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REFLECTIONS ON THE ROLE OF THE SUPREME COURT IN THE PURSUIT OF EQUAL JUSTICE

Arthur J. Goldberg*

Because of our allegiance to the rule of the law, it is of the utmost importance in appraising the role of the Supreme Court that we recognize what is myth and what is reality about the Court.

The very first myth which apparently must be laid to rest in every generation is that the Court has usurped the function of passing upon the constitutionality of state and federal laws and actions. This myth, always revived during times of storm over the Court, has no solid basis in history. Chief Justice Marshall did not write on a clean slate in asserting in *Marbury v. Madison*¹ the right and duty of the Court to declare void an act of Congress contravening the Constitution. His action was forecast in the debates in the Constitutional Convention and urged by proponents as one of the solid reasons for the Constitution's adoption. Professor Charles L. Black, Jr., in his excellent book, *The People and the Court*, has summarized the historical evidence. It supports his conclusion that "[i]t seems very clear that the preponderance of the evidence lies on the side of judicial review."² And the very first Congress, composed of men whose memories of the making of the Constitution were fresh, enacted the Judiciary Act of 1789 which, from that date to this, has expressly authorized the Court to review the constitutionality of state legislation.³ This enactment was shortly followed by a succession of laws providing for ultimate review by the Court of judgments of the lower federal courts.

Thus the reality rather than the myth about the Court is that it exercises judicial review as a consequence of intent as well as tradition. Judicial review is not a usurped power but a part of the grand design to ensure the supremacy of the Constitution as law—supreme law to which all branches of government, executive, legislative and judicial, state and federal, are subject. This is what the Constitution clearly imports.

The next great myth is that, even though judicial review was intended and is sanctioned, it is nevertheless undemocratic and,

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1. 5 U.S. (1 Cranch) 137 (1803).
therefore, to be regarded with alert suspicion and its exercise to be dimly viewed. The argument has an obvious, albeit superficial, appeal. The justices are appointed for life and not elected by the people for limited terms, as the President and Congress are. The latter, so the argument goes, being representative of the popular will, should have their way—otherwise democracy will be forsaken; a guardianship, however benevolent, negates popular government.

This reasoning, however, overlooks the first fact about our Constitution—that its source is the people. It is they who mandated that the individual be protected and safeguarded in his constitutional rights even against the popular will of the moment as voiced by the legislature or the executive. Our courts were entrusted with the responsibility of judicial review, in large part, to protect individuals and minorities in their fundamental rights against abridgment by both government and majorities.

It is not a denial, therefore, but rather a supreme manifestation of democracy that the fundamental rights of the least among us are protected from government by the Constitution and safeguarded by an independent judiciary. History teaches that democracy and an independent judiciary are inseparable. A country where judges are faithful to the popular will, to the executive or to the legislature, rather than to the rule of law, will not be a democratic country worthy of the name.

Another myth disseminated about the Court is that the Court reaches out and determines troublesome cases that would best be avoided. It enters, so it has been said at times, into thickets of controversy. The reality is that the cases which the Court decides are pressed upon it. It does not seek out cases or invite their filing. Under our Constitution it issues no advisory opinions—it decides only actual cases and controversies. These must be genuine and
current; otherwise, jurisdiction will be summarily declined.

But what of cases seeking protection of political rights, should not the Court avoid them? The answer to this is that most of the cases before the Court deal with public issues of the first moment in our society—issues like reapportionment—commonly called political. As de Tocqueville said, "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."

My former colleague, Justice Brennan, accurately observed in Baker v. Carr, the germinal decision of the reapportionment cases, that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words.'" If a claim is justiciable, there is no escaping the responsibility of decision just because the constitutional right asserted is a political one.

Whatever the justification in another age or time for seeking out ways of avoiding decisions on the merits of a case, the temper of the modern world demands that judges, like men in all walks of public and private life, avoid escapism, and squarely and frankly confront even the most controversial and troublesome justiciable problems.

And surely, it should be agreed by all—supporters and critics of the Court alike—that the least possible justification for the Court to avoid adjudicating a claim of constitutional right is that the Court may injure itself if it decides the case. Is this not another way of saying that the Court should avoid unpopular decisions? I have always conceived it to be the first duty of any judge worthy of the name and office to abjure popularity in decision making. Lord Mansfield long ago stated the creed of any worthy judge:

I will not do that which my conscience tells me is wrong to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow.

Once for all, let it be understood, 'that no endeavours of this kind will influence any man who at present sits here."

The Court should—the Court must—decide the cases and controversies properly coming before it, however difficult and controversial they may be, by doing what the justices are appointed and sworn to do: "Faithfully and impartially [to] discharge and perform all the duties" of their office and to "administer justice . . . according to the best of [their] . . . abilities and understanding agreeably to the Constitution and laws of the United States." Judicial timidity is far more likely to be the undoing of the Court as an institution than the faithful exercise of judicial responsibility.

There is a myth that the Court is against states' rights, oblivious of the great interests of federalism—interests which not only reflect our history and traditions but which require constant and vigilant attention if we are to avoid overcentralism of our national government and if we are to preserve viable local government.

There was considerable substance to this myth during three decades early in this century when the Court, in the name of due process, invalidated social and economic legislation of the states as well as the nation. But, as the decisions demonstrate, the Court does not now strike down state or federal legislation because it deems laws of this type unwise or unsound. The nation and the states are free to experiment, and never have their interests in federalism been better safeguarded than they are now.

But it is asserted that the Court has intervened far more frequently than in the past to protect individuals in their constitutional rights against state action. Particularly is this true, so the argument goes, in connection with criminal prosecutions. The Court, critics charge, is following a double standard—it denies the application of the due process clause to economic cases; it applies the clause energetically to cases involving impairment of personal liberties.

There is a simple answer to this charge. There is no evidence that the Framers intended the fifth and fourteenth amendments to deny

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12. E.g., Lochner v. New York, 198 U.S. 45 (1905), where the due process clause was used to nullify laws prescribing maximum hours for work in bakeries; Coppage v. Kansas, 236 U.S. 1 (1915), which nullified a statute outlawing "yellow dog" contracts; Adkins v. Children's Hospital, 261 U.S. 525 (1923), setting aside a minimum wage for working women.
to the nation and the states their right of economic experimentation. There is every evidence that they intended the Bill of Rights and the fourteenth amendment to safeguard the fundamental personal rights and liberties of all persons against governmental impairment or denial. ¹⁴

I could continue this recital of myths about the Court, but I shall conclude with one that emanates from those who seek to support rather than condemn the Court. It is the myth that the Supreme Court is infallible. A simple and correct answer to this myth is the oft-quoted *bon mot* of Justice Jackson: “We are not final because we are infallible; we are infallible because we are final.” ¹⁵

The reality is that as a human institution the Court is bound to err. It is a tribute to its awareness of human frailty, and the extent to which the Court seeks to avoid mistakes, that a relatively few serious ones have been made in the Court’s history. ¹⁶ And, of course, it is only proper to note that reserved to the people is the right to change the course of the Court’s opinions—right or wrong—through the process of constitutional amendment. ¹⁷

There are more sophisticated mythologists who would seek to preserve the illusion of infallibility by banning dissenting opinions. The Court, by their lights, would then speak with a single authoritative voice not to be gainsaid. Some courts in other lands function in this fashion, burying their differences in a single opinion and judgment. But I, for one, would not have it this way, for I profoundly believe that in the long run the Court benefits, and certainly the people do, by the free expression of dissenting views. They educate and sometimes eventually prevail, and they always demonstrate that our judicial air, like all of the air of American life, will remain free.

So long as the Supreme Court sits, myths about it will exist. Myths are not necessarily all or entirely bad, as the literature of mythology proves. But since we must live in this world and not in a

¹⁶. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857); *Korematsu v. United States*, 319 U.S. 432 (1943) and the cases cited in note 12 supra.
¹⁷. An example is Pollock v. Farmer's Loan & Trust Co., 158 U.S. 601 (1895). The Court held that the Income Tax Act was a direct tax and thus unconstitutional and void. The adoption of the sixteenth amendment, which provided that “[t]he Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration,” effectively voided the decision.
make-believe world, myths about the Court or any other human institution must yield to reality. Otherwise our society will be the victim of our fantasies rather than the servant of our purposes.
I. Introduction

Citizen access to government information was severely restricted under the early common law. A citizen could inspect government
documents only with the consent of the crown or by showing that inspection was necessary to maintain or defend a legal action.1 Today in Kentucky and other jurisdictions, the common law is of only historical interest since it has been modified by legislative enactments, considerably broadening the right of access to government information. What follows is a preliminary analysis of the substantive rights and procedures established by Kentucky’s Open Records Act.2 The Act substantially changes earlier Kentucky law and is an attempt, in the words of the General Assembly, to guarantee and facilitate “access to information concerning the conduct of the people’s business.”3 In addition to establishing the legal right of concerned or even curious private parties to inspect most types of state and local government records, the Act provides an important new discovery tool for use by private attorneys involved in agency rule-making, adjudicatory and other administrative proceedings.

II. Scope and Definitions

Kentucky’s Open Records Act was enacted by the General Assembly in 1976 as a comprehensive legislative scheme providing private persons access to state and local public records. The Act greatly expands the right of access to public records and creates an effective method of judicial enforcement.4 The basic premise of the Act, as stated in the preamble, is that access to public records “is a fundamental and necessary right of every citizen in the Commonwealth of Kentucky.”5 The Act states that “free and open examination of public records is in the public interest”6 and that the specific exceptions from disclosure provided in the Act “shall be strictly construed, even though such examination may cause inconvenience or embarrassment to public officials or others.”7

Several key terms used throughout the Act relating to the Act’s scope and implementation are specifically defined. Definitions are

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4. On the status of Kentucky law with respect to inspection of public records prior to 1976, see City of St. Matthews v. The Voice of St. Matthews, 519 S.W.2d 811 (Ky. 1974).
7. Id.
provided for the terms "public agency," "public records," "official custodian," and "custodian." Each is discussed below.

A. Public Agency
Any "public agency" within the state is subject to the requirements of the Act. The definition of "public agency" is extremely broad including every state or local government officer, body or other instrumentality regardless of the branch of government. Even non-governmental organizations are included which derive at least twenty-five percent of their funds from state or local government.

A person or organization is considered a "public agency" under the Act if the person or organization falls within one of the following five definitions: (1) "every state or local officer. . ."; (2) "state department, division, bureau, board, commission and authority. . ."; (3) "every legislative board, commission, committee and officer. . ."; (4) "every county and city governing body, council, school district board, special district board, municipal corporation, court or judicial agency, and any board, department, commission, committee, subcommittee, ad hoc committee, council or agency thereof. . ."; and (5) "any other body which is created by state or local authority in any branch of government or which derives at least twenty-five percent (25%) of its funds from state or local authority."
B. Public Records

Except for certain types of records that are specifically exempted from disclosure, all “public records” are subject to the inspection requirements of the Act. The Act defines “public records” to include “all books, papers, maps, photographs, cards, tapes, discs, recordings or other documentary materials regardless of physical form or characteristics, which are prepared, owned, used, in the possession of or retained by a “public agency.” The Act specifically excludes from the definition of public records “any records owned by a private person or corporation that are not related to functions, activities, programs or operations funded by state or local authority.” This broad definition of “public records” covered by the Act would include any record, document, memorandum, etc., in the possession of an agency regardless of whether it is prepared or generated by agency staff or whether related to an agency function of a proprietary or governmental nature.

C. Official Custodian

The term “official custodian” as used in the Act refers to the chief administrative officer of a public agency or, if designated by such officer in writing, the head of a particular bureau or division within the agency. The official custodian is considered legally responsible for the maintenance and care of an agency’s or bureau’s records. The definition of official custodian is important in that it identifies the agency official to whom a request for inspection of records must be directed and for carrying out other duties imposed on the agency in connection with the inspection of records under the Act.

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No. 76-648 (1976). This definition of public agency as any non-governmental body that receives at least twenty-five per cent of its funds from state or local authority is not found in the Kentucky Open Meetings Act. See Ky. Rev. Stat. § 61.805(2) (Supp. 1978). Therefore, some non-governmental organizations may be subject to the requirements of the Kentucky Open Records Act but not the Kentucky Open Meetings Act. See Op. Ky. Att’y Gen. No. 76-443 (1976).


19. Id.

20. See Section III infra.
D. Custodian

The term "custodian" as used in the Act refers to the agency employee who has personal custody and control over records of an agency.\(^{21}\) The definition of custodian is important only for identifying the agency official responsible for performing certain minor duties imposed on the agency in connection with the inspection of records under the Act.\(^{22}\)

III. Right of Inspection

Except for certain types of information specifically exempted from disclosure, all public records are required to be open for inspection during an agency's regular working hours.\(^{23}\) Each public agency is required to provide suitable facilities for the exercise of this right.\(^{24}\) The Act states that the official custodian may require written application by a person who wishes to inspect agency records.\(^{25}\)

Acting pursuant to authority delegated under the Act, the state Executive Department for Finance and Administration has promulgated a uniform regulation which requires that any request to inspect an agency's records be in writing.\(^{26}\) This regulation applies to all agencies covered by the Act. It requires that a request to inspect records be filed on an official application form and that the records requested to be inspected be described on the form. This written application form must be signed by the applicant and must be filed with the official custodian of the office of the agency having physical custody of the records.\(^{27}\)

Important to note is that under the Act a person requesting to inspect public records need not have any special need or interest to inspect the records.\(^{28}\) A person who is merely curious appears to stand on equal footing with a person who has a special need to

\(^{22}\) See Section III infra.
\(^{26}\) 200 K.A.R. § 1:020(5) (1979). A public agency must post this regulation along with a form notice identifying the official custodian of agency records in a prominent location on its premises to which the general public has access. 200 K.A.R. § 1:020(6) (1979).
\(^{27}\) 200 K.A.R. § 1:020(5) (1979). A public agency is required to keep an adequate supply of forms on hand to comply with requests for inspection of forms on hand to comply with requests for inspection of agency records. 200 K.A.R. § 1:020(5)(2) (1979). Forms may also be obtained from the Central Stores of the Executive Department for Finance and Administration in Frankfort, Kentucky.
inspect the records. Also, a person requesting records is not required
to disclose the purpose of the request or the planned use of the
records. The Act states simply that "any person shall have the right
to inspect public records." This unqualified right to inspect public
records is an important departure from the common
law.30
No provision of the Act or implementing regulations expressly
requires an agency to respond by mail to a request for records.31
However, a Department of Finance implementing regulation indi-
cates an intent that agencies do so when reasonably described re-
cords are so requested.32 When copies of requested records are not
furnished by mail, the records must be inspected on the premises
of the agency having custody of the records and in the presence of
an agency employee.33 A public agency is required to furnish copies
of records when so requested after the appropriate fee for copying
has been paid.34
With respect to obtaining copies of records, the Kentucky Attorney
General has stated that the right to have copies of records is
ancillary to the right of inspection and does not stand by itself.35
That is, if a person has not inspected the records he desires to copy
and cannot describe them with specificity, there is no requirement
that agency employees search broad categories of records to identify
those records containing the information requested.36 This view
seems a rather crabbed interpretation of the Act. The Act on this
point states only that a written application may be required
"describing the records to be inspected."37 Since the Act expressly
requires that its provisions be liberally construed to effectuate its
purpose,38 a more reasonable interpretation of the Act is that a
person need only "reasonably describe" the records requested. This
interpretation seems preferable to requiring that a person
"specifically identify" particular records with which the person is

30. See H. Cross, supra note 1.
agencies with the duty to provide records upon a request by mail.)
32. 200 K.A.R. § 1:020(3)(1) (1979) states in part that "The fee shall be collected before
the copies are handed or sent to the person requesting them." (emphasis added).
36. Id.
unfamiliar. The Attorney General is no doubt correct that a person has no right under the Act to require an agency to search its records to furnish lists or data not already available. But it seems equally clear under the Act that an agency should be required to search its records reasonably described but not particularly identified unless to do so would place an unreasonable burden on the agency. Also, there is nothing in the Act to prevent a person, on his own time, from making a fishing expedition through an agency’s records subject to reasonable safeguards for the protection of records imposed by the agency.

Only three important conditions now restrict a person’s right to inspect a public agency’s records. Information in requested records that is specifically exempted from disclosure under the Act can be deleted by an agency before disclosure. The request for inspection of records must not place an “unreasonable burden” on the agency nor be intended to disrupt “essential” agency functions. When a request to inspect records is denied on either of the latter two grounds the agency can prevail only by a showing of “clear and convincing evidence” that its refusal on such ground is justified.

IV. Information Exempt From Disclosure

The operative premise of the Act is that all agency records must be disclosed except information in records which is specifically exempted from disclosure under the provisions of the Act. Agencies are permitted to deny access to nine types of information. Paraphrasing the statutory language, the nine exemptions are: (1) information of a personal nature the disclosure of which would constitute an invasion of personal privacy; (2) confidential business information; (3) information relating to confidential and prospective business locations; (4) information relating to real estate that is to be

43. Id.
44. Id.
acquired by a public agency;\(^{49}\) (5) test questions and related materials;\(^{50}\) (6) certain investigative information;\(^{51}\) (7) preliminary correspondence with private individuals;\(^{52}\) (8) preliminary advice and recommendations by agency staff;\(^{53}\) and (9) information protected from disclosure by federal or Kentucky law.\(^{54}\) Access to information in agency records that is exempt from disclosure pursuant to the above provisions is allowed “only upon order of a court of competent jurisdiction.”\(^{55}\) The Act expressly states that the above exemptions from disclosure are to be “strictly construed”\(^{56}\) by reviewing courts.

Important to note is that under the Act an entire record may not be withheld by an agency on the ground that it contains some exempt information. If requested records contain some information exempt from disclosure, the agency is to delete the protected information and provide the person requesting the records with the remaining non-exempt portions of the records.\(^{57}\) Also, the Act provides that the provisions exempting information from disclosure “shall not be construed to prohibit disclosure of statistical information not descriptive of a readily identifiable person”\(^{58}\) and shall in no way prohibit the sharing of information between public agencies when doing so serves a legitimate governmental need or function.\(^{59}\)

Each of the nine types of information specifically exempted from disclosure is discussed below.

A. Invasion of Personal Privacy

The Act exempts from disclosure “information of a personal na-
ture where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." 60 This exemption is a provision commonly found in open records legislation elsewhere. 61 It is intended to exempt from public disclosure any information contained in records such as personnel and medical files that relates to the intimate details of a person’s private life. 62 The public’s right to know is here qualified by protection of information concerning a person’s personal affairs which has no bearing or effect on official duties. In addition to medical and family matters, the exemption is likely to be construed to protect a person’s private business affairs such as an income tax return. 63 However, the Act makes clear than an agency may not refuse to disclose information simply on the ground that to do so may cause embarrassment to public officials or others. 64 The author or recipient of a document or persons mentioned therein may be embarrassed by its disclosure, but the personal privacy exemption is likely to be held applicable only to information relating to a person’s private life.

Important to note is that the exemption allowing nondisclosure of “information of a personal nature” is limited to instances where disclosure would “constitute a clearly unwarranted invasion of personal privacy.” 65 For an agency to refuse access to public records under this exemption, the release of the information would have to be not only an “invasion of personal privacy” but also “clearly unwarranted.” Case law at the federal level indicates that this issue is likely to be decided by a consideration of the extent of the potential harm to individual privacy interests and the general public interest in disclosure of the information requested. 66 At this time there are no Kentucky cases on point, but several Attorney General opinions are worth mentioning. The Attorney General has stated that under the invasion of privacy exemption, disclosure is not required with respect to employee performance evaluations; 67 mental

health records; names of patients assisted by a county ambulance service; guest registration records of a state resort lodge; property records listing ownership of real and personal property filed in the property valuation administrator's office; and information concerning a government employee except the employee's name, position, work station and salary. On the other hand, the Attorney General has stated that the exemption does not protect records of divorce proceedings, police arrests, and accident reports.

A remarkably silly interpretation of this exemption is an opinion of the Attorney General that the exemption is applicable to a request for records when the information in question involves the privacy of the person requesting the records. The purpose of the exemption clearly is to prevent an unwarranted invasion of a person's privacy by not disclosing to others personal information concerning the individual. Interpreting the exemption to apply to the release of personal information when the information concerns solely the person requesting the records is to rule in effect that the purpose of the exemption is to protect a person from violating his own privacy. Such an interpretation is not supported by either the law or logic of the Act.

As with other exemptions under the Act, entire records generally may not be withheld. If, after appropriate deletions, the information contained in a record is not descriptive of any readily identifiable person, the record must be disclosed. An individual's privacy can be protected by deletion of identifying references and other editing, which the Act requires rather than the blanket withholding of entire records.

77. Ky. Rev. Stat. § 61.884 (Supp. 1978) states as follows: "Any person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification subject to the provisions of K.R.S. 61.878."
B. Confidential Data and Commercial Information

The Kentucky Act exempts from public disclosure information related to scientific research, the application for a loan, or confidential commercial information when such information has been previously obtained from a private party. However, this exemption would seem to be applicable only under certain conditions. The provision of the Act granting the exemption states that it is applicable to:

Records confidentially disclosed to an agency and compiled and maintained for scientific research, in conjunction with an application for a loan, the regulation of a commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, applications, formulae or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person and which are generally regarded as confidential or for the grant or review of a license to do business and if openly disclosed would permit an unfair advantage to competitors of the subject enterprise.

The language of this exemption is hardly a model of good draftsmanship, and its meaning is open to conflicting interpretations. A close reading of the provision indicates that its purpose appears to be identical to similar provisions found in other open records legislation—which is to encourage cooperation in the furnishing of information to agencies by persons who are not obligated to do so and to protect the rights of persons who must furnish information to agencies. Assuming this to be the intent of the provision, the exemption is likely to be held to apply only where the following three criteria are met: (1) the information was submitted to the agency in confidence; (2) the information is generally recognized as confidential and is not otherwise publicly available; and (3) the disclosure of the information to a third party under the Act will be likely to have either of the following effects: (a) impair the ability of public agencies to obtain necessary information in the future or (b) injure the competitive position of the person from whom the information was obtained.

81. Id.
83. See, e.g., National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir.
Case law interpreting such an exemption in similar legislation has required specific proof with respect to the criteria in (3) above that disclosure of the information would harm legitimate private or agency interests in the secrecy of the information. Marking the submitted information as "confidential" or informing the agency that the information is not customarily released to the public will probably not be sufficient by itself to withstand a challenge to the exemption. Nor is it likely that a promise by a government official or a statement in the agency's regulations that the information will not be disclosed to others alone guarantee that it will not later have to be disclosed. If the final criteria for confidentiality (harm to legitimate private or agency interests in secrecy under the criteria in (3) above) is not met, the information may have to be disclosed under the Act even if it had been submitted previously to the agency in confidence.

Under criteria (3) above, the final test for confidentiality will be met and the exemption applied when disclosure of the information would give an unfair advantage to competitors of the private party who previously submitted the information to the agency. When this test for confidentiality is the issue in a lawsuit under the Act, a Kentucky court is likely to require particularized and specific justification for the agency's action in withholding the information. In this situation, the private party who previously submitted the information may assist the agency at trial by providing expert witnesses or other evidence to enable the agency to prove that disclosure of the information will harm the competitive position of the private party.

Also, under criterion (3) above, the final test for confidentiality will be met if disclosure of the information is likely to impair the ability of a public agency to obtain similar confidential data or commercial information in the future. For this test to be met, it seems clear that the information must have been furnished voluntarily to the agency. The rationale is that when a person is obligated

1974); Continental Oil Corp. v. FPC, 519 F.2d 31 (5th Cir. 1975); Mobil Oil Corp. v. FTC, 406 F. Supp. 305 (S.D.N.Y. 1976).
87. See, e.g., Charles River Park "A", Inc. v. HUD, 519 F.2d 935 (D.C. Cir. 1975).
to furnish the information to an agency pursuant to a statute of regulation, etc., the argument that the agency's ability to obtain similar information in the future will be impaired has little validity.8

An interesting question under the Act is whether a Kentucky court will allow a private party who has submitted to an agency confidential information which meets the criteria for exemption from disclosure to bring suit to enjoin the agency from disclosing the information to a third party.89 Open records legislation elsewhere has been held not to prohibit an agency from disclosing exempt information and not to create a private cause of action to enjoin agency release of confidential information to a third party.90 This question in Kentucky would appear to be resolved by reference to the provision in the Act itself which immediately precedes the list of information exempt from disclosure. This provision states that information exempt from disclosure under the Act "shall be subject to inspection only upon order of a court of competent jurisdiction."91 If the plain meaning of this provision is followed, an agency will be held not to have discretion to disclose information exempt from disclosure under the Act. The fact that the Kentucky Act does not expressly provide for judicial review of agency action in this context by a private party is unlikely to be an impediment to bringing such a suit. This would seem to be true in view of the holding of the Kentucky court that section 2 of the Kentucky Constitution grants an inherent right of court review of agency action affecting private rights when attacked on grounds of arbitrariness or abuse of discretion.92

C. Agency Real Estate Appraisals or Studies

The Kentucky Act exempts from disclosure certain types of information relating to real estate: specifically, records (1) pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's inter-

89. At the federal level, such a suit by a private party is referred to as a "reverse" Freedom of Information Act suit. Case law dealing with the availability of such suits is discussed in Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979).
est in locating in, relocating within or expanding within the Commonwealth;\textsuperscript{93} and (2) relating to real estate appraisals, engineering, or feasibility estimates and evaluations made by or for a public agency relative to acquisition of property.\textsuperscript{94} These relatively straightforward exemptions are clearly an attempt to protect private industry and public agencies against land speculators.

It should be noted that the exemption for private industry is applicable only if the information in question has not been previously disclosed.\textsuperscript{95} The provision in question does not specify what type of prior disclosure voids the exemption. Certainly, public announcement by the interested private business would allow disclosure; and probably disclosure by a third party, without confirmation by the private business, would void the exemption under a literal reading of the provision. Interestingly enough, the no-prior-disclosure requirement is not made a condition to application of the exemption when the information relates to a public agency's acquisition of real estate. However, it is not unlikely that a court would void the exemption if the circumstances of the prior disclosure indicated an abuse of the public trust by the agency involved.

