum rationality test. In Ferguson v. Skrupra, the Supreme Court dealt with a Kansas statute which made it a crime for any person

---

50. Id. at 487-88.
53. The Kentucky Legislature, in effect, set forth in its preamble to House Bill 254, the basis for action within the Due Process Clause of the fourteenth amendment by establishing a rational connection between prohibition of the occupation and elimination of the evils caused by the occupation.
to engage in the business of debt adjusting unless the person was a lawyer. The Court upheld the statute. Justice Black stated in the opinion:

[W]e emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law prohibitory or regulatory.55

The fact situation in Ferguson closely parallels the situation of commercial bail bondsmen in Kentucky. In both cases, an occupation was eliminated because of evils connected with the occupation. There is no reason to believe that the Supreme Court would find any distinction in the case of bail bonding in Kentucky.

In fact, there is reason to believe that the business of bail bonding should be subject to greater regulation than other businesses, even to the point of prohibition. It is, after all, a business which derives its existence from the judicial process itself. Even in the early era of substantive due process an exception was made for businesses "affected with a public interest."56 The public interest inherent in the release of accused or convicted persons is, in the least, substantial.

The bail bondsmen in Kentucky are wading against the tide of judicial history by advancing a due process argument against section 1 of the Act. The line of due process cases does not demand that the most rational or most efficient means be used to regulate an activity which falls within the scope of the state's police power. If there is a possible rational connection, that is sufficient. The courts will defer to the wisdom of the legislature. There is, in effect, a presumption of legislative validity. While it is true that the Court may be more active under the Due Process Clause in the area of individual rights,57 it will follow a path of judicial deference when presented with state economic regulation.

56. Munn v. Illinois, 94 U.S. 113, 126 (1876).
(B) Equal Protection

The Bail Bondsmen Act, like most laws, made a classification of persons to fall under its effect. It designated the class of commercial bail bondsmen and dictated that they should no longer be able to perform the business of bail bonding. There is a question, then, of whether the classification is violative of the Equal Protection Clause of the fourteenth amendment of the Federal Constitution.

If it is presumed that not every bail bondsman in Kentucky was afflicted with or was a cause of the evils recited in the preamble to the Act, then the legislation was overinclusive, that is, it affected those who did not possess the condition (or evil) at which the legislation was aimed. It was, in other words, overinclusive because it eliminated the entire profession instead of regulating against the evils involved in a part of the profession. Of course, most laws are overinclusive or underinclusive to some extent. A law requiring the licensing of all dogs to prevent the occurrence of rabies will inevitably effect the owners of dogs who do not have rabies. Although the law is overinclusive, it is nevertheless reasonable and does not contravene the Equal Protection Clause because the classification is benign and no constitutionally fundamental interest is involved. There is a presumption of legislative validity.58

If, however, a fundamental right or interest is affected by the classification, judicial scrutiny becomes higher and the legislative presumption is lost. The Court will, in some cases, require that the least restrictive means be used to eliminate the designated evil. If such a fundamental right were involved in the elimination of commercial bail bonding, the Bail Bondsmen Act might well be found to be violative of the Equal Protection Clause.

It has been suggested that the process is more complicated than a simple two-level approach, that there is a middle level of judicial scrutiny.59 It has even been said that different interests or rights possess different degrees of fundamentality depending on the nexus between such interests and a specific constitutional guarantee, so that the intensity of judicial scrutiny varies in each case.60

With this in mind, it cannot be said that the Bail Bondsmen Act involves a fundamental right or interest in any sense. The Supreme Court has carefully carved out its areas of fundamentality and has refused to go beyond them. The infringement on the right to contract, which is involved in the prohibition of commercial bail bonding, simply does not trigger a higher level of scrutiny on the part of the Court. The right of contract, while fundamental to the nineteenth century mind, is not fundamental for purposes of the Equal Protection Clause of the fourteenth amendment. The legislative presumption of validity stands and minimum rationality alone is required.

Of course there is at least some level of rationality which must be met if the statute is to stand, although there is currency to the idea of complete deference on the part of the Court. The bail bondsmen in Kentucky might argue that prohibition of commercial practice is so irrational that it fails to meet even this test of low scrutiny. In Morey v. Doud, the Supreme Court in 1957 struck down a state economic regulation on equal protection grounds where no fundamental right or suspect classification was present. The Illinois statute involved in the case regulated all money order firms, but exempted the American Express Company specifically. In a recent case, however, the Court, in addressing a challenge to a state statute which regulated vendors in a preferential manner, stated: "Morey was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds, and we are now satisfied that the decision was erroneous." Such language seems to approach absolute deference by the Court to the legislature in the area of economic regulation. There is little reason to believe that the cause of Kentucky bail bondsmen would fare any better under the Equal Protection Clause than it would under the Due Process Clause. The concepts of minimum rationality and judicial deference are common to both.

(C) **Section One of the Kentucky Constitution**

The second attack upon the Bail Bondsmen Act was that the

---

64. 354 U.S. 457 (1957).
prohibition of the business of bail bonding violated section 1 of the Kentucky Constitution. Since section 1 is the state's equivalent to the fourteenth amendment of the Federal Constitution, much of the discussion concerning the fourteenth amendment would apply to a discussion of section 1. The Kentucky Supreme Court would not, of course, be bound by such interpretation as to its own amendment, even with a statement of equivalency.

The Kentucky cases dealing with regulation and prohibition of certain business activities do, however, reflect reasoning similar to that of the Supreme Court of the United States in dealing with due process under the fourteenth amendment to the Federal Constitution. In the era of substantive due process, the Kentucky high court, like the Supreme Court, showed little deference to the legislature. In the leading case of *Tolliver v. Blizzard,* the court faced a challenge to a city ordinance which forbade the sale of certain soft drinks because some vendors of the drinks were selling alcoholic beverages illegally. Striking down the ordinance, the court, in the prevailing spirit of judicial intervention, stated:

The rule is, that in order to sustain legislative interference with the business of the citizen, by virtue of the police power, the act or ordinance must have some reasonable relation to the subjects included in such power. . . . Where it is possible to conduct the business

---

66. KY. CONST. § 1, reads as follows:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

Second: The right of worshipping Almighty God according to the dictates of their consciences.

Third: The right of seeking and pursuing their safety and happiness.

Fourth: The right of freely communicating their thoughts and opinions.

Fifth: The right of acquiring and protecting property.

Sixth: The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.


68. KY. CONST. § 2, which is involved in many of the Kentucky cases centering on due process, can also be considered the equivalent of the fourteenth amendment to the Federal Constitution. It is, in effect a negative Statement of § 1. It reads:

Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

69. 143 Ky. 773, 137 S.W. 509 (1911).
without harm to the public, all sorts of police regulation may be
instituted which will tend to suppress the evil.\textsuperscript{70} This language, if applied to the Bail Bondsmen Act, might well
dictate that the Act be struck down. Certainly, there are honest men
in the bail bonding business and prohibition of the entire trade,
when regulation is possible, is too extreme a measure and an in-
fringement on the rights under section 1 of the Kentucky Constitu-
tion. Unfortunately for Kentucky bail bondsmen, they are not deal-
ing with the \textit{Tolliver} court of 1911.

The direction away from judicial intervention had not yet oc-
curred by 1925 when the Kentucky high court, in a case involving a
state statute placing limitations on advertising, stated:

\begin{quote}
The rule is that in order to sustain legislative interference with the
business of the citizen the court must be able to see that the act tends
in some degree to promote the public health, morals, safety or wel-
fare. In every case the means adopted must be reasonably necessary
to accomplish that purpose and should not be unduly oppressive
upon the citizen. The determination of the legislature as to these
matters is not conclusive, but is subject to the supervision of the
courts . . . .\textsuperscript{71}
\end{quote}

From these words it is apparent that the minimum rationality stan-
dard of modern due process was yet to make its appearance. The
Kentucky court, like the Supreme Court of the United States, recog-
nized during this early period that businesses “affected with a pub-
lic interest” were subject to state regulation more readily than other
businesses and that such regulation would not contravene section 1
of the Kentucky Constitution.\textsuperscript{72} This kind of regulation was the
exception and not the rule during this early period.

By 1941 the doctrine of substantive due process was nearly abro-
gated in the federal arena; judicial deference and non-intervention
were the prevailing policies with respect to state economic regula-
tion. In that year the Kentucky Court of Appeals (the highest court
of the commonwealth at that time) decided the case of \textit{Carolene
Products Co. v. Hanrahan}.\textsuperscript{73} The legislature had enacted the Filled
Milk Act which prohibited the manufacture for sale of filled milk.
The court first disposed of the question involving the fourteenth

\textsuperscript{70} [Id. at 775-76, 137 S.W. at 510-11.]
\textsuperscript{71} [\textit{Ware v. Ammon}, 212 Ky. 152, 157, 278 S.W. 593, 596 (1925).]
\textsuperscript{72} [\textit{Id. See also Rawles v. Jenkins}, 212 Ky. 287, 279 S.W. 350 (1925).]
\textsuperscript{73} [291 Ky. 417, 164 S.W.2d 597 (1941).]
amendment of the Federal Constitution noting that the Supreme Court of the United States in *United States v. Carolene Products Co.* had been faced with an almost identical act and had held the act constitutional. The court then turned to the Kentucky Constitution and stated that section 1 and other sections were the equivalent of the fourteenth amendment of the Federal Constitution and that the court was in agreement with the Supreme Court. It then distinguished *Tolliver v. Blizzard,* the substantive due process case, by stating: "No valid classification was established . . . . The court there was not confronted with legislation prohibiting the sale of all articles within a certain class." The distinction is dubious and the court might simply have overruled *Tolliver.* The court then formulated its position of minimum rationality and judicial deference: "Of the necessity for legislation the Legislature is the sole judge as long as there is any rational basis supporting its judgement."77

Of course, not all of the cases fit into such well-defined categories. In *Bruner v. City of Danville,* the Kentucky Court in 1963 dealt with an ordinance which required that anyone who wanted to conduct a public dance must obtain a license from the city. The ordinance provided no standards for obtaining such a license. In striking down the ordinance because it gave the city the power to prohibit public dances, the court quoted at length from *Tolliver.* Some of the language seized upon by the court would seem to be helpful to the Kentucky bail bondsmen: "It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it."78 The decision is not, however, meant to reverse the modern standard of minimum rationality, but simply represents the policy that a court may still act when it finds no possible rational basis for the regulation or prohibition of a particular activity: "[T]he time has come when a more realistic view must prevail. In a city of the size and importance of Danville, where private and semi-private dances are an established motif in the pattern of normal social life, to outlaw public dances completely would be unreasonable."79 The court, in fact, concedes the possibil-

74. 304 U.S. 144 (1937).
75. 143 Ky. 733, 137 S.W. 509 (1911).
76. 291 Ky. at 424, 164 S.W.2d at 600.
77. *Id.* at 425, 164 S.W.2d at 601.
78. 394 S.W.2d 939 (Ky. 1965).
79. *Id.* at 943.
80. *Id.*
ity of prohibition of certain activities which are not harmful by definition: "It may be conceded that there have always been certain kinds of activity which, though not harmful or offensive per se, can be not only regulated under the police power but, because of their 'potential evil consequences,' prohibited altogether."81

In short, the decisions of the Kentucky Supreme Court fall within the doctrinal framework of modern due process, and the theme of judicial deference to the wisdom of the legislature is strong. Within such a framework, the cause of the Kentucky bail bondsmen should find no greater anchor in the modern tides of state due process than it would in those of federal due process in the area of state economic regulation.

IV. THE SYSTEM IN OPERATION

Statistics indicate that bail reform does make a difference. In cities which have entertained bail reform projects, there has been a significant increase in the number of defendants released on their own recognizance. More importantly, the percentage of defendants who subsequently appear for court appointments in cities under the reform projects compares favorably with the percentage in cities operating under a traditional bail system.82 Nevertheless, the history of bail reform in the United States has not been one of unchecked growth. Due to the absence of a strong-voiced group of constituents or to tightening finances, bail reform projects have risen and then fallen. Often, financially strapped cities undertook to finance the programs, dooming them at the outset.83

The Kentucky pretrial release program is state-wide and operates under the Administrative Office of the Courts, which was created in the spirit of judicial reform "to serve as the staff for the chief justice in executing the policies and programs of the Court of Justice."84 The program is staffed by full-time employees who investigate and interview defendants and make recommendations to the appropriate court.

During the first three months of operation, 13,510 individuals, out of a total of 53,618 arrested, were interviewed by local pretrial officers. If subtractions are made for arrestees ineligible for interview

81. Id.
82. WIC, supra note 5, at 152 et seq.
83. Id.
under the program (juveniles, incapacitated persons, etc.), the program made contact with 34% of eligible defendants. The percentage will undoubtedly rise as the program moves away from its infancy. Of those interviewed, 9,367 (70%) were found eligible for recognizance release. The particular court followed the recommendation of the pretrial officer in 7,225 (78.7%) cases. This last figure is important because it indicates a high degree of cooperation on the part of the judiciary. Such cooperation would seem institutionally logical since the pretrial release program operates under the authority of the judiciary.

Perhaps the most important statistic is the rate of wilfull nonappearance by those released through the pretrial program. Of the 7,225 released, only 108 (less than 2%) wilfully failed to present themselves for a required court appearance. This figure contrasts with 608 persons who failed to appear, either wilfully or not, who were released by the court outside the pretrial release program.

