THE HUSTLER TRIAL: TWO OPINIONS ON THE USE OF COMPARATIVE EVIDENCE IN DETERMINING COMMUNITY STANDARDS IN OBSCENITY LITIGATION ............................. 195

THE PROSECUTION
Fred J. Cartolano .............................. 195

THE DEFENSE
Andrew B. Dennison .......................... 200

OFF-THE-AIR VIDEORECORDING, FACE-TO-FACE TEACHING, AND THE 1976 COPYRIGHT ACT
Roger D. Billings, Jr. ......................... 225

THE CONSUMER'S NEED FOR TITLE REGISTRATION.
Caryl A. Yzenbaard .......................... 253

THE TAX REFORM ACT OF 1976 — ITS IMPACT ON THE ROLE OF CHARITABLE CONTRIBUTIONS IN ESTATE PLANNING
G. Waldron Snyder .......................... 283

COMMENTS

THE CONSTITUTIONALITY OF MANDATORY PARENTAL CONSENT IN THE ABORTION DECISION OF A MINOR: BELLOTTI II IN PERSPECTIVE ...................... 323

RELEVANCY OF EVIDENCE OF PRIOR SEXUAL CONDUCT UNDER THE KENTUCKY REVISED STATUTE SECTION 510.145 345

NOTES


EVIDENCE — KENTUCKY RULES — BUSINESS RECORDS
EXCEPTION TO THE HEARSAY RULE — Buckler v. Commonwealth, 541 S.W.2d 935 (Ky. 1976). 407

BOOK REVIEWS

Supersonic Pussycats, Energy Ants, and Mabel
the Hip Black Magician — The Politics of Lying.
BY DAVID WISE 419

The Buffalo Creek Disaster. BY G. STERN 433
I. Introduction

On February 8, 1977 Hustler Magazine, Inc. and Larry Flynt were convicted in the common pleas court in Cincinnati, Ohio of pandering obscenity and engaging in organized crime. The trial and, more importantly, the legal issues centering around the first amendment stirred both local and national interest. Although the trial was brought to a resolution, the issues remain the subject of lively and important disagreement among scholars and nonscholars alike.

A singularly important aspect of obscenity law was emphasized during the Hustler trial—the use of comparative evidence in determining community standards under the Roth-Miller test.

Having followed the trial and its aftermath in the local media, members of the Law Review sensed the opportunity for a unique contribution to local legal literature. Both prosecution and defense were approached and asked to submit an analysis of the comparative evidence issue. Both agreed.

What follows, therefore, is not the scholar's treatment of an arcane aspect of first amendment law, but the views of the two combatants from the trial itself.

The Law Review believes that it is presenting a forum for the trial advocates to speak to the legal community beyond the courtroom and hopes that the result will be an improved discussion of important legal issues in general.

II. The Prosecution: Fred J. Cartolano*

On January 10, 1977, Hustler Magazine, Inc. and Larry Flynt, its owner and publisher, went to trial in Cincinnati, Ohio on charges of pandering obscenity and engaging in organized crime. Almost one month later, a jury found both guilty as charged. The basis of the prosecution against the defendants consisted of eleven publica-

* B.A., University of Cincinnati; J.D., University of Cincinnati. Mr. Cartolano is the First-Assistant Prosecutor for Hamilton County, Ohio.
2. Id. § 2923.04.
tions of Hustler magazine which had been distributed in Hamilton County, Ohio during the period of July 1, 1975 to May 20, 1976. This article addresses one of the major issues raised at that trial: whether, in an obscenity prosecution materials comparable to that which is the subject matter of the charge are admissible as evidence to establish contemporary community standards.

The fundamental rationale for prosecution in this field is that "obscene material is unprotected by the First Amendment." The criteria to be used in determining whether a given publication is obscene and thus constitutionally unprotected are as follows:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The prosecution in the Hustler trial introduced the eleven magazines and rested its case without calling an expert witness to bring them under any of the points of the three-pronged test for obscenity. The defense, on the other hand, based its case on the testimony of various expert witnesses who were permitted to give their opinions that: "[Hustler magazines] do not exceed the contemporary community standards of Hamilton County in terms of [being] patently offensive."; Taken as a whole, these magazines do not appeal to the average person's prurient interest.";

4. 413 U.S. at 24 (citations omitted).
5. In Kaplan v. California, 413 U.S. 115, rehearing denied, 414 U.S. 883 (1973) the Court stated: "We also reject... any constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity once the allegedly obscene material itself is placed in evidence." Id. at 121. See Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, rehearing denied, 414 U.S. 881 (1973).
7. Ray Whitman, M.D., id. at 10.
8. Wardell Pomeroy, Ph.D., id. at 14.
[Hustler] would not [appeal to the average person's prurient interest in sex]. They would appeal to the average person's healthy interest in sex." 

"Taken as a whole, Hustler does have serious literary value."

In addition, the defense attempted to introduce into evidence the second-class mailing privileges and copyrights for each of the eleven magazines. The court excluded this proffer, following the rationale in *Hamling v. United States*.

The defense then offered into evidence seventy-eight magazines which they claimed were similar and openly available on newsstands in Hamilton County, Ohio during the period covered by the indictment. It was the requested admission and subsequent exclusion of these items which gave rise to one of the central issues of the case.

The admissibility of "comparable" evidence to prove community acceptance depends upon two factors: the material offered for comparison must, in fact, be truly comparable; and the materials must be accepted and recognized in the community as not being patently offensive. This is a two-pronged test. The similarity of the proffered material must be determined by the judge at the time of offer. This is accomplished by a visual comparison of the publication at issue with that being offered. The trial court in the Hustler case examined the seventy-eight exhibits offered by the defendants before ruling them inadmissible.

10. Thomas LeClair, Ph.D., *id.* at 35.
11. 418 U.S. 87 (1974). "The mere fact that a publication has acquired a second-class mailing privilege does not therefore create any presumption that it is not obscene." *Id.* at 126.
13. The defense alleged that the admission of these magazines as comparable evidence was relevant for a determination of contemporary community standards. "The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce relevant, competent evidence bearing on the issues to be tried." *Hamling v. United States*, 418 U.S. at 125 (emphasis added).
The mere "availability of similar materials on the newsstands of
the community does not automatically make them admissible as
tending to prove the nonobscenity of the materials which the defen-
dant is charged with circulating." Public tolerance is not public
acceptance: Evidence of mere availability of similar materials is not by itself
sufficiently probative of community standards to be admissible in the
absence of proof that the material enjoys a reasonable degree of com-
munity acceptance. . . . Mere availability of similar material by itself means nothing more than that other persons are engaged in
similar activities.

The acceptability of proffered material is not established by the
fact that another jury in another place found accused not guilty of pandering the proffered material. Even assuming that some other
jury in another jurisdiction found the proffered material itself to be
not obscene, this fact alone does not establish contemporary accept-
ance in the local community.

The trial court determines the admissibility of evidence, weighing
the value of proffered evidence against its detrimental effect. This
determination is within the wide latitude of discretion entrusted to
the trial court. The Hustler court, in the exercise of this broad
discretionary power, ruled the seventy-eight magazines proffered
by the defendants to be inadmissible.

State ex rel. Leis v. William S. Barton Co., decided by the court
of appeals for Hamilton County, Ohio is often cited as authority for

15. United States v. Manarite, 448 F.2d 583, 593 (2d Cir.), cert. denied, 404 U.S. 947
(1971).
16. In Miller v. California, the Court stated:
It is neither realistic nor constitutionally sound to read the First Amendment as requir-
ing that the people of Maine or Mississippi accept public depiction of conduct found
tolerable in Las Vegas or New York City. . . . People in different States vary in their
tastes and attitudes, and this diversity is not to be strangled by the absolutism of
imposed uniformity.
413 U.S. at 32-33 (citations omitted).
17. The Court stated in Hamling v. United States: "A judicial determination that particu-
lar matters are not obscene does not necessarily make them relevant to the determination of
the obscenity of other materials, much less mandate their admission into evidence." 418 U.S.
at 126-27.
18. Hamling v. United States, 418 U.S. at 124-25. "Petitioners have very much the laboring
oar in showing that such rulings constitute reversible error, since 'in judicial trials, the whole
tendency is to leave rulings as to the illuminating relevance of testimony largely to the
discretion of the trial court that hears the evidence.'" Id. (citations omitted).
the admissibility of comparable material in obscenity trials. The *Barton* case was a civil action seeking the abatement of a nuisance involving the sale of obscene material. The trial court sat in equity, without the benefit of a jury, and refused "to permit the introduction into evidence of exhibits offered by defendants and arguably demonstrative of contemporary community standards, or of testimony with respect to prurient appeal; or to permit such exhibits to be marked for identification, or to be proffered into the record subsequent to their rejection as evidence." The trial court in *Barton* also refused to allow testimony of so-called expert witnesses and refused to even examine allegedly similar publications. The Hamilton County Court of Appeals held this to be a denial of due process, stating that

where a court, sitting as here, in equity without the benefit of a fact-finding jury and not required to empanel an advisory jury, would become the sole arbiter . . . of what is . . . obscene, and thereby deny to the defendant in the cause the opportunity required by due process of law to present evidence favorable to his position. Unlike *Barton*, the Hustler defendants were permitted to present expert witnesses and the trial court refused admission of the proffered magazines only after examining them.

The Supreme Court of the United States, in *Hamling v. United States*, stated:

The District Court, after examining the materials, refused to admit them into evidence on the grounds that "they tend to confuse the jury" and "would serve no probative value in comparison to the amount of confusion and deluge of material that could result therefrom." The Court of Appeals concluded that the District Court was correct in rejecting the proffered evidence, stating that any abuse of discretion in refusing to admit the materials themselves had been "cured by the District Court's offer to entertain expert testimony with respect to the elements to be shown for the advice of the jury." Here the District Court permitted four expert witnesses called by petitioners to testify extensively concerning the relevant community standards.

The roadway for admissibility of comparable material in an obscen-
ity trial is congested with many barriers. The defendant must show that the proffered material is indeed similar; that it is not only tolerated, but is accepted by the local community; that it is evidence of more than minimal probative value; and that it will not tend to confuse the jury. In short, it would seem that obscenity cannot be judged on a comparative basis.

III. The Defense: Andrew B. Dennison*

In obscenity litigation, the trier of fact is confronted with three independent constitutional standards which must be applied to the questioned publication to determine whether the material is obscene in the constitutional sense. The purpose of this article is to treat the subject of comparative evidence as indicative of the current state of sexual discourse in publications as it relates to one of the three constitutional standards: contemporary community standards. In considering the admissibility vel non of comparative evidence, it is necessary that one be aware of the bramble bush surrounding the law of obscenity.

Parenthetically, no distinction between criminal and civil obscenity litigation shall be made in this article for no distinction exists as to substantive law; only procedural law varies. In either criminal or civil trials, identical constitutional standards are applied. Furthermore, no distinction exists between the substantive law applied to determine obscenity vel non in state and federal prosecutions.

The bramble bush first took seed and was nurtured by the Court in Roth v. United States, which acknowledged that the issue of the


* B.A., Ohio State University; J.D., University of Cincinnati. Mr. Dennison is a member of the firm of Brown, Dennison, & Klayman and acted Of Counsel in the Hustler trial.
constitutional protection of obscenity was squarely presented to that Court for the first time. The Court, therefore, considered two issues of differing priorities within the decision: first, the constitutional question; second, a definition of the utterance being proscribed.

The Roth Court's determination that obscene expression was beyond the pale of constitutional protection was based upon a single premise: "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." The Court advanced four criteria in support of its position that obscenity was utterly without redeeming social importance and therefore not protected by the Constitution. First, through the dicta of past cases, the Court had always assumed that obscenity was not constitutionally protected. Second, the Court relied upon Beauharnais v. Illinois, excluding libelous utterances from constitutional protection, which, in turn, relied upon the dictum of Chaplinsky v. New Hampshire, pertaining to the assumed exclusion of obscene speech. Third, the Court emphasized a history of proscribed expression. During the period of constitutional ratification, the constitutions of ten of the fourteen ratifying states gave no absolute protection for all utterances. Thirteen of the fourteen states provided criminal statutes regulating libel, while blasphemy and profanity were regulated in all fourteen states. The Court observed that currently all states and the Congress prohibited the dissemination of obscene materials and that fifty nations have international agreements restraining distribution of obscene publications. Fourth, based upon that history, the Court opined that the "unconditional phrasing" of the first amendment was not intended to protect every utterance; rather, the protection intended was to "insure unfettered interchange of ideas" including expression having "even the slightest redeeming social importance."

5. Id. at 479-85.
6. Id. at 486-90.
7. Id. at 484.
8. Id. at 481, 485.
12. Id. at 482-83, 485.
13. Id. at 483-84.
ideas, controversial ideas, and ideas hateful to the prevailing climate were all entitled to full protection. Stripped of history, dicta, and statutory regulations, the Roth decision leads to the inescapable conclusion that the basis for constitutional protection vel non is founded upon the sharply drawn principle: utterances possessing a modicum of social importance are constitutionally protected; ideas utterly without redeeming social importance are rejected from that protection.

Having made the threshold determination that obscene matter is not constitutionally protected, the Roth Court was confronted with the problem of identifying the class of speech being proscribed. The Court made it clear that obscenity was limited to sexual speech by stating that sex and obscenity were not synonymous; that obscene material was matter which deals with sex in a manner appealing to the prurient interest. Recognizing the delicate balance being struck, the Court warns: "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." In its search for definition, the Court rejected the test of judging the publication by the effect of an isolated passage upon a particularly susceptible person as too restrictive of the freedoms of speech and press; and adopted the test generally employed by state and federal courts: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

The court further refined the standard for judging material obscene vel non by reference to Webster's Dictionary, the American Law Institute's tentative draft of § 207.10(2) of the Model Penal Code, and approval of the trial court's instruction in the Roth trial. Aside from itching, longing, and the like, "prurient interest" took on the meaning of a shameful or morbid interest in sex by the average person, assuming that the average person is capable of such a response. Contemporary community standards were recognized as

14. Id. at 484.
15. Id.
16. Id. at 487.
17. Id. at 488.
18. Id. at 488-89.
19. Id. at 489.
20. Id. at 487 n.20, 489-90.
going substantially beyond customary limits of candor in description or representation of sexual materials judged by the effect or impact of the publication upon the average person—not upon a particular segment of the community or particular class—and applying present-day standards to determine whether it offends the common conscience of the community as a whole through applying a mean to the extremes of conservatism and liberality.\textsuperscript{21}

The Court elaborated, to a point, the \textit{Roth} decision in \textit{Manual Enterprises, Inc. v. Day},\textsuperscript{22} a plurality opinion, by observing that the standard for judging the element of "indecency" in \textit{Roth} gave little guidance beyond indicating that the standard was a constitutional one, and in the face of the admitted obscenity of the \textit{Roth-Alberts} publications, the Court had no occasion to explore the application of a particular obscenity standard. The Court in \textit{Manual Enterprises} phrased substantial deviation from contemporary community standards as "patent offensiveness," setting "patent offensiveness" apart from "prurient appeal," and decided "the relevant 'community' in terms of whose standards of decency the issue must be judged."\textsuperscript{23} That relevant community for the application of a federal statute, the Court concluded, must be a national community, "reaching as it [the federal statute] does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds," in which a "lesser geographic framework" would have "the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing standards of decency."\textsuperscript{24}

In \textit{Jacobellis v. Ohio},\textsuperscript{25} again a plurality opinion, the Court rejected the application of local community standards and applied national standards in state litigation on the basis that protection is afforded by a national constitution in which a local community cannot properly delineate the area of expression protected by the federal Constitution, reaffirming "the position taken in \textit{Roth} to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard."\textsuperscript{26}

\textsuperscript{21} \textit{Id.}
\textsuperscript{22} 370 U.S. 478, 488-89 (1962).
\textsuperscript{23} \textit{Id.} at 487-88.
\textsuperscript{24} \textit{Id.} at 488.
\textsuperscript{25} 378 U.S. 184 (1964).
\textsuperscript{26} \textit{Id.} at 192-95.
The *Jacobellis* Court first enunciated the principle that the obscenity vel non of a given publication must ultimately be decided by the Supreme Court of the United States as a "constitutional judgment." This principle survived the major alteration of the law of obscenity by the Supreme Court in 1973-1974 by its reaffirmance in *Miller v. California*, and in *Jenkins v. Georgia*. First amendment values are adequately protected "by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," and the recognition that "juries have [no] unbridled discretion in determining what is 'patently offensive.'" The Court in *Jacobellis* further elaborated the Roth decision by recognizing that "the Roth standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matter.'" This is a significant proposition, for unless the expression substantially exceeds the customary limits of candor of sexual discourse there cannot be further judicial inquiry into the remaining two elements. The *Jacobellis* court harkened to the primary, threshold determination that the "recognition in Roth that obscenity is excluded from the constitutional protection only because it is 'utterly without redeeming social importance' permits sexual material "that has literary or scientific or artistic value or any other form of social importance" full constitutional importance." The "constitutional status" of the work cannot turn upon a "weighing" of its social importance against its prurient appeal, "for a work cannot be proscribed unless it is 'utterly' without social importance."

In *Memoirs v. Massachusetts*, albeit a plurality opinion, the Court announced the constitutional standard for judging materials obscene vel non to be the Roth standard "as elaborated in subsequent cases" which required the finding of the coalescence of three elements: "(a) the dominant theme of the material taken as a whole

27. *Id.* at 187-90.
33. *Id*.
34. *Id*.
appeals to the prurient interest in sex; (b) the material is patently offensive, because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value. The Court held that "[a] book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can be neither weighed against nor canceled by its prurient appeal or patent offensiveness."

The Miller Court categorized the Memoirs plurality decision as veering sharply away from the Roth concept on the basis that "while Roth presumed ‘obscenity’ to be ‘utterly without redeeming social importance,’ Memoirs required” affirmative proof of the element, calling upon the prosecution to prove a negative, a burden "virtually impossible to discharge under our criminal standard of proof." Nonetheless, approximately four years after Miller, the Court admits that Memoirs "constituted the holding of the Court and provided the governing standards. Indeed, every Court of Appeals that considered the question” read the case as the constitutional standard. "Memoirs therefore was the law."

Miller, and its companion cases decided June 21, 1973, did not "simply clarify Roth; it marked a significant departure from Memoirs." The Miller opinion refers to the evolution of the law of obscenity as "the somewhat tortured history of the Court’s obscenity decisions," describing itself as "a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called ‘the intractable obscenity problem.’" The Miller Court’s statement that Roth presumed obscenity to be utterly without redeeming social importance, however, simply cannot be squared with the rationale of the Roth decision. Protected expression is separated from obscene materials upon the constitutional principle that those

---

36. Id. at 418.
37. Id. at 419.
40. Id.
41. Id.
43. Id. at 21.
publications possessing a modicum of redeeming value are protected utterances and it is only that which is "utterly" without redeeming social value that is rejected from constitutional protection. The terms "presume" and "implicit" are simply not synonymous. The Court itself has been involved in the entanglement of the onerous semantics of this body of constitutional law which the Court, it is submitted, has thrust upon the juror and the litigant to make reason from this obtuse rhyme.

Miller, first, sharply breaks with the Roth-Memoirs formulation by striking the "utterly without redeeming social importance" element on the basis that proof of this element is virtually impossible, and in its stead imposes the "lacks serious value" test, a circumstance which permits some conduct protected under Roth-Memoirs to result in convictions under Miller. Second, the Miller Court formulates the "local" community concept, acknowledging that first amendment protection does not vary from community to community, on the basis that that constitutional protection does not require a fixed, uniform standard "of precisely what appeals to the 'prurient interest' or is 'patently offensive.'" The central reason presented by the Court for its change from "national" to "local" community standards is the conclusion that the Nation is too large and too diverse to abstractly articulate a single formulation for judging material patently offensive vel non. The Miller formulation consists of the following basic guidelines for the trier of fact: "(a) whether 'the average person, applying contemporary community standards would find that the work taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Uniform national standards were rejected as "hypothetical and unascertainable" by the Miller Court and although the state-wide community instruction is constitutionally approved in Miller, the
Court does not constitutionally require the substitution of some smaller geographical area “into the same sort of formula.” Centering the thrust of the community test at taste and attitudes, the Court directs the governing criteria to the community or vicinage: “People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.” The Court in Hamling asserts that “a juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination just as he is entitled to draw on his knowledge of the propensities of a ‘reasonable’ person in other areas of the law.”

This entitlement of the juror to draw upon his knowledge of the propensities of a “reasonable” person refers to the Miller statement: “The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law.” The Miller statement does not square with the cases cited to support that proposition. “Even though questions of ‘prurient interest’ or of patent offensiveness are ‘essentially questions of fact,’ it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is ‘patently offensive.’” Not only are jurors in obscenity prosecutions not the ultimate factfinders, but the Court interchanges civil tort principles with criminal and constitutional law principles: Hamling cites Stone v. New York, C & St. L. R. Co., a Federal Employer’s Liability Act case, in which the precise question was: “what a reasonable and prudent person would have done under the circumstances.” To the same effect, the Court cited Schulz v. Pennsylvania R. Co., a Jones Act case, where the Court discussed

52. Miller v. California, 413 U.S. at 33.
54. Miller v. California, 413 U.S. at 30 (emphasis added).
57. 344 U.S. 407 (1953).
58. Id. at 409.
the tort concept of what a reasonable, prudent person would have done under like circumstances. The issue in an obscenity case is not whether the distributor acted negligently in his conduct of dissemination, but whether the publication in issue is obscene vel non based upon the application of a tripartite test in a constitutional and criminal environment, in which one of these tests involves ascertainment of the current community standards and the application of those standards to the publication in issue to determine its deviance vel non.

In Jenkins the Court authorized instructions directing the jurors “to apply ‘community standards’ without specifying what ‘community’ is to be applied.” Hamling (albeit a federal case involving a geographic district) concludes that no precise geographic area is required for defining the area of the community and states that a District Judge would be at liberty “to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide.”

In Paris Adult Theatre I the Court held that it was not error to fail to require expert affirmative evidence that the materials were obscene when placed into evidence on the basis that “the films, obviously, are the best evidence of what they represent,” opining, however, that obscenity litigation is not a subject which lends itself to the traditional use of expert testimony, that no such assistance is needed by jurors in obscenity cases, and that the practices employed in obscenity trials utilizing expert witnesses “have often made mockery out of the otherwise sound concept of expert testimony,” concluding that “simply stated, hard core pornography . . . can and does speak for itself.” The difficulty, however, is that publication and audience do not always speak the same language.

The Court in Kaplan v. California, referring to the Miller and Paris Adult Theatre I decisions, again reinstates the position that there is no need for expert testimony on behalf of the prosecution

60. Id. at 525-26.
62. Id. at 106.
64. Id. at 56 n.6.
and expands the concept to include no need for any other ancillary evidence of obscenity, once the materials themselves are placed in evidence. Nonetheless, the Court adds the critical caveat of due process of law: "The defense should be free to introduce appropriate expert testimony," citing with approval the concurring opinion of Mr. Justice Frankfurter in Smith v. California.

It is with ambivalence that one views the element of "contemporary community standards": at once a plural, yet its features are indiscernible; an evolving standard permitting alteration "to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now." It is a standard without paragon shifting aimlessly upon a troubled sea of conjecture.

In addition to the materials thus far discussed, two other decisions of the Court require brief treatment. In Smith, the Court determined that knowledge of the contents and character of the publication possessed by the distributor was a necessary element to the proof of criminal dissemination of obscene materials. In Stanley v. Georgia, the Court held that the citizen possessed a perfect first amendment right to possess obscene material as a part of his home library. To add yet a final straw to break the back of the paradoxical camel, the free speech-free press provisions of the Constitution provide the unique circumstance in which the citizen is given the constitutional right to hear or see obscene discourse while the publisher of obscene expression is subjected to punishment and suppression. This perplexing area of constitutional law presents the classical enigma of granting the right to receive while simultaneously suppressing the right to transmit.

The bramble bush surrounding this area of constitutional law is now complete. The sharpest of its thorns is the inscrutable position of placing the chameleon on the blank, colorless canvas and posing to the beholder the empirical question, "what color is the chameleon?" without requiring the critic to take up brush and painter's palette to give meaning and color to the canvas, and so to

67. Id. at 121.
68. Id.
the chameleon, and permitting a panel of jurors to act as an oracle, possessed of pansophic and ubiquitous powers.

A juror is the finder of fact from facts presented to him and is ill-equipped, without assistance, to become the literary-psychological-sociologist to perceive the dominant theme of a publication, a prudential appeal, a literary value, an average person, a patent offensiveness, or a current standard of a vague community. Even the juror in a negligence case is given facts of conduct from which that conduct takes on shades of meaning juxtaposed against a rule reflecting conduct within a given situation.

The concurring opinion of Mr. Justice Frankfurter in Smith v. California, cited with approval in Kaplan, refers to the rationale supporting the due process concept that defendants be free in obscenity litigation to produce expert testimony and ancillary exhibits. "[T]he right of one charged with obscenity—a right implicit in the very nature of the legal concept of obscenity—[is] to enlighten the judgment of the tribunal, be it the jury or as in this case the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts." The reasoning of Mr. Justice Frankfurter is compelling and is the foundation block upon which the structure of expert testimony and ancillary evidence must be built.

Whether exclusion of such evidence is based upon irrelevance or incompetency is immaterial, "The two reasons coalesce, for community standards or the psychological or physiological consequences of questioned literature can as a matter of fact hardly be established except through experts. Therefore, to exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process."

The discussion by Mr. Justice Frankfurter makes clear that there is no erosion of the ultimate determination required by the trier of fact:

The determination of obscenity no doubt rests with judge or jury. Of course the testimony of experts would not displace judge or jury in determining the ultimate question whether the particular book is

73. 361 U.S. at 160.
74. Kaplan v. California, 413 U.S. at 121.
75. Smith v. California, 361 U.S. at 164-65 (Frankfurter, J., concurring).
76. Id. at 165.
obscene, any more than the testimony of experts relating to the state of the art in patent suits determines the patentability of a controverted device.\textsuperscript{77}

At this stage of his discussion, Mr. Justice Frankfurter unmasked the inherent problem attending all obscenity litigation, and especially the current state of the law permitting jurors to judge for themselves a publication without assistance upon a hackneyed expression that obscene materials can and do speak for themselves:

There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is "applying contemporary community standards" in determining what constitutes obscenity, \textit{Roth v. United States}, . . . it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge. It bears repetition that the determination of obscenity is for juror or judge not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards."\textsuperscript{78}

Mr. Justice Frankfurter concludes his point by noting that "there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859" and that "the difference . . . [is derived] from a shift in community feeling regarding what is deemed prurient \textit{vel non} by reason of the effect attributable to this or that particular writing: . . ."\textsuperscript{79} Justice Frankfurter added that "changes in the intellectual and moral climates of society, [are due,] in part, to views and findings of specialists . . . [and] [u]nless . . . [one can] disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case."\textsuperscript{80} Mr. Justice Frankfurter further refers the reader to the then recent debates in the House of Commons dealing with the insertion of a provision permitting ex-

\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 166.
\textsuperscript{80} Id.
pert testimony in the enactment of the English Obscene Publications Act, which provided "that the opinion of experts as to literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground," as well as the same draft provisions of the American Law Institute's Model Penal Code providing that in an obscenity prosecution evidence shall be admissible to show: "(a) the character of audience for which material was designed or directed; (b) . . . predominant appeal of the material . . . for ordinary adults or special audience, and effect, if any, on [their] behavior . . .; (c) artistic, literary, scientific, educational or other merits of the material; (d) the degree of public acceptance of the material in this country; (e) appeal to prurient interest, or absence thereof . . .; [and] [e]xpert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall be admissible."

The use of comparative evidence is discussed at length and under differing situations and circumstances in United States v. Womack. Two repeatedly used phrases sum up the opinion: (1) a trial judge is granted wide discretion in the admission or rejection of comparison evidence; (2) a correct foundation must be laid for the introduction of the comparable evidence. The categories of discussion in the opinion are: nonobscenity as a matter of law; proving contemporary community standards; and cross-examination of expert witnesses.

The essence of the discussion pertaining to "nonobscenity as a matter of law" is reception by the trial judge of the materials which are legally declared not to be obscene and if those protected materials equal or exceed "the evidence at issue, [then] a judgment of acquittal should [be] granted to the defendant." However, the court positions itself against the influence of such nonobscene materials on the jury on the basis that the jury cannot properly analyze such materials. The court concludes that such materials are pro-

---

81. Id. at 166 n.2.
82. MODEL PENAL CODE § 207.10 (Tent. Draft No. 6, 1957).
83. Smith v. California, 361 U.S. at 167 n.3.
84. 509 F.2d 368 (D.C. Cir. 1972), cert. denied, 422 U.S. 1022 (1975).
85. 509 F.2d at 376-82.
86. Id. at 374.
87. Id.
properly considered by the judge as bearing on the question of dismissal or permitting the matter to go to the jury for its consideration.\textsuperscript{88}

In the second proposition, captioned "proving contemporary community standards," concerning the use of comparison publications as an aid to the jury in determining prevailing community standards, the court, following previous cases, held that comparables were admissible providing a foundation was laid establishing that (1) the materials in issue and the publications being offered were similar, and (2) a showing of reasonable community acceptance of the offered materials was made.\textsuperscript{89} If the movant for admission fails to establish either or both of the foundation criterion, the "comparables" are excluded, with the trial judge having "wide discretion" in exercising judgment of this question.\textsuperscript{90}

These guidelines are equally applicable to the consideration of the use of comparison materials as a tool in cross-examination. The Womack court considers this a troublesome issue, but resolved its reservations upon the basis of "wide discretion" and the application of consistency of ruling by the trial judge.

Once the court has determined under the Womack guidelines that the probative value of the comparison evidence is insufficient to be material on the issue of community standards, it is equally within the judge's discretion, indeed almost incumbent upon him for reasons of consistency, to exclude the introduction of such evidence through the expert witnesses. A more difficult question is whether such materials are to be used for cross-examination purposes. It may indeed be helpful for the jury to know that the expert witness holds an opinion contrary to that of the Supreme Court. However, this is definitely a matter in which the trial judge is to be afforded wide discretion.\textsuperscript{91}

The discretionary principle present throughout the Womack discussion appears to be based upon the suggestion that "the admission of a number of different publications alleged to be comparable to the publication in issue might make the trial unmanageably complex and lengthy."\textsuperscript{92} A review of the state of the law of obscenity, however, establishes that the litigation of these complex issues is far from an exercise in simplicity if the matter is to be properly ex-

\textsuperscript{88} Id. at 375.
\textsuperscript{89} Id. at 376-77.
\textsuperscript{90} Id. at 376-79.
\textsuperscript{91} Id. at 380-81.
\textsuperscript{92} Id. at 378.
plored. The Womack court cites, among other cases, *Books, Inc. v. United States,*\(^93\) and *United States v. West Coast News Co.*,\(^94\) in support of its proposition of “wide discretion” to maintain a manageable trial.\(^95\) It would seem the better course of conduct, based on the history of *Books, Inc.* and *West Coast News*, to expand the trial to completely introspect the issue rather than compromising the trial for brevity only to accept the consequences of protracted appellate review resulting in the ultimate determination of nonobscenity. In short, the axiom haste makes waste may well apply.

The Womack court, in discussing the dual criteria to be applied as foundation for admissibility of comparables, pursues the subject differences depicted between the publications offered for comparison and the publications in issue as bearing upon the similarity element of the foundation test and the posture of community acceptance-tolerance as opposed to “mere availability” as bearing on the second portion of the foundation test.\(^96\) These distinctions are without a difference. The gambit employed is to compare “singles” to “duals,” “heterosexual” to “homosexual,” “nude” to “partially nude,” “male only” to “female only,” “adult couples” to “interracial couples,” and so forth as to the subject matter depicted.\(^97\) A caveat is necessary at this juncture: admissibility relevant to the issue of prevailing community standards is founded upon the similarity of “offered” and “in issue” publications, while the “as a matter of law” test involving a “legally declared not obscene” publication requires that material be equal to, or exceed, the “in issue” publication.\(^98\) The second distinction drawn by the court is that the movant, “in an effort to show a degree of community tolerance and acceptance for works like his own” must establish “a reasonable degree of community acceptance” rather than “a showing of ‘mere availability.’”\(^99\) The court observed: “Of course, a determination of the precise point at which a publication is so widely

---

93. 358 F.2d 935 (1st Cir. 1966), rev’d on other grounds, 388 U.S. 449 (1967).
94. 357 F.2d 855 (6th Cir. 1966), rev’d sub nom. on other grounds, 388 U.S. 447 (1967).
95. Both cases concerned themselves with permitting wide discretion by the trial judge to exclude comparison exhibits and maintain a manageable trial, but upon review by the Supreme Court the materials were found not to be obscene under the case of Redrup v. New York, 386 U.S. 767 (1967), and were reversed.
97. Id. at 378-79.
98. Id. at 374-76.
99. Id. at 379-80.
sold and is so generally available in the community as to warrant a
finding of community acceptance is difficult to fix with assurance
and a few cases have held in close cases it is error to exclude such
comparison materials."

Initially what is not considered, perhaps from the analogy that
one cannot see the forest for the trees, is that books and films in this
context, like most other things, require consideration of their com-
munity acceptance by the ordinary measure of acceptance in the
market place, in which, once the public stops supporting the book
or film through purchase of the object or the payment of an admis-
sion price to view it, it ceases to be. In short, the law of supply and
demand is important; where there is no demand there is no supply,
and availability supports the concept that a demand is present,
especially where the product has been present in the market place
for a significant period of time. This circumstance apparently
prompted Mr. Justice Stevens to remark: "However distasteful
these materials are to some of us, they are nevertheless a form of
communication and entertainment acceptable to a substantial seg-
ment of society; otherwise, they would have no value in the market-
place."

What is connoted in the phrase "community standards" is far
from explicit, but this much has been established over the painful
evolution of this legal subject: the watermark established is a cus-
tomary (the usual; established through use) limit, boundary of
frank, candid discussion or depiction of sex in all of its forms, real
and fantasy. (One would not suggest that Swift's Gulliver, Carroll's
Alice or Disney's cartoon characters have not achieved status or that
they ought be suppressed because they do not adequately depict
reality). Such watermark is the standard and if the material in issue
exceeds it, then it offends that standard. The inquiry, therefore,
must determine the current state of what is being said and what is
being photographed in publications concerning themselves with a
discussion of sex, without regard for the nature of the given publica-
tion, whether it be scientific text, photography magazine, novel,
sociological case histories, or "Playboy" magazine. At least, appli-
cation of the phrase "substantially exceeds customary limits of can-
dor in the description or representation of sexual matter" provides

100. Id. at 379.
101. Marks v. United States, 430 U.S. at 198 (Stevens, J., concurring in part, dissenting
in part).
some degree of appreciation, while "patently offensive" connotes material which obviously offends the viewer's tastes and attitudes pertaining to sexual discourse. The concept of "patently offensive" permits a significant degree of subjectivity to enter the consideration, employing ambiguous and vague terms to interrelate with environmental prejudices of the trier of fact, enhanced by the solemnity within which the issue is debated and coupled with the hypocritical acceptance of sex as a biological monstrosity. Sexual discussion is thus viewed as circumscribed by the locker room or bridge club and not afforded public disclosure, fashioned by concepts achieved by a language—word symbols—possessing such emotive terms as "lust," "impact," "indecency," "shame," "morbid," "conscience," "filth," which by the word itself a value is assigned, the validity of which the individual seldom bothers to question.

The protected candor with which the topic is presented may well be "revolting" and "disgusting"—emotive word symbols imposing a value—to one individual and not another, but neither term is permissible as a testing vehicle in either obscenity or political, protected speech as discussed in United States v. Klaw, where it was noted that such terms are "simply another application of the age-old double standard of the drawing room and the locker room."103

The difficulty with the rationale of Womack and cases cited therein is the implication, or perhaps assumption, that the factors involved within the "contemporary community standards" concept are precisely stated or known. Unfortunately the converse is true. What factors involve themselves within the plural element—"community standards"—has never been revealed in any decision of which this writer is aware, and certainly not revealed by any Supreme Court opinion. To consider relevancy one must juxtapose the offered evidence against a standard. The closest that one comes to a working standard is the standard previously suggested as "the customary limits of candor in the depiction and representation of sexual matter."104 If on one hand, no definite standard emerges, then all matters which touch upon and attempt to explain or reveal or afford understanding, thereby become relevant; while on the other hand, the presence of the suggested working standard would afford all publications relevancy as touching upon, revealing,

102. 350 F.2d 155 (2d Cir. 1965).
103. Id. at 166.
explaining, or affording understanding of what the current state of frankness is as presented by publications present in the community: in either event, all sexual theme publications are relevant. Perhaps this may lengthen the trial, but it affords the trier of fact the occasion to observe what is present in book stores and other retail outlets as publications within the community and to be aware of what books are present in addition to the publication in issue. In the absence of such exposure the litigated publication may be assumed by the jury to be unique.

It is critical to this discussion that perhaps the obvious should be stated. The question is admissibility, not weight. The trier of fact is free in our adversary system to disregard that which, within proper instruction of law, may be disregarded if the trier of fact finds it unworthy of consideration. Thus, the powers presented to judge or jury in an obscenity case are sufficient to permit that trier of fact to consider the publication in issue and comparables during its deliberation and resolve questions of fact, albeit questions of mixed fact and constitutional law. If the adage that obscene matter speaks for itself is correct, must not the axiom also hold true for comparables; otherwise, adversary becomes unilateral or ex parte, in practical application.

The point of a distinction without a difference in the use of comparable exhibits is simply this: all sexual theme publications necessarily bear upon and relate to the publication in issue in the quest to determine how candid is candid; all publications become relevant without query to similarity—all equate on the basis of common sexual theme similarity, some, perhaps, differing as to degree, but all discussing sex with various candor—and being present in the community must be considered.

The sole case in Ohio which considers directly the issue of comparison exhibits is the September 15, 1975, decision by the Court of Appeals for the First Appellate District of Ohio, Hamilton County, State ex rel. Leis v. William S. Barton Co. 1

The case supports this writer's position of the difficulties present in Womack. The issue pertinent to this point was described in Barton as follows: “whether the trial court's blanket exclusion of evidence as to 'contemporary community standards' and 'prurient appeal' was prejudicial error.” 2 As subsequently stated: “The second question

106. Id. at 251, 344 N.E.2d at 345.
of merit raised in this appeal relates to alleged error growing out of the refusal by the trial court to permit defendants to introduce evidence directed toward the various components of the Miller obscenity test." 107 From the backdrop of the issue formed, the court explicitly holds that both testimony and exhibits are admissible:

Accordingly, we are required to hold that it is error for a trial court to deny, or unreasonably curtail a defendant's right in an obscenity case to introduce into evidence otherwise competent and non-repetitive testimony and exhibits which directly relate to or bear upon the absence of any or all of the elements of the Miller obscenity test. 108

It bears repetition to paraphrase the holding once again: it is error to deny, or unreasonably curtail the introduction of competent exhibits which bear upon, or directly relate to any one or all of the constitutional standards to be applied in an obscenity case.

Briefly, the background from which the statement of the issue and the holding take color is the rationale of the court. In commencing the discussion the court quotes at length a statement of the trial judge, the general tenor of which is that counsel had challenged the trial court not to equate its taste for magazines for standards of others, from which the trial judge took issue of any charge of isolation from the realities of community life, considering itself "well-qualified to understand" community standards, noting that the book seller has no monopoly in the assessment of such standards, and concluded that such "standards are formed by countless influences," among which are the rules by which one chooses to live, the influences of family, home, job, church, school, library, organizations, and recreations. 109 The appellate court notes that the basis for the quoted statement of the trial court was his refusal "to permit the introduction into evidence of exhibits offered by defendants and arguably demonstrative of contemporary community standards, or of testimony with respect thereto or with respect to 'prurient appeal,' or to permit such exhibits to be marked for identification, or to be proffered into the record subsequent to their rejection as evidence." 110

Interrelating the statement by the court quoted above with its

107. Id. at 260, 344 N.E.2d at 350.
108. Id. at 263, 344 N.E.2d at 351 (emphasis added).
109. Id. at 260-61, 344 N.E.2d at 350.
110. Id. (emphasis added).
explicit holding, *a fortiori* comparison magazine exhibits which are competent and non-repetitive and which directly relate to, or bear upon, any element, or all elements, of the constitutional standard employed for a determination of obscenity *vel non* are admissible in the trial of an obscenity case.

The court supports its rationale by relying upon Mr. Justice Frankfurter's concurring opinion in *Smith v. California*,\textsuperscript{111} observing that the State's position that its relief from an affirmative burden to offer expert testimony or ancillary exhibits beyond the materials themselves, once in evidence, as authorized by *Paris Adult Theatre I*,\textsuperscript{112} cannot be extended, as the State argues, to bar the introduction of defense expert testimony and exhibits in the face of *Kaplan*\textsuperscript{113} and *Smith*.\textsuperscript{114}

It is assumed that there will be those who will attempt to distinguish *Barton* on the basis of criminal-civil distinction, based upon the court's comments that to hold otherwise would permit a situation where a judge "without benefit of a fact-finding jury . . . would become the sole arbiter unassisted by and uninstructed through the testimony of competent witnesses, of those community standards which are essential to the definition of what is, or is not, prurient and patently offensive . . . and thereby deny to the defendant in the cause the opportunity required by due process of law to present evidence favorable to his position."\textsuperscript{115}

The fallaciousness of such argument becomes readily apparent by review of several factors previously discussed in this article. First, there is no distinction between criminal and civil litigation in the standards applied for judging obscenity *vel non*.\textsuperscript{116} Second, the authorities supporting the *Barton* civil case are all criminal cases, with the lone exception of *Paris Adult Theatre I*.\textsuperscript{117} Third, criminal cases require a more diligent consideration of the due process concept than required for civil proceedings. Fourth, judge or jury, whichever is the fact finder, become the sole arbiter, granted that in one there

\textsuperscript{111} 361 U.S. 147, 160 (1959).
\textsuperscript{112} 413 U.S. 49 (1973).
\textsuperscript{113} 413 U.S. 115 (1973).
\textsuperscript{114} *State ex rel. Leis v. William S. Barton Co.*, 45 Ohio App. 2d at 260-62, 344 N.E.2d at 350-51.
\textsuperscript{115} *Id.* at 263, 344 N.E.2d at 351.
\textsuperscript{116} *See note 2 supra.*
\textsuperscript{117} *State ex rel. Leis v. William S. Barton Co.*, 45 Ohio App. 2d at 260-62, 344 N.E.2d at 350-51.
is a single individual, while in the other there are twelve individuals, but, in either event, a common resolve of the question is reached. Fifth, the arbiter, judge or jury, is equally benefited by the assistance and instruction of expert testimony and exhibits pertaining to the community standards element. Sixth, the opinion is founded upon the rationale of Mr. Justice Frankfurter who carefully states his reasoning in the unison phrase of “judge or jury,” time and again in the course of his discussion.118

To complete the picture, Barton on its remand to the trial court was dismissed.119

In the course of its discussion and cases cited and quoted therein, the Womack court suggests that the presence of expert testimony compensates, or replaces the need for comparison evidence.120 But, like the Trojan horse, the “gift” of expert testimony as compensation for the absence of comparables is the “gift” to permit the invasion of Troy for the expert is precluded from commenting “on matters already deemed immaterial [comparison publications] to the issue at hand.”121 Expert testimony absent comparison materials severely limits the inquiry into the prevailing state of sexual discourse present in publications possessing a sexual theme.

The evidentiary environment imposed for obscenity litigation as constructed from the Court’s position in Paris Adult Theatre I (“the films, obviously, are the best evidence of what they represent”)122 and Kaplan, the general tenor of which is that jurors need no assistance in obscenity cases by way of expert testimony or for any other ancillary evidence of obscenity once the materials themselves are placed in evidence123 assumes the presence of an “external measuring rod for obscenity” and permits, for all practical purposes, the “ascertainment [of obscenity on] a merely subjective reflection of the taste or moral outlook of the individual jurors or individual judges... [in which under such circumstances the interpretation of community standards is dependent] solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge... on the basis of his personal

121. Id. at 380 n.37.
122. Paris Adult Theatre I v. Slaton, 413 U.S. at 56.
123. Kaplan v. California, 413 U.S. at 121.
upbringing or restricted reflection or particular experience of life."\textsuperscript{124} Thus, it is submitted, that such "[v]ague standards . . . encourage erratic administration whether the censor be administrative or judicial; 'individual impressions become the yardstick of action, and result in regulation in accordance with the beliefs of the individual censor rather than regulation by law'."\textsuperscript{125} In short, the trier of fact is left to speculate: it is "invited to behold the accused material and, in effect, conclude simply that it is undesirable, it is distasteful, it is disgusting."\textsuperscript{126}

Implicit within the "patent offensive" concept, as essentially a question of fact, is fact, not conclusions of shame, undesirability, repulsion, distaste, revulsion, or disgust. The fact with which one must be concerned in the first instance is the ascertainment of a standard from which the materials claimed to be obscene can be judged with understanding and application of the aspirations of due process in the course of attempting to attain the theme of justice. Is it not true that the only relevant consideration in this legal process is the "right implicit in the very nature of the legal concept of obscenity—to enlighten the judgment of the tribunal, . . . regarding the prevailing literary and moral community standards. . . ."\textsuperscript{127} This is especially so,"[s]ince the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, . . . it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are."\textsuperscript{128}

The introspection of the heart of the customary limit of candor is best expressed by the candor with which sex is currently being discussed in publications. The best example of the manner in which one may be enlightened concerning what is the prevailing limit, whether one likes or dislikes the result, is to go to the several bookstores and theatres within the community and view for oneself what is being presented and how it is being discussed.

The jury venire is generally composed of individuals who seldom read novels or attend motion picture theatres. The few members of the venire who have read or viewed publications dealing with a

\textsuperscript{124} Smith v. California, 361 U.S. at 165 (Frankfurter, J., concurring).
\textsuperscript{125} Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 685 (1968).
\textsuperscript{126} United States v. Klaw, 350 F.2d at 167.
\textsuperscript{127} Smith v. California, 361 U.S. at 164-65.
\textsuperscript{128} Id. at 165.
sexual theme are removed from the jury by the State's preemptory challenges. The jury thus established has no knowledge of the degree of frankness with which sex is discussed in publications widely distributed and has no awareness of the current state of sexual candor present in magazine, book and film. It is a naive jury that must find the contemporary community standard and thereafter determine whether the subject publication substantially exceeds that standard.

A jury so constituted, or even a fairly sophisticated jury, would be benefited by "shedding some light," presenting an "external measuring rod," through exhibiting to the juror what in fact is present and being discussed in publications possessing a sexual theme. That method is certainly no secret; it is the presentation of publications possessing sexual themes so that the juror can judge for himself just what frankness and how candid sex is being presented in publications through what is known as "comparable."

It is pertinent to such exploration that one be advised of the circulation and longevity of the "suspect" publication and receive identical information concerning comparison publications so that, indeed, comparison can be made and insight furnished in the quest to achieve a prevailing standard and weigh the subject publication against that created standard to ascertain any deviancy of the questioned publication. This is not an impossible, nor a trial-elongating, process. In experience, it is rather simple.

Magazines, films and books don't simply appear in the community like spontaneous combustion, though there are those who would end the matter promptly with resort to the torch. Publications follow a path from publisher to recipient, known as the course of distribution. For purposes of the "local" community, there is a "local" distributor who receives publications from a regional distributor, who in turn has received those publications from a national distributor, and the "local" distributor keeps records of the number and titles of publications distributed to numerous "local" retail sellers, who in turn either disseminate the publication to the public or return unsold copies to the distributor. These records then present the fact of circulation and magazine against magazine can be compared, one against the other, as to circulation numbers which reflect the degree of acceptance.

While the example given above reflects books and magazines, movies are no different. The motion picture "local" distributor has similar information pertaining to length of run, box office receipts
(most pictures are distributed on a percentage of box office plus rental fee basis), and number of theatres “playing” the “suspect” film as well as comparison films.

Other ancillary matters, one of which was discussed in Jenkins\textsuperscript{129} is the critical review and resort to trade publications such as “Variety,” which will inform one, including potential exhibitors, of the box office draw of the top twenty motion picture films on a weekly basis, as well as the longevity of the film within the top twenty category and the total box office draw, and which strangely enough, supports a position that such controversial films as “Deep Throat” and “Devil in Miss Jones” spend a lot of time in the top twenty and produced significant revenue. Jenkins, without so stating, afforded a substantial portion of its discussion to the critical review of the film “Carnal Knowledge,” inferring that such matters were important in the consideration of the affixing of standard and consideration of proclaimed deviancy.\textsuperscript{130}

Magazines, films, and books have their counterparts, each possessing generally subtle copying of format, as is evidenced by “Playboy” and its imitators, “Penthouse,” “Oui,” “Playgirl,” and “Hustler,” in which all vary minimally from “Playboy” but are substantially similar. This provides a close similarity where if one of the group is selected for litigation, the other provides comparisons, not only in candor, but in circulation and longevity, all of which is provable and significant to the issue to be resolved.

The point that has been pressed throughout is the matter of admission, not the matter of weight, and if the jury wishes to conclude, after proper instruction, that no weight shall be given to such facts then that is within the discretion of the fact-finder as, of course, it always has been.

Obscenity litigation involves “an exceptional enclave” to the otherwise “broad freedom of expression so preferentially protected by the First Amendment.”\textsuperscript{131} As such, it has been an area of law much troubled, as reflected by the discussion presented earlier in this article and as adequately discussed in United States v. Klaw.\textsuperscript{132}

Priority must be given to the utilization of comparative and ancil-

\textsuperscript{129} Jenkins v. Georgia, 418 U.S. at 158-59.
\textsuperscript{130} Id.
\textsuperscript{131} United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); United States v. Klaw, 350 F.2d at 163.
\textsuperscript{132} 350 F.2d 155 (2d Cir. 1965).
lary materials, burdensome or not, for "It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for materials which" are not obscene.\textsuperscript{133}

It has been asked that comment be directed to a recent obscenity trial involving a national publication which ranks tenth of all publications circulated in the Nation. This matter is on appeal and questions concerning the introduction of ancillary evidence and comparison materials refused admission are best left to appellate review.

This much may be noted, however. Being an Ohio case, \textit{stare decisis} of the \textit{Barton} case would be controlling and in considering the issues of denying testimony concerning circulation of other magazines distributed by the distributor of the litigated publication and refusing to admit comparables proffered as being similar and reflecting upon the prevailing state of candor in such publications, may be considered on appeal to be reversible error as denying, or unreasonably curtailing, the right in an obscenity case to introduce into evidence testimony and exhibits which directly relate to or bear upon the absence of a deviation from contemporary community standards as held by the \textit{Barton} case.\textsuperscript{134} However, the answer to the issue must await that appellate review. The position of this writer as presented within the course of this article is that all materials which possess information on the construction of the applicable standard are admissible as relevant on that issue and thereafter it becomes the function of the trier of fact to give what weight is permissible under an appropriate instruction to the comparables and ancillary evidence and find fact from the evidence before the tribunal, rather than resort to the tastes and attitudes of the individual arbiter.

\textsuperscript{133} Roth v. United States, 354 U.S. at 488.

\textsuperscript{134} State ex rel. Leis v. William S. Barton Co., 45 Ohio App. 2d at 263, 344 N.E.2d at 351.
OFF-THE-AIR VIDEORECORDING, FACE-TO-FACE TEACHING, AND THE 1976 COPYRIGHT ACT

Roger D. Billings, Jr.*

I. INTRODUCTION

With the advent of new technology, copyright owners have been worried that schools and universities have gained access to audiovisual materials without payment or clearance. A recent incident justifies their concern. The Salt Lake City District School taped ten Walt Disney motion pictures off-the-air without payment or clearance. They kept the tapes in their library and allowed them to be aired publicly over their school television system. After Walt Disney Productions put them on formal notice, the school district agreed to stop any activities which would infringe Disney copyrights. They agreed to erase any tapes containing the copyrighted works and not to tape Disney's copyrighted motion pictures in the future.¹

The problem of marketing audiovisual materials to non-profit educational institutions will be discussed in this article. The problem is acute because the Copyright Act of 1976 deals only incompletely with it while the legislative history discusses it at length.² This article will examine the deficiencies of the new Act and suggest interpretations of it. Instructors acquired both performance rights and copying rights under the Act. Both rights are circumscribed; the performance right rather carefully, the copying right rather confusingly. The two rights will be discussed separately and the owners' licensing of these rights will be analyzed. A discussion of legislative history is needed to an unwarranted degree to flesh out the brief statutory treatment of audiovisual materials in education; however, there is cause to recommend disregarding the history in some cases.

* A.B., Wabash College; J.D., University of Akron, Associate Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.


2. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C.A. § 101 (1977)). This law was signed by the President on October 19, 1976, and generally became effective on January 1, 1978. Its legislative history is as follows: HOUSE CONFERENCE COMM., 94TH CONG., 2D SESS., REPORT ON COPYRIGHT LAW REVISION, H.R. REP. No. 94-1733 (1976); HOUSE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., REPORT ON COPYRIGHT LAW REVISION, H.R. REP. No. 94-1476 (1976) [hereinafter cited as HOUSE REPORT]; 122 CONG. REC. 10872 (1976); SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., REPORT ON COPYRIGHT LAW REVISION, SEN. REP. No. 94-473 (1975) [hereinafter cited as SENATE REPORT].
II. THE FIRST RULE: ALMOST ANYTHING GOES IN FACE-TO-FACE TEACHING

The 1976 Act has made the classroom an almost inviolable sanctuary for using copyrighted materials. Section 110(1) allows performance or display of any copyrighted work,3 elaborating on Sections 1(c) and 1(e) of the 1909 Act. These sections gave exemptions from infringement liability to persons who performed nondramatic literary works or musical compositions in public and not for profit.4

Under the 1909 Act, it was generally assumed educators qualified for the "not for profit" exemption. The exemption appeared to allow them to perform, by reading aloud, books, periodicals, scripts prepared for oral delivery and, some believed, choreography and documentary motion pictures. In addition, they could perform music in class either live or as recorded.5 Finally, included in this laundry list of works available to educators under the 1909 Act were items traditionally displayed in classrooms without question such as maps, works of art, and technical drawings.6

Even if educators paid any attention to the "for profit" exceptions in the 1909 Act, they were sure to be confused by the limiting term, "nondramatic literary work." For decades they had been performing dramatic works in the form of motion pictures with seeming impunity. This was because then, as now, most films are only available by lease from an authorized distributor.7 Permission to perform the

3. Section 110(1) reads, in its entirety, as follows:

Limitations on exclusive rights: Exemption of certain performances and displays
Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made . . . .