The exemption relating to real estate appraisals, estimates, or evaluations made by or for a public agency is applicable until all the property in question has been acquired.\textsuperscript{96} This provision is likely to prove troublesome for the courts, since the provision also states that it is not intended to affect the law of eminent domain. Apparently a person negotiating with an agency for the sale of his land is not entitled to agency information relating to his land or nearby land that the agency has already purchased or plans to purchase. However, in an eminent domain proceeding, agency estimates and appraisals of nearby land are available through normal discovery processes and could be obtained by a third party. Whether a Kentucky court will impose some type of gag order to protect this type of exempt information when requested by an agency remains to be seen.

\textsuperscript{93} Ky. Rev. Stat. § 61.878(1)(c) (Supp. 1978). This exemption is not applicable to records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state. \textit{Id}. However, such information may qualify for exemption under the confidential commercial information provision of the Act. \textit{Id}.

\textsuperscript{94} Ky. Rev. Stat. § 61.878(1)(d) (Supp. 1978). This exemption from disclosure continues only until such time as all of the property has been acquired. \textit{Id}.


D. Tests and Examination Data

The Kentucky Act exempts from disclosure "[t]est questions, scoring keys and other examination data used to administer a licensing examination, examination for employment or academic examination before the exam is given or if it is to be given again."\(^9^7\)

The exemption obviously is an attempt to protect the integrity of testing processes. Exempted from disclosure are both test questions and answers\(^9^8\) but only before an examination is given, or after the examination if the examination is to be given again. With respect to an examination that is routinely repeated, for instance an exam for a particular academic subject or professional license, a court is very likely to hold the exemption applicable if the agency simply states that the questions are likely to be used again on some future examination without specifying specific questions and dates. Otherwise, the integrity of the future examination could be compromised.

E. Investigative Records

One of the most significant exemptions from disclosure under the Kentucky Act deals with investigative reports and files. Exempted from disclosure are "[r]ecords of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication."\(^9^9\) Unless otherwise exempted from disclosure, the Act states that information exempt under this provision must be disclosed "after enforcement action is completed or a decision is made to take no action."\(^1^0^0\)

The exemption does not embrace all information in agency files related to a pending enforcement or adjudicatory action. Information is exempt only if the agency can prove harm to its interests in that disclosure would (1) reveal the identity of an informant,\(^1^0^1\) or

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100. Id.
(2) involve the premature release of information which will be used in a prospective enforcement action or agency adjudication. Accordingly, the Kentucky Attorney General has ruled that the following investigative records are open to public inspection: local traffic accident reports; restaurant inspection reports; police arrest records; and zoning violation complaints. Similarly, the Attorney General has found some investigative agency records to be comparable to court records and thus open to public inspection. The Attorney General has ruled, for example, that the file of a case pending before the Kentucky Occupational Health and Safety Review Board is open to inspection, since it is “similar to the file of a case in a court.”

The investigative records exemption under the Kentucky Act is considerably less detailed than the corresponding exemption in the federal act. The federal statute expressly prohibits disclosure of investigative records which could prejudice a party’s right to a fair trial or an impartial adjudication. While these considerations are not expressly mentioned in the Kentucky Act, and sixth amendment “fair trial” and fourteenth amendment “due process” guarantees obviously require a similar protective approach with respect to the rights of an accused or a respondent in an adjudicatory proceeding.

Also, a conflict with the federal constitutional fourteenth amend-

   Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.
109. Id.
110. U.S. Const. amend. VI.
111. U.S. Const. amend. XIV.
ment guarantee of a fair trial and fair hearing at the state level is possible if the statement in the Kentucky Act that the exemption for investigative records continues until "after enforcement action is completed" is applied to all types of agency investigative records. The United States Supreme Court has held that in a criminal proceeding the government has a duty to disclose to the accused "exculpatory information" in its possession and so called "Jencks materials" which relate to the prior statements of government witnesses. Federal courts have extended these principles, in modified form, to administrative proceedings in which the agency is an adversary. Obviously, such information in an agency's investigative files should be disclosed prior to completion of an enforcement proceeding.

F. Preliminary Drafts and Correspondence

The Kentucky Act exempts from disclosure "[P]reliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency." The exemption of preliminary drafts and notes obviously is intended to protect the integrity of an agency's decision-making process by exempting from disclosure an agency's internal pre-decisional documents. However, further exempting from disclosure preliminary correspondence with private individuals other than correspondence which gives notice of final agency action does not appear to have any intelligible purpose. This seems especially so in view of the exemptions in the Act which protect against invasion of personal privacy and disclosure of confidential information. Nevertheless, the provision appears to exempt from public disclosure all of an agency's correspondence with a private individual prior to final agency action. In view of the Act's requirement that exceptions from disclosure "shall be strictly construed" and the basic policy of the Act of "free and open examination of public records even though such disclosure may cause inconvenience or embarrassment to public officials or others," the exempt-

tion, at the very least, should be interpreted to protect only preliminary agency correspondence and not correspondence from private individuals on file with an agency.

The Kentucky Attorney General’s rulings on correspondence from private individuals has not been entirely consistent. For example, an employment application was ruled a preliminary document exempt from disclosure while a bid from a private contractor was ruled a record open to public inspection. If the exemption is to be applied at all to private correspondence, a distinction consistent with the policy of the Act would be to limit its application to only correspondence which does not constitute what would ordinarily be considered as the “record” of the agency’s decision.

Other than the problem of interpretation discussed above, application of the exemption should present few problems. The determinative criteria for exemption will be the “preliminary nature” of the document. For example, a mailing list being prepared by the Kentucky Horse Council, in a census of the horse industry, was ruled exempt from disclosure; but the list when finalized would be open to public inspection. Similarly, a draft list of rezoning restrictions under consideration by a city was ruled exempt from disclosure as an “embryonic production aimed toward the perfecting of a final proposal.”

One Attorney General opinion has emphasized “the intention of the parties” in determining whether the exemption applies. The opinion involved an agency’s oral history program where taped interviews were conducted with private individuals with the understanding that the tapes were to be kept confidential for a certain period of time. The Attorney General ruled that the tapes were exempt as “preliminary” records on the theory that the records would become “final” only when disclosed at the later time which had been agreed on. This rationale, in effect, allows an agreement between a private party and public agency to determine the preliminary nature of records and, thus, the time when the records will be

open to public inspection. It is difficult to see how "the intention of the parties" in such a case should in any way be relevant in determining the preliminary status of records. Another provision of the Act expressly sets out the circumstances under which information submitted to a public agency in confidence will be exempt from disclosure.\footnote{127} The most logical interpretation of the Act would seem to be to exempt from disclosure information confidentially submitted to an agency only under the circumstances permitted in the specific exemption of the Act dealing with confidential information. Otherwise, a public agency will be able to exempt any records from disclosure by simply agreeing with the private party whenever it desires to do so that the records will not be disclosed.

An interesting application of the exemption is the ruling of the Attorney General that an official but tentative line-item budget of a school district is not a preliminary document within the scope of the exemption.\footnote{128} Since changes would have to be made at a later time to balance the budget in question, it was not literally a final budget. Nevertheless, the Attorney General correctly ruled that the document was not a preliminary document since it was final in the sense that it was the official budget and currently in force. A different conclusion might well open the door to a "tentative" agency classification scheme for records by which many agency policies, though currently in force, would be withheld from public inspection on the ground of likely or possible revision of the policy at some later time.

G. Pre-decisional Advice

In addition to the "preliminary draft" exemption, the Act also exempts from disclosure "[p]reliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended."\footnote{129} This exemption is clearly one of the more significant barriers to disclosure in the Act, although worded differently from its counterpart in federal legislation.\footnote{130} Case law

\footnote{127. Ky. Rev. Stat. § 61.878(1)(b) (Supp. 1978). The oral history tapes in question would seem to meet the requirements for exemption under this provision and also perhaps under the exemption protecting personal privacy.}


\footnote{130. 5 U.S.C. § 552(a)(6)(C)(b)(5) (1976). This provision exempts from disclosure: "inter-agency or intra-agency memorandum or letter which would not be available by law to a party other than an agency in litigation with the agency." The committee report discussing this exemption states: . . . it would be impossible to have any frank discussion of legal or policy matters in}
interpreting the federal exemption clearly indicates that the exemptions share the same purpose to protect the integrity of a public agency’s internal deliberative process.\textsuperscript{131} The rationale is that agency decision-makers will not receive the benefit of frank and uninhibited discussion of policy matters by agency staff unless their advice or opinions are protected from public scrutiny. The exemption thus serves to protect the integrity of an agency’s deliberative process by shielding preliminary staff advice and opinions from disclosure under the Act.

Generally, pre-decisional documents containing advice, opinions, or recommendations used in an agency’s deliberative process would seem to fall within the scope of the exemption. All papers which reflect an agency’s group thinking that have been generated as part of a process leading to the formulation of an agency policy, or making a decision, are likely to be held exempt from disclosure.\textsuperscript{132} Since the exemption serves to protect the deliberative process, for a document to be withheld from disclosure it must have been generated or used in that process. However, a court is not likely to require that a connection be shown between a specific document and a particular decision or policy in view of the fact that deliberative processes do not always result in decision.\textsuperscript{133}

As with the other exemptions in the Act, entire records may not be withheld if the opinions or advice which are exempt from the disclosure can be deleted.\textsuperscript{134} Cases applying the similar federal exemption have refused to apply the exemption to “factual” data or statements so long as the factual information is not “inextricably intertwined” with policy matters or its disclosure would not otherwise reveal or impinge upon the agency’s deliberative process.\textsuperscript{135}

writing if all such writings were to be subjected to public scrutiny. It was argued, and with great merit, that efficiency of government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to ‘operate in a fishbowl.’


133. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); see also text accompanying note 128 supra.


135. See National Cable Television Ass’n v. FCC, 479 F.2d 183 (D.C. Cir. 1973). An example would be where disclosure of the information would allow discovery of what facts were selected or discarded from a public record in preparing an advisory memorandum for an agency decisionmaker. See Mead Data Central, Inc. v. United States, 402 F. Supp. 460 (D.D.C. 1975).
Another distinction under the federal exemption, which would seem to apply with equal logic to the exemption in the Kentucky Act, is that between pre-decisional and post-decisional documents. Only preliminary opinions or advice used in the formulation of an agency decision or policy is exempt from disclosure. Documents which state an agency's policy or which explain the basis for an agency policy or decision are not exempt from disclosure. The exemption is intended to protect the process used in the formulation of a policy, but not the policy or decision itself. Post-decisional information will usually create or provide a means of determining substantive private rights and liabilities.

H. Information Protected by Federal or State Law

The Kentucky Act exempts from disclosure records or information whose disclosure is prohibited by federal law or regulation or by an enactment of the Kentucky General Assembly. The scope of the exemption will obviously depend in a particular case on the wording of the relevant law used to bar disclosure. Such an authorization to withhold records from public inspection is likely to be found in an agency's enabling statute or in the statute authorizing collection of the information.

V. Agency Response Time

Most public records should be immediately available for inspection by a person the same day an application for inspection form is filed with the official custodian. The official custodian is required by law to "promptly determine the availability" of records requested for inspection. If the records requested are not immediately avail-

138. Id.
able for inspection because they are in active use, or storage, etc., the official custodian is required to immediately notify the applicant either orally or in writing of the cause of the delay and to designate a time, place, and date for inspection of the records "not to exceed three days from receipt of the application." If the records requested cannot be produced for inspection within three working days after receipt of the application, the official custodian must give a detailed explanation of the cause for further delay and designate the time, place, and earliest date on which the records will be available for inspection.

Unreasonable delay by an agency in producing requested records is treated under the Act as if the record had been denied by the agency. If an agency intends to deny inspection of a record it must notify the applicant in writing within three working days after an application for inspection is filed stating the reason for the denial in whole or in part, indicate the specific exemption from disclosure claimed, and explain how the exemption applies to the record withheld. The written response denying inspection of records must be issued by the official custodian or under his authority, and it constitutes final agency action.

VI. Enjoining Proceedings Pending Response

The Kentucky Act is likely to be used as a reasonably effective discovery tool. Access to agency information afforded under the Kentucky Act is likely to be a valuable supplement to, and often an improvement on, existing discovery procedures in agency hearings. The Act, of course, can be invoked independently of any pending or threatened agency proceeding. Where an information request under the Act is related to a specific agency proceeding, the question arises as to whether a court may enjoin the agency proceeding pending agency compliance with the Open Records Act request. The Kentucky Act does not expressly grant courts the power to enjoin agency proceedings pending agency response to a request for information under the Act. Nevertheless, courts in similar situations have implied such equitable power and have enjoined agency pro-

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146. Id.
ceedings until the agency has responded to such a request. This relief is generally granted upon a showing by the person requesting the information that unless the agency proceeding is enjoined "irreparable injury" will result.

VII. Cost of Inspection and Copies

Under the Kentucky Act, a person requesting public records has "the right to make abstracts" and "memorandum thereof" and "to obtain copies of all written records." If copies of records are desired, other than written records, the custodian must allow a person to duplicate such records so long as the duplication does not alter or damage the records.

Agencies are authorized to prescribe a reasonable fee for making copies of public records. However, the prescribed fee by law must "not exceed the actual cost thereof not including the cost of staff required." Thus, the Act makes clear, that costs related to search for and review of requested records by agency personnel are not to be charged to the person requesting the records. A person may only be charged the actual cost "of making copies" of the records requested. Presently, a uniform fee of ten (10) cents a page is charged by all public agencies for making copies of written records. Copies of photographs, maps and other non-written material, including records stored in computer files, are required to be provided at whatever the actual cost is of making such copies but not including the cost of agency personnel time that might be involved. The fee charged for making copies or records must be paid before copies of the records requested will be handed or sent to the person requesting them. Agencies are required to advise persons requesting copies of records of the total actual cost of making copies of written records and the actual, if known, or approximate cost, of producing copies of non-written records before copies are made by the agency. The

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148. E.g., Encyclopedia Britanica, Inc. v. FTC, 517 F.2d 1013, 1014 (7th Cir. 1975); GSA v. Benson, 415 F.2d 828 (9th Cir. 1969).
150. Id.
155. Id.
prescribed agency fee for making copies of records is not applicable
to documents printed for sale or which are customarily distributed
without charge. 156

VIII. Interagency Exchange

The Kentucky Act makes clear that the exemption from disclo-
sure "shall in no way prohibit or limit the exchange of public re-
cords" between agencies when the exchange is necessary in the per-
formance of a legitimate government function. 157 The sharing of oth-
erwise exempt information with another agency under this provi-
sion, would not seem to affect the status of the records as infor-
mation exempt from public inspection. Also, information exchanged
between agencies is not itself specifically granted exempt status,
under the Act. Such information would be subject to public inspec-
tion unless the information falls within the scope of the specific
exceptions from disclosure provided in the Act.

IX. Role of Attorney General

A public agency's denial of a request for records under the Act is
immediately subject to judicial review in a circuit court by the party
whose request has been denied. 158 However prior to seeking judicial
relief, a party whose request for records has been denied may re-
quest the Kentucky Attorney General to render an opinion on the
correctness of the agency's decision. 159 The Attorney General must
respond to such a request within ten (10) business days and forward
a copy of his opinion to the requesting party. 160 A party may also
request an opinion from the Attorney General when it appears that
the intent of the Act is being subverted short of an agency denial
such as by a request for exercise fees or agency delay. 161 Even in
such situations, a party requesting records need not request an At-
torney General opinion before seeking court review of the agency's
actions. 162

An opinion by the Attorney General is merely advisory under the

156. Id.
Act. Neither the party requesting records nor the agency involved are bound by an opinion of the Attorney General. An agency's failure to follow an Attorney General opinion, however, may well be a factor a reviewing court considers in determining whether requested records were "willfully withheld" in violation of the Act when deciding whether to award attorney's fees in a suit under the Act.

X. Judicial Enforcement

A party whose request for records has been denied or otherwise impeded by an agency may seek judicial review of the agency decision, as action in a state circuit court. The court is authorized to enforce the Act by injunction or other appropriate order. The case is tried de novo, and the burden of proof is on the agency. The court on its own motion or on motion of either of the parties may examine the records in camera. The Act expressly provides that a circuit court when ruling on a request for agency records must consider the basic disclosure policy of the Act and the Act's policy that exemptions from disclosure be strictly construed "even though such examination may cause inconvenience or embarrassment to public officials or others." Also, suits under the Act "take precedent on the docket over all other cases and shall be assigned for hearing and trial at the earliest practicable date."

XI. Recovery of Costs and Damages

A party who prevails against an agency in a suit under the Act may, upon a finding that the records were wrongfully and willfully withheld, be awarded all costs, including attorney fees, incurred in connection with the suit. The Act also provides that the court may in its discretion award the prevailing private party an amount not to exceed twenty-five dollars for each day that the person was denied access to the records requested. This award is paid by the

168. Id.
170. Id. Except as otherwise provided by law or rule of court.
172. Id.
person or agency the court determines is responsible for the violation.\textsuperscript{173} Such an award, like the award of costs, is likely to be held to depend on a finding by the court that the agency acted “willfully” in withholding records in violation of the Act.\textsuperscript{174}

\section*{XII. Toward a Conclusion}

The Kentucky Open Records Act is already an improvement on the common law. Except for certain information exempt from disclosure, any person, regardless of motive or interest, may inspect and copy a public agency’s records. The exceptions from disclosure provided in the Act appear, for most part, sound and necessary if government is to operate effectively and efficiently. If the Act is applied by courts in a manner consistent with its basic purpose to facilitate “access to information concerning the conduct of the people’s business,”\textsuperscript{175} the Act might well indirectly result in more responsible government. Of course, this result will depend in citizen interest and responsibility. As everyone knows, good laws do not necessarily produce good government, and the Kentucky Act may well turn out to be a mere “paper tiger.”

The Kentucky courts also share the responsibility for effective implementation of the Act. This is particularly true with regard to the provisions of the Act which authorize withholding of records when a request places an “unreasonable burden” on an agency or is intended to disrupt “essential” agency functions.\textsuperscript{176} These two provisions have the potential for subverting the basic disclosure policy of the Act. Their application by the courts will have much to do with whether government in Kentucky actually receives the sunlight of informed public scrutiny.

\begin{footnotesize}
\begin{itemize}
\item[173.] Id.
\item[174.] Id. This would seem the most likely interpretation in view of the preceding provision in this section of the Act. The section reads:
\begin{quote}
Any person who prevails against an agency in any action in the courts seeking the right to inspect and copy any public record may, upon a finding that the records were willfully withheld in violation of KRS 61.870 to 61.884, be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. If such person prevails in part, the court may in its discretion award him costs or an appropriate portion thereof. In addition, it shall be within the discretion of the court to award such person an amount not to exceed twenty-five ($25) for each day that he was denied the right to inspect or copy said public record. The costs or award shall be paid by such person or agency as the court shall determine is responsible for the violation.
\end{quote}
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\end{footnotesize}
THE INITIAL FILING PERIOD IN OHIO WORKERS' COMPENSATION LAW

Jeffrey V. Nackley**

Under Ohio Revised Code section 4123.84, a claimant must file, within two years after the date of injury or death, a workers' compensation claim specifying "part or parts of the body claimed to have been injured." Failure to timely file the claim will "forever bar" the claimant's rights to workers' compensation benefits for

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1. Claims barred after two years; exceptions
   (A) In all cases of injury or death, claims for compensation or benefits for the specific part or parts of the body injured shall be forever barred unless, within two years after the injury or death:
      (1) Written notice of the specific part or parts of the body claimed to have been injured has been made to the industrial commission or the bureau of workers' compensation:
      (2) The employer, with knowledge of a claimed compensable injury or occupational disease, has paid wages in lieu of compensation for total disability;
      (3) In the event the employer has elected to pay compensation or benefits directly, one of the following has occurred:
         (a) Written notice of the specific part or parts of the body claimed to have been injured has been given to the commission or bureau, or the employer has furnished treatment by a licensed physician in the employ of an employer; providing, however, that the furnishing of such treatment shall not constitute a recognition of a claim as compensable, but shall do no more than satisfy the requirements of this section;
         (b) Compensation or benefits have been paid or furnished equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code.
   (B) As used in division (A)(3)(b) of this section "benefits" means payment by a self-insured employer to, or on behalf of, an employee for:
      (1) A hospital bill;
      (2) A medical bill to a licensed physician or hospital;
      (3) An orthopedic or prosthetic device.

The commission shall provide printed notices quoting in full division (A) of this section, and every employer who is authorized to pay compensation direct to injured employees or dependents of killed employees shall be required to post and maintain at all times one or more of such notices in conspicuous places in the workshop or places of employment.

The commission has continuing jurisdiction as set forth in section 4123.52 of the Revised Code over a claim which meets the requirement of this section, including jurisdiction to award compensation or benefits for loss or impairment of bodily functions developing in a part or parts of the body not specified pursuant to division (A)(1) of this section, if the commission finds that the loss or impairment of bodily functions was due to and a result of or a residual of the injury to one of the parts of the body set forth in the written notice filed pursuant to division (A)(1) of this section.

Ohio Rev. Code Ann. § 4123.84 (Page 1973)

2. Id.
that injury unless compensation or benefits have been paid within that time by his or her self-insured employer equal to or greater than that provided for in Ohio Revised Code sections 4123.52, .55 through .62, or .64 through .67. The purpose of the initial filing period is to enable the employers to protect themselves by prompt investigation of the injuries. It is primarily a notice requirement. Thus, it may be distinguished in purpose from general statutes of limitations which serve to protect against "stale claims" or "faded memories" and to gain the "repose" of society.

The two-year rule has been described as jurisdictional and substantive; therefore, the remedies which overcome general statutes of limitations have been held not to apply here. Specifically, courts have barred claims filed after the expiration of the two year period notwithstanding such reasons as reliance or estoppel, lunacy, infancy, imprisonment, and ignorance of the existence of the right.

3. Id.
6. See Callahan, Statutes of Limitation—Background, 16 Ohio St. L.J. 130 (1955). The purpose for statutes of limitations in workers' compensation has elsewhere been similarly stated; for example, to "encourage diligence and prevent injustice," Morrison v. Industrial Accident Comm'n of Cal., 29 Cal. App. 2d 528, 85 P.2d 86 (1938).
8. Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972); Payne v. Keller, 18 Ohio App. 2d 66, 247 N.E.2d 311 (1969). Perhaps by this is meant, "the limit of time must be regarded as not merely a statute of limitations but also as one of the conditions of the right of action." Keser v. U.S.S. Lead Refinery, 88 Ind. App. 246, 163 N.E. 621 (1928) (en banc). See also Higgins v. Heine Boiler Co., 328 Mo. 493, 41 S.W.2d 565 (1931); Hilty v. Fairbanks Exploration Co., 82 F.2d 77 (9th Cir. 1936).
9. Greenwalt v. Goodyear Tire & Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (1955), involved a promise by an employer to file an application for the claimant. The employer let the two years run whereupon the claimant attempted to open the claim. The court held that the claimant had no rights under the act except subject to the conditions enumerated therein. Timely filing being the responsibility of the claimant, the employer was not liable and the claim was barred. See also State ex rel. Koval v. Industrial Comm'n, 74 Ohio L. Abs. 490, 141 N.E.2d 306 (Ct. App. 1956) (barring a claim in which a claimant failed to timely file in reliance upon a wrongful representation by the employer's medical director that the claimant had no compensable injury); cf. State ex rel. Caton v. Industrial Comm'n, 76 Ohio App. 249, 61 N.E.2d 806 (1945) (where filing a claim with a claims adjuster was held not sufficient to toll the statute).
11. Westrich v. Industrial Comm'n, 50 Ohio App. 234, 197 N.E. 823 (1935) (applying the bar against a minor not withstanding Ohio General Code § 11229 OHIO REV. CODE ANN. §
One may assume from the strictness with which the statute has been interpreted in Ohio that fraud would not relieve a claimant from the duty to comply with the two-year statute, although there is some authority to suggest that fraud will overcome jurisdictional (if not "substantive") defects.


13. Larimore v. Perfect, 45 Ohio App. 136, 186 N.E. 739 (1932) (applying the bar notwithstanding failure by the claimant to discover the disability until after the two years had elapsed). Thus, Ohio has rejected Larson's articulation of the rule: "The time period for notice of claim does not begin to run until the claimant as a reasonable man should recognize the nature, seriousness, and probable compensable character of his injury or disease." 3 A. LARSON, supra note 4, § 78.41.

14. Ohio seems relatively harsh in its application of the two year rule. See 3 A. LARSON, supra note 4, §§ 78.45-.49.
15. Greenwalt v. Goodyear Tire & Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (1955), discussed in note 9 supra. To the same effect is Hilty v. Fairbanks Exploration Co., 82 F.2d 77 (9th Cir. 1936) construing the following Alaskan statute: "Any and all claims for compensation hereunder shall be barred unless an action for the recovery of the same shall be commenced within two years after the cause of action shall have accrued. . . ." COMP. LAWS ALASKA 1933 § 2189. The court held:

The limitation therein prescribed goes not merely to the remedy, but to the right of action created by the act. This right of action is wholly statutory and must be accepted with all the conditions and limitations which the act imposes. The requirement that action be commenced within two years is a limitation upon the remedy. The requirement is absolute and unconditional. If the action is not commenced within two years, there is no right of action, and pleas of ignorance, concealment, misrepresentation, and fraud are of no avail.

Hilty v. Fairbanks Exploration Co., 82 F.2d at 79.
16. An unreported case from the Lucas County Court of Appeals holds: "R.C. 4123.74 does not exempt an employer for fraud when the employer intentionally withholds from an employee information, known to the employer as a result of physical examinations of the employee over a period of 13 years, concerning the employee's progressive condition of pneumoconiosis." Delamotte v. Unitcast Division of Midland-Ross Corp., (Lucas County No. L-78-039, Ct. App., Dec. 15, 1978), reported at 55 Merriman & Sutherly Rpts 100 (Aug. 31, 1979).


There emerges, then, a critical difference between the two-year rule and general statutes of limitations. The general maxim is that a statute of limitations extinguishes the remedy but not the right. In Ohio workers' compensation law, the statute of limitations describes the extent of the rights involved—remedy and right are co-extensive.

There are basic inconsistencies in the approaches of the Ohio courts to the two-year rule. An inference from the harsh treatment of claimants under the statute, for example, is that the courts do not really mean what they are saying when they call the statute "substantive." All substantive statutes in this field are to be construed "liberally" and the only possible exceptions are those statutes which are "remedial" or "procedural."