The figures indicate that the pretrial release program has had a good beginning in Kentucky. The fact that the program is statewide and operated by a permanent staff augurs well for its success. The vehicle which will sustain the program and the spirit of reform which gave it birth may well be the existence of an interested and aggressive bureaucracy.

V. Conclusion

The reform of the bail system in Kentucky accomplished by the Bail Bondsmen Act was a welcome and needed change. The fact that the Act made commercial bail bonding illegal poses no serious constitutional threat to the new system under either the federal or the state constitution.

Of course, individual judges may violate the spirit of reform since they have ultimate discretion in the matter of bail, but the institu-

86. Id.
87. One of the most important variables in maintaining a low rate of forfeiture is the contact maintained with the defendant during the period of release. The proposition is simple: most defendants will appear if they are notified of the date, place, and time of appearance shortly beforehand. Wick, supra note 5, at 147. One study suggests that this factor is so important that it outweighs either the fact or the form of bail. P. Enslein, Bail and Court Appearance: Predictive Criteria (September 1, 1976) (unpublished study of the Legal Aid Society of Cleveland).
tional framework in which the new system operates should bring about cooperation, not conflict. The ultimate benefit, the maintenance of constitutional guarantees, runs to every person in the commonwealth.

MICHAEL A. KENNEDY
TRANSFER OF JURISDICTION UNDER THE NEW KENTUCKY JUVENILE COURT ACT

I. INTRODUCTION

On March 23, 1976, the General Assembly of Kentucky approved House Bill 587, "an act relating to juvenile courts,"1 designed to amend chapter 208 of the Kentucky Revised Statutes. Section six of the bill altered the procedure by which a juvenile is transferred to circuit court in felony cases. Prior to the passage of this amendment, exclusive jurisdiction over criminal matters involving juveniles was vested in the juvenile court of each county.2 However, where a child was accused of participation in a felony, the juvenile court jurisdiction could be waived and the case transferred to circuit court.3

Under this felony exception it was only necessary that it appear to the court that there be reasonable cause to believe that the child had committed the act. Before it could exercise its discretion and actually proceed with the transfer, the court was required only to be of the opinion that the best interests of both the child and the

2. Ky. REV. STAT. § 208.020 (1970). The Section provides:
   (1) The juvenile session of the county court of each county shall have exclusive jurisdiction in proceedings concerning any child living or found within the county who has not reached his eighteenth birthday:
     (a) Who has committed a public offense, except a moving motor vehicle offense, involving a child sixteen (16) years of age or older.
   Proceedings against children suspected of felony.—(1) If, during the course of any proceeding in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was murder or rape, including being an accessory to either of said offenses before the fact, and the court is of the opinion that the best interests of the child and of the public require that the child be tried and disposed of under the regular law governing crimes, the court in its discretion may make an order transferring the case to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to, tried and convicted of a felony by a circuit court.
   (2) When the juvenile court so transfers a case to the circuit court:
     (a) If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it may either return an indictment or may return a written report to the circuit court recommending that the child be committed to the department. If the court believes that such commitment would be proper, it may order the child committed to the department.
community would be served by transfer. In making this determina-
tion no procedural standards or substantive criteria to govern the
decision were provided. Juvenile courts could freely transfer cases
whenever any political pressure for retribution was exerted.

In the past ten years, the United States Supreme Court has found
that juvenile proceedings are subject to a number of constitutional
safeguards. Transfer proceedings are one of the areas so covered.
House Bill 587 is Kentucky's attempt to meet these new require-
ments. This amendment must be evaluated according to both the
constitutional requirements imposed and the general philosophy of
juvenile courts. Then, the question of further reform and amend-
ment can be considered.

II. THE SUPREME COURT INTERVENTION

It was not until 1966 that the question of the constitutionality of
allowing judges the discretion to transfer juveniles was raised in the
landmark case of Kent v. United States. This case involved the
construction of the District of Columbia waiver statute, which pro-
vided only that a waiver must be preceded by a "full investigation,"
without setting any standards for the determination. The appel-
lant, Morris Kent, sixteen, had been charged with rape. The juve-
nile court judge denied his motion for a pre-waiver hearing and
rejected his counsel's recommendation that he be hospitalized for
psychiatric observation. The court also rejected counsel's request for
his social service file and his request for an opportunity to prove that
Kent was suitable for rehabilitation. The court ordered that he be
transferred to adult court, without stating reasons on which the
decision to transfer were based.

In a 5-4 decision written by Justice Fortas, the Court held that
the transfer order was invalid and concluded that "as a condition
to a valid waiver order, petitioner was entitled to a hearing, includ-
ing access by his counsel to the social records and probation or
similar reports . . . and to a statement of reasons for the Juvenile

4. See generally Stamm, Transfer of Jurisdiction in Juvenile Court, 52 Ky. L.J. 122 (1973)
[hereinafter cited as Stamm].
Court's decision." The reason for requiring a hearing, the Court said, was to give counsel a forum in which to function, without which the right to counsel would be effectively meaningless. The right to access to social service records was justified on similar grounds: if the child's counsel is denied access to records on which the transfer decision is based, he cannot properly perform his adversary role, since an essential part of that role is to test the veracity and accuracy of such records. The Court explained the rationale for the statement of reasons requirement as follows:

Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made.

Since Kent had retained counsel, the question of whether he was entitled to counsel at the waiver hearing was not raised on appeal. But it may be argued that Kent held by implication that a child is constitutionally entitled to counsel at the waiver hearing, since the Court based its decision on the statute as read in light of due process and the right to counsel. The Court cited with approval Black v. United States in which the District of Columbia Circuit had held that the assistance of counsel in the waiver determination is essential to the proper administration of the proceeding. It then said that the right to counsel would be meaningless if counsel could be denied a hearing in which to function. Since the right to a hearing was expressly based on the right to meaningful assistance of counsel, it may be said that the Court recognized in Kent a constitutional right to counsel at the waiver hearing.

No question had been raised by the petitioner concerning the substantive criteria for the waiver decision, since they were unknown. To its opinion, however, the Court appended a policy memorandum of the District of Columbia District Court issued November

---

10. Id. at 557.
11. Id. at 561.
12. Id. at 559.
13. Id. at 561.
14. Id. at 557.
15. 355 F.2d 104 (D.C. Cir. 1965).
16. 383 U.S. at 561.
17. Id.
30, 1959, which noted the absence of any criteria for determining transfer in the statute. So that all parties affected could know the criteria, the Court set forth a list of eight factors to be considered in making the transfer decision. These factors included 1) the seriousness of the alleged offense, 2) the degree of wilfulness or violence involved, 3) the kind of offense—whether against persons or property, 4) the prosecutive merit of the complaint, 5) the convenience of trying all defendants in one court if the juvenile's associates were adults, 6) the sophistication and maturity of the juvenile, 7) his record and previous history, and 8) "[t]he prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile . . . by the use of procedures, services and facilities currently available to the Juvenile Court."

The Court based its decision in Kent on the belief that it was "required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." Thus, the Court did not expressly hold that the procedural safeguards it set forth were constitutional requirements mandated by the Due Process Clause of the fourteenth amendment independently of considerations of statutory construction. The Court was probably expressing a preference for statutory construction over constitutional interpretation, and more generally for basing its decisions on the narrowest possible grounds.

The Court in Kent applied procedural safeguards to the waiver determination because it was skeptical that the parens patriae theory, traditionally used to justify the absence of safeguards, actually provided enough protection for the juvenile.

---

18. Id. at 565 app.
19. Id. at 566-67 app.
20. Id. at 567 app.
21. Id. at 557.
22. According to this theory the state, as "parents of the country," has established the juvenile court system not to punish the youthful offender but to protect him from the harshness of the criminal court system, while at the same time subjecting him to rehabilitative measures designed to prevent any future contact with that system. The purpose of the adjudicative hearing is thus not to determine criminal liability but the civil status of delinquency which will make him subject to the rehabilitative dispositions of the court. Since a child has no right to liberty but only a right to custody, and since the dispositions of the court are merely alternatives to parental custody, the child can suffer no deprivation of any rights as a consequence of being adjudicated delinquent. There is therefore no reason to impose any of the constitutional safeguards surrounding deprivation of liberty in adult criminal proceedings on adjudicative proceedings in juvenile court. In re Gault, 387 U.S. 1, 17 (1967). See Young
Specifically, the Court doubted whether the system could care for and treat the child sufficiently to justify a complete immunity from constitutional guarantees. At the same time, however, the Court recognized the importance of the statutory right of a child to be treated within the exclusive jurisdiction of the juvenile court, given the benefits which flowed from this right. Among these benefits were the privacy of juvenile proceedings, the avoidance of both the legal and the socio-economic consequences of a criminal conviction, and especially the limitations on the duration and conditions of commitment following adjudication. The Court noted that for a sixteen-year-old charged with a capital offense, waiver of jurisdiction could mean the difference between a maximum sentence of five years and one of death, and concluded that such stakes made a waiver a critically important action which must conform to the procedural standards enumerated. However, the Court expressly refrained from deciding whether the requirements of procedural due process applying to adult criminal proceedings apply in toto to juvenile proceedings in general.

In re Gault, decided the next year, not only resolved the constitutional-statutory ambiguity of Kent, but held that certain principles of procedural due process apply to juvenile proceedings of an adjudicative nature. Gault, fifteen, was taken into custody on the basis of a verbal complaint by a neighbor that he had made an obscene phone call. At a hearing where the complainant was not present, Gault was found to be delinquent on the basis of admissions he made to the arresting officer, and he was committed to the Arizona State Industrial School until he reached majority. He had not been advised that he had a right to counsel or a right to remain silent, or that any statements he made might be used against him in court. Gault’s parents had received oral notice of the charge only on the day before the hearing; the petition contained only general conclusory allegations of delinquency and was never shown either to

v. Knight, 329 S.W.2d 195 (Ky. 1959); Robinson v. Kieren, 309 Ky. 171, 216 S.W.2d 925 (1949); Mattingly v. Commonwealth, 170 Ky. 222, 188 S.W. 370 (1916); Marlow v. Commonwealth, 142 Ky. 106, 133 S.W. 1137 (1911).
23. 383 U.S. at 555.
24. Id. at 556.
25. Id.
26. Id. at 557.
27. Id. at 556.
Gault or to his parents. 29

In a 5-4 decision, the Court, again speaking through Justice Fortas, held that a juvenile adjudicative hearing must conform to the essentials of due process and fair treatment as required by the Due Process Clause of the fourteenth amendment. 30 In such a hearing, the Court said, these essentials included timely written notice of the specific charges, 31 notice of the right to counsel, 32 application of the privilege against self-incrimination, 33 and the opportunity to confront and cross-examine prosecution witnesses. 34 Again, as in Kent, the Court was careful to restrict the scope of the holding to the facts of the case, expressly refraining from applying these requirements to pre- or post-adjudicative proceedings. 35 And, although this time the Court's decision was expressly based on the Due Process Clause, again it made no pronouncement concerning the general applicability of adult due process standards to juvenile proceedings.

Although Gault was concerned only with the adjudicative hearing, it cited Kent as authority, and in so doing, put a gloss on Kent which resolved the ambiguity concerning the basis of the earlier decision. The Court quoted Kent: "[W]e do hold that the [waiver] hearing must measure up to the essentials of due process and fair treatment." 36 The Court then went on to say, "[W]e reiterate this view, here in connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." 37 The natural interpretation of these two statements is that the Kent waiver requirements, like the Gault adjudication requirements, are mandated by the Due Process Clause, and are not merely a matter of a presumed legislative intent to provide for due process in connection with the waiver decision. 38 Thus the Court gave notice that it

29. Id. at 4-8.
30. Id. at 30.
31. Id. at 33.
32. Id. at 41.
33. Id. at 55.
34. Id. at 57.
35. Id. at 13.
36. Id. at 30, citing 383 U.S. at 562.
37. 387 U.S. at 30-31.
regarded the *Kent* requirements to be constitutionally binding on the states and not merely a statutory option which they might decline to exercise.

It was not until 1975 that the Supreme Court decided another case which dealt directly with constitutional problems involving waiver of jurisdiction. In *Breed v. Jones* a petition was filed in juvenile court alleging that the seventeen-year-old accused had committed acts which would be robbery if committed by an adult. The allegations were found to be true in an adjudicative hearing, and at a subsequent dispositional hearing, the court determined that he was unfit for treatment as a juvenile and ordered that he be prosecuted as an adult. He then filed a petition for a writ of habeas corpus, claiming that a felony prosecution for the same act of which he had been adjudicated delinquent would violate the Double Jeopardy Clause of the fifth amendment.

The Court, in a unanimous opinion written by Chief Justice Burger, sustained the petitioner's contention, holding that an adjudicative hearing places a child in jeopardy within the meaning of the fifth amendment. In so holding, the Court said that the deprivation of liberty to which he is exposed in the adjudicative hearing is similar to that to which he would be exposed in a felony prosecution, and that the Double Jeopardy Clause protects him from the burden of defending himself a second time. The Court noted that the resulting requirement that the waiver hearing be held prior to any adjudicative hearing would not unduly burden the juvenile system since the character of the two hearings is different, and it would also avoid the risk that a stout defense at an adjudicative hearing might prejudice the child on the issue of amenability to treatment at a later transfer hearing.