7. See generally Nevins, Copyright, Property and the Film Collector, 29 RUTGERS L. REV. 2 (1975).
films for students was given in the lease, not in the statute.

Under the 1976 Act there is a welcome clearing of the air. Not only may all motion pictures be performed in the classroom of nonprofit educational institutions but all other dramatic works may as well. It is clear in the broad definition of the word "perform" in Section 101 that performance may be live or by mechanical means:

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

Unfortunately, the only other terms used in Section 110(1) which are defined in Section 101 are "audiovisual works," "copies," "display," and "motion pictures." It is curious that terms relating to education are left undefined in the Act. Instead, their definitions are unsatisfactorily discussed in the House and Senate Committee Reports and in the Conference Report. There is an open invitation in the House Report for the parties themselves to develop guidelines for off-the-air taping for nonprofit classroom use, but only as a means of clarification of the requirement that all copies used in teaching be lawfully made.9 Such guidelines should also address the scope of the performance exemption and the missing definitions.

It is axiomatic that courts are bound only by definitions contained in the Act. The eminent authority on statutory interpretation, Professor Reed Dickerson, has stated concerning legislative history: "For legislatures, it would be a wise course never to create legislative history merely for the purpose of helping courts interpret or apply statutes."10 Had the drafters of the Act been more generous with


9. House Report, supra note 2, at 71-72. The Committee statement reads:

   The problem of off-the-air taping for nonprofit classroom use of copyrighted audiovisual works incorporated in radio and television broadcasts has proved to be difficult to resolve. The committee believes that a fair use doctrine has some limited application in this area, but it appears that the development of detailed guidelines will require a more thorough exploration than has so far been possible of the needs and problems of a number of different interests affected, and of the various legal problems presented. Nothing in section 107 or elsewhere in the bill is intended to change or prejudge the law on the point. On the other hand, the Committee is sensitive to the importance of the problem, and urges the representatives of the various interests, if possible under the leadership of the Register of Copyrights, to continue their discussions actively and in a constructive spirit. If it would be helpful to a solution, the Committee is receptive to undertaking further consideration of the problem in a future Congress.

Id.

10. R. Dickerson, The Interpretation and Application of Statutes 195 (1975). Professor
definitions, their work would have been more complete. To illustrate the pitfalls in relying on legislative history for definitions, one may puzzle over a subtle difference in the Senate and House Reports in which they describe works which may be performed in class.

The Senate Report says that "a teacher or student would be free to perform or display anything in class as long as the other conditions of the clause are met. He could read aloud from copyrighted text material, act out a drama, play or sing a musical work . . . ."\(^{11}\) That Report was published November 20, 1975. The House Report, published on September 3, 1976, states that "teachers or students would be free to perform or display anything in class as long as the other conditions of classrooms teaching are met. They could read aloud from copyrighted text material, act out a drama, play or sing a musical work . . . ."\(^{12}\)Was the change to the plural accidental and casual, or was it a clarification that envisioned ensemble performances in class? The latter interpretation is more probably the correct one. Analysis of the undefined terms is necessary.

III. The Misplaced Definitions for Section 110(1)

Restrictions on use of lawfully made copies in teaching seem disarmingly simple. Even a heretofore off-limits Broadway play or musical written solely for entertainment might be used by teachers if but four tests are met. The performance or display of the work must be (1) by instructors or pupils, (2) in the course of face-to-face teaching activities, (3) of a nonprofit educational institution, and (4) in a classroom or similar place devoted to instruction.\(^{13}\)

Where only a one-room schoolhouse is concerned, these tests are sufficient to guide educators. The single "instructor" with one

---

Dickerson goes on to say:

The more realistic approach to legislative history would be to end or severely limit its judicial use. Aside from eliminating the wholly useless at its source, the most effective way to restrict use is through professional persuasion rather than fiat (even English judges have privately confessed to taking an occasional, surreptitious look at legislative history). So long as they are needed for other purposes, records of committee hearings and house debates should not be eliminated. However, because they are highly unreliable as a basis for inferring legislative intent, a court should refuse to consult them either for the purposes of cognition or for those of judicial lawmaking. Even for confirming results reached by legitimate means, they have little value.

\(^{11}\) Senate Report, supra note 2, at 73 (emphasis added).

\(^{12}\) House Report, supra note 2, at 81 (emphasis added).

“classroom” would have no alternative to “face-to-face teaching” of “pupils.” But the tests fail for lack of clarity when the one-room schoolhouse gives way to multiple classrooms on campuses with several buildings where many activities in addition to face-to-face teaching are carried out. These classrooms might have sophisticated electronic equipment and the audiovisual department might be able to transmit copyrighted materials remotely for performance in classrooms. What do the terms in the tests mean in the context of the modern school? Educators must find the meanings in the legislative history, and, because this history will not be readily available to them, the meaning of the legislative history will be further interpreted for them in trade journals and the like.

Audiovisual departments are the natural offices to interpret Section 110(1) for teachers, but it would appear they have little guidance from their administrations for doing this. Administrators tend to think of the school as owner of copyrights under the “works for hire” doctrine and not as user of copyrighted materials.

14. *Id.* § 101. “To ‘transmit’ a performance or display it is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.”

15. Useful guidelines have been published. Among the best are: Counsel from Legal Dep’t, Nat’l Ass’n of Broadcasters, Copyright Q & A No. 5, Educational Use of Broadcast Programming Under the 1976 Copyright Revision Act (Jan. 1977) [hereinafter cited as Copyright Q & A No. 5]; Association for Educ. Com. & Tech. and Ass’n of Media Producers, Copyright and Educational Media, A Guide to Fair Use and Permissions Procedures (1977); EDUC. & INDUS. TELEVISION, Nov., 1976, at 22 (Smith, The New Copyright Law: What You Can and Can’t Do).

16. Under the “works for hire” doctrine, the school, as employer of the instructor, would be considered the author of whatever works the instructor creates. The school would thus own and be able to copyright such works. See 17 U.S.C. § 26 (1971) (§ 26 of the 1909 Act); Annot., 11 A.L.R. Fed. 457 (1972). Section 201(b) of the 1976 Act adopts the “works for hire” doctrine:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

A comment in the legislative history is of particular importance to educators who would transmit programs into the classroom: "Use of the phrase 'in the course of face-to-face teaching activities' is intended to exclude broadcasting or other transmissions from an outside location into the classroom, whether radio or television and whether open or closed circuit." This crucial definition, submerged in the legislative history, is suggested in Section 110(2) of the statute itself, but only by implication. Section 110(2) declares that:

- performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission [is not an infringement of copyright] if—(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and (B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and (C) the transmission is made primarily for—(i) reception in the classrooms or similar places normally devoted to instruction.

The negative implication of this language is that a transmission into the classroom may incorporate performances of no other copyrighted works than those mentioned. Thus, in the course of transmissions to classrooms, educators may read prose and poetry, play music, and display pictorial, graphic and sculptural works, but they may not use audiovisual works nor perform dramas or dramatic musical works, even though these may be performed live in classrooms.

Reactions of some organizations indicate Sections 110(1) and 110(2) are already being interpreted narrowly. The National Association protested the "face-to-face teaching" language, feeling it would indeed "rule out closed-circuit in-school uses as well as uses

---

17. Senate Report, supra note 2, at 73.
over dial—or remote—access system in schools, all of which are designed to bring materials to learners rather than transport learners to materials.\textsuperscript{18} The National Association of Broadcasters gives an equally restrictive meaning to “face-to-face teaching,” maintaining that the instructor, his pupils and the copy of the program utilized for a performance must all be located in the same classroom.\textsuperscript{19}

These interpretations of “face-to-face teaching” ignore the distinction between large scale transmitting of copyrighted materials into many classrooms simultaneously and the harmless, isolated request by an individual instructor for an audiovisual performance in a single classroom. The centralized audiovisual department is most efficiently run by remoting visual and audio signals into classrooms, if equipped to do so.\textsuperscript{20} Otherwise, equipment for performing works in the classroom must be shuttled from room to room, floor to floor, and from building to building, rain or shine. If such equipment as projectors and videotape players may be used in the classroom within the spirit of Section 110(1), why may they not be used for lawful performance from outside the classroom? The answer of media producers would parallel their reaction against unauthorized copying of films: the wider the nonpaying audience for a particular audiovisual product, the fewer the sales possible.\textsuperscript{21} The open or closed circuit transmission of copyrighted materials greatly expands the use to which a single copy may be put. The restriction of one copy for one classroom attributed to the term “face-to-face teaching” effectively limits the number of pupils who might be exposed to a copyrighted work. Moreover, further interpretation of “face-to-face teaching” to mean the instructor must be present with the pupils where a performance takes place presents another obstacle to mass viewing by transmissions.\textsuperscript{22}

It is justifiable that producers should be able to prevent mass viewing of their copyrighted works without payment or clearance

\textsuperscript{18} Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 94th Cong., 1st Sess. 275 (1975)(statement of James A. Harris, President, National Education Association) [hereinafter cited as Hearings].

\textsuperscript{19} Copyright Q & A No. 5, supra note 15, Question 17.

\textsuperscript{20} By using a film chain device, motion pictures may be transmitted electronically for reception on the television screens.

\textsuperscript{21} Hearings, supra note 18, at 330 (Testimony of Edward J. Meell, Chairman, Educational Media Producers Council).

\textsuperscript{22} Senate Report, supra note 2, at 73.
since, by such viewing, schools would be substituting copyrighted materials for teaching staff. The producers have a legitimate claim to some of the savings; however, Section 110(1) can reasonably be interpreted to permit transmissions in lieu of in-class performances when requested by an instructor not acting in concert with any other personnel in the school. Such an interpretation is not contradicted by Section 110(2). When Section 110(2) is read together with Section 112(b) it becomes clear that it is addressed to instructional broadcasting.23

The phrase in Section 110(1) requiring that exempt performances take place "in a classroom or similar place devoted to instruction" is defined in the Senate Report in terms of what is not a classroom. A performance in an auditorium or stadium during a school assembly, graduation ceremony, class play, or sporting event, where the audience is not confined to the members of a particular class, is not a performance in a classroom.24 Once again there is protection for producers against mass viewing. What, then, of a course devoted to the study of modern drama or the film with enrollment restricted only by the size of an auditorium? Might packing students into such large "classrooms" violate the spirit of Section 110(1)? The Senate Report responds to the question negatively, maintaining that any place devoted to instruction can become a classroom. A studio, workshop, gymnasium, training field, library, the stage of an auditorium, or the auditorium itself may be used for systematic instructional activities without violation of Section 110(1).25

Here it is advisable to read the legislative history cautiously in some cases for the protection of producers. Large survey classes are routinely conducted in university auditoriums seating hundreds or thousands of students. By loosely defining the requirements for course credit, universities may violate the spirit of Section 110(1). There is a fine line between a class during which some illustrative dramas are performed and a drama series open to all students for credit, with large attendance, where the dramatic performances are

---

23. Section 110(2) of the 1976 Act, 17 U.S.C.A. § 110(2) (1977), specifies the types of copyrighted works which may be incorporated into teaching programs created by the schools themselves. Such programs might substitute for instructors teaching live in the classroom. Section 112(b), 17 U.S.C.A. § 112(b) (1977), permits schools to make up thirty copies of programs incorporating nondramatic literary or musical works or displays of works as permitted by Section 110(2), 17 U.S.C.A. § 110(2) (1977).


25. Id.
only infrequently punctuated by comments of an instructor. The latter class may not be within the meaning of Section 110(1) especially "where the audience is not confined to the members of a particular class." Factors tending to show that a class is not a sham would be prior enrollment of students a cut-off time not unreasonably late in the course after which a pupil may drop the course only with academic or monetary penalty, nonavailability of the course to pupils who wish merely to audit, and credit for the course toward a degree issued by the institution.

Having dealt with the meaning of "classroom" and "face-to-face teaching" it is necessary to determine who may occupy the classrooms and who may engage in face-to-face teaching within the meaning of Section 110(1). "Pupils" are defined tersely in the Senate Report as "enrolled members of a class." The Act would allow pupils to join with instructors in performing copyrighted works.

Defining "instructors" is problematical. Traditionally, a class is taught by one instructor but the Act will accommodate team teaching. The Act is silent as to whether guests brought into a classroom to perform a copyrighted work can be considered instructors. There is no logical basis for the remark in the Senate Report that payment or clearance is required for performances by actors, singers, or instrumentalists brought in from outside the school to stage a program. If professional people wish to donate their time and perform in the context of face-to-face teaching in a classroom as part of systematic instruction, they should qualify for the instructors' exemption. The key to their status as instructors is that they not be

26. Id. The Senate Report maintains that it would not be permissible for teachers to perform a copyrighted work before a group some of whom are enrolled in the class and some of whom are not.

27. Id. The author regrets that the word used in Section 110(1) is "pupil" instead of "student." "Student" is the nobler word, deriving from the Latin word "studens," which means "to be eager about study." "Pupil" applies "either to a child in school or to a person who is under the personal supervision of a teacher." "Student," on the other hand, is applied "either to one who attends an institution of higher learning or to one who is making a study of a particular problem." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2268, 1844 (1964). The drafters of the Act made their choices, and the author will follow their choice of words, including the word, "instructor," rather than "teacher."

28. SENATE REPORT, supra note 2, at 74.

29. Continuing the not-for-profit exemption in the 1909 Act, 17 U.S.C. § 104 (1971), Section 110(4) of the 1976 Act, 17 U.S.C.A. § 110(4) (1977), provides that public performance by anyone of a nondramatic literary work is exempt if there is "no direct or indirect admission charge." If performance of these works in public is exempt, then performance of them in face-to-face teaching must also be exempt.
paid for performing. Their unpaid performance cannot be distin-
guished from the performance by an audiovisual technician (in a
classroom) of a television broadcast, videotape, motion picture, or
phonorecord.30 In fact, another part of the legislative history does
indicate that audiovisual directors are to be regarded as instructors
when working in consultation with actual instructors.31

IV. OFF-THE-AIR AND INTO THE CLASSROOM

Section 110(1) might seem like a Magna Carta for instructors who
perform or display copyrighted materials in the classroom but it is
illusory with respect to audiovisual materials.32 It provides that mo-
tion pictures and other audiovisual works may not be performed in
face-to-face teaching unless “lawfully made under this title.”33
Under the title, however, no guidance is given for copying an au-
diovisual work to be used in teaching without payment or clearance,
with the possible exception of Section 108(f)(3). That section per-
mits a library or archives to reproduce and distribute by lending a
limited number of copies and excerpts of an audiovisual news pro-
gram, subject only to clauses (1), (2), and (3) of subsection (a) of
Section 108. These clauses provide that no commercial use may be
made of the news programs, that collections of the library or ar-
chives must be open to the public or available to all persons doing

To perform or display a work “publicly” means
(1) to perform or display it at a place open to the public or at any place where a
substantial number of persons outside of a normal circle of a family and its social
acquaintances is gathered; or
(2) to transmit or otherwise communicate a performance or display of the work to a
place specified by clause (1) or to the public, by means of any device or process,
whether the members of the public capable of receiving the performance or display
receive it in the same place or separate places and at the same time or at different
times.
17 U.S.C.A. § 101 (1977). Thus, performance in a classroom is a public performance. The
author submits that anyone who is willing to perform in a classroom for pupils enrolled in a
legitimate course of study becomes an instructor within the meaning of Section 110(1). 17
30. The terms “motion picture” and “phonorecord” are separately defined in Section 101
of the Act. Television broadcast, videotape, and motion picture are lumped together under
31. SENATE REPORT, supra note 2, at 74.
32. The twelve sections following Section 106, 17 U.S.C.A. § 106 (1977), that pertain to a
copyright owner’s exclusive rights, discuss the limitations on and the scope of these rights,
but they provide little guidance on infringement by videotaping for educational purposes.
33. Section 110(1) will, however, exculpate an instructor who, in good faith, believed the
copy was lawfully made.
research in a specialized field, and that the copy of the news program must include a notice of copyright. Thus, nothing in the Act prevents an instructor from borrowing a news program and performing it in face-to-face teaching under Section 110(1), notwithstanding legislative history to the contrary.

Even if this break in the statutory wall of silence were interpreted by courts and libraries to allow classroom performance, there would still remain a definitional trap for the instructor. Already there is debate on the meaning of “audiovisual news program” centering on whether it should include in-depth interviews on current news events, on-the-spot coverage of news events, commentaries on the news, and the like. Surprisingly, the documentary, one of the most desirable programs from the point of view of instructors, would sometimes be classified as a news program by the National Association of Broadcasters.

34. The House Report, supra note 2, at 77, declares that Section 108(f)(3) is intended to permit libraries and archives subject to the general conditions of this Section, to make off-the-air videotape recordings of daily network newscasts for limited distribution to scholars and researchers for use in research purposes. . . . The inclusion of language indicating that such material may only be distributed by lending by the library or archive is intended to preclude performance, copying, or sale, whether or not for profit, by the recipient of a television broadcast tape off-the-air pursuant to this clause.


Not surprisingly, the National Association of Broadcasters follows the House Report interpretation. It says, “Libraries may lend the tapes only for use in research. A recipient of a copy of a television broadcast may not perform, copy or sell, whether or not for profit, a copy of the television news broadcast.” Copyright Q & A No. 5, supra note 15, Question 14. Quaere: May a school or university audiovisual department which maintains a large collection of films, tapes, and the like, qualify under Section 108(a)(2) as a library? Is there another missing definition?

35. The National Association of Broadcasters’ statement, borrowing language from the House Report, supra note 2, at 77, says:

This provision, Sec. 108(f)(3), applies to (1) the daily newscasts of the national networks, and local stations, which report events of the day; (2) interviews concerning current news events and (3) on-the-spot coverage of news events. It does not apply to documentaries (except documentary programs involving news reporting), magazine formats, or other public affairs broadcasts dealing with subjects of general interest to the viewing public.

Copyright Q & A No. 5, supra note 15, Question 13. Quaere: How will they draw the line between a documentary program involving news reporting and other documentaries? Surely, their inclusion of documentaries, which might carry a message and be the product of considerable creativity, will be lamented if Section 108(f)(3), 17 U.S.C.A. § 108(f)(3) (1977), is read to allow performance of taped news programs by instructors. A leader in the debate over off-the-air taping, Ivan Bender, believes the definitional problem was not foreseen by Congress, and that networks do not regard such programs as “60 Minutes” (CBS), “White Paper”
In any event, the Section 108(f)(3) exemption to the exclusive right to copy inures only to libraries and archives. There is no specific exemption anywhere in the Act allowing instructors to copy audiovisual works. There is, however, a limited exemption for public broadcasters. Section 118(d) provides that a “public broadcasting entity,” as defined in 47 U.S.C. 397, may incorporate in its programs published nondramatic musical works and published pictorial, graphic, and sculptural works. In the event clearance and payment cannot be agreed upon, the Copyright Royalty Tribunal will impose terms and reasonable royalty payments.\textsuperscript{34} Nondramatic literary works were considered for inclusion in this compulsory licensing system but not included because “a compulsory license for literary works would result in loss of control by authors over the use of their work in violation of basic principles of artistic and creative freedom.”\textsuperscript{35}

Section 118 is also linked to Section 110(1). Section 118(d)(3) provides that schools are permitted to copy programs of public broadcasters off-the-air insofar as they contain cleared nondramatic musical works and pictorial, graphic, or sculptural works. They may retain the copies for seven days and perform or display the contents in accordance with Section 110(1). The catch is that permission will still be needed from the public broadcaster (presumably the copyright owner) to copy the parts of the program not cleared under Section 118. Thus, the rights granted to instructors to copy off-the-air appear illusory.

\textsuperscript{34} House REPORT, supra note 2, at 119.
As a practical matter, the Public Broadcasting Service, the Agency for Instructional Television, the Great Plains National Instructional Television Library, and the Public Television Library, on November 15, 1975, issued a Statement of Policy authorizing supplemental school rerecordings of public and instructional television programs for use for seven days. This pioneer program operates to give schools off-the-air copying rights to all programs except those listed on a bi-monthly circular from the Public Broadcasting Service as not authorized for seven-day school use. For the most part, the excepted programs are licensed for broadcast by the Public Broadcasting System without rerecording rights.

On September 1, 1976, the Agency for Instructional Television (AIT) broke away from the seven-day limit and permitted certain school districts to retain off-the-air rerecordings during the entire school year, September through June. Prerequisites are that the state education agency be authorized to broadcast AIT telecourses and the school systems be specifically identified as participants in the instructional television services of the agency. It is worth noting that the stated purpose of the experiment is “to test the extent to which unrestricted broadcast rerecordings will be used in classrooms. A further objective is to determine if such an extended use will increase school support for instructional broadcast services. Finally, it is hoped the experiment will provide insight into the effect of advances in recording and playback technology upon instructional broadcasting.”

(A) “The Monarch Butterfly” Argument

If there is no exemption allowing instructors to copy audiovisual works off-the-air, neither is there any explicit prohibition except for the exclusive right to make copies in Section 106(1). This exclusive right, in turn, is offset by the four tired guidelines for fair use in Section 107 which have been languishing in the wings, essentially unchanged since 1964. The House Report, in discussing Section

39. Id.
41. The Senate Report mentions that they were contained in the 1964 bill. Senate Report, supra note 2, at 62. Persons who have followed copyright revision have seen the guidelines so often that they veritably swim before their eyes. Out of necessity the final version of Section
107, declares that "there is ample case law recognizing the existence of the doctrine [of fair use] and applying it," but, in fact, there is no case law at all on the copying of audiovisual materials in a nonprofit setting as a fair use.43

Time, Inc. v. Bernard Geis Associates, the celebrated case involving fair use of the Zapruder film of the assassination of President Kennedy, is the only decided case which approaches making a statement about fair use of audiovisual materials in the classroom.44 It was held that publishing charcoal sketches of frames from the film in a book, Six Seconds in Dallas, was a fair use because of the public

107 should be set out here:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.


43. The two cases involving instructors copying intellectual materials for classroom use without payment or clearance have involved only print media: Witto1 v. Crow, 199 F. Supp. 682 (S.D. Iowa 1961), rev'd, 309 F.2d 777 (8th Cir. 1962) (choral director of an Iowa high school prepared a new arrangement of the plaintiff's copyrighted song, "My God and I," and manufactured 48 copies on the school duplicating machine) and MacMillan Co. v. King, 223 F. 862 (D. Mass. 1914) (tutor at Harvard distributed to his students 30 summary sheets of chapters in economics textbook). These two cases did yeoman duty in the many law review articles on photocopying of medical journals by the National Institutes of Health Library. Williams and Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1976) (equally divided decision). The decision allowing the photocopying as a fair use was discredited in a passage of the Senate Report: "The recent case of The Williams and Wilkins Company v. The United States failed to significantly illuminate the application of the fair use doctrine to library photocopying practices." Senate Report, supra note 2, at 71. A dissenting judge called it the Dred Scott decision of copyright law. 487 F.2d 1345, 1387 (Nichols, J., dissenting). For discussion of two pending cases on videotaping of copyrighted works, see notes 47 and 51 infra.

interest in having the fullest information available on the assassination. Can the holding be made to stand for a similar interest of pupils in having information of national importance or of special importance to a particular class? The case has "not-for-profit" implications because Bernard Geis Associates offered to pay Life magazine a royalty equal to the profits from publication of the book in return for a license, but Life refused. Moreover, subjects of the case were actually photographs registered as such when Life published individual frames from the film, and to that extent there was no audiovisual question.45

The situation in which a private citizen, the actor Roddy McDowall, obtains unauthorized copies of commercial motion pictures for his private use invites comparison.46 So does the situation in which a private citizen uses a videotape recorder to record a television program off-the-air.47 If the use of a videotape machine in the home

45. Section 101 includes this definition:
"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

46. 17 U.S.C.A. § 107(4) (1977). According to the New York Times, more than 500 films and television shows were removed from Mr. McDowall's house by federal authorities on December 18, 1975 as part of a crackdown on a film piracy ring. Mr. McDowall is reported to have admitted purchasing a number of films from Ray Atherton, who, allegedly, was a dealer in unauthorized copies. N.Y. Times, Jan. 18, 1976, at 36, col. 1. Later it was reported that, on June 2, Assistant U.S. Attorney Chester Brown declined to indict Mr. McDowall, apparently because there was no evidence that he had offered copies for sale. Had he done so, he could have been indicted for willful infringement for profit under Section 104 of the 1909 Act (17 U.S.C. § 104 (1971)), a misdemeanor. Id., June 3, 1976, at 25, col. 1. This left unanswered the question of the extent of Mr. McDowall's civil liability for infringement for showing the films privately and not-for-profit. See generally Nevins, supra note 8.

47. A test case on this issue has been filed in Los Angeles against Sony Corporation of America and others by Universal City Studios and Walt Disney Productions, Inc., Wall St. J., Nov. 15, 1976, at 4, col. 1. There is speculation that the suit was filed to protect not only TV programs, but also a multimillion dollar investment by MCA, Inc., parent of Universal City Studios, which, with N. V. Phillips, a Netherlands corporation, has developed a video-disc playing system for home use. Since the video-disc player would have no capability to record off-the-air, the owner of the machine would depend upon MCA to supply the prerecorded discs. The Sony Betamax machine, capable of recording off-the-air, could reduce sales of these discs if it were legal to use it. No one knows how a prohibition on the use of videotape recorders in the home can be enforced. Many other articles have appeared in newspapers and periodicals about the Betamax case and videotape players. See, e.g., Time, Apr. 11, 1977, at 64; The Chronicle of Higher Education, Apr. 11, 1977, at 5; Wash. Post, Dec. 21, 1975, § 7, at 1, col. 1.
results in build-up of private libraries of programs, it becomes apparent that the potential market for reruns of the programs could be affected. In like manner, educational media producers argue that build-up of an unauthorized library in audiovisual departments of schools and universities affects their potential market. Moreover, media producers do not see an analogy to guidelines for photocopying of print media by educators. These guidelines quantified the amount that could be copied by using word counts. For example, the guidelines allowed copying of not more than 250 words of a poem nor 2,500 words of a complete article, story or essay and no more than two excerpts from the same author nor more than nine instances of copying for one course during one class term. Such quantification alone was not satisfactory to media producers as a guideline and their talks with educators broke down before any guidelines could be given to the House Committee on the Judiciary.

The reason media producers would not accept quantification is that small portions of a tape or film might represent the most valuable part of it, and that therefore a quality test must be added to the quantity test. For example, a brief sequence showing a monarch butterfly emerging from the cocoon might be the essence of an educational film about the monarch butterfly and its most costly part to produce. Similarly, the few seconds of footage by Abraham Za-

48. *Hearings*, supra note 18, at 330 (Testimony of Edward J. Meell). Ivan Bender maintains that sale of fifty to seventy-five prints of an educational film makes it a best-seller. The producers’ investment in such a film is $2,000 per minute, or more. Address by Ivan Bender, supra note 35.


50. Id.

51. Address by Ivan Bender, supra note 35. Irwin Karp, counsel for Authors’ League of America, Inc., maintains that quantitative guidelines were essential to an agreement on educational fair use of print media. Address by Irwin Karp, Indiana University Conference: The Copyright Dilemma—A Rational Outcome (Apr. 14-15, 1977). Perhaps guidelines will emerge from the decision in a suit filed in United States District Court for the Western District of New York (seated in Buffalo) by Learning Corporation of America, Time-Life Films, Inc., and Encyclopaedia Britannica Educational Corporation against the Board of Cooperative Educational Services (BOCES) in the First Supervisory District, Erie County, New York. Significantly, named also as defendants were Joseph Plesur, director of the media center, his chief engineer, and other staff. Allegedly they distributed a 200-page catalogue listing videotape copies made off-the-air without clearance or payment. These were made available on request for performance in classrooms. It is doubtful that it would be in the best interest of educators to win a complete victory, since carte blanche copying privileges could force some producers of educational works out of business. *Educ. & Indus. Television*, Dec., 1977, at 6.

52. Address by Ivan Bender, supra note 35. Edward Meell made the point well in his statement to the House Committee on the Judiciary:
prudential showing the assassination of President Kennedy might be the most valuable part of an otherwise routine television program. The issue is complicated by the decision in *Time, Inc. v. Bernard Geis Associates* which clothed the frames of the assassination with a public interest that, when read with Section 108(f)(3) (which permits archival copying of news programs), might well mean that instructors may copy it off-the-air for use in the classroom.\(^{53}\)

(B) **Section 504(c)(2): Protection for Instructors; Peril for Audiovisual Directors**

Where copying is done for educational use and the part to be copied cannot reasonably be classified as news, the decision on the legality of the copying will rest, for practical purposes, with the audiovisual director. It has been seen that school administrators have little concerned themselves with the issue of copyright infringement and when they do promulgate a policy, it will probably devolve upon the audiovisual department to enforce it.\(^{54}\) In these circumstances, the director faces exposure to liability under the Act and might stand alone with the instructor as defendant in some cases should the doctrine of sovereign immunity protect state and local public schools.\(^{55}\) The remedies available to plaintiffs include,

---

The concept of "brief excerpts" (which are not substantial in length in proportion to their source) is very difficult to apply to educational audiovisual materials. A half hour education, nature or biology film, for example, may be built around an exceedingly difficult photographic sequence which may take months of work to capture, but may in the final product only take up a minute or two of time in the film. To permit this minute or two to be reproduced freely under an educational exemption would very likely destroy the economic viability of the product.

*Hearings, supra* note 18, at 316.

53. See discussion of *House Report*, *supra* note 2, at note 34 *supra*.

54. See note 16 *supra*.

55. There is little case law on the issue. In Wihtol v. Crow, the trial court rendered judgment for the school choral director, Nelson Crow, not finding his actions in arranging and copying Austris Wihtol's copyrighted song to be an infringement. As to the school's liability, the court said, "[I]n the exercise of its governmental function it is not liable for tort claims. [citations omitted]. Under the doctrine of governmental immunity the defendant, Clarinda, Iowa School District, cannot be held liable for the copyright infringement alleged herein."

199 F. Supp. 682, 685.

On appeal, the decision was reversed. 309 F.2d 777 (8th Cir. 1962). The court of appeals held that Mr. Crow was an infringer, but upheld the immunity of the school under the eleventh amendment to the United States Constitution, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The plaintiff had been represented
as under the 1909 Act, actual or statutory damages. But, under the
1976 Act, audiovisual directors and their staffs benefit from the
umbrella of protection against statutory damages in Section
504(c)(2), which provides: "The court shall remit statutory damages
in any case where an infringer believed and had reasonable grounds
for believing that his or her use of the copyrighted work was a fair
use under Section 107, if the infringer was: (i) an employee or agent
of a nonprofit educational institution . . . ."58 Here appears an-
other part of the Magna Carta for educators contained in the Act.57

by Melville Nimmer, who criticizes the immunity holding in his treatise. M. Nimmer, supra
note 5, § 131.42.
In Mills Music Co. v. Arizona, 187 U.S.P.Q 22 (D. Ariz. 1975), the court found the state to
be an infringer when it broadcasted the song, "Happiness Is," with special lyrics to promote
the 1971 Arizona State Fair. The court made no mention of immunity, but the issue is before
the Ninth Circuit Court of Appeals.
In an early case, it was held that a compiler of Michigan laws, who used plaintiff's annota-
tions, was not immune from copyright infringement liability under the eleventh amendment
merely because he acted under authority of his contract with the State. Howell v. Miller, 91
F. 129 (6th Cir. 1898). The decision would not, however, stand for liability of an audiovisual
director if he or she made copies under authority of the State and used them only within the
school, for the court said:
If this suit had as its only object a decree disturbing the State's possession of that
manuscript, and ordering the surrender of it to the plaintiff, or its destruction, so that
it could not be used, we should say, according to the rule of Belknap v. Schild, that
such a suit would be one against the State and could not be entertained.
91 F. at 136.
57. Section 504 reads in full as follows:
Remedies for infringement: Damages and profits
(a) In General.—Except as otherwise provided by this title, an infringer of copy-
right is liable for either—
(1) the copyright owner's actual damages and any additional profits of the
infringer, as provided by subsection (b); or
(2) statutory damages, as provided by subsection (c).
(b) Actual Damages and Profits.—The copyright owner is entitled to recover the
actual damages suffered by him or her as a result of the infringement, and any profits
of the infringer that are attributable to the infringement and are not taken into account
in computing the actual damages. In establishing the infringer's profits, the copyright
owner is required to present proof only of the infringer's gross revenue, and the infringer
is required to prove his or her deductible expenses and the elements of profit attributa-
table to factors other than the copyrighted work.
(c) Statutory Damages.—
(1) Except as provided by clause (2) of this subsection, the copyright owner
may elect, at any time before final judgment is rendered, to recover, instead of
actual damages and profits, an award of statutory damages for all infringements
involved in the action, with respect to any one work, for which any one infringer
is liable individually, or for which any two or more infringers are liable jointly
and severally, in a sum of not less than $500 or more than $10,000 as the court
The absence of this remedy could render educators safe from prosecution by producers because statutory damages are "a cornerstone of the remedies sections of the bill." Relegated to proving actual damages and loss of profits, and with scant hope of recovering costs and attorney's fees under Section 505 in view of the protective intent manifested by Section 504(c)(2), producers might well stay out of court when an educator is the target.

With these protective provisions in mind, the instructor might feel comfortable in copying, but the audiovisual director will not. If unauthorized copying is being done with departmental equipment, considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

17 U.S.C.A. § 504 (1977). Giving broad meaning to the word "teacher" so as to include directors was the subject of a remark by Congressman Robert W. Kastenmeier of Wisconsin during the House Floor Debate on S.22:

Another question involves the reference to "teacher" in the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions," reproduced at pages 68-70 of the committee's report No. 94-1476 in connection with section 107. It has been pointed out that, in planning his or her teaching on a day-to-day basis in a variety of educational situations, an individual teacher will commonly consult with instructional specialists on the staff of the school such as reading specialists, curriculum specialists, audiovisual directors, guidance counselors, and the like. As long as the copying meets all of the other criteria laid out in the guidelines, including the requirements for spontaneity and the prohibition against the copying being directed by higher authority, the committee regards the concept of "teacher" as broad enough to include instructional specialists working in consultation with actual instructors.


it is likely to include systematic copying of whole works rather than parts of the works. Moreover, if anyone in the school is likely to be aware of the interpretive problems of the 1976 Act as it applies to copying, it is the audiovisual director. Section 504(c)(2) does not protect them from intentional infringement and, while individual producers might not have incentive to redress loss of isolated sales, their economic loss could be measurable if a film series were transmitted over closed circuit without permission. Closed circuit rights are being offered under licenses costing thousands of dollars to a single licensee. Here, injunctive relief alone is appropriate.

Returning to the monarch butterfly, it appears that unauthorized copying of a small segment from an audiovisual work presents a \textit{de minimis} case against educators. Should a producer wish to incur the expense of obtaining an injunction, the defense would be advised to ask for new guidelines for fair use of parts of an audiovisual work. Educators will argue they have no way to know in advance what parts of a film or program meet the quality test as well as the quantity test. Rather, the owners should specify the sequences of each film that may not be copied without permission or suffer the implication that sequences not reserved may be copied. Designations of reserved segments of works may be placed in the title material, in catalogues, and on packaging. Audiovisual personnel will become used to looking for them. An owner of a televised work wishing to prevent off-the-air videotaping may identify reserved sequences in a message preceding the telecast. For example, “The sequence in this program of a butterfly emerging from the cocoon may not be copied off-the-air for educational use without prior written permission from [the company].” Such a warning would be no more out of place than the familiar “parental discretion advised” notices.

With owners able to protect their most valuable sequences, there should be no difficulty in allowing the rest of their works to be copied on a percentage basis. Such a system is appealing in that the

59. See text accompanying notes 68-69 \textit{infra}.
60. 17 U.S.C.A. § 502 (1977). It is interesting to speculate on the outcome of a request for relief under Section 503: “Remedies for infringement: Impounding and Disposition of Infringing Articles.” Under this section, a court may order destruction of both unauthorized copies and the equipment used to make them. It is improbable that a court would go so far as to deprive a nonprofit educational institution of its audiovisual equipment. Indeed, the doctrine of sovereign immunity and the eleventh amendment could prevent any seizure of state-owned copies. See note 55 \textit{supra}.
quantity rule for educational copying may be stated in one sentence. For example, "Up to 10% of any audiovisual work may be copied off-the-air or otherwise for educational use under Section 110(1) except for sequences identified by the owner on the work which may not be copied under any circumstances without permission." Because of the face-to-face teaching limitation in Section 110(1), there would be no appreciable likelihood of loss of revenue to the owner. Closed circuit use of sequences in multiple classrooms would be a matter for licensing.

There remain the problems of spontaneity and cumulative effect. The print media guidelines deal with these, but in the audiovisual context they are unduly complicated. The rule should be retained that the copying must be at the instance and inspiration of the individual teacher because any systematic copying for many classes should be the subject of licenses. However, the requirement that individual instructors must request permission unless "[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply" is vague and unreason-

61. Compare this with a provision in the Guidelines for Educational Uses of Music:
2.(a) For academic purposes other than performance, multiple copies of excerpts of works may be made, provided that the excerpts do not constitute a performable unit such as a section, movement or aria, but in no case more than (10% of the work). The number of copies shall not exceed one copy per pupil.
HOUSE REPORT, supra note 2, at 71.
62. Id. at 67-72. The tests for spontaneity and cumulative effect must be met, as well as the quantity test, in order for an instructor to make multiple copies of print media for classroom use:

Spontaneity
(i) The copying is at the instance and inspiration of the individual teacher, and
(ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect
(i) The copying of the material is for only one course in the school in which the copies are made.
(ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.
(iii) There shall not be more than nine instances of such multiple copying for one course during one class term.

[The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]
Id. at 69.
If an individual instructor wishes to use a permitted excerpt year after year with the limits of Section 110(1), there is no compelling reason for imposing a requirement continually to check with the owner. A cumulative effect test should prohibit instructors from putting together sequences from the same work so as to subvert the quantity guidelines. There should also be no limit to the number of courses in a school in which an excerpt may be used independently. There would be safeguard enough for owners in the prohibition on use of reserved segments. Unless an owner offers segments under a convenient license arrangement it would seem reasonable for educators to copy and use in classrooms up to 10% of the remainder of an audiovisual work with appropriate credits, without editing the segment and without incorporating it in any other work.

63. Id.

64. The integrity of a work is a growing concern of producers and owners. See Gilliam v. American Broadcasting Companies, Inc., 538 F.2d 14 (2d Cir. 1976); Comment, Education and the Copyright Law: Still an Open Issue, 46 Fordham L. Rev. 91, 125-26 (1977). The author proposes the following guidelines for off-the-air videotaping:

(e) EXEMPTED USES: TAPING OF BROADCASTS.—Notwithstanding the provisions of section 106, it is not an infringement of copyright for a school to—

1. make tapes incorporating the sound or pictures or both (including recording of television or radio signals in any form now known or later developed) of broadcasts of copyrighted works for a subsequent use in a current learning activity, provided—

(A) the work taped is not available for purchase or rental in the same or a substantially similar format;

(B) the tape is retained only as long as is necessary, not to extend beyond the end of a current learning activity for which the tape was made;

(C) the taping is done to satisfy a spontaneously arising need presented by a current learning activity;

(D) the taping is not part of a systematic practice, such as the regular taping of all such broadcasts by a media specialist; and

(E) the tape is not used as a substitute for rental or purchase of another work which would otherwise have taken place.

2. make and retain tapes incorporating the sound or pictures or both (including recording of television or radio signals in any form now known or later developed) of broadcasts of current news events, provided—

(A) the substantial nature of the broadcast is current news, not original creations such as editorials or documentaries; and

(B) the tapes, if retained, are not used for any purpose except subsequent learning activities, scholarly research, or preparation for the conduct of learning activities.

Id. at 134. Essentially, this proposal would allow off-the-air videotaping of an entire work for use during “current learning activity” except when the work is for sale or rent. How long is a “current learning activity”? What if the work is not for sale or rent but a license is available? Is videotaping of excerpts ever a fair use? The author does not address these questions.
V. CONTRACTUAL CONTROL OF COPYING AND PERFORMANCE

Unlike print media owners, audiovisual media owners have experimented with licensing agreements during the pendency of the 1976 Act. Most of the licenses contemplate use of a whole work. However, one plan, Encyclovideo, offers copying of excerpts from the entire backlist of Encyclopedia Britannica Educational Corporation. In Encyclovideo, each film is broken down into excerpts which are then cross-indexed in several ways.

The Encyclovideo system, limited to the films of one producer, does not have the advantages of the industry-wide approach of print media owners in their Copyright Clearance Center (CCC). The American Association of Publishers with guidance from the Commission on New Technological Uses of Copyright, made the CCC operational on January 1, 1978. Journal articles have been published with codes informing all potential users what they must pay the CCC. Anyone at a participating copy center may pay the fee and make photocopies. The fee is sent to the CCC which, with the aid of codes read by computer, remits proceeds to publishers. There are still the problems of affording authors the right to withhold permission to copy and of maintaining Department of Justice clearance for antitrust aspects of the program.

Warrenton, Virginia Conference revealed that, at the least, educators want seven-day rights to videotape any work off-the-air without payment or clearance. See note 74 infra.

65. Even the Williams and Wilkins Co. made a abortive attempt to license the National Institutes of Health Library for photocopying. 487 F.2d 1345 (Ct. Cl. 1973).


68. See Publisher’s Weekly, Apr. 11, 1977, at 28. It is interesting to note that the Program contemplates developing, along with publishers, authors, and library associations, new guidelines for fair use of journal articles, only temporarily using those guidelines now contained in the House Report as interim guidelines. See text accompanying note 41, supra. It is not clear whether libraries will participate in the plan, or, by their disinterest, force the establishment of print-supply centers. Libraries would have increased administrative costs. Section 108(f)(1), 17 U.S.C.A. § 108(f)(1) (1977), exempts libraries (not just public libraries), archives, and their employees from liability arising from the unsupervised use of reproducing equipment located on their premises provided the equipment displays a warning notice that the making of a copy may be subject to the copyright law. An almost identical program involving textbooks was described in Comment, The Effect of the Fair Use Doctrine on Textbook Publishing and Copying, 2 Akron L. Rev. 64, 65 (1969). In a business review letter dated September 1, 1977, the Antitrust Division of the Justice Department declared that “the
Audiovisual licenses often combine rights to copy and rights to perform, and the licensor considers several criteria to arrive at a fee. For example, a license to perform might be triggered at no extra cost simply with the purchase of a program on the state level as in the case of the AIT Policy, or the licensor might charge separately for performance rights per copy, per student, per monitor, per building, per school, per district, per campus (with or without branch campuses), or per state system, and for transmission over closed circuit, open circuit, or otherwise. For example, the BFA Videotape Duplication Plan allows the user to make annual payments based on titles to be copied and on the number of students in the school district. Upon payment of the copying fee, the licensee is granted rights for unlimited copying of titles.

Licenses may provide for making copies from purchased copies or from borrowed copies, but if a program is expected to have wide appeal, the most efficient system is licensing to copy off-the-air. The first such license was the License to Make and Use Off-Air Recorded Video Cassettes of the thirteen-episode series, “The Age of Uncertainty,” offered in early April, 1977 by Films Incorporated. For the first time, a company obtained from the owners of a televised series not just the traditional rights to market films and videocassettes, but also the right to license schools to copy off-the-air. Off-the-air rights benefit licensees in that they may purchase the series for half the price of 16 mm film and about two thirds the price of the video-cassette format. They benefit the licensor by saving the expense of preview copies which are customarily sent to audiovisual departments as a necessary marketing device.

Division has no present intention of challenging the organization or operation of the [Copyright Clearance Center under the antitrust laws.” 344 PATENT, TRADEMARK & COPYRIGHT J., Sept. 8, 1977, at A-2.

70. Id. at 5.
72. Id. See also note 74 infra.
73. Even with the obvious advantages available under an off-the-air license, sales were not satisfactory three months after its introduction. The Sales Manager of Films Incorporated speculates there might be two reasons. First, there is some doubt about the popularity of the series among educators. Second, the broadcasting began in May near the end of the school year. The company believes that, logically, the license concept must be acceptable because
There are several business hazards in sending out preview copies. The copy might be damaged by carelessness of the previewer, might not lead to a sale, or might be copied without permission. In fact, the making of pirated copies off-the-air or from preview copies has already given rise to a copyright infringement suit. Instead of litigation, licensors have tried to rely on the contractual device of certificates of destruction or erasure. For example, the Films Incorporated license carries a privilege to make an off-the-air copy of each episode for preview use only for fifteen days, but failure to supply the licensor with a certificate of erasure within that time shall be deemed a purchase of the license for that episode. Failure to com-

74. When an upstate New York school system reportedly circulated a catalogue listing bootleg videotapes of educational programs for sale to other schools, it appeared a test case was in the making by a number of distributors. The Register of Copyrights then requested a conference on July 19-22, 1977, in Virginia, at which representatives of the parties would address the problem of off-the-air videotaping. Address by Barbara Ringer, Register of Copyright, University of Kentucky Symposium I: Public Law 94-553 (Apr. 22, 1977). The suit was nevertheless filed. See note 51 supra. The conference which resulted was described as follows:

The "Conference on Videorecording for Educational Uses," sponsored jointly by the Copyright Office and The Ford Foundation, was held July 19-22, 1977 at Airlie House in Warrenton, Virginia. The conference was attended by roughly 80 participants, who were divided into five working groups chaired by the following:

Group I—Barbara Ringer, Register of Copyrights
Copyright Office

Group II—Jon Baumgarten, General Counsel
Copyright Office

Group III—Richard Lacey, Consultant
Ford Foundation

Group IV—David Davis, Officer in Charge,
Communications Program, Ford Foundation

Group V—Lewis Flacks, Special Legal Assistant
to the Register of Copyrights, Copyright Office

Letter from Linda Cox, Secretary to the Register of Copyrights, to author (Oct. 28, 1977).

75. The license provisions read in full:

1. OFF-AIR TAPING AND PREVIEW: FILMS INC. grants to LICENSEE and LICENSEE hereby accepts from FILMS INC. a limited nonexclusive license under copyright as follows:

a. LICENSEE shall have the right to record off-the-air, on videotape, from a commercial telecast or otherwise, one copy only of each of the programs listed above or as may, from time to time, be added to this Agreement by a schedule B or Supplements thereto.

b. Unless otherwise stipulated by FILMS INC. for recording of multi-episode series, LICENSEE shall have fifteen (15) days following the date the program is recorded by it to determine whether it desires to license such program for its use under the terms of this Agreement. During such fifteen day period LICENSEE may exhibit the video...
ply with the requirement to supply a certificate of destruction gives the licensor the option of suing in state court for breach of contract or in federal court for the tort of infringement of copyright. 74 Certificates of erasure cannot be required without a contract providing for them; but the fact that certificates of erasure can only be required under a contract does not mean they should not be asked for where there is no license. By contrast, in the Public Broadcasting Service Statement of Policy, schools that have recorded off-the-air under the seven-day privilege are merely requested to erase or destroy copies at the end of seven days. 77 It is interesting to note that this seven-day privilege to record and perform in an accredited nonprofit educational institution applies to "The Age of Uncertainty Series" and that instructors may either use the series free for seven days or acquire a license to use it indefinitely. 78

VI. CONCLUSION

The Warrenton Conference reports reveal there is no agreement among educators and owners on the propriety of videocopying off-the-air. 79 Some owners would allow copying only for previewing;
others would allow none at all. 80 Even if the premise of some copying for performance under Section 110(1) were accepted the number of days or weeks the copy could be used would be contested.

Owners expect that, soon after copying, the copies must be paid for, perhaps after seven days, while educators speak in terms of semesters and quarters. 81 After the time for use without payment has run, either payment or erasure must occur. What controls will be acceptable to owners? Would certificates of erasure by the hundreds of thousands kept on file be a meaningful control? Would school administrators assume responsibility for keeping them or, as in the past, show little interest in the problem of videocopying? 82

While complete works may eventually be copied under controlled circumstances the question of unauthorized use of excerpts remains. It is not analogous to photocopying excerpts from the print media. Those owners are not as sensitive to the value of a particular part of a work, but audiovisual media owners want to control copying of especially costly and desirable excerpts. Nothing in Section 107 on fair use denies this right but it might be in the owners' interest for permission to be stated on the work itself to copy a standard 10% for classroom use while reserving certain portions as available only by license. Perhaps this policy would lessen the tension that exists between owners and educators.

80. *Id.*

81. Working Group I observed that the period might either start from the first broadcast of a program or from any broadcast, even a rerun, provided that copying a rerun might be prohibited where the program is available for licensing.

82. See note 17 supra. In addition to the requirement of erasure, other principles for the protection of owners seem desirable. A particularly well-drafted statement of them emerged from the Warrenton Conference:

Where an entire work is reproduced, the appropriate credits and the copyright notice should be included in all cases. Where an excerpt is reproduced, the work from which it is taken should be identified, and the copyright notice should be reproduced unless impracticable (e.g., stock footage).

The following practices would be prohibited under the doctrine of fair use:

a. the making of more than a single copy by or for a particular teacher;

b. any transfer, distribution or use of the copy made under the fair use doctrine outside the educational institution;

c. Reproduction of “theatrical” or “feature” films (i.e., films previously distributed for public showing other than on television), inasmuch as these are available through licensing arrangements for educational use.

d. Off-air taping of broadcasts by an educational institution, not at the specific instance of an individual teacher.
The land-buying public can no longer afford to support the inconclusiveness, inefficiency, waste, and expense inherent in our present systems of title protection. The consumer needs the security, information, and protection of title which only a system of title registration can provide; however, to date, inertia and ignorance coupled with opposition from various special interest groups have prevented the fulfillment of that need. The consuming public has become increasingly militant in recent years and has secured legislative protection in a number of areas. Nonetheless, one area where the protection of the consumer remains weak, if not totally absent, is in the protection of his greatest investment—the purchase of his home.

The expectations of the typical home buyer and the seller are relatively simple. The buyer wants a home whose title is secure.

* A.B., Hope College; J.D., University of Michigan. Assistant Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.


2. For factors which have prevented the adoption or use of the Torrens System of Land Registration, see notes 39-48 infra. It should not be forgotten that the purpose of land law is to serve the public interest as exemplified by the land owner. See Cribbet, The Lawyer and Title Insurance, 1 REAL PROP. PROB. & TR. J. 355 (1966).

3. See, e.g., Buckley, Recent Consumer Protection Legislation in Ohio, 22 CLEV. ST. L. REV. 393 (1973). The author lists the legislative enactments in the State of Ohio that were intended to protect the consumer from pre-1911 to the present. None of these enactments protect the consumer's title to real property.

4. The purchase of a home to a young married couple probably involves more to them than does the acquisition of a large tract of land to a corporation. See Cribbet, supra note 2; Gresham, The Residential Real Estate Transfer Process: A Functional Critique, 23 EMORY L.J. 421 (1974). Although this author disagrees with Mr. Gresham's solution to the problem of title protection, the article gives an excellent review of the consumer's need for protection in the four primary areas of the residential real estate transfer: finding the home, lending, title establishment, and closing, including possible "transfunctional 'tie in'" in the system. Of special note is the discussion of the purchase and sale contract.

5. The primary goal of the buyer is protection and security in the purchase of his home. He wants more than information. Only a system of land registration can effectively provide him that security. See McDougal, Title Registration and Land Law Reform: A Reply, 8 U. CHI. L. REV. 63 (1940); Raushenbush, The Small Real Estate Transfer: Problems and Controversies, 3 REAL PROP. PROB. & TR. J. 317 (1968).
The seller wants to convey that title in an expeditious manner. Both want the transfer to be inexpensive. In reality, the typical title conveyance today is not necessarily inexpensive, secure, or carried out in an expeditious manner. Today's average home buyer accepts without a murmur of protest the closing costs either incurred at the closing or assessed at that time by the lending institution. If diligent, he may note that such costs include a title search, sometimes a title insurance policy, or a title opinion letter or certificate. What the home buyer does not know, since generally no one so informs him at the closing, is what the title search reveals about the property and what title protection, if any, is given to him. In addition to being woefully ignorant of what title protection he received at the closing, the buyer is usually unaware that even that protection is lost on his subsequent transfer of the home.

The welfare of the consuming public demands a system of title protection which is expeditious, inexpensive, and primarily conclusive and secure. It is the duty of all individuals and institutions concerned with serving the consuming public in land transactions to promote such a system. The legal community should be at the forefront of this effort. A comparison of the "title registration"

---

6. Today's marketplace considers land to be a commodity; however, proof of its ownership depends on outworn and dated systems resulting in expense, delay, and insecurity of title. See note 1 supra; Patton, The Torrens System of Land Title Registration, 19 MINN. L. REV. 519 (1935).

7. Most residential home buyers require financing. The problems noted in this article are essentially the same in regard to title protection where no financing is involved. The typical home buyer only knows about the monthly payment on the mortgage loan and gives little attention to the terms of the mortgage, the costs connected therewith, or the protections received. See Gresham, supra note 4, at 440. In fact, the uselessness and futility of the present recordation system is amazing, and is completely unknown to most consumers. See Heinrich, The Case For Land Registration, 6 MERCER L. REV. 320, 333 (1955).