_Shira v. B.F. Goodrich Co._ is revealing because it holds the statute to be remedial in a case in which such a holding works a hardship on the claimant. The claimant alleged that an injury occurred on July 27, 1941. On September 4, 1942, the General Code was amended to require written notice. Prior to the amendment, oral notice was sufficient. On March 24, 1942, an oral application was allegedly made, but no written application was filed until August 27, 1947. Had the court held the amendment to be substantive, it


17. See 51 AM. JUR. 2d Limitations of Actions § 22 (1970); 53 C.J.S. Limitations of Actions § 6 (1948).

18. It has been said,

> Where by statute a right of action is given which did not exist at common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right and will control. In such a case time is made the essence of the right created, and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation and a lapse of the statutory period operates to extinguish the right altogether.


20. _Cf._, _State ex rel._ Holdridge v. _Industrial Comm'n_, 11 Ohio St. 2d 175, 228 N.E.2d 621 (1967).


22. For a history of this change in the statute, see _Wilson_, _Analysis of Important Amendments to Workmen's Compensation Act_, 12 J. CLEV. B.A. 173 (1941).
would have had no retroactive effect, and the claimant’s oral application would have tolled the statute. However, the court took the distinct minority position without acknowledging contrary precedent: “It is our view that the Section 1465-72a, General Code, [predecessor of Ohio Revised Code § 4123.84] before and after the amendment effective September 4, 1941, was and is remedial in operation on rights, obligations, duties and interests already existing; that it does not create and define substantive rights.”

If the distinction between “substance” and “remedy” means anything at all, the Shira court is correct in asserting that the filing requirement is remedial. Yet, only if it is remedial can it be excepted from the liberal construction requirement of Ohio Revised Code section 4123.95. Therefore, when other courts insist that it is substantive and strictly construe the statute because it is substantive, they only beg the two questions they raise: Upon what bases do we separate those “substantive” statutes which are to be liberally construed from those which are to be strictly construed? If the filing requirement is one of substance, are there any non-substantive statutes in workers’ compensation laws?

A more no-nonsense approach is suggested by the cases which hold that the statute describes the condition precedent or that the statute is mandatory or jurisdictional. Since the language of the statute is clear, there is not much to “liberally” construe. This approach also has the advantage of applying a clearly written statute without considering whether it refers to form or substance.

However, if a worker injured at work informs the employer who promises to file the application and in the meantime pays wages during the worker’s disability, and thereafter the claim is barred

24. 67 Ohio L. Abs. at 550, 121 N.E.2d at 297.
25. My reading of the statute (set out in note 19 supra) finds no exceptions for “remedial” or “non-substantive” statutes. If remedy and right are truly inseparable in this area, making the distinction for purposes of liberal construction is unsound.
28. E.g., State ex rel. Carr v. Industrial Comm’n, 130 Ohio St. 185, 198 N.E. 480 (1935).
29. Another approach is that the statute is simply a condition annexed to a right, and not a statute of limitation at all. See McCrater v. Stone & Webster Eng’r Corp., 248 N.C. 707, 104 S.E.2d 858 (1958); Warinchak v. United States Steel Corp., 267 N.E.2d 395 (Ind. App. 1971). This represents the logical extreme of the “condition precedent” thesis and, in a satirical way, points out the problems some courts have had in dealing with this issue.
because of failure to timely file, the problem is not with the merits of the claim but with the remedy itself. The underlying rationale of the courts appears to be that since the jurisdiction of the Commission is limited by statute, it has no general equity powers to invoke remedies which transcend statutes.

Concededly, remedies against failure to timely file based upon fraud, duress, estoppel, or ignorance are founded in equity, but the Commission is not entirely without equity powers:

Had there been fraud or imposition practiced upon the commission—a quasi-judicial body—in the procurement of the award, the commission under equitable principles has the same power to vacate a decree so procured as is exercised by courts of general jurisdiction. Irrespective of any statute for a vacation, such power has always been regarded as being inherent in the body whose jurisdiction has been thus befouled.

Thus, under Kilgore and the language quoted above, the Commission has general equitable powers to vacate an award because of the fraud of a claimant. Yet, under Greenwalt it has no power to protect a good claim from the fraud of an employer. In an area of law devised for the benefit of injured workers and in proceedings which remain ostensibly non-adversary, such a position cannot be justified. When a claimant is defrauded of his rights, it is no answer to say that there is a "jurisdictional bar" to the claim, because the underlying question has not been addressed: When is a jurisdic-


It must be recognized that the hearing first had before the Industrial Commission on an application for compensation is not an adversary proceeding as is a court trial, the primary obligation of the commission being to assist the applicant in all proper ways rather than to conduct the hearing with all the technique and opposition of a trial: to use every effort to oppose a fraudulent or unfounded claim but to be likewise alert to assist those who seem reasonably justified in seeking compensation, and, if there be any doubt, to resolve that doubt in favor of the claimant.

56 Ohio App. at 540, 11 N.E.2d at 253. But see discussion of the de facto adversary nature of the proceedings in Beall & Beall, The Procedure and Practice, 19 Ohio St. L.J. 591 (1958). "Non-adversary" proceedings generally mean there are no opposing parties, i.e., the claimant or potential beneficiary simply addresses her or his case to the decision-maker. See, e.g., regulations for evidentiary hearings before a Social Security Administration Administrative Law Judge in 20 C.F.R. §§ 404.917, 404.927, 404.934 (1975).
tional bar ineffective? The question is the same when a litigant brings a civil suit, and the answer should often, though not always, be the same. The scope of the Commission's jurisdiction should be limited by subject matter, not by such dubious categorizations as "law" and "equity."

An intriguing early case dealt with the problem of the initial filing requirement without resort to the contrivances later appended by the courts. In Industrial Commission v. Rotar a widow-claimant resided in Austria-Hungary during World War I. Before the restoration of peace, her husband was killed while working in Ohio. She made an application for death benefits more than two years after the date of death, but within two years of the formal restoration of peace. The Commission argued that the widow-claimant was a resident of that part of the Austrian Empire which became Yugoslavia, and therefore, she was not really an "enemy alien." The court held:

It is elementary that, when a state of war exists, an alien enemy cannot prosecute any claim in the courts of a country. Irrespective of statute, this is the universally accepted rule. The right of action is merely suspended until the close of the war, at which time it may be asserted by an alien enemy.

There is no language in the decision about "substance" or "conditions" or "jurisdiction." The court simply treated the filing requirement as it would any other statute of limitation and found a good reason to extend the statutory limit.

The two-year rule is also treated as a jurisdictional, substantive, and mandatory bar to the filing of an application for an additional award for an employer's violation of a specific safety requirement (VSR Claim). Yet, VSR claims are not mentioned in Ohio Revised

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34. Since a workers' compensation claim is relatively easy to obtain (i.e., compared to civil actions), there are sound policy reasons for not waiving the initial filing requirement in the cases of lunacy, infancy, or ignorance. But when the delay is the result of actions or neglect by the Commission, the Bureau of Workers' Compensation, or the employer, and when such actions or neglect place those bodies on actual or constructive notice, waiver of the bar is entirely consistent with the broader statutory scheme of compensating workers for their injuries and the particular notice requirements of Ohio Rev. Code Ann. § 4123.84 (Page Supp. 1978), § 4123.95 (Page 1973). The fact that an action is created by statute does not obliterate every legal concept in the area. Nor should it be used by the courts as a substitute for analysis.

35. 124 Ohio St. 148, 179 N.E. 135 (1931) (affirming 40 Ohio App. 168, 178 N.E. 208 (1931)).

36. Id. at 149, 179 N.E. at 136 (citations omitted).

37. Id. at 148, 179 N.E. at 135.

38. See, State ex rel. Fruehauf v. Industrial Comm'n, 154 Ohio St. 241, 95 N.E.2d 381 (1950); State ex rel. Carr v. Industrial Comm'n, 130 Ohio St. 185, 198 N.E. 480 (1935); State ex rel. Curry v. Industrial Comm'n, 58 Ohio St. 2d 268, 389 N.E.2d 1126 (1979) (which barred
Code section 4123.84, only "all cases of injury or death." A literal approach must concede that VSR claims are not within the purview of the statute. The refusal of the courts to accept this literal reading of the statute is best explained in State ex rel. Carr v. Industrial Commission: "The action under this provision [VSR under Article II, Section 35, of the Ohio Constitution] is in no sense a modification of the previous award but, on the contrary is a new, separate, and distinct award, application for which must be filed within the period limited by the statute." Since the VSR penalty is so distinct in nature from the allowance of the claim, the Carr court's assertion that it is "in no sense a modification" may be accepted. But exactly how this premise brings the filing of such an award within the ambit of Ohio Revised Code section 4123.84 is a matter of considerable difficulty. By its terms, that statute pertains only to "injuries" involving "specific parts or part of the body." Carr does not suggest that the employer's violation of certain code sections is either another injury or a new part or parts of the body. Rather, it discusses the fact that "negligence—or rather the failure of the employer to comply with some specific lawful requirement" is the basis of the VSR award, distinguishing it from the underlying death claim. The court does not explain exactly why this would bring the VSR claim within the substantive parameter of a statute which is being strictly construed. If anything, the distinctions between the VSR award and the types of claims listed in the statute indicate quite the opposite conclusion from that reached by the court.

A two-year rule for filing VSR claims is expressly stated in an

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40. The only rule of limitation which specifically mentions VSR awards is the Industrial Commission's regulation, Ohio Adm. Code § 4121-3-20(A) (Banks-Baldwin 1978).
41. 130 Ohio St. at 188, 198 N.E. at 482.
42. From this premise, it follows that the continuing jurisdiction of the Industrial Commission would not apply to VSR claims until after they are distinctly allowed. See State ex rel. Curry v. Industrial Comm'n, 58 Ohio St. 2d 268, 389 N.E.2d 1126 (1979).
44. 130 Ohio St. at 188, 198 N.E. at 482.
45. Id.
46. It was the predecessor of Ohio Rev. Code Ann. § 4123.84 (Page Supp. 1978) which was discussed in Carr. The statute read:
In all cases of injury, or death, claims for compensation shall be forever barred, unless within two years after the injury or death, application shall have been made to the industrial commission of Ohio, or to the employer in the event such employer has elected to pay compensation direct.
Industrial Commission regulation, analysis of which would raise such questions as: Does the Commission have authority to issue the rule? Is the rule reasonable? and, Is the rule consistent with the underlying statutory and/or constitutional scheme? There is no reason to suppose that the Industrial Commission rule is violative of any rule of law or reason. Yet, the imposition of jurisdictional limits upon any arguably valid claim should be done with caution. Perhaps the Carr court was simply construing VSR's as strictly as possible and, therefore, held the initial filing requirement to be jurisdictional and substantive by applying the most appropriate statute. It would have been less preferable for the court to have insisted upon a jurisdictional/substantive limitation by applying the Commission's own rule, since such an arrangement would have implied that the Commission had power to vest and divest itself of its own jurisdiction.

The reason for the failure of equitable remedies to overcome the two-year rule is that the rule in workers' compensation statutes is jurisdictional and substantive. However, insofar as the filing

48. Other regulations of the Commission or the Bureau of Workers' Compensation have been ruled upon applying these basic principles. See, e.g., State v. Brand X Corp., 12 Ohio St. 2d 81, N.E.2d 404 (1967); State ex rel. Kildow v. Industrial Comm'n, 128 Ohio St. 573, 192 N.E. 873 (1934); State ex rel. Herbert v. Saunders, 72 Ohio App. 413, 52 N.E.2d 675 (1943); Industrial Comm'n v. Colella, 17 Ohio App. 301, 1 Ohio L. Abs. 344 (1923); and Midvale Coal Co. v. Cardox, 24 Ohio Op. 2d 124 (C.P. Tuscarawas County, 1948).
51. However, State ex rel. DeBoe v. Industrial Comm'n, 72 Ohio L. Abs. 317, 134 N.E.2d 859 (Ct. App. 1953) held as follows:
Under the rule-making powers of the Industrial Commission . . . such a rule has the same force and effect as a law of the state. . . . Since the claimant failed to perfect his remedy within the time provided for under the aforesaid rule, the order of the respondent [Commission] became final . . . and the respondent was divested of jurisdiction to consider the violation . . . as set forth in the motion.
Id. at 319, 117 N.E.2d at 862. The rule under discussion in DeBoe was the thirty-day provision for filing for reconsideration of VSR orders presently found in Ohio Adm. Code § 4121-3-20(G) (Banks-Baldwin 1978). Notwithstanding the impression which the above language gives, the case should not be read as granting the Commission power to vest itself with jurisdiction through its rules. The rule under consideration actually was one reserving jurisdiction over an order, i.e., rendering an order not final until the lapse of 30 days after issuance. Compare State ex rel. Kresge v. Industrial Comm'n, 157 Ohio St. 62, 104 N.E.2d 450 (1952) with State ex rel. Oberlin v. Industrial Comm'n, 114 Ohio App. 135, 178 N.E.2d 250 (1961).
52. Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972); Payne v. Keller, 18 Ohio App. 2d 66, 247 N.E.2d 311 (1969). Perhaps by this is meant, "the limit of time must be
period is imposed by administrative regulation rather than by statute, it could be waived in particular instances,\textsuperscript{53} so long as the "public interest" is not affected.\textsuperscript{44} Thus, the Ohio courts have neatly avoided any possibility of liberality in VSR claims by applying Ohio Revised Code section 4123.84 to them.

Notwithstanding the strictness of construction afforded to both the two-year rule and VSR claims, it has been held that a claimant may modify a citation in a VSR claim after more than two years from the date of injury.\textsuperscript{55}

To bring an application within the parameters of the two-year rule, a claimant must give notice of the specific "part or parts of the body claim[ed] to have been injured,"\textsuperscript{56} (which does not bar filing for resultant disability "residuals")\textsuperscript{57} of the allowed injury\textsuperscript{58} pursuant to an amendment effective December 11, 1967. The amendment may be considered a legislative response to \textit{Laas v. Young},\textsuperscript{59} which permitted a claimant to amend a claim setting forth new parts of the body from those alleged within the first two years of injury. Because of the present language of the statute, it has been the policy of the Commission to regard injury descriptions, such as "multiple contusions" or "electric shock," insufficient to toll the

\begin{itemize}
\item \textit{Keser v. U.S.S. Lead Refinery}, 88 Ind. App. 246, 163 N.E. 621 (1928) (en banc).
\textit{See also} \textit{Higgins v. Heine Boiler Co.}, 328 Mo. 493, 41 S.W.2d 565 (1931); \textit{Hilty v. Fairbanks Exploration Co.}, 82 F.2d 77 (9th Cir. 1936). \textit{Greenwalt v. Goodyear Tire \\& Rubber Co.}, 164 Ohio St. 1, 128 N.E.2d 116 (1955), involved a promise by an employer to file an application for the claimant. The employer let the two years run whereupon the claimant attempted to open the claim. Held: The claimant had no rights under the act except subject to the conditions enumerated therein. Timely filing being the responsibility of the claimant, the employer was not liable and the claim was barred. \textit{See also} \textit{State ex rel. Koval v. Industrial Comm'n}, 74 Ohio L. Abs. 490, 141 N.E.2d 306 ( Ct. App. 1956) (barring a claim in which a claimant failed to timely file in reliance upon a wrongful representation by the employer's medical director that the claimant had no compensable injury); \textit{cf. State ex rel Caton v. Industrial Comm'n}, 76 Ohio App. 249, 61 N.E.2d 906 (1945) (where filing a claim with a claims adjuster was held not sufficient to toll the statute).
\item \textit{State ex rel. Allied Wheel v. Industrial Comm'n}, 166 Ohio St. 47, 139 N.E.2d 41 (1953).
\item \textit{See Kaiser v. Industrial Comm.}, 136 Ohio St. 440, 26 N.E.2d 75 (1949); \textit{Kittle v. Keller}, 9 Ohio St. 2d 177, 224 N.E.2d 751 (1967).
\end{itemize}
two-year rule.\textsuperscript{66} As an alternative to filing with the Bureau or the Commission, Ohio Revised Code section 4123.84(B) mandates the tolling of the statute when a self-insured employer pays a hospital bill, a medical bill, or for an orthopedic or prosthetic device.\textsuperscript{61} 

*Francis v. Chrysler*\textsuperscript{62} held that the furnishing of medical services to an employee by a salaried plant physician was not such a benefit as would invoke the tolling provision of this section. In what was clearly a response to this holding, the legislature amended the statute to read as follows: "or the employer has furnished treatment by a licensed physician in the employ of an employer; Providing, however, that the furnishing of such treatment shall not constitute a recognition of a claim as compensable but shall do no more than satisfy the requirements of this Section."\textsuperscript{63}

The two-year rule for occupational disease claims is found in Ohio Revised Code section 4123.85. Although it contains no tolling provision where bills are paid by a self-insured employer, that clause of Ohio Revised Code section 4123.84, by its terms, pertains to occupational diseases. The difficulty in ascertaining commencement of an occupational disease is widely acknowledged.\textsuperscript{64} Many states mark the date as the beginning of incapacity to work.\textsuperscript{65} There is no "date of injury" in Ohio occupational disease claims since, under the definitions, there is no injury in such claims.\textsuperscript{66} Instead, Ohio Revised Code section 4123.85 uses the more problematic term "date of disability." According to the former rule of the Bureau, disability due to an occupational disease shall be deemed to have begun as of the date on which the claimant first became aware through medical diagnosis\textsuperscript{67} that he was suffering from such disease, or the date on which he first received medical treatment for such disease, or the date claimant first quit work on account of such disease, whichever date is the latest.\textsuperscript{68}

\begin{footnotes}
\item 61. OHIO REV. CODE ANN. § 4123.84(B) (Page 1973). It has been suggested that payment of compensation is evidence of notice. 3 A. LARSON *supra* note 4, § 78.31(d). This would be consistent with Ohio's scheme wherein the two-year rule is primarily a notice requirement.
\item 62. 44 Ohio St. 2d 229, 339 N.E.2d 826 (1975).
\item 64. See 100 C.J.S. Workmen's Compensation § 437(C) (1958).
\item 65. Id.
\item 67. See State ex rel. Maxwell v. Industrial Comm'n, 81 Ohio L. Abs. 61, 160 N.E.2d 346 (Ct. App. 1959) *infra* nn. 77-79 for support for this interpretation.
\item 68. Important Resolutions, Rules, Orders, and Instructions Issued by the Bureau of Work-
\end{footnotes}
The recently promulgated regulations of the Bureau and the Commission delete this useful rule, but its continued use as a guideline (there being no other guidelines available and the long-term acquiescence by the legislature and courts indicating it is within permissible administrative jurisdiction) is preferable to leaving this rather significant issue to the interpretation of various hearing officers and Regional Boards of Review.

The statute does provide a grace period after the expiration of the two years "within such longer period as does not exceed six months after diagnosis by a licensed physician."\(^6\) Prior to October 1, 1963, the statute read: "six months after diagnosis . . . or within six months after date claimant is informed of the diagnosis."\(^7\) Although under ordinary rules of statutory interpretation,\(^8\) the change in the statute probably meant that the legislature intended to remove the "date claimant informed of diagnosis" as a reference point for the six month extension,\(^9\) the legal history surrounding the change reveals that such an intent is not as clear as it first appears. In 1959, the court in \textit{State ex rel. Maxwell v. Industrial Commission},\(^10\) construed a virtually identical requirement in Ohio Revised Code section 4123.68 under which claims specifically for silicosis "are forever barred unless application therefore is made to the commission within one year after total disability began or within such longer period as does not exceed six months after diagnosis . . . by a licensed physician."\(^11\) Affidavits from two physicians indicated the claimant was not informed of the diagnosis, "made" considerably earlier, until April or May, 1955. The claimant filed his claim on June 26, 1955. The court held: "Lack of knowledge in this instance should prevent the running of the statute until the diagnosis is completed and made known to the claimant or his representative."\(^12\)

\(^{7}\) Act of July 24, 1959, 128 Ohio Laws 743.
\(^{9}\) However, the date claimant was informed of diagnosis may validly mark the "date of disability" and therefore begin the two-year period rather than the six-month extension.
\(^{10}\) \textit{81 Ohio L. Abs.} 61, 160 N.E.2d 346 (Ct. App. 1959).
\(^{12}\) \textit{State ex rel. Maxwell v. Industrial Comm'n}, 81 Ohio L. Abs. at 64, 160 N.E.2d at 349.
It seems unlikely that the legislature intended two virtually identical clauses in the same area of law to be construed differently. Furthermore, had the legislature wanted to remove the “date claimant informed of diagnosis” from both statutes, it appears that the specific silicosis statute of Ohio Revised Code section 4123.68 would have been amended after the Maxwell decision. Nevertheless, the ambiguity of this particular legislative response would not overcome the strong presumption that the legislature intended to do something when it changed the statute, were it not for the legislative and administrative history since that amendment. Every indication is that neither the Industrial Commission nor the Bureau of Workers’ Compensation has changed its treatment of occupational diseases in any way in response to this particular legislative change, but have retained “date claimant informed of diagnosis” as the reference point in occupational disease claims. The legislature has failed to respond to the administrative gloss on the statute for the past sixteen years. When the body charged with administering a law has chosen an interpretation of a statute for a long period of time, it is presumed that the legislature has acquiesced in that interpretation and that the interpretation is correct.

The legislature has ambiguously expressed its intent regarding the “date of diagnosis” clauses in Ohio Revised Code sections 4123.68 and 4123.85. On the one hand, the 1963 deletion of the “date claimant informed of diagnosis” probably meant the legislature intended to remove that clause from Ohio Revised Code section 4123.85. However, the failure of the legislature to respond to either the Maxwell interpretation of Ohio Revised Code section 4123.68 or to the administrative gloss on Ohio Revised Code section 4123.85,

76. See 82 C.J.S. Statutes § 343 (1953).
78. Standard review sheets used for evaluation of occupational disease claims, in the Industrial Commission Legal Section, have always noted both “date of diagnosis” and “date claimant informed of diagnosis.” Also, see discussion above pertaining to retention of “first became aware” in the definition of “date of disability.”
79. Plainly claimants should be expected to display no greater diagnostic skill than any other uninformed layman confronted with the early symptoms of a progressive condition . . . Of course, if even qualified physicians have not been able to present claimant with a diagnosis of his condition within the limitations period, the claim should not be barred.
80. See 50 Ohio Jur. 2d Statutes § 268 (1961); 82 C.J.S. Statutes § 316 (1953).
as revised, probably means that the legislature intended to retain "date claimant informed of diagnosis" as a reference point in occupational disease claims. Under the former view, the 1963 amendment deleted references to "date claimant informed of diagnosis" from both statutes. Under the latter view, the intent of the legislature in 1963 was to remove surplus language in § 4123.85. The legislative, judicial, and administrative history favoring retention of the "date claimant informed of diagnosis" interpretation is not as ambiguous as the single legislative response of 1963. In any event, the two statutes using the same language should be given the same effect.

Considering the history of the clauses, it would be facile to argue that the Maxwell case is the only judicial interpretation in Ohio of the "date of diagnosis" clause. However, any but the most superficial argument on the other side must concede that the legislative expression of intention in the 1963 amendment is ambiguous. Therefore, any definitive interpretation must rest upon other grounds. Both Ohio Revised Code section 4123.95, the liberal construction clause, and analysis of the purpose of the statute lead to the conclusion that the administrative interpretation has been correct. Knowledge acquired by the claimant seems to be central to the purpose of the clause. It is a "grace period," giving the claimant a reasonable time in which to file after discovering the disability. Uncommunicated knowledge by a physician has little to do with that purpose. Furthermore, other jurisdictions which do not have a date of diagnosis extension on occupational disease statutes usually extend the filing based upon the awareness by the claimant of the nature of the disability.

The leading Ohio authority makes clear the intent of the six month extension: "The two-year period is extended to six months after diagnosis of the occupational disease by a licensed physician to cover those situations where an employee might have disability from an occupational disease but not know the nature of the disabil-

81. See 82 C.J.S. Statutes § 343 (1953).
82. Id. § 316.
ity." Given the two possible interpretations of the 1963 amendment, the one referring to knowledge of the claimant appears more in keeping with the purpose of the statute and, therefore, should be followed. In 1963 a reading of the amendment was slightly more indicative of removal of the "date claimant informed of diagnosis" interpretation from both statutes. However, that reading was by no means certain and the administrative bodies chose an alternative interpretation. That interpretation has been in effect for sixteen years with legislative acquiescence and, therefore, proven correct.

Death claims arising from occupational diseases, however, have received different treatment. Neither the language of Ohio Revised Code section 4123.85, nor the judicial history of the statute, permit the inference that the six-month grace period based upon date of diagnosis pertains to these claims. The date of diagnosis was held to be irrelevant in State ex rel. Willis v. Industrial Commission. In Willis, the date of diagnosis was December 2, 1955. The dependent of a decedent filed an application for benefits on March 27, 1956. There was no provision for "date of diagnosis" in the statute at the time, and the court refused to read one into it.

Several changes have occurred in the statute since Willis, most notably, for present purposes, the "date of diagnosis" extension.

87. See 82 C.J.S. Statutes § 323 (1953).
88. The authority of administrative bodies to interpret ambiguous statutes is implicitly recognized in Ohio Rev. Code Ann. § 1.49 (Page 1978). "If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: . . . (F) The administrative construction of the statute."
89. In interpreting a statute, it is a well-settled rule that a resort made, under proper circumstances, be had to the construction given thereto by those charged with its execution and application, especially where it has long prevailed. . . . The construction placed upon a statute by executive departments or bureaus is not only persuasive, but is entitled to great respect and great weight, and it is not to be disregarded or set aside unless judicial construction makes it imperative to do so.
90. See Ohio Rev. Code Ann. § 4123.85 (Page 1973). Note that the adjectival clause, "or within such longer period as does not exceed six months after diagnosis" appears before the disjunctive separating "date of disability" from "date of death." Applying ordinary rules of usage, the modifier does not apply to the latter clause. See also, State ex rel. Raymond v. Industrial Comm'n, 140 Ohio St. 233, 42 N.E.2d 992 (1942), which refused to refer to date of diagnosis in a death claim when there was none in the statute.
Assuming that the addition of this grace period was responsive to Willis, the change in the statute was placed so as not to pertain to death claims. The harshness of this rule against the survivors of workers dying from exposure to various chemical toxins or obscure diseases, the exact nature of which is not ascertained until long after death, seems inconsistent with the purpose of workers' compensation law. However, since the history of the initial filing period indicates that nothing short of war or strict compliance will toll the statute, it seems unlikely that the courts will read into it something that is not there simply to avoid harsh results.
THE FEDERAL DEPLETION DEDUCTION FOR OIL, GAS, AND COAL

Robert W. Miller*

I. Oil and Gas

Oil and gas, like other minerals in place, are wasting assets. The production of oil and gas is treated as an income producing operation instead of a conversion of capital investment upon a sale. It is also categorized as a manufacturing business carried on by the use of the soil,¹ and the depletion effected by production is compared to the depreciation of machinery or the using up of raw materials in manufacturing.²

The Internal Revenue Code allows a deduction for depletion of the property, intending it to serve as a tax-free return of the capital investment consumed in the production of gross income through severance of the minerals.³ However, in order to encourage development of natural resources, the Code also provides for depletion based on a stipulated percentage of the gross income from the property without regard to the amount of the investment therein.