III. The Kentucky Judicial Response

Regardless of the ambiguities in the language of *Kent*, the Kentucky court adopted a constitutional interpretation of the case. In

40. *Id.* at 521-24.
41. *Id.* at 541.
42. *Id.* at 530.
43. *Id.* at 532.
44. *Id.* at 538.
45. *Id.* at 540.
Smith v. Commonwealth, the juvenile court judge ordered the appellant, arrested in 1958 at seventeen for armed robbery, transferred to circuit court following a hearing at which the youth was not represented by counsel. He was then tried by the circuit court, found guilty, and sentenced to life imprisonment, after which he made a motion to vacate the sentence based on the failure of juvenile court to afford him counsel, which motion was denied following an evidentiary hearing. On appeal the court said, citing Kent, that the appellant had a right to counsel at the hearing, but it declined to grant his motion on the ground that a remand to juvenile court was impossible because of his age.

Later cases followed this interpretation. In Whitaker v. Commonwealth, appellants Whitaker, an adult, and Wells, seventeen, were arrested for breaking and entering a dwelling. The juvenile court waived jurisdiction over Wells in an order which did not reveal that a hearing had been held or that he had been represented by counsel. The order also failed to set forth specific reasons for the waiver. Wells was subsequently indicted, tried, and convicted by the circuit court. On appeal, the Kentucky court reversed his conviction, holding that Kentucky Revised Statutes Section 208.170(1) requires that the juvenile have a hearing to determine if there are sufficient facts to support a waiver. It further held, citing Kent and Smith, that Wells was entitled to be represented by counsel at the hearing, and that the waiver order must set forth sufficient reasons for the waiver. The language of the opinion indicates that these rights were considered to be required by the constitution and not merely by the language of the statute.

In 1972 the Kentucky General Assembly adopted a series of amendments to Chapter 208, some of which attempted to codify the requirements of the relevant Supreme Court decisions since Kent.

46. 412 S.W.2d 256 (Ky. 1967).
47. Id. at 257.
48. In a footnote, the court described the appendix to Kent as "a guide to assist in determining whether or not waiver is appropriate," thereby judicially adopting the waiver criteria set forth therein. Id. at 260 n.1.
49. 479 S.W.2d 592 (Ky. 1972).
50. Id. at 593-94.
52. 479 S.W.2d at 595.
53. Id.
It also tried to amend Section 208.170 to incorporate the *Kent* procedural requirements and substantive criteria for the transfer decision, but was unsuccessful. Meanwhile, later cases coming before the Kentucky high court showed that many juvenile courts were ignoring the *Kent* requirements, or at best, misinterpreting them. For example, in *Hopson v. Commonwealth*, the court held that a waiver order which merely recited that the transfer was in the best interest of the child and the public was invalid on the grounds, *inter alia*, that it failed to set forth sufficient reasons for the transfer.

Then in *Hubbs v. Commonwealth*, decided in 1974, the Kentucky court put a gloss on *Kent* and its prior decisions relaxing the requirement of detailing the reasons for transfer in the waiver order, while strengthening the requirement regarding the right to counsel. The appellant, a juvenile, had been convicted of grand larceny and sentenced to three years in prison by the circuit court. He had been transferred from juvenile court on a waiver order which had failed to show whether he had been represented by counsel at a hearing, and which merely recited in conclusory language that the statutory requirements for transfer had been met. Rejecting appellant’s contention that the waiver order must show that the *Kent* requirements had been met, the court remanded to the trial court for it to determine from the juvenile court record whether these requirements had been satisfied. It is sufficient, the court said, that either the order or the record or an accompanying statement show that these requirements had been met, since any of these methods would satisfy the *Kent* rationale of providing sufficient information for meaningful review.


55. M. STAMM, LAW AND CHILD ADVOCACY IN KENTUCKY JUVENILE COURTS 118 (1974) [hereinafter cited as M. STAMM].
56. E.g., *Risner v. Commonwealth*, 508 S.W.2d 775 (Ky. 1974); *Baker v. Commonwealth*, 500 S.W.2d 69 (Ky. 1973) (waiver order failed to indicate that hearing was held or that juvenile had counsel).
57. 500 S.W.2d 792 (Ky. 1973).
58. Id. at 793.
59. 511 S.W.2d 664 (Ky. 1974).
60. Id. at 665.
61. Id. at 666.
Of the right to counsel, the court said: “The Supreme Court in Kent held that before the entry of a waiver order a juvenile must have a hearing at which he is represented by counsel . . . .”62 The court went on to say, citing Whitaker, that the record “must reveal that a hearing was held, that the juvenile was represented by counsel at the hearing. . . .”63 Thus the court seemed to elevate the right to counsel prescribed by Kent to a requirement that counsel be provided, regardless of the wishes of the accused. The Supreme Court in Gideon v. Wainright64 had held that state courts must provide counsel for indigent defendants unless the right to counsel is competently and intelligently waived.65 The Court in Gault had quoted the recommendation of the President’s Commission on Law Enforcement and the Administration of Justice that “[c]ounsel . . . be appointed as a matter of course whenever coercive action is a possibility, without requiring any affirmative choice by child or parent.”66 The reason given by the Commission for this recommendation was that juveniles are not likely to be sophisticated enough to make an intelligent waiver.67 The Gault Court, however, declined to give this recommendation the status of a constitutional requirement, instead using it as an a fortiori argument for the recognition of a constitutional right to counsel.68

The Kentucky Court of Appeals had already held in Sizemore v. Commonwealth69 that in an adult felony prosecution in which the accused was not represented by counsel, the record must clearly show that the waiver was intelligently, competently, understandingly, and voluntarily made.70 Since the rationale for requiring counsel at the juvenile waiver hearing is the possibility of exposure to adult felony prosecution, it would be inconsistent with the rationale of Kent and with the protective philosophy of the juvenile court system not to apply this requirement to the waiver hearing as well. The special difficulty of showing that a child has “intelligently,
competently, understandingly, and voluntarily” waived his right to counsel had been forcefully argued by Mortimer Stamm,71 which arguments were undoubtedly familiar to the court in Hubbs. It was probably to avoid these problems that the court held in Hubbs that the waiver order, accompanying statement, or the juvenile court record must show that the child was in fact represented by counsel, and not merely that he was advised of his right to be represented.

IV. THE 1976 AMENDMENTS

It was against this background that the General Assembly enacted section 6 of House Bill 587. This section is divided into five subsections. The effect of each is discussed below.

Subsection (1) codifies the Kent requirement, engrafted by the Whitaker court onto the prior statute, that a separate hearing be held to determine the question of transfer. It deletes the pre-Kent language which had continued to suggest to juvenile court judges that both the transfer procedure and substantive criteria were ultimately a matter of their own discretion.72 It also codifies the Breed requirement that such a hearing be held prior to any adjudicative hearing.

Subsection (2) extends the former statutory requirement that the court have reasonable cause to believe the child has committed a felony. It now requires that, in addition, there must be a probable cause determination at the waiver hearing. This amendment gives added protection to the child by requiring that the determination be made in an adversary proceeding and by increasing the quantum of proof necessary to support a transfer order.73 It may be argued that the distinction between “reasonable cause” and “probable cause” is difficult to determine, but the language of the amendment should at least suggest to judges that the standard of proof has been

71. M. Stamm, supra note 55, at 64-65. Stamm argued that to consider a child competent to waive his right to counsel was inconsistent with his legal incompetence in other, less complex areas (e.g., his legal incapacity to contract, to vote, and to buy alcohol), and that there were good reasons to think that waiver of counsel by a child would almost of necessity require the advice of counsel in order to be competent. He also contended that to permit a child to waive counsel was inconsistent with the protective philosophy of the juvenile court system.

72. See notes 74 & 75 and accompanying text supra.

73. Since a showing of “reasonable cause” is a condition precedent to the institution of the waiver hearing and the amendment sets a “probable cause,” standard for the hearing, it is only reasonable to conclude that the legislature intended to increase the quantum of proof necessary to support the transfer order. Cf. Stamm, supra note 4, at 194.
increased, and that it would not be met as a matter of course by the controverted testimony of an arresting officer.

Subsection (3) extends the former statutory requirement that the court might transfer a juvenile when it believes the transfer to be in the best interests of both the child and the community. This determination is now to be made at the hearing according to the same criteria set out in the Kent appendix.74 These criteria, now codified, include

the seriousness of the alleged offense, whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.75

Some of these criteria (e.g., prior record) could allow the admission of evidence considered to be prejudicial in an adjudicative hearing, and thus also in the probable cause determination of the waiver hearing. However, the statutory requirement that the probable cause determination be made first implies a separation of issues and evidence which should, if conscientiously followed, minimize the danger of such prejudice.

Subsection (4) codifies the requirement in Kent, as it was construed in Whitaker, that a statement be made of the reasons for the transfer. Whitaker held that the waiver order itself must set forth sufficient reasons for the transfer.76 The legislature thus declined to follow the more lenient reading of the Hubbs court, which had held that it was sufficient if either the order, or the record, or an accompanying statement set forth the reasons in sufficient detail to permit meaningful review. An examination of Hubbs reveals why the legislature declined to follow it. In that case it was necessary to remand to the trial court for it to determine, based on the juvenile court record, whether the Kent requirements were met.77 This wasteful and burdensome procedure, in effect, makes both the trial court and

74. The amendment is silent on the questions of burden and standard of proof on these issues, and, since the Kent appendix preceded the hearing requirement, it does not address these questions.
76. See text accompanying note 71 supra.
77. See text accompanying note 92 supra.
the defendant pay for the failure of the juvenile court. The stricter reading requiring that the order itself set forth the reasons for the transfer places the burden where it belongs. Thus, where the order is found insufficient in this respect, the case will be remanded to juvenile court for compliance.

Subsection (5)(a) amends what was formerly section 208.170(2), which had given the grand jury an option to commit the transferred child to the Department of Human Resources if it found sufficient evidence to indict. This option was clearly inconsistent with the rationale, if not the express holding, of *Gault*,\(^78\) which required essential due process standards including a determination of guilt in an adversary proceeding with a right to counsel prior to any disposition involving deprivation of liberty. It is also inconsistent with the holding of *In re Winship*,\(^79\) which required that such a determination be beyond a reasonable doubt, a higher quantum of proof than that required to indict.\(^80\) In its place, this subsection gives the grand jury an option to recommend that the circuit court return the child to juvenile court.\(^81\) Subsection (5)(b) gives the circuit court the option to return the child even if the grand jury decides to indict. Presumably both the grand jury and the circuit court would be guided by the same criteria, set forth in subsection (3), to be used at the waiver hearing. They would thus be given limited power of review over the waiver hearing. To the extent to which they are exercised, these options will increase the protection of juveniles subject to transfer and reduce the number of juveniles subject to felony prosecution.

V. Criticism and Evaluation

House Bill 587, section 6 was a somewhat overdue response to *Kent* and the Kentucky cases construing it. These cases required that the decision of the juvenile court to waive jurisdiction over a child be made using due process procedural safeguards, including a separate hearing, representation by counsel, and a statement of reasons justifying the transfer.\(^82\) Subsection 6\(^83\) codified the first and
third of these requirements, and to that extent, it substantially improved the prior statute. It failed, however, to codify the right to counsel.

It might be said that the legislature did not include a right to counsel because Kent did not expressly hold that there was such a right at the waiver hearing. It has already been argued, however, that Kent so held by implication.\textsuperscript{84} Further, the Kentucky Court, from the beginning, has construed Kent as requiring the right to counsel at the waiver hearing,\textsuperscript{85} and since Hubbs, as demanding counsel at the hearing.\textsuperscript{86} A more plausible explanation is that one purpose for codifying a constitutional right is to give notice to judges who may not be aware of the import of federal or even state cases construing these rights.\textsuperscript{87} Another purpose is to provide clear-cut statutory grounds for appeal in case of violation, thus tending to deter such violations by making reversal in state court a virtual certainty. In the case of the waiver hearing, statutory codification of the right to counsel might not appear to be necessary for these purposes, since any child charged with a serious offense would have already had a detention hearing at which the right to counsel is expressly guaranteed by the statute.\textsuperscript{88} However, there is nothing in either the statute or case law which would prevent a child from waiving his right to counsel at the detention hearing. If he did, he would arrive at the waiver hearing without counsel, and nothing in the waiver statute would give notice of his right to have counsel appointed at that time.\textsuperscript{89} He would be unrepresented. Consequently, it would have been better to have codified the right to counsel, especially since the case law makes counsel mandatory at the hearing.\textsuperscript{90}

Although section 6 was enacted primarily in response to the con-

\textsuperscript{84} Kent v. United States, 383 U.S. 541, 557 (1966). See text accompanying note 36 \textit{supra}.
\textsuperscript{85} Smith v. Commonwealth, 412 S.W.2d 256, 259 (Ky. 1967).
\textsuperscript{86} Hubbs v. Commonwealth, 511 S.W.2d 664, 665 (Ky. 1974). See text accompanying note 94 \textit{supra}.
\textsuperscript{87} The necessity for this is indicated by Kentucky cases appealing transfer orders after \textit{Kent}. \textit{E.g.}, Hopson v. Commonwealth, 500 S.W.2d 792 (Ky. 1973); Fields v. Commonwealth, 498 S.W.2d 130 (Ky. 1973).
\textsuperscript{88} Ky. REV. STAT. § 208.192 (Supp. 1976). It is unlikely that a juvenile charged with a serious offense would be released into the custody of his or her parents pursuant to Section 1 and thus avoid the detention hearing.
\textsuperscript{89} \textit{Id}.
\textsuperscript{90} \textit{E.g.}, Hubbs v. Commonwealth, 511 S.W.2d 664 (Ky. 1974); Whitaker v. Commissioner, 479 S.W.2d 592 (Ky. 1972).
stitutional requirements of Kent, it should be evaluated in light of the general philosophy and purpose of the juvenile court system. On the one hand, it has been argued that the very existence of a provision for waiver of jurisdiction is contrary to the parens patriae philosophy of the juvenile court system, and inimical to its avowed purpose of protecting children from the harmful effects of the adult criminal process. Thus, it has been said that a transfer provision constitutes a public admission of a half-hearted commitment to the goals of the juvenile system, and an abandonment of the very children who stand most in need of that system. It may be further argued that the transfer provision is viciously self-justifying in that it tends to undermine the incentive for developing facilities which would treat the child within the system and thus prevent his transfer.