8. See notes 81 & 90 infra.

9. The primary goal is for security. That security will require that the title be conclusive and all interests which might affect the title to be adjudicated. Hopefully, that security can be obtained quickly and inexpensively. See McDougal & Brabner-Smith, supra note 1; McDougal, supra note 5.

10. Suggestions for task forces to consider the problem have included the use of state law schools, the use of bar associations, and an interdisciplinary approach using an economist, computer technician, lawyer, and a survey engineer. Compare Spies, A Critique of Conveyancing, 38 VA. L. REV. 245 (1952) with Cribbet, supra note 2 with Committee on Improvement and Modernization of Land Records, Modernization of Local Record Keeping of Land Title Information, 11 REAL PROP. PROB. & TR. J. 343 (1976).

11. Title protection is within the peculiar province of the lawyer. Often the real estate closing is the consumer's first contact with the legal system. See Heinrich, supra note 7; Payne, The Price the Bar Must Pay to Retain Its Title Practice, 35 ALA. L. AW. 277 (1974);
system with the present systems of title protection which are based on the system of title recordation demonstrates clearly the superiority of the former.\textsuperscript{12}

Although the concept of land title registration had been known for years, Robert Richard Torrens, the first prime minister of Australia, formulated the first workable system.\textsuperscript{13} He conceived the plan while working as a British customs clerk in southern Australia. At that time, each ship was registered under the English Ship Registry Act. A page in this registry was given to each ship so registered, and the owner's name, description of the ship, and all liens and encumbrances on the ship were noted thereon. In order to transfer ownership of the ship, the certificate of title held by the current owner had to be submitted for cancellation and a new certificate issued to the new owner. Thus, there would be only one certificate outstanding at any one time, and all encumbrances and liens would be noted thereon. This procedure ensured ease and certainty in the transfer of ownership. Title registration of land was derived from, and is therefore similar to, the above-noted system and is often referred to as the "Torrens system."\textsuperscript{14}

Raushenbush, \textit{supra} note 5. If the legal community does not meet this challenge, it may be excluded from the decision making process. \textit{See}, e.g., Fiflis, \textit{supra} note 1 (questioning whether the appropriate section of the American Bar Association would sponsor such a project); Gresham, \textit{supra} note 4, at 468 (noting that lawyers may be dispensable insofar as giving title protection to consumers).


14. The terms "land registration" and "Torrens System" are often used interchangeably,
The key to the Torrens system of land registration is that title to the land itself is registered and not merely the evidence of that title. Although each statute for land registration may differ, the format of the process of registration is the same. In all American jurisdictions, title registration is done in a court proceeding initiated by the fee simple owner of the property. His complaint will contain a legal description of the property, generally based on an attached survey, and will note all ownership interests outstanding on the land, including all liens and encumbrances. Named as defendants will be all adjacent property owners. The court then appoints an official title examiner who will investigate the status of the title and report to the court. This is an in rem proceeding, and all parties who may have an interest in the property are named as defendants and must be served with notice. The court, upon receipt of the official title examiner’s report, and after all notices have been given, will either (1) confirm the title in the applicant as stated in the complaint or as modified by the court, or (2) reject the application. If the application is confirmed, the court directs the registrar of the county to enter a certificate of title in his office to show the exact

and as mentioned infra note 17, there are differences between this system and the English form of land registration. According to Bordwell, The Resurrection of Registration of Title, 7 U. CHI. L. Rev. 470, 471 (1940), the use of the name Torrens was of great advertising value. Evidently, given the course of history of Torrens legislation, additional advertisement was needed.

15. The basic principle of this [Torrens] system is the registration of the title of land, instead of registering, as the old system requires, the evidence of such title. In the one case only the ultimate fact or conclusion that a certain named party has title to a particular tract of land is registered, and a certificate thereof delivered to him. In the other the entire evidence, from which proposed purchasers must, at their peril, draw such conclusion, is registered. State ex rel. Douglas v. Westfall, 85 Minn. 437, 438, 89 N.W. 175, 175 (1902).

16. See, e.g., McCall, supra note 1; A. DUNHAM, supra note 13; R. PATTON & C. PATTON, LAND TITLES (2d ed. 1957); Heinrich, supra note 7; Comment, supra note 12 (discussing the Georgia System); Spies, supra note 10 (discussing the Virginia System); Maher, Registered Lands Revisited, 8 W. RES. L. Rev. 162 (1957); Hudak, Registration-of-Land-Titles Act: The Ohio Torrens Law, 20 CLEV. ST. L. Rev. 617 (1971) (discussing the Ohio Act).

17. The judicial aspect of the American Torrens System is the primary difference between the American and English form of Torrens. The judicial proceeding is needed to satisfy our concept of due process. See A. DUNHAM, supra note 13; Patton, Evolution of Legislation on Proof of Title to Land; supra note 12; Sabel, supra note 12. The authority of a state to enact registration statutes was established by the United States Supreme Court in American Land Co. v. Zeiss, 219 U.S. 47 (1911). The Committee on Improvement and Modernization of Land Records (see note 10 supra) accepted without discussion the conclusion that if the Torrens System survived constitutional challenge, then their own suggested system of a multi-purpose cadastre would survive such challenge.
status of the title as determined by the court proceeding. This certificate will state the legal description of the property as determined by the court, the name or names of the owner, and on its reverse side, will note any and all encumbrances, liens, or interests outstanding on the property. The original certificate of title is retained by the registrar of titles and an owner's duplicate certificate is given to the now registered owner. At this point, subject to the exceptions noted below, the certificate of title states accurately the status of title and is conclusive on all individuals. The title is now, and at all times in the future will be, an adjudicated title. All interests affecting the title are noted on the certificate, and the validity of all such interests has been determined. As even the most severe critics of this system of registration acknowledge, a registered title is the most conclusive method of title protection available today.18

A registered title is not, however, absolutely conclusive since certain exceptions will be noted on the title certificate.19 Nonetheless, the nature of these exceptions generally can be ascertained by a brief title search or by an inspection of the property. The basic exceptions include such items as (1) appeals from the original decree of registration, generally a period from six months to two years; (2) rights arising under the laws of the United States which are not required by federal law to be registered or recorded; (3) leases of certain terms, generally no longer than three years; (4) rights of the public in highways; and (5) appeals from the initial decree on the basis of fraud or a similar action.

If a party has been injured by the registration of the land, or by the subsequent misconduct of the officials administering the system, redress may be had from an assurance fund which is established by the registration statute to indemnify against losses resulting from such injury. The assurance fund is state administered and is funded by a deposit required of each initial applicant for land

18. See note 12 supra. Most experts agree that once the land is registered, the title protection provided is superior to other methods used in this country. One of the primary advantages of the system is that title cannot be obtained in registered land through the doctrine of adverse possession. There are exceptions to the certificate, and a registered title could be upset if acquired by fraud or forgery. Nonetheless, a title certificate is almost 100% secure. See Patton, supra note 6. See also Staples, The Conclusiveness of a Torrens Certificate of Title, 8 MINN. L. REV. 200 (1924).

19. Some exceptions should be removed from the certificate of title to increase its conclusiveness. Other exceptions, due to their nature, will need to remain. Nevertheless, the Torrens System is far superior to any other system of title protection.
registration. The deposit is based on a certain percentage, typically one-half of one percent, of the assessed value of the property. Claimants of these funds have been rare. 20

Once title to the property has been registered, all subsequent transactions affecting the property must follow the statutory procedure. 21 If the land is voluntarily conveyed, as under the present system, the seller will deliver a deed to the buyer. However, in addition to delivery of the deed, the seller will surrender to the buyer his certificate of ownership, often called the owner's duplicate of title. The buyer then takes the deed and the owner's duplicate of title to the county registrar's office. The county registrar will require the buyer to sign a signature card kept in his office. The registrar retains the original deed, cancels the prior certificate of title, and issues a new certificate of title to the new owner. The new certificate of title will refer to the prior cancelled certificate and will carry forward any and all encumbrances or interests noted on the prior certificate which have not been cancelled. It is not until the new certificate of title has been issued by the county registrar that title to the property is transferred. Title is not transferred by the delivery of the deed at the closing, but only by the surrender of the prior certificate and the issuance by the registrar of a new certificate. There can be but one fee simple owner's certificate of title, and it is the only evidence of ownership outstanding at any one time.

Voluntary transfers are recorded on the certificate of title and noted by the registrar on both the owner's duplicate of title, which

20. Recourse to the assurance fund has been limited. Heinrich, supra note 7, however, suggests that the fund would be used more if it were more accessible to claimants. Thus, even though the title registration system was widely used in Boston and there was a large assurance fund, few claims were made against it. See D. Burke & N. Kettlhe, supra note 12. Note, however, the case of Horgan v. Sargent, 182 Minn. 100, 233 N.W. 866 (1930), in which a registrar erroneously listed a mortgage for the value of $3300, instead of the actual value of $3810. A bona fide purchaser of the owner's equity paid the full amount of the mortgage, as based on the recorded memorials. Consequently, the purchaser was able to collect the amount lost from the assurance fund. Under the present recording systems there would have been no recovery in this situation against the recorder, and the loss might not have been covered by other means of title protection.

is returned to the owner, and on the original certificate, which is retained for public inspection in the registrar's office. All involuntary interests which affect the property are also recited on the certificate. An involuntary interest is noted on the original certificate of title in the registrar's office only on an order directed to the registrar from the appropriate court.\footnote{22} The next time the owner's duplicate of title is surrendered to the registrar, that certificate is brought current to conform with the original certificate. Thus, even though an owner's duplicate of title may not be kept current as to involuntary interests, the original certificate of title at the county courthouse will correctly state the status of title as to all interests, be they voluntary or involuntary.

This system of title registration is the most conclusive form of title protection available.\footnote{22} Once title has been registered, subsequent transfers have been cheaper and faster.\footnote{24} Consumers like to buy registered land because the conflicting interests affecting the property have been adjudicated and can be readily ascertained from the certificate, because adverse possession is not possible, because there is no fear of hidden risks or recorded-but-not-stated interests, and because title is secure and known. Nonetheless, the fact remains that although a form of the Torrens system is now being used in most English speaking countries of the world, it has never been popular in the United States.\footnote{25} After Sir Torrens devised the system for Australia, American commentators soon urged its adoption in

\footnote{22. Consequently, a potential buyer can rely on his seller's Duplicate of Title as to all facts contained therein. However, he can easily verify all interests by a review of the Original Certificate at the local courthouse in the office of the County Registrar. See A. DUNHAM, supra note 13; Patton, supra note 6.}

\footnote{23. See notes 12 & 18 supra.}

\footnote{24. Savings result primarily because a title search beyond the standard exceptions noted on the face of the certificate is no longer needed. There is also a public savings because the cost of maintaining the registration office is less than the cost of the recordation office. See A. DUNHAM, supra note 13; R. PATTON & C. PATTON, supra note 16; D. BURKE & N. KETTRIE, supra note 12; Fiflis, supra note 1; Heinrich, supra note 7 (making a comparison of costs in Georgia).}

\footnote{25. Generally, these systems are not commenced by judicial proceeding. Rather, the initial determination is made by an administrative official. A statute of limitations is used to convert the possessory title into a conclusive title. Usually registration is compulsory. See R. Hogg, Registration of Title to Land Throughout the Empire (1908); Committee on Improvement and Modernization of Land Records, supra note 10; Fiflis, Security and Economy In Land Transactions; Some Suggestions From Scotland and England, 20 Hastings L.J. 171 (1968)(noting that although registration was not universally required in England, since 1899 the system has become compulsory at a gradual pace).}
the United States. Illinois passed the first land registration act in 1895, and Ohio quickly followed suit in 1896. Both acts were later judged unconstitutional, but later, Illinois and Ohio passed new statutes authorizing land registration, which survived constitutional challenges and are still used today. In the early part of the 20th century, many states passed legislation authorizing land registration. At one time, nineteen states and the then territories of Alaska and Hawaii had statutes for land registration. The Committee on Uniform State Laws adopted a Uniform Land Registration Act. Today only ten states have legislation which authorizes the use of land registration. Even in those ten states, the use of the registration statute is sporadic and limited to certain areas or individuals with defined economic interests.

What has happened? The battle for and against land registration was waged mightily in legal periodicals during the 1930's.

26. Compare People ex rel. Kern v. Chase, 165 Ill. 527, 46 N.E. 454 (1896) with Tower v. Glos, 256 Ill. 121, 99 N.E. 876 (1912) and People ex rel Deneen v. Simon, 176 Ill. 165, 52 N.E. 910 (1898). Although the Ohio Act was held invalid in State ex rel. Attorney General v. Guilbert, 56 Ohio St. 575, 47 N.E. 551 (1897), a later version was made possible by an amendment to the Ohio Constitution. OHIO CONST. art. II, §40.

27. Several of these registration statutes were subsequently repealed. E.g., California: Torrens Land Title Registration Law, 1897 Cal. Stats. 138, as amended 1915 Cal. Stats. 1932 (repealed 1955).


30. Often registration is used only in urban areas. Today, registration is primarily used in Hawaii, Illinois (Cook County), Massachusetts, Minnesota, and Ohio. Registration has been used to avoid adverse possession of timber or mining lands, to define boundary lines, to strengthen a tax sale title, and to clear up defective titles. Registration is also used by large subdividers and owners of titles that are technically defective and unmarketable. Certain organizations, including corporations and municipalities, may register their property under the system. The Prudential Center in Boston was registered. See Fiflis, supra note 1. In Cincinnati, title to the professional sports stadium was registered by the city. See generally McCall, supra note 1; O. Browder, R. Cunningham, & J. Jolin, supra note 1.

31. While some of the objections raised in the 1930's have changed, many should be noted and taken into account when drafting new registration legislation. The use of modern technol-
icated below, the lines of controversy were clearly drawn, primarily on the basis of cost, time, and effectiveness of the proposed system (which were accentuated by non-use, ignorance, and opposition). The death knell probably came with the publication entitled Registration of the Title to Land in the State of New York by Professor Richard Powell, a former advocate of the system, urging the registration statute in New York be repealed. Soon states began to repeal their land registration statutes. Thereafter the proponents and opponents of the system laid aside their pens. The few states which still authorized the system continued to limp along. Periodically, a law review article or two appeared discussing the system in general terms though noting that the battle for the Torrens system of land registration should not be renewed. Some authors dismiss the Torrens system as anemic; others as impractical; some as of historical interest alone; and unfortunately, some do not even consider the system when talking of title protection. 36

Phenology will assist in the administration of the system, and a compulsory system will survive constitutional challenge. See Fiflis, supra note 1. See also Lobel, A Proposal for a Title Registration System for Realty, 11 U. CHi. L. REV. 501 (1977)(discussing the attention again being focused on the Torrens System).

32. R. Powell, Registration of the Title to Land in the State of New York (1938). Among the reasons cited by Professor Powell were the following: The relative non-use of the system, the cost, the tendency of the system to invoke litigation, and the fact that it was a foreign system which was not relevant to the American experience. These arguments were attacked by many commentators. See, e.g., Fairchild & Springer, A Criticism of Professor Powell's Book Entitled Registration of Title to Land in the State of New York, 24 CORNELL L.Q. 557; McDougal & Brabner-Smith, supra note 1.

33. The battle lines on this controversial issue were drawn long ago and are now quiescent, having apparently given way to more active battle grounds elsewhere. In any event little could be gained by reexamining in detail the "pros and "cons" [sic] of the Torrens system. For despite a personal conviction that the system is eminently superior to that which we now have, there can be little doubt but that the battle for the Torrens system has been irretrievably lost in Virginia. Spies, supra note 10, at 252.

34. See McCall, supra note 1. Even though title registration is the best theoretical method of title assurance ever devised, it is "too frail a need" to support conveyances today. J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY (2d ed. 1975).

35. See J. CRIBBET, supra note 34. The system should not be resorted to unless there is a complete breakdown in the present system. Id. The costs connected with title registration can be reduced. Not only is the general populace familiar with the concept of registration, the system also provides the greatest form of title protection that is available. Nonetheless, the practical considerations of opposition and the "foreignness" of the system show that it is not a solution to existing problems. See Comment, supra note 1.

36. Professor Bordwell dismisses the concept as a passing phase of politics. See Bordwell, supra note 14; Comment, supra note 1.

37. Gresham, supra note 4, does not even discuss the system of title registration in his
To encourage adoption of a system of land registration, the initial cost of the registration of title must be reduced. Second, the time delay now required for initial registration must be shortened. The inconvenience of waiting is compounded by the fact that a land owner often does not choose to register his title until the property is sold, when the factor of time is most important. Generally, property is to be sold immediately, and the eight to twelve months required for registration is too long to wait.

Closely coupled with the problems of cost and delay during the initial registration is the consuming public's ignorance of the system. Most laymen simply do not know that there is an alternative to the traditional recording system. Since the consumer does not know about the system of registration, he has never been in a position to ask for it. Unfortunately, members of the legal community frequently are unaware of the system. The bar has been and remains unfamiliar with the system and, as a result, has not recommended it to their clients.

Another problem is that because registration of title is optional,
every jurisdiction which has had a registration system also has maintained the traditional recording system. The registration system is administered solely by the county and therefore receives little publicity. On the other hand, the merits of the existing recording system are often publicized by special interest groups whose success depends on the continuation of that system. These special interest groups have used their influence to thwart land registration in a variety of ways, including working to prevent the passage of registration legislation, or if passed, for its repeal; failing to advise their clients about the system or advising against it; and in general working to frustrate the purposes of registration. Although such opposition to registration may stem from a sincere belief in the disadvantages of the system, it may also be that the lawyer's desire to stay in business and to make a profit cause opposition. Among those opposed to title registration are lawyers, not only because they know little about the system, but because they fear losing fees. The most strenuous opposition continues to be from the title industry. The title industry consists of (1) those lawyers who search titles and draft title opinions or certificates, (2) professional abstractors, and (3) title insurance companies. The title industry believes that it must actively fight the adoption of title registration in order to justify its own continued existence, for without the recording system, its services would no longer be needed. Today mortgage lenders have joined with the title industry. For example, both the federal

recording system, especially when the latter is reinforced by the active support of the special interest groups noted in note 43 infra. Proponents of recording have often engaged in advertising campaigns. See D. Burke & N. Kettrie, supra note 12. See also Fairchild & Gluck, Various Aspects of Compulsory Land Title Registration, 15 N.Y.L.Q. Rev. 545 (1938); Heinrich, supra note 7.

43. Most of the commentators on land registration note the opposition of various special interest groups. At one time, administrators were opposed to the system, but such opposition is now gone. See Bordwell, Registration of Title To Land, 12 Iowa L. Rev. 114 (1926). Scathing comments toward the special interest groups can be found in several articles, but the language of Rood is particularly colorful in describing the beneficiaries of the existing system: "If you turn over a stone in the field, a lot of crooked wriggling creatures are distressed by being exposed to the light and deprived of their shelter. If you try to correct an old vice you will find the same situation; and the recording system is no exception." Rood, supra note 12, at 380.

44. See Heinrich, supra note 7; McCall, supra note 1; Rood, supra note 12.

45. The title industry has always displayed the most intense opposition because it feels—and rightfully so—that it is fighting for its continued existence. However, in the suggested title registration scheme proposed herein, there will be room for workers in the title industry. Thus, the opposition of the solicitors to compulsory registration eventually failed in England. See Fiflis, supra note 25.
mortgage market and lenders demand an American Land Title Assurance policy of title insurance even if the subject property is registered under the Torrens system.46

The consuming public is not only ignorant of title registration but also suffers from inertia.47 It, as well as the legal community, is naturally opposed to change. Until the defects of the present system and the advantages of the registration system are made known and explained to the public, the existing system will continue. Change will come only if the consuming public is made aware of the fact that innovation in the area of title registration is good and that the continuation of the present system will soon be an albatross too heavy to bear.48 The public is not reassured by the requirement of a lawsuit. Even though the suit with his neighbors may be friendly, the registrant must face the possibility of a title defect.49

Other factors have also contributed to the non-use of title registration. Some statutes which have been repealed or are seldom used today either suffer from poor draftsmanship or were adopted before the need for registration was present.50 The characterization of the system as a "foreign system" was especially damaging in the 1930's.51 Finally one key reason for the failure, or at least non-use of the Torrens system of title registration, is that most titles are good without any need for title protection.52 The adoption of a system of

46. Generally, lenders like the uniformity of protection offered by title insurance. Their opposition to registration has increased in recent years especially with the growth of the secondary mortgage market. Often, a lender will require title insurance on registered land. See D. Burke & N. Ketrie, supra note 12; A. Dunham, supra note 13; Hudak, supra note 16; Maher, supra note 16.

47. Inertia is probably the greatest factor contributing to the non-use of registration statutes. This is especially true when it is coupled with a voluntary system of land registration. See, e.g., J. Cribbet, supra note 34; Rood, supra note 12.

48. As Barnett points out, the concept of an albatross to describe the present system of recordation is not new, but appropriate. See Barnett, supra note 12.

49. The average man does not want to spend time and money to prosecute a lawsuit simply to clear a title. This is due to the sentiment that lawsuits are not "neighborly," and a reluctance intensified by the feeling of "letting sleeping dogs lie." As a result, there may be a title defect. See Hudak, supra note 16; McCall, supra note 1; Rood, supra note 12.

50. Statutes often were poorly drafted, or else were passed "before their time" by overly zealous reformers. See Fairchild & Gluck, supra note 42; McCall, supra note 1.

51. Many commentators have felt that registration was not suited to the American way of life. This belief was due to a distrust of anything foreign and assisted in the decline of registration. Compare R. Powell, supra note 32 with Fairchild & Springer, supra note 32.

52. Most titles are good, and no method of title protection is needed. It is the uncertainty of whether a particular title is good, however, which has led to the various forms of title protection. See Heinrich, supra note 7. Rarity of the loss, however, is of little solace to the
title registration as contemplated herein will affect all titles in order to give protection to a few. The present system, however flawed, does generally work. Nonetheless, it should be remembered that even though most titles are good, the expense, time, and wasted effort expended to ascertain that fact each time the property is transferred under the present system suggest the advantage of the adoption of a system of title registration.\footnote{53}

Despite the problems noted above, the battle for the adoption and use of the Torrens system of land registration must again be waged with renewed vigor and urgency. The protection offered by land registration is needed by all land owners, but especially by the individual home owner, whose investment is probably the greatest he will ever make.\footnote{54} The consuming public can no longer afford the expense of private and public moneys to maintain the present outmoded, cumbersome, and inefficient recording system, nor can it continue to support the private title plants which have arisen to supplement the public recording offices. A review of the existing methods used for title protection, other than title registration, will show that these methods are not secure, are expensive, and are not necessarily expeditious.

All methods of title protection other than registration rely on a search of the record. Title protection is then given by means of an opinion of title, a certificate, or a policy of title insurance.\footnote{55} The victim. See Hollander, Hidden Risks in Real Estate Title Transactions, 19 CLEV. ST. L. REV. 111 (1970).

\footnote{53} Even if most titles are secure, buyers—and more importantly, lenders—want assurances that the title is secure. It is the cost and wasted human effort required under the present system of recordation that dictates the need for change. Many commentators view the rise in title insurance companies as an indictment of the present system. See, e.g., Rood, supra note 12.

\footnote{54} Fiflis calls for renewal of the battle for title registration in his conclusion “that the battle must be fought, that it could be won; and that there is a probability that the defects of initial registration can be eliminated.” Fiflis, supra note 1, at 432. McDougal also has foreseen the need for consumer protection:

[The day for title registration in this country is just beginning to dawn: it has no need of “resurrection;” it is far from dead; it is big with all the life of the swelling contemporary demands of millions of people for livable homes, in livable environment, at an approachable price and of other millions for some kind of farm security; it may not “save” these millions for some far-flung millenium; but it is an indispensable, if perhaps minor, element in a comprehensive program for the rehabilitation of a substantial part of their lives.]

McDougal, supra note 5, at 77.

\footnote{55} The certificate, which is used in a few jurisdictions, describes the state of the title based on either an abstract or a title search. Generally, no opinion of title by a lawyer is attached.
actual title search is made of all documents (which affect the subject property) filed for record with the county recorder’s office as well as all other places where interests affecting the property might be filed, e.g., the county clerk’s office, the probate court, the federal courthouse. In addition, the property itself should be searched to see who the current occupant is. A title search, regardless how thorough, will never reveal all items which may affect the title. The list of “hidden risks” that never appear on the record seems endless. Without a search of the property, which might not even reveal the true facts, it is impossible to know whether the property has been adversely possessed by a third party. A search of the records might be hampered by administrative error in the indexing of documents. The search only reveals the recorded instruments which affect the property, without any indication or determination as to the validity of such interests. Absent appropriate legislation, a search should go back to the original title, though in practice it is often limited to forty or sixty years, depending on the local custom or practice. It quickly becomes apparent that a title search can be, and generally is, a long, tedious, and laborious procedure. Countless records must be checked. As the length of time for the search increases, so do the chances for human error. The next time the same parcel of property is transferred, the entire record must again be searched. Once

See Fiflis, supra note 1. One or more of these methods is usually required by the lending institutions, and the charge is paid by the purchaser. Even without the requirement of the lending institutions, most buyers want to know the status of the title. See Gersham, supra note 4.

56. For lists of all the possible hidden risks, see Chaplin, Record Title To Land, 6 HARV. L. Rev. 302 (1892); Hollander, supra note 52; and Sabel, supra note 12.

57. The fact that adverse possession cannot apply to registered land is one reason why the procedure is used by certain companies. See note 30 supra.


59. The title search only reveals those documents which have been recorded against the property. The search does not disclose whether the interests are valid or not. Each person must draw his own conclusions as to the effect of each instrument. See Barnett, supra note 12; Chaplin, supra note 56; Fiflis, supra note 1; Rood, supra note 12; Comment, supra note 1.

60. The length of the search varies according to custom. Marketable title legislation often uses a period of forty years, although advocates of this legislation suggest a shorter period. See D. Burke & N. Kettricke, supra note 12; Fiflis, supra note 1; Spies, supra note 10.

61. Human error is present in every search of the record. The possibility of error increases as the records swell, and as more and more young law clerks are used to perform the title search. See Spies, supra note 10.
again, a title examiner will be sent to search the same records, except that there will be one additional transfer. On each transfer the mass of records which must be searched grows. The waste of human energy and talents is great. The inefficiency continues to grow as each transfer is made.

The use of an abstract was devised to solve some of the problems incurred when searching the public record. An abstract of title is a condensation of the recorded instrument. So long as the first abstract is accurate and each transfer is accurately recorded therein, the abstract of title solves many of the problems connected with the duplication of the search. Also, today the large title insurance companies have avoided much of the duplication of title searching by the establishment of their own so-called “title plants” in which they maintain their own records and files. For example, once the title plant has made a search, a file is opened on that property which can be used on a subsequent transfer. Both the abstract and the title plant have helped avoid the duplication of the title search in the public records, yet the other problems inherent in the recording system continue.

62. The primary weakness of the system is that with each transfer, the record swells. This increases the chance of human error, and intensifies the waste of human effort. See note 12 supra; note 63 infra.

63. Many commentators note that the system of recordation is an improvement over the prior system of title deed retention. Nevertheless, the fact remains that the present system represents a large perpetual motion machine. See Bordwell, supra note 43. Examples of this inefficiency abound, but a favorite example is cited in Viele, The Problem of Land Titles, 44 Pol. Sci. Q. 421, 425 (1929). A certain parcel of land was divided into 1,383 parcels and sold at a partition sale to approximately 300 purchasers. Each purchaser probably had the title searched. Thus, 300 hundred lawyers were hired to examine the same index and the same records in the 3,500 volumes of the recorder's office, and were paid 300 fees. The same labor was performed 300 times—299 of which was wasted effort. And, when each of the original 300 owners sell their 1,383 lots, an examination will again be made. This time, however, it will be by 1,383 purchasers, with 1,383 lawyers, who will earn 1,383 fees. Of course, the fees will now be greater, and the recorder's office will probably have 10,000 volumes instead of a mere 3,500.

64. The abstract is described in J. CRIBBET, W. FRITZ & W. JOHNSON, PROPERTY (2d ed. 1966). Bordwell, supra note 14, suggests that the solution to the recording system is to improve the abstract system. But, it should be remembered that the abstract only lists the instruments of record without a determination as to their validity. See note 59 supra.

65. Title insurance companies and some abstract companies now have offices which, in effect, duplicate public records. Such plants are an improvement over the public records because they are organized like registration records. See Fiflis, supra note 1; McDougal & Brabner-Smith, supra note 1; Sabel, supra note 12.

66. This is due in part to the hidden risks noted in note 56 supra, and the fact that there has been no judicial determination of the interest as noted in note 59 supra.
What happens after this laborious title search has been made? Often, the lawyer who made the search, or for whom it was made, will draft a letter expressing an opinion, based on the title search or on a review of the abstract of the title, as to the status of the title. Typically, the opinion letter is limited to the information revealed in the title search or the abstract and does not cover such exceptions as parties in possession, unrecorded instruments, and hidden risks. The exceptions contained in the letter are there to protect the lawyer who naturally does not want to opine as to a matter which might later result in liability, even if the chance of its arising is slim. This practice results in overly cautious and nit-picking letters which protect the attorney rather than the client. Often the letter contains so many exceptions that the client is tempted to ask, “but can I safely buy?”

What type of protection does the consumer receive with the opinion letter? At best, the buyer receives an opinion of title on only those matters of records and items on which the letter expresses an opinion. If there is a loss, the buyer will receive only money damages and then only if he can prove negligence. In addition, the lawyer who gave the opinion must be alive, solvent, and reachable. Because the opinion letter is based on the recording system, the buyer is told of the existence of interests affecting the property, but is not assured of their validity. The buyer cannot use the opinion letter as a bargaining weapon on resale of the property. The letter is addressed solely to him and offers protection only to him. Any subsequent purchaser must use the same process. An opinion of title

67. Such “nit-picking” or “fly-specking” results in protection of the attorney. The lawyer is more concerned with whether a subsequent title examiner or court will approve his opinion than whether the title itself is free from encumbrances or defects. See McCall, supra note 1; Raushenbush, supra note 5; Spies, supra note 10.

68. There is no liability if the draftor has expressed no opinion or has exempted himself from liability.

69. If there is a loss, and the buyer is protected under the opinion letter, he will receive monetary compensation only for the loss. The defect itself is not removed, and the buyer may lose his home. The typical home buyer is more interested in an undisturbed retention of his home rather than money damages. See note 84 infra. Liability will arise only if there is negligence. Generally, the opinion letter is personal and is not transferrable to a third party. See McDougal, supra note 5; McDougal & Brabner-Smith, supra note 1. Similar liability attaches to the abstractor. See, e.g., Slate v. Boone County Abstract Co., 432 S.W.2d 305 (Mo. 1968)(liability extended to third parties on a third party beneficiary contract theory).

70. Again note that the opinion letter merely lists the interests outstanding on the property; the hidden risks remain.
based on either a title search or an abstract of title is neither fast, inexpensive, nor conclusive.\textsuperscript{71}

The inadequacies of the use of the opinion letter led to the rise of the title insurance company. In fact, many commentators today believe that title insurance is the preferred method of title protection today and will be in the future.\textsuperscript{72} As with the opinion letter system of title protection noted above, a policy of title insurance first requires a title search of the public records. Once that search has been made, a policy of insurance is then issued to the named insured in regard to the status of the title. Obviously, many of the inherent problems of the title search also affect the insurance policy, although some are rectified. A policy of title insurance generally will protect against the hidden risks.\textsuperscript{73} Nonetheless, because the policy is based on a search of the public records, the validity of the recorded documents which affect the title has not been ascertained. A lawyer is still needed to explain the policy.\textsuperscript{74} Likewise, the term "title insurance" is a misnomer. Basically, the policy is only a statement of the condition of the title as of a certain date. Protection is limited to matters noted as of that date, and the policy offers no protection for subsequent loss, nor does it take account of increases in the risk of loss or of the market value.\textsuperscript{75}

Typically, a policy of title insurance first describes the property.\textsuperscript{76} This description is based solely on descriptions contained in prior deeds, without the benefit of an accurate survey. In fact, a basic exception from coverage of the policy is what would be revealed by

\textsuperscript{71} See note 69 supra.

\textsuperscript{72} While many commentators view the increase of title insurance companies as an indictment of the present system of title recordation, others feel that title insurance is the title protection system of the future—and that its use will increase. Compare J. Cribbett, supra note 34 with Rood, supra note 12. Eventually, title plants and the public offices may blend and exist much like a public utility. See Cribbett, supra note 2.

\textsuperscript{73} The primary advantage of title insurance over the opinion letter system is that the insurance company will generally insure against the hidden risks mentioned in note 57 supra. For a good description of a typical policy, see J. Cribbett, supra note 34, and Bowling, The Alta Loan Policy—Have You Read Paragraph 3(a)?, Law Title News, July-August, 1974, at 15.

\textsuperscript{74} See note 59 supra; notes 76 & 77 infra. A lawyer must still determine whether the interests noted on the policy are valid. There has been no official adjudication.

\textsuperscript{75} The primary criticisms raised by commentators over the title insurance policy are that the policy does not reflect increases in value due to inflation or improvements, and that it is limited to the status of the title on a particular date. See Fiflis, supra note 1; Comment, supra note 1.

\textsuperscript{76} See Bowling, supra note 73.
an accurate survey. Schedule B of the policy contains "standard exceptions" contained in all policies and the "particular exceptions" covering the subject parcel of property. The latter exceptions are all items which have been revealed by the title search as affecting the title. Thus, all recorded data are duly noted on the insurance policy as exceptions from the insurance coverage. The named insured is not apprised of the validity of such interests but is merely told they are not covered by the policy and that no protection is given if loss results from these interests.\textsuperscript{77} The standard exceptions exempt from the insurance coverage are matters which would be revealed by a survey, interests of any person in possession, interests created after the date of issuance of the policy, and often items known or which should have been known to the named insured. In addition, there are normal exclusions of matters which the title company believes it cannot insure against, such as zoning laws, eminent domain rights, or defects and encumbrances assumed by the insured or known to the insured and not disclosed. All these are of vital concern to the homeowner. Finally, the policy contains in fine print a list of conditions and stipulations which cover the details on how and when the insured can collect for loss.

As noted above, the title insurance policy is an improvement over the opinion letter system of title insurance in covering hidden risks. In addition, a state generally requires the title insurance company to maintain a minimum amount of capital so as to minimize the risk of loss to the insured due to the insolvency of the insurer. The title insurance company generally agrees to defend the insured against loss.\textsuperscript{78} But what protection has the insured really received? The protection is actually very little at a very high cost.\textsuperscript{79} First, coverage is limited to the amount set at the time of the original issuance of the policy. Thus, the policy does not compensate for, nor contemplate, any increase in market value of the property due to either inflation or actual appreciation in value. Second, the policy speaks only to the status of the title as of the date of issuance. It does not

\textsuperscript{77} See notes 59, 70 & 74 supra.

\textsuperscript{78} Another of the alleged advantages of title insurance is that the company will defend the insured party. See J. Cribbett, supra note 34. Query the effectiveness of this advantage, especially in view of the fact that many title companies are reluctant to pay. See note 85 infra; Fiflis, supra note 1.

\textsuperscript{79} The exceptions are well documented by Bowling, supra note 73, and the actual protection offered is very little. See McDougal & Brabner-Smith, supra note 1.
address itself to any factors which might later affect the title. Third, the cost is too high, particularly because the cost cannot be passed on to subsequent transferees as the policy is personal to the named insured and is not assignable. Each time the property is transferred a new policy must be issued. Typically, the title company need only update its file on that particular parcel; however, little, if any, credit in cost is given the insured. Finally, the insurance policy is not proof of the title to the property. It is not conclusive. The policy merely certifies that as of a certain date, the status of the property is as noted therein. If the true status of the property is not as stated therein, the insurance company will be liable, but the insured is compensated only monetarily. The property itself might be lost, and the insured, at best, will receive up to the face amount of the policy in damages. Clearly this protection is not what the consumer seeks and expects. In addition, it is evident that title insurance companies are not above trying to avoid payment of claims. Law suits to enforce such payments are frequent. The protection offered the insured is, therefore, limited and expensive, although generally it may be quickly given.

The expensive, if usually efficient, protection offered the insured by title insurance is being used increasingly today. Yet, even with increased use, rates have not gone down as anticipated. The increase can be credited to the practice

80. The cost is high, especially since it is incurred every time the property is transferred. Many commentators have felt that with the increase of title insurance, the cost would go down. To the contrary it appears that the increase of insurance has led to monopolistic tendencies with no cost decrease of any significant amount. See Fiflis, supra note 1; Heinrich, supra note 7; McDougal & Brabner-Smith, supra note 1.

81. As with the attorney opinion and the abstract, the protection offered by title insurance is personal to the named insured. It cannot be used in the subsequent resale of the property. See Fiflis, supra note 1; McDougal, supra note 5.

82. Occasionally, there is a rebate if the same title company is used on the transfer; however, the reduction is small. See Fiflis, supra note 1.

83. The average home owner wants to enjoy his home without interruption. This is more important than the monetary damages which the title company might pay if liable. If registration is used, the homeowner can retain his home; the injured party will have recourse against the state's assurance fund. See Spies, supra note 10; note 12 supra.

84. Title insurance companies are often sued by policy holders attempting to enforce their claims. Such recourse should not be needed if the protection were adequate. McDaniel v. Lawyer's Title Guar. Fund, 327 So. 2d 852 (Dist. Ct. App. Fla. 1976); Beaulieu v. Atlantic Title & Trust Co., 60 Ga. App. 400, 45 S.E.2d 78 (1939).

85. Title insurance is generally expeditious. This is especially true if the title plant already has a file on the particular tract of land. See Comment, supra note 39.

86. The rates have not decreased, and are still high. See notes 80 & 82 supra.
whom most residential customers must resort, of requiring title insurance. Yet the named insured under such policies, in most cases, is the lending institution and not the home buyer. There are two basic forms of title insurance policies: a mortgagee’s policy and an owner’s policy. The mortgagee’s policy is issued in favor of the named mortgagee and insures only its interests, although it is usually paid for by the mortgagor. Because of the greater bargaining ability of the mortgagee, a mortgagee’s policy is typically subject to fewer exceptions than an owner’s policy and is less expensive. The mortgagee’s policy insures only the mortgagee’s interest in the property and only up to the amount of the mortgage. Each time a mortgage payment is made, the amount of the policy is decreased by the amount of principal paid. When the entire mortgage is paid, the policy is gone. The owner’s policy, on the other hand, insures the owner’s interest in the property and typically is for the purchase price of the property. It is issued in favor only of the named insured and is not assignable. It is more expensive than the mortgagee’s policy and generally contains more exceptions.

The consumer is seldom aware of the difference between these two types of title insurance. Typically, he does not have his own attorney at the closing, but tends to rely on the real estate broker and the lender. No one present explains the difference in policies to him or recommends that he procure an owner’s policy. Thus, often the owner’s equity is not protected. For example, a lender who has lent $20,000 on a $30,000 home is not troubled by an undiscovered mechanic’s lien for $500 on the property. The lender’s policy of title insurance would protect it if needed, yet this amount would be taken first from the owner’s equity. On the other hand the unprotected owner has lost $500, a significant amount of money to the typical consumer. The lender and the title insurance company would have to pay only if the loss exceeds the owner’s equity.

Too often the consumer also naively assumes that his interests

87. Lenders typically require title insurance today, especially in their quest for uniformity of assurance. See note 46 supra. The government has also assisted in the increase of use through lenders in the various housing programs.

88. The differences between the two policies are clear if one is familiar with the system. Nonetheless, the average consumer generally believes they are the same. See Bowling, supra note 73; Fiflis, supra note 1; Gresham, supra note 4.

89. These differences are real; they can and do cause problems. See Raushenbush, supra note 5. See also notes 81 supra & 90 infra.
and those of the lender are the same. This is not necessarily the case. The lender wants title insurance so that its security interest in the property will be protected, and it will be able to recoup its investment from the title company if necessary. That is the extent of its interest. The consumer, on the other hand, wants a title which will permit him to have the uninterrupted enjoyment of his property without additional action or cost. These interests might not always coincide. For example, a lender does not care necessarily whether there are restrictions in regard to the erection of fences; however, the consumer might well be concerned with such a restriction. At a minimum, a consumer should be advised that a mortgagee's policy of title insurance does not protect his equity in the home and that his interest is not necessarily the same as the lender. A few states require this warning to be typed on the policy in bold-face. Even if the consumer is protected by an owner's policy of title insurance, he does not necessarily have a secure title. In fact, he may lose the property even though he will receive monetary compensation for the loss. The average consumer probably would prefer to keep the property rather than receive only the cash equivalent, which, of course, is calculated as of the date of issuance of the policy without consideration for inflation or improvements made to the home.

There have been several laws enacted to improve our system of title protection. Most of these laws, however, serve only to bolster the sagging recordation system, without curing its major defects. For example, many states have enacted marketable title acts. The purpose of these acts is to shorten the period of search required and to eliminate stale and dormant claims. Typically, the act requires that a search of the records be made only back to the root title, the last transfer of title occurring more than a stated number of years ago. Any interests which affect the property prior to the root title,

90. Too often, the consumer feels that he will be protected. The buyer tends to rely on the real estate broker and the bank for protection. No one dissuades him from this view, and if questioned, the cost of the additional fee quickly dissuades him. See Gresham, supra note 4. Often due to customs in a particular area only the mortgagee's policy is secured. In the Cincinnati area, for example, an owner's fee policy or title opinion is rare.


92. It must be emphasized that the property itself may be lost and the monetary compensation is limited to the amount set when the policy was issued. See notes 69, 75, & 83 supra.

93. Marketable title legislation has been praised and criticized by the commentators. See, e.g., D. Burke & N. Kettner, supra note 12; Barnett, supra note 12; Gresham, supra note 4; Patton, supra note 5; Spies, supra note 10; Comment, supra note 1.
including hidden risks, are automatically eliminated unless they have been preserved by re-recording, as provided in the statute. Obviously, these acts benefit title searchers and also the general public in the sense that the laborious search process is shortened. Nonetheless, there are many problems with marketable title acts. The interests prior to the root title are eliminated without notice or hearing and an individual whose interest has been wrongfully eliminated has no recourse. Because the acts continue the reliance on the recording system, instruments continue to be noted without any determination as to their validity. Finally, every marketable title act contains certain exceptions to its coverage. To the extent that there are exceptions, there must be a search past the root title. At best, marketable title acts reduce both the time period required for search and the cost of searching. At worst, they bolster unfounded hopes of title conclusiveness. 94

Other methods suggested to improve the current system of recording include the use of a tract index rather than the grantor/grantee index, 95 title standards, 96 and curative statutes. 97 All aid the recording system: however, their failure is that even collectively they do not solve all of its inherent problems. For example, the use of tract indexes will assist in ascertaining all relevant interests on the property; however, they do not make valid the interests which appear nor aid in the conclusiveness of the title. Title standards have been adopted unofficially in several states as a means to make uniform the requirements of a title examination. The standards have the advantage of reducing the detail of title searches: nonetheless, again they do not make valid the interests noted in the search. In addition, the standards are not official in most states. Curative statutes are merely examples of stopgap law to aid in certain circumstances. None give the consumer the needed conclusiveness which only an abandonment of the recording system can provide.

94. The chief criticism, which is seldom voiced in the commentaries, is that the advocacy and use of this system has defeated the high expectations of many purchasers. See note 83 supra.

95. Tract indexes are not needed if registration is used. Such indexing assists but does not cure the recording system. See Gresham, supra note 4; Spies, supra note 10.

96. Title standards have the force of law only in Connecticut. See J. Cribbett, supra note 34: Real Estate Comm. on Uniform Practices, Real Estate Title Standards, 12 Conn. B.J. 100 (1938).

97. Curative statutes again merely assist the recording system. Some curative legislation might be used with registration. See Spies, supra note 10; Comment, supra note 1.
The use of a quiet title suit would appear to be the best way to achieve a conclusive title under the existing recording system.\textsuperscript{88} Advocates of this method suggest changes to the statutes including the use of a Torrens-like assurance fund to provide greater security to the land owner. Nonetheless, the use of the quiet title suit, even as amended, undoubtedly will be expensive and will not result in a title which is as secure as a registered title.\textsuperscript{89}

The American Bar Association's Committee on Improvement and Modernization of Land Records recently suggested that a study be made of the use of judicial cadastres.\textsuperscript{90} The judicial cadastre is similar to title registration, but provides even more protection. Under this system, title registration is compulsory. The title to the property is examined and publicly warranted. The legal boundaries are set by a survey, and the survey itself examined and the boundaries warranted. Each tract of land has a parcel number, and a computer is incorporated into the system which stores data to control land transactions, data which is to be used for public planning. The cadastre is not currently used in the United States; however, efforts are underway to establish it in the Canadian Maritime Provinces, and its use is being studied by the Massachusetts Land Records Commission Program and the Wisconsin Coastal Zone Cadastre Study.\textsuperscript{91} The ABA Committee noted that the use of the cadastre

\begin{footnotes}
\footnote{88. Advocates of the quiet title suit champion their system as the "next best thing" to a Torrens System of land registration. The advantage seems to be that the present system can be retained. There would be an adjudication periodically as to the validity of outstanding interests, at a cost cheaper than registration. However, if the recordation system itself is no longer viable, it is best to discard it and use the preferable system of registration. Efforts should be directed toward improving the registration system. "If all the brainpower expended by law professors and by the property-law sections of local, state, and national bar associations on marketable title acts were expended instead on devising a model Torrens act, surely a satisfactory adaptation could be found." Barnett, \textit{supra} note 12, at 94. See also Comment, \textit{supra} note 1.}

\footnote{99. See note 98 \textit{supra}.}

\footnote{100. Legal cadastres have been recommended for further study by the committee of the American Bar Association dealing with Improvement and Modernization of Land Records. See note 10 \textit{supra}. Basically, this system is similar to the Torrens System suggested herein. The use of the cadastre will surely suffer from attacks that it is a foreign system. See note 51 \textit{supra} concerning the affect of the "foreign" label that has been attached to the Torrens System by the public. See also Reeves, \textit{supra} note 12.}

\footnote{101. See note 100, \textit{supra}. Roberts, \textit{The Use of The Legal Cadastre In The Maritime Provinces of Canada}, 5 \textit{RUTGERS COMPUTERS \\& LAW} 121 (1975), notes where the cadastre is used and describes the system. The use is new in the provinces, but the author feels that the change was necessary and overdue. A similar argument can be made for the Torrens System in the United States.}
\end{footnotes}
would result in land being transferred easily, cheaply, and with security. The use of computers would stimulate the land market, reduce litigation, and promote public planning. The Committee suggested that the study committee be interdisciplinary—that it consist of a lawyer, a surveying engineer, a qualified computer technician, and an economist. The Committee's recommendation is admirable and should be supported by the bar. In essence the committee is adopting the Torrens system of land registration. The only major changes are that the use of the judicial cadastre is compulsory and the boundaries of parcels of land are warranted. Both can be and should be adopted into a Torrens system. Likewise, the use of computers should be used with land registration. These, and other changes, suggested below, can be made easily. An effective Torrens system of land registration will effectively accomplish the purpose of the judicial cadastre. The Torrens system is known and is in use in some places in the United States and in most English speaking countries, and it therefore probably has a better chance of adoption in the United States than has the judicial cadastre. Also an effective Torrens system will not require years of study before adoption.

When compared to the other systems of title protection noted above, the defects, or alleged defects, of a Torrens system of land registration seem miniscule. The inefficiency, expense, and inconclusiveness of title protection methods presently used in this country must cease. This is true for all land owners, but especially for the consumers who must pay personally for the present system when purchasing his home and through his taxes to maintain the public records. The consumer primarily needs a system of title protection which is conclusive and secondarily a system which is cheap and efficient. An effective Torrens system of land registration can meet all these requirements.102

Most, if not all, commentators and experts acknowledge that the Torrens system of land registration offers the most conclusive form of title protection. The possession of a certificate of title enables the holder thereof not only to ascertain with reasonable certainty and speed the status of his title, but also the validity of the interests noted thereon, because they have been adjudicated and judged

102. Many of the methods and suggestions noted herein are not novel. Nonetheless, it is now time to collect the best of these ideas and draft an effective compulsory registration statute. See, e.g., O. Browder, R. Cunningham, & J. Julin, supra note 12 (concerning use of public subsidy); Heinrich, supra note 7; Sabel, supra note 12.
valid. Admittedly, under the present Torrens system, to the extent that there are exceptions to the certificate of title, that information is left wanting. To solve this problem, all standard exceptions should be removed from the title certificate if possible. As a practical and/or legal matter, the standard exception for claims of the United States for the short term lease and for taxes probably must remain. Any other exceptions should be examined closely, and most, if not all, eliminated. The exceptions to the registered title which remain then would be few and easily verified.

The use of the Torrens system of land registration must be made compulsory. Experience in other countries with title registration indicates that registration will not be effective unless the system is made compulsory. Ideally, a well-informed public should demand the security of the Torrens system, but such a demand is unlikely. Compulsory adoption of the Torrens system is the solution. A well drafted Torrens statute, hopefully, a uniform act, should withstand any constitutional challenges. Compulsory registration might require all land to be registered by a set date. Alternative methods might require certain types of properties be registered by a set date, or demand that all transfers be accompanied by a registration suit, or mandate that only voluntary transfers be accompanied by a registration suit. A requirement that all land be registered by a certain date would place too great a strain on the machinery needed to register land. Similarly, a requirement that all land be registered on transfer, be it involuntary or voluntary transfer, might result in undue hardship. The goal of registration can be effectively achieved without such strain or hardship by requiring certain types of property to be registered by a set date and by requiring registration on all voluntary conveyances. For example, municipal and other governmental bodies should be required to have all land registered by a set date.

103. See notes 18 & 19 supra. Some exceptions can be eliminated from the certificate in order to increase the conclusiveness of the certificate.

104. Experience from other countries, and in the United States as well, shows that registration will not be effective so long as it must compete with the recordation system. See Fiflis, supra note 25. See also note 35 & 42 supra.

105. Ohio's statute, which involved compulsory registration in certain involuntary transfers, was found unconstitutional. See note 26 supra. Nevertheless, a well-drafted compulsory registration statute should surpass a constitutional challenge. See Fairchild & Gluck, supra note 42; Fiflis, supra note 1; note 56 supra.

106. The City of Cincinnati registered title to the land on which the professional sports stadium is located prior to completion of the stadium. See note 30 supra.
A requirement that all land be registered when voluntarily conveyed will eventually result in universal registration without placing too great a burden on the parties to the transfer. Under the present system, the title generally is searched prior to the purchase. The only potential problem would be the time delay, which has been in the past inherent in land registration proceedings. No party to a real estate transaction wants the transaction hampered or slowed because the title must be registered. This problem might be solved by use of the incentives noted below so that people will have their land registered prior to the sale. An effective mechanism must nevertheless exist for those who do not register until conveyance.

Of course, the problem of the time delay will be a temporary one. Once a parcel of land has been registered, the problem will disappear. Nonetheless, solutions must be found for the interim. First, the adoption of the Torrens system must be accompanied by the use of computer technology. Computers will aid in the speed of the initial search and in subsequent transactions. Second, universal registration will result in the eventual demise of the recording system, and the two eventually will no longer coexist. Thus, the recorder should be instructed to accept no deed following a voluntary conveyance unless the deed is accompanied by a petition for registration. This method would permit the transaction to be concluded prior to the registration; however, the registration machinery would be started. The petition could not be withdrawn except by order of the court.

The foregoing does not solve the problem for the land buyer or lender who wants to determine if the title is marketable and secure prior to committing himself to the purchase or to the loan. The present system of having a title search made of the property could be continued absent the accompanying title protection device of insurance, opinion letter, or certificate. A computerized system might well be able to furnish data for a report on the current status of the title similar to the present title insurance commitment. The time needed for this search should be no longer than a title report under the present system and would be expedited by the use of

107. The adaptation of a new system would be an ideal time to incorporate modern technology. The use of computer technology revived the Torrens System in Australia. See Roberts, supra note 101. The adoption of a registered land system, operated with computer technology would advance land planning in general. Of prime importance would be the use of standardized parcel numbers. See D. Burke & N. Kerrie, supra note 12; Fiflis, supra notes 1 & 25.
computers. The consumer would decide on purchasing or making the loan based on that report. Of course, the problem still exists that a defect of title might not appear until registration. What protection would then exist for the buyer and/or lender? Previously, the title insurance company might have made monetary compensation. A solution might be to make the entire sale subject to a condition subsequent that the final registration be no more burdensome than the initial report. Or the parties could agree between themselves that if title cannot be registered, or if there is a defect of title which hampers the marketability thereof, a portion of the purchase price will be refunded or the transaction rescinded. Lenders might wish a portion of the purchase price held in escrow pending the outcome of the registration suit. History shows us that, in fact, most property will have no title problem, and thus the eventuality of difficulty is slim. Such risk as does exist is a problem which can be solved between the parties for the brief transactional period when land is initially registered.

The last major problem which must be solved before universal registration becomes a reality in the United States is that the initial cost of registration must be reduced. Today, the cost factor of registered land is present only with the initial registration of title. Subsequent land transfers are generally cheaper than the transfer of recorded land. One solution to the initial cost problem would be the use of a government subsidy to pay a portion of the official examiner’s or surveyor’s fee. Some commentators have suggested that a portion of the state assurance fund be used to pay a part of the cost of the official examiner. A broader plan would be for the state to hire and pay all official examiners and surveyors. As an added benefit, employment by the state would insure the impartiality of their decisions. Of course, the individual land owner would still be represented by individual counsel. Such public expenditure could be justified on the basis of the state’s continuing interest in stable land titles.