If the depletion allowance is to apply, the oil and gas must be sold, not merely produced.⁴ Thus, a taxpayer may not claim depletion on oil and gas which are consumed in the mining operation⁵ or on any oil which is destroyed before sale.⁶

A. Economic Interest

The questions of who is taxable on the income derived from the production of the oil and gas, and who is entitled to the depletion deduction on such production, are answered by determining who has a capital investment in the minerals in place and what the

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5. Le Danois Land & Stone Co. v. Commissioner, 215 F.2d 475 (5th Cir. 1954); Roundup Coal Mining Co., 20 T.C. 388 (1953).

extent of the investment interest is.\(^7\)

It is well settled that a taxpayer must possess an economic interest in the oil and gas produced in order to claim the depletion deduction with respect to such oil and gas.\(^8\) The United States Supreme Court has held that a taxpayer possessed an economic interest when he had acquired, by investment, any interest in the oil in place and secured, by any form of legal relationship, income derived from the extraction of the oil to which he must look for a return of his capital.\(^9\) This standard for determining the existence of an economic interest has subsequently been adopted by the Internal Revenue Service.\(^10\)

The various economic interests a taxpayer may possess include royalties, working or operating interests, overriding royalties, net profits interests, production payments, and carried interests.\(^11\) A royalty basically is an interest in minerals in place entitling the owner to a specific portion of the total production from the property. A royalty differs from an overriding royalty in that the latter can only be created from an operating interest, and its existence is limited to the term of the operating interest from which it was created. An operating interest is a interest in minerals in place burdened with the cost of development and operation of the property. A net profits interest is an interest in minerals in place, defined as a share of gross production measured by net profits in the operation of the property. A production payment is a right to minerals in place entitling the owner to a specified portion of production for a limited time, or until a specified sum of money or number of mineral units has been received. A carried interest is an arrangement between two or more co-owners of a operating interest in which one advances all or part of the development costs on behalf of the others, which advances are recovered from any future production accruing to the other owners’ share of the operating interest.

A taxpayer who, through a contractual relation, has a mere economic or pecuniary advantage derived from production does not


\(^8\) Palmer v. Bender, 287 U.S. 551 (1933).

\(^9\) Id.

\(^10\) Treas. Reg. § 1.611-1(b)(1).

\(^11\) Id.
possess an economic interest. For example, if A, who owns all of the mineral rights for Blackacre, enters into an agreement with B, whereby B may purchase the produced mineral, B merely has a pecuniary advantage derived from production, not an economic interest.

Depletion deductions allocable to an economic interest owned by a corporation are allowable as deductions to the corporate entity but not to the individual shareholders. The opposite treatment is accorded to members of a partnership, where the depletion allowance is computed separately by the partners and not by the partnership. This is done by allocating to each partner his proportionate share of the adjusted basis of each partnership oil or gas property. The adjusted basis is the cost of the property plus all subsequent expenditures which were capitalized rather than deducted as current expenditures. The adjusted basis of partnership property assigned to each partner should be consistent with each partner's interest in partnership capital or income, except the partners may agree among themselves as to how the depletion deduction is to be shared in order to take account of any variation between the basis of the property to the partnership and its fair market value at the time of contribution.

Where there is a lease, the depletion deduction must be equitably apportioned between the lessor and the lessee(s). If a taxpayer holds an interest in oil and gas for life, the remainder to another on the taxpayer's death, the taxpayer is entitled to claim all of the allowable depletion during his lifetime, and the remainderman may claim any remaining depletion upon the death of the holder of the life estate.

If oil and gas are held in trust, the depletion deduction must be apportioned among the income beneficiaries and the trustee on the basis of the trust income from trust property allocable to each, unless the trust instrument, or local law, requires or permits the trustee to maintain a reserve for depletion in any amount. If the trustee is permitted or required to do so, the deduction is first allocated to the trustee to the extent income is set aside for a depletion
reserve, and any part of the deduction which exceeds the reserve income set aside is apportioned among the income beneficiaries and the trustee on the basis of the trust income (in excess of the reserve) allocable to each.\textsuperscript{18}

The depletion deduction attributable to oil and gas property held by an estate is apportioned among the estate, heirs, legatees, and devisees on the basis of estate income from such property which is allocable to each.\textsuperscript{19}

B. Cost Depletion

The taxpayer owning a proper economic interest is required to compute depletion using two different formulas: cost depletion\textsuperscript{20} and statutory percentage depletion.\textsuperscript{21} He then must claim the larger amount as the allowable depletion deduction.\textsuperscript{22}

The cost depletion deduction available for an oil or gas property is computed by dividing the adjusted basis of the property before depletion at the end of the taxable year by the number of units of oil or gas remaining at the end of the taxable year plus the units sold during the year. The quotient is then multiplied by the number of units of mineral sold within the taxable year.\textsuperscript{23}

The regulations provide a different formula for a natural gas well from which the annual production is not metered and cannot be estimated with reasonable accuracy. The cost depletion is computed by multiplying the adjusted basis of the property by a fraction, the numerator of which is the decline in closed or rock pressure during the taxable year and the denominator of which is the expected total decline in closed or rock pressure from the beginning of the taxable year to the economic limit of production.\textsuperscript{24} Taxpayers who use this method are required to keep accurate records of periodic pressure determinations.\textsuperscript{25}

These two formulas may pose a problem to the taxpayer who owns a production payment which is limited by a dollar amount rather than a total amount of production units. Courts have approved the following method: divide the amount of the proceeds from the pro-

\textsuperscript{18} Treas. Reg. § 1.611-1(c)(4).
\textsuperscript{19} Treas. Reg. § 1.611-1(c)(5).
\textsuperscript{20} I.R.C. §§ 611-612.
\textsuperscript{21} I.R.C. §§ 611, 613.
\textsuperscript{22} Treas. Reg. §§ 1.611-1(a), 1.613-1.
\textsuperscript{23} Treas. Reg. § 1.611-2(a)(1).
\textsuperscript{24} Treas. Reg. § 1.611-2(a)(4).
\textsuperscript{25} Id.
duction payment for the taxable year by the face amount of the production payment which is unpaid at the beginning of the taxable year; then multiply by the adjusted basis of the property at the end of the taxable year.\textsuperscript{26} If a certain amount of money is to be included as interest in a production payment which is limited by a dollar amount, the amount of the interest payment must be added to the unpaid face amount of the production payment.\textsuperscript{27}

The Internal Revenue Service has attempted to clarify the problem of computing cost depletion for a production payment which contains an amount equal to interest (referred to as "interest equivalent element").\textsuperscript{28} Revenue Ruling 65-10 provides two methods of computing depletion for such production payments: The "sum of the dollars" method is computed by multiplying the basis of the production payment at the end of the year (before adjustment for depletion) by a fraction, the numerator of which equals the total proceeds received from the production payment during the taxable year and the denominator of which equals the total expected amount remaining to be recovered from the production payment at the beginning of the year.\textsuperscript{29} The other method is called the "decline in principal" method. It is computed by multiplying the basis of the production payment at the end of the year by a fraction, the numerator of which is the portion of the proceeds from the production received during the taxable year applied against the principal (excluding the "interest equivalent element") and the denominator of which is the principal balance of the production payment at the beginning of the year (with the total estimate "interest equivalent element" excluded).\textsuperscript{30} The Ruling requires that after a taxpayer has elected to use either the "sum of the dollars" method or the "decline in principal" method with respect to a production payment acquired within a taxable year for which a return has not been filed, the taxpayer must obtain the consent of the Commissioner of Internal Revenue before changing the election.\textsuperscript{31}

A cash payment to a lessor upon the execution of a lease is considered a bonus in the nature of an advance royalty.\textsuperscript{32} If a taxpayer-

\begin{footnotes}
\item[26] John Vaccaro, 1943 T.C.M. (P.H.) ¶ 43, 433.
\item[27] Id.
\item[29] Id. at 255.
\item[30] Id.
\item[31] Id.
\item[32] Herring v. Commissioner, 293 U.S. 322 (1934).
\end{footnotes}
lessor receives such a bonus, as well as retaining a royalty, upon the granting of a lease for oil or gas, the taxpayer is entitled to a cost depletion allowance on the bonus, which is computed by multiplying the basis of the minerals by the bonus, and then dividing by the sum of the bonus plan the estimated royalties expected to be received. Any basis not recovered in the initial computation using this formula will be recovered through depletion as the royalties are actually received.

C. Percentage Depletion

The deduction for percentage depletion is a stipulated percentage of gross income from the property interest, which shall not exceed 50% of the taxpayer's taxable income from the property (computed without allowance for depletion). Since percentage depletion is based on a percentage of gross income, a taxpayer is entitled to claim percentage depletion, even though he has previously claimed deductions to the extent of reducing his basis in the property to zero. The taxpayer could not claim cost depletion, because he would have no basis for determining such depletion but could still claim percentage depletion.

Historically, the only requirement a taxpayer had to satisfy to claim percentage depletion was that he owned an economic interest in the oil or gas being produced from the property. However, due to strong congressional action within the last decade in the Tax Reform Act of 1969 and the Tax Reduction Act of 1975, the mere possession of an economic interest is not enough to qualify one for the percentage depletion deduction.

The Tax Reform Act of 1969 provided that a production payment, which is a right to minerals in place entitling the owner to a specified fraction of production for a limited time or until a specified sum of money or number of minerals units has been received, will be treated as a mortgage loan on the property rather than an economic interest, with two exceptions.

One exception applies when a production payment is granted by the owner of the working interest in the lease and the consideration

34. Id.
35. I.R.C. § 613(a).
38. I.R.C. § 636.
is utilized for exploration or development of the oil or gas property, provided gross income from the property, for purposes of percentage depletion under the Code prior to January 1, 1975, would not be realized by the grantor in the event the production payment was not to be treated as a mortgage loan. The consideration received is an expenditure for development or exploration to the extent that it is necessary for ascertaining the existence, location, extent, or quality of any deposit or mineral, or is incident to and necessary for the preparation of a deposit for the production of mineral. For example, assume that A acquires a lease from B for a $10,000 bonus and a one-eighth royalty. A now has an operating interest in the property, but he lacks funds for exploration and development. C, an investor, advances $500,000 to A, which A pledges to use for exploration and development, and A agrees to pay C $900,000 out of four-fifths of the first oil and gas produced from the property. The production payment would be treated as an economic interest subject to depletion rather than a mortgage loan on the property.

The other exception applies when a production payment in oil and gas is retained by the lessor in a leasing transaction. The lessor will treat the production payment as an economic interest in the property, but the lessee is required to treat the production payment as a bonus payable in installments and must capitalize the amounts as leasehold costs at the time of payment. Since the lessor has an economic interest, the amounts he receives in discharge of the production payment are gross income subject to depletion. For example, assume that in 1971, A leases a mineral property to B, reserving a one-eighth royalty and a production payment in the principal amount of $300,000 plus an amount equivalent to interest. In 1972, B pays A $60,000 of the principal due, plus $16,350 equivalent to interest. The adjusted basis of the property in the hands of B for 1972 includes the $16,350 paid to A. In 1973, B pays A $60,000 principal plus $12,750 equivalent to interest. B’s adjusted basis for 1973 and years thereafter must include the $72,750 paid to A. The $76,350 received by A in 1972 and the $72,750 in 1973 are gross income to A, subject to depletion in the years he received such amounts.

41. I.R.C. § 636(c).
43. Treas. Reg. § 1.636-2(b).
44. Treas. Reg. § 1.636-2(c).
The effect of the Tax Reduction Act of 1975 was much stronger, because it repealed the allowance for percentage depletion on gross income from oil and gas properties, subject to certain exemptions. There are four basic interests which are still subject to a percentage depletion allowance: regulated natural gas from domestic wells, natural gas from domestic wells which is sold under a fixed contract, some geothermal deposits, and the interests of certain independent producers and royalty owners.

The Code defines “natural gas sold under a fixed contract” as being “domestic natural gas sold by the producer under a contract in effect on February 1, 1975, and at all times thereafter before such sale, under which the price for such gas cannot be adjusted to reflect any increase in liabilities of the seller for tax under this chapter by reason of the repeal of percentage depletion for gas.”

The Code defines “regulated natural gas” as being “domestic natural gas produced and sold by the producer, before July 1, 1976, subject to the jurisdiction of the Federal Power Commission, the price for which has not been adjusted to reflect to any extent the increase in liability of the seller for tax under this chapter by reason of the repeal of percentage depletion for gas.”

A geothermal deposit is defined as a “geothermal reservoir consisting of natural heat which is stored in rocks or in an aqueous liquid or vapor (whether or not under pressure).”

The Energy Tax Act of 1978 allows a depletion deduction for natural gas which is produced from geopressed brine if the drilling of the well began after September 31, 1978 and before January 1, 1984. Gas produced from geopressured brine where the drilling does not fall within that time span will be subject to the Code provisions for other types of natural gas.

Under the independent producer and royalty owner’s exemption, a taxpayer may determine an allowance for percentage depletion on the gross income from as much of his average daily production as does not exceed his “depletable oil quantity” as established by the Code.

45. See generally, I.R.C. §§ 611, 613 & 613A.
46. I.R.C. § 613A(b).
47. I.R.C. § 613A(c).
50. Energy Tax Act of 1978, Pub. L. No. 95-618, tit. IV, § 403(a), 92 Stat. 3203 (to be codified at IRC § 613(e)(3)).
51. Id. § 403(b) (to be codified at IRC § 613A(b)(2) & (3)(C)).
The Code provides for a depletable oil quantity of 2,000 barrels of domestic crude oil per day in 1975 and for reduction to 1800 in 1976, 1600 in 1977, 1400 in 1978, 1200 in 1979, and 1,000 barrels in 1980 where it will remain.  

A taxpayer who wishes to claim percentage depletion on natural gas rather than crude oil may elect to convert either some or all of his depletable oil quantity into an equal quantity of depletable natural gas at a rate of 6,000 cubic feet of natural gas for every barrel of crude oil. Of course, the taxpayer must deduct one barrel of “depletable oil quantity” which he could have claimed for each 6,000 cubic feet of “depletable natural gas quantity” which he does convert.

The taxpayer's average daily production for purposes of determining “depletable oil quantity” or “depletable natural gas quantity” is determined by “dividing his aggregate production of domestic crude oil or natural gas, as the case may be, during the taxable year by the number of days in such taxable year.” A taxpayer, who owns a partial interest in the production, multiplies the total production of such property by his percentage participation in the revenues from such property.

Having determined his average daily production and how much of that average is his “depletable oil quantity” for a particular year, the taxpayer must apply the appropriate percentage depletion rate to gross income from his depletable oil quantity. The applicable percentage for determining percentage depletion was established at 22% for the years 1975 through 1980, at which time it will be decreased according to the following schedule:

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>20%</td>
</tr>
<tr>
<td>1982</td>
<td>18%</td>
</tr>
<tr>
<td>1983</td>
<td>16%</td>
</tr>
<tr>
<td>1984 and thereafter</td>
<td>15%</td>
</tr>
</tbody>
</table>

The Code provides that the taxpayer's average daily production, with respect to the independent producer and royalty owner's exemption, shall be reduced, but not to less than zero, by the taxpayer's average daily secondary or tertiary production.

53. Id.
54. I.R.C. § 613A(c)(4).
55. Id.
58. I.R.C. § 613A(c)(5).
The Regulations define the term “secondary or tertiary production” as that which is produced after a secondary process has been applied to the mineral extracting process. Any production after the application of the secondary process, which would not have been produced but for the secondary process, qualifies as “secondary or tertiary production” and shall reduce the taxpayer’s average daily production for purposes of the independent producer and royalty owner’s exemption.

To determine secondary or tertiary production, a taxpayer divides his aggregate production resulting from such secondary processes during the taxable year. If the taxpayer owns only a partial interest in the production, his secondary or tertiary production is determined by multiplying secondary or tertiary production from the property by the taxpayer’s percentage participation in the revenues from such property.

Secondary or tertiary production is subject to a depletion rate of 22% until January 1, 1984, at which time it will become subject to a 15% rate, the same as other oil and natural gas with respect to the independent producer and royalty owner’s exemption.

The Code also provides that in the event of any transfer of an interest in a “proven” oil or gas property occurring after December 31, 1974, the transferee may not consider the production from such interest in determining his status under the independent producer and royalty owner’s exemption. The Code defines a “proven” property as one in which “at the time of the transfer, the principal value of the property has been demonstrated by prospecting or exploration or discovery work.”

The Code recognizes six specific transfers which shall be excluded from the “proven interest” provision: a transfer of oil or gas at death; a § 351 exchange of property for controlling stock or securities in a corporation, if, following the exchange, the independent producer and royalty owner exemption is allocated between the

60. Proposed Treas. Reg., § 1.613A-7(k).
61. Id.
64. Supra, note 60.
66. Id.
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transferor and transferee. (Note that if such allocation is not made, the "proven interest" provision applies to the exchange); a transfer of oil or gas which occurs as a result of a change of beneficiaries of a trust, because of the death, birth, or adoption of any vested beneficiary, if the transferee was a beneficiary of such trust or is a lineal descendant of the settlor or any other vested beneficiary of such trust; a transfer of oil and gas properties between corporations which belong to the same controlled group of corporations; a transfer of property between business entities under common control, that is, 50% or more of the beneficial interest is owned by the same or related persons, or between related persons in the same family; and a transfer of an interest in oil and gas properties between a trust and related persons in the same family, to the extent that the beneficiaries are and continue to be related persons in the family that transferred the property. For this final exception to apply, depletable oil quantity must be allocated between members of the family.

Another limitation on the independent producer and royalty owner's exemption is the retail product exclusion, which provides that the exemption is not available to any taxpayer who directly, or through a related person, sells oil, natural gas, or any product therefrom:

(1) through any retail outlet operated by the taxpayer or a related person;
(2) to any person obligated under an agreement or contract with the taxpayer, or a related person, to use a trademark, trade name, or service mark or name owned by such taxpayer, or a related person, in marketing or distributing oil or natural gas or any product derived from oil or natural gas; or
(3) to any person given authority, pursuant to an agreement or contract with the taxpayer or a related person, to occupy any retail outlet owned, leased, or in any way controlled by the taxpayer or related person.

72. I.R.C. § 613A(c)(9)(B)(v); see also, I.R.C. § 613A(c)(8)(C).
74. Id.
75. I.R.C. § 613(d)(2).
If a taxpayer's total receipts from retail outlets do not exceed $5,000,000, he is not a retailer for the purposes of determining the availability of the independent producer and royalty owner's exemption, even though he may fall within the scope of the previous paragraph. A taxpayer who sells his oil, gas, or products therefrom outside of the United States is not considered a retailer for the purposes of this provision, as long as neither he, nor any related person, exports domestic production during the taxable year or the immediately preceding taxable year. Bulk sales of oil, gas, or items therefrom to commercial or industrial users are not considered retail sales for the purposes of this provision.

In applying the retail product exclusion, a person is related to the taxpayer "if a significant ownership interest in either the taxpayer or such person is held by the other, or if a third person has a significant ownership interest in both the taxpayer and such person." The term "significant ownership interest" means: (1) with respect to a corporation, 5% or more in value of the outstanding stock of such corporation; (2) with respect to a partnership, 5% or more interest in the profits or capital of such partnership; and (3) with respect to an estate or trust, 5% or more of the beneficial interests in such estate or trust.

A taxpayer may not claim the independent producer and royalty owner's exemption if he, or a related person, engages in refining crude oil and if, on any day during the taxable year, the refinery runs of the taxpayer and the related person exceed 50,000 barrels (a barrel equals 42 gallons). Percentage depletion, under the independent producer and royalty owner's exemption, may not exceed 65% of the taxpayer's taxable income for the year, computed without regard to: (1) any depletion on production from oil and gas properties which is subject to the exemption; (2) any net operating loss carryback to the taxable year; and (3) any capital loss carryback to the taxable year.

Any available depletion which cannot be allowed because it would...
exceed 65% of the taxpayer's taxable income for the year, without regard to the above factors, shall be treated as an amount allowable for the depletion deduction through the independent producer and royalty owner's exemption in the following taxable year, again subject to the 65% limitation.

Since the independent producer and royalty owner's exemption is based on actual production during the taxable year, it appears that the taxpayer who receives a bonus or an advance royalty may not deduct cost depletion, regardless of whether or not there is actual production during the taxable year in question. The regulations require that there eventually be production from the property in question, or the taxpayer-lessee would then be required to restore to income the depletion amounts which he had previously deducted from the bonuses and/or advanced royalties. However, the Internal Revenue Service has ruled that if the lessor (or sublessor) transferred his interest by sale, gift, devise, or inheritance before the lease expired, the lessor (or sublessor) would not be required to restore depletion to income.

Exactly how much production is necessary to prevent the taxpayer from being required to restore depletion to income is uncertain. The Tax Court first took the view that any nominal production would suffice. In that case, the lessors received royalties in the amount of $13.81 and payments from oil to apply on the reserved oil payments in the amount of $23.17, resulting in a total of $36.98 being paid to the lessor. The Tax Court held that such production was sufficient to prevent a taxpayer from being required to restore depletion to income. However, the Tax Court has subsequently indicated that such production must be in commercial quantities.

In order for the taxpayer-lessee to be required to restore previously deducted depletion to income, there must be a complete termination of his interest. The Fifth Circuit Court of Appeals reversed a Tax Court decision which had required a taxpayer to restore depletion on a partial termination of a lease, computed by restoring to income the portion of depletion taken which the acreage under the

84. Treas. Reg. § 1.612-3(a)(2) & (b)(2).
85. Id.
89. Driscoll v. Commissioner, 147 F.2d 493 (5th Cir. 1945).
terminated portion of the lease bore to the entire lease. The Tax Court accepted this decision in 1967 when it refused to allow the Commissioner to require that depletion be restored to income on an acreage basis.

D. Gross Income

Statutory percentage depletion is based on the gross income from the property. Cash basis and accrual basis taxpayers are required to report depletable income in different manners. A cash basis taxpayer must report depletable income in the year when it is received, not when the product is sold. An accrual basis taxpayer, however, reports depletable income during the taxable period in which the product is sold without regard to when payment is received.

A transaction is deemed to be a lease if the owner of the operating rights assigns all or some part of those rights to another person, with or without immediate consideration, and retains a continuing non-operating interest in production, such as a royalty.

If one of the following assignments is made for cash or its equivalent, it is deemed a sale: (1) the owner of a property interest assigns all of his interest or a fraction thereof, identical, except for quantity, with the fractional interest retained; (2) the owner of the working interest in a property assigns a continuing nonoperating interest of the property and retains the working interest, i.e., an overriding royalty or a net profits interest carved out of the property; or (3) the owner of a continuing property interest assigns the interest and retains a noncontinuing interest in the production from the property, i.e., a production payment.

Gross income from the sale of an oil and gas property, or an interest therein, does not qualify for the depletion allowance. However, gross income from the sale of production from the property by one who has an economic interest therein does qualify for the allowance. Therefore, it is important to determine whether a taxpayer has sold property or granted a lease and thus derives gross income from production.

The regulations define gross income from oil and gas property as

90. Id.
91. Norman Freeman, 48 T.C. 96 (1967).
93. Id.
95. Id.
being "the amount for which the taxpayer sells the oil or gas in the immediate vicinity of the well."\textsuperscript{96}

If the oil or gas is manufactured or converted into a refined product, or is transported from the premises prior to sale, the gross income from the property will be assumed to be equivalent to the representative market or field price of the oil or gas before conversion or transportation.\textsuperscript{97} If there is no posted representative market or field price, the taxpayer should deduct transportation and conversion costs from the sales proceeds in order to arrive at the field price of the oil or gas in the vicinity of the well.\textsuperscript{98}

In order to determine gross income from the production for depletion purposes, the taxpayer must determine when production ceases and manufacturing begins. There are three different operations which are important in this area: separation, absorption and fractionation. Separation removes water and hydrocarbons from oil and gas. Absorption is accomplished by processing wet gas with a mineral oil to remove the wet content. The absorbed products are then separated into their components in fractionating towers.

The Internal Revenue Service generally recognizes that separation is a production process, while the processes of absorption and fractionation have been held to be manufacturing processes.\textsuperscript{99} However, there is a split of authority when the absorption process is being used in recycling plants where the gas is separated from the oil and other liquid hydrocarbons and then rejected into productive areas of the formation. The Fifth Circuit Court of Appeals has held that in a recycling plant (which is often indispensable to the production of gas), when absorption occurs, the taxpayer may treat the gross income from the plant as being from production and thus includible in gross depletable income.\textsuperscript{100}

However, the tenth circuit has also held that when the absorption process, as in a recycling plane, was for the purpose of removing hydrocarbon liquids which would collect in low portions of the pipelines and prevent the passage of gas, the purpose for removing these materials was to enable the gas to be transported for marketing and, therefore, was manufacturing.\textsuperscript{101}

\textsuperscript{96.} Treas. Reg. § 1.613-3(a).
\textsuperscript{97.} Id.
\textsuperscript{98.} James P. Evans Sr., 11 T.C. 726 (1948).
\textsuperscript{99.} Shamrock Oil & Gas Corp. v. Commissioner, 346 F.2d 377 (5th Cir. 1965).
\textsuperscript{100.} Weinert v. Commissioner, 294 F.2d 750 (5th Cir. 1961).
\textsuperscript{101.} Mountain Fuel Supply Co. v. United States, 499 F.2d 816 (10th Cir. 1971), cert.
The taxpayer must exclude from his gross income any amounts which are paid to other owners of economic interests in the property.\textsuperscript{102} The regulations provide that bonuses are excluded from gross income of the lessee, because they are advanced royalties in the hands of the lessor, and, as such, are depletable by the lessor.\textsuperscript{103} However, the proposed regulations would not allow percentage depletion on bonuses received by a lessor for granting an oil and gas lease, and the exclusion apparently should no longer apply to the lessee. Royalties, production payments pledged for development, net profits payments, and overriding royalties are also excluded from gross income of the lessee.\textsuperscript{104}

Production payments, which are not classified as mortgage loans, are includible in depletable gross income of the owners.\textsuperscript{105} A net profits interest owner includes only the share of the net profits actually paid to him in his depletable gross income.\textsuperscript{106} Taxpayers who receive royalties must include such amounts in their gross income. Any advanced royalties paid after October 28, 1976, may be deducted from the payor's gross income for the year in which the mineral product is sold.\textsuperscript{107} However, an advanced royalty recoverable from future production which is paid or accrued on mineral property as a result of a minimum royalty provision is subject to an option: the payor may elect to treat the payments as deductions for the year in which they are paid or accrued.\textsuperscript{108}

A minimum royalty provision requires that a substantially uniform amount of royalties be paid at least annually, either over the life of the lease or for a period of at least 20 years, in the absence of mineral production requiring payment of aggregate royalties in a greater amount.