On the other hand, it may be argued that a provision for transfer is actually required by the goals of the juvenile system since a reasonable probability of rehabilitative success depends upon the separation of those juveniles who are not amenable to rehabilitation from those who are. Children must be separated, it is said, both to protect the treatable children from the influence of those who are not treatable and also to avoid the necessity of giving the institutions of treatment a restrictive character which is not conducive to successful rehabilitation.

However, even those who think positively of transfer in the juvenile system cannot oppose increased protection for juveniles in the waiver determination, since increased protection merely increases the accuracy of the determination, making it less likely that a treatable child will be transferred to circuit court. There is little reason to think that the likelihood of an untreatable child's being retained is increased, but even if it were, the harm done by a mistaken retention is undoubtedly less serious than that done by a mistaken

---

91. M. Stamm, supra note 55, at 111-12.
92. Id.
93. It may be noted that Subsection (3) provides that one of the transfer criteria shall be the, “likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system,” thus permitting the transfer of children otherwise amenable to treatment simply because the state lacks adequate facilities to treat them.
95. Id. at 1041.
transfer. It has been suggested\(^9^6\) that, to increase protection, transfer should require a finding of guilt beyond a reasonable doubt, that amenability to treatment within the juvenile system should be the sole non-adjudicative test for transfer, and that the state should have the burden of proof on the question of amenability, giving the child the rights of confrontation, cross-examination, and the production of witnesses.

Adopting a reasonable doubt standard of proof at the transfer hearing would make it more like a criminal trial. But double jeopardy problems similar to those in \textit{Breed} would not be raised since there is no possibility that the juvenile will be deprived of liberty at such a hearing.\(^9^7\) Of course, there is a risk of prejudicing the juvenile in the criminal trial by determining guilt beyond a reasonable doubt at the waiver hearing. It would, however, be advisable to provide expressly that there must be a determination of the non-adjudicative issues by a preponderance of the evidence since the statute is silent on this matter. It would also be advisable to provide expressly that the state have the burden on these issues, since such a provision would be more in keeping with the protective character of the juvenile court system than a statute which leaves the burden question open.\(^9^8\)

The ambiguous language of the statute makes unclear whether amenability to treatment should be the sole non-adjudicative test for transfer. The statute requires that a determination to transfer be made if transfer is "in the best interest of the child and the community."\(^9^9\) This language does not make clear whether joint or separate interests are referred to. The ambiguity is not resolved by the listed criteria, some of which pertain to the child's interest (e.g., maturity), some to the community's interest (e.g., public safety), and some to both (e.g., probability of rehabilitation). If a joint interest is meant, then these criteria will be used in a balancing test in

\(^{96}\) Stamm, \textit{supra} note 4.

\(^{97}\) See text accompanying note 58 \textit{supra}.

\(^{98}\) This recommendation can also be justified as a protection of the statutory right to treatment which arises from the exclusive jurisdiction and rehabilitative purpose of the juvenile court. Since the statute creates a right to treatment in every child within the jurisdiction of the court, the burden should be on the state on any issue in any proceeding which may result in the abrogation of that right. \textit{See} Stamm, \textit{supra} note 4, at 134-37; \textit{Cf.} People v. Browning, 45 Cal. App. 3d 125, 199 Cal. Rptr. 420 (2d Dist. 1975) (language of statute suggests presumption of fitness for treatment as juvenile).

which the child's interest may be outweighed by that of the community; if separate interests are meant, then a child may never be transferred against his best interest. The second interpretation would in effect make amenability the sole test of transfer, since it will not be in his best interest to be transferred where he can benefit from treatment.¹⁰⁰

The ambiguity in the language of the statute should be resolved to make clear whether the interests of the child may be outweighed by those of the community. If community interests are more important, the court should indicate whether a balancing of both interests is intended. If they are not, then reference to the interest of the community should be dropped from the statute. Insofar as community interests coincide with the child's interests (e.g., rehabilitation), considering them would be superfluous, and insofar as they conflict with his interests (e.g., public safety), they could never prevail. Since the second alternative, in effect, makes amenability to treatment the sole test of transfer, it may be desirable for the sake of clarity to expressly so provide in the statute if this alternative is chosen. Of course, it would be more in keeping with the parens patriae philosophy to eliminate any reference to the community interest in public safety as a criterion to be considered in making a transfer. On the other hand, the concern for public safety is a legitimate and important state interest which may on occasion be jeopardized by a premature release or escape from juvenile detention facilities. It is important that this question be decided, and that the legislature's decision be expressed in clear, unambiguous terms.

The suggestion that the statute provide the juvenile the rights to confrontation, cross-examination and production of evidence is one which is well taken. In Kent, the Supreme Court based its holding that a hearing and access to records were required for a valid waiver on the grounds, inter alia, that these procedures were necessary to give counsel an opportunity to function, without which the right to counsel would be meaningless.¹⁰¹ In Gault, the Court said that the right to cross-examination, and thus also confrontation, applied to

¹⁰⁰. An exception might be argued where the maximum adult sentence was very short compared to the period during which the child might remain committed on an indeterminate sentence by the juvenile court, but the juvenile court would be unlikely to accept the argument that a short sentence in prison without any attempt at rehabilitation was really in the child's best interest.

juvenile adjudicative proceedings “in accordance with our law and constitutional requirements.”

Although Gault did not expressly relate the right to confrontation to the right to counsel, and the question of the right to confrontation was not raised in Kent, the rationale of Kent supports the view that this right should also be required, since without it, the right to counsel would be of severely limited use. Further, the holding that access to records by counsel is required supports this view by analogy. The purpose of giving counsel access to records is the same as that of giving him the opportunity to cross-examine a witness—to test for veracity and accuracy.

Further support for this argument is found in McKeiver v. Pennsylvania, in which the Court held that the sixth amendment right to trial by jury is not to be applied to juvenile adjudicative hearings by the Due Process Clause of the fourteenth amendment. In so holding, the Court said that since juvenile proceedings are not criminal prosecutions within the meaning of the sixth amendment, they are subject only to those due process requirements essential to reliable fact-finding procedures. Since confrontation and cross-examination are closely related to such reliability, the Court’s fragmentation of the sixth amendment along due process lines in McKeiver supports the argument based on Kent.

The spirit, if not the letter, of Kent, as well as the protective philosophy underlying the juvenile court system, require that the

---

102. In re Gault, 387 U.S. 1, 57 (1967).
103. The support from Gault would be stronger if it had discussed these rights, since this would mean that a right applied to waiver hearings in Kent constitutionally required the right to confrontation. On the other hand, if this right is merely derived from general requirements of due process at the adjudicative hearing, it will not follow that it applies at the waiver hearings, since the due process requirements of the two hearing may be different. 387 U.S. at 13.
104. 383 U.S. at 563.
105. 403 U.S. 528 (1971).
106. Id. at 543.
107. On the other hand, it should be noted that at the end of the opinion, the Court in dictum gave an indication that it may be reluctant to extend any further the due process rights granted to juveniles in previous decisions:

Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge’s possible awareness of the juvenile’s prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of prejudgment—chooses to ignore, it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.

Id. at 530.
rights of confrontation, cross-examination, and production of evi-
dence be granted to the juvenile at the waiver hearing. The codifi-
cation of these rights, especially that of cross-examination, will help
reduce one of the most frequently complained of abuses in what has
been called the most crucial proceeding of the juvenile court.

VI. CONCLUSION

House Bill 587, section 6 has made an important and much
needed improvement in the Kentucky law of transfer by codifying
the Kentucky requirements that a child being considered for transfer be
given a separate hearing and that the transfer order contain a state-
ment of reasons justifying the transfer. Further, it has gone beyond
these procedural requirements by codifying the substantive criteria
to be used in making the transfer determination. It has thus at-
ttempted to answer the two most serious criticisms of Kentucky
transfer law: the absence of both regularized procedures and the
lack of objective standards.

However, there remain substantial defects which should be reme-
died by the legislature. First, the right to counsel at the waiver
hearing should be made explicit to avoid problems where the child
has waived counsel at the detention hearing. Second, the ambiguous
language of subsection (3) should be amended to remove the uncer-
tainty concerning whether the best interest of the child and the
community must be considered separately or may be balanced
against one another in making the waiver decision. Third, in com-
pliance with the spirit of both Kentucky and the philosophy of the juve-
nile justice system, the child should be granted the rights to con-
frontation, cross-examination, and the production of favorable evi-
dence at the waiver hearing. Finally, in the light of the protective
and rehabilitative purpose of the juvenile justice system, the statute
should be amended to provide that the burden be placed on the
state at the hearing to prove by a preponderance that the child is
not amenable to treatment by the juvenile facilities available, be-
fore his right to such treatment, and to protection from adult treat-
ment, is taken away.

RODERICK J. MORTIMER

109. See Kentucky Office of Continuing Legal Education, Report of Seminar on Juve-

Federal Bureau of Narcotics and Dangerous Drugs (BNDD) agents had been conducting an investigation of Charles Beasley during late 1972 and early 1973. On several occasions undercover agents had purchased heroin from Beasley in an attempt to identify his source of supply. In December, 1972, defendant Carriger also became a subject of the BNDD investigation, but there was "no indication in the record that Carriger, at that time, was believed to be Beasley's source."

In January, 1973, the BNDD agents decided to purchase a large enough quantity of narcotics from Beasley to force him to go to his source of supply while under surveillance. The informant who telephoned Beasley about the sale was told that Beasley "had to go to a source to get the heroin." A few minutes later agents watched Beasley leave his home and followed him to an apartment building which the defendant Carriger owned and in which he maintained an apartment. Agents observed Beasley enter the apartment building carrying an empty green shopping bag. The agents attempted to gain entry into the building, but were unsuccessful because both the front and back entrance doors were locked; the doors could be opened only by someone with a key, or by someone inside the building activating a buzzer. Several minutes later some workmen walked out of the apartment building through one of the locked doors, and before the door closed again, one of the BNDD agents, without permission, entered the building and began to search for Beasley. The agent saw Beasley walking down a third floor corridor carrying the green bag, which now appeared to have something in it. Beasley apparently spotted the agent. Rather than leave the building, he quickly went to the defendant Carriger's apartment

2. Id. at 547.
3. Id. at 548 (quotations omitted).
and gave Carriger the green bag. When Beasley and Carriger began to walk away from the apartment, the agent went downstairs and admitted the other officers. The officers went to the apartment where the agent had seen the suspected drug transaction, and after identifying themselves and their purpose to the occupants, they forced entry. During the search, while neither Beasley nor Carriger were present in the apartment, a clear plastic bag containing heroin was found. Shortly thereafter, defendant Carriger returned to the apartment and was arrested. Beasley was arrested by other agents as he left the apartment building. The green shopping bag, found behind a carton in a stairwell near Carriger's apartment, contained 89.5 grams of heroin. The BNDD agents then obtained a search warrant, and more heroin was discovered in two safes in the basement—one in a common storage area reserved for all tenants, and one in a separate, paneled room under the stairway.

Defendant Carriger was convicted by a jury on three counts of an indictment charging violations of the Drug Abuse Prevention and Control Act. The district court held that the agent's unauthorized entry into the apartment building and subsequent search for Beasley in the common areas of the building did not violate Carriger's reasonable expectation of privacy; therefore, there was no violation of Carriger's fourth amendment rights. The court refused to suppress the plastic bag found in the apartment, reasoning that the first agent in the building had probable cause to believe that Carriger was committing a felony. Therefore, the court said that the agents could force entry into the apartment and seize any evidence found in plain view. The district court also refused to suppress the shopping bag found in the stairwell because the defendant could have no reasonable expectation of privacy in the building stairwell. However, the court did suppress the evidence seized from the safe in the separate paneled room, apparently because the room was not part of the open common areas of the building or the storage area.