The strain placed on the registration office would be great even if compulsory registration on the order noted above is enacted. To alleviate this problem, the active cooperation and assistance of all individuals presently concerned with the title protection system can and should be utilized. Lawyers, abstractors, and title insurers could be appointed official examiners. Much of the initial title search would already be available in their offices. After the initial glut of registration, the title plants of these individuals would grad-
ually be phased out; however, the individuals concerned could be employed as official examiners or as counsel for the land owner.

Tax incentives are powerful weapons to encouraging any new program. With or without the subsidy noted above, tax incentives should be used to encourage registration. The cost of the initial registration should be permitted as a deduction for income tax purposes. If the initial cost of registration is split between the buyer and the seller, each should be permitted a ratable share in the tax deduction. To encourage early registration prior to sale, the individual so registering should be permitted to take a tax credit rather than a deduction in that tax year. Costs could also be decreased at the time of initial registration by the waiver of the state's conveyance fee. The state might also waive the costs of recordation on the initial registration.

In summary, a public subsidy as to both the official title examiner and the surveyor, plus the tax deductability of registration costs and the waiver of certain fees, or any combination thereof, would reduce the cost of registration for the individual property owner. The state in return would have stable land titles, and eventually the cost of maintaining the present recording system could be eliminated. The public subsidy therefore actually will decrease after the initial period of time.

It is possible to conceive of a Torrens system of land registration which will work efficiently, effectively, and inexpensively. Land cannot become a commodity in the market place, nor can the individual owner be assured of having a conclusive title, which can be easily and quickly determined, until the existing conveyance laws are amended. The Torrens system of land registration comes the closest of all known systems to providing the security which is needed by the consuming land owner and all owners of real property. This security cannot be achieved until a new land law is either enacted or until existing laws are effectively amended and the public is made aware of its merits.

The first step in this process is to have the appropriate legislation enacted. Ideally, the Commissioners on Uniform State Laws should again study and draft a Uniform Land Registration Act. This act could then be a basis for adoption by each state. In the absence of a uniform act, each state bar association and/or the law schools in each state should establish task forces to write an effective registration act for that state. These task forces should not hesitate to include non-lawyers in their ranks, such as computer experts, real
estate brokers, title examiners, and lending institutions.

The second important step is that the land buying public must be informed adequately and intelligently of the Torrens system of land registration. The public should be made aware of the system of land registration and the need for change. We cannot have a consumer revolt until the consumer is aware of the need. Public input in the planning and enactment of registration legislation will assure inclusion of all vital interests and assist in the acceptance of the system, for such acceptance is needed even if, as anticipated, registration is compulsory. We cannot afford to pass legislation again which merely sits idly on the statute books or is quickly repealed. The education of the public on legal matters is the peculiar province of the legal community. The legal community must accept that responsibility and assume a leadership role.

The Torrens system of land registration is needed. It can be made to work effectively, cheaply, and efficiently. The need is urgent.
THE TAX REFORM ACT OF 1976—ITS IMPACT ON THE ROLE OF CHARITABLE CONTRIBUTIONS IN ESTATE PLANNING

G. Waldron Snyder*

The Tax Reform Act of 1975, passed by the House of Representatives on December 4, 1975, was a complex piece of legislation that hardly lived up to its name and might have been more appropriately termed the Revenue Act of 1975; but last minute Senate Amendments that completely restructured the estate and gift tax provisions of the Code certainly removed all doubts as to whether the law that became known as the Tax Reform Act of 1976, [hereinafter referred to as the TRA], was appropriately named. The Senate Amendments introduced a single unified estate and gift tax rate schedule with progressive rates that are based, like the gift tax schedules under prior law, on cumulative transfers during lifetime, with transfers at death, to be added on in the final estate tax return. The new law also increased marital deductions; provided new rules for jointly held property; gave farms and closely held busi-

* B.A., Valparaiso University; L.L.B., Salmon P. Chase College of Law; J.D., Salmon P. Chase College of Law; M.B.A., University of Cincinnati. Retired Visiting Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University. Currently Adjunct Professor of Law, Salmon P. Chase College of Law, Northern Kentucky University.


4. Id. § 2001 (this section adds I.R.C. §§ 2011 & 2505 and amends I.R.C. §§ 2011, 2013, 2101, 2502, 2504 & 6018; it also repeals I.R.C. § 6052)(applicable to gifts made and estates of decedents dying after December 31, 1976)[Sections of the Internal Revenue Code, whether newly added, amended, or repealed by the 1976 T.R.A., are cited throughout the footnotes to this article as I.R.C. sections rather than session laws. This is done in order to ease comparison between the Code immediately prior to, and the Code following the effective date of the 1976 T.R.A., Jan. 1, 1977].


6. 1976 T.R.A. § 2002 (amending I.R.C. § 2040)(applicable to joint interests created after Dec. 31, 1976). Under the new subsection, if the creation of a joint tenancy solely between husband and wife results in a gift transfer for gift tax purposes, in whole or in part, and was created by the wife, husband, or both, only half of the value of the property will be included

283
nesses a valuation break;7 allowed estate tax payments to be spread out over a longer tax period;8 and limited the benefits to be derived from generation skipping transfers of property with a value of more than $250,000.9

The unification provisions are slanted to provide much needed relief to those estates that are the smallest to incur a Federal Estate liability and to the medium sized estates that incur greatly enlarged liability as a result of the devastating inflation of property values in recent years.10 In lieu of the $30,000 specific gift tax exemption and the $60,000 estate tax exemption the TRA provides for a phased in unified credit that starts at $30,000 (the equivalent of an exemption of $120,677) for decedents who die in 1977, and finally provides a unified credit of $47,000 (equivalent exemption $175,625) for decedents who die in 1981 and thereafter.11 The House Committee states the reasons for the change as follows:

The present amount of the estate tax exemption was established in 1942. Since that date, the purchasing power of the dollar has decreased to less than one-third of its value in 1942. To some extent this effect has been mitigated by the addition of a provision for a marital deduction in 1948. Despite this change in 1948, the inflation which has occurred means that the estate tax now has a much broader impact than it did originally.

In addition, since the present estate tax exemption is a deduction in determining the taxable estate, it reduces each estate's tax at the highest estate tax brackets. However, a credit in lieu of an exemption will have the effect of reducing the estate tax at the lower estate tax

in the estate of the spouse who dies first, irrespective of each spouse's contribution. Id. § 2002(d).


10. For an interesting presentation of the view that the $60,000 estate tax exemption should not be increased primarily because only the wealthiest seven percent of families in the United States will benefit from the additional exemption, see S. SURREY, P. MCDANIEL & J. PECHMAN, FEDERAL TAX REFORM FOR 1976 (1976).

11. 1976 T.R.A. § 2001. Section 2001 also provides for a unified credit of $34,000 (equivalent exemption, $147,333) for decedents who die in 1979 and of $42,500 (equivalent exemption, $161,563) for decedents who die in 1980. Id.
TAXING CHARITABLE CONTRIBUTIONS

brackets since a tax credit is applied as a dollar-for-dollar reduction of the amount otherwise due. Thus, at a given level of revenue cost, a tax credit tends to confer more tax savings on small-and-medium sized estates, whereas a deduction or exemption tends to confer more tax savings on larger estates. Your committee believes it would be more equitable if the exemption were replaced with a credit.

As a practical matter, the gift tax exemption is not available to individuals who cannot afford to make lifetime transfers. Thus, the overall transfer tax exemption is effectively greater for individuals who are financially able to utilize the gift tax exemption through lifetime transfers. Your committee believes that it would be more equitable if a unified credit in lieu of an exemption were available on an equal basis without regard to whether the transfers are made only at death or are made both during lifetime and at death.12

This article is a second edition of my article on “The Role of Charitable Contributions in Estate Planning,” published in the June 1973 issue of the Wake Forest Law Review.13 The purpose is to reevaluate that role in the light of the restructuring of the estate and gift tax provisions of the code in the 1976 TRA. The original article pointed out that federal estate and gift collections in the fiscal year ended in 1972 were 5.490 billion dollars or 337.56% of the amount collected in 1960.14 The rates during that 12 year period were the same. Estate and Gift Tax collections fell below the five billion mark during fiscal 1975 to $4.69 billion.15 The reduction probably results from the lower stock market prices and recession induced reductions in property values.

Obviously, as pointed out in the House report quoted above, the heavier burden in estate and gift taxes in recent years has been due to higher appraisals of property values and the static exemption. The original article closed with a comment that charitable organizations would probably “receive a great deal more in major gifts if moderately prosperous testators were fully aware of the total value of the assets that they now own, the extent to which federal income and estate taxes will deplete the after-tax values that will be transferred to their heirs, and the net after-tax cost of a major charitable contribution when it is a well-designed part of a complete estate

14. Id. at 343.
The purpose of this article is to examine the effect of major charitable contributions on the income and estate tax liabilities of the smaller taxable estates, where the estate tax liability is only slightly more than the unified tax credit allowed under the TRA; and in medium sized estates, with assets less than one million dollars, where the tax on the marginal dollar of value is 39% or less. The tax savings that charitable contributions will produce in larger estates will increase roughly in proportion to the increase in estate tax rates.

I. The Deterrent Effect of the Higher Threshold of the TRA

The new unified credit will eliminate any estate tax liability for taxable estates of less than $175,625, for estates of decedents dying after December 31, 1980, as contrasted with the specific exemption of $60,000 allowed under prior law. Thus, the TRA raises the threshold at which charitable contributions can be effective to reduce estate tax liabilities. However, the thirty-two percent rate applies on the first dollar of the taxable estate in excess of $175,625, so that once this threshold is passed, the benefits derived from charitable contributions are comparable to those realized under prior law. The 1976 TRA also increases the maximum marital deduction to the greater of $250,000 or 50% of the adjusted gross estate, thus further raising the threshold in the estate of any decedent who leaves a surviving spouse. The 1976 TRA has no provisions that directly effect deductions allowed for gifts to charities.

The unified tax treats inter vivos gifts, other than those to qualified charitable organizations, as a part of the gross estate. This gift tax is assessed at the same rates as those used for estate tax purposes and is applied as a credit against the final estate tax. The specific gift tax exemption of $30,000 allowed under prior law is

---

16. Snyder, supra note 13, at 376.
17. See note 4 supra.
20. Id. § 2002(a) (amending I.R.C. § 2056(c)(1)(a)). The maximum marital deduction applies to both separate and community property. The purpose of this provision is to maintain parity of estate tax treatment between estates which contain community property and those which do not by providing for adjustments where the decedent owns community property. H.R. Rep. No. 1380, supra note 12, at 18.
eliminated, but the unified tax credit is taken into account in computing gift tax liabilities. The net result is that the only advantages of noncharitable inter vivos gifts are:

(1) the $3000 annual exclusion [$6000 where the husband and wife join in the gift],
(2) the elimination of any gift tax paid from the gross estate, except where the gift is made less than 3 years before death,
(3) elimination of any appreciation in value of the subject matter of the gift from the gross estate.

These minor advantages, however, may be overshadowed by the additional estate tax that will result from a reduction of the maximum marital deduction where the donee is not the spouse of the donor. Thus, the new and more severe taxation of noncharitable inter vivos gifts tends to offset the higher threshold discussed in the preceding paragraph.

The House committee was no doubt correct in concluding that the advantages of lifetime transfers under prior law were really not available in the smaller estates since the taxpayer could not afford to take advantage of them. Thus, the higher threshold probably is only a minor deterrent to charitable contributions in the smaller and medium sized estates that we are primarily concerned with in this article.

II. Charitable Contributions and the Objectives of Estate Planning

The primary objective of estate planning is to leave the largest possible portion of the property included in the estate in the hands of those persons or institutions that the testator regards as the natural objects of his bounty and should never be merely an exercise in tax avoidance. To fulfill this objective the estate planner must take into account both the income tax liabilities that will be incurred by the testator during his lifetime and the transfer taxes that will be asserted against his estate after his death.

22. Id. § 2001(b)(3) (repealing I.R.C. § 2521).
23. Id. § 2001(b)(2) (adding I.R.C. § 2505).
26. The value on which the gift tax is computed and that used in computing the final unified tax is the value on the date that the gift was made, irrespective of any increase between the date of the gift and the date of death. See I.R.C. § 2512.
These dual objectives will obviously be best achieved, in so far as charitable contributions are concerned, by lifetime gifts that: (1) result in an income tax deduction for a charitable contribution, (2) offer the potential for reduction of taxable income if that is a legitimate objective, and (3) eliminate the subject matter of the gift from the estate of the decedent. The client should never be permitted, in the name of estate planning, to make inter vivos gifts of assets that he will, or even might need during his lifetime. There are, however, some forms of charitable gifts, to be discussed in detail in subsequent sections of this article, that do offer the opportunity for a limited income tax deduction, equal to the value of the remainder interest, while still permitting the retention of some income or right of use during the donor's lifetime, with complete elimination from the taxable estate.

It is only under rare and unusual circumstances that the tax benefits from gifts to charitable organizations will exceed the value of the subject matter of the gift. The tax deduction will always be a percentage (less than 100%) of the value of the gift. It follows that inter vivos gifts should be made only to those persons or entities who would naturally be included as beneficiaries in the will of the taxpayer, and that any inter vivos or testamentary gifts that do not conform to the basic testamentary objectives of the taxpayer cannot be justified merely because they achieve some reduction in federal income or estate taxes.

(A) Testamentary Gifts to Charitable Organizations

Testamentary gifts to charities reduce only the estate tax liability and do not result in any reduction of, or deduction from, taxable income of the testator during his lifetime. The amount by which the estate tax liability is reduced depends on the amount of the taxable estate. For decedents dying after December 31, 1980, with taxable estates in excess of $175,625 and not more than $250,000, the reduction would be thirty-two percent (thirty-four percent to the extent that the taxable estate plus the charitable deduction exceeds $250,000). Thus, a charitable bequest of $50,000 in the estate of a decedent dying after December 31, 1980, with a gross estate of $250,000 and administrative expenses of $20,000, would reduce the estate tax liability by $16,000, from $17,400 to $1,400. A charitable deduction of $100,000 in a taxable estate of more than $500,000 would result in a thirty-seven percent reduction in tax liability, or
$37,000. The deduction increases to forty-one percent in estates of more than one million dollars and to a maximum of seventy percent in estates of more than five million dollars.\(^7\)

Deductions are allowed for any property included in the gross estate which is transferred by the decedent during his lifetime or by will to a charitable organization.\(^8\) There is no limit as to the portion of the estate that can be the subject matter of a deductible charitable bequest.\(^9\) Qualified charitable organizations are relatively easy to identify since most such organizations have a ruling letter from the Internal Revenue Service recognizing their tax exempt status.\(^0\)

(1) Charitable remainders and charitable income trusts—The bequest of a life interest in a personal residence or a farm to an heir, with a remainder interest to a qualified charity, will give rise to a deduction equal to the value of the remainder computed on the

\(^7\) 1976 T.R.A. § 2001(a)(1) (amending I.R.C. § 2001(c)).

\(^8\) I.R.C. § 2055(a). It should be noted that the deduction is based on the provisions of the will of the testator. Pledges, promises, or subscriptions made by the testator during his lifetime do not result in transfers that are deductible from the gross estate. When the amount or extent of a legacy to a charitable organization is contested and ultimately reduced in a will contest, the deductible amount is that which the charitable organization finally received in the compromise settlement. See Rev. Rul. 145, 1953-2 C.B. 273; Dumont's Estate v. Commissioner, 150 F.2d 691 (3d Cir. 1945).

\(^9\) I.R.C. § 2055(a). This section allows a deduction for the amount of all legacies, bequests, devises or transfers:

I. To or for the use of the United States, any state, political subdivision thereof, or the District of Columbia, for exclusively public purposes;

II. To or for the use of any corporation or association organized and operated exclusively for religious, charitable, scientific, literary or educational purposes; or

III. To or for the use of any veteran's organization incorporated by an act of Congress, or any of its departments, local chapters, or posts.

The allowance of deductions for transfers under II and III above is made only upon conditions that no part of the net earnings of the organization, trustee, or association may inure to the benefit of any private shareholder or individual, and no substantial part of their activity may involve carrying on propaganda or otherwise attempting to influence legislation. The Tax Reform Act of 1969 added a requirement that the organization must be one which "does not participate in or intervene in any political campaign (including the publishing or distributing of statements) on behalf of any candidate for public office." See I.R.C. § 2055(a)(3).

\(^0\) The requirements of I.R.C. § 2055 are a much condensed statement of the very detailed provisions of I.R.C. § 501(c)(3), which deals with organizations that are exempt from taxation. Organizations that claim to be exempt from taxation are required to file an application for exempt status with the Internal Revenue Service and a ruling as to the exempt status of the applicant is then issued pursuant to Rev. Proc. 74-38, 1974-2 C.B. 492. I.R.S. Pub. No. 78 is a "Cumulative List of Organizations Described in Sec. 170(C)," which is updated quarterly and identifies organizations by type and limits on deductibility. If I.R.S. changes or revokes a ruling on exempt status, contributions made in reliance on the earlier ruling are nevertheless deductible if made on or before the date of the I.R.S. announcement of nondeductibility. See Rev. Proc. 72-39, 1972-2 C.B. 818.
basis of the life expectancy of the life tenant. Prior to the Tax Reform Act of 1969, a deduction was also available for the value of the charitable remainder of any property left in a trust created for private purposes, provided that the remainder interest was separable and ascertainable. The will creating such a trust would almost invariably allow invasion of the corpus for specified purposes, with the result that the courts have consistently held that the value of the charitable remainder was not ascertainable and therefore not deductible. The Tax Reform Act of 1969 resolved this problem by providing that a deduction for the value of a charitable remainder would be allowed only where the life estate was in a personal residence or a farm, a charitable remainder annuity trust, a charitable remainder unitrust, or a pooled income fund.

It is also possible to create a charitable income trust with a non-charitable remainder. Under the Tax Reform Act of 1969, a deduction from the gross estate arises only when the income distributed to charity is a guaranteed annuity or an annual distribution of a fixed percentage of the annually determined fair market value of the corpus of the trust. The present value of the total income distribution provided for would be a deduction from the gross estate.

(B) Lifetime Gifts to Charitable Organizations

For income tax purposes a deduction is allowed for contributions to domestic charitable organizations. Payments made to individuals are not deductible, even though there is no relationship between the donor and the donee. The donee must have organizational content,

31. A carefully considered case in which a deduction for a charitable remainder in a testamentary trust was disallowed is Kline v. United States, 202 F. Supp. 849 (N.D.W. Va. 1962), aff'd, 313 F.2d 633 (4th Cir. 1963). The will permitted invasions of the corpus during the lifetime of the testator's son to the extent that such invasions might be necessary for his proper maintenance and support or to meet emergencies such as illness. The estate argued that the invasions were limited by a sufficiently definite standard and that the possibility of invasion was so remote as to be negligible. The son was seventy-four years of age when his mother died. He was a retired lawyer with investments valued at more than $650,000, and his living expenses were less than twenty-five percent of his income. The court, after charting twenty-three leading cases, concluded that the authority invested in the trustee was such that the monetary value of the charitable remainder was not sufficiently certain to qualify for a deduction under I.R.C. § 2055.

32. I.R.C. § 2055(e).

33. Id.

34. Cox v. Commissioner, 297 F.2d 36 (2d Cir. 1961); Estate of Barry v. Commissioner, 34 T.C. 160, aff'd, 311 F.2d 681 (9th Cir. 1962).
TAXING CHARITABLE CONTRIBUTIONS

i.e., it must be a corporation, trust, fund, foundation, or similar organization operating for public charitable purposes, and the code specifically requires that the contribution be to a domestic organization.35

Unlike the estate tax laws, there are percentage limitations on income tax deductions on individual income tax returns. An individual taxpayer can deduct up to fifty percent of his contribution base,36 defined in the statute as adjusted gross income without regard to any net operating loss carry back,37 for contributions made to the following organizations:38

1. A church or a convention or association of churches;
2. An educational organization that maintains a regular faculty and curriculum, and a student body attending resident classes;
3. A hospital or an organization directly engaged in medical research in conjunction with the hospital;
4. An organization that normally receives a substantial part of its support from the United States, a state or political subdivision thereof, or from direct or indirect contributions from the general public, organized to receive, hold, invest, and administer property for the benefit of state and local colleges or universities;
5. A state, or any political subdivision thereof, or the United States, or a possession thereof, if the contribution is made for exclusively public purposes;
6. An organization exempt as a charitable, religious, educational, scientific, or literary organization, if it normally receives a substantial part of its support from a governmental unit, or from direct or indirect contributions from the general public;39
7. Certain private foundations that meet very stringent requirements as to distribution of support funds received;40 and

35. I.R.C. § 170(c)(2).
39. Examples of such publicly supported institutions are the Red Cross, the American Cancer Society, and many other health organizations, museums, and orchestras.
40. There are three types of private foundations that qualify for the fifty percent deduction under I.R.C. § 170(b)(1)(A)(vii). These are, (1) all private operating foundations, (2) any other private foundation that distributes the contributions it receives to charities within two and one-half months following the year of receipt, and (3) any private foundation that pools
(8) Public foundations. 41

Provided that the donee organization meets the requirements of the preceding paragraph a thirty percent limitation is applied to any gift of property, usually real estate or securities, on which long term capital gains would be realized if such property were sold. 42 The donor has the election of deducting fifty percent of the appreciation in value, in which event the fifty percent limitation would apply. A twenty percent limitation applies to gifts to all types of organizations not listed above, and to gifts that are made "for the use of," rather than "to," the charitable organization. 43 The fifty percent and thirty percent qualify for a five-year carryover; therefore, even a gift equal to 300% of the donor's average contribution base (180% when the gift is in long term capital gain property) will be deductible in full for income tax purposes over a six year period (the year of the contribution plus five carryover years). 44 No such carryover is allowed with respect to gifts that are subject to the twenty percent limitation, nor is an income tax deduction allowable for a charitable contribution which consists of a future interest in tangible personal property. 45

(1) Hypothetical cases—The use and effectiveness of the various types of inter vivos gifts that we will consider can probably best be

its contributions into a common trust fund which is distributed to charity. The income distributed within two and one-half months must be after the end of the year in which it is realized, and corpus must be distributed to charity within one year of the death of the last surviving lifetime beneficiary. The private operating foundation mentioned in (1) above is an organization that spends at least eighty-five percent of its income for the active conduct of the activities constituting the exempt purpose for which it is organized and which meets one of the following tests:

(a) At least sixty-five percent of its assets must be devoted directly to its exempt purpose or to functionally related businesses, or both; or
(b) Substantially all of the support must be derived from at least five independent exempt organizations and not more than fifty percent may be derived from gross investment income; or
(c) It must have an endowment (plus assets not directly related to the charitable function) that, based on a four percent rate of return, is no more than adequate to meet current operating expenses.

41. Public foundations are organizations that receive more than one-third of their support from gifts, grants, contributions, membership fees, gross receipts from miscellaneous commercial activities (including the operation of a related business), and the like, and from persons other than disqualified persons, and who receive less than one-third of their support from gross investment income.
42. I.R.C. § 170(b)(1)(D).
TAXING CHARITABLE CONTRIBUTIONS

illustrated by hypothetical cases. Those cases will be more useful if we develop two hypothetical taxpayers and consider the tax effects on each of them in regard to the various types of gifts discussed. We will call these hypothetical taxpayers John Abell and Walter Baker. We will not pretend that they are merely average men; rather we will say that they are typical of the "moderately successful business or professional man" with which this article is primarily concerned. They are fictional characters created solely for the purposes of this article; and like many fictional characters, they are composites of many people.

John Abell

John Abell is an upper level government executive in charge of a district office in a midwestern city as a GS-16 employee with twelve years in grade, his current salary is $50,000 per year. Personal savings and inheritances which he and his wife have received from the estates of their parents have been wisely invested, and, as a result, Abell owns in his own name, securities that have a current market value of $165,000. His wife owns securities with a current market value of $80,000. These securities produce income of about $7,000 a year. Abell also holds fully paid life insurance with a face value of $50,000 in addition to a group term insurance policy acquired in connection with his employment having a face value of $53,000.

Abell is now sixty-five years old, and his wife is sixty-one. They reside in a large house that was located in an outstanding residential area when they purchased it twenty years ago. It is close to X University, a major University with 25,000 students, and several large hospitals. The neighborhood has gradually been taken over by professional offices, clinics, and service organizational headquarters. The Abells were recently offered $60,000 for their home but decided not to sell because they expect to continue to use the home as their principal residence after Abell's retirement. Abell intends to retire in December, 1978, and estimates that his civil service annuity after thirty-two years of service, will be $30,000 per year, and that his wife will receive approximately $12,000 a year after his death if she survives him. His annuity will be tax free until he recovers his cost, estimated at $35,000, after which it will be taxable as ordinary income. 46

46. I.R.C. § 170(d)(1)(B); Heard v. Commissioner, 40 T.C. 7, aff'd, 326 F.2d 962 (8th Cir.),
Abell has two children. The son, thirty-two years of age, a member of the bar, is associated with one of the major law firms in the city where Abell lives. He is married and has three children. Abell's daughter, twenty-eight years of age, is married to a medical doctor who recently opened a promising practice as a pediatrician. The daughter has one child, a boy six months of age.

Abell has consulted you about revising his will and that of his wife, in order to take maximum advantage of the unified credit and the increased marital deductions allowed under the TRA. He is also seriously considering a major gift to X University because his children will be well provided for and he feels that some part of his accumulated wealth should go to an institution of higher education. Abell's will has now been revised to provide that the entire estate, after the payment of debts and administration expenses, will go to two testamentary trusts. Trust A, a formula marital deduction trust, will receive that amount which, after reduction by insurance and interests in jointly held property passing outside the will, equals the maximum marital deduction or the amount of marital deduction that will eliminate any federal estate tax liability, whichever is the lesser. The income of Trust A is to go to his surviving spouse for her life with the remainder to be appointed by her in her will. All of the remaining assets of the estate are to go to Trust B. The income of Trust B is to go to his surviving spouse for her life and the remainder is to be divided equally between the two children. The will also provides that any federal estate tax which is assessed against the estate is to be paid from the funds that would otherwise be allocated to Trust B. In the discussions that follow we will make the realistic assumption that Abell will predecease his wife. This assumption will make it unnecessary for us to concern ourselves with the provisions of Abell's will that would apply in the event that his wife should predecease him, or with the provisions of the wife's will. It should be noted that the total value of property held separately by the wife is substantially less than the total value of property held by Abell individually, so that the earlier death of the wife would reduce the marital deduction and increase the overall federal estate tax liability. Therefore, the benefits by way of a reduction in

cert. denied, 377 U.S. 978 (1964). The Eighth Circuit affirmed the decision of the Tax Court that the amount received by the taxpayer in excess of the amount he contributed to a Civil Service Retirement Fund was taxable income and not a non-taxable gift from the government. 326 F.2d at 963.
federal estate tax liabilities that would be derived from a major charitable contribution would be slightly greater in the event that Mrs. Abell should predecease her husband.

Walter Baker

Walter Baker is a retired businessman sixty years of age. His wife is 58. Baker owns stocks and bonds with a current market value of $450,000, and his wife, in her own name, owns securities having a current market value of $150,000. These investments produce approximately $30,000 a year in interests and dividends. The Bakers live in a highrise apartment building and spend much of their time travelling. Mrs. Baker is an only child who has no close living relatives whereas Mr. Baker has a brother and a sister and five nieces and nephews. The brother and sister are in comfortable circumstances, and the five nieces and nephews are now well educated adults pursuing what appears to Baker to be successful careers. Baker is no longer covered by life insurance because he elected as a young man to secure term insurance which has now expired.

Baker and his wife are devoutly religious and have a sincere commitment to higher education. They are considering a major bequest to a religious organization or a church-related college or university. They have asked you to revise their wills to take maximum advantage of the increased marital deduction available under the TRA, and advice as to the form and timing of major charitable contributions. Baker's will has now been revised to provide that the entire estate, after the payment of debts and administration expenses, will go to two testamentary trusts that are similar in all material respects to those discussed in connection with John Abell. For the same reasons as those stated with reference to Abell, we will concern ourselves only with those provisions of Baker's will that will apply if his wife survives him.

Table 1 set out below is a computation of the estimated income tax liabilities that will be incurred by Abell and Baker during the years 1976, 1977, and 1978, assuming that no major contributions are made during those years. Table 2, which follows, is a computation of the estimated estate tax liabilities of Abell and his wife and Baker and his wife, again assuming in each case that the husband is the first to die and that no major charitable contributions have been made.
### TABLE 1

<table>
<thead>
<tr>
<th></th>
<th>John Abell and Wife</th>
<th>Walter Baker and Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Salary</strong></td>
<td>$ 50,000</td>
<td>$ 57,000</td>
</tr>
<tr>
<td><strong>Interest and Dividend Income</strong></td>
<td>$ 7,000</td>
<td>$ 30,000</td>
</tr>
<tr>
<td><strong>Less: Deductions</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Charitable Contributions</td>
<td>1,500</td>
<td>(1,500)</td>
</tr>
<tr>
<td>Other</td>
<td>5,000</td>
<td>(1,300)</td>
</tr>
<tr>
<td>Standard Deduction</td>
<td>6,500</td>
<td>2,800</td>
</tr>
<tr>
<td><strong>Adjusted Gross Income</strong></td>
<td>50,500</td>
<td>27,200</td>
</tr>
<tr>
<td><strong>Less: Personal Exemptions</strong></td>
<td>1,500</td>
<td>1,500</td>
</tr>
<tr>
<td><strong>Taxable Income</strong></td>
<td>49,000</td>
<td>25,700</td>
</tr>
<tr>
<td><strong>Tentative Tax</strong></td>
<td>16,560</td>
<td>6,272</td>
</tr>
<tr>
<td><strong>Less: Credit for Dependents</strong></td>
<td>180</td>
<td>180</td>
</tr>
<tr>
<td><strong>Tax Liability</strong></td>
<td>$ 16,380</td>
<td>$ 6,092</td>
</tr>
</tbody>
</table>

### TABLE 2
**Estimated Estate Tax Liability Before Major Gift**

<table>
<thead>
<tr>
<th></th>
<th>John Abell and Wife</th>
<th>Walter Baker and Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Estate of Husband</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marketable Securities</td>
<td>$ 165,000</td>
<td>$ 450,000</td>
</tr>
<tr>
<td>Personal Residence</td>
<td>60,000</td>
<td></td>
</tr>
<tr>
<td>Life Insurance</td>
<td>50,000</td>
<td></td>
</tr>
<tr>
<td>Group Life Insurance</td>
<td>53,000</td>
<td></td>
</tr>
<tr>
<td><strong>Gross Estate</strong></td>
<td>$ 328,000</td>
<td>$ 450,000</td>
</tr>
<tr>
<td><strong>Less: Administrative Expenses and Debts of Decedent</strong></td>
<td>15,000</td>
<td>21,000</td>
</tr>
<tr>
<td><strong>Adjusted Gross Estate</strong></td>
<td>$ 313,000</td>
<td>$ 429,000</td>
</tr>
<tr>
<td><strong>Less: Marital Deduction</strong></td>
<td>137,375</td>
<td>250,000</td>
</tr>
<tr>
<td><strong>Taxable Estate</strong></td>
<td>$ 175,625</td>
<td>$ 179,000</td>
</tr>
<tr>
<td><strong>Tentative Tax</strong></td>
<td>47,000</td>
<td>48,080</td>
</tr>
<tr>
<td><strong>Less: Unified Credit</strong></td>
<td>47,000</td>
<td>47,000</td>
</tr>
<tr>
<td><strong>Estate Tax Liability</strong></td>
<td>NONE</td>
<td>$ 1,080</td>
</tr>
<tr>
<td><strong>Estate of Wife</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Received from Husband’s Estate</td>
<td>$ 137,375</td>
<td>$ 250,000</td>
</tr>
<tr>
<td>Marketable Securities</td>
<td>80,000</td>
<td>150,000</td>
</tr>
<tr>
<td><strong>Gross Estate</strong></td>
<td>$ 217,375</td>
<td>$ 400,000</td>
</tr>
</tbody>
</table>
TAXING CHARITABLE CONTRIBUTIONS

Less: Administrative Expenses and Debts of Decedent
Adjusted Gross Estate
Tentative Tax

Less: Unified Credit
Estate Tax Liability

Combined Estate Tax Liability (Husband and Wife)

(2) Outright gifts to charities—It is, of course, obvious that the maximum tax benefits will be produced by an outright gift to charity. The amount of the gift, to the extent that it is within the statutory limitations discussed above, is a deduction for federal income tax purposes. The gift also irrevocably eliminates the subject matter from the estate of the donor and thus produces estate tax savings as well. Let us assume that both Abell and Baker decide to make a gift of $30,000 to a qualified charitable organization. The income tax savings that would result in each case are computed as follows:

TABLE 3
JOHN ABELL—INCOME TAX SAVINGS FROM GIFT OF $30,000 TO X UNIVERSITY

<table>
<thead>
<tr>
<th></th>
<th>1977</th>
<th>1978</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Income before Any Deductions for Contributions</td>
<td>$50,500</td>
<td>$50,500</td>
<td>$101,000</td>
</tr>
<tr>
<td>Maximum Deduction Allowable</td>
<td>28,500</td>
<td>28,500</td>
<td>57,000</td>
</tr>
<tr>
<td>Other Contributions</td>
<td>1,500</td>
<td>1,500</td>
<td>3,000</td>
</tr>
<tr>
<td>Deduction Allowed for Contribution to X University</td>
<td>27,000</td>
<td>3,000</td>
<td>30,000</td>
</tr>
<tr>
<td>Total Contributions</td>
<td>28,500</td>
<td>4,500</td>
<td>33,000</td>
</tr>
<tr>
<td>Adjusted Gross Income after Deductions for Contributions</td>
<td>22,000</td>
<td>46,000</td>
<td>68,000</td>
</tr>
<tr>
<td>Less: Personal Exemptions</td>
<td>1,500</td>
<td>1,500</td>
<td>3,000</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>20,500</td>
<td>44,500</td>
<td>65,000</td>
</tr>
<tr>
<td>Tentative Tax</td>
<td>4,540</td>
<td>14,310</td>
<td>18,850</td>
</tr>
<tr>
<td>Less: Credit for Dependents</td>
<td>180</td>
<td>180</td>
<td>360</td>
</tr>
<tr>
<td>Tax Liability after Deduction for Contribution to X University</td>
<td>4,360</td>
<td>14,130</td>
<td>18,490</td>
</tr>
<tr>
<td>Tax Liability without Contribution (Table 1)</td>
<td>16,380</td>
<td>16,380</td>
<td>32,760</td>
</tr>
<tr>
<td>Income Tax Savings Attributable to Gift to X University</td>
<td>$12,020</td>
<td>$2,250</td>
<td>$14,270</td>
</tr>
</tbody>
</table>
TABLE 4
WALTER BAKER—INCOME TAX SAVINGS FROM GIFT OF $30,000 TO X UNIVERSITY

<table>
<thead>
<tr>
<th>Year</th>
<th>1976</th>
<th>1977</th>
<th>1978</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Contributions</td>
<td>$28,700</td>
<td>$15,000</td>
<td>$1,500</td>
<td>$45,000</td>
</tr>
<tr>
<td>Maximum Deduction Allowable</td>
<td>$28,700</td>
<td>$15,000</td>
<td>$1,500</td>
<td>$86,100</td>
</tr>
<tr>
<td>Taxable Income before Any Deductions for Contributions</td>
<td>$28,700</td>
<td>$15,000</td>
<td>$1,500</td>
<td>$45,000</td>
</tr>
<tr>
<td>Deduction Allowed for Contribution to X University</td>
<td>$13,500</td>
<td>$13,500</td>
<td>$3,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>Other Contributions</td>
<td>$1,500</td>
<td>$1,500</td>
<td>$1,500</td>
<td>$4,500</td>
</tr>
<tr>
<td>Adjusted Gross Income after Deductions for Contributions</td>
<td>$13,700</td>
<td>$13,700</td>
<td>$24,200</td>
<td>$51,600</td>
</tr>
<tr>
<td>Less: Personal Exemptions</td>
<td>$1,500</td>
<td>$1,500</td>
<td>$1,500</td>
<td>$4,500</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>$12,200</td>
<td>$12,200</td>
<td>$22,700</td>
<td>$47,100</td>
</tr>
<tr>
<td>Tentative Tax Liability</td>
<td>$2,316</td>
<td>$2,316</td>
<td>$5,244</td>
<td>$9,876</td>
</tr>
<tr>
<td>Less: Credit for Dependents</td>
<td>$180</td>
<td>$180</td>
<td>$180</td>
<td>$540</td>
</tr>
<tr>
<td>Tax Liability after Deduction for Contribution to X University</td>
<td>$2,136</td>
<td>$2,136</td>
<td>$5,064</td>
<td>$9,336</td>
</tr>
<tr>
<td>Tax Liability without Contribution (Table 1)</td>
<td>$6,092</td>
<td>$6,092</td>
<td>$6,092</td>
<td>$18,276</td>
</tr>
<tr>
<td>Income Tax Savings Attributable to Gift to X University</td>
<td>$3,956</td>
<td>$3,956</td>
<td>$1,028</td>
<td>$8,940</td>
</tr>
</tbody>
</table>

If we assume that the income tax savings were spent or given to charity and thus are not part of the gross estate and that the husband is the first to die and leaves his estate to the marital deduction and residual trusts previously discussed, the estate tax savings could be computed as follows:

TABLE 5
ESTIMATED ESTATE TAX SAVINGS RESULTING FROM A GIFT OF $30,000 TO X UNIVERSITY

<table>
<thead>
<tr>
<th>Estate of Husband</th>
<th>John Abell and Wife</th>
<th>Walter Baker and Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjusted Gross Estate</td>
<td>$313,000</td>
<td>$429,000</td>
</tr>
<tr>
<td>Less: Marital Deduction</td>
<td>$107,375</td>
<td>$223,375</td>
</tr>
<tr>
<td>Balance</td>
<td>$205,625</td>
<td>$205,625</td>
</tr>
<tr>
<td>Less: Charitable Contribution</td>
<td>$30,000</td>
<td>$30,000</td>
</tr>
<tr>
<td>Taxable Estate</td>
<td>$175,625</td>
<td>$175,625</td>
</tr>
<tr>
<td>Tentative Tax</td>
<td>$47,000</td>
<td>$47,000</td>
</tr>
<tr>
<td>Unified Credit</td>
<td>$47,000</td>
<td>$47,000</td>
</tr>
<tr>
<td>Estate Tax Liability after Contribution</td>
<td>NONE</td>
<td>NONE</td>
</tr>
</tbody>
</table>
The total estimated savings in federal income and estate taxes are summarized as follows:

### TABLE 6
TOTAL ESTIMATED TAX SAVINGS RESULTING FROM GIFT OF $30,000 TO X UNIVERSITY

<table>
<thead>
<tr>
<th></th>
<th>John Abell and Wife</th>
<th>Walter Baker and Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income Tax Savings</strong> (Tables 3 and 4)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>$ 12,020</td>
<td>$ 3,956</td>
</tr>
<tr>
<td>1977</td>
<td>2,250</td>
<td>3,956</td>
</tr>
<tr>
<td>1978</td>
<td></td>
<td>$ 14,270</td>
</tr>
<tr>
<td><strong>Estate Tax Savings</strong> (Table 5)</td>
<td>9,600</td>
<td>10,132</td>
</tr>
<tr>
<td><strong>Total Estimated Tax Savings Resulting from Gift of $30,000 to X University</strong></td>
<td>$ 23,870</td>
<td>$ 19,072</td>
</tr>
<tr>
<td><strong>% of Tax Savings to Total Gift</strong></td>
<td>79.6%</td>
<td>63.6%</td>
</tr>
</tbody>
</table>

Note that gross income and the amount of the gross estate are treated as constant figures. This necessarily assumes that income and disbursements are exactly equal and that there is no change in the value of assets involved during the years that intervene between the gift and the death of the donor. These assumptions are, however, conservative and tend to reduce rather than increase the tax savings. The probabilities are that the donors will accumulate additional assets over the years and that the values of those assets will increase. Furthermore, the thirty-two and thirty-four percent brack-
ets cover taxable estates ranging from $150,000 to $500,000, and changes in the amount of the taxable estates will have only a minor effect on the amount of tax savings involved in a major gift. These comments are also applicable to the computations in Tables 8 through 11 hereafter.

The benefits would, of course, be far more dramatic if we assume that the donor has an adjusted gross income of more than $200,000, to which the maximum tax bracket of seventy percent would apply, and an estate of more than ten million dollars, to which the maximum estate tax bracket of seventy percent would apply. The seventy percent bracket disregards the credit for state taxes on testamentary transfers, but since such credits are allowed only when the tax has been paid to the state, this approach would seem to be practical. In such an estate, it could be said that a $50,000 gift would produce tax savings of $70,000 since the entire amount of the gift is eliminated from both the adjusted gross income for income tax purposes and the gross estate for estate tax purposes. If the amount to be eliminated from the gross estate is limited to the $15,000 that represents the amount of the gift less the income tax saved, then the total tax savings are only $45,500, and the net after-tax cost of the $50,000 gift is $4,500. When a major gift is involved, the donor also benefits from the elimination from his adjusted gross income, for federal income tax purposes, of the income that would otherwise be derived from the subject matter of the gift. For estate tax purposes he is relieved of an estate tax on any income that is accumulated and included in the gross estate at the date of death, as well as any appreciation in the value of the property that is the subject matter of the gift from the date of the gift to the date of the death of the donor. Thus, it is clear that donations to carefully selected charities can contribute much to a well-rounded estate plan; and the tax benefits to be derived from such gifts are maximized by lifetime gifts that achieve savings in both income and estate taxes.

(3) Gifts of appreciated securities—Many, perhaps even most, major gifts involve a transfer of property to the charity rather than the payment of money. The amount of the deduction allowed for a contribution made in property that qualifies for long-term capital gains is determined by the fair market value of the property at the time of the gift. However, the deduction is limited to the donor's adjusted basis in the property, which is generally lower than the fair market value of the property. As a result, the donor may receive a lower charitable deduction than the fair market value of the property.

50. See Snyder, supra note 13, at 359-61.
TAXING CHARITABLE CONTRIBUTIONS

gains treatment is a fair market value of the property,51 and the donor is not required to report as capital gain the excess of that value over the donor's cost or other basis.52 Nor would he be permitted to deduct as capital loss any of the excess of his costs or adjusted basis over the fair market value.53 Therefore, donors who hold securities or real estate that have appreciated in value will find that such assets are ideal gifts in that they produce enhanced tax savings. If the donor's basis exceeds the fair market value, then the obvious course of action would be a sale of the property, establishing a capital loss, and donation to the charity of the proceeds of the sale.

The rule that the amount allowable as a charitable contribution is the fair market value of the property applies only in those situations where a gain on the sale of the property would qualify for treatment as a long-term capital gain. The Tax Reform Act of 1969 further limited the tax advantages of gifts of appreciated property by providing that the donor must elect either (1) to limit the deduction for a charitable contribution to 30% of his contribution base, or (2) to reduce the amount of the contribution by 50% of the appreciation in the value of the donated property.54 The donor is, however, permitted a five-year carryover of such a charitable contribution regardless of the alternatives elected.55

If a sale of the property would have resulted in a short term capital gain or ordinary income, then the amount of the charitable contribution deduction is limited to the adjusted basis,56 usually the cost of the property in the hands of the donor. Ordinary income results where a sale of the property would result in a recapture of

52. But see I.R.C. § 170(c)(1)(B). Subsection (i) limits the deduction for contributions to tangible personal property if the use of such property is unrelated to the purpose of the function constituting the basis for the donee's exemption under I.R.C. § 501. Subsection (iii) limits the deduction where property is given to a private foundation. In both cases, the deduction allowed is limited to fifty percent of the amount of gain which would have been long term capital gain if the property had been sold.
53. While there is no statutory provision directly in point, it is obvious that no loss is suffered when property is given away, even though the fair market value of the gift is less than the basis in the hands of the donor. By the same reasoning, no loss is realized or recognized when the fair market value of the property at the date of the gift is less than the donor's basis. See H.R. Rep. No. 413, 91st Cong., 1st Sess. 88, reprinted in [1969] U.S. Code Cong. & Ad. News 1699.
depreciation deduction,\textsuperscript{57} where the property would be classified as inventory of a trade or business operated by the donor,\textsuperscript{58} or where Section 306 stock\textsuperscript{59} is the property sold. There is, therefore, no advantage in using property in these classifications as the subject matter for a charitable contribution.\textsuperscript{60}

EXAMPLE: John Abell has decided to make a gift to X University of 484 shares of common stock of the Standard Oil Company of Ohio. In 1957 he purchased 100 shares for $5,650. A ten percent stock dividend, a two for one split, a second ten percent stock dividend and a second two for one split have increased Abell's holdings to 484 shares. The stock is listed on the New York Stock Exchange, and the mean price on the date of the gift is $85 per share. Abell feels that the stock has relatively little potential for further increases in value for the next three to five years and that the relatively low levels at which other stocks are selling indicates that the Sohio stock should be disposed of. The value of the 484 shares at $85 per share is $41,140.

\begin{table}[h]
\centering
\caption{JOHN ABELL: ESTATE TAX SAVINGS THAT WILL RESULT FROM A GIFT OF 484 SHARES OF COMMON STOCK OF THE STANDARD OIL COMPANY OF OHIO TO X UNIVERSITY}
\begin{tabular}{lcccc}
\hline
Value — 484 shares @ $85.00 per share & & & & \\
\hline
Taxable Income before Gift & 1977 & 1978 & 1979 & Total \\
(Table 1) & $49,000 & $49,000 & $49,000 & $147,000 \\
Deduction Allowable for Gift & 15,600 & 15,600 & 9,940 & 41,140 \\
Taxable Income after Gift & $33,400 & $33,400 & $39,060 & $105,860 \\
Tentative Tax after Gift & $9,248 & $9,248 & $11,788 & $30,284 \\
\hline
\end{tabular}
\end{table}

57. I.R.C. § 1245. \\
58. I.R.C. § 1221. \\
59. See I.R.C. § 306. Section 306 stock is very carefully defined in § 306(c). In general, it is any stock received as a dividend on another class of stock, or in a corporate reorganization or capitalization, or any other transaction in which receipt of the stock was cost free and did not result in taxable income to the shareholder. Section 306(a) provides that if a shareholder sells or otherwise disposes of Section 306 stock, the amount realized shall be treated as a gain from the sale of property which is not a capital asset. If such stock were to be transferred as a gift to a charitable organization, the adjusted basis of the stock, rather than its current market value, would be the amount of the gift if such stock were to be transferred as a gift to a charitable organization. \\
60. See Snyder, supra note 13, at 361-62.
(4) Bargain sales—Before the Tax Reform Act of 1969, it was common practice to sell appreciated securities to charitable organizations at a price that was less than the fair market value of the securities sold, but at least equal to the donor's cost. The transaction resulted in a deduction for a charitable contribution equal to the excess of the fair market value of the securities over the sale price, and in a capital gain to the extent that the sale price exceeded the adjusted basis of the securities in the hands of the donor. If the sale price were less than the donor's cost the loss would not be recognized and the maximum benefits in a transaction of this type would be realized when the sale price was exactly equal to the donor's cost. Under this practice the donor would realize a deduction for a charitable contribution with no out-of-pocket cost, and it was not uncommon for the donor to realize more by way of tax
benefits from the contributions than the after-tax gain on an outright sale.\textsuperscript{61}

The Code as amended by the Tax Reform Act of 1969, however, now requires that the donor allocate his cost or adjusted basis between the portion of the property that is sold and the portion of the property that is given to a charitable organization.\textsuperscript{62} This revision largely eliminates the advantages of the bargain sale and an outright gift of the appreciated securities would appear to be the preferable course. In the example below, we have used the 484 shares of common stock of the Standard Oil Company of Ohio, referred to in Table 7, as the subject matter of the “bargain sale.” In this particular situation the cost and the selling price are only 13.7\% of the fair market value of the stock and the benefits derived from the bargain sale are, therefore, not substantially less than the benefits that would be derived from an outright gift as computed in Table 7.

\textbf{EXAMPLE:} Under existing law, a sale by Abell of his 484 shares of common stock of the Standard Oil Company of Ohio to X University for $5,650 would produce the following result:

\begin{table}[h]
\centering
\begin{tabular}{lrr}
\hline
\textbf{Allocation of Cost} & \textbf{Amount} & \textbf{\%} \\
\hline
Fair Market Value ($85.00 per share) & $41,140 & 100\% \\
Cost & 5,650 & 13.7\% \\
\hline
\textbf{Amount of Gift} & $35,490 & 86.3\% \\
\textbf{Cost to be Allocated to Sale} & (13.7\% of $5,650) & $774 \\
1977 & 1978 & 1979 & Total \\
\hline
Taxable Income Before & & & \\
“Bargain Sale” & $49,000 & $49,000 & $49,000 & $147,000 \\
Less: Deduction for & & & & \\
Charitable Contribution & 15,600 & 15,600 & 4,290 & 35,490 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{61} For a general discussion of “bargain sales” before the 1969 Tax Reform Act, the changes made by the Act, and the reasons for those changes, see H.R. REP. No. 413, 91st Cong., 1st Sess. 88, \textit{reprinted in} [1969] U.S. CODE CONG. & AD. NEWS 1699.

\textsuperscript{62} I.R.C. § 1011(b).
TAXING CHARITABLE CONTRIBUTIONS

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ordinary Taxable Income</td>
<td>$33,400</td>
</tr>
<tr>
<td>After Bargain Sale</td>
<td>$33,400</td>
</tr>
<tr>
<td>Long Term Capital Gain</td>
<td>$44,710</td>
</tr>
<tr>
<td>(50% of $5,650 - 774)</td>
<td>$2,438</td>
</tr>
<tr>
<td>Taxable Income After Bargain Sale</td>
<td>$35,838</td>
</tr>
<tr>
<td>Tentative Tax After Bargain Sale</td>
<td>$9,248</td>
</tr>
<tr>
<td>Less: Tax Credit</td>
<td>$180</td>
</tr>
<tr>
<td>Income Tax Liability After Bargain Sale</td>
<td>$10,092</td>
</tr>
<tr>
<td>Income Tax Liability Before Bargain Sale</td>
<td>$9,068</td>
</tr>
<tr>
<td>Tax Savings Resulting From Bargain Sale</td>
<td>$16,380</td>
</tr>
<tr>
<td>Capital Gains Tax Savings (25% of $35,490)</td>
<td>$6,288</td>
</tr>
<tr>
<td>Estate Tax Savings</td>
<td>$207,375</td>
</tr>
<tr>
<td>Estate Tax Liability of Wife Before Bargain Sale</td>
<td>$10,160</td>
</tr>
<tr>
<td>Taxable Estate Before Bargain Sale</td>
<td>$207,375</td>
</tr>
<tr>
<td>Less: Gift Portion or Bargain Sale</td>
<td>$35,490</td>
</tr>
<tr>
<td>Taxable Estate After Bargain Sale</td>
<td>$171,885</td>
</tr>
<tr>
<td>Tentative Tax</td>
<td>$45,803</td>
</tr>
<tr>
<td>Unified Credit</td>
<td>$47,000</td>
</tr>
<tr>
<td>Estate Tax Liability After Bargain Sale</td>
<td>$0</td>
</tr>
<tr>
<td>Estate Tax Savings Resulting from Bargain Sale</td>
<td>$10,160</td>
</tr>
<tr>
<td>Total Tax Savings</td>
<td>$34,778</td>
</tr>
<tr>
<td>Tax Savings as a % of the Gift Portion of the Bargain Sale</td>
<td>98%</td>
</tr>
</tbody>
</table>

(5) Gifts of life insurance contracts—Life insurance contracts can be an excellent vehicle for charitable contributions in a carefully analyzed estate plan. Such contracts are usually acquired soon after marriage to protect the young family from the disaster that would result if the family bread winner were to come to an untimely death. In many families, the life insurance protection that was so essential in early years is no longer really needed when the bread winner is approaching retirement age, and a large portion of the death benefits may be eaten up in federal estate taxes. The careful estate planner should, however, give careful attention to the needs of the executor and the surviving spouse for cash funds, needs that are often met by death benefits from life insurance. If the liquid assets in the estate are adequate to meet the cash needs of the estate, then...
the life insurance contract might be ideal subject matter for a charitable contribution. The income tax deduction to be allowed for such a charitable contribution will be the value of the policy on the date of the gift.63

The value of a paid-up policy is "replacement cost" or what the insurance company would charge on the date of the transfer to issue a similar policy. The value of the policy on which future premiums are payable is the interpolated terminal reserve plus that part of the last prior premium payment attributable to the period subsequent to the gift. The total of these two figures usually equals an amount slightly more than the cash surrender value. Such a gift will also achieve substantial estate tax savings because the proceeds of the policy will be paid to the donee charitable organization, and they are thus removed from the taxable estate.64

It is not required that the policy be fully paid-up to qualify as property that can be the subject matter of a charitable contribution. The charity can pay the remaining premiums and collect the death benefits or collect the cash surrender value. The donor can also elect to pay the premiums that fall due after the date of the gift and claim the amount thus paid as an additional contribution.

EXAMPLE: The life insurance contracts presently held by John Abell include one twenty-payment policy issued by the Provident Insurance Company, with a face value of $25,000. The policy was taken out in 1942 and is now fully paid up. The policy has a cash surrender value as of July 1, 1977, of $18,275. Provident will issue a single premium policy with a face value of $25,000 to a male age 65 for $17,656. Abell decides to make a gift of the policy to X University. He no longer needs the protection since his other insurance is more than adequate to meet federal estate taxes, administration costs, and the widow's expenses for the first year. The widow's long term living costs will be met by survivor's benefits under the civil service annuity.