Shut-in gas payments, which are royalties paid on wells that have been successfully completed, but where the contents cannot be produced immediately, are not included in depletable gross income.\textsuperscript{109}

A delay rental paid by a lessee during the primary term of a lease

\textsuperscript{102} I.R.C. § 613(a).
\textsuperscript{103} Quintana Petroleum Co. v. Commissioner, 143 F.2d 588 (5th Cir. 1944).
\textsuperscript{104} Kirby Petroleum Co. v. Commissioner, 326 U.S. 599 (1946); Perkins v. Thomas, 86 F.2d 254 (5th Cir. 1936).
\textsuperscript{105} Thomas v. Perkins, 301 U.S. 655 (1937).
\textsuperscript{106} Commissioner v. Felix Oil Co., 144 F.2d 271 (9th Cir. 1944).
\textsuperscript{107} Treas. Reg. § 1.612-3(b)(3).
\textsuperscript{108} Id.
\textsuperscript{109} Johnson v. Phinney, 287 F.2d 544 (5th Cir. 1961).
agreement for the purpose of deferring development of the property is ordinary income (not subject to depletion) to the lessor. The lessee may elect either to capitalize or to expense delay rentals. If the rental extends the lease for more than a year beyond the term of the original agreement it will be treated as a lease bonus.

Generally, a payment received by a taxpayer as an award of damages for breach of a lease agreement is not includible in gross depletable income. However, the United States District Court for the Southern District of West Virginia has held that, when coal had to be sold on a spot market at a price less than the contract price, because of a breach by the buyer, the amount of damages was actually part of the purchase price for the coal and includable in the producer's gross depletable income.

When there is a carried interest, which exists when one co-owner of a working interest agrees to advance all or part of development costs on behalf of the other(s) and to recover such advances from any future production accruing to the other owner's share of the working interest, the carrying party—the one advancing the money—reports all production proceeds in his depletable gross income, until he recovers his advances. After such advances are recovered, the carried party is entitled to his proportionate share of the depletion deduction.

E. Taxable Income

The percentage depletion allowance may not exceed 50% of the taxable income from the property. After the taxpayer determines his gross depletable income, he arrives at his taxable income by subtracting deductions (excluding depletion) allowable to the oil or gas property. Expenditures, which are attributable to an oil or gas property subject to depletion and to another activity, must be properly apportioned among the two activities. Also, if the taxpayer has more than one oil or gas property subject to depletion, those deductions which are not attributable to a specified property shall be properly apportioned among the different properties. General overhead expenses must be attributable to the production which is

110. Treas. Reg. § 1.612-3(a).
111. Id.
112. Houston Farms Development Co. v. United States, 194 F.2d 520 (5th Cir. 1952).
116. Id.
resulting in depletion; and, if so attributable, must be allocated among the various activities occurring on the property. Such expenses are also required to be apportioned among the various property interests giving rise to such activities. 117

Some of the more common deductions from gross income are intangible drilling and development costs (if the proper election has been made), 118 abandonment losses, 119 ad valorem taxes, 120 interest expense, 121 and some selling expenses. 122

F. Property

The taxpayer must deduct cost or percentage depletion, whichever is greater, with respect to each oil and gas property. "Property" means each separate interest owned by the taxpayer in each mineral deposit in each separate tract or parcel of land.

There are basically two types of property interests: operating and non-operating interests. An operating interest is an interest in minerals in place and is responsible for the cost of development and operation of the property. A non-operating interest, such as a royalty, is not responsible for such costs.

If a taxpayer owns two or more separate operating interests in a tract of land, he must elect to treat them as separate property units or they will be treated as one property unit. 123

The taxpayer may also elect to combine certain operating interests in a particular tract of land and yet treat other interests as separate property units; however, he may make only one such election per tract of land. 124 Non-operating interests may not be included in these elections. 125 If the taxpayer takes this election with respect to any interest in a tract or parcel of land and, after the taxable year for which the election is made, discovers or acquires other mineral interests in such tract of land, those interests shall be treated: 126 (1) as a separate property, if there is no combination of interests in the tract, unless the taxpayer elects to combine it with

117. Id.
118. Treas. Reg. § 1.613-5(c); Helvering v. Willshire Oil Co., 308 U.S. 90 (1939).
120. Montreal Mining Co., 2 T.C. 688 (1943).
124. Id.
another interest; or (2) as a part of the combination if there is a combination of interests in said tract, unless the taxpayer elects to treat it as corporate property.

If a taxpayer has two or more separate non-operating interests in a single tract of land, or in two or more adjacent tracts, he may treat all such mineral interests in each separate kind of mineral deposit as one property. However, he must obtain the consent of the Commissioner by showing that tax avoidance is not the principal purpose of such treatment.\(^\text{127}\)

The Tax Court, refusing to adopt the view that different property interests acquired at the same time are a single property unit, has held that a working interest and an oil payment are "inherently separate."\(^\text{128}\) However, the Supreme Court has accepted the contention that two separate interests which are acquired together create one interest.\(^\text{129}\)

If a taxpayer acquires interests of the same type, at the same time, which exist on tracts of land that are geographically separated, he owns separate interests.\(^\text{130}\) Also, if the taxpayer owned interests of the same type which are not geographically separated but were acquired from different parties or at different times, he would own separate interests.\(^\text{131}\)

The Internal Revenue Service has ruled that "same time" does not mean "same date." Instead, it contemplates interdependent transactions; that is, simultaneous acts which are mutually or reciprocally dependent upon one another.\(^\text{132}\)

The definition of property also refers to each separate tract of land. The regulations state that "all contiguous areas (even though separately described) included in a single conveyance or grant or in separate conveyances or grants at the same time from the same owner constitute a single separate tract or parcel of land."\(^\text{133}\) However, the Regulations also provide that if a taxpayer simultaneously acquires two contiguous leaseholds from two separate owners, and then assigns the two interests to a second taxpayer, the leaseholds

\(^{127}\) I.R.C. § 614(e)(1).

\(^{128}\) Herndon Drilling Co., 6 T.C. 628 (1946).


\(^{131}\) Treas. Reg. § 1.614-1(a)(5) examples (5) & (8).


\(^{133}\) Treas. Reg. § 1.614-1(a)(3).
would be separate interests to the second taxpayer also. The Tax Court has found that, where a sublessee acquired from a lessee five contiguous leases originating from different lessors, the sublessee had five different properties.

The definition of property also refers to each mineral deposit. The regulations provide that each separate mineral deposit is a separate property, even though found within the same tract of land, if the taxpayer so elects.

An example in the Regulations gives the impression that a separate deposit becomes a separate property only in the year in which the taxpayer discovers and incurs development costs in regard to a particular operating mineral interest. Amounts spent for intangible drilling and development costs are expenditures for development for purposes of percentage depletion.

II. Coal

The determination of the depletion deduction for an interest in coal is similar to the determination for an interest in oil and gas properties. The taxpayer must own an economic interest in the coal in place. The proper depletion deduction is the larger of cost or percentage depletion. Percentage depletion for coal is 10% of gross income from the coal production, excluding rents and royalties paid or incurred by the taxpayer in respect of the operating interest. Also, the depletion shall not exceed 50% of the taxpayer's taxable income from the property (before the depletion allowance). The significant differences in treatment are discussed in the following paragraphs.

A. Gross Income from Coal Properties

The Code contains a detailed definition of gross income from mining ores and minerals, other than oil and gas, for purposes of percentage depletion. Mining includes not only the extraction of the ores or minerals from the ground, but also certain specified treatment processes necessary or incidental to the mining. With respect to coal these processes include cleaning, breaking, sizing, dust allay-

139. I.R.C. § 613(a) & (b)(4).
ing, treating to prevent freezing, loading for shipment, and other processes applicable to a crude mineral product. Mining also includes transportation from the point of extraction from the ground to processing or treatment plants. If the coal is transported more than 50 miles, it is necessary to satisfy the Commissioner that physical and other requirements necessitate the greater distance. The Code also specifies certain treatment processes which are not considered mining.\textsuperscript{140}

The term “extracting minerals from the ground” includes extraction, by the mine owners or operators, of coal from the waste or residue of prior mining; however, a purchaser, who purchases the residue, may not treat the coal derived therefrom as having been derived from mining.\textsuperscript{141}

If a taxpayer sells his coal in more than one form, and yet applies only the approved mining processes discussed above, gross income from the mining would include the amounts received for both forms of the coal.\textsuperscript{142}

If the taxpayer processes the coal before sale by the application of non-mining processes (including non-mining transportation), gross income from mining shall be computed by use of the representative market or field price of coal of like kind and grade as the taxpayer’s coal, after the application of any mining processes (including mining transportation), but before any non-mining transportation.\textsuperscript{143} A taxpayer who sells his coal after the application of only mining processes and after non-mining transportation shall use his delivered price (if otherwise representative), reduced by costs paid or incurred by him for purchased transportation to the customer, as the representative market or field price.\textsuperscript{144} The regulations define “purchased transportation to the customer” as non-mining transportation of the taxpayer’s coal to the customer:\textsuperscript{145} (a) which is not performed in conveyance owned or leased, directly or indirectly, in whole or in part, by the taxpayer; (b) which is performed solely to deliver the taxpayer’s coal to the customer, rather than to transport such coal for packaging or other additional processing by the taxpayer (other than incidental storage or handling);

\textsuperscript{140} I.R.C. § 613(c).
\textsuperscript{141} Treas. Reg. § 1.613-4(i).
\textsuperscript{142} Treas. Reg. § 1.613-3(a).
\textsuperscript{143} Treas. Reg. § 1.613-4(c).
\textsuperscript{144} Treas. Reg. § 1.613-4(e)(2)(i).
\textsuperscript{145} Treas. Reg. § 1.613-4(e)(2)(iii).
and (c) with respect to which the taxpayer ordinarily does not earn any profit.

However, if the sum of the proposed representative market or field price plus the total of all costs of the non-mining processes (including non-mining transportation) which the taxpayer applies to his coal regularly exceeds the taxpayer’s actual sales price for his coal, the proposed representative market or field price will not be accepted.¹⁴⁶

In determining the representative market or field price for the taxpayer’s coal, consideration is given only to prices of coal of like kind and grade as the taxpayer’s coal and with which, under commercially accepted standards, the taxpayer’s coal would be considered to be competitive if it were sold, after the application of mining processes and before any non-mining processes were applied.¹⁴⁷ The taxpayer’s own competitive sales price for coal, which has been subjected only to mining processes, is taken into account in computing a weighted average of the competitive selling prices of coal of like kind and grade as the taxpayer’s, in the relevant markets.¹⁴⁸ This weighted average, although not determinative, is an important factor in the determination of the representative market or field price.

If it is impossible to determine a representative market or field price, then gross income from mining is computed by use of the proportionate profits method, unless the Commissioner determines that another method of computation is more appropriate.¹⁴⁹

Gross income, using the proportionate profits method, is computed as follows: (Mining Costs/Total Costs) X Gross Sales = Gross Income From Mining.¹⁵⁰ The regulations define the formula applied to gross sales as a “fraction whose numerator is the sum of all costs allocable to those mining processes which are applied to produce, sell, and transport the first marketable product or group of products,” reduced by any trade or cash discounts allowed by the taxpayer and by the cost of any purchased non-mining transportation.¹⁵¹

As stated earlier, the taxpayer may request the permission of the

¹⁴⁷. Treas. Reg. § 1.613-4(c)(3).
¹⁴⁸. Id.
¹⁵¹. Id.
Commissioner to use a formula other than the proportionate profits method to compute representative market or field prices. The regulations present three alternative methods: the "representative schedule method," which uses representative finished product prices, penalties, charges and adjustments, established in arms-length transactions between unrelated parties to determine the representative market or field price; the "other market method," through which the taxpayer uses representative market or field prices established outside of his markets, provided that conditions there are substantially the same as in his markets; and the "rate of return on investment method," upon which the regulations do not elaborate.

The regulations refer to the "first marketable product or group of products." This term is important because it signifies the point at which gross income for purposes of percentage depletion is determined. The United States Supreme Court has held that gross income for such purposes is determined at the point when the ordinary miner has applied all "ordinary and normal" mining processes in producing his first commercially marketable product and preparing it for disposition.

B. Coal Royalties not Subject to Depletion

Taxpayers who receive capital gains treatment on royalties received for coal mined in the United States are not entitled to claim depletion thereon. To qualify for this treatment, the following requirements must be met: (1) the taxpayer-owner of the coal must dispose of it under any form of contract by virtue of which the owner retains an economic interest in the coal; (2) the taxpayer must have owned the coal for at least one year prior to the disposal; and (3) the taxpayer-owner is not a co-adventurer, partner, or principal in the mining of the coal.

The difference between the amount realized from the disposal of the coal and the adjusted depletion basis of the coal (plus the deductions disallowed for the taxable year under § 272 of the Code) is treated as a gain or loss from the sale of property used in a trade or

152. Treas. Reg. § 1.613-4(d)(5)-(7).
157. I.R.C. § 613(c).
158. Id.
business.\textsuperscript{159} The regulations state that, for the purposes of this section, an owner is anyone who owns an economic interest in the coal in place.\textsuperscript{160} The date of disposal, for purposes of this section, is the date the coal is mined. However, a taxpayer who does not satisfy the one-year holding period does not qualify for the capital gains treatment, and thus is entitled to depletion.

C. Exploration Expenditures

A taxpayer mining coal may elect to deduct exploration expenditures from gross income.\textsuperscript{161} The Code defines exploration expenditures as those “paid or incurred during the taxable year for the purpose of ascertaining the existence, location, extent or quality of any deposit of ore or other mineral, and paid or incurred before the beginning of the development stage of the mine.”\textsuperscript{162} Such expenditures are not deductible from gross income produced from oil and gas wells,\textsuperscript{163} unless they qualify as intangible drilling costs.\textsuperscript{164}

Ore drilling expenditures paid or incurred by the taxpayer in order to ascertain the existence of commercially marketable ore are exploration expenditures.\textsuperscript{165} Expenditures for exploratory drilling from within a producing mine to ascertain the existence of what appears (on the basis of all facts known at the time of the expenditure) to be a different ore deposit are also considered exploratory expenses.\textsuperscript{166}

The taxpayer must allocate all exploration costs to specific mining property units in order to be able to adopt the election with respect to exploration costs and to satisfy the recapture provisions, which are on the basis of each individual mine.\textsuperscript{167}

The Internal Revenue Service has ruled that, if only one area of interest is located, the entire exploration expenditure is allocated to that one area of interest. If two or more such areas are located, the expenditure is to be allocated equally among such areas. If no areas of interest are located, the expenditure is deductible as a loss for the taxable year in which the project area was abandoned as a potential

\begin{itemize}
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Treas. Reg. § 1.611-1(b)(1).
\item \textsuperscript{161} I.R.C. § 617.
\item \textsuperscript{162} I.R.C. § 617(a).
\item \textsuperscript{163} I.R.C. §§ 616-617.
\item \textsuperscript{164} \textit{See} R. Bowhay & F. Burke, \textit{Income Taxation of Natural Resources} § 12.06 (1979).
\item \textsuperscript{165} Treas. Reg. § 1.617-1(a).
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Treas. Reg. § 1.617-3(a)(i).
\end{itemize}
source of mineral production. Furthermore, if on the basis of a detailed survey relating to no particular property within a particular area of interest a property is acquired or retained within or adjacent to that area of interest, the entire exploration expenditures may be allocated to that property as a capital cost or deducted, at the election of the taxpayer. If no property is acquired on the basis of such a survey, the exploration expenditure allocable to the area of interest is deductible as a loss for the taxable year in which the area of interest is abandoned.\textsuperscript{168}

The Code authorizes a taxpayer to elect to deduct exploration expenses paid or incurred prior to the development stage of the mining operation.\textsuperscript{169} This election may be made by deducting exploration expenditures in the taxpayer's income tax return for his first taxable year where such expenditures are paid or incurred by him during that taxable year.\textsuperscript{170} The election is made by deducting exploration on expenditures, either in the taxpayer's return for the taxable year, or in an amended return which is timely filed.\textsuperscript{171}

The Code requires that if the mine with respect to which an election is in effect becomes a producer, the deducted exploration expenses for that mine will be recaptured\textsuperscript{172} using one of two methods: (1) the taxpayer may elect to include in gross income for the taxable year an amount equal to the adjusted exploration expenditures with respect to the mines which become producers. The amount so included is deemed an expenditure paid or incurred on the date which the mine reached the producing stage and is properly chargeable to capital account.\textsuperscript{173} “Adjusted exploration expenditures” means the amount of the expenditures allowed (for the taxable year and all preceding taxable years) as deductions for exploration expenditures to the taxpayer, or any other person, which are properly chargeable to the mine in question and which would be reflected in the basis of the mine if not for the above-described election to deduct, reduced by, for the taxable year and each preceding taxable year, the amount which would have been allowable for

\textsuperscript{169} Treas. Reg. § 1.617-1(a).
\textsuperscript{170} Treas. Reg. § 1.617-1(c).
\textsuperscript{171} Id.
\textsuperscript{172} I.R.C. § 617(b); Treas. Reg. § 1.617-3(a)(1)(i).
\textsuperscript{173} I.R.C. § 617(b).
\textsuperscript{174} I.R.C. § 617(b)(1)(A).
percentage depletion. The taxpayer may elect to forego the depletion allowance allowable on the property until the amount of foregone depletion equals the amount of the adjusted exploration expenditures with respect to the property.

D. Development Expenditures

The Code provides that a taxpayer may deduct expenditures for the development of a mine, if they are paid or incurred after the existence of ores in commercially marketable quantities has been disclosed.

The Internal Revenue Service defines development expenditures as "those resulting directly from the mining process or activity of making the ore or other minerals in place accessible for extraction through the removal of mineral, the driving of shafts, tunnels, and galleries, and other mining excavations." Thus, these types of activities, although initially exploration activities, become development activities, when pursued "after the existence of ores or minerals in commercially marketable quantities has been disclosed." The District Court for the Southern District of West Virginia has held that a development expenditure, although made during the production stage, was nonetheless a development expenditure.

As previously stated, the existence of a sufficient amount of mineral to justify commercial exploitation depends on all the facts and circumstances.

The taxpayer may elect to treat development expenditures paid or incurred during the taxable year as deferred expenses and deduct them on a ratable basis as the units of produced ores or minerals benefited by such expenditures are sold. These deferred expenditures are added to the adjusted basis of the mine, but disregarded in determining the adjusted basis of the property for the purpose of computing the depletion deduction. However, if a mine is in the development stage, the election to defer applies only to the amount of development expenditures which exceed net receipts from the

175. I.R.C. § 617(f)(1).
177. I.R.C. § 616(A).
179. I.R.C. § 616(a).
182. I.R.C. § 616(b).
183. I.R.C. § 616(c).
sale of minerals from the mine during that taxable year. Development expenditures not exceeding net receipts are deductible.

The mine enters the production stage when "the major portion of the mineral production is obtained from workings other than those opened for the purpose of development, or when the principal activity of the mine or other natural deposit is the production of developed ores or minerals rather than the development of additional ores or minerals for mining." 185

If a property unit has more than one natural deposit of minerals, the taxpayer may deduct the development expenditures made with respect to one of the natural deposits and defer the development expenditures made with respect to another of the natural deposits. 186 The same treatment is permissible if there is more than one mine with respect to one underlying deposit. 187

The regulations provide that the amount of deferred development expenses to be deducted in a taxable year is the amount which bears the same ratio to the total deferred development expenditures for a particular mine or other natural deposit, reduced by the amount of such expenditures deducted in prior taxable years, as the number of units of the ore or mineral benefited by such expenditures sold during the taxable year bears to the number of units of ore or mineral benefited by such expenditures remaining as of the taxable year. 188 The "number of units of ore or minerals benefited by such expenditures remaining as of the taxable year," as used above, means the number of units of ore or minerals benefited by the deferred development expenditures remaining at the end of the year to be recovered from the mine or other natural deposit (including units benefited by such expenditures recovered but not sold) plus the number of units benefited by such expenditures sold within the taxable year. 189

Expenditures for the acquisition or improvement of property which is subject to a depreciation allowance are not considered development expenditures. 190 Note, however, the regulations provide

184. Treas. Reg. § 1.616-2(a); Korth v. Mountain City Copper Co., 174 F.2d 295 (10th Cir. 1949).
186. Treas. Reg. § 1.616-1(c).
187. Id.
188. Treas. Reg. § 1.616-2(f).
189. Id.
190. I.R.C. § 616(a).
that allowances for depreciation of such improvements, which are used in the development of ores or minerals, are considered development expenditures.\textsuperscript{191}

A taxpayer who owns only a fractional share of a working interest may deduct development expenditures only to the extent of his fractional interest.\textsuperscript{192} The remaining fractional share of his development expenditures is capitalized as an expense of acquiring the interest and recovered through the depletion allowance.\textsuperscript{193}

\textbf{E. The Property Unit with Respect to the Mining of Coal}

The property unit must be correctly ascertained, because cost and percentage depletion must be computed separately for each property unit.

The Code provides that a taxpayer who owns two or more separate operating mineral interests (other than oil or gas), which constitute all or part of an operating unit, may elect: (1) to form an aggregation of, and to treat as one property, all such interests owned by him which comprise any one mine or any two or more mines; and (2) to treat as a separate property each such interest which is not included within an aggregation referred to in (1).\textsuperscript{194}

The Code defines “operating mineral interest” as “an interest in respect of which the costs of production of the mineral are required to be taken into account by the taxpayer for the purposes of computing the 50 percent limitation” on net income for the purposes of the percentage depletion deduction.\textsuperscript{195}

An “operating unit” is defined as “the operating mineral interests which are operated together for the purpose of producing minerals.”\textsuperscript{196} Four factors which indicate that mineral interests are operated together as a unit are: (1) common field or operating personnel, (2) common supply and maintenance facilities, (3) common processing or treatment plants, and (4) common storage facilities.\textsuperscript{197}

A “mine” is defined as “any excavation or other workings or series of related excavations or related workings, as the case may be for the purpose of extracting any known mineral deposit except oil and
A taxpayer may elect to form more than one aggregation of separate operating mineral interests within one operating unit so long as each aggregation consists of all the separate operating mineral interests which comprise any one mine or any two or more mines. An aggregation may not include any separate operating mineral interest which is a part of a mine without including all of the separate operating mineral interests which comprise the mine in the first taxable year for which the election to aggregate is effective. If a taxpayer fails to elect to aggregate a particular operating mineral interest (other than an interest which becomes a part of a mine with respect to which the interests have been aggregated in a prior taxable year) on or before the last day prescribed for making the election, the interest will be treated as if an election to treat it as a separate property had been made. A taxpayer may not aggregate operating mineral interests and non-operating mineral interests.

If a taxpayer, who has properly elected to aggregate with respect to any operating mineral interests within a particular operating unit and for a particular taxable year, desires to make an election for a subsequent taxable year, with respect to an additional operating mineral interest within the same operating unit, his right to elect depends upon the nature of the additional interest. If the additional interest is part of a mine with respect to which the other interests have been aggregated, it must be included. If it is part of a mine with respect to which the other interests have been treated as separate properties, it must be treated as a separate property. If the additional interest is part of a mine which previously consisted of a single interest, not aggregated with any other mine, it may be aggregated or treated as a separate property. If the additional interest is an entire mine, it may be added to any aggregation within the same operating unit, aggregated with any other single interest which is an entire mine, provided both interests are within the same operating unit, even though the single interest has previously been treated as a separate property, or treated as a single property.

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200. Id.
201. Id.
203. Id.
204. Id.
205. Id.
If a single tract of land contains a coal deposit which will be extracted by two or more mines for which expenditures for development or operation have been made by the taxpayer, the taxpayer may allocate to those mines all of the tract of land and all of the coal deposits contained therein or treat as a separate property that portion of the tract and coal deposit so allocable to each mine.\(^\text{206}\)

A taxpayer who owns two or more separate non-operating mineral interests in a single tract of land or two or more adjacent tracts of land may treat all such mineral interests in each separate kind of mineral deposit as one property, provided that the taxpayer can convince the Commissioner that his principal purpose is not the avoidance of tax.\(^\text{207}\) Non-operating mineral interests in tracts of land, which are not adjacent, may not be aggregated and treated as one property.\(^\text{208}\)

**F. Taxable Income from Coal Properties**

The regulations define “taxable income” as gross income from the property, less all allowable deductions (excluding the depletion deduction) which are attributable to mining processes, including mining transportation, with respect to which depletion is claimed.\(^\text{209}\) Expenditures attributable to the property subject to depletion and other activities is apportioned among the mineral property and the activities.\(^\text{210}\) If a taxpayer has more than one mineral property, deductions not attributable to a specific mineral property are apportioned among the different properties.\(^\text{211}\)

A coal slurry pipeline exists when the coal is crushed, ground, and concentrated by flotation. During the grinding and flotation process, water is added resulting in a slurry, which is suitable for transportation by pipeline. The slurry is moved by pipeline to its point of sale. The Internal Revenue Service has ruled that this transportation is non-mining transportation,\(^\text{212}\) therefore, not deductible as mining transportation. Note, however, that the expenses entailed in removing the coal from the ground, transporting it to the beneficiation plant, applying the crushing, grinding and flotation process,

\(^\text{206}.\) I.R.C. § 614(c)(2).
\(^\text{207}.\) I.R.C. § 614(e)(1).
\(^\text{209}.\) Treas. Reg. § 1.613-5(a).
\(^\text{210}.\) Id.
\(^\text{211}.\) Id.
removing part of the water at the beneficiation plant, and removing the remaining water once the coal slurry reaches its destination, are deductible from gross income as mining processes. Additional deductible items include operating expenses, certain selling expenses, administrative and financial overhead, depreciation, certain taxes, losses sustained, intangible drilling and development costs, and exploration and development expenditures.