4. Id.
5. 21 U.S.C. § 841 (a) (1970) provides in part:
   Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
   (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.
6. 541 F.2d at 548.
7. Id. at 548-49.
8. Id. at 548.
On appeal, the Sixth Circuit Court of Appeals reversed Carriger's conviction, believing the officer's unauthorized entry into the locked apartment building to be an illegal entry and violative of Carriger's fourth amendment rights. The court held that "because the officer did not have probable cause to arrest appellant or his accomplice before he invaded an area where appellant had a legitimate expectation of privacy, the subsequent arrest and seizure of narcotics were invalid." The fourth amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Nowhere in the Constitution is the word "unreasonable" defined; consequently, there has been considerable controversy over the scope of the protection afforded by the fourth amendment. Further, the application of the "exclusionary rule" to evidence obtained in violation of the amendment has made the determination of its protections a crucial, if not dispositive, issue in many criminal prosecutions.

In early efforts to outline the extent of the amendment's protections, the courts relied heavily upon property concepts and the law of trespass. In Olmstead v. United States federal agents obtained evidence by wiretapping the defendant's telephone. Rejecting the defendant's contention that the wiretap invaded the protection of the fourth amendment, the United States Supreme Court held that since there had been no physical trespass, nor any seizure of tangible items, there was no search and seizure within the meaning of the amendment; therefore, there was no violation of the defendant's constitutional rights. The Court observed, "[t]he Amendment
itself shows that the search is to be of material things—the person, the house, his papers, or his effects.”\textsuperscript{17} Thus, the \textit{Olmstead} decision affirmed the doctrine of “constitutionally protected areas;”\textsuperscript{18} any search and seizure which resulted in a trespass against a “constitutionally protected area” was viewed as violative of the fourth amendment.\textsuperscript{19}

Not every trespass, however, would invalidate a subsequent search and seizure.\textsuperscript{20} Four years prior to the \textit{Olmstead} decision, the Supreme Court, in \textit{Hester v. United States},\textsuperscript{21} refused to extend the protection of the fourth amendment to an “open field,” although there had been a technical trespass by revenue agents upon the land of the defendant’s father.\textsuperscript{22} The Court’s holding made it clear that fourth amendment rights were not necessarily coextensive with property interests.

As an aid in identifying those areas within the protection of the amendment, the courts often looked to the common law concept of “curtilage.”\textsuperscript{23} By its own terms the amendment protected against the unreasonable search and seizure of “houses.” The courts generally extended this protection to include the areas which would ordinarily be viewed as within the “curtilage” of the “house.” Areas outside the curtilage were usually denied protection. While there was less difficulty in ascertaining what was normally included in the curtilage of a single-family dwelling, more serious problems were presented when considering the urban apartment situation. The fourth amendment protection of “houses” was easily and logically extended to include the apartment itself,\textsuperscript{24} but the hallways and stairways were more troublesome.

As a rule, the courts refused to extend protection of the fourth amendment to “common” or “relatively public” apartment hallways and stairways even though there had been a technical trespass.

\textsuperscript{17} \textit{Id.} at 464.
\textsuperscript{18} \textit{VARON,} supra note 14 at 10. The doctrine of “constitutionally protected areas” evolved from the common law theory of trespass to property. \textit{Id.} at 9.
\textsuperscript{20} \textit{But see RINGEL,} supra note 12 § 161.01.
\textsuperscript{21} 265 U.S. 57 (1924).
\textsuperscript{22} \textit{Id.} at 58.
\textsuperscript{23} Curtilage has been defined as “The enclosed space of ground and buildings immediately surrounding a dwelling house.” \textit{BLACK’S LAW DICTIONARY} 460 (rev. 4th ed. 1968).
Due to their somewhat public nature, these areas were viewed as akin to the "open fields" which had been denied protection in *Hester*.

Similarly, an apartment building roof and courtyard were held to be beyond the scope of the protection afforded by the amendment.

In *McDonald v. United States*, however, the United States Supreme Court reversed the conviction of a defendant who had been convicted of carrying on a "numbers game" when it appeared that one of the arresting officers, without a search warrant, gained entry to the defendant's rooming house by opening a window leading into the landlady's room and climbing through. The officer identified himself to the landlady and then admitted the other officers. By standing on a chair and looking through the transom of the defendant's room, the police were able to observe the defendant engaging in gambling activities, and the subsequent arrest, search, and seizure took place. The Court noted that the "inconvenience of the officers and delay" appeared to be the only reasons a search warrant had not been sought and held this to be "no justification for by-passing the constitutional requirement . . . ." Significantly, Justice Jackson, in a separate concurring opinion, expressed a strong distaste for the forcible means of entry employed by the officers, characterizing it as "felonious," and stated that the fourth amendment protected individuals from this kind of conduct by law enforcement officials.

In spite of the *McDonald* decision, in at least one case, *United States v. St. Clair*, the amendment's protection was held not to encompass a locked apartment building vestibule and hallway. In *St. Clair* narcotics agents sought admittance to a locked apartment building. The landlord insisted that all of his tenants were "law-abiding" and refused to allow the agents to enter. In the "general

---

27. 335 U.S. 451 (1948).
28. Id. at 455.
29. Id.
30. Id. at 458-59.
31. Id.
33. Id. at 340.
which ensued, one of the agents slipped by the landlord, entered the building, and subsequently arrested the defendant, finding narcotics in his apartment. The district court, refusing to suppress the introduction of the seized narcotics into evidence, concluded:

The hallway, used by tenants and the public alike, was not part of the defendant's apartment. The fact that the door leading to it from the street was locked for the security of the tenants did not make the hallway part of the defendant's dwelling so that his constitutional privilege under the Fourth Amendment extended thereto. To hold otherwise would extend the protection under the Fourth Amendment beyond its purpose.  

The district court distinguished the case before it from the *McDonald* decision, noting that in *McDonald*, the police had lacked probable cause when they entered the rooming house, and the violation of the defendant's privacy occurred when the agents peered over the transom of the defendant's apartment.  

After struggling for years with determinations of "constitutionally protected areas," the courts were at last liberated from their dependence upon property law and trespass considerations by the 1967 decision of the United States Supreme Court in *Katz v. United States*. 

The petitioner in *Katz* had been convicted of violating a federal statute prohibiting interstate transmission of wagering information by telephone. His communications were monitored by FBI agents who, without a warrant, had attached an electronic listening device to the outside of the telephone booth from which the petitioner placed his calls. The Court of Appeals for the Ninth Circuit rejected the petitioner's contention that his fourth amendment rights had been violated by the actions of the agents because "[t]here was no physical entrance into the area occupied by [the petitioner]."

Before the Supreme Court, the petitioner argued that the telephone booth was a "constitutionally protected area," while the Government insisted that it was not. The Supreme Court declined to adopt this formulation of the issue. Instead, in reversing the petitioner's
conviction, the Court concluded that property interests and the
"trespass" doctrine could "no longer be regarded as controlling,"39
and that "the reach of [the Fourth] Amendment cannot turn upon
the presence or absence of a physical intrusion into any given enclo-
sure."40 The Court explained that
the fourth amendment protects people, not places. What a person
knowingly exposes to the public, even in his own home or office, is
not a subject of fourth amendment protection. ... [b]ut what he
seeks to preserve as private, even in an area accessible to the public,
may be constitutionally protected.41
The "expectation of privacy," however, must be "reasonable."42 The
Court held that the Government had violated the petitioner's rea-
sonable expectation of privacy by listening to his conversations, and
therefore his fourth amendment rights had been violated.43
Applying the "expectation of privacy" test set forth by the Su-
preme Court in Katz, courts have since held the fourth amend-
ment's protections to extend to, among others, a college dormitory
room,44 a union office,45 and a commercial building.46 In United
States v. Rosenberg, the Seventh Circuit held an entry to be illegal
when agents entered a commercial building without permission
through a closed, but unlocked, steel entrance door.48
In cases decided since Katz involving apartment hallways and
stairways, the courts, applying the "reasonable expectation of pri-
vacy" test, have generally held that a defendant can have no "rea-
sonable expectation of privacy" in a common, public hallway or
stairway,49 but such an expectation becomes increasingly reasonable
if the area is of a less public nature.50

39. Id. at 353.
40. Id.
41. Id. at 351.
42. Id. at 361 (Harlan, J., concurring).
43. Id. at 352.
44. Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).
45. In Mancusi v. DeFort, 392 U.S. 364 (1968), the Supreme Court held that for purposes
of fourth amendment protection there was no reasonable expectation of freedom from govern-
mental intrusions on the part of the defendant where his office consisted of a large room which
he shared with several other union officials.
47. Id.
48. Id. at 682-83.
49. See United States v. Wilkes, 451 F.2d 938 (2d Cir. 1971).
50. Cf. United States v. Case, 435 F.2d 766 (7th Cir. 1970). Hallway was generally locked
and used by "a very confined group" and it was not open to the general public. Id. at 769.
Although the Supreme Court in *Katz* rejected property interests as no longer controlling in fourth amendment cases, the courts still, on occasion, utilize the property concepts of curtilage and trespass as an aid in determining whether a defendant has a "reasonable expectation of privacy" in a given area. In *Fixel v. Wainwright* the Fifth Circuit, "applying . . . traditional property concepts" found that a defendant's constitutional rights under the fourth amendment were violated when officers searched a fenced courtyard of the defendant's apartment building without a warrant. Similarly, in another case, the concept of curtilage was relied upon to help determine whether the defendant's expectation of privacy could reasonably extend to a drainpipe outside his townhouse. The court, refusing to suppress the evidence seized from the drainpipe, held that the defendant "could not have had any reasonable expectation of privacy when he placed the newspapers [concealing cocaine] there."

The *Carriger* case presented to the Sixth Circuit Court of Appeals a question of first impression: "whether a tenant in an apartment building has a reasonable expectation of privacy in the common areas of the building not open to the general public."

The district court, in refusing to suppress the evidence found in the apartment building, had relied upon three Second Circuit cases: *United States v. Miguel*, *United States v. Conti*, and *United States v. Wilkes*. In *Miguel* narcotics agents gained entry to the lobby of a multi-tenanted apartment building when a door was opened by a woman coming out; the defendant was subsequently arrested in the lobby. The court of appeals, noting that the agents' entry had been peaceful, rejected the defendant's contention that the lobby was within his curtilage and therefore protected by the fourth amendment. Similarly, in *Conti*, the Second Circuit refused to suppress evidence obtained by IRS agents, even though the court...

---

51. 389 U.S. at 353.
52. 492 F.2d 480 (5th Cir. 1974).
53. Id. at 483.
54. Id.
56. Id. at 105.
57. United States v. Carriger, 541 F.2d 545, 549 (6th Cir. 1976).
58. 340 F.2d 812 (2d Cir. 1965).
59. 361 F.2d 153 (2d Cir. 1966), vacated on other grounds, 390 U.S. 204 (1968).
60. 451 F.2d 938 (2d Cir. 1971).
conceded there may have been a technical trespass by the agents. In that case IRS agents maintained surveillance of an apartment from inside a hallway door. The apartment hall door was meant to be kept locked, but there was testimony that the door was often open, and even when closed, its lock was broken and nearly any key could open it. Again noting that the agents' entry, although technically a trespass, was nevertheless peaceable, the court declined to extend the amendment's protection to the apartment hallway. In the Wilkes case federal narcotics agents entered an unlocked apartment building, walked down a common vestibule area, and arrested the defendant after the agents had overheard a male voice in an apartment shouting, "I don't sell bundles at a discount." The court, citing its previous decisions in Miguel and Conti, predictably refused to extend the protection of the fourth amendment to the common hallway.

Before the Sixth Circuit in Carriger, the Government argued that the Miguel, Conti, and Wilkes cases stood for the proposition that "where an officer's entry into the common areas of an apartment building is peaceable, there is no infringement upon the tenant's Fourth Amendment rights." The court, while believing that the Second Circuit's decisions should be given some weight, observed that only the Wilkes case had been decided after Katz v. United States, and chose to evaluate the Second Circuit decisions "in light of Katz and in light of the particular circumstances of this case." Applying its understanding of the principles set forth by the Supreme Court in Katz and McDonald, the court reversed Carriger's conviction.

The court recognized that the Supreme Court in Katz had refused to regard the "trespass" doctrine as "controlling," but reasoned that since, in its view, Katz was "intended to expand the protection afforded by the Fourth Amendment," trespassing was still "one form of intrusion by the Government that may violate a person's

63. Id.
64. United States v. Wilkes, 451 F.2d at 940.
65. Id. at 941, citing United States v. Conti, 361 F.2d 153, 156-57 (2d Cir. 1966); and United States v. Miguel, 340 F.2d 812, 813-14 (2d Cir.), cert. denied, 382 U.S. 859 (1965).
66. United States v. Carriger, 541 F.2d at 549.
67. Id.
68. Id.
reasonable expectation of privacy," and reliance upon property concepts, such as those utilized by the Fifth Circuit in *Fixel*, was still "helpful" in determining the extent of fourth amendment protections.

The court then reviewed several post-*Katz* decisions which had, in applying the test of "reasonable expectation of privacy," extended the protection of the fourth amendment in situations analogous to the one it faced in *Carriger*. In *United States v. Case*, a hallway which was generally kept locked and not open to the general public, was held by the Seventh Circuit Court of Appeals to be within the scope of the amendment's protection, even though federal agents had gained access to the corridor through the cooperation of the landlord. The Seventh Circuit also held that a defendant's fourth amendment rights were violated when agents entered a commercial building through a closed, but unlocked entrance door. The Louisiana Supreme Court, in *State v. Di Bartolo*, likewise held that fourth amendment protection extended to an apartment hallway when the agents illegally entered a locked building.