64. See Snyder, supra note 13, at 364-65.
**TABLE 9**

JOHN ABELL: ESTIMATED TAX SAVINGS THAT WILL RESULT FROM THE GIFT OF A FULLY PAID UP LIFE INSURANCE POLICY IN THE FACE AMOUNT OF $25,000

| **Taxable Income Before Gift of Insurance Policy** | $49,000 |
| **Less: Replacement Cost of Insurance Policy** | 17,656 |
| **Taxable Income After Gift** | $31,344 |
| **Tax Liability Before Gift (Table 1)** | 16,380 |
| **Tentative Tax After Gift** | $8,404 |
| **Less: Credit for Dependents** | 180 |
| **Tax Liability After Gift** | $8,224 |
| **Income Tax Savings Resulting from Gift** | $8,156 |

| **Estate Tax Liability Before Gift (Table 2)** | NONE |
| **Estate of Husband** | $10,160 |
| **Estate of Wife** | $10,160 |
| **Adjusted Gross Estate of Wife Before Gift** | $207,375 |
| **Less: Death Benefits on Policy** | 25,000 |
| **Adjusted Gross Estate After Gift** | $182,375 |
| **Tentative Estate Tax After Gift** | $49,160 |
| **Less: Unified Credit** | 47,000 |
| **Estate Tax Liability After Gift** | 2,160 |
| **Estate Tax Savings Attributable to the Gift** | $8,000 |

**Total Tax Savings Attributable to the Gift**

**Total Tax Savings as a % of Replacement Cost of the Insurance Policy** 91.5%

---

**(C) Deferred Giving to Charitable Organizations**

Many prospective donors who intend to make a major gift to a charitable organization are deterred from doing so by the fact that the funds are not available without liquidation of investments that may be essential to the lifetime security plan of the donor. This is particularly true with respect to taxpayers in the thirty to fifty percent income tax bracket, with whom we are primarily concerned in this article. The result is that such gifts are often made by a bequest in a will. Consequently, the tax advantage of a lifetime gift
is needlessly lost, or the gift to charity might have been greatly enlarged by the extra savings that would have been generated by a deferred gift.

Prior to the passage of the Tax Reform Act of 1969, deferred giving was a simple matter, based on the legal concept that interests in property are divisible in several ways. There can be (1) the transfer of a divided portion of the property, (2) the transfer of an undivided interest in the whole (creation of a tenancy in common), or (3) the transfer of a life estate to one or more persons or organizations with a remainder interest going to another. The transfer of a remainder interest to charity, with the donor retaining a life estate for himself or a person or persons dependent upon him, or both, became a rather common method of making a gift to charitable organizations. The amount to be allowed as a charitable contribution in the year that the remainder interest was transferred with the present value of the remainder interest computed on an actuarial basis that takes into account the life expectancy of a life tenant.

The average layman rarely understands that a remainder interest has a present value that is dependent on the life expectancy of the life tenant. A gift of a remainder interest is a means by which the donor can eat a portion of his cake (achieve an income tax deduction) but retain almost all of it, because he has unrestricted use of the property during his lifetime and still eliminates the property from his gross estate. The concept that the gross estate includes the value of the property transferred if the donor retains the use, possession, right to the income, or other enjoyment of the transferred property does not come into play where the remainder interest is given to charity, because the inclusion of the property would give rise to a deduction for a charitable transfer in an equal amount.

Under English common law, the law protected the rights of the remainderman. Many American courts, at an early date in our history, broke away from this stricter early view. This more relaxed

65. I.R.C. § 2036.
67. At least from the Statute of Marlborough, 1267, 52 Hen. 3, c.2, this protection was available. See generally 2 F. Pollack & F. Maitland, The History of English Law (2d ed. 1898).
68. Statutory enactments removed many of the strict rules concerning remainders. See 33 Am. Jur. Life Estates, Remainders and Reversions § 61 (1941). This is especially true in Ohio which has abolished the Rule in Shelley's Case and made remainders of all types freely alienable, devisable, and descendable. Ohio Rev. Code Ann. §§ 2107.49 & 2131.04 (Page
attitude towards the use of property by the life tenant has produced some problems and considerable litigation in situations where the value of the charitable remainder was placed in doubt by powers vested in the life tenant to commit waste, or powers vested in a trustee to invade the corpus of a trust to provide for the well-being of the life beneficiary.

Under the regulations in effect before 1969, the assumed rate of interest used in computing the value of the charitable remainder was 3 1/2%. This rate was substantially below the current anticipated return on even the most conservative investment, and resulted in an artificially high evaluation of the remainder interest. Furthermore, there was little or no control over the investments that were made by the trust. If the trustee adopted a policy of investment in high-income, high-risk investments the value of the income vested in the life tenant would be enhanced. However, the value of the remainder interest going to charity would be decreased, and might be substantially less than the amount of the charitable contribution that was allowed to the donor at the time that the remainder interest was transferred to charity.

In order to resolve these problems, the Tax Reform Act of 1969 placed strict limitations on the deductions allowed for gifts of remainder interests to charities. In a case of real estate, the 1969 Reform Act limits the use of the traditional gift of a remainder interest to those situations in which the subject matter of the gift is either a farm or a personal residence of the donor. The 1969 Reform Act also allows a charitable contribution for the gift of an undivided interest in real estate to a charity which creates a tenancy in common, or of any partial interest in property, such as an income interest or a remainder interest, provided that such interest constitutes

---

69. See, e.g., notes 42-45 supra, and accompanying text.
70. See, e.g., Kline v. United States, 202 F. Supp. 849 (N.D.W. Va. 1962), aff'd, 313 F.2d 633 (4th Cir. 1963). A will which authorized the trustee to invade the corpus "as circumstances may require" rendered the remainder to a charity too uncertain to qualify as a charitable deduction. 202 F. Supp. at 852.
71. See, e.g., notes 42-45 supra, and accompanying text.
the donor's entire interest in the property. The obvious problems of sharing occupancy or income from the property with a charitable organization prevent anything more than isolated use of this type of transfer.

The 1969 Reform Act abolished the deduction for a charitable contribution upon the creation of a trust with a life beneficiary and the gift of a remainder interest to a charitable organization. It does, however, provide new, carefully-structured forms: the charitable remainder unitrust, the charitable remainder annuity trust, and the pooled income fund that will provide what are basically the same advantages for the taxpayer, with reasonable assurance the charity will receive value consistent with the deduction allowed to the donor.

(1) Gifts of remainder interest in real estate—As previously mentioned, the Tax Reform Act of 1969 limits the use of the traditional gift of the remainder interest to situations in which the subject matter of the gift is either a farm or the personal residence of the donor. As thus limited, however, there are circumstances in which the gift of a remainder interest of a charitable organization can be a very useful part of an estate plan. The client may have a personal residence or farm that has no real utility to his heirs but is useful to him during his lifetime. The gift of a remainder interest to charity will achieve a substantial reduction in his federal income tax liabilities, thereby increasing the net income, after taxes, available during his lifetime. He will also have unrestricted use of the property for as long as he lives.

EXAMPLE: John Abell has decided to give a remainder interest in his personal residence to X University, reserving for himself a life estate. He and his wife want to retain the property as a personal residence during his lifetime, but Mrs. Abell feels that she does not wish to live alone in the residence after the death of her husband. The recent offer of $60,000 for the property previously referred to, was made by a builder and developer who intended to tear down the building and construct a multi-story professional office building on the site. You have determined, therefore, that the property has a fair market

74. See Snyder, supra note 13, at 366-67.
value of $60,000 all which is allocable to the land; and that the building will be fully depreciated at the end of the life expectancy of the donor. The applicable table published by the Internal Revenue Service shows that the value of a remainder interest with a life estate vested in a male, 65 years of age, computed on the basis of a 6% return, is 51.788% of the value of the property as a whole. Abell would, therefore, be entitled to a deduction for a charitable contribution of $31,073 ($60,000 X .51788).

<table>
<thead>
<tr>
<th>TABLE 10</th>
<th>JOHN ABELL: TAX SAVINGS ACHIEVED BY THE GIFT OF A REMAINDER INTEREST IN HIS PERSONAL RESIDENCE TO X UNIVERSITY</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Taxable Income Before Gift</strong></td>
<td>$ 49,000</td>
</tr>
<tr>
<td>Less: Deduction for Major Gift</td>
<td>27,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$ 22,000</td>
</tr>
<tr>
<td>Tentative Tax Liability After Gift</td>
<td>$ 5,020</td>
</tr>
<tr>
<td>Less: Credit for Dependents</td>
<td>180</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>$ 4,840</td>
</tr>
<tr>
<td>Income Tax Liability After Gift (Table 2)</td>
<td>16,380</td>
</tr>
<tr>
<td>Income Tax Savings Resulting from Gift</td>
<td>$ 11,540</td>
</tr>
<tr>
<td><strong>Adjusted Gross Estate of Wife Before Gift</strong></td>
<td>$ 20,375</td>
</tr>
<tr>
<td>Less: Value of Residence at Date of Death</td>
<td>60,000</td>
</tr>
<tr>
<td><strong>Adjusted Gross Estate of Wife After Gift</strong></td>
<td>$ 147,375</td>
</tr>
<tr>
<td>Tentative Estate Tax After Gift</td>
<td>$ 38,013</td>
</tr>
<tr>
<td>Unified Tax Credit</td>
<td>47,000</td>
</tr>
<tr>
<td><strong>Estate Tax Liability After Gift</strong></td>
<td>NONE</td>
</tr>
<tr>
<td><strong>Total Tax Savings Resulting from Gift</strong></td>
<td>$ 10,160</td>
</tr>
<tr>
<td><strong>Tax Savings as a % of the Value of the Remainder Interest</strong></td>
<td>76.4%</td>
</tr>
</tbody>
</table>

(2) Gifts of remainder unitrusts—A charitable remainder unitrust is created by an irrevocable transfer of money or property or both to a trustee with one or more lifetime beneficiaries and a remainder interest vested in a charitable organization. The beneficiary or beneficiaries of the trust must be persons in being at the time that the trust is formed, and may, and usually does, include the grantor and/or his spouse. The unitrust terminates upon the death of the income beneficiary, or the survivor of them if there is more than one, or may terminate, if so provided in the trust instrument, at the end of a specified term not to exceed twenty years. 77

It is required that the distribution to the income beneficiary be a fixed percentage, not less than five percent, of the current fair market value of the assets held by the trust redetermined annually. 78 The fixed percentage distribution can be varied in either of two ways. The trust instrument may provide that the distribution to the income beneficiary shall be the fixed percentage of the redetermined value, or the income realized by the trust, whichever is the least amount. If the distribution is thus limited to the amount of income realized by the trust, then the trust instrument may further provide, if the grantor so elects, for payments that will make up any deficiencies in the percentage rate in those years when the income of the trust exceeds the fixed percentage of the current value of the assets. 79

The statute provides that the minimum percentage of the current value of the assets that is to be paid to the income beneficiary shall be five percent. 80 There is no ceiling on this rate, but any increase in the rate above five percent would necessarily reduce the value of the remainder and the amount of the deduction for a charitable contribution in the year that the trust was formed. 81 For example, the remainder interest would probably be without value if the distribution to the income beneficiary were ten percent of the current value of the trust assets. Accumulated income of the trust, to the

---

78. Id.
81. For example, the present net worth of a remainder interest in a charitable remainder unitrust with the life estate vested in a male aged 60 and a payout rate of 5.0% would be 48.833% of the amount contributed to the trust. With a payout rate of 9.0% the present worth of the remainder would be 30.736% of the amount contributed to the trust. See Treas. Reg. § 1.664-4(b)(5), Table (E)(1) (1972).
extent that it exceeds the specified payments to the life beneficiary, must be added to the principal. There can be no invasion of the principal of the trust for any purpose other than the payments that are to be made to the income beneficiaries. Upon termination, the entire corpus must go to the charity or charities designated as the remaindermen in the trust instrument. The grantor may contribute additional money or property to the trust after its formation. Such a contribution would, of course, enlarge the payments to the income beneficiary and give rise to a further deduction for a charitable contribution in the year of the addition. The contribution would be measured by the increase in the value of the remainder interest.

The charitable organization that receives the remainder interest may be designated as trustee, provided that it has the power to act as a trustee under state law and under its corporate charter. A bank or a trust company could be authorized to act as trustee, or the grantor could designate his attorney or a trusted friend to act in that capacity. There is some case law which indicates that the grantor himself can act as a trustee, although the obvious bias of a grantor might create a situation in which the deduction for a charitable contribution in the year of formation of the trust would be disallowed. There must be an independent trustee when the assets of the trust include such hard-to-value assets as real estate or stock in a closely held corporation.

The current fair market value of the assets of the trust must be redetermined annually on a specific date each year, or they may be redetermined quarterly, in which case the average value would be

---

82. I.R.C. § 664(d)(2)(C).
84. See O'Brien v. Commissioner, 46 T.C. 583 (1966) and cases cited therein. The court held that the grantor could be the trustee for two charitable organizations and that "there is nothing in the law that prevents trustors from appointing themselves as trustees." Id. at 594. The court concluded that the possibility of abuses was slight since the attorney general of the state could strictly enforce the trust. Id. at 595-96. The commissioner did not appeal this adverse decision and noted his acquiescence. 1968-1 C.B. 2.
85. See Darling v. Commissioner, 43 T.C. 520 (1965).
86. While there is no specific statutory provision, H.R. Rep. No. 413, 91st Cong., 1st Sess. 88, reprinted in [1969] U.S. Code Cong. & Ad. News 1699 states: "It is contemplated that a charitable contribution would be denied where assets which do not have an objective, ascertainable market value, such as real estate or stock in a closely held corporation, are transferred in trust, unless an independent trustee is the sole party responsible for making the annual determination of value."
used to determine the amount to be distributed to the income beneficiary. The basic requirement is that the valuation must be made on a consistent basis. The trustee would not be permitted to determine the value on January 1 for one year and December 31 for another, nor could he use the current value on a specific date for one year and the average of quarterly evaluations for another. The simplest procedure probably would be to determine the current value of the assets on the first day of January each year, thus fixing the distributions that are to be made for that year.

The statute requires that payments must be made to the beneficiary at least annually, although quarterly payments are probably the most common practice. The beneficiary is required to report the payments that he receives from the trust as ordinary income in any year in which the ordinary income of the trust is equal to or greater than the amount distributed. If the ordinary income of the trust, plus any accumulation of the undistributed ordinary income from prior years is less than the income distributions to the beneficiary, and the trust has capital gains or tax exempt income equal to the amount of distribution, then the income beneficiary would report ordinary income to the extent received, then capital gains to the extent received. Distribution of tax exempt income or distributions that are made from the principal of the trust do not constitute taxable income to the income beneficiary, but distributions to the income beneficiary are presumed to be ordinary income to the extent realized, and then capital gains to the extent realized.

The donor is allowed wide latitude as to the types of property that can be the subject matter of a gift to a charitable remainder unitrust. Real estate and common stock of closely held corporations, however, probably will present some valuation problems that make them less desirable as property to be contributed to a unitrust than securities that are regularly traded on a stock exchange. Stocks of closely held corporations may also present some problems of compliance with requirements in the code that prohibit excess holdings in any business, self-dealing by the trustee or the grantor, or investments that might tend to jeopardize the charitable remainder.

89. I.R.C. § 664(b).
90. The Tax Reform Act of 1969 imposes sanctions applicable to both private foundations and trusts, against self-dealing at I.R.C. § 4941, excess business holdings at I.R.C. § 4943,
When property contributed to the unitrust has appreciated in value, the donor is required to elect to either limit his deductions for charitable contributions to thirty percent of his contribution base, or reduce the contribution by fifty percent of the appreciation in value. The regulations further prohibit the contribution of mortgaged property if the mortgage attached to the property less than ten years before formation of the trust. The unitrust is exempt from income tax as a charitable organization, but the exemption is forfeited during any period that the trust holds property that is subject to a mortgage. A further problem with mortgaged property is that the Internal Revenue Service might hold that the gift of property subject to a mortgage is a bargain sale and assert a capital gain tax on the excess of the mortgage over the portion of the original cost allocated to the portion sold.

The deduction for a charitable contribution allowed to the grantor in the year of formation of the unitrust is, as in the case of any deferred gift, the value of the remainder interest, taking into account the life expectancy of the income beneficiary or beneficiaries and the fixed percentage of the current value of the assets that is to be distributed to them. The value of the remainder, and the amount of the deduction for a charitable contribution, is greatest where the minimum payment to beneficiaries, five percent of the current value of the assets, is used. The Internal Revenue Service has prepared detailed tables from which the amount of the deduction can readily be computed, given the age to the nearest birthday of the income beneficiary and the percent of the current value of the assets that is to be distributed.

An outstanding advantage of the unitrust is that it provides an excellent hedge against future inflation. The current value of the assets held in the trust should increase as general price levels increase and the amount of the distribution to the income beneficiary increases proportionately. It is readily apparent that the charitable

92. Treas. Reg. § 53.4941(d)-2(a)(2). Note also that I.R.C. § 4947(a)(2) provides that rules against self-dealing and retention of excess business holdings apply to both private foundations and charitable remainder trusts.
93. I.R.C. § 1011(b).
94. Treas. Reg. §§ 1.664-2(b) & 2(c) (1972).
remainder unitrust will have no attractions for our hypothetical John Abell, since he has a substantial salary income and will receive a generous annuity upon retirement. The unitrust is, however, an excellent vehicle for Walter Baker, who has substantial investments that could be used as subject matter for a unitrust and who relies on the income from those investments to cover living expenses.96

EXAMPLE: Walter Baker has decided to transfer U.S. Government bonds having a current market value of $100,000 to a charitable remainder unitrust naming himself as the sole income beneficiary and X University as the charitable remainderman. He has also named X University as the trustee. The trust instrument provides that Baker individually is to receive payments equal to five percent of the current value of the assets which is to be determined annually on January 1 of each year. The payments are to be made on a quarterly basis and the amount of the payment is not to be affected by the income of the unitrust.

Note that Baker has really given up nothing more than the right to make a testamentary disposition of the securities that were used for the formation of the unitrust and the deferred gift made in the unitrust is probably consistent with the testamentary disposition that he would have selected. His income will be virtually unaffected since he will receive during his lifetime five percent of the value of the assets held in the unitrust. Furthermore, the income funds available to him during his lifetime will be increased by an amount equal to the reduction in his federal income tax liability that results from the deferred gift to charity. The applicable table7 shows that the present worth of a remainder interest of $1.00 in a charitable remainder unitrust with a single male age sixty as the income beneficiary and a payout rate of five percent is .48833.

96. See Snyder, supra note 13, at 369-72.
WALTER BAKER: ESTIMATED TAX SAVINGS THAT WILL RESULT FROM A GIFT OF $100,000 TO A CHARITABLE REMAINDER UNITRUST

<table>
<thead>
<tr>
<th>Year</th>
<th>1977</th>
<th>1978</th>
<th>1979</th>
<th>1980</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taxable Income Before Gift</td>
<td>$25,700</td>
<td>$25,700</td>
<td>$25,700</td>
<td>$25,700</td>
<td>$102,800</td>
</tr>
<tr>
<td>Less: Deduction Allowable for Gift to Unitrust</td>
<td>13,500</td>
<td>13,500</td>
<td>13,500</td>
<td>8,333</td>
<td>48,833</td>
</tr>
<tr>
<td>Taxable Income After Gift</td>
<td>$12,200</td>
<td>$12,200</td>
<td>$12,200</td>
<td>$17,367</td>
<td>$53,967</td>
</tr>
<tr>
<td>Tentative Tax Liability After Gift</td>
<td>$2,304</td>
<td>$2,304</td>
<td>$2,304</td>
<td>$3,631</td>
<td>$10,543</td>
</tr>
<tr>
<td>Less: Credit for Dependents</td>
<td>180</td>
<td>180</td>
<td>180</td>
<td>180</td>
<td>720</td>
</tr>
<tr>
<td>Income Tax Liability After Gift</td>
<td>$2,124</td>
<td>$2,124</td>
<td>$2,124</td>
<td>$3,451</td>
<td>$9,823</td>
</tr>
<tr>
<td>Income Tax Liability Before Gift (Table 1)</td>
<td>6,092</td>
<td>6,092</td>
<td>6,092</td>
<td>6,092</td>
<td>6,092</td>
</tr>
<tr>
<td>Income Tax Savings Resulting from the Gift</td>
<td>$3,968</td>
<td>$3,968</td>
<td>$3,968</td>
<td>$2,641</td>
<td>$14,545</td>
</tr>
</tbody>
</table>

Estate Tax Savings

<table>
<thead>
<tr>
<th>Estate of Husband</th>
<th>Estate of Wife</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marketable Securities</td>
<td>$350,000</td>
</tr>
<tr>
<td>Received from Estate of Husband</td>
<td></td>
</tr>
<tr>
<td>Gross Estate</td>
<td>$350,000</td>
</tr>
<tr>
<td>Less: Administrative Expenses, etc</td>
<td>15,000</td>
</tr>
<tr>
<td>Adjusted Gross Estate</td>
<td>$335,000</td>
</tr>
<tr>
<td>Less: Marital Deduction</td>
<td>159,375</td>
</tr>
<tr>
<td>Taxable Estate</td>
<td>$175,625</td>
</tr>
<tr>
<td>Tentative Tax</td>
<td>$47,000</td>
</tr>
<tr>
<td>Unified Tax Credit</td>
<td>47,000</td>
</tr>
<tr>
<td>Estate Tax Liability After Gift</td>
<td>NONE</td>
</tr>
<tr>
<td>Estate Tax Liability Before Gift (Table 2)</td>
<td>1,080</td>
</tr>
<tr>
<td>Estate Tax Savings</td>
<td>$1,080</td>
</tr>
<tr>
<td>Income Tax Savings</td>
<td></td>
</tr>
<tr>
<td>1977</td>
<td>$3,968</td>
</tr>
<tr>
<td>1978</td>
<td>3,968</td>
</tr>
<tr>
<td>1979</td>
<td>3,968</td>
</tr>
<tr>
<td>1980</td>
<td>2,641</td>
</tr>
<tr>
<td>Total Tax Savings</td>
<td>$46,777</td>
</tr>
<tr>
<td>Tax Savings as a % of the Gift</td>
<td>46.8%</td>
</tr>
</tbody>
</table>
(3) Charitable remainder annuity trusts — The charitable remainder annuity trust, much like the charitable remainder unitrust, is formed by an irrevocable transfer of money or property, or both, to a trustee under a trust instrument that requires the payment of a specified dollar amount to one or more beneficiaries with the remainder vested in a charitable organization. The fixed dollar amount of the annual annuity may not be less than five percent of the initial capital of the trust. There is no ceiling on the amount of the annuity, but as noted in connection with the charitable remainder unitrust, the larger the annuity the smaller the remainder for charity and the deduction for a charitable contribution allowed to the grantor.

The major difference between the annuity and the unitrust is that the payment to the beneficiary in the former is a fixed dollar amount, whereas the payment in the latter is a fixed percentage of the current value of the assets held by the trust. One further significant difference is that the grantor is not permitted to add to the corpus of an annuity trust, a restriction that does not apply to the unitrust. The other comments with respect to unitrusts in the preceding section are equally applicable to the charitable remainder annuity trust.

There certainly are circumstances in which the annuity trust may be a very useful format. It would appear, however, that the unitrust, with the built-in hedge against inflation, will probably be more popular. The tax savings realized from a gift to a charitable remainder annuity trust are identical with those achieved in the unitrust as reflected in Table 11.

(4) Pooled income fund trusts — The third of the trilogy of new formats for charitable trusts created by the Tax Reform Act of 1969 is the pooled income fund trust. In this case, the trust is formed and maintained by the charitable organization, and as the name suggests, is a pooling of funds irrevocably contributed by various donors. This is done under life income agreements that provide for the payment of the income of the fund ratably to the donors, or the life income beneficiaries designated by them. Upon the death of the

98. I.R.C. § 664(d)(1).
99. See note 81 supra.
100. Treas. Reg. § 1.664-2(b) (1972).
101. See Snyder, supra note 13, at 373-74.
102. I.R.C. § 642(c)(5).
TAXING CHARITABLE CONTRIBUTIONS

income beneficiary the entire contribution of the donor is removed from the fund and used by the charity for charitable purposes.103

We will not discuss here the complex rules that govern the maintenance of the pooled income fund since these are basically the concern of the charity that holds the remainder interest. It is true that a major infraction of the rules could result in loss of the fund's exempt status and a determination that the fund is an association taxable as a corporation. Payment of the deficiency in federal income taxes would seriously deplete the income distributable to life income beneficiaries.104 Thus, any prospective donor to a pooled income fund trust would be wise to have his attorney review the operation of the fund and make certain that the applicable provisions of the Internal Revenue Code are fully complied with.105

The income distribution to the donor, or the income beneficiary designated by him, is a pro rata distribution based on the total fair market value of the assets of the fund compared with the amount of cash or the fair market value of the property contributed by the donor. The fund is required to determine the current fair market value of its assets at least four times per year, and the valuation dates must be no more than one calendar quarter apart. It is also required that the first day of the taxable year must be a fifth valuation date if it is not one of the four valuation dates otherwise selected.106 The logical and easy method of allocation is to accept new entrants into the fund only on the specified valuation date, but the fund is permitted to make a proration based on the average of the total value determined on the first preceding and first subsequent valuation date. Normally, the valuations are expressed in terms of units and the new donor is credited with the number of units that expresses his proportionate contribution to the fund.107 The income earned by the fund is then divided by the number of units outstanding, and the amount distributed to the donor or his designated beneficiary is the amount of income per unit realized by the fund times the number of units held by or attributed to the donor.

105. I.R.C. § 642(c)(3)(F); Treas. Reg. § 1.642(c)-5 to 7.
107. Id.
EXAMPLE: On July 1, 1973, A contributes $30,000 to the pooled income fund trust operated by Y University. July 1 is one of the four valuation dates for the fund and on July 1, 1973, the current value of the assets of the fund has been determined to be $300,000 which is divided into twenty units. Two units would be allocated to A as a result of his $30,000 contribution. There are no new entrants into the fund during the next six months and the income of the fund for the six-month period ended December 31, 1973, is $11,000. The amount of income distributable to A or his designated beneficiary would be $1,000 ($11,000 divided by 22 times 2).

All of the income distributions made by the fund are taxable as ordinary income. The fund is not permitted to hold tax exempt securities\(^\text{108}\) and capital gains are not distributed but are treated as additions to the corpus of the fund.\(^\text{109}\) The statute requires that income be distributed currently, and all of the income realized in a given taxable year must be distributed within sixty-five days after the close of that year.\(^\text{110}\) An alternative plan, seldom used, could allocate income attributable to appreciation in assets to the operating charity and this income would be distributed to the charity at the same time that distributions are made to the income beneficiary.\(^\text{111}\)

The deduction allowed to the donor in the year that he makes the contribution to a pooled income fund is, as with other deferred gifts, the value of the remainder interest determined after taking into account the life expectancy of the income beneficiary, discounted at a rate that represents the income payments to be made to the donor or his designated beneficiary. The discount rate is based on the rate of interest, compounded annually, that is equal to the highest yearly rate of return for the three years immediately preceding the taxable year in which the contribution was made. If the fund has been in existence less than three years, the discount rate applied is six percent.\(^\text{112}\)

\(^\text{108}\) I.R.C. § 642(c)(5)(C).
\(^\text{109}\) I.R.C. § 642(c)(4).
\(^\text{112}\) Treas. Reg. § 1.642(c)-6(b)(2)(C) (1971).
The pooled income fund trust is an excellent vehicle for gifts to charitable organizations in the $10,000 to $50,000 range. The donor has the satisfaction of making an important charitable gift and the pooled income fund trust, like the charitable remainder unitrust, provides an excellent hedge against inflation, in that the donor can reasonably anticipate an appreciation in the value of the assets held by the trust that will result in the increasing income payments over the years. The income beneficiary also realizes an advantage in that the pooled fund should provide a well-diversified investment portfolio. The donor is also relieved of the responsibility for managing his investments, which may be a major advantage in his declining years. Here again, the tax savings that would result from a contribution to a pooled income fund trust would not differ from those resulting from a contribution to a charitable remainder unitrust as reflected in Table 11.113

III. Summary

While there are no provisions in the Tax Reform Act of 1976 that directly apply to charitable contributions, the substitution of the Unified Tax Credit, (equivalent to a specific exemption of $175,625 for estates of decedents dying after December 31, 1980) for the specific exemption of $60,000, has raised the threshold at which charitable gifts will be effective in reducing estate tax liabilities. The rate structure under the Tax Reform Act, however, is such that the applicable rate on estates between $150,000 and $250,000 is thirty-two percent, or two percent more than the rate that applies to the estates of decedents dying before December 31, 1976. Thus, under the 1976 TRA, a $50,000 charitable bequest with an adjusted gross estate of $200,000 before any charitable deduction and no marital deduction would reduce the tax liability by $16,000, as compared with $15,000 under prior law. Since the rates on the first $150,000 under prior law were relatively low, the higher threshold will have only a minimal effect on charitable bequests.

While the point has already been mentioned, some emphasis should be placed in the fact that the maximum tax savings are achieved by major charitable gifts made during the lifetime of the donor, particularly when made in the years when income is at its

113. See Snyder, supra note 13, at 374-76.
highest level and the income tax deductions for charitable contributions have their greatest impact. An outright gift, of course, produces the largest income tax deduction and effectively eliminates the subject matter of the gift from the estate of the donor. In situations where the donor needs the property or the income that it will produce during retirement years, a deferred gift will permit retention of the income for life and still produce a limited income tax deduction and the maximum estate tax benefits.

IV. Conclusion

For more than fifty years federal income and estate tax statutes have contained generous provisions allowing deductions for contributions to charitable organizations. There is good reason for this generosity. There are still a few of us who can remember the days when the support of higher education, care of the poverty stricken sick, disabled, or aged, and the maintenance of community welfare organizations was a responsibility of private philanthropy rather than public welfare. Even with the encouragement afforded by generous tax deductions the task is now beyond the resources of private philanthropy and the responsibility for at least minimal support of those functions has largely passed to the federal, state, and local governments. There is still a need, however, for private support in these areas, particularly with respect to higher education.

Furthermore, religious organizations must depend entirely on the private sector for support, in view of the constitutional requirement for separation of church and state and the strong tradition that supports that limitation. Nevertheless, a great majority of Americans favor indirect government support through the allowance of tax deductions for contributions to religious organizations.

It is my hope that this article will encourage the effective use of charitable contributions in estate plans. Effective use of such tax deductions will result in substantial benefits to the donor, to the charitable organizations that are the recipients of the gifts, and to our society as a whole.
COMMENTS

THE CONSTITUTIONALITY OF MANDATORY PARENTAL CONSENT IN THE ABORTION DECISION OF A MINOR: BELLOTTI II IN PERSPECTIVE

I. INTRODUCTION

In Roe v. Wade, the Court expressly reserved ruling on the constitutionality of statutory provisions requiring parental consent as a prerequisite to the performance of an abortion upon an unmarried minor. Four years later in Planned Parenthood v. Danforth, the Court invalidated a blanket consent requirement as giving the parent an absolute and possibly arbitrary veto over the abortion decision of a minor during the first trimester of pregnancy. In a companion case, Bellotti v. Baird (hereinafter referred to as Bellotti I), the Court indicated that a statute requiring the consent of a third party in the abortion decision of a minor, if properly drawn so that its impact would not be unduly burdensome, might be constitutional.

In response to the mandates of the Supreme Court in Bellotti I, the Supreme Judicial Court of Massachusetts in Baird v. Attorney General (hereinafter referred to as Bellotti II) has construed a state statutory provision requiring the consent of both parents of an unmarried minor as a prerequisite to the performance of a legal abortion. If this interpretation passes constitutional review, it is likely to serve as a prototype for protective abortion legislation drafted by lawmakers across the country. Moreover, it will define and limit the constitutional rights of all minors in areas significantly affecting their individual autonomy and freedom in the personal decision-

2. Id. at 165 n.67.
5. The Court remanded the case and ordered the district court to certify appropriate questions concerning the meaning of Mass. Ann. Laws ch. 112, § P(1) (Michie/Law. Co-op 1974) and the procedure it imposes on The Supreme Judicial Court of Massachusetts under an established procedure (Mass. Rules of Court, Sup. Jud. Ct. Rule 3:21 (1971)) for the state court's interpretation. The Court held the statute to be susceptible to interpretation such that it would avoid or substantially modify the constitutional challenge.
making process.\textsuperscript{7}

In recognition of the far-reaching impact of the construction of parental consent provisions on the constitutional status of minor citizens, this article will focus on the \textit{Bellotti II} interpretation and the constitutionality of the mandatory parental consent provisions adopted therein.

II. PARENTAL CONSENT FOR MEDICAL TREATMENT GENERALLY

In \textit{Roe v. Wade},\textsuperscript{8} the Court found that the abortion decision, at least during the first trimester, is to be treated no differently than the decision to elect any other medical procedure.\textsuperscript{9} With this in mind, it is appropriate to begin by examining the necessity for parental consent to medical services, both under the common law and as modified by statute.

Traditionally minors lacked the capacity to give informed consent; parental consent has been prerequisite to receiving any medical care.\textsuperscript{10} Failure to obtain parental consent prior to rendering medical services to a minor subjects the physician to civil liability for at least a technical battery.\textsuperscript{11}

As a matter of public policy,\textsuperscript{12} minors are considered, as a result of their age and inexperience, to be incapable of appreciating the potential dangers involved in medical treatment, and consequently deemed incapable of reaching a decision based on their own best interests.\textsuperscript{13} In requiring that the judgment of a parent be superim-

\begin{itemize}
  \item \textsuperscript{7} The relevance of this case to the Sixth Circuit is underscored by the invalidation of Act of March 29, 1974, ch. 255, § 4(3), 1974 Ky. Acts 485 in Wolfe v. Schroering, 541 F.2d 523 (6th Cir. 1976). The statute provided that after the first trimester, the consent of either the parents, guardian or other legal custodian must be obtained prior to performing an abortion on an unmarried woman under eighteen years of age. In striking down this provision, the court, echoing \textit{Danforth}, found this consent requirement impermissibly interfered with the woman's right to a second trimester abortion in that a parent might veto an abortion for reasons unrelated to the permissible goal of protecting maternal health. The court stated that "there can be no assurance that the 'veto' of the parents or guardian, purportedly to protect maternal health, is not designed to protect the unrecognizable interest in fetal life." \textit{Id.} at 525.
  \item \textsuperscript{8} 410 U.S. 113 (1973).
  \item \textsuperscript{9} \textit{Id.} at 163.
  \item \textsuperscript{10} Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941).
  \item \textsuperscript{11} \textit{Id.}; Reddington v. Clayman, 334 Mass. 244, 134 N.E.2d 920 (1956).
  \item \textsuperscript{12} See Pilpel, \textit{Minors' Right to Medical Care}, 36 \textit{Ala. L. Rev.} 462, 463 (1972) (implying that the social underpinnings of the parental consent requirement are actually rooted in the feudal concept of the child as a chattel of the parent).
  \item \textsuperscript{13} \textit{See Dixon v. United States}, 197 F. Supp. 798 (W.D.S.C. 1961); Pilpel, \textit{supra} note 12.
\end{itemize}
posed on that of a minor, the law is seeking to protect the minor from her own improvidence and, simultaneously, from an over-reaching physician.\textsuperscript{14}

Four well-recognized exceptions\textsuperscript{15} have developed to relax the obvious harshness of a rigid application of the common law rule.

1) \textit{Emergency}

When a physician is confronted with a situation where delay will endanger the life or health of his minor patient, he is not required to forestall treatment until he can obtain parental consent but is privileged to presume such consent and render immediate treatment.\textsuperscript{16} This common law exception has been codified in many jurisdictions.\textsuperscript{17}

2) \textit{Parens Patriae}

In accordance with its responsibility to provide for the health and welfare of its citizens, the states can compel medical treatment necessary to preserve the life or health of a minor citizen notwithstanding vehement parental objection.\textsuperscript{18} With its usual deference to the integrity of the family unit and the notion of parental control of minors, the state exercises this power narrowly.

3) \textit{Emancipated Minor Doctrine}

At the common law, when the parents no longer exert control or authority over the decision making of the minor, the minor is considered emancipated\textsuperscript{19} and given the legal capacity of one at majority.\textsuperscript{20} By virtue of the responsibility the minor has as-

\textsuperscript{14} See Note, \textit{The Minor's Right to Abortion And The Requirement of Parental Consent}, 60 VA. L. Rev. 305 (1974) (The author suggests the exceptions function primarily as defenses available to a physician treating a minor without parental consent rather than as a tool of the minor for use in independent decision making and the assumption of responsibility for important, personal decisions).

\textsuperscript{15} Sullivan v. Montgomery, 155 Misc. 488, 279 N.Y.S. 595 (New York City Ct. 1935).


\textsuperscript{17} See Jacobsen v. Massachusetts, 197 U.S. 11 (1905).

\textsuperscript{18} In re Hudson, 13 Wash. 2d 673, 126 P.2d 765 (1942).

sumed for her own life, evidenced by certain objective criteria, she is deemed to possess the capacity to fully appreciate the nature and extent of any medical treatment and to be able to give informed consent based on her perception of her own best interests.21

In the absence of statutory declaration, such actions as getting married, bearing a child, or entering the military serve to emancipate a minor.22 An increasing number of states have codified statutes delineating circumstances under which a minor will be considered emancipated.23 Included among these are: (1) marriage, (2) child bearing, (3) entry into the military, (4) parental neglect, (5) parental consent, (6) financial independence, and (7) maintenance of a separate domicile.

Many states recognize the doctrine of Partial Emancipation and liberate minors to give valid consent for specific types of medical treatment.24 Treatment of problems related to sexual intimacy, such as the treatment of venereal diseases and pregnancy, are typically excepted by statute from the parental consent requirement.25 Allowing minors to receive this treatment without requiring that their parents be consulted is recognized as being in the best interests of the minor while simultaneously serving the state's interest in providing health care and limiting the spread of disease.26 Implicit in these statutes is legislative recognition of the fact that parents may, in this sensitive area, refuse consent for reasons unrelated to the health and best interests of the minor.27

21. The precise age of legal majority is regulated by individual state statute. At the common law, the minimum age of majority was considered 21. Since the adoption of the twenty-sixth amendment giving 18 year-olds the right to vote, all but a few states have codified the age of majority at 18.
25. See Note, supra note 15, at 312.
26. The state's interest in providing health care for the minor is a Janus-faced proposition in terms of the abortion decision. On one hand, it can be argued that the state should as a matter of right provide abortion without parental consent as an alternative to pregnancy in all situations where the total health picture of the minor (psychological, emotional, physical) requires it. On the other hand, as a result of the strength of its interest on the health of the minor the state could argue that, to fulfill its obligations, it will delegate its responsibility to the parents of the minor, whose involvement will then serve multiple interests.
27. Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971); see Paul, Legal
4) Mature Minor Rule

The conclusive presumption that a minor is incapable of making a medical judgment in her best interests has been eroded in a number of jurisdictions by the recognition and adoption of the Mature Minor Rule.28 This doctrine allows for a case by case inquiry into the subjective capacity and maturity of the particular minor to make an informed and reasonable decision.29

In applying the Mature Minor Rule, the court generally looks to the nature of the operation, to its likely benefit, and to the capacity of the particular minor to understand fully what the medical procedure involves.30

III. Roe, Doe, and Danforth

In Roe v. Wade,31 the Court held that the fundamental right of privacy is broad enough to encompass a woman's decision to terminate her pregnancy by abortion.32 Further, the right to abortion is not absolute and, like any other fundamental right, may be subject to regulations justified by the showing of a compelling state interest. Legislative enactments must be narrowly drawn to express only such compelling interest.33

The state has three interests with respect to the adult woman; each increases in substantiality as the woman approaches term, and at some point during the pregnancy, each becomes compelling.34 Balancing the relative weights of the respective interests involved, the Court adopted the following guidelines:

(1) During the first trimester, the abortion decision must be made without state interference and is based on the medical judgment of the attending physician in conjunction with the

Rights of Minors to Sex-Related Medical Care, 6 Colum. Hum. Rights L. Rev. 357, 364 (1974-75).

28. State v. Koome, 84 Wash. 2d 901, 908, 530 P.2d 260, 268 (1975); see Bellotti II, supra note 6 (generally adopted except in the abortion situation); Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).


32. Id. at 153.

33. Id. at 155.

34. Id. at 162.
(2) For the stage subsequent to the first trimester, in promoting its interest in the health of the mother, the state may regulate the abortion procedure in ways that are reasonably related to maternal health.

(3) For the stage subsequent to viability, the state, in promoting its interest in the potential of human life, may regulate and even proscribe abortion, except where it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother.35

In establishing the qualified right to abortion, the Court was concerned with the practical impact of childbearing and child rearing on the prospective mother. The Court recognized that maternity, or additional offspring, may serve to deprive a woman of her preferred life style and force upon her a radically different and undesirable future.36 In its rationale, the Court stated:

Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child, and there is a problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of an unwed motherhood may be involved.37

In Doe v. Bolton,38 the Court made it clear that any medical determination must necessarily consider the psychological as well as the physical well-being of the prospective mother.39 In making the medical judgment as to the advisability of the first trimester abortion, the attending physician must consider emotional, psychological, physical, and familial status, as well as the age of the pregnant adult woman.40 The Court held further that because of the state

35. Id. at 164.
36. "The vicissitudes of life produce pregnancies which may be unwanted, or which may impair 'health' in the broad . . . sense . . . or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make . . . abortion the only civilized step to take." Doe v. Bolton, 410 U.S. 179, 215-16 (1972) (Douglas, J., concurring) (companion case to Roe).
38. 410 U.S. 179 (1972) (companion case which should be read contiguously with Roe).
39. Id. at 192. The Court adopted the comprehensive definition of the word "health" set forth in United States v. Vuitch, 402 U.S. 62, 71-72 (1971) ("Health" presents no vagueness problem and encompasses both physical and mental health).
licensing requirements, all qualified physicians were competent to make assessments in good faith without further third-party input or other professional consultation. The Doe Court also recognized that time is of the essence in the abortion decision, as the risks to the pregnant woman during the first trimester are admittedly lower than in later months.

Supplementing Roe and Doe and further delineating the permissible extent of state involvement in the abortion decision, Planned Parenthood v. Danforth, upheld the requirement of the patient's written consent to the abortion procedure. Provisions requiring spousal and parental consent, however, were invalidated as being, presently, a constitutionally impermissible intrusion into the abortion decision during the first trimester, since they gave a third party an absolute and, potentially arbitrary, veto in that decision. While recognizing that the constitutional rights of minors are subject to somewhat broader state regulation than are corresponding rights of adults, the Court questioned whether there is any significant state interest in conditioning the abortion of a minor upon the consent of a parent (a third party) and not so conditioning it in the case of an adult. While invalidating the Missouri statutory scheme as imposing an undue burden on what it announced to be a recognized right of a minor, the Court made no attempt to delineate the

41. Id. at 199. "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. If he fails in this, professional censure and deprivation of his license are available remedies . . . . The attending physician will know when consultation is available . . . ." Id. Common sense dictates that the same rationale apply without regard to the age or marital status of the patient.
42. Id. at 198.
43. 428 U.S. 52 (1976).
44. Id. at 66-67. "The decision to abort, indeed, is an important, and often stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the state to the extent of requiring her prior written consent." Id. at 67.
45. Id. at 69.
46. Id. at 74-75. (Citing several significant district court and state court decisions, the Court held that any statute requiring permission of the parent or one in loco parentis as a prerequisite to obtaining an abortion during the first 12 weeks of pregnancy was impermissibly intrusive on the privacy right as delineated in Roe).
47. Id. at 75.
48. Id. In its discussion of the various competing interests which must be balanced to determine the exact perimeters of permissible limitations on the independent exercise of the abortion decisions by a minor woman, the Court stated: "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the
minor's rights, nor to issue any guidelines as to possible compelling interests which could withstand a Roe/Doe attack.\textsuperscript{49}

IV. Bellotti II—Judicial Construction

In \textit{Bellotti I},\textsuperscript{50} the Court abstained from deciding the constitutional validity of a challenged Massachusetts statute requiring the consent of both parents in the case of a nonemergency abortion sought by an unmarried minor.\textsuperscript{51} In the event parental consent was refused, the statute provided for judicial consent given for “good cause shown.” The Court concluded that the statute was susceptible to a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of that problem.\textsuperscript{52}

On remand, the district court certified nine questions as a guide to define the required parental consent under Massachusetts law.\textsuperscript{53}

\textsuperscript{49} It is unmistakable, however, that the Court envisions the use of the Roe trimester scheme and the rationale of Doe in any permissible regulation of the exercise of the right of privacy of pregnant minor women seeking abortions.

\textsuperscript{50} 428 U.S. 132 (1976).

\textsuperscript{51} (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

\textsuperscript{52} Bellotti I, supra note 4, at 148.

\textsuperscript{53} Bellotti II, supra note 6, at 292.

1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

a) Is the parent to consider “exclusively . . . what will serve the child’s best interest?”
In response, the Massachusetts court found that parental consultation, in an attempt to procure consent, is mandatory in every instance where an unmarried minor woman seeks a nonemergency abortion.\(^5\)

In deciding whether to consent to an abortion for their unmarried minor daughter, both parents must consider the best interests of

b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the "long-term consequences to the family and her parents' marriage relationship?"

2. What standard or standards is the superior court to apply?

a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

c) Other?

3. Does the Massachusetts law permit a minor (a) "capable of giving informed consent," or (b) "incapable of giving informed consent, to obtain [a court] order without parental consultation?"

4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?

5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12P which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?

6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, § 12P?

7. May a minor, upon a showing of indigency, have court-appointed counsel?

8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good faith, though erroneously, believed that she was eighteen or more years old or had been married?

9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?

\(^{54}\) The \textit{Bellotti II} opinion is broken into sections each of which is directly responsive to one of the above certified questions. From the onset, the court makes it clear that its role is confined to statutory construction in light of legislative intent. In so construing the statute, the court indicates its awareness that constitutional infirmities may be presented. In one of several exculpatory clauses peppered throughout the opinion it is stated: "If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principal that we would have construed the statute to conform to that interpretation." \textit{Id.} at 292.
their child. In the event that one or both parents refuse consent, a superior court judge may authorize an abortion for an unmarried minor if he finds, after judicial hearing, that an abortion is in the minor's best interests. In ruling, the judge must look independently at what constitutes the best interests of that particular minor. The parents, if available, must be notified of any court proceedings, and be allowed to participate therein. Such proceedings must be handled expeditiously in a manner provided for in the opinion, and the judge, in his discretion, may appoint counsel or a guardian ad litem for the minor in such court proceedings.

In defining what constitutes her "good cause shown," necessary for the issuance of judicial consent, it was decided that the judge must disregard all parental objections and other considerations not based exclusively on what would serve to promote the minor's best interests. In granting such consent, reasonable conditions may be imposed if necessary to protect the minor's best interests.

While adopting the Mature Minor Rule generally, the court ex-

55. The court does not delineate the elements which should guide a parent in determining what is in the "best interests" of the minor and further provides no penalty for failure to employ this undefined standard. The court is content to list commonwealth cases employing the best interest standard as if that were sufficient notice to all parties bound by that standard under the statute at issue. Query: do parents especially when confronted with what could be a highly charged emotional situation possess the objectivity mandated by the best interest standard? Most likely recognition of the frequency of failure of the parents in this regard prompted the inclusion of the judicial hearing provisions.

56. In State v. Koome, 84 Wash. 2d at 905, 530 P.2d at 264, the court wisely found that even if court intervention were automatic minor women unwilling to add litigation against their parents to already acute personal difficulties would gain little from the possibility of court intervention. The increased anxiety caused by such intra-familial litigation could not possibly be supportive of the rationale behind the establishment of the right to make an abortion decision announced in Roe and Doe.

57. The fact that judicial review is provided does nothing to mitigate the impermissible impact of the threshold requirement of mandatory parental consultation in an effort to obtain consent. An "equal protection" analysis of this initial step is dispositive of the constitutionality of this statute, at least insofar as it applies to the first trimester, the infirmities or strengths of the hearing process need not be explored.

58. The court explicitly rejects the view that without parental involvement, an unemancipated but mature minor may consent to an abortion where one or both parents are available and where there is no medical emergency. They construe the statute as following the general common law rule that in the absence of an emergency, parental consent is necessary for a medical procedure, despite the fact that Massachusetts has partial emancipation legislation. In justifying the mandatory parental consent/consultation interpretation, the court advances two beneficial influences that parents may have on the abortion decision: (1) on the circumstances under which the abortion is to be performed, including the quantity and quality of the pre-operative counseling, medical care and personal attention, and (2) on the amount, source and quality of post-operative assistance in counseling including birth control counsel-
pressly rejected its application in the abortion situation as being contrary to legislative intent. In a "good cause hearing," all relevant views presented must be considered, and the opinions of the minor and her degree of maturity are entitled to some consideration.

The sixth certified question raises the issue of the possible impermissibility of treating abortion differently from other medical procedures. Under its statutory scheme, Massachusetts permits emergency treatment without parental consent and also provides that a minor who is married, widowed, or divorced may consent to any medical or dental care, including abortion or sterilization. All other categories of emancipated minors are not permitted to consent to abortion without following the mandatory parental consultation/consent procedure.

The court explained that the best interest standard for consent under the abortion statute is the same as that applied in determining the advisability of performing any medical service. What distinguishes abortion from all other medical treatment is the procedure that must be followed in determining what course of action will

---

See note 48 supra. Additionally, the state argued in Bellotti I only for a case by case determination which, while preferring parental consultation and consent, allows a mature minor to proceed without them where it is shown to be in her best interests.


Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

Id. In Bellotti I, the Court announced that not all distinctions between abortion and other medical procedures were forbidden. Further the constitutionality of any distinction would depend on the justification advanced for it which could only be determined after state court construction of the statute. Bellotti I, supra note 4, at 149-50. But see Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554, 568 (E.D. Pa. 1975)(finding such a distinction violative of the Roe/Doe mandate).

60. While the Bellotti II court labeled this statute as creating a Mature Minor Rule, it is clear that this is a codification of the Emancipated Minor Doctrine.
serve the best interest of the minor. While acknowledging possible equal protection difficulties with this analysis, the court limits its involvement strictly to statutory interpretation, reserving the constitutional problems for the district court. 61

Additionally, this court abstained from dealing with the equal protection question raised by the creation of the following classifications of pregnant women: (i) adult, (ii) married, widowed, or divorced minor, and (iii) unmarried minor. 62

V. Minor Woman's Right to Privacy

Constitutional rights do not mature magically when one attains the state-defined age of majority. 63 Minors as well as adults are protected by the Constitution and possess constitutional rights. 64 Germane to any analysis of the constitutional permissibility of Bellotti II, in light of the Roe origins of the abortion choice, is an inquiry into the nature and scope of the right to privacy accorded minor citizens. 65

61. This analysis is superficial at best and it is clear that a higher court, dealing with the constitutional issues presented, if they in fact would find it necessary to examine the statutory scheme to this extent before invalidating it, would need much stronger state interest justification to support the consent distinction between abortion and all other medical procedures during the first trimester. Again the elusive "best interest" standard is bantered around by the court in an attempt to justify an impermissible classification. The best interests of the child doctrine—while it is an often used phrase, provides little assistance in defining what these interests are in a particular factual setting. See Note, State Intrusion into Family Affairs: Justifications and Limitations, 26 Stan. L. Rev. 1383, 1391 (1974).

62. In addition to the obvious equal protection problems (lack of rational basis) engendered by singling out unmarried minor women, without a method for a prima facie mature minor exception analysis, statutes of this type can have the effect of encouraging unmarried minor women, not yet equipped for marriage, to enter into that union in order to avoid parental confrontation over the abortion decision. Obviously this runs counter to the best interests of the minor which is the statutory goal. It is difficult to envision how any scheme not allowing for a case by case determination in the matter of all pregnant minor women could pass constitutional analysis.


64. Id.

Regardless of its genesis, it is undisputed that the right to privacy is a fundamental right protecting a dignitary interest. The right to privacy is steeped in notions of the autonomy of the individual in reference to those areas of her life which are intimate and immune from general scrutiny.

In *Stanley v. Georgia,* the Court expounded on the dimensions of the right to privacy:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man.

In *Eisenstadt v. Baird,* Justice Brennan, speaking for the majority, affirmed the nature of the right of privacy in the context of the pregnancy decision. “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

The essence of the right of privacy is the freedom to decide matters of personal intimacy without unsolicited aid and interference. Clearly, if the right is fully accorded, then the state may not constitutionally intrude to superimpose its will, and a third-party parent likewise is forbidden to intervene.

66. In *Roe,* 410 U.S. at 152, the Court cites case law rooting the right of privacy in the first, fourth, fifth, tenth, and fourteenth amendments as well as finding a penumbra right embodied generally in the Bill of Rights. The majority makes it clear that while they cannot agree on the origins of the right, it does exist.


68. “[P]rivacy is the condition of human life in which acquaintance with a person or the affairs of his life which are personal to him is limited.” Gross, *The Concept of Privacy,* 42 N.Y.U.L. REV. 34, 35-36 (1967).


71. 405 U.S. 438 (1972).

72. *Id.* at 453.

Various lower courts, in striking down parental consent statutes, have justified the extension of the privacy right by relying on the newly emerging line of cases which have recognized that certain limited rights belong to minors. A recitation of those cases, however, does little to illuminate the overall constitutional position of the minor. Each case is narrowly constructed around the particular facts at issue, and each holding is narrowly drawn.

Further, it is well established that even where constitutional rights are found to exist, the state may assert interests justifying regulation in the case of minors which do not exist when dealing with adults. Of the numerous interests advanced on behalf of the state, the following have been recognized as valid: (i) protecting maternal health, (ii) protecting the potential life, (iii) protecting minors from their own improvidence, (iv) supporting the family as a social unit, and (v) fostering parental control.