213. Id.
COMMENTS

OPERATION BABYLIFT AND THE EXIGENCIES OF WAR—WHO SHOULD HAVE CUSTODY OF “ORPHANS”?

“Several thousand children were evacuated from South Vietnam to the United States by ‘Operation Babylift,’ an effort to airlift Vietnamese orphans out of South Vietnam just before the fall of the Saigon government in 1975.” However, some of the 2700 children were not orphans. They had been evacuated by mistake or through the efforts of concerned relatives who viewed the airlift as the safest means of getting their children out of the country. Many relatives of these non-orphan children later arrived in the United States and, upon locating their children, discovered that adoption proceedings were already in progress. Actions by natural parents and other relatives to regain custody of these children involved questions of international law, conflicts of law, jurisdictional questions, and family law. One popular course of action to regain custody has been the habeas corpus proceeding, challenging the state’s custody of the children.

Two cases, Huynh Thi Anh v. Levi and Doan Thi Hoang Anh v. Nelson, illustrate the factual circumstances of such actions. Levi

2. Id.
3. Id. at 628. The court in Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1197 (9th Cir. 1975), detailed some of the circumstances surrounding the airlift of non-orphaned children by mistake, as follows:

   The airlift was apparently intended to remove only those children who were already in some stage of the requisite procedure for admission to the United States and adoption by American families i.e., who were adoptable under Vietnamese law, legally in the custody of the American private agencies, and who satisfied the criteria for admission into the United States under the definition of an orphan “child”, 8 U.S.C. § 1101 (b)(1)(F), classifiable as an “immediate relative” under 8 U.S.C. § 1151(b) (1978).

   . . . (However), it appears that some of the children have a living parent, and were merely left in orphanages for safekeeping (Vietnamese orphanages allegedly serve some of the functions of day care centers). The parent(s) may or may not know the child is alive, or where it is. Other children were allegedly released with the understanding that the parents would be reunited with the child here; still others were released by hysterical parents terrorized by the fear that the child would be murdered by the approaching forces.

6. 245 N.W.2d 511 (Iowa 1976).
is a habeas corpus action brought by the grandmother and uncle of four Vietnamese children against the Attorney General of the United States, officials of the United States Immigration and Naturalization Service, the Michigan Department of Social Services, and certain Michigan probate judges. The children's grandmother, Huynh Thi Anh, had cared for the children in South Vietnam and arranged for their evacuation by turning them over to a friend who placed them in an orphanage in April 1975. The grandmother and uncle followed the children to the United States; and while they were detained at Camp Pendleton pending government processing, the four boys were moved temporarily to a convent in Mount Angel, Oregon. By the time the relatives reached Mount Angel, the Michigan Department of Social Services had placed the children in two foster homes in Michigan. The social workers involved had relied on "releases" signed by the director of an orphanage in Vietnam stating that the children were orphans, despite the fact that they had been advised the grandmother was in the United States and the releases were probably invalid.

The foster parents instituted adoption proceedings in probate court. The grandmother and uncle brought an action in federal district court seeking to enjoin the state adoption proceedings and to acquire custody of the children. Essentially the grandmother claimed that because she reared the children in her Saigon home in the absence of their natural parents, she has parental rights or interests in the children under Vietnamese law, or, more broadly, "an interest in the unity and integrity of their family under federal and international law." Furthermore, she asserts that officials in Vietnam had mistakenly signed the papers releasing the children for adoption, since she had never intentionally abandoned or released them. She petitioned the court to adopt the following rule of law for protection of aliens under the provisions of international and domestic law:

Where a close relative other than the natural parents has reared and cared for a child in a different culture but has voluntarily given up custody temporarily for evacuation to another country due to the exigencies of war, the relative is entitled to custody in the new country if she has not abandoned or otherwise abused or neglected the child.

8. 586 F.2d at 628.
9. Id. at 629.
10. Id.
The court held that there is no principle of international or federal domestic law which would require the return of the children to the relative's custody without determining the children's eligibility for adoption and weighing the children's desires and best interests in accordance with the law of their state of residence.\textsuperscript{11}

In \textit{Doan Thi Anh v. Nelson},\textsuperscript{12} a Vietnamese mother brought a habeas corpus action against the adoptive parents of one of her children.\textsuperscript{13} Anh's husband had been killed by the Communists and, after an incredible flight to escape death or capture, Anh arrived in Saigon from the central highlands of South Vietnam with her seven children. After her arrival in Saigon on April 23, 1975, she took her children to an orphanage called Friends of Children of Vietnam (FCVN) and requested that they take her children out of the country. She expressly refused to sign an adoption consent form and instructed her oldest daughter to keep all the children together for two years. She procured the address of FCVN in Denver, Colorado to help her trace the children's whereabouts if she survived. Anh managed to escape Vietnam on a fishing boat and eventually arrived at Camp Pendleton, California, on August 5, 1975. Anh regained custody of six of her children, but the adoptive parents of Binh, her seventh child, refused to release the child to her. Anh then brought the above cited action in state court seeking his custody.\textsuperscript{14}

The trial judge determined that it would be in Binh's best interest to return him to the care and custody of his natural mother.\textsuperscript{15}

\section{Jurisdictional Issues}

The federal district court in \textit{Levi} found that they did not have jurisdiction, because Anh had not exhausted all remedies in state court. This decision is in line with the policy of the federal courts to refuse to intervene in domestic relations matters until all remedies have been exhausted in the state courts.\textsuperscript{16}

The federal court did, however, assume jurisdiction of a similar

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item 245 N.W.2d 511 (Iowa 1976).
\item Id. at 513.
\item Id. at 514.
\item Id. at 517.
\item See Labine v. Vincent, 401 U.S. 532 (1971); Wissner v. Wissner, 338 U.S. 655 (1950); Ohio \textit{ex rel} Popovici v. Angler, 290 U.S. 397 (1930); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968).
\end{enumerate}
\end{footnotesize}
case in *Nguyen Da Yen v. Kissinger.*\(^7\) In that case, the plaintiffs, guardians ad litem for babylifted Vietnamese children, brought a class action against the Immigration and Naturalization Service to challenge the involuntary detention of the children in the United States in the custody of persons other than their parents in violation of fifth amendment rights and other fundamental human rights. The court asserted jurisdiction under the All Writs Act\(^8\) in order to require the Immigration and Naturalization Service to develop preliminary information as to identity, location, and circumstances of potential habeas corpus applicants which would be necessary to litigate the claims of illegal detention.\(^9\)

The airlifted children had been admitted to the United States through the exercise of the Immigration Service's parole power,\(^20\) which enables the Attorney General or his delegate to parole an alien into the United States without regard to immigrant status or any other basis for admission if it is deemed to be in the public's best interest to do so.\(^31\) Once the alien is paroled into the United States, he may remain until the Attorney General determines that the purpose of his parole has been served.

The plaintiffs in *Kissinger* claimed that the Attorney General had used his parole power to illegally detain the children in the United States. The Immigration Service, on the other hand, contended that the court was prevented from interfering in the determination of the children's status under section 701 (a)(2) of Title 8 of the United States Code. Nevertheless, the court held that while it could not inquire into the decision to admit an alien under the parole power, it could "entertain a suit to remedy a deprivation committed by an unconstitutional exercise of discretion."\(^22\) The court stated that the plaintiffs were not seeking review of the conduct of an administrative investigation, but rather were seeking facts germane to their

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17. 528 F.2d 1194 (9th Cir. 1975).
18. 28 U.S.C. § 1651 (1977). The All Writs Act provides a legislatively approved source of procedural instruments designed to achieve the best hearing for the interested parties and to resolve the merits of the claims. The court's habeas jurisdiction under the writ is limited to children presently detained within its territorial jurisdiction and those within the jurisdiction when the application was filed, who subsequently have been removed. Inasmuch as more than half the airlifted children were processed through the Northern District of California, the court found that the district court properly had jurisdiction to ascertain the status of all the children in order to determine those over whom it had jurisdiction.
19. 528 F.2d at 1204.
21. 528 F.2d at 1198 n.3.
22. *Id.* at 1199.
claim, discovery of which the court may compel and which the Immigration Service has no discretion to refuse to produce.\textsuperscript{23} The court of appeals held that the district court had jurisdiction over a suit (to challenge the legality of the children's present custody) under its habeas corpus power and added that such illegal detention need not be by governmental authorities to confer jurisdiction under section 2241 of Title 28, but it need only be in violation of the Constitution or laws of the United States.\textsuperscript{24}

**II. International Law Applications**

In *Levi*\textsuperscript{25} the plaintiffs contended that they should be granted custody of the children as a "matter of fundamental biological and moral right recognized by international law and incorporated in our federal domestic law by various constitutional, treaty, and statutory provisions."\textsuperscript{26} They based their contention on section 9 of the Judiciary Act of 1789\textsuperscript{27} which provides for a federal right of action by an alien in tort only, when the tort is committed in violation of the law of nations or a treaty of the United States. Anh also relied specifically on the following: articles 24 and 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War\textsuperscript{28} which provides that education of children separated from parents by war should be entrusted to persons of similar cultural tradition; article 4 of the Convention Relating to the Status of Refugees\textsuperscript{29} which provides that refugees are entitled to practice their religion and teach it to their children; and article 16 of the United Nations Declaration of Human Rights which provides that the family is the foundation of society and entitled to protection.

The *Levi* court held that it was not clear that the Geneva Convention or the United Nations Declaration of Rights were in fact treaties in force in the United States, and that even if they were, there was no evidence that the general language relied on by Anh was intended to create private rights of action in the domestic courts of signatory countries, in the absence of further legislative action.\textsuperscript{30}

\textsuperscript{23} Id. at 1200.
\textsuperscript{24} Id. at 1202.
\textsuperscript{25} 586 F.2d 625 (6th Cir. 1978).
\textsuperscript{26} Id. at 628.
\textsuperscript{27} Judiciary Act of 1789, ch. 20, 1 Stat. 76 (codified at 28 U.S.C. § 1350 (1976)).
\textsuperscript{28} 75 U.N.T.S. 287 (1950).
\textsuperscript{29} 19 U.S.T. 6264 (1951).
\textsuperscript{30} 586 F.2d 625, 629 (6th Cir. 1978).
The court discussed the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants. The 1902 Convention provided that a child's status would be governed by the law of his or her nationality, or the nationality of his or her parents, but the 1971 Convention provided that the law of the location of the child's "habitual residence" should be taken into account in determining eligibility for adoption and custody rights.

With respect to the difficulty in determining Vietnamese law, the court said:

We are uncertain what the law of the Republic of South Vietnam is or was at the time of its conquest by the North. There is strong evidence that South Vietnam adopted a law in 1972 which gives relatives, including grandparents, much broader parental rights in children than under the law of the United States. We cannot determine, however, whether this vesting of broader parental rights in the extended family unit was a temporary measure taken in response to the disruption of normal family life caused by war or is a deeply embedded tradition in Vietnamese culture. Under the circumstances . . . we cannot possibly determine what recognition Vietnamese law would now give to the wishes of the children or what weight Vietnamese law would give to alternatives other than returning the children to the custody of plaintiffs.\(^3\)

The court found that the United States has not ratified any of the Hague Conventions and that the traditional American conflict of laws principles provide that a court having jurisdiction in an adoption or custody matter would apply its own domestic law, including its rules concerning choice of law. It should be noted that Anglo-American law, as distinguished from civil law, disfavors choice-of-law principles based on nationality.\(^2\) As such, it would appear that both the most recent Hague Convention and American choice-of-law principles would favor the application of Michigan law, including its choice-of-law rule, in determining the children's eligibility for adoption and custody.

However, the Kissinger court indicated in a footnote that "[t]he illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations.'"\(^3\)

31. 586 F.2d at 630-31 (footnotes omitted).
may be ascertained by consulting works on public laws, by looking at the general usage and practice of nations, or by reviewing judicial decisions recognizing and enforcing that law.\textsuperscript{34} \textit{Nguyen Da Yen v. Kissinger}, however, was brought against United States government officials, and it is not clear whether the Ninth Circuit would apply this principle to a private cause of action. In light of the federal policy of non-interference in domestic relations matters, it is highly unlikely that even the \textit{Kissinger} court would find the "law of nations" applicable to \textit{Huynh Thi Anh v. Levi}.

\section*{III. Domestic Relations Law Principles}

It is clear that a state’s domestic relations law will control in a private cause of action for custody of a child, whether that child is Vietnamese or not. As such the domestic relations law of the appropriate state must be considered with respect to eligibility for adoption, which includes a determination as to whether a valid consent to adoption has been given, and with respect to factors relevant to determining the best interests of the child.

\subsection*{A. Valid Consent to Adopt}

In an adoption proceeding, there must be compliance with statutory requirements for consent before the question of the best interest of the child is considered.\textsuperscript{35} Consent must be voluntarily given. However, in the case of abandonment, the court does not need the consent of the natural parent to proceed with adoption.\textsuperscript{36} "To constitute an abandonment, there must be a relinquishment or surrender of rights or property by one person to another; a giving up; a total desertion. It includes both the intention to abandon and the external act by which the intention is carried into effect."\textsuperscript{37}

The concept of voluntary abandonment, as used in adoption statutes, does not mean parental conduct which is brought about by the force of circumstance or dire necessity, but rather it relates to intentional and willful acts or conscious disregard or indifference to par-

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\textsuperscript{35} \textit{See} \textit{In the Matter of Burney}, 259 N.W.2d 322 (Iowa 1977); \textit{Doan Thi Hoang Anh v. Nelson}, 245 N.W.2d 511 (Iowa 1976); \textit{In re Adoption of Moriarty}, 152 N.W.2d 218 (Iowa 1967); \textit{In re Adoption by McElroy}, 522 S.W.2d 345 (Tenn. 1975).
\textsuperscript{36} Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1107 (1st Cir. 1978).
\textsuperscript{37} Pitzenberger v. Schnack, 215 Iowa 466, 469, 245 N.W. 713, 714 (1932).
\end{flushright}
ent obligations toward the child.38 For example, the Iowa statute39 provides that substantial, continuous or repeated neglect of parental duties constitutes abandonment.40 There is substantial authority for the principle that parents should be encouraged in time of need to look for help in caring for their children without risking loss of custody and that the presumption preferring parental custody is not overcome by a mere showing that such assistance was obtained.41

As indicated by the Nelson court, it is hard to recognize circumstances of greater dire necessity than those surrounding the airlifting of the "orphans" from Vietnam. The South Vietnamese faced a dangerous and uncertain future and lived in constant fear for their lives and the lives of their children as the Viet Cong marched into South Vietnam. Under such circumstances, a parent may resort to desperate means in order to save his children's lives, but such action can hardly be called abandonment. On the contrary, parents and relatives braved substantial dangers and hardships in order to follow their children to the United States. Once they arrived in the United States, they pursued all available means to relocate their children and to be reunited with them. The question of abandonment, therefore, should not be an issue in these cases in the absence of clear and convincing evidence to the contrary.

B. Best Interests of the Child

The Levi court discussed several factors which the court must weigh in determining the best interests of the child, as follows:

(a) The love, affection and other emotional ties existing between the competing parties and the child; (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion or creed, if any; (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care . . . ; (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; . . . (f) The moral fitness of competing parties; (g) The mental and physical health of the competing parties; (h) The home, school and community record of the child; (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference.42

41. Id.
42. 586 F.2d at 634.
However, "[c]ourts are not free to take children from parents simply by deciding another home offers more advantages." Economic and cultural advantages alone are insufficient to determine the best interests of the child. Furthermore, there is a strong presumption in favor of custody by the natural parent. Constant association with natural brothers and sisters is desirable.

The best interests of the child will also hinge on the length of time the child has been in the home of the adoptive parents and the wishes of the child. If the foster parents have become the psychological parents of the child, then the court may determine that it is not in the best interests of the child to disturb that relationship. The court found that "if a person having lawful care of a child has properly provided for a child's social, moral and educational needs for a substantial period of time... a court is not justified in transferring that custody to another except for the most cogent reasons."45

In the case of the airlifted children, certainly those parents and relatives, having suffered the victimization of war, and the hardship following the children to the United States with hopes of locating them, have demonstrated considerable love, affection, and concern for their children. Indeed, many of these parents were willing to sacrifice the companionship of their children, forever if need be, in order to save their lives. In many instances, it was an act of great concern for the child's best interests which prompted the parents to arrange for their evacuation from Vietnam.47 In addition, these parents are best able to rear these children according to their native religion.

43. Id.
44. Doan Thi Haong Anh v. Nelson, 245 N.W. 2d 511, 517 (Iowa 1976). The underlying rationale of this presumption is articulated in Risting v. Sparboe, 179 Iowa 1133, 1136-37, 162 N.W. 592, 594 (1917) as follows:
   Something more than the material things of life is essential to the nurture of a child, and that something is the father's and the mother's love, or as near its equivalent as may be. Recognizing this, the law raises a strong presumption that the child's welfare will be best subserved in the care and control of parents... 'Indeed,' as said in one case, 'this presumption is essential to the maintenance of society, for without it man would be denaturalized, the ties of family broken, the instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed.'
45. Cf. Huynh Thi Anh v. Levi, 586 F.2d at 634. (The court implied that if the children had become psychologically dependent on adoptive parents that harm to the children would override other considerations.)
46. 245 N.W.2d at 517-18.
47. 586 F.2d at 628.
Adoptive parents often contend that they can provide greater material comforts for the child than its natural parents. This is likely to be true in most instances regarding airlifted children, inasmuch as their natural parents have been displaced from their homes and their employment and have, for the most part, left all material wealth behind in Vietnam. Although material considerations cannot be entirely disregarded, in the absence of proof that the child will be severely deprived if placed with his natural parents, material considerations should weigh least heavily in determining the best interests of the child. The interests of the child are best served with custody in the natural parents or other relatives unless rebutted by evidence that the child will experience severe psychological difficulties if separated from the adoptive parent.

IV. Conclusion

Custody proceedings concerning airlifted Vietnamese children are fraught with difficult issues and emotional upheavals. On one hand are the natural parents who have suffered the adversities of war, have risked their lives, and have given up all they owned so they might be reunited with their children. On the other hand are the adoptive parents who have reached out to provide a good home for a child they have come to love and accept as their own. The Levi court expressed its sympathy for the brave grandmother and indicated that it was tempted to award custody to her in compensation for her suffering. However, the court found that the best interests of the child must be taken into account and that this is best handled by a state court in recognition of the rule that custody proceedings are essentially within the jurisdiction of the state courts.

It is clear that such proceedings should take into account the circumstances involving the separation of the children from their natural parents. Indeed the circumstances involved are extreme and the separation of parent and child was created by dire emergency and necessity. In light of these facts, a court should favor the natural parents in the absence of a showing by clear and convincing evidence that the parents willfully consented to adoption or willfully abandoned or abused their children.

Certainly the courts should not condone the behavior of social service agency do-gooders, like the Michigan agency who took it

48. See note 43, supra.
upon itself to determine that the best interests of the child lay in adoption, despite its knowledge that the natural parents or relatives were attempting to regain custody and that any release to adopt was likely not to be valid. A court should, instead, severely sanction such agencies, which, despite such knowledge, place the children for adoption.

Where the adoptive parents or federal or state agencies refuse to relinquish custody, the proper course of action appears to be a habeas corpus proceeding in the state court.

Operation Babylift was a humanitarian gesture meant to rescue as many children as possible from the terrors of the Viet Cong. Despite the fact that it was assumed that all of the children were orphans and they were accepted in this country on a parole basis presumably to be adopted by United States citizens, the courts cannot dispense with determining the difficult questions of custody. Certainly the exigencies of the circumstances should weigh heavily in those decisions and the court should, whenever possible, reunite those families who, in order to save their children, have suffered such extreme hardships.

Barbara M. Brown
INSURANCE; UNINSURED MOTORIST COVERAGE; "STACKING"; THREE RECENT KENTUCKY CASES

In 1966 the Kentucky General Assembly enacted a body of statutes requiring each automobile insurance company to include uninsured motorist coverage (UMC) in every policy issued unless the insured rejected the coverage in writing. The statutes required a minimum coverage of $10,000 UMC per person, $20,000 per accident.¹

The express purpose of the mandatory coverage was to protect those persons injured in automobile accidents from the hardship of suffering loss at the hands of another, who, though legally responsible for this damage, carried no liability insurance and was, therefore, unable to satisfy a judgment rendered against him.²

It should be clear, however, that in today's inflated economy damages related to injuries suffered in automobile accidents will often exceed $10,000. In many cases when the defendant driver does have insurance, his policy will contain only the minimum amount of liability coverage required by law, which is equal to the 10/20 uninsured motorist coverage required by statute.³ As such, the injured party is protected by his own UMC to the same extent as if he had been able to collect from the defendant who had only the minimum coverage.

But in many other cases, an injured party will own or be covered by more than one automobile insurance policy, and due to the mandatory nature of Kentucky's UMC statute, will pay a premium for or be entitled to coverage under more than one $10,000 UMC endorsement. In this type of situation the question becomes whether he can recover more than $10,000 from the insurance company by combining the applicable UMC endorsements when his damages exceed the $10,000 limit of any one applicable policy. Such an attempt to combine the applicable UMC endorsements is referred to as "stacking."⁴

For example, if the plaintiff is injured by an uninsured motorist

while he is a passenger in a friend’s insured automobile, two uninsured motorist endorsements may be involved. The friend’s policy may provide coverage by defining an insured under its uninsured motorist endorsement so as to include “any person occupying the insured highway vehicle.” In addition, the plaintiff may be covered by the uninsured motorist endorsement of his own liability policy which covers him wherever he may be injured: an extraterritorial type coverage referred to as an omnibus clause. If the plaintiff’s damages exceed $10,000, he may attempt to recover $10,000 under his friend’s policy and then recover the excess under his own policy, thus “stacking” the two coverages.

A similar situation can arise when the plaintiff is injured while occupying one of his own two insured automobiles. The policy covering the car which he was driving at the time of his injuries would cover him as the driver, and, the omnibus clause in the policy insuring the other car would cover him “extraterritorially,” thus, in theory, providing him with two separate uninsured motorist coverages.

As might be expected, the insurance industry has attempted to incorporate clauses in their policies which would limit the right of an insured to stack coverages and thus expose the insurance company to greater liability. These clauses and the litigation they have produced over the last nine years are the subject of this comment.

The concept of stacking uninsured motorist endorsements to provide extended coverage for a single accident with an uninsured driver first emerged in Kentucky on March 20, 1970. Exactly nine years later to the day the most recent and dramatic change in the area of stacking took place when the Supreme Court of Kentucky decided Ohio Casualty Insurance Co. v. Stanfield. Focusing on Stanfield, the scope of this article is a discussion and outline on the law of stacking as it exists in the Commonwealth today.

Three recent and important decisions of the Kentucky Supreme Court provide a natural outline for this article. As mentioned above,

5. R. Keeton, Basic Text on Insurance Law, 221 (1971). The term “omnibus clause” is ordinarily used to signify a provision of liability insurance policy designating additional insureds by an expansive class description in terms of some relationship to the insured. Although this usage is prevalent in discourse about policy forms, the forms themselves ordinarily do not refer to such a provision as an omnibus clause. Rather, the clause usually appears under a caption such as “persons insured” or “definition of insured.”


8. 581 S.W.2d 555 (Ky. 1979).
Stanfield provides a center for the discussion, and the other cases are included to cover related areas as follows:


II. When may he stack? *Safeco Insurance Co. of America v. Hubbard.*

III. What may be stacked? *State Farm Mutual Automobile Insurance Co. v. Fletcher.*

I. Who May Stack?

A. *Background of Ohio Casualty v. Stanfield*

On March 20, 1970, the Court of Appeals held in *Meridian Mutual Insurance Co. v. Siddons* that the Kentucky uninsured motorist statute, which requires each policy issued to contain $10,000 UMC, permits an insured owning two or more policies who is injured in a single accident to collect under each policy, thus "stacking" his coverages. The court reasoned as follows:

As we read the statute it plainly requires each policy to contain uninsured motorist coverage of $10,000 and $20,000 (unless rejected in writing by the insured) . . . The legislature very well, and reasonably, could have considered that an insured who had occasion to acquire two liability policies would benefit by having a doubled amount of uninsured-motorist coverage. Actually, uninsured-motorist coverage has a number of aspects of accident insurance, and the legislature may have thought that since it can be provided for a relatively small premium in conjunction with a liability policy, the insured should be afforded the additional amount of coverage with each policy he takes.

The court struck down a clause in the policy which limited the liability of the insurance company to the greater of any two applicable coverages, finding it in contravention of the statute which "required" each policy issued to contain $10,000 UMC.

On September 13, 1974, James Stanfield, while on duty as a police officer for the City of Newport, Kentucky, was struck and injured by an uninsured motorist. At the time of the collision he was operating a motorcycle owned by the city and insured under its fleet plan policy covering a total of 63 city vehicles and providing $10,000

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9. Id.
10. 578 S.W.2d 49 (Ky. 1979).
11. 578 S.W.2d 41 (Ky. 1979).
12. 451 S.W.2d 831 (Ky. 1970).
13. Id. at 834.
UMC for each. Stanfield was also a named insured in a single policy with two endorsements providing $10,000 UMC on each of his two privately owned automobiles.