Further, the court reasoned that due to the manner in which the agents gained entry into the apartment building, the *Carriger* case was "different in degree but not in kind from *McDonald*. . . ." Justice Jackson, in his concurring opinion in *McDonald*, stated:

Doubtless a tenant's quarters in a rooming or apartment house are legally as well as practically exposed to lawful approach by a good many persons without his consent or control. Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. . . . If in this manner they, or any private citizen, saw a crime in the course of commission, an arrest would be permissible.

But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the

69. Id.
70. Id. at 550.
71. Id.
72. Id. at 552.
73. 435 F.2d 766 (7th Cir. 1970).
75. 276 So. 2d 291 (La. 1973).
76. Id. at 294.
77. 541 F.2d at 550 (citation omitted).
integrity and security of the entire building against unlawful breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal . . . Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me, followed every step of their journey inside the house and tainted its fruits with illegality.78

In view of Justice Jackson's comments, and the Katz decision, the Sixth Circuit determined that "[t]he officer's entry into this locked apartment building without permission and without a warrant of any kind was an illegal entry and violated appellant's Fourth Amendment rights."79 The court observed that "[a] tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers."80 Refusing to agree with the district court that McDonald could be distinguished on the basis that it prohibited only forcible entry into an apartment building, the court stated flatly:

Whether the officer entered forcibly through a landlady's window or by guile through a normally locked entrance door, there can be no difference in the tenant's subjective expectation of privacy, and no difference in the degree of privacy that the Fourth Amendment protects.81

The court concluded:

[When, as here, an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the common areas of the building must be suppressed.82

At oral argument the Government asserted that the agents' entry was authorized to effect Beasley's arrest because the agent had probable cause to believe that Beasley was violating federal narcotics laws. The Sixth Circuit summarily rejected the "fallback argument" of the Government.83 The court, believing that warrantless arrests "should be subjected to closer scrutiny than . . . arrests authorized by warrants,"84 stated that there "was only the agent's

78. 335 U.S. 451, 458-59 (1948) (Jackson, J., concurring).
79. 541 F.2d at 550.
80. Id. at 551 (footnote omitted).
81. Id.
82. Id. at 552.
83. Id.
84. Id. at 553; see, e.g., United States v. Squella-Avendano, 447 F.2d 575 (5th Cir.), cert.
speculation that a drug transaction was taking place in the build-
ing."\textsuperscript{85}

In any event, the court continued, even if there were probable
cause to arrest Beasley, his arrest could not be used as a pretext to
arrest Carriger and subsequently search his apartment.\textsuperscript{86}

The Sixth Circuit correctly applied the principles of \textit{Katz} in
\textit{Carriger}, and the result was a sound decision. Certainly it is reason-
able for a tenant of a locked apartment building to rely upon the
security which its locked doors seek to ensure, and this expectation
applies no less to invasions by law enforcement officers as it applies
to unlawful entry by criminals. Of course, if the authorities have
accumulated sufficient evidence to convince an impartial magis-
trate that there is probable cause to believe a crime is being commit-
ted in the building, they may apply for a warrant. A warrantless
entry could also be held reasonable if “exigent circumstances”\textsuperscript{87}
are present. In the \textit{Carriger} case, however, there were no exigent cir-
cumstances, and the officers lacked enough evidence to obtain a
warrant. The protections of the fourth amendment were properly
held to apply. As the Fifth Circuit stated in \textit{Fixel v. Wainwright},\textsuperscript{88}
“[c]ontemporary concepts of living such as multi-unit dwellings
must not dilute [the] right to privacy any more than is absolutely
required.”\textsuperscript{89}

Although the Sixth Circuit, in \textit{Carriger}, used property concepts
in determining the reasonableness of the defendant’s expectation of
privacy, it properly refused to employ them as a “talismanic” solu-
tion, and this is in accord with the views expressed by the Supreme
Court in \textit{Katz}.\textsuperscript{90}

Justice Brandeis, in his dissenting opinion in \textit{Olmstead}, stated
that “every unjustifiable intrusion by the Government upon the
privacy of the individual, whatever the means employed, must be

\textsuperscript{85} 541 F.2d at 552-53. The BNDD agent-in-charge admitted that the day prior to the raid
the Government did not have probable cause to arrest Carriger for any narcotics violations.
\textit{Id.} at 547.

\textsuperscript{86} \textit{Id.} at 554; see, \textit{e.g.}, United States v. Harris, 321 F.2d 739 (6th Cir. 1963) (an arrest
may not be used as a pretext for making a search of premises without a search warrant when
ordinarily one would be required under the fourth amendment).

\textsuperscript{87} \textit{RINGEL}, \textit{supra} note 12, \textsection 260-61.

\textsuperscript{88} 492 F.2d 480 (5th Cir. 1974).

\textsuperscript{89} \textit{Id.} at 484.

\textsuperscript{90} 389 U.S. at 351 n.9.
deemed a violation of the 4th Amendment."

Through its decision in Carriger, the Sixth Circuit has affirmed the sanctity of fourth amendment rights which Justice Brandeis recognized.

William J. Desmond

91. 277 U.S. at 478 (Brandeis, J., dissenting).
LIMITATION OF ACTIONS—SECURITIES EXCHANGE ACT—WHETHER THE STATUTE OF LIMITATIONS FOR COMMON LAW FRAUD OR THE BLUE SKY LIMITATION PERIOD SHOULD BE APPLIED IN A FEDERAL SECURITIES CLAIM IS DECIDED BY DETERMINING WHICH STATE CAUSE OF ACTION BEARS THE CLOSEST RESEMBLANCE TO THE FEDERAL CAUSE OF ACTION CREATED UNDER THE SECURITIES EXCHANGE ACT OF 1934 10(b) AND RULE 10b-5—IDS PROGRESSIVE FUND INC. v. FIRST OF MICHIGAN CORP., 553 F.2d 340 (6th Cir. 1976).

On October 31, 1974, plaintiffs, IDS Progressive Fund, Inc. and IDS New Dimension, Inc., filed a complaint seeking to represent a class of investors allegedly injured by their purchase of the common stock issued by Great Markwestern Packing Company (GMP). The complaint alleged that GMP had induced these purchases by a false and misleading prospectus prepared by defendant, First of Michigan Corporation. Arthur Young and Company was joined as a defendant since it was GMP's auditor and, in that capacity, either knew, or should have known, of the alleged fraud.

The defendants moved to dismiss the complaint, setting up the defense that the two-year statute of limitation under Michigan securities law had run. The United States District Court for the East-

---


   (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 states:

   (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.


ern District of Michigan denied the motion, ruling that the correct statute of limitations to be applied in an action for damages for violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 was the six-year Michigan statute of limitations applicable to actions for common law fraud. The United States Court of Appeals for the Sixth Circuit granted leave to appeal on the issue: "what is the applicable period of limitation in an action brought in Michigan alleging a claim under Section 10(b) of the Act of 1934 and Rule 10b-5?" The Sixth Circuit affirmed the decision of the District Court holding that the Michigan securities law "provides no private right of action comparable to that afforded by Rule 10b-5," and that Michigan's six-year statute of limitation applicable to common law fraud governing the action.

No federal statute of limitation is provided for civil actions brought under Section 10(b) and Rule 10b-5; therefore, "the law of limitations of the forum state is followed as in other cases of judicially applied remedies." This follows the well-settled rule of law "that state statutes of limitations govern the timeliness of federal causes of action unless Congress has specifically provided otherwise." The Sixth Circuit applied this rule in its 1967 decision, Charney v. Thomas. The fact situation in Charney was similar to the one in IDS Progressive. The plaintiffs in Charney claimed that the defendants had fraudulently misrepresented the financial condition of the corporation whose stock the plaintiffs had purchased. The district court granted the defendants' motion to dismiss the complaint on the ground that Michigan's Blue Sky law two-year

---

3. The permission to take the interlocutory appeal was based on 28 U.S.C. § 1292 (b) (1970).
4. 533 F.2d at 341.
5. Id. at 344.
7. UAW v. Hoosier Cardial Corp., 383 U.S. 696, 703-04 (1966); M'Cluny v. Silliman, 28 U.S. (3 Pet.) 415 (1830). In M'Cluny, the Court stated at 417 that "acts of limitations of the several States, where no special provision has been made by congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the state courts."
8. 372 F.2d 97 (6th Cir. 1967).
9. The Blue Sky Laws are broad remedial statutes having as their primary purpose the protection of the public from investing in fraudulent companies and from exploitation by unscrupulous salesmen. The law seeks to prevent fraud and deceit by requiring the Michigan Securities Commission to investigate business ventures and to determine whether sound
statute of limitations barred the plaintiffs' claim. The Sixth Circuit reversed, holding that the action was governed by the six-year period of limitations provided for in common law fraud actions in Michigan. In Charney the Sixth Circuit set forth the standard to be used in deciding which statute of limitation should be applied. Since the standard is to select the statute that best effectuates federal policy, the test to be used is to determine which local statute bears the closest resemblance to the federal statute involved. To apply this test a court must investigate the purpose behind the local statute, the elements and features it has in common with the federal securities law, the remedies it provides to defrauded purchasers and sellers, and the extent of scienter it requires.

The manner in which the courts apply the test is uniform; however, the application of the test produces different results. On one hand, some circuits have believed that the periods of limitation provided by the local Blue Sky Laws should be the periods of time within which the federal suits must be brought, theorizing that the federal cause of action is "essentially what might be termed as an 'implied federal blue-sky' type of statutory action." These same circuits also believe that the local Blue Sky Laws, like Rule 10b-5,
seek to protect the "uninformed, the ignorant, and the gullible." 17 On the other hand, the Sixth Circuit in applying the resemblance test, has consistently concluded that the local common law fraud statute of limitation best effectuates federal policy. 18 In Charney, for example, the court noted that the Michigan Blue Sky law contained no provisions similar to Section 10(b) and that the civil liability provision was not sufficiently analogous to Rule 10b-5 to permit application of the Blue Sky statute of limitations. 19 In a more recent case, Nickels v. Koehler Management Corp., 20 the Sixth Circuit affirmed the district court decision which had found a resemblance between the Ohio law of fraud and 10b-5. 21

Where the resemblance test is not expressly applied, the decisions favor the selection of the common law fraud statutes of limitation. For example, the Ninth 22 and Tenth 23 Circuits have relied upon the statute of limitations applicable to common law fraud actions, without resort to the resemblance test. The First 24 and Second Circuits 25 have also applied the statute of limitations applicable to common law fraud actions with little discussion of the local Blue Sky laws.

A factor which weighs heavily in the various circuits when they apply the resemblance test is the element of scienter. 26 Under Sec-

---

19. 372 F.2d at 100.
20. 541 F.2d 611 (6th Cir. 1976). The Nickels case dealt with a complaint filed by stockholders of defendant Koehler Management Corporation alleging that defendants held back information during a merger of the company. When the information came to light the value of the stock dropped drastically. The district court granted defendants motion to dismiss on grounds that the action was barred by the state Blue Sky statute of limitation. Plaintiffs appealed. The Court of Appeals reversed stating that "the four year period of limitation in Ohio Rev. Code 2305.09 should be adopted because it best effectuates the policies of the federal securities laws." Id. at 612.
21. Id.
26. For an in depth look at scienter, see Bucklo, Scintor and Rule 106-5, Nw. U.L. Rev. 562 (1972) [hereinafter cited as Bucklo]. The article states that scienter should be interpreted to mean knowledge of the facts, either actual or constructive. Constructive knowledge is found when one's lack of knowledge is the result of conduct which is sufficiently careless enough so that the law of knowledge is deemed inexcusable.
tion 10(b) and Rule 10b-5, the use of any manipulative, deceptive, or fraudulent device in contravention of the security laws is forbidden. The Sixth Circuit held in SEC v. Coffey\(^{27}\) that Section 10(b) and Rule 10b-5 impose liability for acts of fraud and deceit. Included in this definition of fraud and deceit are the common law requirements for scienter: the intent that the statement or conduct be misleading and the intent that it be conveyed to a specific person who then acts thereupon.\(^{28}\) The Supreme Court in Ernst & Ernst v. Hochfelder\(^{29}\) recently affirmed this position by holding that an action will not lie under Section 10(b) and Rule 10b-5 in the absence of scienter.\(^{30}\) In its analysis of Section 10(b) and Rule 10b-5, the Court questioned what Congress intended the standard of liability to be and concluded from the relevant portions of the legislative history of the Act of 1934 that some degree of scienter is required and that negligent conduct alone is insufficient.\(^{31}\)

In IDS Progressive the court applied the resemblance test, analyzed the scienter requirement, and concluded that the Michigan six-year statute of limitations, applicable to common law fraud, governed the action. The court did reconsider Charney in light of the newly adopted Uniform Securities Act of the State of Michigan.\(^{32}\) The new section, in substance, is virtually identical to the previously repealed section examined in Charney.\(^{33}\) The court in Charney had ruled that the civil liability section was not a suffi-