In addition, certain strong constitutional rights which may be asserted by parents have been recognized. These rights include the

---

75. In the landmark case of In re Gault, 387 U.S. 1 (1967), the now famous quotation of Justice Fortas set the stage for a clear extension of fundamental constitutional rights to minors and the resultant recognition of minors as persons within the ambit of the Constitution. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." Id. at 13.
76. However, the state cannot legislate to control the general moral climate (by prohibition on speech, the availability of contraception, or the proscription of abortion) without the showing of compelling interests, ripe to attach, and restrictions which are narrowly drawn to meet the goal of those interests. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 214 (1975); Poe v. Gerstein, 517 F.2d 787 (5th Cir. 1975).
77. State interests expressly rejected as invalid include preventing illicit sexual conduct. Griswold v. Connecticut, 381 U.S. 479 (1965). The state has a valid interest in protecting the integrity of its social welfare system. This interest, however, is never asserted by the state in the abortion situation as it is antithetical to the typical state position. Since, regardless of her marital status, if a minor is unable to financially care for her offspring the state must furnish her with support.
79. Id.
right to privacy in matters of the family, the maintenance of the familial unit, and the recognized duty to control and protect minor children.

In *Bellotti II*, the court concluded by implication that any right a minor may have to privacy can only be exercised in conjunction with the rights of parents and the state. In the *Bellotti II* arrangement, the parents and state can exercise a complete veto over the abortion decision of a minor during the first trimester.

There is a basic inconsistency in allowing one person to exercise the right of privacy of another. The privacy right is in essence one which must be exercised by the possessor of that right. Although it is well recognized that there can be limitations on the exercise of fundamental rights by juveniles, there is reason to believe that the very nature of the right itself dictates that there be less of an intrusion into this area than is permitted into the area of other fundamental rights.

*Bellotti II* must be subjected to careful equal protection scrutiny to determine if its rationale is consistent with the recognition in *Danforth* and *Bellotti I* that the fundamental right of privacy exists in some form for minor women.

VI. **Equal Protection Analysis**

An analysis of the Massachusetts statute could proceed under either equal protection or due process considerations. Whichever approach is adopted, it will be seen that similar considerations lead

---


86. As was discussed in Poe v. Vanderhoff, 389 F. Supp. 947 (5th Cir. 1975), other Supreme Court cases recognizing the rights of the parents in terms of minor children have involved conflicts between the state and the parent where the state intrudes into areas of parental values to determine the best interests of the child. Query: In cases where a parent refuses consent to abortion on religious grounds alone, in light of Prince v. Massachusetts, 321 U.S. 158 (1944), and cases following, is there a prima facie showing that the minor desiring an abortion is thereby entitled to the abortion?

In the abortion situation presented in *Bellotti* where the parents are in conflict with the minor child as to what course of action serves the best interest of the child, the state imposes the parents' view upon that minor by statutory mandate. It is important that no distinction is made between stages of pregnancy.

87. Importantly, the very reasons advanced in *Roe* to justify the need for abortion apply with greater force when the woman is a minor. See Doe v. Exon, 416 F. Supp. 716, 718 (D. Neb. 1975) (making the need for the availability of abortion as an alternative during the first trimester even more compelling than with her adult counterpart).
to the same result although different language is used to describe the legal facts. Unfortunately, the Court itself has failed to distinguish clearly between due process and equal protection language in its own analysis.88

The threshold consideration in any equal protection analysis is the existence of a statutorily created classification. In the case of the Massachusetts statute, the classification is unmistakably that of unmarried, pregnant, minor women. Of course, all statutes by their nature create classifications. In order to sustain a classification as constitutionally valid, the state must be able to demonstrate some degree of rationality for the classification.89 The degree of rationality which must be shown will depend on the nature of the right upon which the classification infringes.

It has been previously established that the right of privacy is a fundamental right personal to the possessor of that right.90 Although this right is possessed by minors,91 the right itself may not be fully accorded, and/or its exercise may be limited by the impact of various competing interests which either do not exist where the right of an adult is concerned or lack the strength to impede the adult’s right to the same extent.

Because the right involved in the Massachusetts statute is a fundamental right, the highest degree of rationality to legitimate goals must be demonstrated by the state.92 Of course, the rationality of the statute cannot be weighed without an initial consideration of the goals of that statute. When the goals of the statute are known, the rationality is then tested by a showing that the state has employed the “least restrictive means” to implement that goal.

When not expressly set out in a preamble or by some other descriptive device, the goal of a statute like the one at issue cannot be precisely ascertained. Rather, the goals of the statute are likely to emerge from a consideration of the antagonism between the many interests which gave rise to the legislation.

The Massachusetts statute construed in Bellotti II reflects not only the array of interests set forth previously but also additional

90. See notes 66-70 supra and accompanying text.
91. See note 75 supra.
considerations which may be gleaned from the sense of the statute itself interpreted in light of the cumulative line of abortion decisions (Roe, Doe, Danforth, Bellotti I). It is apparent that the competing considerations involved in the goals of the statute will dictate the "least restrictive means" to accomplish that goal. It is therefore not the simple matter of the application of a precise standard to a clear statute.

Although it is not expressly set out in Bellotti II, the overriding goal of the state in requiring parental consent in the abortion decision of an unmarried minor (as construed in Bellotti II) appears to be to insure a well-reasoned decision on the part of such minor. The idea of an informed decision which reflects the best interests of the minor is central to the aims of the statute. The competing interests derive significance from their necessary interplay with the abortion decision.

From the mandatory requirement of parental involvement in every case where a minor woman seeks an abortion, a number of legitimate interests can be implied. The parents of a minor have a protected interest in matters pertaining to the family. Further, the parents have a duty to control and direct the growth processes of their minor children while maintaining the integrity of the family unit.

The parents of a minor have a legitimate interest in protecting the health of their minor daughter. In Roe, after examining medical evidence, the Court concluded that the dangers to maternal health inherent in the abortion procedure during the first trimester were not sufficient to justify external interference in the case of an adult woman. Moreover, medical data demonstrates, that abortion is somewhat more dangerous to the maternal health of the minor than her adult counterpart in the first trimester and significantly more dangerous thereafter.

In addition to the interests of the parents in the minor's abortion

93. Such a goal can be clearly extracted from the analysis of each section of the Bellotti II opinion.
94. See Bellotti I, supra note 4, at 147.
decision, there are also interests possessed by the state. In Roe, the Court recognized the protection of maternal health and the potential life of the fetus as viable state interests. Additional valid state interests include the encouragement of minors to seek medical care and the maintenance of the state's social welfare system. Lesser state interests which have been noted are protecting minors from their own improvidence, supporting the family as a social unit, and fostering parental control. Because of the structure of the Massachusetts statute and the limitations of the state interests articulated in Roe, those interests are, at most, no greater than and exist co-extensively with parental interests. A determination of the permissible scope of parental intrusion into the minor's right of privacy is then necessarily dispositive of the state's interest.

The requirement of parental consultation will, in many cases, impede the abortion decision of a minor and contravene her best interests rather than support them. Despite the admonishment of the Court that parents' decision must be guided by the best interests of their minor daughter, there is no penalty for failure to follow this directive. Because of family dynamics, parents will not always counsel and consent or withhold consent solely guided by the best interests of the minor.

There are parents . . . who because of ignorance or prejudice or neglect and sometimes even viciousness, are either incapable or unwilling to do things necessary for the protection of their own offspring. There are parents who will by act do that which is harmful to the child and sometimes will fail to do that which is necessary to permit a child to . . . [live] a normal life in the community.

Although the Massachusetts statute provides for judicial intervention for “good cause shown,” the initial requirement of parental consultation cannot be avoided under any circumstances. In some

101. See note 77 supra.
102. See notes 74-75 supra.
104. Given a statutory requirement of absolute parental consultation in the first trimester there is no way to avoid parental involvement without encountering serious due process problems, even in cases where the minor could show cause to a magistrate. If it is legislatively determined that the parents have an assertable interest then they must be given notice and an opportunity to be heard at any judicial inquiry hearing. If the purpose of the hearing is to show cause why parents should not be informed, then their presence defeats the very purpose
cases, the specter of parental confrontation will dispose of abortion as a viable alternative to pregnancy for an already confused and frightened minor woman. Quite possibly, abortion, with proper supportive counseling by an objective party, might have presented the most beneficial option in terms of the life perspective and future productivity of that particular minor. Parental involvement then can be a complete deterrent to the exercise of the abortion decision by a minor woman.

Since the abortion decision springs from the minor’s right of privacy, the existence of forced parental consultation as a component of that decision in cases where the consultation constitutes an impediment infringes on that right of privacy in a very basic way. While the minor’s right of privacy need not be left completely untrammeled, equal protection considerations require that the statute reflect the means, with reference to its goals, which will least restrict the right of privacy. The final interrogation proposed, therefore, by the equal protection analysis is stated thusly: Is mandatory parental consultation a means which restricts to the least degree the minor’s right of privacy embodied in the abortion decision while still accomplishing the permissible goals of the statute?

The response to this query must be phrased in terms of the trimester concept developed in Roe. The Roe Court found that the least restrictive means of imposing upon the privacy right of an adult woman was to segment the pregnancy process into three stages. With the onset of each stage, competing rights were permitted to

of the hearings. If they are not informed or given an opportunity to appear, then the judicial decision will be made without the benefit of what the legislature has decreed as weighty evidence. Additionally, if they are not parties to the action, the parents will lack standing to challenge any ruling made without their testimony and opinions as to the best interest of the minor child.


106. Another way of looking at the equal protection analysis is through the vehicle of the Doctrine of Irrebuttal Presumption. Under this theory, statutory schemes will be held unconstitutional if they create a conclusive presumption that is neither necessarily nor universally true, [Cleveland Board of Education v. La Fleur, 414 U.S. at 646] without allowing for the individual affected to show that she does not fall within the rule and where the state has a reasonable alternative means of making the crucial determination [Vlandis v. Kline, 412 U.S. 441 (1973)]. The Massachusetts Statute as construed in Bellotti II, creates the irrebuttable presumption that parental involvement during the first trimester is always in the best interest of the minor. For the difficulties of according a pre-parental involvement hearing on the desirability of that involvement, see note 104 supra.

invade the woman's privacy right, imposing greater restrictions in graduated steps. *Danforth*, through its language,\(^\text{108}\) recognizes that the *Roe* trimester theory applies to minors. It is apparent then that whatever interests are permissible also attach in graduated steps rather than accruing in totality upon the discovery of the pregnancy.

The Massachusetts statute makes no reference to stages of pregnancy. Within the *Roe* context, the documented dangers inherent in the abortion procedure during the second and third stages of pregnancy would be sufficient to justify parental involvement of the kind found in this statute. The equal protection analysis considered here is thus limited to the permissible restrictions on the minor's decision to abort during the first trimester.\(^\text{109}\)

Given the acknowledged need for guidance and counseling prior to making the abortion decision\(^\text{110}\) and the obstacles which forced parental consultation introduces into the exercise of the abortion decision (and hence the incursion into the right of privacy), the proposition immediately occurs that the availability of an uninvolved third party, especially a professional,\(^\text{111}\) would satisfactorily protect the most dominant interest present during the first trimester; to wit, the best interests of the minor. Such a device would be, in fact, less restrictive.

The presence of an objective third party would serve both the parental and state interests at least as well, and in some cases more effectively, than the present statutory scheme. During the first trimester, the predominant interest is the physical, emotional, and

---

109. Theoretically a reviewing court examining a statute to determine if it presents the least restrictive means of protecting legitimate state goals will construct alternatives. If they find alternative approaches giving sufficient protection to constitutionally permissible state interests which are less restrictive, the court will invalidate the statutory plan under review. The Massachusetts requirement of forced parental consent must fail as violative of the fourteenth amendment equal protection clause if a less restrictive alternative is available.
110. [T]he most significant consequences of the decision are not medical in character (and) it would seem to me that the State may, with equal legitimacy, insist that the decision be made only after other appropriate counsel has been had as well. Whatever choice a pregnant young woman makes—to marry, to abort, to bear her child out of wedlock—the consequences of her decision may have a profound impact on her entire future life. A legislative determination that such a choice will be made more wisely in most cases if the advice and moral support of a parent plays a part in the decision making process is surely not irrational.
111. This suggestion has in mind a trained social worker or psychologist whose services are available on a confidential basis, free of charge, through an agency run by the state.
psychological well-being of the minor. Certainly, there is no reason why a competent third party cannot represent the state and parents, thereby protecting their interest in this area. The use of a third party counselor, even if mandatory, would avoid the constitutional dangers of overreaching limitations on the right to privacy caused by forced parental involvement because it would allow the minor to maintain some degree of autonomy in the decision-making process, thus allowing exercise of the right.

The third party device is therefore a less restrictive means than that of forced parental consultation during the first trimester and must therefore be adopted as it successfully accomplishes the goals of the Massachusetts statute.

VII. Conclusion

In his famous quote from *Carolene Products*,\(^{112}\) Justice Stone said: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry."\(^{113}\)

At this juncture in the development of our society, minors, because of their unclear constitutional status, constitute just such a discrete and insular minority. The abortion choice is, notwithstanding judicial recognition, still disapproved by society at large. Protecting those individuals who wish to exercise this unpopular right is imperative.

Courts and legislatures must recognize the fact that the family is not always the idyllic unit functioning harmoniously in the best interests of its members as envisioned by the Massachusetts legislature. The multiplicity of new choices in every aspect of life ushered in during the revolution and counter culture of the 60's and early 70's has broadened the generation gap and made communication in sensitive areas often impossible.

The time has come to recognize that the maturation process requires that minors be allowed to take responsibility for their own life choices in areas having significant impact on the entire life course. The right of privacy must be extended untainted and undiminished.

---

\(^{112}\) United States v. Carolene Products Co., 304 U.S. 144 (1938) (Stone, J.).

\(^{113}\) Id. at 152 n.4.
to pregnant minor women contemplating the abortion choice.

The Massachusetts statute contravenes the equal protection clause of the fourteenth amendment because of the requirement of parental consultation in an attempt to procure consent during the first trimester in the abortion decision of a minor woman. Such consultation unnecessarily invades the right of privacy of the minor because legitimate state and parental interests can be protected by less intrusive means, namely, the requirement of consultation with an objective third party.

The district court on remand should invalidate the statute in toto issuing through its opinion suggestions to the Massachusetts legislature of constitutionally permissible reforms.

Hope M. Levitt
RELEVANCY OF EVIDENCE OF PRIOR SEXUAL CONDUCT UNDER THE KENTUCKY REVISED STATUTE SECTION 510.145

I. INTRODUCTION

Evidentiary reform is a gradual and sometimes controversial process. The Kentucky legislature, through section 510.145 of the Kentucky Revised Statutes, has implemented new guidelines for the admission of the testimony of the complaining witness' prior sexual conduct in sex offenses. Section 510.145 constitutes a rather drastic revision of the common law evidentiary rules and places Kentucky with a growing number of states having comparable provisions.

This article analyzes the ramifications of section 510.145 and, in so doing, discusses the evolution of applicable Kentucky law. Potential constitutional questions are addressed, and the results of a survey of Kentucky attorneys as to the impact of section 510.145 on criminal prosecutions are discussed.

II. A BRIEF SUBSTANTIVE OVERVIEW

In 1976 Kentucky joined several other states which have adopted evidentiary reform for sex offenses by enacting section 510.145 of the Kentucky Revised Statutes.1 This evidentiary reform has long been needed in Kentucky, and section 510.145 serves to conquer the need.

To acquaint the reader with this enactment, a brief analysis of its key provisions seems warranted. Section 510.145 provides in full:

Inadmissibility of evidence of prior sexual conduct or habits of complaining witness—exception—procedure for admission. - (1) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to the provisions of this section.

(2) In any prosecution under KRS 510.040 through 510.140, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of these sections, reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct or habits is not admissible by the defendant.

(3) Notwithstanding the prohibition contained in subsection (2)

of this section, evidence of the complaining witness' prior sexual conduct or habits with the defendant or evidence directly pertaining to the act on which the prosecution is based may be admitted at the trial if the relevancy of such evidence is determined in the following manner:

(a) A written motion shall be filed by the defendant with the court no later than two (2) days prior to the day of trial, or at such later time as the court may for good cause permit, stating that the defendant has an offer of relevant evidence of prior sexual conduct or habits of the complaining witness.

(b) A hearing on the motion shall be held in the judge's chambers. If, following the hearing, the court determines that the offered proof is relevant and that it is material to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall admit the offered proof, in whole or in part, in accordance with the applicable rules of evidence. 2

Subsection (2) of section 510.145 identifies the inclusiveness of the provisions and states the crucial evidence prohibition under discussion.

Kentucky Revised Statutes sections 510.040 through 510.140 are the applicable sexual offenses in Kentucky's new penal code. 3 Thus, subsection (2) of 510.145 provides that in a prosecution of a sexual offense covered by the pertinent statutes alluded to above, existence of the complaining witness' prior sexual conduct or habits with persons other than the defendant, offered to prove consent, is made inadmissible. However, this prohibition must be analyzed in light of the exceptions provided for in subsection (3) of 510.145.

Subsection (3) provides that evidence of the complaining witness' prior sexual history or habits with the defendant, or evidence directly pertaining to the act on which the prosecution is based may be admissible evidence if the proper procedure is followed. It should be noted that subsection (3) is not in contravention of subsection (2) but is limited to a twofold evidentiary allowance. First, evidence

---

of the complaining witness’ sexual activities with the defendant is allowable, and second, evidence directly pertaining to the act on which the prosecution is based may be admissible. The former speaks for itself. The latter may need clarification. An example may provide the necessary insight. Suppose A, the prosecutrix, is engaged in sexual intercourse with her boyfriend in the University park when she is suddenly startled by a lonely voyeur. The campus police arrive, and A, hard pressed for a story, states that our voyeur has raped her. In this specific fact situation the defendant voyeur could admit evidence of the sexual act between the prosecutrix and her boyfriend. Another example may be posed as follows: Suppose A, the prosecutrix, comes home late one night and her parents suspect she has engaged in sexual activity. Naturally wanting to protect herself from their wrath, she informs them that she has been raped. The alleged rape is blamed on an innocent party. In this set of facts, the innocent defendant could produce admissible evidence of the sexual act between the prosecutrix and her actual partner.4 Naturally, in both of the aforementioned examples, the innocent defendant will need to assert the defense that the act in question was actually consensual between the prosecutrix and her real partner. Section 510.145(3) provides that such a defendant be able to do so.

The inquiry must not stop here, however. The latter portion of subsection (3) is important to judges and attorneys. The two exceptions of subsection (3) analyzed above must meet the procedural hurdle in parts (a) and (b) of subsection (3). According to these provisions the defendant must file a written motion with the court no later than two days before trial stating that he has relevant evidence that will fall into one of the exceptions listed in subsection (3). At this time, according to subsection (3)(b), a hearing will be held on the motion in the judge’s chambers. If, following the hearing, the court determines that the evidence is material and relevant to a fact in issue as defined by section 510.145, and that its probative value outweighs any prejudicial impact, the court shall admit such evidence.

Judges and attorneys in Kentucky must not misunderstand this

---

4. The authors would like to express their sincere appreciation to Ms. Donna Davenport and her staff of the Louisville Regional Criminal Justice Commission. Ms. Davenport, the Commission’s director of research and evaluation, provided the authors with key insight and research, enabling us to write a more informed analysis of Kentucky’s new shield law.
admittance and balancing of interest procedure. First, the in camera hearing is to be held only as to evidence meeting the exception criteria of subsection (3), that is, evidence of the complaining witness' prior sexual conduct with the defendant, or evidence directly pertaining to the act on which the prosecution is based. Moreover, according to the mandate of subsection (3)(a) and (b), such evidence will be admitted only if the relevancy test is met. To meet this test, evidence must be both relevant and material to a fact in issue. The words fact in issue in subsection (3)(b) refer to facts which are relevant and material as they relate to either of the two exceptions in subsection (3). As subsequently analyzed, such a restrictive inclusionary test may be viewed as a denial of a defendant's basic right of confrontation and effective cross-examination. We deal with the divergent views on this particular issue later. As for now judges in Kentucky must follow what the legislature has prescribed. They must keep their evidentiary inquiry in a sexual offense case confined according to the clear meaning of section 510.145. Although some may question the constitutional validity of this enactment, few would question that it is a step forward in the evidentiary process. To construe section 510.145 broadly is to make Kentucky's step forward illusory and meaningless. Section 510.145 attempts to confine the trial to the basic prosecution of the defendant, and not to allow the complaining witness to be prosecuted (persecuted?) through a fishing expedition of her past sexual activity. If judges do not strictly follow this enactment one can see how the reformation attempt of the Kentucky legislature will have been in vain. Thus, although section 510.145 is certain to be tested constitutionally, for now it is serving as a bold evidentiary reform in Kentucky and must be followed accordingly.

III. THE TRANSFORMATION

Before the enactment of section 510.145, Kentucky, like the majority of states, consistently recognized that evidence of the complaining witness' prior sexual conduct, as well as her reputation for chastity, was competent evidence on the issue of her consent to any sexual act of which the defendant was charged. Many social, econ-

6. U.S. Const. amend. VI.
7. See Rooney v. Commonwealth, 302 Ky. 102, 194 S.W.2d 71 (1946); Merriss v. Commonwealth, 287 Ky. 58, 151 S.W.2d 1030 (1941).
nomic, and political attitudes were solidified over the years of our country to assist in molding this evidentiary concept into the shape it held before the enactment of section 510.145. One may legitimately ask: Which of these many factors had influenced the juristic and legislative minds into adopting such a seemingly callous attitude toward the victim? Naturally, the question is rhetorical, but perhaps an adequate summation is provided by the renowned evidentiary scholar, John Henry Wigmore:

There is, however, at least one situation in which chastity may have a direct connection with veracity, viz., when a woman or young girl testifies . . . against a man charged with a sexual crime, rape, rape under age, seduction, assault. Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious [and] distorted . . . [O]ne form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim . . . . The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale . . . . [T]he lamentable thing is that the orthodox rules of evidence in most instances prevent adequate probing of the testimonial mentality of a woman witness . . . [and] one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed. And the situation of injustice has become the more extreme . . . , so that a plausible tale by an attractive, innocent-looking girl may lead to life sentence for the accused . . . . The modern realist movement having insisted on removing the veil of romance which enveloped all womanhood since the days of chivalry, it is now allowable for judges to look at the facts. . . . No judge should ever let a sex offense charge go to the jury unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.

Thus, one can see by Professor Wigmore’s proposal and corresponding beliefs how the evidentiary process was influenced and how it existed before the enactment of section 510.145.

Judicial holdings in Kentucky were not far behind in adhering to the basic philosophy exemplified by Professor Wigmore’s writings and proposals.

8. See 3A J. WIGMORE, EVIDENCE § 924(a) at 736-37 (3d ed. 1940) (emphasis omitted).
In the case of Muncey v. Commonwealth the defendant was convicted at the trial level of detaining a woman against her will with intent to have carnal knowledge of her. During the trial the defendant offered to show specific acts of a lewd and lascivious character by the complaining witness with others shortly before the commission of the alleged offense. The trial court excluded this evidence.

The Kentucky Court of Appeals ruled this exclusion erroneous, stating:

[We have supported] the proposition of the admissibility of such evidence in rape cases, we [have] held that such evidence was also admissible in prosecutions for forcibly detaining a woman against her will with intent to have carnal knowledge of her. The evidence is admissible on the issue of consent vel non on the part of the woman. The court erred in excluding the offered testimony.

Subsequently, in 1945 the Kentucky Court of Appeals expanded the logic of Muncey with its ruling in Grigsby v. Commonwealth. The court in Grigsby stated that evidence that the prosecutrix had a "bad reputation" for chastity in the community in which she lived was competent evidence on the issue of consent. The court demonstrated in the following statements that Kentucky concurred in the logic of Professor Wigmore, and was seemingly immune to the feelings of the victim:

Many courts have expressed the opinion that no inference can be logically drawn that the prosecutrix voluntarily yielded to the defendant upon the particular occasion from the fact that she had previously submitted to the embraces of other men, hence that it is incompetent to prove any of them. But we held that evidence of particular acts of immorality with other men occurring shortly before the alleged rape is competent upon the idea that if she has made merchandise of her virtue, that fact will strongly militate against the probability that she did not consent in the case at hand. Especially competent is evidence of voluntary sexual relations with the defendant prior to the occasion charged and testimony that a prosecutrix had a bad reputation in the community in which she lived for chast-

9. 245 Ky. 664, 54 S.W.2d 46 (1932).
10. Id. at 667, 54 S.W.2d at 48.
11. Id.
12. Id. But cf. Yates v. Commonwealth, 211 Ky. 629, 277 S.W. 925 (1925)(holding that in a prosecution for carnal knowledge the chastity of the female was not involved and evidence of intercourse with others was properly excluded).
14. Id. at 728, 187 S.W.2d at 263.
ity, as circumstantial corroborative evidence on the issue of consent or a bearing upon the question of its probability.\textsuperscript{15}

Thus, the \textit{Grigsby} ruling broadened the circumstances by which evidence of a complaining witness’ prior sexual conduct could be admitted. Because now, the court would allow in “particular prior acts of immorality”, whereas the standard in \textit{Muncey} was specific prior acts of a lewd and lascivious character.\textsuperscript{16} One can see that even though the definitions of such terms may be less than clear, the Kentucky Court of Appeals was gradually incorporating a very liberal inclusionary evidentiary policy in the sexual offense area. To be sure, the standard of “particular acts of immorality”\textsuperscript{17} would open the evidentiary door wider than an admittance policy based on “specific acts of a lewd and lascivious character.”\textsuperscript{18}

Later, in \textit{McCloud v. Commonwealth},\textsuperscript{19} a defendant was convicted of the statutory offense of carnally knowing a female child with her consent. The Kentucky Court of Appeals relied upon the doctrine of \textit{stare decisis}\textsuperscript{20} to hold that since the evidence in the case was in conflict as to whether the complaining witness was over sixteen, it was prejudicial to the defendant to exclude proffered evidence as to the sexual immorality and general reputation of the complaining witness.\textsuperscript{21} This case shows how Kentucky had not only adopted the logic of Professor Wigmore through its judicial pronouncements, but also that it had codified these rulings in its statutory scheme.

Finally, the highest court of Kentucky ably summarized the law in this area as it existed before the adoption of section 510.145 in the case of \textit{Sanders v. Commonwealth}.\textsuperscript{22} The \textit{Sanders} court described the previous evidentiary mandate by the following statement:

\begin{quote}
We have often held that evidence of voluntary sexual relations between the prosecutrix and others prior to the alleged offense is compe-
\end{quote}

\textsuperscript{15} \textit{Id.} (citations omitted). For an interesting analysis of the view adopted by the first sentence of the quotation, see S. \textsc{Brownmiller}, \textit{Against Our Will} 370-71 (1975).

\textsuperscript{16} \textit{Muncey v. Commonwealth}, 245 Ky. at 664, 54 S.W.2d at 46.

\textsuperscript{17} \textit{Grigsby v. Commonwealth}, 299 Ky. at 728, 187 S.W.2d at 263.

\textsuperscript{18} \textit{Muncey v. Commonwealth}, 245 Ky. at 667, 54 S.W.2d at 48.

\textsuperscript{19} 303 S.W.2d 299 (Ky. 1957).

\textsuperscript{20} \textit{Id.} at 300.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} 269 S.W.2d 208 (Ky. 1954).
tent as substantive corroborative evidence on the issue of consent or as bearing upon the question of its probability. 23

Further analysis of precedent in Kentucky on the issue of admissible evidence in a sexual offense case would only be repetitious. Suffice it to say that Kentucky's previous position on the admittance of evidence of a complaining witness' prior sexual conduct in a sexual offense case has seen a dramatic transformation: Kentucky Revised Statute, 510.145.

IV. THE CONSTITUTIONALITY OF EXCLUDING CHARACTER EVIDENCE

(A) Introduction

Not all rape prosecutions involve the issue of consent. In statutory rape cases, for instance, the offense is consummated by proving the act of intercourse with a woman who is below the statutory age, regardless of her consent. 24 This section is limited to the law as it applies to forcible rape, i.e., sexual intercourse with another person by forcible compulsion. 25 Two areas pertaining to the issue of consent will be discussed. The first is whether the complaining witness' prior sexual conduct or habits as they relate to people or events other than the defendant or the act on which the prosecution is based is relevant evidence from which an inference may be drawn as to whether she consented to have intercourse with the defendant. The second area is whether it is constitutionally permissible for a state legislature to automatically exclude evidence that may, in some situations, be relevant to an essential element of the crime.

Much recent criticism of rape laws and their enforcement has centered on the fact that the complaining witness' sexual history may be inquired into at trial by cross-examination, thus making her prior sexual conduct a matter of public record. This evidentiary procedure is believed by many to be responsible for much of the failure to report and successfully prosecute rapes by the victims. 26 On the other hand, an across-the-board exclusion of all evidence of the victim's prior sexual conduct with people other than the defen-

23. Id. at 210 (citations omitted).
24. Ky. Rev. Stat. § 510.020 (1975) states that a person less than 16 years old is incapable of consent.
dant or evidence directly pertaining to the act on which the prosecution is based may deny the defendant his constitutional right of effective cross-examination. In this setting we will examine evidentiary and constitutional ramifications of Kentucky's legislative attempt to deal with this difficult problem.

(B) Relevancy of Character Evidence and Admissibility Standards

The fourteenth amendment to the United States Constitution prohibits the states from depriving any person of life, liberty, or property without due process of law.27 The United States Supreme Court held in Pointer v. Texas28 that the sixth amendment right of an accused to confront the witnesses against him29 is "a fundamental right and is obligatory on the States by the Fourteenth Amendment."30 The right to cross-examine witnesses is an essential part of the right of confrontation,31 and, in essence, permits the accused a fair opportunity to defend himself against the state's accusations.

It is the essence of a fair trial that the cross-examiner be given reasonable latitude in eliciting material and relevant evidence from witnesses so the jury can fully and fairly appraise their testimony.32 A defendant, however, has no constitutional right to produce witnesses and elicit testimony which is wholly irrelevant to his defense. If a witness' testimony does not tend to prove the existence of facts asserted by the defense, then the testimony can hardly be deemed to be within the protection of the sixth amendment.33 The scope of cross-examination, in our present inquiry, is therefore limited to

27. U.S. Const. amend XIV, § 1.
29. U.S. Const. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor . . . ." Accord, Ky. Const. § 11.30. 380 U.S. at 403.
30. 380 U.S. at 403.
31. Id. at 404.
relevant testimony for the purpose of disproving a material element of the state's case against the defendant.

For evidence to be admissible in our evidentiary system, it must first be shown to be material, i.e., it must be offered as being probative of some matter that is in issue at the trial.\textsuperscript{34} Evidence of the complaining witness' prior sexual conduct or habits with someone other than the defendant is offered as being probative of the issue of whether the complaining witness consented to have intercourse with the defendant. As stated previously, forcible rape is defined as engaging in sexual intercourse with another person by forcible compulsion.\textsuperscript{35} As the prosecution must prove beyond a reasonable doubt that the intercourse was induced by forcible compulsion, evidence that is offered for the purpose of raising the inference that the act was either forced or consensual is clearly material.\textsuperscript{36}

Materiality must be distinguished from relevancy. Relevant evidence is defined as "evidence having any tendency to make the existence of a fact . . . more probable or less probable than it would be without the evidence."\textsuperscript{37} To be relevant, an offer of evidence is not tested by whether it fully proves the existence of certain facts, but rather, if it has a tendency to prove such facts or provide a basis for an inference as to the truth of the facts alleged.\textsuperscript{38} Thus, the degree of probative value required for admissibility is that the evidence change the probabilities that the fact at issue is true.\textsuperscript{39} It is a question of logic and "common sense" whether any one piece of evidence tends to make the existence of any fact in issue more or less probable.\textsuperscript{40} This determination has traditionally been made at the discretion of the trial court,\textsuperscript{41} based upon the judge's experience,
his judgment, and his knowledge of human conduct and motivation.42

Technically, of course, proof of unchastity has never been an affirmative defense to the crime of forcible rape.43 If the complainant’s prior sexual history is offered into evidence for the sole purpose of proving that she was not chaste at the time of the alleged forcible rape, such evidence would be properly excluded as immaterial. The testimony has traditionally been admitted on the issue of consent or as bearing upon the question of its probability.44

More specifically, evidence of the complaining witness’ prior sexual conduct was deemed by Kentucky case law to be “circumstantial corroborative evidence”45 from which, courts sometimes state, her “character” for chastity or unchastity may be inferred.46 As “character” implies the disposition or permanent attribute of a person, it is perhaps more accurate to say that the evidence was admitted to show the complaining witness’ propensity to have consensual sexual intercourse, or more simply, propensity to have intercourse.47 Herein lies the crucial conflict as to whether or not the complainant’s prior consensual sexual conduct is relevant to the

---

42. See C. McCormick, supra note 34, § 185, at 438.
44. See Sanders v. Commonwealth, 269 S.W.2d 208 (Ky. 1954); Grigsby v. Commonwealth, 299 Ky. 721, 187 S.W.2d 259 (1945).
45. Grigsby v. Commonwealth, 299 Ky. at 728, 187 S.W.2d at 263.
47. “Character” may be defined as “[t]he aggregate of the moral qualities which belong to and distinguish an individual person; the general result of . . . one’s distinguishing attributes.” BLACK’S LAW DICTIONARY 294 (rev. 4th ed. 1968); see also WIGMORE § 52, at 448. Implicit in this definition is the notion that one’s character remains relatively constant. Because character is deemed to be somewhat unchanging, it is felt that predictions of behavior based on the knowledge of that character may be made.

Evidence of the complainant’s character for chastity or unchastity is introduced to aid the trier of facts’ attempt to resolve the issue of consent. To be of help, the complainant’s character for chastity or unchastity must convey information about the likelihood that she will consent to have sexual intercourse on any given occasion. As “character” is a trait of a person that is thought to be fairly constant over time, the use of this term in a discussion concerning the likelihood that a person will consent to intercourse is misleading.

Comment, Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process, 3 Hofstra L. Rev. 403, 409 n.28 (1975). But see Washburn, supra note 26.
issue of consent. Opponents of the rape-shield law maintain that a demonstrated propensity to consent in the past is relevant as to whether she consented on this particular occasion with the defendant. On the other hand, proponents of the rape-shield law stress that consensual relations in the past have no tendency to show consent on any particular future occasion.

One argument which might be made for holding the complaining witness' propensity to have sexual intercourse irrelevant is that various court's assumptions of relevancy are based on an antiquated, Victorian concept of women, and value judgments which bear no reasonable relation to the woman of today. Recent studies of sexual behavior have shown that over two-thirds of American women have had premarital intercourse by the age of twenty-five, and 81 percent of those married before or by the age of twenty-five have had premarital intercourse. The argument may continue, that women today realize that they are free to consent or not consent to sexual relations and control their own bodies. Each decision to have sexual intercourse is distinct and unaffected by past behavior. A woman's prior sexual behavior has no bearing whatsoever on her future decisions, and thus would not be relevant as to the issue of consent on any particular occasion. In further support, since statistics show that the vast majority of rape victims are below age twenty-five, it is quite probable that the majority of such victims have had consensual, premarital sexual relations.

On the other hand, the opponents of the rape-shield law counter the above argument by stating that prior consensual sexual conduct is illustrative of her capacity to consent and may, at least, change the probability that she might have consented to have intercourse with the defendant on the occasion in question.

Further, regardless of the value judgment as to sexual mores made by today's society, its characterization will not alter the fact that people who engage in a certain type of behavior are more likely to engage in that behavior at any randomly selected occasion than are people who have never engaged in that behavior previously. In a criminal proceeding where the complaining witness and the defendant are at variance on the issue of consent, knowledge of the complainant's prior sexual history may well provide some indication of

48. See Comment, supra note 47, at 409.
49. See Washburn, supra note 47, at 296; Comment, supra note 47, at 414.
50. See Washburn, supra note 26, at 296 & n.108.
the likelihood that she would consent to have intercourse on any
given occasion and will therefore aid the trier-of-facts' attempt to
give credence to conflicting stories as to the issue of consent. Once
the complainant's propensity to have consensual sexual intercourse
is demonstrated, it is circumstantial evidence from which inferences
may be drawn\(^5\) as to the probability that she consented to have
intercourse with the defendant. The complainant's propensity to
consent to intercourse will have at least some tendency to make it
more or less probable that she consented to have intercourse on the
occasion in question.

It certainly is not clear from the above discussion whether or not
the complainant's prior sexual behavior would be relevant as to the
issue of consent. In the vast majority of rape prosecutions, the com-
plainant's sexual history would seemingly not be relevant to the
issue of consent. This is not to say however that the complainant's
propensity to consent would not be relevant under any circumstan-
ces. This becomes clear in the following two situations:

(a) M meets W in a singles bar for the first time. M offers to buy
W a drink, and half-way through the drink, W makes M an offer. M
realizes that W is a businesswoman and quickly agrees to "purchase"
W's intimate services for the night.

W is apparently an inexperienced businesswoman as she neglects
to collect the consideration prior to having sexual intercourse with M.
At this point a disagreement over price develops, scratches follow
shouts, and M punches W to get her off of his back.

Feeling betrayed, W screams "Rape." M is apprehended while
leaving the apartment and booked for rape at the police station.

b) W has the reputation on campus as a participant in sequential
group sex. The members of X fraternity seek to test the accuracy of
W's reputation and invite her over to the house. W is very accomodat-
ing and has sexual intercourse with the first four takers. The fifth
young man is refused, however, because W must return to her dormi-
tory.

The fifth young man is not to be denied and forces W to have
intercourse with him. W becomes infuriated and claws the young
man's back. The young man loses his temper, slaps W around and
throws her, naked, out of the back door of the fraternity house.

W, quite understandably, is humiliated and fearful as she runs to
the nearest residence for help. W reports the incident as a gang-rape
and all five young men are arrested and charged with rape.

In the above two examples, evidence of complainant's propensity to consent can be divided into two categories. The first category is evidence of conduct pertaining to the act of rape in question, i.e., in the first example, the fact that W propositioned M to have sexual intercourse in exchange for money; and in example (b), W consented to intercourse with the first four young men and was actually raped, only by the fifth young man. The second category of evidence deals with conduct not pertaining to the rape, i.e., in example (a), evidence that W may have performed acts of prostitution on previous occasions with other men; and in the second example, W may have engaged in prior group sex encounters with other young men.

Under section 510.145, the first category of evidence from the above examples is arguably admissible under subsection (3); to wit: "evidence directly pertaining to the act on which the prosecution is based." Of course, the defendant would have to submit a motion to the court to determine the admissibility of the evidence pursuant to subsection (2)(b). The defendant in each example would argue that the complainant's actions, i.e., the act of prostitution and the group sex encounter, were relevant to a material fact in issue-consent-in that such evidence would have a tendency to show that the sexual intercourse was consensual and that its probative value outweighed the prejudicial impact on the jury. The act of sexual intercourse between the complainant in the second example and the fifth young man is, admittedly, an instance of forcible rape. However, evidence of the four consensual relations that immediately preceded the rape, may be relevant and should arguably be admissible for mitigation consideration in jury sentencing.

The prostitute's solicitation in the first example and the continuous acts of sexual intercourse in the second example are clearly relevant to the issue of consent and should be admitted as evidence directly pertaining to the act on which the prosecution is based. The solicitation and the continuous acts of sexual intercourse (particularly for the first four young men) are relevant to the issue of consent in that the complainant's conduct relates directly upon whether the sexual act was accomplished by forcible compulsion or whether the complainant consented thereto. The complainant's conduct has a causal connection to the resulting sexual act and, as such, goes to the gravamen of the alleged crime. Furthermore, such conduct has

52. See section II of text supra.
a definite tendency to make the existence of consent more probable than it would be without the evidence. The conduct of the complainant is admissible as evidence directly pertaining to the act on which the prosecution is based for the following two reasons. First, the conduct of the complainant is closely associated in time with the alleged rape; second, the conduct is either directly responsible for precipitating the sexual encounter with the defendant or is an integral part of a continuous chain of events which culminate with the alleged rape. Such conduct of the complainants in the above two examples should therefore be admitted notwithstanding the potential prejudicial effect on the jury.

The trial court, as previously stated, has the discretion to admit facts into evidence under section 510.145 if such facts fall within one of the two exceptions of subsection (3), and if they further qualify under the criteria set forth in subsection (3)(a) and (3)(b). Evidence in the second category of the two prior examples, i.e., the fact that the complainant, in the first example, may have performed other prior acts of prostitution with men other than the defendant, and, in the second example, that the complainant may have had a history of group sex encounters with other men, is automatically excluded as admissible evidence under section 510.145. This is because such evidence fails to fall within the exceptions set forth in subsection (3), to wit: prior sexual conduct with the defendant or evidence directly pertaining to the act on which the prosecution is based. Section 510.145 prohibits the trial court from exercising its discretion on the relevancy of such evidence in all cases. It is this across-the-board exclusion of arguably relevant evidence that creates the question as to the constitutionality of section 510.145. A discussion of the relevancy of prior sexual conduct of the complainant that does not involve sexual contact with the defendant nor directly pertain to the act on which the prosecution is based, in light of the two previous examples, may prove helpful in illuminating this constitutional question.

A complainant who is a prostitute or who is generally promiscuous is entitled to the law's protection as well as a virgin. The prior sexual history of a complainant would admittedly be wholly irrelevant if she was in fact raped. If we could always be sure of events, we would

not need trials. But, of course, the jury in a criminal prosecution cannot always be sure of what actually happened and must rely on testimony permitted to be elicited and admitted as evidence. For instance, in the first example, both the complainant and the defendant would offer their divergent views as to the act in question. The complainant may claim they went to her apartment for a friendly drink, and that the defendant made improper advances to which she resisted. The defendant then became angry, threatened and punched her, and then, forcibly raped her. The complainant would maintain that she resisted up until the defendant punched her in the face and at that point she became fearful for her life and submitted. The physical evidence would show a bruise on the complainant’s face, scratches on the defendant, and traces of semen to evidence the act of sexual intercourse.

The defendant, on the other hand, admits to the sexual intercourse but claims it was a result of the complainant’s proposition. His testimony would also allege a different time sequence as to the bruise and scratches, i.e., as occurring after the intercourse as a result of the dispute over price.

The principal issue for the jury to resolve is that of consent. The crux of the defendant’s defense is that he was propositioned by a prostitute and the sexual act was a consensual result thereof. The jury, in judging the defendant’s veracity, cannot consider the fact that the complainant may have propositioned other men at the same bar on prior occasions. Section 510.145 would automatically exclude this proffer of evidence. The exclusion of this evidence may be crucial to the defendant because the fact that the complainant engaged in prostitution in similar circumstances may give credence to the defendant’s otherwise naked claim that the claimant propositioned him. The fact that the complainant is a prostitute at least has the tendency of making the defendant’s testimony more probable than it would be without the evidence. The peril of excluding such evidence is that if the jury does not believe the complainant engaged in an act of prostitution with the defendant, the crux of the defendant’s testimony is negated.

A similar peril may exist for the defendants in the second example. The fact that the complainant had engaged in previous group sex encounters may at least have the tendency to make their story more probable than it would be without the evidence. If such evidence does have any tendency to make the existence of a fact more probable, then this evidence is, by definition, relevant.
Evidentiary relevance does not, however, dispose of the question of admissibility. Evidence logically relevant may still be inadmissible if its probative value is outweighed by considerations of law or public policy. Any analysis of this issue should begin with recognition of the strong policy favoring admission of any evidence which is probative of the basic question at trial. Any exception to this policy should be well-founded and carefully scrutinized so as to provide the trier of fact with an adequate basis upon which to form an opinion. On the other hand, as *McCormick* states: "[R]elevancy is not always enough. There may remain the question, is its value worth what it costs?" The goal is to weigh the probative value of the evidence against the dangers to a fair trial which the admission could create and therefore requires a judicial balancing of the respective interests.

At least four policy considerations have been recognized as counterweights to admission of relevant evidence: (1) admitting such evidence might result in unfair surprise to the complaining witness; (2) admitting such evidence might consume an unwarranted amount of time; (3) admitting such evidence might result in confusion of the issues; and (4) admitting such evidence might result in unfair prejudice against the complainant.

The above is essentially a balancing test in which the trial judge must weigh the arguments on each side in light of the surrounding circumstances. Opponents of section 510.145 argue that the first consideration, that of unfair surprise against the complainant, can be effectively avoided by an *in limine* or an in-chambers hearing prior to trial in which the admissibility of specific offers of evidence will be ruled upon. Furthermore, the problem of surprise may be remedied by the granting of a continuance. Similarly, little weight

---

54. Fed. R. Evid. 401 defines evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (emphasis added). Additionally, Fed. R. Evid. 403 states: "Although relevant, evidence may be outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

55. See generally, 1 J. Wigmore, supra note 51, § 10.

56. C. McCormick, supra note 34, at 438.

57. Fed. R. Evid. 403.

58. A man is prosecuted for rape. His defense is that the woman consented. He may show that her reputation for chastity is bad. He may not show specific, even though repeated, acts of unchastity with another man or other men. The one thing that a sensible trier of the facts would wish to know above all others in estimating the truth
should be accorded to the time consumption argument which, because of its purely economic nature,\textsuperscript{59} is difficult to justify in a criminal context.

The two remaining objections to the introduction of character evidence—that inquiry into the sexual behavior of the complainant will introduce collateral issues tending to distract the jury and that such an inquiry may result in unfair prejudice against the complainant—generally occur together to present the strongest argument in favor of section 510.145.

Proponents of section 510.145 argue that jurors of both sexes may allow the complainant's past sexual conduct to influence them on issues other than consent. The jury closely, and often harshly, scrutinizes the female complainant and may be moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.\textsuperscript{60} For instance, in situations where the complainant attempted to arouse the defendant without the intention to have intercourse, the "assumption of risk" is asserted even though it would not constitute a valid legal defense.\textsuperscript{61} In such cases the defense may allege a "rape trap."\textsuperscript{62} The concept of "assumption of risk" is also applied to situations in which the complainant consented to have a drink or go for a ride with a stranger (showing a reckless attitude) or in which she failed to react strongly enough to the advances of the defendant.\textsuperscript{63} The effect of this theory is to make the complainant partly responsible for the rape, thereby mitigating the acts of the defendant. Such a conclusion, the proponents continue, is likely to focus the blame on the complainant for having innocently engaged in "dangerous" situations.

The proponents argue that admission of the complainant's prior sexual conduct will also unduly prejudice the jury. Prejudice, of

\begin{itemize}
\item \textsuperscript{59} See C. McCormick, supra note 34, at 319 n.28.
\item \textsuperscript{60} Slovenko, A Panoramic View: Sexual Behavior and the Law, in Sexual Behavior and the Law 54 (R. Slovenko ed. 1965).
\item \textsuperscript{61} Id. at 52 n.16.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} See Comment, The Victim in a Forcible Rape Case: A Feminist View, 11 Am. Crim. L. Rev. 335, 339 (1973).
\end{itemize}
course, does not merely mean that the complainant's case is damaged, since that is always true of evidence showing that the facts are not as the party alleged. A more accurate meaning is "an undue tendency to move the tribunal to decide on an improper basis." It is generally recognized that admitting evidence of the defendant's bad character in any criminal case will prejudice his defense and may cause the jury to convict him on the basis of his past acts. The jury must appraise the veracity of the testimony before them, but they are given only half the picture. The jury, which usually lacks the discipline of the judge, also retains a certain amount of discretion and autonomy regardless of the instructions given them by the court. McCormick summarizes the reasons for excluding character evidence by stating that it is not essential and that it "comes with too much dangerous baggage of prejudice, distraction from the issues, time consumption, and hazard of surprise."

The opponents of section 510.145 state that this argument, in most rape cases, has much merit and is not easily refuted. There are however several problems with this position. First, even though sexual-behavior evidence may have relatively slight probative value in some or even most cases, the Kentucky statute in question categorically and automatically excludes all sexual conduct with anyone except the defendant in all cases. There is no provision for admitting evidence demonstrated to be relevant and highly probative. Second, in a criminal proceeding in which the prosecution must prove all essential elements of the alleged crime beyond a reasonable doubt (including lack of consent), evidence with only slight probative value may prove sufficient to introduce a legitimate doubt into a juror's mind. Although sexual-behavior evidence may not be sufficient by itself to prove consent, it may be sufficient, when linked with additional evidence of consent, to introduce doubt into the minds of enough jurors to avoid a conviction. The demonstration of a prior inclination or propensity of the complainant to consent to intercourse may provide a probative link as to whether or not she

65. See, e.g., C. McCormick, supra note 34, § 190; 1 J. Wigmore, supra note 51, § 57.
66. C. McCormick, supra note 34, § 188, at 445.
67. Cf. United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969)(defendant has a constitutional right to produce evidence if there is "a significant chance that this added item . . . could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."
consented to intercourse with the defendant on the occasion in question. In each case, if reasonable people could differ as to the probative value of such evidence, it is up to the jury to determine how much weight, if any, the evidence carries.

While the dual policies of avoiding collateral issues and eliminating prejudice toward the complainant are unquestionably serious, the opponents state that they should not lead to the adoption of the mechanistic, automatic exclusion of relevant evidence. Initially, one must remember that the jury system itself is based on the presumption that a properly instructed jury can sort out the issues and reach a correct result.

The preceding discussion hopefully has demonstrated that there are legitimate views on either side of the relevancy question. On one hand, evidence of prior sexual conduct may have some tendency to make the existence of consent more probable. On the other hand, the probative value of this evidence may be outweighed by the confusion of issues and undue prejudice to the complainant. Furthermore, it is questionable whether such evidence is directly relevant at all. The ultimate answer to this relevancy-admissibility question is not free from doubt. The automatic exclusion of this "doubtful" evidence may have constitutional ramifications in a situation where the defendant alleges that his sixth amendment rights have been violated by the denial of effective cross-examination. The question therefore remains whether the United States Constitution requires that defendants be allowed to adduce evidence concerning the prior consensual sexual conduct of alleged rape victims.

(C) Constitutional Restraints on the Exclusion of Character Evidence

(1) Changing the Evidentiary Rules—A legislative or judicial function—Section 27 of the Kentucky Constitution states that the powers of the government are to be divided into three distinct branches: the legislative, the executive, and the judicial. Section 28 prohibits persons charged with exercising the powers of one branch from exercising any powers properly belonging to either of the others. The Kentucky legislature, in section 510.145, automatically excludes from admissibility all evidence of the complaining witness' prior sexual behavior with anyone other than the defendant, unless it falls under one of its two exceptions. By so doing the legislature apparently intended to make its own mechanistic determination of
the relevancy of such evidence. This function was formerly performed at the discretion of the trial court. Section 510.145 therefore changes the rules of evidence and standards of judicial review in Kentucky, and in so doing raises the question whether altering such rules is a legislative or judicial function.

As stated previously, in *Pointer v. Texas*, the United States Supreme Court held that the sixth amendment right of an accused to confront the witness against him was a fundamental right made obligatory on the states by the fourteenth amendment. The framers of the sixth amendment did not intend to commit the futile act of guaranteeing the defendant the right to confront and effectively cross-examine witnesses against him while leaving it to state legislative fiat to prohibit testimony by employing arbitrary standards of relevance. As such, the standard of relevance applied to the admissibility of testimony ultimately presents a federal question to be resolved by federal constitutional standards.

The relevance of evidence initially depends upon identifying the elements composing an offense and the available defenses. It is suggested that a legislature may not determine relevancy directly, but only indirectly by setting the framework for relevance by defining the elements constituting crimes and the defenses. Beyond this initial delineation of the substantive issues, the legislature has limited power. It is a settled principle of separation of powers that the legislature cannot invade the province of the judiciary. In a criminal proceeding it is the function of the court to adjudicate. The court must first determine whether an offer of evidence is being offered to prove either an element of the crime in question or the existence of a defense (materiality) and then whether the evidence is probative of that issue (relevancy).

The Kentucky Penal Code defines rape in the first degree as engaging in sexual intercourse with another person by forcible compul-

---

68. The evidentiary nature of the limitation on admitting evidence of prior sexual conduct is obvious. See Grigsby v. Commonwealth, 299 Ky. 721, 187 S.W.2d 259 (1945).
69. 380 U.S. 400 (1965).
70. Arnett v. Meade, 462 S.W.2d 940 (Ky. 1971).
72. See Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972).
73. See Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 Vand. L. Rev. 385, 386 (1952); see also notes 11-14 supra, and accompanying text.
74. Fed. R. Evid. 401.
cision.\textsuperscript{75} The Penal Code makes the lack of consent an element in the offense of rape.\textsuperscript{76}

One interpretation of section 510.145 is that it reduces or interferes with the discharge of a judicial function in that it directly limits judicial discretion as to the admissibility of evidence to a crucial element of the offense in question. As long as the Kentucky legislature has chosen to allow the defendant to raise a defense based on consent, it is questionable whether they can usurp the court’s right to determine relevancy and admit evidence that may be probative of that issue.

(2) Constitutionality of excluding character evidence-Section 510.145 is predicated upon the legislative determination that the probative value of the complaining witness’ past sexual behavior with anyone other than the defendant or facts directly relating to the act on which the prosecution is based is always outweighed by social policies or by the danger of prejudice, or that it is simply not relevant. Its adoption was due in part to efforts to make the criminal justice system more congenial to the victims. This was accomplished by an alteration of the evidentiary rules that were believed to have previously deterred victims from reporting sexual assaults.

Section 510.145 presents a potential problem of constitutional magnitude. By declaring most sexual-behavior evidence to be legally irrelevant by an across-the-board exclusion, the statute automatically excludes evidence that might reasonably be deemed to favor the defendant’s case, thereby potentially denying the defendant the right of effective cross-examination.

There will be no attempt to second guess the ultimate outcome of the above constitutional question, but rather, to objectively analyze the arguments and case law on each side of this extremely close issue.