Stanfield brought suit against Minnie Russell, the uninsured owner of the automobile which struck him, Charles Turner, the uninsured driver-permittee of the automobile, Buckeye Union Insurance Company, Stanfield's private insurer, and Ohio Casualty Insurance Company, the city's fleet plan insurer, seeking damages of $250,000.14 The trial court entered summary judgment against all defendants on the issue of liability and against both insurance companies on the issue of "stacking." The trial court determined that Ohio Casualty had a potential liability of $10,000 for each of the 63 vehicles insured by the city and that Buckeye's potential exposure was $10,000 for each of Stanfield's two vehicles. The trial court also determined that Buckeye's liability was secondary to that of Ohio Casualty. The Kentucky Court of Appeals affirmed the decision of the trial court on December 16, 1977.15

Although the court of appeals had dealt with the issue before them only nine months earlier in Safeco Insurance Co. of America v. Hubbard16 and denied stacking in a factually similar situation, it approached the "stacking" issue in Stanfield as one of first impression in the Commonwealth.17 The court defined the issue in Stanfield as an extension of the question raised in Meridian, that is, whether stacking, permissible in multiple policy situations could be extended to single policy/multiple premium situations, thereby entitling Stanfield to stack 63 endorsements in Newport's fleet plan policy and two in his own single personal policy. The court of appeals phrased the issue before them as a simple interrogatory and then answered that question in a steady logical fashion as follows:

The question presents itself: Is the distinction that the insurer pays separate premiums for uninsured motorist protection for multiple vehicles on a single policy rather than paying separate premiums for multiple vehicles under separate policies a distinction warranting a contrary result? . . .

Those cases allowing the stacking of coverages on separate vehicles under a single policy turn primarily upon one significant factor—that

15. Id. at 3.
the single policy contained separate endorsements and descriptions of each covered vehicle for which separate vehicles under a single policy with separate endorsements and separate premiums. There is no reason to distinguish the single policy/separate premium situation from the separate policy/separate premium situation. The purpose of stacking so widely allowed in the multiple policy situation is to give effect to the legislative intent where the uninsured motorist statute requires a minimum coverage for each policy and also to allow the insured the coverage for which he has paid. These same considerations apply to a single policy where multiple coverage is obtained through separate premiums. The insured has paid separately for the coverage for each vehicle and should receive the benefits.\textsuperscript{18}

In posing the question and in answering it, the court of appeals had decided the case, yet it supplemented the decisive language with this dicta: “Also, it is immaterial that Stanfield’s employer paid the premium.”\textsuperscript{19} The court cited Zurich Insurance Company v. Hall\textsuperscript{20} as directly supporting this statement.

Why the court decided to cite this language from Hall is a question without an answer. The language was dicta even in Hall, and though it did support the decision of the court of appeals in Stanfield, the fact that Hall was factually different from Stanfield makes even the dicta distinguishable. Nonetheless, upon that final note, the court of appeals lowered the gavel. The dicta, however, would later turn out to be the most haunting language in the opinion, being precisely the issue upon which the supreme court would overrule the court of appeals.

As mentioned earlier, only nine months before, the court had decided the same issue with which it was faced in Stanfield in Safeco Insurance Co. of America v. Hubbard,\textsuperscript{21} where it had decided that stacking multiple UMC endorsements within a single policy was prohibited. After deciding Stanfield, the court of appeals was asked to reconsider its earlier decision in Safeco; and upon reconsideration, it revised the Safeco opinion to concur with Stanfield.\textsuperscript{22} The court had clearly stated that single policy/multiple premium stacking was permissible in Kentucky.

The simple reasoning used in Stanfield seemed settled, well reasoned, and clearly consistent with the decision in Meridian. None-

\textsuperscript{18} Id., slip op. at 4.
\textsuperscript{19} Id. at 5.
\textsuperscript{20} 516 S.W.2d 861 (Ky. 1974).
theless, the prospect of exposing an insurance company to a potential liability of $630,000 on each insured vehicle when the original policy provided $10,000 coverage per vehicle raised some doubt as to the propriety of Meridian. As a result, both cases were appealed to the supreme court and accepted upon motions for discretionary review.23

B. Ohio Casualty v. Stanfield

Though the supreme court opinion in Stanfield basically left Meridian in tact, Justice Reed ferreted out an issue in the stacking area which had gone unnoticed until then. In a nutshell, the supreme court indicated that even though stacking was permissible in Kentucky, the first question which must be asked in every stacking case is who is trying to stack and whether they may do so.24

Going outside its jurisdiction for authority, the Kentucky Supreme Court reexamined the omnibus nature of Ohio Casualty's policy and extracted from that policy the following language:

Persons Insured.
Each of the following is an insured under this insurance to the extent set forth below:
(a) the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either;
(b) any other person while occupying an insured highway vehicle; and
(c) any person, with respect to damage he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.25

The court said that in using this clause, the company envisioned two classes of insured persons: first, the named insured (who bought and paid for the policy) and members of his household, and second, other persons injured while occupying an insured vehicle.26 With respect to the first class, the court found that coverage applied to household members regardless of their location or activity so long as their injuries were sustained at the hands of an uninsured motorist. This, the court said, was due to the fact that the coverage provided was without qualification.27

23. 578 S.W.2d 49 (Ky. 1979); 581 S.W.2d 555 (Ky. 1979).
24. 581 S.W.2d 555 (Ky. 1979).
25. Id. at 557.
26. Id.
27. Id.
However, the court found that the coverage applicable to the second class of insureds was qualified by the provision that they were protected only so long as they were occupying the "insured highway vehicle." The court seemed to be saying that the law in Kentucky with respect to stacking is still firmly based on the rationale in *Meridian*, that is, UMC has many of the attributes of accident insurance, and therefore, an insured should be afforded additional coverage with each policy he purchases. Yet, the language in the Ohio Casualty policy indicated that a permissive user's right to coverage was a qualified right, limited to coverage only while he was occupying the "insured vehicle." The court reasoned that such a user could not reasonably expect to share in the broader coverage afforded an insured of the first class since the insured of the second class did not pay for the additional coverage involved. Likewise, his rights to stack the coverage found in separate endorsements should be limited because he bears none of the incidents of additional accident coverage as to him and is not necessarily entitled to expect that all of the policies owned by the registered owner cover him, considering that he may not even know that the owner has more than one policy.

To support its new theory of status/stacking, the court cited a Virginia case, *Cunningham v. Insurance Co. of North America*. In that case the insured's rights were determined by his status as an insured of the first or second class based upon a statutory definition as opposed to the policy definition involved in *Stanfield*. Nonetheless, citing the Kentucky uninsured motorist statute and its broad reference "persons insured thereunder," the supreme court held that Ohio Casualty's policy definitions came within the statutory contemplation of "insured."

The only relevant statutory mandate in Kentucky is KRS 304.20-020 which requires that no automobile or motor vehicle liability policy be delivered or issued without uninsured motorist coverage in limits of $10,000 and $20,000 for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. It is not contended nor could we hold that the definitions of insured contained in the Ohio Casualty's policy violate the requirements of our statute. Therefore,

28. Id. at 557.
29. Id. at 557-59.
30. 213 Va. 72, 189 S.E.2d 832 (1972).
the contractual policy definitions in the policy with which we are concerned coincide in legal effect with the contractual and statutory definitions considered in Cunningham, supra.\footnote{581 S.W.2d at 557.}

Most of the Stanfield opinion came from the rationale fashioned in Cunningham. Though not expressly, the Stanfield court cited Cunningham with approval in what appeared to be support of the accident insurance rationale found in Meridian. This time, however, the court was deciding who was entitled to the benefits of this contractual protection and not whether it was available or not in the first place.

The purpose of uninsured motorist insurance is to provide compensation to the victim of the uninsured motorist. The named insured in a policy receives coverage, and a contract benefit, for which he has paid a consideration. He seeks indemnity based on the payment of that premium and where he has paid separate premiums, he is entitled to the additional coverages. However, the argument and reasoning does not apply to a permissive user of a vehicle who pays no premium and does not receive the broader uninsured motorist coverage of a named insured.\footnote{189 S.E.2d at 836,\footnote{Ohio Cas. Ins. Co. v. Stanfield, 581 S.W.2d at 558.} cited in, Ohio Cas. Ins. Co. v. Stanfield, 581 S.W.2d at 558.}

The court found in Cunningham a theory consistent with the Meridian approach to stacking, yet, because of the outrageous nature of the Stanfield fact situation, found it necessary to bolster its decision by approaching it from a second angle.

Attempting to realign the rights of an insured to “stack” with the rights of an insurance company to know what coverage is being provided when the policy is issued, Stanfield cited an Alabama case, Lambert v. Liberty Mutual Insurance Co.,\footnote{331 So.2d 260 (Ala. 1976).} for its rationale which rested on a “reasonable expectation” approach to the contract itself.

In Lambert, the court pointed out that an insurance policy is still a contract and, quite frankly, an adhesion contract. Therefore, the court reasoned, if an insured bought and paid for more than one UMC endorsement, each of which purported in one clause to cover him whether he was a driver, a passenger, or a pedestrian, and language in another clause in the policy attempted to limit his right to recover to the greater of any one applicable amount, there exists an ambiguity which, by contract law, should be decided in favor of the insured. Very simply, Lambert held that insureds of the first class should not be denied what the contract purports to give them.

\footnote{331 So.2d 260 (Ala. 1976).}
As a logical extension of this rationale, the court pointed out that
the permissive user, since he is not a party to the insurance contract,
could not be presumed to have any expectations which would be
undermined if the ambiguity were not resolved in his favor. There-
fore, language which limits the permissive user's right to coverage
should not be voided on the contract theory. In other words, the
insured of the first class should not be denied that which he has paid
for and expected to get, but an insured of the second class who has
paid nothing and was not a party to a contract creating reasonable
expectations of extended coverage is not entitled to the same protec-
tion as the named insured.
Applying these policy rationales to the Stanfield fact situation,
the court quickly concluded that as to the Ohio Casualty policy
issued to his employer, Stanfield was an insured of the second class,
entitled only to the $10,000 UMC applicable to the vehicle he was
occupying at the time of his injury. However, as to the two UMC
endorsements contained in the single policy with Buckeye Union
covering his two personal vehicles, he was an insured of the first
class, and therefore, entitled to "stack" those coverages for a poten-
tial recovery of $20,000.
Justice Reed's well written opinion, rendered on the ninth anni-
versary of Meridian, answered questions left unresolved by
Meridian. First, it prohibited stacking in the outrageous situation
presented in Stanfield where, for 63 premiums, Ohio Casualty could
have been subjected to a potential liability of $39,690,000. Second,
the decision tackled the issue with which the court of appeals had
originally dealt, that is, the right of an insured to stack coverages
contained in a single policy with multiple endorsements and multi-
ple premiums. Deciding that Stanfield, as an insured of the first
class, could stack the two endorsements found in his single personal
policy, Reed settled the last issue presented by the Stanfield fact
situation. In other words, single-policy/multiple-premium stacking
is permissible, but only for insureds of the first class.

34. Id. at 263.
35. 581 S.W.2d at 559.
36. Assuming each insured vehicle was involved in an accident with an uninsured motorist,
this is the potential liability for 63 insured vehicles covered under each of 63 endorsements
under one policy with UMC of $10,000 each.
37. 581 S.W.2d at 559.
II. When May One Stack?

Once it is determined that the person seeking to stack UMC endorsements is an insured of the first class as to those endorsements and eligible to "stack," the question then becomes, when do the injuries sustained by that insured entitle him to stack those endorsements? Though reference must be had to the insurance policy itself for guidance, at least one recent case has intimated that certain provisions within a policy may work to prevent stacking by an insured of the first class. 38

A. Background of Safeco Insurance Co. of America v. Hubbard

It should be remembered that the decision in Meridian Mutual Insurance Co. v. Siddons 39 laid the foundation for the law of stacking in Kentucky by holding that a clause in the policy at issue limiting recovery to the greater amount of any two endorsements applicable to the claimant was in direct contravention of the uninsured motorist statute then in effect which required each policy issued to contain the minimum UMC. As such, it appeared that after Meridian any attempt by an insurer to limit liability by the terms of the policy was void under the statute. However, it now appears that this seemingly hard and fast Meridian rule is subject to at least some qualification.

It should be noted at the outset that the Kentucky uninsured motorist statute provides that "[f]or the purpose of this coverage the term uninsured motor vehicle shall, subject to the terms and conditions of such coverage, be deemed to include. . . ." 40 Early in the history of uninsured motorist litigation in Kentucky, it was decided in Allen v. West American Insurance Co. 41 that this language left open the possibility of defining an uninsured motor vehicle in such a way as to reasonably exclude certain types of vehicles, thus limiting coverage without violating the statutory scheme.

In using the italicized language, the Legislature recognized that there would be terms and conditions of such coverage to which the statute's application would be subject. . . . If the solons had intended that the [uninsured motorist] provisions should be applicable . . . regardless of the policy provisions, it is difficult to discern why the words subject to the terms and conditions of such coverage were employed. What terms and what conditions are permissible? 42

38. Safeco Ins. Co. of America v. Hubbard, 578 S.W.2d 49 (Ky. 1979).
39. 451 S.W.2d 831 (Ky. 1970).
41. 467 S.W.2d 123 (Ky. 1971).
42. Id. at 126.
Partially answering the question posed in *Allen*, the court decided in a later case that the exclusion of government vehicles from the definition of an "uninsured motor vehicle" was reasonable in light of the existence of the Federal Tort Claims Act, the Kentucky Board of Claims Act, and the abandonment of sovereign immunity as it applies to municipal corporations.\(^4\) In deciding that such exclusions do not violate Kentucky's statutory scheme, the court used language which would become the basis for validating all future exclusions.\(^4\)

In adopting uninsured motorist coverage, the Legislature did not specify what exclusions would be either valid or invalid. Had it so desired, the General Assembly easily could have included a list. Its failure to do so affords basis for the construction that the statute does not invalidate all exclusions but only those which are unreasonable.\(^4\)

Notwithstanding the fact that the statutory language upon which the *Commercial Union* court had relied qualified only the right of an insurance company to define what was or was not an uninsured motor vehicle, the supreme court held in *Preferred Risk Mutual Insurance Co. v. Oliver*\(^4\) that a policy exclusion denying UMC to an insured injured while operating a motorcycle was reasonable and, therefore, within the intent of the legislature. Without discussing the issue of whether the statutory language emphasized in *Commercial Union* was pertinent to anything other than defining an uninsured motor vehicle, the court simply stated that:

> It is common knowledge that motorcycle riders, as a class, are among the highest risk groups conceivable. Motorcycles offer no protection whatsoever from the front, back, sides or top, and leave the rider exposed to every peril of highway travel. The exclusion of such a class from coverage is clearly reasonable where, as here, the assured has the option of avoiding the excluded peril.\(^4\)

Within one month's time *Oliver* became the basis for a decision which validated another type of motorcycle exclusion, found in *State Farm Mutual Automobile Insurance Co. v. Christian*.\(^4\) There, the court upheld a policy provision which defined the "insured automobile" as a "four-wheeled land motor vehicle" and thus excluded

\(^{43}\) Commercial Union Ins. Co. v. Delaney, 550 S.W.2d 499 (Ky. 1977).
\(^{44}\) *Id.*
\(^{45}\) *Id.* at 500.
\(^{46}\) 551 S.W.2d 574 (Ky. 1977).
\(^{47}\) *Id.* at 577.
\(^{48}\) 555 S.W.2d 571 (Ky. 1977).
from coverage injuries to an insured of the first class incurred while operating a motorcycle.

Within three short months, the statutory language which gave leeway to insurance companies in defining what was and what was not an "uninsured motor vehicle" became established precedent for validating any exclusion from UMC, whether or not it dealt with the definition of an uninsured motor vehicle, and so long as the court found the exclusion "reasonable."

One year later, the supreme court decided *M.F.A. Insurance Company v. Whitlock,*49 in which the issue on appeal was whether an automobile insurance policy could extend coverage to an insured by way of its omnibus clause and yet, in another clause, exclude coverage to an insured while he was occupying another of his own automobiles not named in the policy in question. The same issue arose in *Christian,* although there it was joined with the motorcycle exclusion. In *Whitlock,* however, it was the only issue to be decided; and the supreme court used the occasion to state once and for all its position on UMC exclusions.

It should be obvious by now that so long as our uninsured motorist statute, KRS 304.20-020, remains in its present form, the only question which must be answered in determining the validity of any particular exclusion is whether the exclusion is a reasonable one. For even if it be true, as the Whitlocks argue, that the phrase subject to the terms and conditions of such coverage contained in subsection (2) of the statute does nothing more than allow insurers leeway in defining what constitutes an uninsured motor vehicle, we think the failure of the remainder of the statute to mention exclusions one way or the other affords basis for the construction that the statute does not invalidate all exclusions but only those which are unreasonable.50

The door had been opened. It appeared that any exclusion, so long as reasonable, would be granted judicial approval. However, it was not long until a policy provision which eliminated the right of an insured to "stack" multiple endorsements would be tested under the "reasonable exclusion" rule.

**B. Safeco Insurance Co. of America v. Hubbard**

On February 27, 1979, the Kentucky Supreme Court reversed the decision of the court of appeals in *Safeco Insurance Co. of America v. Hubbard,*51 which, along with *Ohio Casualty v. Stanfield,*52 dis-

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49. 572 S.W.2d 856 (Ky. 1978).
50. Id. at 857.
51. 578 S.W.2d 49 (Ky. 1979).
52. 581 S.W.2d 555 (Ky. 1979).
cussed above, was one of Kentucky's two main cases in the single policy/multiple premium UMC stacking area. The court of appeals had identified the issue in *Safeco* as whether there was a valid distinction between the multiple policy/multiple premium stacking situation given approval in *Meridian*, and the single policy/multiple premium situation which it approved in *Stanfield*. The supreme court, however, in an opinion by Justice Reed, disposed of the *Safeco* case under the "reasonable exclusion" rule as announced in *Whitlock* without reaching the stacking issue addressed by the court of appeals.

*Safeco* was an action brought by the father of a boy who had been killed in an accident with an uninsured motorist. The boy was a resident of his father's household and covered under his father's uninsured motorist policy. The accident occurred while the son was operating his own auto for which he had separate UMC. The court of appeals ruled invalid a policy provision in the father's policy limiting UMC to an insured occupying an automobile "owned by the named insured and described in the policy for which a specific premium charge indicates that coverage is afforded." The court, having ruled the attempted policy exclusion void, addressed the stacking issue and decided the father could recover in a survival action under the coverage of his son's policy as well as under the coverage of his own policy, his son being an insured under the father's policy as a resident of the father's household. The court rejected *Safeco*'s argument that the son was excluded under the father's policy because he was driving his own car when killed and not a car named in the father's policy.

Once the court was past this preliminary problem, it wrangled with the stacking issue involving the father's two endorsements in his single policy. Since the father had two of his own cars insured under one policy, he wanted to stack the coverages for both cars on top of the coverage for his son's car. The court ruled that he could stack one of his own coverages on his son's policy, but not both, distinguishing *Meridian*, two-policy/two-premium situation, from *Safeco*, involving a single-policy/two-premium situation. In short, it ruled that intra-policy stacking was not allowed.

Nine months later in *Stanfield*, the court of appeals approved

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55. 451 S.W.2d 831 (Ky. 1970).
"stacking" in the single policy/multiple premium situation. No mention was made, however, to the Safeco opinion rendered earlier that year, but after Stanfield was handed down, the court of appeals agreed to reconsider Safeco on the limited issue of whether the father was entitled to "stack" the UMC endorsements of his single policy. On rehearing, the court decided that in light of Stanfield, the father could stack within his single policy. Both Safeco and Stanfield were accepted by the supreme court on motions for discretionary review.

On February 27, 1979, the Supreme Court of Kentucky reversed the second Safeco decision on the limited issue presented in the first Safeco case, namely, whether the exclusion limiting UMC to insureds operating automobiles named in the policy was or was not void. The court found the exclusion "reasonable"; therefore, the issue of stacking was never properly reached by the court of appeals.

The opinion by Justice Reed noted that M.F.A. Insurance Co. v. Whitlock, which held that the uninsured motorist statute did not invalidate all policy exclusions but only those which were unreasonable, was dispositive of Safeco in that a clause which has the net effect of prohibiting "recovery for accidents arising from the use of an automobile owned by the named insured or a relative but not insured under this policy" was reasonable. Because this decision effectively precluded any recovery under the father's policy, the issue of "stacking" two coverages within one policy was moot.

The circumstances under which an insured will be permitted to stack will likely depend on the policy exclusions applicable to that particular case. But it is clear, at least at this point, that if an insured occupied a vehicle owned by him but not named in the policy under which he seeks to recover, he may not stack that endorsement on top of the coverage applicable to the vehicle he was occupying at the time of his injury. The cases indicate that Safeco Insurance Co. and M.F.A. Insurance Co. incorporate this now valid exclusion into their policies, and it can be safely predicted that any company which does not now include such an exclusion will likely

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59. 578 S.W.2d 49 (Ky. 1979); 581 S.W.2d 555 (Ky. 1979).
60. See Safeco Ins. Co. of America v. Hubbard, 578 S.W.2d at 49.
61. 572 S.W.2d 856 (Ky. 1978).
62. 578 S.W.2d at 50.
do so in the future in light of the fact that it has been given judicial approval and effectively limits liability in a potentially common stacking situation.

Though the decision by Justice Reed successfully cut through the sludge which had bogged down the court of appeals and got to the very heart of the issue, it is subject to at least some criticism when one considers the following hypothetical.

An insured and his wife were traveling in the automobile of a friend when it was struck by an uninsured motorist. The husband and wife each owned a standard automobile liability policy containing UMC. As a resident of each other's household, each is an insured under the other's policy as well as his or her own policy, as an insured of the first class. As such, each is entitled to stack the coverages of those policies to meet their damages. In addition, each would be entitled, as an insured of the second class, to at least some amount of coverage under the friend's policy. Under the decisions by Justice Reed in \textit{Safeco} and \textit{Stanfield}, this situation subjects the couple's insurer to liability for both insureds under both policies, the insurer's potential exposure being $40,000 under both policies. However, under \textit{Safeco} alone, if the husband and wife had been occupying one of two jointly owned cars at the time of the accident, they would not be entitled to the coverage applicable to their other car if the applicable policy included the \textit{Safeco} exclusion which denies coverage where the insured is occupying an "owned automobile" which is not named in that policy. The second hypothetical is perhaps more likely to occur than the first, and it might be said that this exclusion is, therefore, reasonable because it limits what could otherwise be a source of "flooded liability" for the insurance industry. But the question presents itself: is it reasonable to deny an insured the coverage which he has purchased and expected to receive when he is occupying his own automobile, when it would violate the uninsured motorist statute to deny it to him when he is injured while occupying an automobile owned by someone else? Or in other words, is it reasonable to afford him more coverage as a pedestrian or as a guest rather than as a driver or passenger of one of his own cars?

The \textit{Safeco} court, by stacking precedent upon precedent, has effectively eliminated stacking in a two-policy/two-premium situa-

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64. Id.
tion by validating an exclusion in one of the policies which cuts off liability when the insured is injured in an automobile he owns not named in the policy. Here, Safeco questions the propriety of Meridian with respect to the validity of exclusionary clauses. Yet, Stanfield, decided after Safeco, seemed to rely upon the Meridian rationale as if it were still good law. What the court appears to have done is decide that the “excess” clause struck down in Meridian is violative of the statutory scheme. Because the net effect of these two clauses is the same, the decision as to when one may stack now rests firmly within the court’s determination as to what is a “reasonable” method of excluding the right to “stack.”

Though, at the moment, the question of when an insured of the first class may stack is answered by saying that he may stack when the car he is occupying is named in the policy under which he seeks coverage, or whenever he is injured as a guest of another person or as a pedestrian, the “reasonableness” of this answer will surely be presented to the court again. Whether, at that time, the concept of stacking will be disposed of once and for all, or whether the exclusion held valid in Safeco will be considered unreasonable or violative of the statute is impossible to predict. That decision may very likely depend on the court’s perception of the role of Kentucky’s other two forms of statutory injury compensation, no fault insurance65 and mandatory liability coverage.66 But for the present, the mere existence of these other two forms of insurance raises at least one additional question with respect to stacking: what insurance coverages may an insured stack?

III. What May One Stack?

Another problem in the uninsured motorist area was presented in State Farm Mutual Automobile Insurance Co. v. Fletcher.67 This case presented a question relating to the relationship of no-fault insurance coverage (PIP) and UMC. A short recital of the facts of the case will reveal the problem the court faced.

Fletcher had obtained a judgment in Jefferson Circuit Court against an uninsured motorist for $42,740.23, which included $10,740.23 for medical expenses and lost wages, and $37,000 for pain and suffering. Under Kentucky law, medical expenses and lost wages are compensable under both PIP and UMC, whereas pain and suffering are not. The court therefore had to determine whether the uninsured motorist was entitled to recover any of the $37,000 for pain and suffering under the PIP coverage.

67. 578 S.W.2d 41 (Ky. 1979).
suffering is unique to UMC and not part of PIP benefits. State Farm had issued Fletcher two policies of automobile insurance, one of which included PIP coverage. The issue presented on appeal was whether State Farm could offset the PIP payments already made against the UMC of the second policy pursuant to the following contract clause:

(A) Any amount payable under the uninsured motor vehicle coverage [UM] shall be reduced by the amount of any personal injury protection benefits [PIP] paid or payable under this or any other automobile insurance policy because of bodily injuries sustained by an eligible insured person.

The Supreme Court of Kentucky pointed out that the uninsured motorist statute specifically required UMC in each policy in an amount not less than $10,000 for each person, $20,000 for each accident, for persons legally entitled to recover thereunder. The court considered the validity of the policy provision in question in light of that statutory mandate:

By its plain terms, the effect of the policy provision in issue here is to reduce the amount payable under [UM] coverage by the amount payable under [PIP] coverage in every case. To put it another way, [PIP] coverage is always set off against [UM] coverage regardless of the nature and the source of the damages for personal injury. This means that in any case in which [PIP] is payable less than $10,000 [UM] is payable. This result is repugnant to the mandate of the legislature that not less than $10,000 [UM coverage] be provided. This policy provision is void because public policy will not permit the contract to take away that which the statute requires to be given.