---

29. 425 U.S. 185, rehearing denied, 425 U.S. 986 (1976). Scienter was defined as the intent to deceive, manipulate, or defraud on the defendant's part. The Court held that mere negligence is not actionable. The result of this decision might have far reaching effects since several circuits (the Seventh in Parent and the Eighth in Vanderboom in particular) have ruled that 10b-5 actions, like the state Blue Sky laws, do not require proof of scienter.
30. Id. at 214.
31. Id. at 206-12. The Court noted that Thomas G. Corcoran, a spokesman for the drafters, indicated that the section of the securities law involved here was designed as a catch-all to prevent manipulative devices. The Court stated it would be difficult to believe that a lawyer, legislative draftsman, or legislator would use these words if the intent was to create liability for negligent acts or omissions.
33. Act of May 23, 1923, no. 220, § 16, 1923 Mich. Acts 352 (repealed 1965). Rule 10b-5 is more comprehensive than Section 410 since it applies to both sellers and buyers, while Section 410 limits liability to sellers. It is also noted that the Uniform Act does not require any intent to mislead nor actual knowledge of the falsity by the defendant. Uniform Securities Act § 410(a)(2).
ciently close analogue to Rule 10b-5.\textsuperscript{34} In *IDS Progressive* the court rejected the contention that it ought to apply the new Michigan Blue Sky limitation contained in the Uniform Securities Act, since to "change the applicable limitation period without good cause would add an unnecessary uncertainty to the prosecution of federal claims under Section 10(b)."\textsuperscript{35} Additionally, the court observed that "the broad remedial policies of the federal securities laws are best served by a longer, not a shorter statute of limitation."\textsuperscript{36} The purposes behind this decision were to promote stability and certainty in those laws that pertain to the voluntary relationships between parties and to preserve the parties' rights to go to court to settle disputes arising from these relationships.\textsuperscript{37} The court in *IDS Progressive* concluded that the Michigan securities law did not provide a private right of action comparable to that afforded by Section 10(b) and Rule 10b-5, so it reaffirmed *Charney*, holding that Michigan's six-year statute of limitation applicable to common law fraud governed the action.\textsuperscript{38}

The Sixth Circuit then logically concluded that the statute of limitations applicable to common law fraud should be applied.\textsuperscript{39} Also, the court concluded that the Uniform Securities Act, Civil Liability Section, did not sufficiently resemble rule 10b-5 to warrant an application to its limitation period.\textsuperscript{40} Finally, the court stated that the policy of the federal securities laws in protecting purchasers and sellers would be best effectuated by a longer, Rule 10b-5 statute of limitations which would allow the aggrieved plaintiff his day in court.\textsuperscript{41} This rationale is especially applicable today in light of *Ernst & Ernst*, since the longer time limit allows the party bringing the action additional time to prepare for the heavier burden of alleging and proving scienter.

The Sixth Circuit in *IDS Progressive* was urged to "consider implementation of a uniform federal statute of limitation based upon the express limitation periods governing other sections of the federal

\textsuperscript{34} 372 F.2d at 100.
\textsuperscript{35} 533 F.2d at 343.
\textsuperscript{36} Id. at 344, citing United Cal. Bank v. Salik, 481 F.2d 1012, 1015 (9th Cir. 1973).
\textsuperscript{37} Id. at 343. See also Douglass v. Glenn E. Hinton Inv., Inc., 440 F.2d 912 (9th Cir. 1971).
\textsuperscript{38} 533 F.2d at 344.
\textsuperscript{39} The Michigan statute based on common law fraud does require intent to deceive. See MICH. COMP. LAWS § 600.5813 (1968).
\textsuperscript{40} 533 F.2d at 343.
\textsuperscript{41} Id. at 344.
securities laws." However, the court fell back on the well-settled rule that state statutes of limitations govern the timeliness of federal causes of action unless Congress specifies otherwise. In the more recent case of *Nickels v. Koehler Management Corp.*, the court referred to *IDS Progressive* in declining to overrule its precedent of applying the state statute of limitations which best effectuates federal policy. The court indicated in dicta that a uniform federal period of limitation would prevent the anomaly of courts applying different limitation periods to plaintiffs who purchased or sold the same security but resided in different states, but it concluded that a "single circuit could not impose a pattern on the entire nation." The court also referred to the *Ernst & Ernst* case, which observed that "[s]ince no statute of limitation is provided ... under 10(b), the law of the forum state is followed as in other cases of judicially applied remedies."

The Sixth Circuit Court of Appeals decided that Michigan's six-year statute of limitations governed this action since it best effectuated the federal policy at issue. The court reasoned that it would avoid uncertainty and maintain uniformity in the circuit by not changing the applicable statute of limitations. The result is that all eleven circuits use basically the same test and criteria but reach different results. Because of the variations in state laws, the results within each circuit are not uniform. The Seventh Circuit is the best example of the wide variations of results within one circuit: Wisconsin requires an action be brought within one year from the date of discovery but no later than three years from the date of the wrong; Indiana requires an action to be brought within two years from the time of the wrong; and Illinois Blue Sky law provides that an action shall be brought within three years from the time of the wrong.

42. Id. at 342.
44. 541 F.2d 611 (6th Cir. 1976).
45. Id. at 614.
46. Id.
47. Id., citing Ernst & Ernst v. Hochtelder, 425 U.S. at 210 n.29.
51. Ill. Ann. Stat. ch. 121 1/2, § 137.13(D) (Smith-Hurd 1960). For a comprehensive list of
periods exist when the courts resort to those applicable to common law fraud actions.\textsuperscript{52} In light of \textit{Ernst \& Ernst}, more uniformity among and within the circuits is to be desired. If there is not, Congress should specifically set out a period of limitation for actions brought under Section 10(b) and Rule 10b-5.

JEFFREY K. HEINICHEN


\textsuperscript{52} Compare \textsc{ Ala. Code tit.} 7, § 42 (1960) (1 year) with \textsc{Tenn. Code Ann.} § 28-310 (1955) (10 year).
BOOK REVIEWS

RESEARCH IN MEDICAL LITERATURE AS TRIAL PREPARATION

by Wesley Gilmer, Jr.*

The Kentucky Court of Appeals, now the Kentucky Supreme Court, has adopted the 1953 Uniform Rules of Evidence standard making it easier to introduce portions of learned treatises into evidence. In a lawsuit where one of the issues of fact was whether a physician was negligent when he did not sterilize a patient's skin before giving her injections, expert testimony was introduced to support the claims of both sides. According to one witness, the physician's failure to treat the patient's skin before giving her the injections violated the standard of care. The defendant and other physicians gave opinions that contradicted that witness. Over the plaintiff's objections, a medical treatise was admitted into evidence during redirect examination of the defendant. The jury found the defendant not negligent and returned a verdict in his favor.

On appeal, the patient argued that the admission of the treatise as substantive evidence constituted reversible error. Earlier opinions of the Court supported the patient's contention. The Court reviewed modern trends in this area and said:

We now adopt the Uniform Rules of Evidence that publication by experts should be admitted in evidence to prove the truth of a matter stated therein if the judge takes judicial notice, or a witness expert in the subject testifies, that the treatise, periodical, or pamphlet is a reliable authority on the subject. Therefore the class of Travelers' Ins. Co. v. Davies* . . . , and Kentucky Public Service Co. v. Topmiller* . . . , and all other cases with holdings contrary to the view adopted herein, are now expressly overruled.*

* J.D., University of Cincinnati; M.S.L.S., University of Kentucky; Member, Ohio and Kentucky Bars.
4. 152 Ky. 600, 153 S.W. 956 (1913).
5. 204 Ky. 196, 263 S.W. 706 (1924).
6. 520 S.W.2d at 323. The court additionally stated: "Although we consider the ruling
A scientific book has traditionally been allowed in evidence for only the limited purpose of contradicting or impairing the credibility of an expert who based his opinion on that particular authority. Under the former rule, where a physician testifying as an expert referred to a medical author as supporting his view, the other party was permitted to cross-examine him as to what the author stated in order to lay a foundation for reading the authority to the jury so as to discredit the witness. If, upon inspecting the authority, the witness did not admit that the authority did not sustain his views, the authority could be read to the jury to prove that it did not. This rule has been materially expanded by the Kentucky court’s opinion.

Occasionally, appellate courts will consider medical literature when reaching their decisions, and cite it in their opinions. The submission, at times, of a medical trial brief, and the frequent compilation of copies of relevant medical text material as preparation for personal injury cases, is recommended by knowledgeable and experienced trial attorneys. Perhaps 80 percent of the litigated cases and administrative hearings in America involve medical issues. A trial lawyer in the United States, with few exceptions, must have medical-legal ability.

For these reasons, Kentucky lawyers should develop a familiarity with medical literature. Medical witnesses are, of course, indispensable in litigation which involves medical questions, but it is important also that the lawyer who handles the case have a solid understanding of the medical aspects of the lawsuit. If for no other reason, an advocate should be knowledgeable concerning the terms and determinations contained in the medical witnesses’ testimony.

A good beginning is a dependable medical dictionary. Among those which are of particular assistance to lawyers are: Blakiston’s Gould Medical Dictionary, Dorland’s Illustrated Medical

herein adopted as being prospective, it is our opinion that the statements in the pamphlet were cumulative of other expert opinion evidence in the case and therefore harmless.” Id.


Dictionary, and Stedman's Medical Dictionary. Lawyers who want a smaller version of a reliable medical dictionary for their briefcase, or other purposes, are likely to find Dorland's Pocket Medical Dictionary of value.

Once the particular branch of medicine relating to a lawyer's medical inquiry is determined, such as geriatrics, orthopedics, or surgery, he or she can use credible and authoritative medical textbooks to assist in obtaining a detailed understanding of the medical features of the lawsuit. Medical libraries, in part, consist of collections of textbooks and treatises cataloged and classified according to the various medical specialties. Pocket parts are seldom seen in medical books, however. Up-to-date developments in medical knowledge are either published in the medical periodicals called "journals," incorporated into revised editions of medical books, or incorporated into a relatively few looseleaf medical books.

Excerpta Medica is a device, similar to a law digest, for the analysis and discovery of medical periodical (journal) articles. It is not as frequently used as one might expect, however. Perhaps the quickest source of selected medical articles is the Abridged Index Medicus. Over the years, there have been various periodical indices which had the name Index Medicus. The modern unabridged Index Medicus was first published in 1960 and continues to today. In 1970, a condensed version, the Abridged Index Medicus, made its appearance in monthly advance parts. The advance parts are cumulated into an annual volume. Abridged Index Medicus indexes articles in 100 selected medical journals. The unabridged Index Medicus performs a similar function for approximately 2,200 medical journals. Potentially, 18,000 journals are relevant to medicine. It may be of interest to lawyers who frequently research in medical literature that the monthly advance parts and the annual cumulated volume of Abridged Index Medicus are relatively inexpensive subscriptions.

---

15. DORLAND'S POCKET MEDICAL DICTIONARY (21st ed. 1968).
16. EXCERPTA MEDICA (1947-date). This device is organized by medical specialities, e.g., Arthritis, Rheumatism, Physiology, and Surgery. This is published by the Excerpta Medica Foundation of Amsterdam, The Netherlands.
17. ABRIDGED INDEX MEDICUS (1970-date). This is published by the National Library of Medicine.
18. INDEX MEDICUS (1960-date). This is also published by the National Library of Medicine.
Once journal references are obtained from the Abridged Index Medicus, or any other of the various indexing devices that are published for medical journals, some of which are described below, it should be a relatively easy matter for resourceful lawyers to contact a medical library and obtain access to, or copies of, articles. Most articles in medical journals are relatively short, when compared to articles found in law reviews. For that reason, the cost of making copies of such articles will be relatively slight. Frequently, medical textbooks and journals are available at medical center libraries, medical schools, county medical societies, and dental schools. They are likely to be available at other locations such as law schools and public libraries. Few, if any, Kentucky lawyers should find copies of medical books or journals inaccessible.

There are special indices which can be utilized by a researcher who desires to exclude from his research materials for which he is unlikely to have a need. As an example, if the question which the attorney has concerns dentistry, he should probably research Dental Abstracts or Index to Dental Literature, rather than the general indices. As another example, he could seek references in Anesthesia Abstracts if the topic of his inquiry were anesthesiology. Abstracts of journal reports of suspected adverse reactions to drugs should be sought in Clinical Experience Abstracts. Also available are Psychological Abstracts and Psychiatry Digest. In addition to these finding devices, there are abstracting tools which will refer researchers of medical literature to earlier medical works.

Lawyers who are unfamiliar with this kind of research should consult one or more of the periodical articles which contain detailed information concerning the use of medical libraries and the selection of books for particular medical specialties. Each of the articles listed in the footnote is a bibliographic guide to medical literature. Some

19. Dental Abstracts (1956-date). This work is compiled by the American Dental Association.
20. Index to Dental Literature (1939-date).
22. Clinical Experience Abstracts (1963-date).
23. Psychological Abstracts (1927-date). This work is published by the American Psychological Association.
of them are addressed to lawyers and others are addressed to physicians and medical librarians. There are concrete lists of finding devices, textbooks, treatises, and medical periodicals with descriptive notes in the articles. Readers should be constantly aware, however, that revised editions and new medical books frequently become available, and any published bibliographic guide can quickly become at least partially outdated.