The fundamental right of an accused in a criminal prosecution “to be confronted with the witnesses against him” is guaranteed in state as well as federal proceedings.\textsuperscript{77} Confrontation means more than simply having the witness physically present in the courtroom.\textsuperscript{78} A primary interest secured by the confrontation clause is the

\begin{itemize}
  \item \textsuperscript{75} Ky. Rev. Stat. § 510.040 (1975).
  \item \textsuperscript{76} Id. § 510.020.
  \item \textsuperscript{77} Pointer v. Texas, 380 U.S. at 407.
  \item \textsuperscript{78} See Chambers v. Mississippi, 410 U.S. 284, 295 (1973); Gordon v. United States, 344 U.S. 414, 422-23 (1952); Mattox v. United States, 156 U.S. 237, 242-43 (1895).
\end{itemize}
right of a defendant to cross-examine the witnesses who testify against him.\textsuperscript{79} Cross-examination gives the defendant an opportunity to demonstrate that a witness' testimony is motivated by malice, vindictiveness, intolerance, prejudice or jealousy.\textsuperscript{80} Cross-examination also allows the accused to "place the witness in his [or her] proper setting and put the weight of his testimony and credibility to a test."\textsuperscript{81} However, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."\textsuperscript{82} We must therefore examine section 510.145 in relation to analogous constitutional questions to determine whether it is consistent with the requirements of the sixth and fourteenth amendments.

In a recent case dealing with the defendant's right of confrontation, the United States Supreme Court defined the scope of constitutionally protected cross-examination. In \textit{Davis v. Alaska},\textsuperscript{83} the state relied on the identification testimony of a seventeen-year-old witness in a criminal prosecution. The youth was a key prosecution witness. The state trial court granted a prosecution motion to issue a protective order which prohibited cross-examination of the youth as to his probationary status for a prior juvenile offense. Counsel for the defendant sought to demonstrate that the youth was vulnerable to pressure from the prosecution, and was therefore possibly biased. The grant of the protective order was based on a state statute designed to protect the anonymity and to prevent embarrassment of juvenile offenders by exposing their juvenile records. The Supreme Court of Alaska affirmed. The United States Supreme Court, with two justices dissenting, reversed, holding:

In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family

\begin{footnotesize}
\textsuperscript{79} The main and essential purpose of confrontation is to secure for the opponent the opportunity for cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of question and obtaining immediate answers. \textit{See Davis v. Alaska}, 415 U.S. 308 (1974).

\textsuperscript{80} \\textit{Davis v. Alaska}, 415 U.S. at 316.


\end{footnotesize}
by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

The State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records.4

Davis therefore held that the confrontation clause of the sixth amendment guarantees a criminal defendant the right to effectively cross-examine a crucial government witness for possible bias.5 Davis represents a continuing line of Supreme Court decisions finding violations of the right of confrontation in trial court evidentiary rulings involving cross-examination.6 However, Davis is the first to hold that the right of confrontation was violated on an explicit examination of the effectiveness of the permitted scope of cross-examination. The implications and potential applications of Davis may be broad, since the constitutional guarantee of effective cross-examination necessarily expands appellate court review of the various limitations imposed on cross-examination by trial courts and legislatures.7

The opponents of section 510.145 argue that the Davis decision and reasoning should control in a state prosecution for forcible rape where the state must prove lack of consent as an element of its case in chief. This is based upon the assertion that a valid analogy exists between Davis and the forcible rape situation, to wit: whereas the juvenile was the prosecution's principal witness in Davis, the alleged victim in a rape prosecution is the crucial state witness. Fur-

84. 415 U.S. at 319-20.
85. U.S. CONST. amend. VI.
86. See Chambers v. Mississippi, 410 U.S. 284 (1973); Bruton v. United States, 391 U.S. 123 (1968)(limiting instructions cannot cure constitutional error of admitting into evidence confession of co-defendant who does not take the stand where confession implicates defendant); Smith v. Illinois, 390 U.S. 129 (1968)(right of confrontation violated by permitting prosecution witness to conceal his true name and address where safety of witness not a factor); Pointer v. Texas, 380 U.S. 400 (1965)(right of confrontation violated by introduction into evidence of preliminary hearing testimony of prosecution witness where defendant was not represented by counsel at the preliminary hearing and did not cross-examine the witness); Barber v. Page, 390 U.S. 719 (1968)(Pointer rule extended to cases in which defendant represented by counsel at preliminary hearing; requirement imposed that even where cross-examination takes place at preliminary hearing, state must make good-faith effort to produce witness at trial).
thermore, strong state interests exist in both *Davis* and the forcible rape prosecution. In *Davis*, the Supreme Court acknowledged the state's interest in protecting the anonymity of juvenile offenders; in a rape case, the state has a strong interest in encouraging rape victims to come forward. Also, in *Davis* it was recognized that disclosure of the juvenile's criminal record might result in embarrassment to the juvenile and his family; one of the primary objections to the introduction of the complainant's past sexual behavior is that she is humiliated by the evidence. Lastly, in *Davis*, exposure of the juvenile's probationary status and possible bias resulting therefrom had the potential to discredit the testimony of the juvenile, the prosecution's key witness, thereby causing serious damage to the strength of the state's case against the defendant. The same argument is asserted in a forcible rape case as to the admission of prior sexual-behavior evidence.

The *Davis* court clearly indicated that limiting the scope of effective cross-examination renders the right to confront adverse witnesses nugatory: "While counsel was permitted to ask [the juvenile] Green *whether* he was biased, counsel was unable to make a record from which to argue *why* Green might have been biased."

In a rape prosecution, by analogy, while counsel is permitted to ask the complainant *whether* she consented, counsel is unable to make a complete record by introducing relevant evidence which shows *why* she might have consented, *i.e.*, her propensity to consent.

It is argued by the proponents of section 510.145 that a rape prosecution is clearly distinguishable from *Davis* in that the evidence in *Davis* had great probative value, and its admission was deemed to protect the validity of the fact finding process, not to subvert it. This is to be contrasted with a rape prosecution wherein the prior sexual behavior of the complainant has so little probative value as to the issue of consent that the state's interests—encouraging rape victims to come forward and prosecute, and keep prejudicial evidence from the triers of fact—outweighs any probative

88. *Id.* at 319.
89. One court has so held. "We . . . interpret [*Davis*] as holding solely that the confidentiality of a juvenile offender's record must give way to the right of 'effective cross-examination for bias of an adverse witness.'" *State v. Burr*, 18 Or. App. 494, 495, 525 P.2d 1067, 1068 (1974) (juvenile records sought solely to impeach the credibility of the witness).
value of the evidence.

The opponents of section 510.145 rebut this attempted distinction by asserting that regardless of the weight the jury gives evidence of the complainant's propensity to have intercourse, the evidence should be admitted if relevant to the issue of consent. As the Davis court stated:

We cannot speculate as to whether the jury, as the sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided "a crucial link in the proof . . . of petitioner's act." 91

Once the evidence is determined to be relevant to a material issue, the evidence must be admitted for the jury to weigh the evidence along with all other relevant facts, and to accept it or reject it. The issue of consent in a forcible rape prosecution may be a vital link in the proof of the defendant's act. Section 510.145 insofar as it automatically limits the defendant's right to make inquiries relevant to his defense, unconstitutionally denies him the right to confront and effectively cross-examine the most important witness that is testifying against him.

The proponents of section 510.145 also cite several limitations of a defendant's right to introduce evidence, either directly or on cross-examination. One limitation, as previously mentioned, is that irrelevant evidence may be excluded. 92 Therefore, if the prior sexual conduct of the complainant is irrelevant to the issue of consent, it is constitutionally permissible to exclude such evidence.

A trial court would also have wide discretion in situations where the complainant's sexual behavior is not considered totally irrelevant. And while the court may limit the scope of cross-examination, "this principle cannot be expanded to justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony." 93

91. Id. at 317 (citations omitted).
92. See, e.g., United States v. Spivey, 508 F.2d 146, 151 (10th Cir. 1975); United States v. Honneus, 508 F.2d 566, 573 (1st Cir. 1974).

While the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth
There are other constitutionally permissible limitations on the admissions of relevant evidence which can justify the total exclusion of a rape victim's past sexual conduct. These limitations have been recognized by the United States Supreme Court and the United States Congress and are embodied in Rule 403 of the Federal Rules of Evidence which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."\textsuperscript{94}

The federal courts, on numerous occasions, have held that the trial court may exclude evidence that is relevant if it is of only slight probative value, which value is outweighed by considerations of undue delay, waste of time, or needless presentations of cumulative evidence.\textsuperscript{95} There are also numerous cases that allow for the exclusion of evidence when its probative value is outweighed by the danger of unfair prejudice.\textsuperscript{96} From these cases, the proponents conclude that evidence of the complainant's prior sexual behavior can be excluded from rape trials because whatever little probative value might exist, it is greatly outweighed by its prejudicial effect. The Constitution then, under certain circumstances, does not require that the defendant be allowed to cross-examine the complainant as to her prior sexual conduct.

The above arguments essentially boil down to the balancing of the probative value of the evidence against the possibility of confusing and unfairly prejudicing the jury. The balance is a very delicate one. It does seem, however, that unless the prejudicial effect substantially outweighs the probative value of the evidence, such evidence should be admitted, and to deny this would result in a denial of effective cross-examination. The \textit{Davis} court stated that in the situ-
ation involving a clash between a testimonial privilege and the right to confront, the state's interest should not outweigh the defendant's constitutional rights. That case demonstrates that the Supreme Court is aware of the crucial importance of the right of confrontation to a criminal defendant, and will strike down obstacles that a state puts in the path of effective cross-examination.

Thus, Kentucky's attempt in this area of evidentiary reform must be analyzed with a proper constitutional perspective. That is, a proper balancing of interests test must be applied by Kentucky trial judges to judiciously protect the interests of both the defendant and the complaining witness.

V. Survey Conducted Across Kentucky Shows Differing Opinions and Analyses

In the latter part of 1976 the authors of this article conducted a survey in Kentucky to collect data from randomly selected Kentucky judges, Commonwealth attorneys, and defense attorneys to see how they were going to apply section 510.145.\(^7\) It is these practitioners who will have to properly interpret section 510.145 if it is to have the effect contemplated by the legislature.

First, we asked the question, "As a Commonwealth attorney or defense attorney, (whichever was applicable) how do you think section 510.145 will alter your overall strategy in a rape prosecution?" Approximately 80% of the Commonwealth attorneys who responded stated that they did not see the new law as being a drastic evidentiary transition. Conversely, of the defense attorneys who responded, approximately the same percentage stated that they would be compelled to alter their strategy by relying on other defenses besides attempting to show consent through prior sexual conduct of the complaining witness.\(^8\) After determining if Kentucky practitioners foresee a major deviation in strategy, the important analysis must be drawn from subsection (3) of 510.145. For it is this subsec-

---
\(^7\) Out of approximately 90 questionnaires mailed, 30 each to Commonwealth attorneys, defense attorneys, and trial judges, the authors received a 30% response. Two-thirds of this response came from Commonwealth attorneys. Approximately one-sixth of the responses can be attributed to defense attorneys and the remaining one-sixth to trial judges. These percentages should be considered when analyzing the responses given.

\(^8\) Among defenses given were: faulty identification of the defendant, alibi, the prosecution failing to prove every element of the offense, and no sexual offense was actually committed.
defendant would need to be in close proximity in time to the rape and that the relationship between the victim and the defendant would need to be the same at the time of the rape as at the time of the previous sexual activity.

In addition, approximately 50% of defense attorneys responding to our survey raised the issue of the constitutionality of section 510.145, and its exclusion of the prior sexual conduct of the complaining witness unless such evidence becomes admissible by being relevant as it pertains to one of the two exceptions in 510.145(3). We examined this issue in part IV(C)(2) of this work, and it is raised again at this time only to confirm that it is an issue in the minds of some Kentucky practitioners. Although our survey exhibited differing constructions by defense and prosecuting attorneys of the relevance inquiry in subsection (3) of 510.145, the basic import of the section was understood and correctly analyzed. The burden will ultimately come to rest upon the shoulders of the trial judge to balance the interests of all, and adopt a judicious construction of 510.145(3). They are the ones who will be forced to coordinate judge-made law and statutory law.100 Perhaps the best summation of what a judge may do to a new statutory law was supplied by Pound:

Four ways may be conceived of in which courts in such a legal system of ours might deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however as of equal or coordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.101

100. See N. Dowling, E. Patterson, R. Powell, & H. Jones, Materials for Legal Method (2d ed. 1952).
tion that provides the exceptions to the mandate against admission of the prior sexual conduct of the complaining witness. As previously examined in part two of this work, these exceptions are evidence of the complaining witness' prior sexual conduct or habits with the defendant, and evidence directly pertaining to the act on which the prosecution is based. Accordingly, relevance as it pertains to one of these two exceptions must be shown to escape the clear mandate of inadmissibility exhibited by 510.145(2). It is vital that attorneys and judges properly interpret this section if the new law is to have the contemplated impact on sexual offense prosecutions in Kentucky. To do otherwise would be to eviscerate Kentucky's evidentiary reform in this area, and force a reversion to pre-section 510.145 days. Accordingly, responses to the following question were elicited: “What criteria would you consider important in determining relevancy under section 510.145(3)?”

First, let us examine the answers of the Commonwealth attorneys responding. Approximately 95% of the Commonwealth attorneys who responded were aware that the issue of relevance must be confined to one of the two exceptions spelled out in subsection (3). Most assuredly, they would want the trial judge to restrict his inquiry and subsequent ruling to this confinement and not allow defense attorneys to go “fishing.”

On the other hand, the defense attorneys demonstrated that they understood subsection (3), but naturally, by a somewhat different interpretation. Where prosecuting attorneys applied a literal and strict construction to subsection (3), defense attorneys seemed to believe that the relevance inquiry should not be strictly construed by the trial judge. They seemed to believe that prior sexual conduct of the complaining witness with the defendant at any time and in any manner would be relevant as it pertains to subsection (3). Commonwealth attorneys, however, would be more strict in their interpretation of this subsection before acquiescing in any admittance of such evidence. The following statement of one Kentucky Commonwealth attorney explains the distinction drawn from the responses:

I would consider that in order to be relevant as contemplated by the statute in question, the prior sexual conduct of the victim with the

---

99. It should be noted that Commonwealth attorney responses were in greater number than defense attorney responses, and therefore, any analysis of these responses must take this factor into consideration.
How are Kentucky judges going to construe section 510.145 in light of Pound's theory? Of course only time will tell, but some answers to our questions from trial judges may also provide insight. Responding to the question of what criteria they would use in determining relevancy under 510.145(3), some judges exhibited a tendency to place an erroneous standard on this basic determination. Some examples will illustrate this conclusion. One judge stated that he would consider whether the complaining witness' conduct was thought to be "lewd and lascivious." Another judge stated that he would consider whether the complaining witness had a reputation for "immorality." Another judge used a "lewd" standard to determine relevance under subsection (3). All of these standards are erroneous in that they are irrelevant to the basic inquiry. The proper standard for the trial judge to use is clearly spelled out in 510.145(3)(b). That section provides in pertinent part: "If . . . the court determines that the offered proof is relevant and that it is material to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall admit the offered proof in whole or in part . . . ."

Thus, the initial inquiry must be whether the offered proof is relevant and material to a fact in issue. This fact in issue may be the issue of consent, but only as may be proved by evidence pertaining to one of the two exceptions in subsections (3) of 510.145, and not the general reputation of prior sexual conduct of the complaining witness. Our survey showed that some judges failed to properly confine their inquiry in this manner. After this initial inquiry, the judge must determine if the offered proof is more probative than inflammatory or prejudicial. Accordingly, the judge's inquiry should be twofold, and he should consider the relevance of any offered proof only by this dualistic approach. Moreover, the standard is clear, and the trial judge should be hesitant to deviate from it. To coordinate his interpretation of the statute with the legislature according to one of Pound's four options is one thing; to totally misunderstand the new statutory enactment is quite another. Hopefully, the Kentucky trial judge will use a proper balancing of interest technique in his

102. It again should be noted that only one-sixth of sum total responses came from trial judges in Kentucky, and therefore, any answers given should not be viewed as generally indicative of trial judges across the state.

decisions and will not adopt the theory of judicial and legislative relations espoused by John Chipman Gray.\textsuperscript{104}

As between the legislative and judicial organs of a society, it is the judicial which has the last say as to what is and what is not law in a community. To quote . . . the words of Bishop Hoadley: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver to all intents and purposes, and not the person who first wrote them." . . . [I]t is with the meaning declared by the courts, and with no other meaning, that [statutes] are imposed upon the community as Law.\textsuperscript{105}

It is hoped that the trial judge in Kentucky will "strike a happy median" between Gray's theory and what the legislature clearly meant to accomplish by enacting section 510.145—the avoidance of senseless persecution of a complaining witness.

Concluding our survey, we asked for a general appraisal of section 510.145 by propounding the following question: "How do you think this law will change rape prosecutions?" Although there was a divergence of opinion on whether this law would lead to more convictions, all respondents seemed to agree that sexual offense victims would now be less apprehensive about reporting and prosecuting the offense. Perhaps the following statement from one Commonwealth attorney best illustrates how some think of the change: "This is a good law. Many crimes of real rape have gone unpunished because the victim feared she would be placed on trial instead of the defendant . . . People are human—they are not machines."

In summary, most respondents to our survey were favorable to this new evidentiary enactment, and saw it as an aid in the prosecution of sexual offenses. Some questioned its constitutionality, and the survey as a whole did show there is a wide divergence of opinion and analysis in the interpretation of section 510.145. It will be for the trial judge to draw a proper balance between the differing interpretations, and, at the same time, not stray from the clear mandate of section 510.145. Many years ago scholars such as Pound and Gray recognized the inherent difficulties in accomplishing this feat, but with Commonwealth attorneys, defense attorneys, and trial judges "learned in the law,"\textsuperscript{106} perhaps it can be done.


\textsuperscript{105} Id. § 366.

\textsuperscript{106} Farmer's Loan & Trust Co. v. Winthrop, 238 N.Y. 477, 488, 144 N.E. 686, 687 (1924)(Cardozo, J.).
VI. Conclusion

It is hoped that through this article Kentucky practitioners will realize the importance of balancing the need for a proper prosecutorial function and the need to protect the victim in a sexual offense case.107 Section 510.145, if properly applied, is capable of serving as the balancing weight. The consequences of misapplication are clear; a retreat from reform and a return to seemingly less sophisticated evidentiary days. Whether such reform can withstand constitutional attack remains to be seen. Regardless of one's feelings on this precise issue, all should remember the admonition of Mr. Justice Cardozo: "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."108 If Kentucky practitioners heed this admonition, then section 510.145 will be serving the people of Kentucky in the design intended by the legislature.

Randall S. May
P. Dane Shields

NOTES

Workmen's Compensation—Statute’s Coverage Extended to Non-Traumatic Injuries if the Nature of the Work Contributed to the Disability—Young v. Fulkerson Still Remains as the Basic Apportionment Formula—Haycraft v. Corhart Refractories Co., 544 S.W.2d 222 (Ky. 1976).

Norman Haycraft, who had a long history of back trouble, filed a claim on June 5, 1974 with the Kentucky Workmen's Compensation Board. He was 43 years old and had worked continuously at Corhart Refractories for 17 years, primarily at jobs involving hard physical labor. The claim was filed in connection with an April 11, 1974 off-the-job incident. Haycraft had spent that day at his mother's side in the hospital where she was in serious condition. On that day, he had a sudden onset of pain and had to be hospitalized the next day. On April 23, 1974, an extruded disc with a sequestered fragment was surgically removed from his spine. After the operation, Haycraft continued to have pain. He testified that he could not stoop and bend and lift as well as before.¹

Haycraft had previously suffered two on-the-job injuries and two other off-the-job injuries to his back. On September 14, 1959 he sustained a lower back sprain and possible disc injury while swinging a sledge hammer at work. In March of 1972, after turning over heavy slabs of graphite at work, Haycraft experienced back pain and was sent to the hospital. The two other off-the-job incidents occurred when Haycraft slipped on some steps at his home and in 1964 when he was in an automobile accident.²

The doctors who testified assessed Haycraft's permanent partial disability at between fifteen and thirty-five per cent, with a pre-existing degenerative disc condition accounting for five to ten per cent of the total disability. Ten to twenty per cent of the disability was attributed to the April 11, 1974 incident. Three doctors gave opinions in the case before the board. One diagnosed the condition as degenerated discs. Another doctor stated that the heavy work performed by Haycraft eventually did lead to the rupture of the

¹ Haycraft v. Corhart Refractories Co., 544 S.W.2d 222, 225-26 (Ky. 1976).
² Id. at 225-26.
Haycraft's neurological surgeon testified that the heavy work over the years was an aggravating factor in the April 11, 1974 incident.\footnote{Id. at 226-27.}

The Workmen's Compensation Board, in dismissing Haycraft's claim, concluded as follows: "The plaintiff in this case has an extensive history of back problems and it is difficult for us . . . to connect his problems with his work."\footnote{Id. at 228.} An appeal was taken to the Jefferson Circuit Court which affirmed the board. The Kentucky Supreme Court then reversed the previous decision holding that (1) Haycraft's work aggravated a pre-existing degenerative disc condition to the degree that it culminated in an active, physical impairment sooner than would have been the case had the work been less strenuous, and to that extent the pre-existing condition is itself an "injury" as now defined in the workmen's compensation statute,\footnote{Id. at 225.} and (2) although Haycraft cannot be compensated for any "active disability" he had before April 11, 1974, he can be compensated for the remainder of his present back disability that is work related.\footnote{Id. at 228.}

The court also ruled that such compensation is to be divided between the employer and the Special Fund, with the employer's portion to be assigned not on the basis of how much of the additional disability would have occurred in the absence of the degenerative disc condition, but on the basis of how much the work contributed to it.\footnote{Id.}

Workmen's compensation is a product of state statute.\footnote{E.g., Ky. Rev. Stat. §§342.004-.990 (1978).} To understand \textit{Haycraft}, it is necessary to examine the statutes, their history, and the case law interpreting them. In 1955 the Kentucky Court of Appeals in \textit{Adams v. Bryant}\footnote{274 S.W.2d 791 (Ky. 1955).} held that the death of a coal miner from shock, overexertion, and exposure, sustained when he attempted to rescue other employees from a cave-in, constituted a personal injury by accident and was thus compensable.\footnote{Id. at 794-96.} The court held that the claimant was within the application of Kentucky Revised Statute section 342.005(1) which read as follows:
It shall affect the liability of the employers subject thereto to their employees for a personal injury sustained by the employee by accident arising out of and in the course of his employment, or for death resulting from such accidental injury; provided, however, that 'personal injury by accident' as herein defined shall not include diseases except where the disease is the natural and direct result of a traumatic injury by accident, nor shall it include the results of a pre-existing disease.\textsuperscript{11}

In deciding \textit{Adams} the court stated that "the word injury, when used without any qualifying words, such as traumatic, is to be given its broadest possible scope."\textsuperscript{12} \textit{Adams} expresses the same reasoning as the majority of court decisions in this area, all of which have "at some time awarded compensation for conditions that have developed, not instantaneously, but gradually over periods ranging from a few hours to several decades, culminating in disability from silicosis . . . heart injury . . . back injury . . . herniated disc . . . and the like."\textsuperscript{13}

In 1956, however, the Kentucky General Assembly amended Ky. Rev. Stat. § 342.005(1) by inserting the word "traumatic" before the words "personal injury."\textsuperscript{14} As a result, so much of the \textit{Adams} decision as held that injury need not be traumatic appeared to be nullified.\textsuperscript{15} But, in interpreting the new amendment five years later, the Kentucky Court of Appeals in \textit{Grimes v. Goodlett & Adams}\textsuperscript{16} held that the death of a worker who died of a heart attack suffered at work after operating a jackhammer for two hours was a compensable traumatic personal injury by accident. Admitting the confused state of the law concerning the definition of "traumatic" the court stated that "we are unable to say just what was the legislative intent of the 1956 amendment."\textsuperscript{17}

It should be noted that in \textit{Grimes}, the court held that a heart attack is a compensable, traumatic, personal injury by accident even though the claimant was resting and not working at the time of the heart attack. The rule that came out of \textit{Grimes}, was later

\begin{footnotes}
\item[12] 274 S.W.2d at 793.
\item[16] Id. at 51.
\item[17] Id.
\end{footnotes}
stated in *Hudson v. Owens*\(^8\) as follows: "Where the physical effort of a man's work precipitates his internal breakdown resulting in disablement, he has sustained a compensable personal injury within the meaning of our compensation law. Once a condition is accepted as a personal 'injury' it is necessarily accepted as traumatic."\(^9\)

After *Grimes*, the next relevant decision on this point was *Trailer Convoys, Inc. v. Holsclaw* where the Kentucky Court of Appeals held that the death of a truck driver was compensable.\(^9\) He was found slumped over the wheel of his truck and later died at the hospital. Medical evidence in that case indicated that he died of a cerebral hemorrhage caused by underlying arteriosclerosis probably precipitated by the strain of driving 1200 miles in two days. Appellant unsuccessfully contended that "because Holsclaw was found slumped over in the truck while it was not moving, the cerebral hemorrhage was not the natural and direct result of a traumatic injury by accident and is therefore not compensable under Ky. Rev. Stat. § 342.005(1)."\(^2\) The concurring opinion of Justice Palmore, who was later to write the *Haycraft* decision, sheds some light on the court's reasoning at that time. He said that whether or not the legislative amendment of 1956 was intended to overrule *Adams v. Bryant* . . . , the court found it difficult to believe it was intended also to deny compensation in all of these many types of cases in which the physical effort of a man's work precipitates an internal breakdown resulting in disablement. It seemed more reasonable to believe that the legislators would not intentionally have departed from the fundamental purpose of workmen's compensation, which is to compensate the employee for disability caused by his work. And that is what a unanimous court decided in *Grimes v. Goodlett and Adams*.

The majority opinion does not represent a hit-or-miss approach. It follows a consistent line of cases holding that if there is substantial medical proof that the physical effort demanded by a man's work was a *probable* factor in precipitating a disability, though a pre-existing disease may be the predominant cause and the board so finds, or under the weight of the evidence has no reasonable basis for finding

\(^8\) 439 S.W.2d 565 (Ky. 1969).
\(^9\) Id. at 568.
\(^2\) 419 S.W.2d 563 (Ky. 1967).
\(^2\) Id. at 564.
otherwise, he is entitled to compensation apportioned on the basis of
the contribution of the work to the resulting disability.22

In 1969 the Court of Appeals overruled Trailer Convoys to a cer-
tain extent in Hudson,23 a case in which the court clarified its posi-
tion as to cardiac disease compensation claims. Hudson held that
the decedent's fatal heart attack was caused by the natural progress
of his pre-existing disease and was thus not compensable.24 But the
court noted that it was still committed to the approach taken in
Grimes. The apportionment rule, as expressed in that case, is that
"where a work-connected exertion precipitates or triggers a disabil-
ity in which a pre-existing disease is the pre-dominating cause the
award should represent only the contribution of the injury to the
disability.25 The Hudson court affirmed the Grimes rule.26

The distinguishing factor in Hudson was that the decedent con-
tinued to work long hours after his doctor had ordered hospitaliza-
tion. It seems likely that it was this evidence that caused the court
to uphold the board's finding that "the work connection should be
viewed as de minimis and the decedent's cardiac disability was
merely coincidental with, rather than caused by, a work-connected
event."27

The Hudson case culminated a line of workmen's compensation
cases attempting to interpret Ky. REV. STAT. §342.005 and set the
stage for legislative action. The 1972 Kentucky General Assembly
repealed Ky. REV. STAT. §342.00528 and replaced it with superceding
provisions,29 including Ky. REV. STAT. §342.620(1), which defines
"injury" as follows: " 'Injury' means any work related harmful
change in the human organism, . . . but does not include any com-
municable disease unless the risk of contracting such disease is
increased by the nature of the employment. 'Injury' when used gen-
erally . . . shall include an occupational disease."30 The court in
Haycraft reasoned that the legislature's intent in excluding com-
municable diseases from the coverage of the statute was actually an

22. Id. at 566-67 (emphasis in original) (citations omitted).
23. Hudson v. Owens, 439 S.W.2d at 569.
24. Id. at 570.
26. 439 S.W.2d at 569.
27. Id. at 570.
attempt to broaden the effect of the law. The court asserted that the new definition "reflects a definite legislative policy to the effect that although a particular affliction is of common occurrence among the population in general, it may nevertheless be found work-connected, hence compensable, when the nature of the victim's occupation has increased the victim's susceptibility to it."\textsuperscript{31} The court noted that the statutory provisions covering pneumoconiosis reflected the same policy.\textsuperscript{32}

The court also pointed out that prior to 1972, under Ky. Rev. Stat. §342.120,\textsuperscript{33} the apportionment statute, degenerative disc conditions were not compensable because they were not considered to be "disease conditions." The court said that Ky. Rev. Stat. §342.120(b) had provided that "if a dormant nondisabling 'disease condition' was aggravated or aroused into an active disability through the occurrence of a compensable injury, liability would be apportioned between the employer and the Special Fund."\textsuperscript{34}

The 1972 General Assembly also reworded § 342.120(b) to read "dormant disabling disease or condition."\textsuperscript{35} The court explained that the purpose of the change was to shift "liability from the employer to the Special Fund for that portion of the workman's disability ascribable to a pre-existing nondisabling condition that was not a 'disease.'"\textsuperscript{36}

Prior to Haycraft, spinal disc conditions were held by the board to be not compensable unless it could be proven that the condition resulted from an identifiable incident occurring on the job. In Haycraft the court noted that "in view of the 1972 legislation . . ., this view is unrealistic and unnecessarily restrictive."\textsuperscript{37} The court pointed out that strenuous manual labor would certainly hasten the deteriorating processes of a disc condition.

The court held that in the future the Special Fund would have to pay "that portion of the disability that probably would exist regardless of the work; . . ."\textsuperscript{38} and the employer would be responsible for

\textsuperscript{31} 544 S.W.2d at 224.
\textsuperscript{32} Id. at 224, n.4. Pneumoconiosis is "an inflammation . . . of the lungs caused by the inhalation of dust incident to various occupations." \textit{Stedman's Medical Dictionary} 1109 (4th ed. 1976).
\textsuperscript{34} 544 S.W.2d at 224.
\textsuperscript{35} Ky. Rev. Stat. §342.120(b) (1972).
\textsuperscript{36} 544 S.W.2d at 225.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
the rest of the disability, attributable to the work itself.

The court thus found that Haycraft had "undergone a 'harmful change in the human organism' that is to some degree work-related."

The court agreed with the board that not all degenerative conditions are compensable but asserted that in Haycraft it is "beyond question that the nature of the work probably aggravated and accelerated the degenerative disc condition, . . ." The court also noted that Haycraft had suffered two injuries to his "back arising out of and in the course of his employment."

On January 14, 1977, the court denied a motion for rehearing of the Haycraft case.

In conclusion, the only thing that can be said with certainty concerning future back claims is that some pre-existing, degenerative disc conditions, whether active or inactive, are compensable. The court has come a long way in Haycraft in allowing a claim where the identifying incident occurred completely off-the-job. Haycraft, in fact, had not even worked on April 11, 1974. The court was aware, however, that Haycraft had two previous injuries to his back which arose out of and in the course of his employment even though no claim was filed in connection with either incident. Would the court have ruled the off-the-job incident to be compensable if there had not been prior on-the-job injuries?

The court clearly recognized in Haycraft that "not all degenerative diseases or conditions are compensable." The court said that it did not question that the nature of the work probably aggravated the degenerative disc condition and that there had been two on-the-job injuries anyway. At first glance, it appears that the court is looking for other on-the-job injuries so that it can make the leap to compensating an off-the-job injury. But Haycraft was cited in Seventh Street Tobacco Warehouse v. Stilwell as holding that Ky. Rev. Stat. §342.005 was repealed and replaced by § 342.620 (1) "to expand workmen's compensation coverage to non-traumatic injuries." The court, through Justice Lukowsky's opinion, stated that

39. Id.
40. Id.
41. Id.
42. Brief for Appellee at 3, Haycraft v. Cohart Refractories Co., 544 S.W.2d (Ky. 1976).
43. 544 S.W.2d at 228.
44. 550 S.W.2d 469 (Ky. 1976).
45. Id. at 470.
"it is the injury element and not the employment element of a workmen's compensation claim that the legislature meant to expand." Seventh Street involved an employe who slipped on steps and fractured his skull while attempting to get his paycheck at his place of work. In that case, the court affirmed the board's ruling that an employe is in the course of employment while collecting his pay.

It should be noted that there was no mention in Haycraft of Young v. Fulkerson, the leading opinion on apportionment. At first glance, it would then appear that Haycraft is setting forth a brand new apportionment scheme. Haycraft's attorney, W. David Klingman, speaking at a workmen's compensation seminar, pointed out that

KRS § 342.120(3) is the apportionment statute. It is the one which applied in Young v. Fulkerson and other cases prior to Haycraft. The opinion seems to say that KRS § 342.120(3) is going to be limited in the future to cases where dormant preexisting conditions or preexisting dispositions to injury are not attributable in any degree to the work.

Klingman's analysis is the interpretation that would naturally be drawn from the language in Haycraft but the Kentucky Court of Appeals, Judge Gant writing, in Transport Motor Express, Inc. v. Finn stated:

This court is aware of the fact that some confusion exists in the recent Workmen's Compensation cases and we will therefore present to the Workmen's Compensation Board, the lower courts and to the practicing attorneys the formula to be used in computing percentages and compensation and apply this formula to the instant case.

Judge Gant, in explaining the apportionment between the employer and the Special Fund, then cited Young v. Fulkerson and enunciated the principles therein.

Glen L. Schilling, chairman of the Kentucky Workmen's Compensation Board, has also stated that "Young v. Fulkerson remains

46. Id.
47. Id. at 471.
48. 463 S.W.2d 118 (Ky. 1971).
51. Id. at 11.
the basic formula for allocating responsibility where the subsequent injury does not alone cause all disability."

An implication that can be drawn from Haycraft is that the plaintiff's burden of proof will be lessened since the plaintiff is no longer required to prove that an accident occurred on the employer's premises. If the proof is available, it should be offered anyway, but what must be shown is a causal connection between the work and the harmful change in the organism.53

Gurney Johnson

52. Address by Glenn L. Schilling, Kentucky Bar Association Meeting in Louisville (May 13, 1977).
53. Klingman address at 12.
TELECOMMUNICATIONS—HUSBAND AND WIFE—STATUTES—INTER-
SPOUSAL WIRETAP IMMUNITY—DID CONGRESS, IN ENACTING TITLE III
OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968,
INTEND TO SUBJECT A SPOUSE TO UP TO FIVE YEARS IN PRISON FOR
TAPPING HIS OR HER OWN TELEPHONE WITHIN THE MARITAL HOME?

A husband, suspecting his wife of having an extramarital affair,
installs a recording device on his own home telephone. The record-
ings of the intercepted calls confirm his suspicions, and he uses
them to obtain a divorce. Can he be convicted in federal district
court of violating Title III of the Omnibus Crime Control and Safe
Streets Act of 1968 and thereby subjected to a fine of up to $10,000,
or imprisoned up to five years, or both? At the present time, the
answer in Kentucky, Ohio, Tennessee, or Michigan seems to be
“yes.” If the tapping occurred in Texas, Louisiana, Mississippi,
Alabama, Georgia, Florida, or the Canal Zone, the answer would
probably be “no.”

In United States v. Jones, Jones and his wife separated in July
of 1974 and did not live together as man and wife after that date.
On September 25, 1974, Jones filed for divorce and on October 7,
1974, his wife was granted a restraining order by the Chancery Court
prohibiting Jones from “coming about” her. Jones continued to pay
the rent on their home owned by his grandmother, and continued
to pay the telephone bills. The telephone was listed in his name.
Jones and his wife continued a sexual relationship even though he
had moved out of his house. On October 18, 1974, Jones became
suspicious that his wife was involved in an extramarital affair and
placed a recording device on the telephone. The recordings of the

(1) Except as otherwise specifically provided in this chapter [§§ 2510-2520 of this
title] any person who
(a) willfully intercepts, endeavors to intercept, or procures any other person
to intercept or endeavors to intercept, any wire or oral communication;

(d) willfully uses, or endeavors to use, the contents of any wire or oral communi-
cation, knowing or having reason to know that the information was obtained
through the interception of a wire or oral communication in violation of this
subsection;
shall be fined not more than $10,000 or imprisoned not more than five years, or both.
intercepted calls confirmed his suspicions, and he used the recordings to obtain a divorce. 

Jones was thereafter arrested and charged with intercepting telephone conversations of his estranged wife and using the content of the intercepted communication in violation of section 2511(1)(a) and (d) (1970).  

The United States District Court for the Eastern District of Tennessee, relying principally on the decision of the Fifth Circuit Court of Appeals in Simpson v. Simpson, held that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was not intended to reach an interspousal wiretap placed on a telephone in the marital home, and dismissed the case. This dismissal of the indictment against Jones was then appealed to the Sixth Circuit Court of Appeals.

BACKGROUND

Title III of the Omnibus Crime Control and Safe Streets Act was passed by Congress in 1968. The primary target of the legislation was organized crime; however, the legislation was also a response to widespread dissatisfaction with the then existing federal statute regulating the interception of wire communications, coupled with recognition of the increasingly widespread use of electronic surveillance. The senate report on the bill evinces such recognition:

The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home

3. See note 1 supra.
4. 490 F.2d 803 (5th Cir. 1974).
8. See United States v. Jones, 542 F.2d at 667 n.10.
and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.\(^{10}\)

Sprinkled throughout the legislative history of Title III are repeated references to abuses in the private sector, specifically mentioning "domestic relations investigations."\(^{11}\) The senate report on the bill states: "Title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order. . . ."\(^{12}\) The final language of the bill is all-inclusive and would, taken literally, seem to reach spouses:

\begin{quote}
(1) Except as otherwise specifically provided in this chapter any person who—
(a) wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communications;\(^{13}\)
\end{quote}

A person convicted of violating Title III is not only subject to civil penalties,\(^{14}\) but also criminal penalties of up to $10,000 or five years in prison.\(^{15}\) Did Congress intend such severe penalties to extend to concerned spouses? Congress did not anywhere in the bill or the legislative history specifically express a positive intent to reach so far, and in light of the severe penalties and novelty of relief for aggrieved spouses, it is only natural that a court might attempt to carve from the inclusive language of the statute a special exception

\textsuperscript{10} Id.
\textsuperscript{11} See United States v. Jones, 542 F.2d at 668 n.12, 669 nn.14 & 16, and at 671 n.19; Simpson v. Simpson, 490 F.2d at 806-08 nn.9-14.
\textsuperscript{12} SENATE JUDICIARY COMM., S. REP. No. 1097, 90th Cong., 2d Sess., reprinted in \[1968\] U.S. CODE CONG. & ADL. NEWS at 2113.
\textsuperscript{15} Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
(b) punitive damages; and
(c) a reasonable attorney's fee and other litigation costs reasonably incurred.
A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.
for spouses. Such an attempt was made by the Fifth Circuit Court of Appeals in Simpson v. Simpson.\(^\text{16}\) Approximately one year before Simpson, in an action for dissolution of marriage,\(^\text{17}\) the Supreme Court of Florida, faced with the question of the admissibility into evidence of unauthorized “wiretap” recordings made by a husband in the marital home, held that such recordings were inadmissible.\(^\text{18}\) The Florida court, stating that the husband had no right to invade his wife’s right to privacy, relied principally on Florida statutes.\(^\text{19}\) But the following excerpt from the dissenting opinion addresses itself not only to Florida statutes but also to section 2518 of Title III, which precludes admission into evidence of any recordings obtained in violation of Title III:

> We are now invited, however, to conclude that the Congress and the Legislature intended to grant such right of privacy to a spouse in the furtherance of his or her conspiracy with a lover to break two of the basic ten commandments relating to human conduct. I can no more perceive a right of privacy on the part of those here thus engaged to so use the telephone lines in the *reasonable* expectation of privacy relating thereto, than would have been so had they claimed the right of privacy in the use of the husband’s bedroom. Such a conclusion would seem to me to be tortured logic. I therefore note my dissent.\(^\text{20}\)

In Simpson, the above sentiments were transformed into a basically sound legal opinion which recognized an exception to Title III for spouses who tap their own telephones in the marital home. The term “exception” is somewhat misleading, however. The Simpson court did not actually create a judicial exception, but merely decided that the law was not intended to extend to taps placed by spouses within the marital home. “Given the novelty of a federal remedy for persons aggrieved by the personal acts of their spouses within the marital home, and given the severity of the remedy seemingly provided by Title III, we seek such indications of congressional intent and awareness before extending Title III to the case.”\(^\text{21}\) The court found no specific indication of such clear “intent and awareness.” Although Simpson was a civil action based upon section 2520, the court, looking to the criminal provisions of Title III, relied on

---

16. 490 F.2d 803 (5th Cir. 1974).
17. Markham v. Markham, 272 So. 2d 813 (Fla. 1973).
18. Id. at 814.
19. Id.; FLA. STAT. § 934.01(4) (1972).
20. Markham v. Markham, 272 So. 2d at 815 (emphasis in original).
the principle that criminal statutes "must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed." The Simpson court expressed the view that if the defendant is subjected to civil sanction, he could, upon the meeting of higher standards of proof, be subjected to severe criminal penalties as well. The court found the statute not sufficiently definite and specific to create a federal cause of action against the spouse under these particular circumstances. Thus, what has been called the "interspousal electronic surveillance immunity" sprang into existence. The clear wording of the statute and repeated references in the legislative history to private abuse did not, however, fail to make an impression upon the court. In the final paragraph of its opinion, the court stated: "As should be obvious from the foregoing, we are not without doubts about our decision [and]. [o]ur decision is, of course, limited to the specific facts of this case."

Less than two months after deciding Simpson, the Fifth Circuit had the opportunity to demonstrate that the interspousal exception was to be narrowly circumscribed. In United States v. Schrimsher the interspousal exception was held not applicable when the defendant was not the legal spouse but merely a lover. The court pointed out in Schrimsher that the defendant had never been married to the prosecutrix; that at the time of the tapping he was not part of her household; and that he had no legal right to be on the premises to tape record her telephone conversation.

In September of 1974, in Beaber v. Beaber, an Ohio common pleas court, citing Simpson, agreed that Title III did not apply to spouses within the marital home. Relying upon the interspousal immunity exception of Simpson, the recordings of a wife's telephone conversations secretly taped by her husband within the marital home were admitted into evidence in a divorce proceeding. The

---

22. Id. at 809.
23. Id. "That is, if appellant prevails here then appellee is subject to severe criminal penalties, assuming of course that the prosecution could meet the higher standards of proof required for criminal convictions." Id.
26. 493 F.2d 848 (5th Cir. 1974).
27. Id. Schrimsher was convicted of violating Title III and sentenced to three years imprisonment, a sentence that the Fifth Circuit did not consider too harsh.
husband had installed the recording device upon the instructions of a private detective. In a very similar fact situation seven months later, the United States District Court for the Eastern District of Pennsylvania, although recognizing the interspousal exception of *Simpson*, held that when a private detective (third party) was involved, interspousal immunity would not apply. The district court cited *Simpson* with approval, but distinguished it on the basis of the involvement of a private detective. The court pointed out that even *Simpson* had stated that “a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse’s privacy of a much greater magnitude than is personal surveillance by the other spouse.”

In May of 1976, another court had the opportunity to extend this cutback of the interspousal immunity doctrine. This time it was the United States Court of Appeals for the Eighth Circuit. *White v. Weiss* involved the tapping by a wife, within the marital home, of her husband’s conversation. The wife actually installed the recording device; however, a private detective was beside her, instructing her during the installation. The district court had relied upon *Simpson* in dismissing the case. The Eighth Circuit held that “[t]he conduct of a private detective who personally instructs and supervises an individual in the installation and connection of wire-tapping equipment for the purpose of intercepting telephone communications falls within the purview of [Title III].” The Eighth Circuit extensively discussed *Simpson*, but without approval or disapproval, merely holding that *Simpson* did not apply in an action against a third party.

Up to this point, many cases had discussed *Simpson* and distinguished it. None of the cases actually questioned the correctness of *Simpson* or disagreed with the interspousal immunity exception. The first case to actually do so was *Rickenbaker v. Rickenbaker*, decided by the Supreme Court of North Carolina in July, 1976, more than two years after the *Simpson* decision. In *Rickenbaker*, a case involving the admissibility of evidence in a divorce proceeding, the husband, in order to check on his wife at home, had an extension

30. *Id.* at 901 citing *Simpson v. Simpson*, 490 F.2d at 809.
32. *Id.* at 1072.
phone with a recording device placed in his office. The North Carolina court refused to admit the recordings into evidence and distinguished Simpson on a number of grounds. In Rickenbaker, the husband and wife were separated; also, this case was not one seeking recovery of civil damages. The court stated that these distinctions were "highlighted" because the Simpson opinion restricted itself to the specific facts of that case. But the North Carolina court did not stop there, stating further:

We do not agree with the 5th Circuit's patently doubtful conclusion that the legislative history of the statutes under consideration show [sic] no direct indication that the statute was intended to reach domestic conflicts. The history of the act indicates a legislative intent that individuals be protected from invasions of their privacy by sophisticated surveillance devices. 34

Thus, the stage was set for the Sixth Circuit Court of Appeals in the Jones case either to implant more firmly or to uproot more completely the interspousal immunity exception originally advocated by Simpson.

THE REASONING OF THE SIXTH CIRCUIT

When the ink dried on the Jones opinion, it became obvious that instead of accepting the Simpson viewpoint and thereby more firmly implanting the interspousal exception into Title III, the court chose to take a major step in uprooting the exception, leaving it exposed to severe criticism. The Sixth Circuit could have taken a middle position in reference to Simpson's interspousal immunity merely by distinguishing Simpson on its facts. In approximately the last two pages of a thirteen page opinion, the Jones court did distinguish Simpson, beginning such discussion by saying that "[e]ven if Simpson was correctly decided on its facts, this case is clearly distinguishable." 35 The distinction considered most important was that Simpson involved the civil remedies of section 2520, 36 whereas here, the court was construing the scope of the criminal penalties of section 2511. 37 One of the problems confronting the Simpson court, the doctrine of interspousal immunity from civil action in tort

34. Id. at 378, 226 S.E.2d at 352.
35. United States v. Jones, 542 F.2d at 672.
36. See note 14 supra.
37. See note 1 supra.
recognized by many states, was not involved in this criminal case. But even in recognizing this distinction, the Jones court commented that it had “substantial doubt whether a doctrine of state tort law should have any influence in defining a cause of action expressly created by federal statute, particularly when Congress could have included a similar provision in the statute and failed to do so.”

A second distinction recognized in Jones was that in Simpson, the wiretapping took place while the couple was living together as man and wife; in Jones, the couple was not separated. Stating that it was convinced that the location of the surveillance had no relevance in ascertaining the scope of the statute, the court pointed out that the term “marital home” might not be applicable when, as here, the couple was not sharing a domicile at the time of the interception. The court also pointed out that here, as in Remington, the marriage had become one more in name than in fact. Also, in light of the restraining order issued against Jones, this case was similar to Schrimsher, in that the defendant had no legal right to be on the premises. The court concludes its attempt to distinguish Simpson by stating: “Under these circumstances we do not find applicable the implied interspousal exception to the wiretap statute recognized in Simpson.”

Jones, however, did much more than merely distinguish Simpson. Most of the opinion was devoted to seriously attacking the reasoning and correctness of Simpson’s interspousal immunity exception to Title III. The Sixth Circuit read Title III as being unambiguous and stated that “[d]espite the unambiguous language of the statute, the District Court chose to follow the Fifth Circuit’s holding in Simpson . . . .” Such a conclusion by the district court was found untenable because it contradicted not only the explicit language of the statute but also the clear intent of Congress.

While the Sixth Circuit stated that if the language of a statute is clear on its face, there is no need to consult the legislative history, it nevertheless felt compelled to thoroughly research and review the legislative history of Title III since the Simpson court had done so.

38. United States v. Jones, 542 F.2d at 672.
39. Id. at 673.
40. Id.
41. Id.
42. Id. at 666.
43. Id. at 667.
44. Id.
and had found an intent different from the statutory language. Viewing, for the most part, the same passages as did Simpson, the Jones court concluded that Title III was intended to reach private surveillance between spouses.

Our review of the legislative history of this section, testimony at congressional hearings, and debates on the floor of Congress, inescapably lead to the conclusion that 18 U.S.C. 2511(1)(a) establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation. The distinction made in Simpson between unaided surveillance by a spouse and surveillance involving a third party, even if instigated by the spouse, was viewed as a classic “distinction without a difference.”

Congress, the court reasoned, was aware of the abuses in domestic relations cases and responded with an all inclusive, clearly worded statute specifying four exceptions, none of which involved interspousal immunity. If Congress had intended such an exemption, it could easily have added a fifth exception. Thus, “[t]he implication is clear then that Congress enacted Title III to protect the privacy of all persons conversing over the telephone [except the specifically mentioned exceptions] and that their privacy is shielded from invasion by third parties and spouses alike.”

Although the court distinguished Simpson “if correctly decided,” the following passage from the opinion’s final paragraph clearly indicates that it believed Simpson to have been wrongly decided:

We reach this conclusion reluctantly because we share the concern of other courts which have grappled with this problem that application of federal wiretap law to essentially domestic conflicts may lead to harsh results in individual cases. However, the plain language of the section and the Act’s legislative history compels interpretation of the statute to include interspousal wiretaps. It is not for this Court to question the wisdom of Congress and to establish an implied exception to a federal statute by judicial fiat.

45. Id. at 667-69; see note 11 supra.
46. Id. at 669.
47. Id. at 670.
48. Id.
49. Id. at 672.
50. Id. at 673.
After criticizing Simpson’s interspouse immunity exception, the Sixth Circuit distinguished Simpson on two bases: that the action was civil, not criminal, and that the violation took place within the "marital home." Are these distinctions sufficiently valid to enable a later court to find no conflict between the two cases? The civil versus criminal distinction which, at first glance, appears to be a valid one, all but evaporates in light of the reasoning of the Simpson court as to the probable intent of Congress. Although Simpson involved an application of the civil sanctions of the statute, the Fifth Circuit reached its opinion primarily by taking into consideration the corresponding criminal sanctions. The Simpson court’s strongest and most basic argument was that if civil penalties were imposed, the defendant would also then be subject to the criminal penalties and, thus, Title III, which includes criminal sanctions, should be construed strictly and narrowly to avoid ensnaring behavior not clearly proscribed. The Simpson court obviously considered the proscribed conduct to be the same whether civil or criminal penalties were imposed. This consideration must necessarily be correct. Even the Jones court noted that the Senate Report suggests, to some extent, “that civil and criminal liability should be coterminous.”

The language of section 2520 relating to civil penalties clearly refers back to the conduct proscribed in section 2511(1). Section 2520 does not attempt to add or delete persons to whom Title III applies, but merely grants a civil cause of action against them. The civil and criminal liabilities imposed by Title III should be consistently applied. If they are applied inconsistently as the civil/criminal distinction suggests, the result would clearly be unreasonable. In other words, the offending spouse would not be required to pay $100 a day for each day of the violation plus punitive damages, but would be subject to a fine of $10,000 and a prison term of five years. Such a distinction is therefore not consistent with the reasoning of the Simpson court and cannot be made consistent by a discussion of traditional state civil tort immunity. The Jones

51. "We thus are bound by the principle that criminal statutes must be strictly construed, to avoid ensnaring behavior that is not clearly proscribed." Simpson v. Simpson, 490 F.2d at 809.
52. 542 F.2d at 672 n.23.
53. See notes 14 & 1 supra, respectively.
54. See United States v. Jones, 542 F.2d at 672.
court may be correct in holding that the criminal penalties apply to spouses, but such conclusion cannot be reconciled with Simpson by distinguishing it on a civil/criminal basis.

If reconciliation is the goal, the second distinction, that involving the absence of a "marital home," seems to be more plausible. Even here, however, the distinction is somewhat superficial. The Jones court did not conclusively state that the surveillance occurred outside the "marital home," but merely questioned whether the home of a separated married couple would be considered a "marital home." The court's statement that it was not convinced that the location of the surveillance had any relevance indicates an intention to provide a means of future reconciliation. A future court could easily consider the legislative history discussion as mere dictum and reconcile the two cases to include an interspousal exception. The majority in Jones points to the fact that, if presented with a case indistinguishable from Simpson, the Sixth Circuit would not recognize an interspousal immunity exception to Title III. Reconciliation must then come from a court other than the Sixth Circuit.

The present situation, in light of Jones and Simpson, can be summarized by the following questions and answers. Do sections 2511(a) and (d) and section 2520 of Title III apply to spouses when the interception takes place:

(1) Outside the "marital home" with third-party involvement? Both cases say "yes."
(2) Outside the "marital home" without third-party involvement? The answer by viewing Jones is definitely "yes"; by viewing Simpson, probably "yes," because so much emphasis was placed on the "marital home." Decisions rendered after Simpson and before Jones clearly answer the question affirmatively.  
(3) Inside the "marital home" with third-party involvement? The Simpson decision emphasized the absence of a third party. The Eighth Circuit Court of Appeals, citing Simpson, conclu-

55. "[W]e are not convinced that the location of the surveillance device has any relevance in ascertaining the scope of the statute." Id. at 673.
56. Id. at 670.
The legal reasoning of both courts forms the basis for arguments to resolve the hypothetical situation set out in the beginning of this note. The basic assumption in *Jones* is that it is not for the court to establish an exception to a federal statute by judicial fiat, and if Congress desires such an exception, it can create one. On the other hand, it could be argued, in line with the *Simpson* reasoning, that the court is not creating a judicial exception, but is instead interpreting the federal statute to show a lack of intent to reach actions by spouses within the marital home. If Congress desires to do so, it can easily close the gap by extending the statute.

Fundamental in both lines of reasoning is a determination of the intent of Congress in enacting Title III. Ascertaining that intent more than eight years after passage is not simple. The evaluation

---

by the Sixth Circuit in *Jones* is the more convincing, but the fact that two separate courts of appeals have viewed the history and reached opposite conclusions lends weight to *Simpson*'s final point: if the legislative history is questionable, the statute must be construed in line with the narrower interpretation. 59

This note does not purport to discover the true intent of Congress in enacting Title III; it will be whatever the Supreme Court decides it to have been. A suggested solution is founded upon the as yet unsupported assumption that in enacting Title III Congress intended to protect an individual's reasonable expectation of privacy. 60 If so, the court's task is then merely to decide whether the actions of a defendant violated another's reasonable expectation of privacy. A court could set forth guidelines when wire communications are used so as finally to settle the major questions relating to this area of Title III. Guidelines regarding spouses should be flexible enough and at the same time specific enough to constitute a workable tool with which to solve future Title III cases. The notions of judicial expediency and fundamental fairness would require that such a framework enable future courts and individuals accurately to recognize the boundaries of the reasonable expectation of privacy.

A court could view the reasonable expectation of privacy incorporated into Title III as prohibiting all electronic interception other than the specified exceptions listed in Title III. With this approach, however, a number of problems remain. The first, of course, is the nagging suspicion that Congress could not have intended such consequences to flow to a concerned spouse. The *Simpson* argument would be used, that behavior not clearly proscribed has been "ensnared."

Another problem at the present time is a lack of general public awareness that tapping one's own phone could result in extreme penalties. Of course, this is more a practical consideration than a legal problem. Ignorance of the law is no defense as long as the law affords sufficient notice of the conduct prohibited. A federal district court

60. The *Simpson* court stated:
   We are aware that there is no statutory requirement of an expectation of privacy in wire communications. Compare § 2510(1) . . . with § 2510(2).
   "(2) 'oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation; . . . ."
*Simpson v. Simpson*, 490 F.2d at 809 n.15.
court, in a case involving the interruption of an employee’s telephone call by the employer, specifically held that the clear wording of the statute, “any person... shall be fined not more than $10,000 or imprisoned not more than five years or both,” affords sufficient notice of conduct prohibited.

A possible concern in the above mentioned case is that of selective prosecution. Of the many instances in which this type of behavior occurs, only a few would be discovered and even fewer actually prosecuted. A problem not so easily disposed of concerns the interception of telephone communications by the use of an extension telephone. In a case involving the interception by a police officer of telephone communications between another police officer and the Bureau of Narcotics and Dangerous Drugs, the Tenth Circuit Court of Appeals held, in interpreting Title III, that the extension phone, and not the tape recorder attached to the extension phone, was the intercepting mechanism. Would an all-inclusive set of guidelines concerning one’s reasonable expectation of privacy subject a person who overhears or listens in on an extension phone to a prison term of up to five years? There are three viewpoints. The first is that a

64. United States v. Harpel, 493 F.2d 346 (10th Cir. 1974).
65. In State v. McCartin, 135 N.J. Super. 81, 342 A.2d 591 (Super. Ct. 1975), the Superior Court of New Jersey held that evidence concerning gambling oriented conversations was admissible. The telephone subscriber hearing strange voices on his malfunctioning telephone invited the police to listen and the police then recorded the conversation. The court in finding that the overhearing was not a violation of Title III stated: “[T]he case at bar does not involve a willful interception but rather one inadvertently made by a private citizen.” Id. at 595.
66. The Jones court, in a footnote, stated:
   We express no opinion on the dictum in Simpson v. Simpson that Title III does not reach a family member’s interception of a telephone conversation by use of an extension telephone in the family home, other than to note that there is a vast difference between overhearing someone on an extension and installing an electronic listening device to monitor all incoming and outgoing telephone calls.
67. A fourth viewpoint might be that an interception by a spouse in the marital home falls within the specific exception contained in subsection (5)(a)(i) of section 2510. The Fifth Circuit in Simpson stated: “[I]t is clear that Congress did not intend to prohibit a person from intercepting a family member’s telephone conversations by use of an extension phone in the family home—subsection (5)(a)(i) of section 2510 directly covers this point.” Simpson v. Simpson, 490 F.2d at 809. 18 U.S.C. § 2510(5)(a)(i) reads as follows:

(5) “electronic, mechanical, or other device” means any device or apparatus which can be used to intercept a wire or oral communication other than—
reasonable expectation of privacy includes freedom from eavesdropping. Therefore, the spouse who eavesdrops could be convicted and sentenced to five years in prison. Such a result could not have been the intention of Congress in passing Title III.

The second viewpoint is that the reasonable expectation of privacy does not apply to an eavesdropper because "eavesdropping requires the presence of the eavesdropper, and therefore human frailties such as hunger and sleep are limiting factors . . . [and] detection is a real problem to the eavesdropper who uses an extension phone." Under this viewpoint of reasonable expectation of privacy, not only would the spouse not be in violation of Title III, but anyone else who listened in via an extension phone would also be outside Title III. In other words, anyone able to overcome the "frailties of hunger and sleep" would be able, if he could avoid detection, to eavesdrop freely via an extension phone and not be in violation of Title III. Such a result would be far broader than the original interspousal immunity advocated in Simpson.

The third possible view of reasonable expectation of privacy is simply that anyone other than a member of the family who eavesdrops within the marital home via an extension phone is violating one's reasonable expectation of privacy and so comes within Title III. In light of the sanctions provided by Congress in Title III, this third approach would seem to be more reasonable and acceptable. If this third viewpoint is in accord with the intent of Congress, does this not also include an exception to the "clear" wording of the statute? The only exclusion of the statute under this interpretation is an eavesdropping family member who listens on an extension phone but does not record the conversation. But whether the conver-

---

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business . . . .

Construing this to permit listening in, but not recording from the extension phone would mean the entire force of the statute could turn upon the superficial distinction that in one case the spouse picked up a cassette recorder and taped the conversation for a more accurate record, whereas in the other case, a recording device was not used. As already seen, the extension telephone itself, not the recording device, has been viewed as the illegal intercepting mechanism. "The 10th Circuit Court of Appeals has flatly held as a matter of law that a telephone extension used without authorization or consent to surreptitiously record a private telephone conversation is not being used in the ordinary course of business." Rickenbaker v. Rickenbaker, 226 S.E.2d at 350, citing United States v. Harpel, 493 F.2d 346 (10th Cir. 1974).

68. Comment, supra note 24, at 205.
sation is recorded is not sufficiently important to trigger the criminal sanctions of the statute. 69 The question then is whether a family member who secretly records a conversation while at home and thus is not subject to the criminal penalties would be treated the same as a family member who by means of remote control records the same conversation while away from home and thus is subject to five years in prison, or a $10,000 fine, or both.

One solution to all of the Title III problems in this area is not to view the term reasonable expectation of privacy as being all inclusive, but instead to define it as being free from all interference by anyone other than an immediate family member. If not so defined, would not a concerned father who listens in on his teenaged daughter be subject to severe criminal and civil penalties? 70 A set of guidelines based upon this view of the reasonable expectation of privacy would avoid the classic "distinction without a difference" referred to in Jones. It should not matter whose hand actually placed the tap inside the telephone. The offender should be the one who became privileged to the intercepted communications. 71 If a third party (other than a family member) knowingly became privileged to the communication with the help of a family member, then both the third party and the family member would be violating the reasonable expectation of privacy of the abused member. The only significant problem to overcome with such family-based definition of reasonable expectation of privacy concerns the rights of the non-family member in the intercepted communication. But does a woman having an illicit affair with another woman's husband reasonably expect a telephone conversation with that man within his marital home to be completely free of prying ears? Does she expect a federal protection of her affair? If her right to call into a marital home and freely use the telephone line is of more public importance than the recognition of the natural and human behavior of a concerned family member to listen in, then many of the citizens of this nation may

69. See note 64 supra (telephone extension itself is the intercepting device, not the recorder); note 67 supra.

70. The legislative history contains the following comment made by Professor Herman Schwartz, appearing for the A.C.L.U. before the House Judiciary Committee: "I take it nobody wants to make it a crime for a father to listen in on his teenaged daughter or some such related problem." Hearings on the Anti-Crime Program, before Subcomm. No. 5 of the House Judiciary Comm., 90th Cong., 1st Sess. at 989 (1967). See Simpson v. Simpson, 490 F.2d at 809 n.17.

serve many years in prison as a result. This note does not approve of nor advocate a family member's right freely to intercept telephone calls. But saying that a person does not have the right to engage in such action is not the same as saying that it was the intent of Congress to punish such action by imposing a $10,000 fine or a five year prison term or both. Congress intended to punish only that action which violated the reasonable expectation of privacy. The proposed guidelines concerning the reasonable expectation of privacy, to be free from wire interception by anyone other than a family member, when within the marital home, and to be free from interception even by them outside the home, not only avoids the previously mentioned problems but also avoids a federal intrusion into an area previously left to the states. If this proposed view of the intent of Congress in enacting Title III is in error, then Congress can remedy the error by enacting legislation specifically addressed to wire interception within the family.

JEFFREY H. RAINES
Stella Buckler was indicted for the August 17, 1973, murder by suffocation of her two-month-old son. After the first jury failed to return a verdict, a second jury was impanelled which found appellant guilty and sentenced her to life imprisonment.

In the circuit court, appellant relied on her history of previous mental instability in presenting a defense of not guilty by reason of insanity. The evidence offered indicated that she attempted suicide in August, 1971, and had subsequently undergone periodic treatment for mental depression.

The circuit court ruled that her medical records which were compiled after the alleged crime and were in the custody and control of the Director of Medical Records at River Region Hospital were inadmissible as evidence because they were hearsay. The trial court further held inadmissible a medical opinion of appellant's mental condition at the time of the offense as well as of her subsequent mental condition. The inadmissible testimony was based on the excluded medical records and on consultations with the appellant. The appellant assigned the rulings as error.

The Supreme Court of Kentucky reversed the judgment and granted a new trial holding:

(1) that hospital records, pertaining either to mental or physical therapy, are admissible into evidence under the “shopbook” exception to the hearsay rule, either on identification of the original by the custodian of the records, or on offer of a certified or sworn copy; and

(2) that an expert may properly express an opinion based upon information supplied by third parties which is not in evidence, but upon which the expert customarily relies in the practice of his profession.

This note will be handled in two parts. Part one will discuss the first holding in the Buckler decision as stated above. Part two will examine the second holding that expert testimony based on third party information may be admissible.

2. Id. at 939.
3. Id. at 940.
HISTORY OF THE SHOPBOOK EXCEPTION TO THE HEARSAY RULE

The shopbook exception to the hearsay rule, set forth centuries ago to allow into evidence certain business records, has undergone a substantial evolution in recent years. It emerged in the seventeenth century in the common law courts. Shopbooks were the records kept by tradesmen and craftsmen as proof of goods sold or services rendered. These records were admitted into evidence because the common law would not allow a businessman to testify in his own behalf, thus making the records the only proof available to him. Later, due to objections to the self-serving nature of this form of evidence and to its abuse in the courts, a statute was passed limiting the use of shopbooks.

In eighteenth century England, the exception was expanded to include an entry in the shopbook by a clerk who died before the trial. By the early 1800's, the English doctrine was firmly established to include all entries made by a person, since deceased, recorded in the regular course of business.

In America, the doctrine was slow to develop, and numerous restrictions were imposed. The requirements that the entry be made at or about the time of the transaction and that the entry be made in the ordinary course of business were retained. Additional requirements often included that (1) the party using the book make the entries himself, (2) the party file a "supplemental oath" that the accounts were accurate, (3) the books bear an honest appearance, (4) the transactions not exceed a certain limited value, (5) the witnesses testify from their experience in dealing with the party that his books were honest, (6) the books be used only to prove open accounts for goods and services furnished, and (7) other proof be made of the actual delivery of some of the goods.

During the early 1800's, the American courts adopted the English exception for regular business entries made by persons who died

---

4. The modern version of the shopbook exception to the hearsay rule is Rule 803(6) of the Federal Rules of Evidence. Today it is best known as the business records exception to the hearsay rule. Fed. R. Evid. 803(6).
5. 7 Jac. I, c. 12 (1609).
6. Only those debts not over one year old could be proven by the shopbooks unless a bill of debt was given or the debt was between tradesmen or craftsmen.
7. 5 J. Wigmore, Evidence § 1518 (Chadbourn rev. ed. 1974).
8. Id.
9. Id.
before trial. The doctrine has grown to include entries made by a person who is unavailable because of death, insanity, disappearance, or other valid reason. Today, numerous courts are guided by shopbook or business record statutes which generally only require (1) that the record be a writing or memorandum of the transaction, (2) that it be recorded at or within a reasonable time after the transaction and (3) that it be recorded in the ordinary course of business. The exception also extends to businesses or institutions not operated for profit.

The exception continues to be allowed because business records are considered to be reliable and necessary. The complex system of record keeping in today's businesses demands a high degree of accuracy. The records are constantly checked and re-checked, and record keepers are trained in making entries precisely because the business relied on these entries. The shopbook exception is necessary for two reasons. First, it is highly unlikely that the person having first-hand knowledge of the transaction will accurately remember all of the details of the entries for a specific transaction and therefore must rely on written records to refresh his memory. Second, it is inconvenient and disruptive to business to call all parties having first-hand knowledge.

In Kentucky, the shopbook rule has been in effect for at least eighty-five years in civil cases and at least sixty-two years in criminal cases. In 1906, Justice O'Rear, in *Louisville & N.R.R. v. Daniel,* set forth in detail the reasons for the shopbook rule. The appellee objected to the use of a dispatcher's records showing the exact movements of all trains which were in the area of the accident on the day of the accident. The trial court sustained the objection. The court of appeals found this holding to be error. It recognized the use for centuries of shopbooks in evidence stating:

15. 5 J. Wigmore, *supra* note 7, §§ 1422 & 1546.
19. 122 Ky. 256, 91 S.W. 691 (1906).
These are . . . , as the courts require the production of the best evidence the nature of the case admits of, a necessity, and circumstantial guarantee of trustworthiness of such entries may render them, not only the best, but the only reliable, evidence practicable to be obtained to establish the disputed fact. 20

The opinion explains the importance in our society of business records and the reason entries by disinterested third parties are held to be reliable. 21 Justice O'Rear also addressed the impracticality of calling every employee to court, that is, "bringing a regiment of witnesses to prove minute details of a status more easily and truly shown by a contemporaneous record, [which] would be to discard the better for the worse, and to trammel the administration of justice." 22 The necessity for the use of business records in court, and their trustworthiness overcome the desirability of allowing the jury to observe individuals as they testify and allowing the adverse party to cross-examine.

The use of hospital records was once looked upon with disfavor by the courts who refused their admissions under the business records exception. Seemingly, the only reason was the hospital's non-commercial status. Today, all courts would concede the admission of hospital records on the same basis as other regularly kept records. 23 Hospital records are prepared in stages as the condition of the patient changes. The reliability of the recorded diagnosis is unquestionable since the health and welfare of the individual is at stake. 24

The Kentucky Court of Appeals held medical records to be an exception to the hearsay rule in Whittaker v. Thornberry. 25 The records were considered shopbook records meeting the requirements

---

20. Id. at 264, 91 S.W. at 692.
21. No motive, not criminal in the highest degree, could exist for fabrication in making such original entries. He has no personal interest whatever to serve by making a knowingly false entry. On the contrary, the security of his position, the prospect of advancement, the fear of the awful consequences of mistake, the impossibility of keeping a false record as a working record in the matter without immediate disaster and detection, all combine to insure against any motive on his part for fabrication. Id. at 266-67, 91 S.W. at 693.
22. Id. at 268, 91 S.W. at 694.
24. A hospital record is prepared primarily to plot a patient's progress, not to be utilized in litigation.
25. 306 Ky. 830, 209 S.W.2d 498 (1948).
of necessity and trustworthiness. The rule in Kentucky was broad-
ened by the Whittaker decision. The lower courts, however, ac-
cepted a narrow interpretation of the holding. Medical records that
could be used were records involving physical treatment or therapy,
not those reporting to mental treatment or therapy.26

THE Buckler DECISION IN LIGHT OF THE SHOPBOOK BACKGROUND

The first question resolved by the court's holding in Buckler is
whether the defendant's mental records at River Region Hospital
fall under the holding in Whittaker v. Thornberry.27 In Whittaker,
the court set forth the guidelines28 allowing hospital records to qual-
ify for an exception to the hearsay rule. The court stated the basic
rule, that the witness should testify from personal observation, but
that the necessities of a case and the trustworthiness of certain
records brought about the shopbook rules allowing "entries made in
the ordinary and regular course of duty by persons not having
knowledge of the facts entered [to be] admitted as competent evi-
dence."29

The necessity for their use lies in the inconvenience and serious
interference with hospital functions if nurses, technicians, and hos-
pital staff were required to sit in court every time a litigant wished
to utilize a hospital record. The circumstantial guarantee of trust-
worthiness is in the fact that these records are prepared to promote
the health and welfare of patients. Where life and death situations
occur daily, society demands precise recording of data and diag-
noses. A second factor ensuring the trustworthiness of hospital re-
cords is that people making them are not likely to recall the details
of specific transactions. Proof that the record was made in the ordi-
nary course of a routine business activity is therefore adequate and
the recorders need not be called as witnesses.30 Argument can be

26. This is evidenced by the holding of the circuit court from which this appeal derived.
27. 306 Ky. 830, 209 S.W.2d 498.
28. Id. at 834-35, 209 S.W.2d at 500-01.
30. See Rossmanno v. Laclede Cab Co., 328 S.W.2d 677 (Mo. 1959) (holding that a
medical report was admissible under the Uniform Act although the doctor who made the
report was in the city and was apparently available). After suggesting that there was no
requirement of unavailability, this court added: "Moreover, it is inconceivable that a busy
medical practitioner would have an independent recollection of each entry made in his busi-
ness records and be able to testify from personal recollection as to when and by whom all
entries were made." Id. at 681-82.
advanced that these records could contain errors. Even so, the person making the entry or transcribing the error would probably not be able to recollect the correct information on the witness stand in order to reconstruct the proper entry. Furthermore, these records would be at least as reliable as testifying witnesses would be.\textsuperscript{31}

The guidelines for admitting hospital records, as set forth in \textit{Moore v. Commonwealth}\textsuperscript{32} included (1) a showing of necessity of admitting the record rather than having the people who made it, or who caused it to be made, to testify, (2) a showing that the record was made at or within a reasonable time of the transactions, and (3) a showing that the record was made in the ordinary course of the hospital's business. The problem caused by these guidelines was the lack of a definitive interpretation of "necessity." Most courts followed the historical meaning of necessity, that being death, insanity, or a \textit{showing} that there were other reasons for not having witnesses testify.\textsuperscript{33}

The problem arose in \textit{Buckler} when the trial court ruled that appellant had not used the requisite "due diligence" necessary to satisfy the "necessity" requirement of \textit{Whittaker}.\textsuperscript{34} The Kentucky Supreme Court, realizing the problems caused by such rigid interpretations, wisely overruled \textit{Whittaker} to the extent that no further showing of necessity was required. The court said that "the necessity requirement for the introduction of this type of hearsay evidence is satisfied by the very nature of the evidence sought to be introduced. We, therefore, feel it serves no useful purpose to require any further showing of necessity of admitting the medical records."\textsuperscript{35}

The Supreme Court of Kentucky, through the \textit{Buckler} decision, closed the door on making any distinctions between the admissibility of hospital records of physical treatment as opposed to mental therapy.\textsuperscript{36} This holding is not only a much needed recognition of

\textsuperscript{31} It should be noted that the court still has the power to summon these persons making the recordings if in its discretion the court deems it necessary.
\textsuperscript{32} 92 Ky. 630, 18 S.W. 833 (1892).
\textsuperscript{34} The doctors preparing the reports were not present at trial and had not been subpoenaed. Appellants' attorneys stated in chambers that the whereabouts of the doctors were unknown, and thus subpoenas would have been useless. \textit{See Payne v. Commonwealth, 509 S.W.2d 264, 266 (Ky. 1974)} ("Our rule is that records of patients at a hospital, organized on the modern plan may be produced in evidence by the custodian of the records.")
\textsuperscript{35} 509 S.W.2d 264 (Ky. 1974).
\textsuperscript{36} Until the \textit{Buckler} decision, the answer to the question of whether "hospital" meant only those rendering physical therapy was unclear; though the \textit{Whittaker} decision in 1948
advancements made in the field of psychiatry in recent years, but is also a boon to legal practitioners. The psychiatric field, like the medical field, is one in which the lay jury requires expert assistance. The technology and terminology is complex and beyond the understanding of the average layman. By analogy, the records of the psychiatric hospital should not be considered any less reliable than records made in the hospital administering to physical infirmities. Regular tests and therapy are administered daily to psychiatric patients. Accurate records of these treatments and responses to them must be recorded to register a patient’s progress. Surely no sound argument could be raised that records of mental therapy would not be as accurately kept as records of physical treatment. The Kentucky Supreme Court has taken a step which the courts in other states should follow.37

**History of Expert Testimony**

Experts, or witnesses with special knowledge, were used by the courts in the eighteenth century. However, they were not used in the sense recognized in modern judicial proceedings. Many of the proceedings were inquisitorial hearings at which the inquisitors were all persons with specialized experience. The inquisitors determined the issue upon the basis of their own information. This was a special jury or a jury of experts that decided upon matters within its own expertise.38

With the rise of the adversary system in which witnesses were looked upon as being called by a party and expected to represent that party’s position in the case, the use of expert testimony and scientific proof developed into a testimonial battle of experts. Coincident with the evolution to the adversary system came the new rule that the testimony of the witnesses and real evidence were the sole sources of factual data upon which a verdict could be rendered. As stated by Lord Coke in 1622, “It is not satisfactory for a witness to say that he thinks or persuadeth himself.”39

held “hospital” records to be admissible, the decision made no distinction. Not until Payne v. Commonwealth, 509 S.W.2d 264 (Ky. 1974), did the court even launch into this area of confusion. Even then the decision only indicated that such records would be admissible.

37. For a comprehensive compilation of authority for the admission of hospital records in other jurisdictions, see 6 J. Wigmore, Evidence § 1707 n.1 (Chadbourn rev. ed. 1976).
38. 9 W. Holdsworth, History of English Law 211 (1926).
Even under the strict rule of exclusion of opinion testimony, two necessary exceptions arise: first, upon matters about which an ordinary witness cannot detail pertinent facts in such a manner that the jury would derive the most from his observation without the use of inferences; and second, in the case of expert testimony. Necessity, as applied to the admission of expert testimony, arises from the inability of triers of fact to resolve certain issues requiring persons with special skills, experience, or scientific knowledge to understand them. In many cases involving special knowledge, the ordinary jury or judge, in cases tried to the court, would be helpless without the aid of the expert. Consequently, for admissible expert opinion, a body of rules has grown up, almost as complex as the subject matter about which the expert testimony is given.

Admissibility of Medical Expert Opinion Based on Information Supplied by Third Parties

Until the Buckler decision, Kentucky followed the majority rule that a question is improper if it calls for the witness's opinion based on reports that are not in evidence or are inadmissible as substantive evidence under the hearsay rule. The rule exists because the jury should not be asked to accept the inferences or opinions of a witness if they are arrived at from a third person's hearsay assertion of a fact which is, presumably, not supported by any evidence at the trial. The trier of fact, therefore, has no basis for finding them to be true.

This long standing rule has been abandoned by a growing minority of jurisdictions. There is a strong and rapidly growing trend toward the admission of expert testimony based on information supplied by third persons. A major step in this direction was the adoption of Rule 703 of the Federal Rules of Evidence. This rule allows an expert to base an opinion or inference on his perception of facts or data in a particular case or upon facts or data made

40. See E. Cleary, supra note 33, §§ 10-15.
41. See E. Cleary, supra note 33, § 15; Equitable Life Assur. Soc. v. Kazee, 257 Ky. 803, 79 S.W.2d 203 (1935)(opinion based on X-rays and reports from others).
42. E. Cleary, supra note 33, § 15.
43. See Annot., 55 A.L.R.3d 551 (1974)(in the area of expert psychiatric testimony on the issue of sanity, the trend is toward admitting the testimony of experts which is based upon information supplied by third persons).
44. Fed. R. Evid. 703.
known to him at or before the trial. The second part of the rule states: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

Rule 703 recognizes today's expert as one who has access to information and who can distill facts into an intelligent opinion. Experts in various fields seldom rely solely on personal observation. To do so would be contrary to the discipline they have mastered. Advancements in the technology come from research and experiments. An expert, to stay abreast, must keep up with the constant changes to be of service to his clients. Information of this type provided by third persons, coupled with the expert's personal expertise and personal observations makes for a more intelligent opinion. Rule 703 allows a practical application of "evidence reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

The courtroom should not be so removed from the daily workings of everyday community transactions that it shuts its eyes to changes which will affect both the legal system and the community.

As early as 1928, Wisconsin courts recognized the practical necessity of allowing experts to rely on reports, made by technicians or by the patient's friends or relatives, of the patient's symptoms or behavioral patterns. Justice Stevens of the Wisconsin Supreme Court said,

This court . . . will not close the doors of the courts to the light which is given by a diagnosis which all the rest of the world accepts and acts upon, even if the diagnosis is based in part upon facts which are not established by the sworn testimony . . . to be true.

The division of labor and specialization in medicine today, made necessary by technological advancements and heavy demands for medical services, demands that the doctor rely on the reports fed to him to broaden his patient contact. To hold that this system cannot be reliable in a court of law is nonsense.

---

45. The Buckler decision does not address itself to a requirement of personal observation. The holding implies no such necessity, but rather would allow expert opinions based solely on information supplied by third parties, if customarily relied upon, even if personal observation had been reasonably possible.
46. Fed. R. Evid. 703.
47. Sundquist v. Madison Rys., 197 Wis. 83, 221 N.W. 392 (1928)(doctor relied on reports by third persons and case history of the patient).
48. Id. at 86, 221 N.W. at 393.
An expert in any field does not always accept as fact all information supplied to him. Rather, he utilizes the reports or data to supplement his own opinions or observations. The expert, because of his training and professional experience, knows what data, reports, or studies he can rely upon to aid him in making a more intelligent decision. The general public relies on this expert for guidance in matters which are beyond layman skills. Laymen expect the expert to sift through as much third party information as he deems necessary to make the best decision possible for the client.

Similarly, at trial, the expert is once again providing guidance to laymen on matters beyond their skills. The expert's function, after using third party information to prepare an informed analysis of the problem, is to advise the court of his professional opinion. He does not state a fact, but gives an opinion in order to aid the trier of fact. This system does not invade the province of the jury since the jury must make the ultimate decision on the issue. The jurors may believe or disbelieve the expert's testimony.

This exception to the hearsay rule can be made because the expert is available for cross-examination. On cross-examination the adverse party should probe the authenticity and accuracy of the sources relied on by the expert and the reasoning processes by which the expert arrived at his evaluation. During cross-examination the jury has a chance to listen to the approach used by the expert and decide for itself if the technique and supplementing third party information is credible. Further, the jury has a chance to observe the demeanor of the expert while on the witness stand.

49. See Birdsell v. United States, 346 F.2d 775 (5th Cir. 1965).
50. See Fed. R. Evid. 704.
52. See generally E. Cleary, supra note 33, ch. 4.
53. The expert whose testimony was excluded in Buckler was available for cross-examination. The Commonwealth could have brought out any facts from the expert which would have tended to manifest his credibility or lack thereof or the credibility of his sources of information.

The argument can be raised that the admission of this type of expert testimony violates the sixth amendment right of confrontation. See United States v. Williams, 447 F.2d 1285 (5th Cir. 1971)(right arises only in criminal case). This argument fails however, when the primary objective of the provision is studied. This provision was intended to prevent depositions or ex parte affidavits from being used against the accused in lieu of personal examination and cross-examination of the witness. This system allows the accused the opportunity, not only of testing the recollection and conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the names in which he gives his testimony whether he is worthy of belief.
As do most of the cases supporting this trend of allowing reliance on third party information, the Buckler decision addresses itself mainly to expert testimony in the medical or psychiatric field. The Buckler decision says that any expert opinion based on information supplied by third parties upon which the expert would customarily rely in his practice is admissible. This holding may be too broad. Allowing any expert in any field to avail himself of this privilege may unnecessarily broaden the rule, considering the history of its use. Predicting the types of expert analysis of each situation that might arise is impossible. The philosophy of allowing the exception might be violated in some instances when an expert is allowed to give an opinion based on information supplied by third parties when such third parties are not called as witnesses. The profession might be one which is not very advanced or which does not have accurate data gathering facilities. The court in these cases must, in its sound discretion, prevent the abuse of this exception to the hearsay rule.

The Supreme Court of Kentucky has adopted an exception to the hearsay rule which should allow for judicial economy through speedier trials. There appears to be no sacrifice of judicial control or abuse of the evidentiary system by its implementation. As the technology of society adapts to changing social needs, the legal system must change also to be a compatible system.

G. Richard Wilson

Mahox v. United States, 156 U.S. 237 (1895). In California v. Green, 399 U.S. 149 (1975), the Court expounded on the idea that the confrontation guarantee focuses upon the right of the accused to confront and probe each of his accusers. Given this view of the confrontation clause, it is evident that the admission of an expert's opinion based in part on third party information does not violate this guarantee. The expert is personally available for cross-examination. The probe for the degree of accuracy and reliability of his facts and opinions is at the defendant's disposal.

54. The area where the second largest group of experts is used appears to be experts with specialized knowledge in land.
55. 541 S.W.2d at 940.

By Edward H. Ziegler, Jr.**

Several months ago a friend was good enough to pass along David Wise’s book, The Politics of Lying. The book was published in 1973, but in light of the failure of legal scholarship to investigate and propose effective juridical restraints on the official abuses of power with which the book is concerned, a brief look at the book might be of some relevance.

The philosophical assumption that democracy must rest upon the support and processes of genuine public opinion found expression very early in the history of this country. Strict guarantees of freedom of speech and of the press were included in our early state constitutions as well as in the national Constitution. Those concerned with creating and maintaining a republican structure of power based upon widespread shaping and sharing of opinion were obviously aware of the threat to such a governing arrangement posed by the ability of government to impede or influence open debate and the free expression of informed public opinion.1 In this respect, a distinguishing characteristic of democratic, as opposed to totalitarian, government is thought to be that while the former attempts to facilitate and ascertain public opinion and act largely in accordance with it, the latter attempts to engineer public opinion in support of predetermined decisions. With the rise of “executive hegemony”2 in American government, however, that theoretical distinction has become increasingly blurred. The reality of today is that American government is increasingly “administrative government,”3 and the

** B.A., University of Notre Dame; J.D., University of Kentucky; L.L.M., George Washington University; Assistant Professor of Law. Salmon P. Chase College of Law, Northern Kentucky University.
2. For an excellent discussion of the constitutional development of the rise of “executive government” in America, see Miller, Separation of Powers: An Ancient Doctrine Under Modern Challenge, 28 Ad. L. Rev. 299 (1976).
3. On the importance of administrative government in today’s society consider the following statement in R. Lorch, Democratic Process and Administrative Law 9 (1973): “Among the revolutions of our time is an administrative revolution. Administrators are no longer

419
passion of the executive branch is more and more for the art of public relations—including, among other things, the use of secrecy and misrepresentation in important international and domestic affairs, the smear tactic, and mass propaganda campaigns.

In his book, David Wise sketches the outlines of this development in post World War II America. In part, the book is concerned with the particular lies on matters of import that our past presidents from Eisenhower through Nixon have told to the American public: Eisenhower’s authorization of a press release describing the U-2 spy affair as a NASA “weather research” flight; 4 Adlai Stevenson’s announcement that no United States “personnel” or “government airplanes” had been involved in the Bay of Pigs, 5 and his many misrepresentations with respect to early United States involvement in Vietnam; 6 Johnson’s fabrication of the Tonkin Gulf incident which significantly escalated the Vietnam war; 7 and Nixon’s lies, to mention only a few, concerning the invasions of Laos and Cambodia and the bombing of North Vietnam. 8 Those matters involved largely international affairs and are now, of course, widely known if not altogether accepted as part of this nation’s realpolitik in foreign affairs.

What is not so widely realized, and what Wise’s book and others 9 like it have only recently disclosed is the extent to which presidents and the executive branch routinely dip into classified and otherwise confidential files for the purpose of leaking often misleading information to the press and the public. 10 The intent is sometimes to damage a political adversary or uncooperative newsman, but more often simply to influence and manipulate the news and the electorate. That practice has become a tradition in Washington reporting, and such secret briefings are now commonly known as “background sessions.” 11 Seldom can the truth of the information be verified, and

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 legislators or that controversies are mostly settled in the courts is far behind the times.”

5. Id. at 37.
6. Id. at 40.
7. Id. at 43.
8. Id. at 49-52.
11. Id. at 287.
the source of the leak goes undisclosed. These background sessions create, in Wise's opinion, a symbiotic and unhealthy relationship between the government and the press. “[O]fficials who are able to hide behind a cloak of anonymity may be more than normally tempted to lie, or to disseminate self-serving propaganda, than if held publicly accountable for their words . . . . [B]y agreeing to the rules for background sessions, the press enters into a sort of conspiracy of concealment with the government.”

The point is not that the press fails to criticize the government, but that in a broader perspective the press has become to a significant degree a “mere transmission belt for government pronouncements.” As noted constitutional scholar Arthur S. Miller recently stated:

As for the press—the media generally—they are more willing allies or tools of the Executive than true adversaries. Publishers and media owners, with some exceptions, come from or identify with the very social classes that have captured the political branches. The working reporters are somewhat different, but, again with some notable exceptions, are either too lazy to do more than rewrite governmental handouts or are quite content to become tacit allies of government officers.

The problem as Wise demonstrates in his chapter entitled, “The Selling of the Government,” is that the entire executive branch of the government is presently top heavy with a public relations apparatus that is apparently as often dedicated to self-serving secrecy and misinformation as it is to performing its supposed function of informing the public. It is this developing pattern of government publicity and propaganda, highlighted in Wise's book, that is the concern of these brief comments.

The President, as “the chief public relations officer of the government” heads up what Wise refers to as a “vast interlocking federal information machine.” That information machine “includes not only his own coterie of press secretaries, communicators, and media advisors, but literally thousands of public relations and information officials in the civilian and military departments of the government.” No one yet knows the precise cost or size of this information

12. Id. at 303-04.
13. Id. at 311.
14. Miller, supra note 2, at 319.
15. D. Wise, supra note 4, at 187.
16. Id.
apparatus. A 1968 study by the U.S. Civil Service Commission did indicate, however, that workers in the job category "Information and the Arts" increased at a much more rapid rate than did those in any other job category in the entire federal government between 1957 and 1968. Department and agency imagemakers now number in the tens of thousands, and one estimate in 1967 was that the federal government spent $425 million a year on public relations.

Wise gives the example of how Rogers C. B. Morton hired Harry Treleaven (an alumnus of J. Walter Thompson) within less than three weeks after being sworn in as Secretary of the Interior under Nixon. According to Wise, "Morton hired Treleaven as a $121-a-day consultant. His task was to analyze Interior's public relations and apply his Madison Avenue expertise to "streamline" and "improve the image" of the department."

Ironically, one of Treleaven's first assignments turned out to be advising the department on how to circumvent a Nixon directive ordering curtailment of self-serving and wasteful public relations activities by the executive branch. Treleaven later found time to rewrite the description of the goals of the Office of Information of the Secretary of the Interior. "Among the 'objectives of this office' listed by Treleaven were: 'to play a key role in helping develop new programs to mold public opinion in support of the secretary and the administration...and to head off or counteract adverse publicity resulting from events and activities that could put the department in a bad light (such as mine disasters, accidents in national parks, etc.).'" A film entitled *Children in the City* was produced by the Interior to show how the Nixon administration had used federal funds to aid urban recreational programs. Similar funds were not appropriated in 1971, but Treleaven ingeniously advised that "the same film could be used with a new voice track changing the thrust to an appeal for private support of an increased recreational budget."

Treleaven also proposed that the Interior spend $200,000 to

---

17. The Navy for example has no idea of how much it spent in 1976 on its public relations programs. Letter from Rear Admiral John J. Edelund to Author (March 4, 1977).
18. D. Wise, supra note 4, at 199.
19. Id. at 200.
20. Id. at 202.
21. Id. at 204.
22. Id.
$500,000 for a "full scale all-media communications program"\textsuperscript{23} to persuade coal miners that their own carelessness was a major cause of mine disasters and deaths. This project, which was to be handled by Treleaven's own company and the Holder-Kennedy Co., a Nashville public relations firm, was to consist of lapel buttons, bumper stickers, billboards, and television commercials to "help motivate miners to do what is right."\textsuperscript{24} Secretary Morton also hired a full-time director of the Interior's Office of Communications, Robert A. Kelley, at that time director of public relations for Pepsi-Cola.\textsuperscript{25} After several weeks in that job, Kelley proudly commented:

Secretary Morton, . . . was getting a hell of a lot of exposure. Wednesday night he's doing the Dick Cavett show, network; Thursday morning he's doing the CBS morning news, twelve minutes; Friday he meets with Mr. Sulzberger and the editorial board of \textit{The New York Times}. In all of these meetings he will be communicating where he stands. At the same time this enhances his personal image. It's a natural by-product.\textsuperscript{26}

The public relations efforts of the Interior Department under Secretary Morton are hardly unique in the federal bureaucracy. Many federal agencies now routinely engage in propaganda that is intended to influence public opinion and behavior in support of the agency's mission or to simply bolster the image of the agency itself. Examples of this type of propaganda are legion. Whether its FEA's Energy Ant\textsuperscript{27} campaign or Allan Funt speaking from inside a U.S. Postal Service mailbox, the bureaucracy now comes fully equipped with a media message that has seldom received external authoritative screening. In 1977 the National Audiovisual Center announced that because of the costs involved, it could no longer publish its usual "Catalog of Government Produced Audiovisual Materials." That catalog by 1975 had grown to the size of a large city's phone book.\textsuperscript{28}

Wise tells of how the Department of Transportation in its public relations efforts to generate public support for the SST printed and distributed 50,000 copies of a seventy-three page \textit{Teachers Guide for

\begin{itemize}
  \item \textsuperscript{23} Id. at 205.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id. at 206.
  \item \textsuperscript{27} \textit{FEDERAL ENERGY ADMINISTRATION, ENERGY ANT FILMSTRIP SET}, Title No. 00891.
  \item \textsuperscript{28} See \textit{NATIONAL AUDIOVISUAL CENTER, A CATALOG OF UNITED STATES GOVERNMENT PRODUCED AUDIOVISUAL MATERIALS} (1974-75).
\end{itemize}
The booklet was obviously blatant propaganda on the virtues of the then-controversial aircraft. A chapter entitled "Supersonic Pussycat" tells the story of a cat's ride to the French Riviera on an SST:

My silver fur was washed, brushed, and perfumed. My nails were done particularly well . . . . Bright and early the next morning, Mistress and I were off to the airport . . . . We made ourselves comfortable in the large roomy seats and before we knew it we were airborne . . . . The pilot announced we were cruising at an altitude of 64,000 feet and at a speed of 1,800 mph—faster than the speed of sound. Why at this rate, I thought, we'd be in Paris in less than three hours. By the time I had a few slivers of liver (excellent, by the way) and watched a short movie, we had arrived.  

Another story in the teacher's guide tells of how "Maxwell the Mouse" finds a house soundproofed from jet noises. Students were encouraged to "play airport" and to test themselves as to how they would "write the advertisements for the first flight on the SST."  

According to a fiscal 1971 study by the Office of Management and Budget, NASA with a $12.2 million public relations budget and a staff of 359, ranked only third among all federal agencies in public relations expenditures that could be accounted for. Like most federal agencies, NASA has undertaken and continues a massive propaganda effort in order to protect what some Congressmen believe to be an inflated and wasteful budget. NASA keeps the pressure on with films, booklets, and color lithographs produced and circulated at taxpayer expense. NASA's August 1976 catalog of "Educational Publications" lists, for example, the following two pamphlets: New Horizons (this booklet highlights "NASA's contributions to the solution of pressing national problems"); and Skylab and the Sun (this booklet describes "what mankind stands to gain from the skylab experience").

HEW, according to Wise, ranked second in the OMB study with a then annual public relations budget of $27.4 million and a staff of

29. D. Wise, supra note 4, at 209.
30. Id.
31. Id.
32. Id.
33. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, EDUCATIONAL PUBLICATIONS, August 1976.
34. Id. at 4.
35. Id. at 5.
Since the publication of Wise's book, HEW's propaganda efforts have been largely directed toward America's children. HEW's most recent achievement in its attempt at social engineering is its 1976 "integrated children's television series for minority and nonminority children." This series was produced in HEW's words "with a home viewing audience in mind."

One film series entitled Carrascolendas consists of 130 half-hour programs targeted for "children 3 through 9" years of age. That series, which cost the taxpayers over four and one-half million dollars, is described by HEW as a "musical comedy" whose characters "include Agapita Gomez y Gomez y Gomez—the world's only bilingual lion; Mable, the hip, Black magician; and an assortment of zanies and straights, both Anglo and Latino." Series content for all 130 shows "stresses" in the words of HEW "affective (emotional and attitudinal) concerns." Another of the series, entitled Vegetable Soup, which cost the taxpayers over one and one-half million dollars, "is intended to bridge the gap between different racial and ethnic groups." This series features "cartoons" and "animated puppets." Another is entitled South by Northwest which features "black cowboys and pioneers," while others, such as Amerasia, feature "the long-ignored history of Asian Americans," and one entitled The First Americans concerns itself "with the history and culture of the Oneida and Menominee tribes of Northern Wisconsin." Still another, called Rehop, conveys the simple

37. This is not to say that the mothers of America's poor have been overlooked. For example, a recent HEW pamphlet encourages sterilization on the ground that sexual pleasure will be increased. The Cincinnati Post and Times Star, Nov. 5, 1977 at 3.
message that "kids dig kids." 53 Outside of the probable waste of taxpayer dollars and despite the good intentions, even those in complete agreement with the goals of such a series must, at least, question for a moment the obvious implications of such efforts by Washington bureaucrats to shape, through home television viewing, the "emotional and attitudinal" makeup of America's children.

The Defense Department, however, took first place in the 1971 OMB study, referred to by Wise, with a then annual public relations budget of over $44 million and with a public relations staff of over 3,000. 54 Wise points out in his book that the true figures for the Defense Department public relations in 1971 were probably twice as high as the estimates made by OMB. 55

It is, of course, no secret that for years the Defense Department has spent enormous chunks of the public till in "the selling of the Pentagon." 56 A GAO report, cited by Wise, found that, in 1970, films produced at the Air Force's Aerospace Audio Visual Service at a cost of $13.3 million were shown 26,300 times to civilian groups. 57 One such film, entitled NORAD Tracks Santa, portrayed "Santa Claus' trip from the North Pole to homes of children in the United States . . . as tracked by the men and equipment of the North American Air Defense Command." 58 In 1977 the combined yearly advertising budgets of the four uniformed services for recruiting alone totaled nearly $68 million. 59 Senator Fulbright, whom Wise refers to as "the arch foe of the Pentagon propaganda machine," 60 once remarked that the Pentagon's "public information" program is aimed, not at providing the public "with unvarnished facts, but at persuading it that the programs and weapons systems of the Army, Navy, or Air Force . . . should have the first claim on public funds and are the key to peace." 61 Little, however, has been done to heed Senator Fulbright's warning in the same speech:

53. Id.
54. D. Wise, supra note 4, at 210.
55. Id.
57. D. Wise, supra note 4, at 210.
58. Id.
60. D. Wise, supra note 4, at 211.
There is something basically unwise and undemocratic about a system which taxes the public to finance a propaganda campaign aimed at persuading the same taxpayers that they must spend more tax dollars to subvert their own independent judgment. I am reminded of W.C. Field's admonition: "Never give a sucker an even break." That statement was made in 1969. Under Nixon's administration, nine of the eleven cabinet departments set up "a new form of electronic, fully automatic government public relations." The departments installed Spotmester machines ("tape units that carry brief recorded announcements such as speech excerpts by cabinet secretaries, and other canned features") which present in the guise of "news," stories that Wise labels "blatant propaganda." Wise provides this example of how that system works:

[A] radio station that dialed OXford 5-6201 on March 9, 1972, would have heard the following: "This is Captain Ron Tindike speaking for the Department of Defense Public Affairs. Following a five second tone, Defense Audio release for Thursday, March 9. Today's release was updated at 9:30 a.m. and includes the forty-five second story with actuality on a new lunar camera developed by the Naval Research Laboratory in Washington." The announcement, painting the development of the new camera in glowing terms, followed. The tape ended: "This concludes Defense Audio Release for Thursday, March 9."

These taped announcements, known as "actuality" reports, are changed daily and provide the benefit of allowing "a small radio station in the Midwest, for example, to broadcast a 'live' report as though it had a correspondent in Washington."

If all this seems a bit Orwellian, consider the secret study prepared by the Nixon White House and mentioned in Wise's book, which was uncovered by Congressman Moorhead. The study "included a proposal that would have 'required manufacture and installation of special FM receivers in every home radio and television set, boat, and automobile, which could be automatically turned on by the government to contact every citizen awake or asleep."

62. Id. at 344.
63. D. Wise, supra note 4, at 208.
64. Id.
65. Id.
66. Id. at 208-09.
67. Id. at 208.
68. Id. at 186.
The federal propaganda machine is as Wise tells us "at once frightening and hilarious. Its language and style often evoke the Newspeak and doublethink of George Orwell's 1984. But its humor is unintended; to the government, information is a tool of power." 69

A persuasive case can be made for the statement that the use of public administrative agencies as governing institutions is the most significant twentieth century development in the American legal system. 70 As Justice Jackson stated in 1952, the rise of administrative agencies "has been the most significant legal trend of the last century and perhaps more values are affected today by their decisions than by those of all the courts." 71 That development is not only unlikely to be reversed, but will no doubt continue in light of the complex social and economic problems that this country faces. 72 However, despite the growth and influence of bureaucratic governance in this country, the juristic literature that exists on the use of government communications as an instrument of policy is almost exclusively focused on its use in international affairs. 73 The lone exception is an agency's use of adverse publicity directly affecting a private person or business.

Agency release of inaccurate or adverse information to the public about a person or business can do devastating harm. 74 For example, in 1959, HEW issued a warning against buying cranberries. Although the contamination problem that prompted this warning only applied to cranberries from two states, HEW suggested that all cranberries might be dangerous; the result was that virtually the entire crop went unsold. Bon Vivant Soup Company went bankrupt after an agency announced that botulism in a can of vichyssoise had killed a man. In another instance, the FTC issued a proposed complaint which received widespread publicity alleging that Zex antifreeze was ineffective and dangerous. An FTC investigation later concluded that the product was effective and that the manufacturer had long since withdrawn from the market the possibly dangerous product. That subsequent development, however, was

69. Id.
73. See B. Murty, Propaganda and World Public Order 6 (1968).
74. See Hearing on H.R. 10187 § 5 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary 94th Cong., 1st Sess. ser. 29 (1975).
not publicized and the manufacturer was seriously injured.

Agency use of potentially damaging publicity, or merely threatening the use of such publicity to obtain compliance with agency policy, raises serious questions concerning maintenance of procedural due process rights of affected parties. Yet, as Ernest Gellhorn, a noted authority on administrative law, has stated, "The legal controls on administrative press releases are as undeveloped as the power of publicity is extensive." Moreover, jurisdiction of the federal courts for prior review of agency publicity appears nearly non-existent. In addition, the federal government and agency officials have almost an unlimited privilege from tort liability for defamation. The only legal tether restricting agencies in this respect was cut away with the 1976 Supreme Court decision in Paul v. Davis.

In Paul, an agency publicly branded an individual an "active shoplifter" without a prior hearing on the issue even though the person had never been convicted of shoplifting. The Court decided that a person has no "liberty" interest in reputation alone protected by procedural due process. Thus, there are now no prior restraints with respect to an agency's use of adverse publicity, and affected individuals will usually have no legal remedy in the courts. This particular irresponsible use of agency publicity has been noted for some time in the literature. What has been overlooked in legal scholarship is the growing need for legal restraints with respect to the types of government communications discussed in Wise's book.

Since the publication of The Politics of Lying, instances of agency propaganda have surfaced, which perhaps are indicative of a new, more adventurous use of government communications. Like HEW, other agencies appear to be going in for a use of propaganda unrelated to mere self-serving image making. Some agencies are already on record as having used propaganda as an ideological instrument of policy in order to influence more traditional political processes. In 1975, it was disclosed that the Commerce Department had spent nearly $250,000 and planned the expenditure of at least $1,000,000

75. E. GELLHORN, ADMINISTRATIVE LAW AND PROCESS 111 (1972).
in conjunction with the National Advertising Council to print and disseminate a booklet promoting the "free-enterprise system." The United States Law Enforcement Assistance Administration, in 1975, funneled over $670,000 into Kentucky to be used by a group known as Kentucky Citizens for Judicial Improvement, Inc. for the purpose of promoting passage of an amendment to the Kentucky Constitution changing the state's judicial system shortly before the issue was voted on in a statewide referendum. More striking is the Energy Research and Development Administration's (ERDA) printing and distributing in California of over 78,000 pamphlets entitled *Shedding Light On Facts About Nuclear Energy.* These pamphlets, which one person described as resembling "religious" leaflets, were distributed in California in June of 1976 shortly before citizens in that state voted on a statewide referendum on nuclear energy. A Congressionally requested study by GAO concluded that the ERDA pamphlets constituted "propaganda." The study found that the pamphlets "did not discuss the issues in sufficient depth to provide an objective statement on the current state of nuclear power." The study further found that ERDA had "presented certain facts and omitted others in a way which resulted in a misleading document."

The increasing use by agencies of taxpayer dollars to finance communications intended to influence public behavior and opinion has yet to be analyzed with respect to its implications on the maintenance and integrity of democratic processes. This developing aspect of modern administrative governance surely deserves closer scrutiny by the legal community. What is needed is a thorough study of the capability of existing and alternative methods of regulating agency communications to insure the free flow of necessary information, and yet provide an effective authoritative means for determining

81. U.S. LAW ENFORCEMENT ADMINISTRATION, GRANT No. 75-286.
84. Id. at iv.
85. Id. at 35.
86. Id.
the propriety of agency communications prior to dissemination, and adequate public sanctions or private remedies thereafter.

As early as 1961, Francis Rourke noted that "[t]hese apprehensions over administrative press agentry have swelled rather than receded with time, as new instruments of persuasion have been added to the weaponry of government public relations. The advent of radio and television and the growing orientation of the entire community around national affairs have now brought brainwashing on a nationwide scale within the range of at least a technical possibility."87 Less alarmist, perhaps, but to the point, is the question by Congressman Sam Gibbons at a 1971 congressional hearing: "How can you give the consent to be governed if you are misled and lied to?"88

87. Rourke, supra note 1, at 19.
88. D. Wise, supra note 4, at 354.

Reviewed by Jon Ghiselin*

Natural resources are regarded as being of two kinds. Renewable resources, such as wood, can with intelligent stewardship be exploited, replenished, and used again. Many such resources can be managed by agriculture. Non-renewable resources are those which are quickly extracted for a single use.

The history of conservation shows how some resources have been regarded differently, and hence handled differently, as their supply dwindled. This difference is basically economic. Timber barons grew rich because they could exploit forests and move on. Natural gas was once flared as a valueless by-product of oil wells.

Coal's abundance makes it cheap, but the immense amounts consumed make its extraction a complex industrial process. Capital requirements restrict the enterprise almost entirely to large corporations. The economies of scale, especially for strip mining, require that companies control large land holdings. Because of this, a single coal company is often the principal employer in an area. Such a hegemony carries considerable political heft.

Almost entirely because of trade unionism, miners now make far better livings than a few decades ago. But in some ways their lot has changed little from the days of corporate seigniory. There is sometimes a clear parallel between the treatment of land by those who extract its resources and the treatment of the people who live on that land.

Coal cannot merely be dug up and hauled away. Extensive ancillary operations must be conducted near a mine. After separation of waste rock, the coal must often be washed. Frequently, a whole area becomes permeated with varying quantities of coal dust and coal sludge.

In 1972, a West Virginia coal company's dam broke. In the valley below the dam, 125 people were killed by black coal-cleaning water. Gerald M. Stern, a Washington lawyer, describes the event and its consequences. He tells how 600 survivors of the flood sued the Pittston Company, corporate parent of the mining company, and won a large settlement. As the survivors' principal lawyer, Stern explains

---

* Ph.D. in Biology, University of Wisconsin; Professional Ecologist.
chiefly how he and other lawyers maneuvered. He discusses the law involved, and describes the evidence of tortious acts. He recounts his own compassion, doubts, and errors.

The story of the flood is constructed, often with little comment, from survivors’ depositions. These accounts alternate with other examples showing how neglect by its individual officers and employees added up to Pittston’s corporate irresponsibility. Through all this, one perceives Stern’s mild outrage that “West Virginia . . . is a colony, owned and controlled by absentee landlords.”1 One feels more strongly his commiseration with the “psychic impairment” the survivors suffered, and shares his satisfaction at winning.

What Stern’s book lacks is an indication that he understands that the Buffalo Creek disaster was rather a commonplace catastrophe. That so many mine families were affected was somewhat unusual; but what is lacking is the recognition that the behavior of the Pittston Company was typical corporate deportment.

“Development” of raw materials has historically disregarded both land and people. Timbering in the nineteenth century and mining in this century are examples which hardly need detailed description. Both are increasingly regulated as are such other misuses of limited resources now dealt with by laws which limit water pollution, protect open space, or provide for managing game as a crop.

Corporations are not natural persons and cannot feel as natural persons might about the consequences of what they do. The importance of Stern’s suit is not particularly that he won for his clients. The real significance is that, as part of a virtual revolution in environmental law, it is helping make corporations—unnatural persons—more responsible for their unnatural acts.