Reviewed by Gary W. Deeds*

F. Lee Bailey, in For the Defense, proceeds from where he left off in his previous book, The Defense Never Rests. In this sequel, he takes the reader through several of the more famous and not so famous cases that he has handled since the printing of his prior book.

Mr. Bailey begins with a very brief autobiographical sketch which also includes a gaudy description of his present residence. Complete with the usual swimming pool, the house also includes a helipad and some sort of fancy gadget that is able to pick up his helicopter and place it in the garage. Bailey points out the obvious advantages of commuting to the airport via helicopter instead of in a mere car, especially on snowy winter mornings.

The author indicates that his interest in the law was first kindled by reading a book written by Lloyd Paul Stryker, The Art of Advocacy. In many respects, he does not indicate the work and torture that one must endure to become a good criminal lawyer, not to mention the tremendous odds one faces as a neophyte lawyer. The book reserves only six lines for Mr. Bailey’s law school


* B.S., Ohio State University. Fourth year student, Salmon P. Chase College of Law.
experiences and then goes on to tell in some detail how he was able first to assist in and then practically to take over the successful defense of the well publicized "Torso Murder" case, even though he was just out of law school. He readily admits that the publicity generated launched his successful career. Unfortunately, very few beginning lawyers ever receive such a break, thus most of them spend the first few years of their practice struggling to make ends meet.

A large portion of the book is devoted to his defense of Captain Ernest Medina whom Mr. Bailey described as the "nicest guy he every obtained an acquittal for." The chapter on the Medina case provides an interesting and thoughtful comparison between the military system of justice and its civilian counterpart. Mr. Bailey points out the advantages that an Article 32 investigation has over its civilian counterpart, the grand jury. Whereas the grand jury is an all-prosecution show, Article 32 of the U.C.M.J. allows the defendant and his counsel to be present during the investigation, to cross-examine all witnesses and to put on proof.

As one would naturally expect, the Medina case is told from a rather slanted defense viewpoint. The successful defense theory is that Captain Medina did not order and was not aware that his men were killing unarmed civilians at My Lai. In building up to the actual trial, Mr. Bailey tells how Captain Medina and his two military defense lawyers, along with the prosecution team, were forced to travel all the way to Long Binh Post, Viet Nam, in order to take the depositions of two Vietnamese who were to be prosecution witnesses. The book points out that "almost to a man, the base supported Medina." This is probably an overstatement, but nonetheless it was obvious that the majority of the men and officers at Long Binh were behind Medina. What Mr. Bailey neglects to explain is why they were behind Captain Medina. In July, 1971, the troops stationed at Long Binh believed that Medina as well as Calley were being made scapegoats for the entire war. What Medina had allegedly done was believed to be no different than what many other American units had done, not to mention what the South Vietnamese and the Koreans had perpetrated. This feeling had nothing to

2. F. Bailey, For the Defense 125 (1975) [hereinafter cited as Bailey].
do with a belief in the Medina defense theory. It was more a feeling that this was war and to be expected. There was tangible evidence of this feeling at that time which was demonstrated by various “Free Calley” signs that had been painted on many of the enlisted barracks.5

After the Medina acquittal, Mr. Bailey describes how he got involved with Glenn Turner and then continues to describe several other interesting cases which he handled, including Billy Phillips, the corrupt cop who was accused of murder.

The last part of the book includes an extensive chapter on Mr. Bailey’s defense to his own criminal indictment. Glenn Turner, who hired Bailey to help straighten out his various legal entanglements, was indicted along with several of his cohorts for mail fraud. Unfortunately, the indictment also named Mr. Bailey as a co-conspirator. It took Mr. Bailey a year and a half from the start of the trial to get the case against him dismissed. The case lasted so long that it almost destroyed his law practice. Very little, if any, of the prosecution’s long case had anything to do with Mr. Bailey. Yet his motions for severance and speedy trial were vigorously opposed. It was this denial of a speedy trial that eventually led to a dismissal of the case against Mr. Bailey on appeal. The trial itself ended in a mistrial after Mr. Bailey’s case had finally been severed. The author’s description of his experiences demonstrates many of the shortcomings of our criminal justice system. It allows an innocent man to be subjected to possible financial destruction as well as emotional harm without giving him any meaningful redress. A possible, though costly solution, would be to have the state reimburse all acquitted defendants a percentage of their legal fees.

Mr. Bailey closes with an assessment of what he believes to be a legal profession suffering from a lack of competent trial lawyers. His solution is to require that potential trial lawyers undergo additional schooling in the art of trial practice. A far more practical and economical step would be an increased emphasis on trial practice in law school curricula.

The book is not intended to be, and therefore is not, what one would classify as a legal work. Yet, it is well written and can be recommended to both lawyers and laymen, not as a handbook, but simply as a book that one can enjoy during his leisure hours.

---

5. The writer of this book review was stationed at Long Binh Post in Vietnam when Captain Medina visited there in July, 1971.

 Reviewed by John Palmer*

Dr. David Fogel, former Commissioner of the Minnesota State Department of Corrections, and present Director of the Illinois Law Enforcement Commission, outlines his "justice model" to his audience in his latest book. In order to appreciate the thrust of the book, and Dr. Fogel's valuable contribution to the theoretical analysis of corrections and its future, the reader should realize that the author writes from a wealth of practical experience in academic, institutional, and political communities. Unfortunately, most literature on corrections is essentially academic; few books and articles have been published by scholars such as Dr. Fogel, who have been "on the firing line" and politically and legally responsible for the implementation of their policies. Although the "justice model" of Dr. Fogel is not entirely free from fault, "... We are the Living Proof ..." is a must on any reading list for a serious student of corrections.

The rapid and seemingly uncontrollable increase in serious crime throughout the United States in recent years has resulted in some serious evaluation as to the cause. One group claims that the lack of harsh treatment, the swift and certain punishment due the offender, encourages more crime. Under this theory retribution and long term isolation of the offender are the answers. Another faction finds that the problem lies with our system of parole. Parole boards, meting out indeterminate sentences and lacking administrative or judicial control, are viewed as the cause of the crime problem. One interesting phenomenon of recent criticism of corrections is that both the "left" and the "right" have joined in attacking the parole system, and they both advocate "flat time" sentencing, although for different reasons. Dr. Fogel attempts to find a middle road. Recognizing that certainty and predictability are essential to a rational system of crime control, Dr. Fogel stresses the critical importance of the fair treatment of the criminal offender through enlightened correctional management.

Chapter One, "Our Inglorious Prison Heritage," gives the reader, especially one not familiar with corrections, a broad historical

* B.A., Oberlin College; J.D., University of Michigan; Professor of Law, Capital University Law School.
perspective of the way convicted offenders have been used and abused. Reference's made to the most important historical works in the field.

Chapter Two, "On Guarding in Prisons" acquaints the reader with the plight of prison guards. They must be both custodian and rehabilitator, and the conflict between these roles is stressed. Indeed, an argument can be made that the only difference between an inmate and his guard is that the inmate serves a relatively short sentence, while the guard serves a life sentence, retirement as his only "parole." One may only speculate as to who is the more institutionalized, the inmate or the guard. Their dilemma is made more serious and visible by recent efforts of guards to unionize and exert pressure on prison management to institute change, real or imagined. The ramifications of guard, and possible inmate organization, are beyond the scope of Dr. Fogel's book. At least the pressures which encourage guards to organize are covered in depth.

Chapter Three, "From Patient to Plaintiff—From the Couch to the Bench," begins with an explanation of the "treatment" or rehabilitation model, and ends with a description of its judicial impact on corrections during the last decade. Many cases in the key areas of correctional law are cited as authority. However, this chapter has two serious shortcomings. First, many of the cases cited are from the 1960's—a period of correctional law that is in many respects ancient history. Most of the relevant decisions in correctional law reflecting current judicial thinking are past 1971. Few of these are cited. Second, cases which have been overruled, are cited as legal authority, not to show a judicial approach. For example, Theriault v. Carlson,¹ dealing with religion in prison, was reversed by the United States Court of Appeals for the Fifth Circuit. Careful research would have revealed that the "Church of the New Song," the subject matter of Theriault, was discussed in Remmers v. Brewer.² Similarly, Clutchette v. Procunier³ and Palmigiano v. Baxter⁴ have been reversed by the United States Supreme Court.⁵ The former cases were cited by Fogel as authority for requiring due process for an inmate who faces possible criminal prosecution for acts committed in

---

¹. 495 F.2d 390 (5th Cir. 1974).
². 494 F.2d 1277, 1278 (8th Cir. 1974).
³. 510 F.2d 613 (9th Cir. 1975), rev'd, 96 S. Ct. 1151 (1976).
prison. Admittedly, due to the time involved in the appellate process it is difficult to find "final" cases not in the process of being appealed, but the reader should be cautioned that the cases cited do not necessarily represent "the law" on the subject. Finally, undue emphasis is placed on the concurring opinion of Mr. Justice Marshall in *Procunier v. Martinez*, dealing with mail censorship. Unfortunately, many prison administrators do not understand the distinction between reading inmate mail, which they have the right to do, and the censorship, or suppression of mail, which they can do only under prescribed conditions. The section on "mail" does not clarify this distinction. Overall, however, this chapter is complete.

Chapter Four, "Pursuing Justice," proposes an elaborate model for prison administration. The author advocates the elimination of unnecessary discretion and the narrowing of necessary discretion in decision making, first articulated by Professor Kenneth Culp Davis of the University of Chicago Law School.

In Chapter Five, "Hope and Hang-Ups—The Immediate Future," Dr. Fogel explains his doubts about the model he has proposed. He talks about the residual offender, behavior modifiers, and the need for high visibility with the correctional administrator's constituency, the public, the legislature, and the prisoner. Openness is the main theme.

Extensive citations and quotations are made from leading authorities—one of the few shortcomings of the book. At times it is difficult to discern the views of Dr. Fogel from those of his primary authorities. Indeed, it takes some degree of effort to determine just what his "justice model" is. However, "...We are the Living Proof..." is an excellent book, professionally written. It should be read by every student of corrections.

UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA.

Reviewed by Leslie M. Crall*

Mr. Auerbach, a former law student who is now an historian, has written a provocative book which traces the growth of the legal

---

* B.A., University of Cincinnati: J.D., Salmon P. Chase College of Law: LL.M. Tulane University. Member, Schleuter, Crall, & Lukey, Cincinnati, Ohio.
profession in America. He criticizes the legal profession's failure to promote justice through social change. According to Mr. Auerbach, the organized bar lacks social conscience and therefore is unwilling and unable to act as an agent for change. He argues that members of the organized bar are socially and economically removed from most of society and thus do not serve the best interests of lawyers or society as a whole. This elitism, he argues, has been perpetuated by an outmoded system of legal education. Complicity among legal educators and practitioners has sharply limited the availability of legal services so that the persons who need the services the most have least access to them. Entry into the profession is restricted to those who are willing to promote these interests.

It is a matter of common knowledge that Blacks, Jews, native Americans, and women have, until very recently, been either excluded from law schools entirely, or admitted under a rigid quota system.¹ There are documented cases of individuals having been denied admission to the bar upon such irrelevant grounds as race² or the political beliefs they hold.³ Nearly every law student has questioned whether he or she is being educated for a profession or inducted into a social class. It is all too frequently true that lawyers shy away from representation of unpopular persons or groups and impose unsubtle sanctions upon those who dare to do so. However, Mr. Auerbach is not content to merely expose these problems; he searches out the causes and seeks potential cures.

One cause he suggests is the misperception by lawyers of their societal role. He argues that lawyers have persistently labored to insure that the image of the bar remains aristocratic, that its members are elitist, and that the causes which it serves are for those of the socially and economically favored class. He further suggests that the divisiveness which exists between legal educators and legal practitioners is overly exaggerated, and that each group has eagerly served the other nurturing the aristocratic myth.

The cures which he suggests are advertising, prepaid legal serv-

ices, minority recruitment, and the education of future lawyers as practitioners, rather than as theoreticians and scholars. He suggests that allowing lawyers to advertise would destroy the protective secrecy the profession depends on to make itself unavailable to the general public.

However, he ignores the fact that the practice of poverty law is less lucrative than the practice of business law. Furthermore, practicing with a law firm is more secure than the assumption of entrepreneurial risk by the fledgling practitioner. These established firms frequently practice more commercial law than poverty law. It is likewise true that lawyers who practice business law are likely to enjoy both status and esteem, whereas lawyers who practice criminal law will probably enjoy a modicum of esteem, but be accorded very little status. Lawyers who represent unpopular groups or causes are likely to enjoy neither, as status and esteem are awarded by the majority, not the oppressed minorities.

It is totally unreasonable to expect that the person who expends three or more years of time, and from ten to twenty thousand dollars obtaining a legal education, should voluntarily, knowingly, and freely take the path leading to social commitment and involvement, as opposed to the path leading to money, prestige, and public esteem. That is unless the person involved is exceptional, or unless there are other equally powerful inducements. Nevertheless, it is also inappropriate to condemn this so-called behavior merely because it is impractical.

Mr. Auerbach's book is thoughtful, timely, and well worth the reader's time and money. Whether one agrees or disagrees with his conclusions, the book is worthy of careful thought, as it is a useful starting point, from which every lawyer and law student may begin to reassess his or her perception of the lawyer's microcosmic and macrocosmic roles.