The court was quick to add that it did not mean the PIP and UMC could entitle the insured to double recovery for the same items of damage. The court noted that Kentucky Revised Statute 304.39-070(2) provides an insurer is subrogated against the uninsured tortfeasor to any amount of PIP benefits paid to the insured, and as such, the effect of the statute was to prevent double recovery of the same items of damage. Reducing this rationale to very simple terms, the court said:

Conceptually, the UM Coverage may be thought of as excess as to the PIP coverage. Thus, no award may be made under UM coverage

69. 578 S.W.2d at 43.
70. Id.
which includes any damages paid or payable under PIP coverage. We have rejected the proposition that paid or payable damages are to be deducted from the UM award. It is simply that they may not be included therein. Thus, if an insured’s case, evaluated apart from paid or payable damages, is worth the UM limit of liability, that limit must be paid. Hence, in an appropriate case an insured may collect the limits of both the PIP and UM coverages.\textsuperscript{71}

From this decision it now appears that an insured not only is entitled to coverage under the uninsured motorist endorsement in his policy as indicated in Sections I and II above, but he is also entitled to stack uninsured motorist and PIP coverages to compensate him for his injuries suffered at the hand of an uninsured motorist by way of entitlement to \textit{all} the insurance he has purchased.

The decision of the Supreme Court of Kentucky in \textit{Fletcher} again echoed the rationale first articulated in \textit{Meridian}, no contract term can abrogate the mandate of the legislature that each policy contain the minimum uninsured motorist coverages and that each insured will receive all the benefits he pays for when he contracts with an insurance company in Kentucky.

\textbf{Conclusion}

In three months early in 1979, the Supreme Court of Kentucky changed the direction of uninsured motorist law.

In \textit{Stanfield v. Ohio Casualty Insurance Co.}, the court ruled that only those persons who occupy the status of first class insureds as to particular uninsured motorist endorsements can “stack” those endorsements. First class insureds were defined as the named insured and residents of his household. These people, the court held, were entitled to all the coverage purchased by them or the head of their household without exclusion. This was true whether the coverages were contained in separate policies or in one policy. They could stack as high as necessary to cover their injuries, since they had purchased the insurance and presumably expected to get what they paid for.

In \textit{Safeco Ins. Co. of America v. Hubbard}, the Supreme Court of Kentucky looked no farther than the holding of prior cases to decide that if that policy contained a “reasonable” exclusion, that exclusion would be valid even though the statute prohibits the exclusion of UMC unless it is waived by the insured.

\textsuperscript{71} Id. at 44.
Building upon earlier cases, *Safeco* came to a conclusion inconsistent with the rationale behind other, and even later, cases. Beginning with a decision which recognized that the UM statute allowed an insurance company to define an “uninsured motor vehicle,” *Safeco* interpreted that decision as allowing an insurance company to exclude coverage under its uninsured motorist endorsement so long as the exclusion was “reasonable.” It came to this conclusion even though in *Stanfield*, decided later, it reaffirmed its continuing policy of invalidating any attempt by an insurance company to exclude coverage as a violation of the mandatory language of the UM statute. In other words the back door is open to reasonable exclusions but the front door is barred to any exclusion which attempts to prevent stacking. A position like this is indefensible and likely to be attacked in future litigation.

Insofar as other types of pseudo-stacking issues have appeared, the Supreme Court of Kentucky validated a type of stacking in *Fletcher*, where the court ruled that recovery under PIP for medical bills and lost wages did not preclude recovery under applicable UMC endorsements for pain and suffering or medical bills or lost wages in excess of the PIP coverage. In other words, PIP and UMC could, in one sense, be stacked in an appropriate case.

Though the law surrounding uninsured motorist coverage and stacking in particular will surely see further change and definition, for those with an interest in insurance law the last weeks of winter in early 1979 provided exceptionally fertile ground for change. Between February 6 and March 20, the Supreme Court of Kentucky saw to it that, at least in the field of insurance law, the spring of 1979 started out with a roar.

*Marcus S. Carey*
NOTES


Since World War II, franchising has become an increasingly popular and lucrative method of marketing and a seemingly endless variety of goods and services. It is a complex subject for the law practitioner, largely because no two franchise relationships are quite the same. As one commentator has noted, "the word ‘franchise’ has been applied so indiscriminately, and to such divergent business arrangements as to defy consistent definition." One difficulty for the practitioner is that franchise law is not so much in a state of flux, as in a state of initial development.

Franchising law . . . is a modern melange of legal disciplines which includes trademark licensing, antitrust, contracts, securities, taxation, corporations, real estate, financing, and insurance. It is syncretic in nature, and it sorely lacks internal consistency. It is still in its infancy, but is developing rapidly, usually without ascertainable direction, through court decisions and federal and state legislative and regulatory efforts.

In Kosters v. Seven-Up Company, the Sixth Circuit has given significant direction to the rapidly developing law of franchise by defining tort liability in warranty of a franchisor for the acts of a franchisee. Although the court was examining Michigan law and studying a long-established franchising method, the concepts discussed broke new ground in the Sixth Circuit and could potentially have widespread application in other jurisdictions.

The Kosters court was faced with an old fact situation clothed in trendy legal garb. The plaintiff in the case had removed a cardboard carton, containing six bottles of carbonated beverage, from a Michigan grocery shelf and put it under her arm. The carton was not designed by the franchisor (nor by the franchisee, for that matter), although the franchisor had reserved the right of approval of the

4. The soft drink and automobile industries were among the first to employ the franchise method of marketing. 62 Am. Jur. 2d Private Franchise Contracts § 2 (1972).
carton. The carton, described as "over-the-crown" or "neck-through," was apparently designed to be held from the top. When held in another way, as was done by the plaintiff, the bottles could slip out. Predictably, one bottle did fall out, hit the floor of the store, and shattered. The plaintiff was looking down at the time, and a piece of flying glass struck her in the eye, causing permanent loss of vision in that eye.

The plaintiff filed suit against the franchisor, the franchisee, the carton designer and manufacturer, and the grocery store. Prior to trial, the plaintiff settled her claims against the bottler, the carton manufacturer, and the grocer for $30,000. The franchisor, the Seven-Up Company, denied any liability and filed a third-party complaint against the franchisee, the carton manufacturer, and the grocery store, seeking indemnification or contribution if it was found liable. By stipulation, the grocery was dismissed as a defendant before trial, and the franchisee and carton manufacturer were severed from the action by the court at the start of the jury trial, thereby leaving the franchisor as the sole defendant in the action.

At the conclusion of the trial, the district court judge submitted the case to the jury on five related products liability theories, one in negligence, one in contract, and three in strict liability. The jury returned a general verdict, awarding the plaintiff $150,000. However, it was impossible to determine upon which of the theories of

5. The franchise agreement in relevant part read that "cases, bottles, and crowns used for 7-Up will be of a type . . . and design approved by the 7-Up Company," and "any advertising . . . material . . . must be approved by the 7-Up Company before its use by the bottler." Kosters v. Seven-Up Co., 595 F.2d at 350. The franchisee used an extract provided by the franchisor to produce the beverage which it then marketed to retailers within its franchise area encompassing some 52 Michigan counties. Id.
6. Id.
7. Id.
8. The theories submitted to the jury were:
   1. *Negligence.*—Plaintiff may recover from a franchisor for negligence without regard to privity.
   2. *"Implied Warranty."*—Plaintiff may recover from a franchisor for "breach of implied warranty of fitness" if the product in question, the 7-Up carton, was defective.
   3. *"Inherently Dangerous."*—Plaintiff may recover if the jury finds that 7-Up "bottles are inherently dangerous" and that the franchisor failed to warn the consumer of the danger.
   4. *"Opportunity to Change Design."*—Plaintiff may recover for an injury resulting from the design of a product (the 7-Up carton) if the franchisor did not exercise an "opportunity to avoid causing injuries" by altering the design of the product.
   5. *Contract.*—Plaintiff may recover as a third party beneficiary of the franchise agreement between 7-Up and the bottler.
   Id. at 350-51 (footnotes omitted).
recovery the jury had relied. The Seven-Up Company appealed, arguing that all of the theories, save negligence, were incorrect.

On appeal, the Sixth Circuit found that three of the four disputed theories were wrong, at least under Michigan law. It reversed and remanded the case since the jury might have followed an erroneous theory. The importance of the action lies in the fact that the one theory that the court sustained could have broad application in almost any jurisdiction.

Judge Merritt, writing for the unanimous panel, noted that the question of franchisor liability in this factual and legal context was a new one in Michigan and "appeared to be a new question not generally considered in other jurisdictions." Nevertheless, by logical extension of existing principles, the court was able to find liability could attach in a most significant area, breach of warranty. Thus, the decision in favor of the Seven-Up Company may prove to be a Pyrrhic victory for franchisors.

The Seven-Up Company conceded at the outset of the appeal that a franchisor can be liable to a consumer for its own negligence just as a manufacturer or supplier can be liable. However, Seven-Up argued that liability may not lie in implied warranty when the franchisor did not manufacture, handle, design, or even require the use of the product at issue—in this case, the carton. Plaintiff contended that liability did attach in the form of strict tort liability for breach of implied warranty when the franchisor retained the right of control over the product and specifically consented to its distribution in the form sold.

The court agreed with the plaintiff on the breach of implied warranty argument, pointing out that Seven-Up "not only floated its franchisee and the bottles of its carbonated soft drink into the so-called 'stream of commerce,' the company also assumed and exer-

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9. The most common theory of recovery against a franchisor in tort cases, respondeat superior, was neither submitted to the jury nor discussed by the reviewing court. The common law rule observed in Michigan and other jurisdictions is that a pretrial release of a "servant" bars recovery from the "master" at trial. See Drinkard v. William J. Pulte, Inc., 48 Mich. App. 67, 210 N.W.2d 137 (1973).
10. The panel consisted of Chief Judge Edwards and Circuit Judges Celebrezze and Merritt. The opinion was written by Judge Merritt.
12. Id. at 351-52.
13. Id. at 352. This concept is hardly amenable to challenge in light of MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) and its progeny.
15. Id.
cised a degree of control over the 'type, style, size and design' of the carton in which its product was to be marketed. 16 Aside from the specific actions involving Seven-Up's approval of the carton design, the court concluded that this not uncommon franchising agreement showed control exercised by Seven-Up. 17 Despite this observation, the court made it clear it was not deciding this case in terms of agency responsibility 18 in which the control exercised by a master-franchisor over a servant-franchisee establishes vicarious liability. 19

Instead, the court articulated a checklist of "several factors in combination" which create liability:

1) The risk created by approving for distribution an unsafe product likely to cause injury;
2) The franchisor's ability and opportunity to eliminate the unsafe character of the product and prevent the loss; 20
3) The consumer's lack of knowledge of the danger; and
4) The consumer's reliance on the trade name which gives the intended impression that the franchisor is responsible for and stands behind the product. 21

The first three factors sound in traditional negligence actions. Inasmuch as Seven-Up did not dispute the negligence instruction on appeal, 22 no new ground was broken here. The addition of the fourth factor—plaintiff's reliance on a warranty implied from the Seven-Up trade name—is a significant step toward expanding the doctrine

16. Id. at 352-53.
17. The court cited Seven-Up's "sponsorship, management and control of the system for distributing 7-Up." Id. at 353. The court explained that the franchise agreement establishes the relationship between the parties and usually regulates the quality of the product, sales territory, the advertising and other details; and it usually requires that certain supplies be purchased from a franchisor." Id. at 352.
18. Id.
19. See note 9 supra.
20. The court later concluded that "the opportunity to eliminate the harm is a proper consideration for the jury in considering the negligence and implied warranty theories." Id. at 354. Nevertheless, the court found that the instruction as given was improper. Based on the given instruction, it would have been possible for the jury to impose liability if the jury found that the defendant had the opportunity to change the design and to limit the risk of injury without also finding that the carton was defective or not reasonably safe. In other words, such an instruction would have required Seven-Up to make the carton accident-proof. The court conceded it was possible the jury may have understood the element of "defectiveness" was implicit in the instruction. However, the court indicated that the instruction should have been more explicit. Id. at 354. The court implied that more precise draftsmanship or delivery by the court below would have created a proper instruction well within the law.
22. Id. at 352.
Although the court pointed out that the liability in warranty of a franchisor was a new issue in the Sixth Circuit, the court was not deciding this case in a total vacuum. The case represents the most significant decision to date in a sparse series of similar actions involving trademark licensors. These recent cases have imposed strict liability on trademark licensors for both property damage and personal injuries, resulting from defective products marketed by trademark licensees. In discussing the consumer's reliance on the "trade name,"23 the Koster court was actually basing its analysis on these cases, which sounded not in warranty, but in tort. In Michigan, as in most other jurisdictions, however, there is little difference in an action for breach of implied warranty and a strict liability action in tort.24

The first case to hold a trademark licensor strictly liable in tort was decided in 1972. In Kasel v. Remington Arms Co.,25 the plaintiff was injured by an exploding shotgun shell. Defendant Remington owned forty percent of the Mexican company which manufactured the defective shell. Under the trademark licensing agreement, the company allowed use of its trademark and reserved the right to inspect and control the quality of the ammunition. It received a percentage of net sales as its royalty.26 The Kasel court noted that the right of inspection and approval may have indicated a desire by Remington to protect its reputation "even if it posed to Remington little likelihood of liability on its part."27 The court also noted that Remington marketed the shells by means of an extensive national and international advertising campaign.28

In its decision, the Kasel panel found that sufficient basis for a products liability action lay in the evidence that Remington, the

23. Id. at 353.
24. Dean Prosser terms the seller's warranty "a curious hybrid, born of the illicit intercourse of tort and contract." W. Prosser, Handbook of the Law of Torts § 95 (4th ed. 1971). The mixture of tort and contract is particularly evident in the area of implied warranty of fitness for purpose. This warranty is imposed by operation of law when the seller knows of the purpose the buyer has in mind, and knows that the buyer is relying on the seller's judgement to select and furnish suitable goods. See U.C.C. § 2-315, which is discussed at Restatement (Second) of Torts § 402A, comment m (1965). As a practical matter, the distinction has all but disappeared with the warranty action merging into a cause of action for strict liability in tort.
26. Id. at 718, 101 Cal. Rptr. at 318.
27. Id. at n. 3.
28. Id. at 720, 101 Cal. Rptr. at 319-20.
trademark licensor, was an “integral part” of the enterprise which placed the shell into the stream of consumer goods. The California court recognized the radical nature of the step it was taking, pondering “whether enterprise involvement should extend up from the manufacturer.” The court specifically likened trademark licensing to franchising “because the licensing of trademarks and the sale of technical know-how are the backbone of most franchising operations.” Although the court conceded it could find no support in case law, it argued that “as long as the franchisor or trademark licensor can be said to be a link in the marketing enterprise which placed a defective product in the chain of commerce, there is no reason in logic for refusing to apply strict liability in tort to such an entity.” Further,

[i]t is the defendant’s participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant’s legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for the imposition of strict liability.

The following year, in Pennsylvania, a federal district court reached much the same conclusion, but it found even broader liability. In Carter v. Joseph Bancroft & Sons Co., the court looked to liability under Sections 400 and 402A of the Restatement Second of Torts. Defendant owned the trademark BAN-LON. Although it did not manufacture the material and had no connection with the manufacturer (unlike Remington, which in the Kasel case owned a

29. The evidence of Remington's involvement in the 'enterprise' was uncontradicted and was sufficient so that the trial court should have found as a matter of law that Remington was an integral part of the composite business enterprise which placed the defective shell in the stream of commerce, and should have instructed the jury that it would be strictly liable if they found: (1) that the shell had been placed on the market under circumstances wherein it was known that it would be used without inspection for defects, (2) that the injury was caused by a defect which, unbeknown to plaintiff, made it unreasonably dangerous for its intended use, and (3) that it was being used for the purpose for which it was designed.

Id. at 723, 101 Cal. Rptr. at 322.
30. Id. at 724, 101 Cal. Rptr. at 322.
31. Id. at 725, 101 Cal. Rptr. at 323.
32. Id.
33. Id.
35. Id. at 1105-10.
substantial portion of the manufacturing licensee), the licensor did allow placement of a BAN-LON tag on a garment sold to the plaintiff. The garment caught fire, burning the plaintiff severely. Defendants contended that they were not sellers of the product within the meaning of Section 402A. Rather, the defendants contended they were merely licensors, who permitted articles made according to specification and quality control standards prescribed and controlled by them to be identified by the BAN-LON trademark.

The defendants argued that there was no authority in Pennsylvania, or anywhere else, to hold a licensor liable as a seller, but the court said "it is clear that defendants were sufficiently involved in the manufacturing process to be a 'seller' under the laws of Pennsylvania." The court supported this conclusion by noting that Pennsylvania had adopted Section 400 of the Restatement which covered the point. Furthermore, the court noted in passing that Pennsylvania case law flatly stated "that the elements of breach of warranty and 402A are identical."

Bancroft thus carried Kasel a step further. In Kasel, the facts disclosed that the trademark licensee was more in the nature of a subsidiary of the licensor. There was no such ownership in Bancroft.

36. Id. at 1106. RESTATEMENT (SECOND) OF TORTS § 402A (1965) reads:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment f to § 402A reads in part: "The rule stated in this Section applies to any person engaged in the business of selling products for use or consumption. It therefore applies to any manufacturer of such a product, [and] to any wholesale or retail dealer of distributor. . . ."

37. 360 F. Supp. at 1106-07.

38. Id. at 1107.

but the court imposed strict liability in tort (and could have in warranty) solely because the use of the trademark indicated “involvement” in the manufacturing process. The holdings, broad as they were, were expanded even further in 1978.

A Connecticut court, in City of Hartford v. Associated Construction Co.,40 found strict liability in tort for a trademark licensor whose position was remarkably similar to that of Seven-Up in the Kosters case. In Hartford, the licensor sold a key ingredient, along with the rest of the formula for a roofing material, to various licensees, who actually mixed and applied the material. When the plaintiff’s roof failed, an action was brought under Section 402A. The court did not distinguish between franchise and license:41

The plaintiff, in substance, seeks to impose strict liability upon the owner of a registered trademark who has licensed its composition and use by a franchise agreement with another and thereby caused harm to the property of the ultimate user or consumer of the trademarked product. The claim is unique. It is without precedent or parallel. The issue is, however, of great importance to the commercial marketplace in light of the contemporary popularity of franchise agreements for the manufacture and sale by licensees of trademarked products in designated territories in substitution for the traditional direct marketing of goods by the trademark owner. It was inevitable that the continuous growth of franchised businesses should present this question for judicial determination. The marketplace is the common denominator of franchising as a fact and strict liability as a law, and the two were bound to join in issue for resolution by the court.42

The court quoted at length from Kasel with favor. It also discussed the rationale behind the Lanham Act43 governing trademarks. In reaching its conclusion, the court relied upon Section 400 of the Restatement, which Connecticut has adopted,44 and Section 402A.45

41. In reality, there is a definite distinction between franchise and trademark. Generally speaking, the trademark is only a part—albeit the most important one—of the overall franchise operation.
42. 384 A.2d at 393.
43. 15 U.S.C. §§ 1051-1127 (1976). “That act was designed for the mutual benefit of the public and the trademark owner. In purchasing a product protected by a registered trademark, the consumer may be confident that he will get the item which he asks for and wants to get.” 384 A.2d at 394-95.
It is clear that these three cases, although denominated as trademark licensing cases, provide a framework in which to analyze the Kosters holding which dealt strictly with franchising. Trademark, of course, is only a part of franchise, but its importance cannot be over-emphasized. "Of key importance in almost any franchise is the franchisee's use of the franchisor's brand name or trademark. . . . [It] is often responsible for the final sale." The Kosters court found the consumer reliance on the Seven-Up trade name and trademark a factor to be considered in determining the liability of a franchisor. As the Tenth Circuit noted, albeit in a different context, "reliance of the consumer on the integrity of the manufacturer is not defeated by a complicated corporate structure in which the consumer has no interest or knowledge."

Thus, the decision in Kosters, while breaking new ground, was at least foreseeable in light of developments in the related area of trademark law. The linchpin of the analysis remained the consumer's reliance on the trademark. It was a reliance which the franchisor sought to foster, and one from which the franchisor profited. As the court pointed out, "[l]iability is based on the franchisor's control and the public's assumption, induced by the franchisor's conduct, that it does in fact control and vouch for the product." As such, the decision in Kosters was squarely in line with the ever-expanding protection granted to consumers and the increasing liability imposed on all phases of the manufacturing and marketing process.

Although the Kosters court did find liability on the grounds of breach of implied warranty, the court rejected the plaintiff's other theories of recovery. The most interesting theory presented was the question of whether third-party beneficiary status should be accorded the plaintiff as a result of the franchise contract between Seven-Up and its franchisee. The Kosters court, noting that recent

46. The Kosters court noted these three cases but did not directly analogize to them in its opinion. 595 F.2d at 352.
49. Vaughn v. Chrysler Corp., 442 F.2d 619, 622 (10th Cir. 1971).
50. Reliance by the consumer in dealing with what he perceived to be a centrally-managed business organization has been held to establish agency liability of a franchisor. E.g., Beck v. Arthur Murray, Inc., 245 Cal. App. 2d 976, 981, 54 Cal. Rptr. 328, 331 (Dist. Ct. App. 1966).
52. Id. at 355-56 & n. 27.
Michigan cases seemed to allow recovery by a foreseeable third-party beneficiary,\textsuperscript{53} concluded that those holdings were inapposite to the case before it. "It is clear from the contract itself and the evidence in the record that the bottler did not extract a promise from Seven-Up to perform actions directly benefiting consumers such as the plaintiff . . . ."\textsuperscript{54}

Logically, however, consumers are third-party beneficiaries of a franchise contract. The strict controls placed upon trademark licensors and licensees by the Lanham Act\textsuperscript{55} were clearly placed there with protection of the consumer in mind. Under the Lanham Act, the licensing of trademarks is regulated not only to protect the parties, but to protect the consumer relying on that trademark. It follows that a franchising agreement—at least, one that incorporates a trademark licensing agreement—which comports with the provisions of the Lanham Act is one which, at least by implication, protects consumers. The consumer can thus arguably be a third-party beneficiary of the franchise agreement, inasmuch as certain terms in it were mandated by a statute designed in part to protect him.

The consumer “benefits” from the controls exercised by the licensor or franchisor every time he buys a drink or a hamburger which tastes the way he expects it to. Obviously, the consumer is a donee beneficiary, a foreseeable one. The \textit{Kosters} court concluded that the franchise agreement “simply cannot be read to include any promise by Seven-Up to the bottler to provide or arrange for safe cartons.”\textsuperscript{56} On the other hand, had the court found liability on the basis of an

The relevant sections of the franchise agreement provide:

3. Advertising and promotion material offered by the 7-Up Company to all its bottlers will be purchased and used according to plans discussed and agreed upon from time to time. Any advertising or promotion material other than that obtained from the 7-Up Company must be approved by the 7-Up Company before its use by the bottler.

4. Cases, bottles, and crows used for 7-Up will be of a type, style, size and design approved by the 7-Up Company. No non-standard bottles or crows will be used except with the written permission of the 7-Up Company. 7-Up will be sold in 7-Up cases at all times . . . . Delivery trucks for 7-Up will be decorated in standard 7-Up colors and according to approved designs. Proper identification for 7-Up will be maintained on the bottling plant at all times and uniforms of all employees will carry approved 7-Up emblems. (Emphasis added).

\textit{Id.} at n. 27.


\textsuperscript{54} \textit{Kosters} v. Seven-Up Co., 595 F.2d at 355.


\textsuperscript{56} \textit{Kosters} v. Seven-Up Co., 595 F.2d at 355.
agency theory, a third-party beneficiary claim might have been sustained.

It seems logically—though certainly not legally—inconsistent to hold that a contract which induces consumer reliance is not one designed to benefit that consumer. Presumably, such a contract would not be structured so as to create public reliance on a deliberately inferior product. Thus, the consumer is promised a certain level of quality. To argue that the consumer is a direct beneficiary of an implied warranty, but is not an indirect beneficiary of the contract which gave birth to that warranty, appears ingenuous. The Kosters court rejected liability on the basis of the "inherently dangerous products" doctrine. The court's determination, of course, was based strictly on Michigan case law. In Michigan, findings of "inherently dangerous" products or activities have been relegated in the main to cases involving blasting and similar traditional "dangerous" activities. Exploding bottle cases in Michigan have all turned on theories of negligence or implied warranty, with the courts of that state strictly construing Section 520 of the Restatement in making that determination. It should be noted that exploding bottle cases in many other jurisdictions have concluded that

57. See note 9 supra.
58. The case law of each jurisdiction must be examined to determine if "foreseeable" beneficiaries may maintain a cause of action. As pointed out at note 50 supra, maintenance of such an action is permissible in some circumstances in Michigan. In Ohio, it must appear the contract was made and entered into directly or primarily for the benefit of the third party. E.g., Cleveland Metal Roofing & Ceiling Co. v. Gaspard, 89 Ohio St. 185, 106 N.E. 9, (1914), overruled on specific holding, Royal Indemnity Co. v. Northern Ohio Granite and Stone Co., 100 Ohio St. 373, 126 N.E. 405 (1919). Obviously, under the Lanham Act, trademark licensing agreements must be drafted so as to protect the consumer but are not for the specific benefit of a third party.
61. RESTATEMENT (SECOND) OF TORTS § 520 (1977) states:
§ 520. Abnormally Dangerous Activities.
In determining whether an activity is abnormally dangerous, the following factors are to be considered:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) the extent to which its value to the community is outweighed by its dangerous attributes.
the bottling of carbonated beverages is "inherently dangerous." 2 Clearly, the ruling of the Koster court based on Michigan law would have little meaning in other jurisdictions which hold to a broader definition of "inherently dangerous."

Michigan has long been a leader in developing the law of strict liability, 3 and the decision of the Sixth Circuit is consistent insofar as it continues to build on that trend. Other jurisdictions can be expected to follow, or at least consider, Michigan's law as construed by the Sixth Circuit. The position that a trademark licensor or franchisor is liable for a breach of implied warranty is consistent, at least in theory, not only with the law of Michigan, but with that of most other jurisdictions. 4 Merely because the matter has not been litigated in those jurisdictions does not preclude them from following the rationale of the Sixth Circuit. Indeed, liability as defined by the Sixth Circuit may actually be buttressed in other jurisdictions by additional grounds unavailable to Michigan plaintiffs. 5 Thus, in Kosters, the franchisor won the battle with a remand, but the opinion in Kosters has armed future consumer plaintiffs with yet another means to win the overall war.

JAMES F. LUMMANICK

63. E.g., Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958) (first reported case in which the requirement was abandoned in products liability claim for breach of implied warranty).
64. See note 24 and accompanying text supra.
65. See note 62 and accompanying text supra.
Search and Seizure—Kentucky’s Constitutional Requirement of a Search Warrant to Inventory an Automobile—The Exceptions—Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979).

Ed Anthony Wagner was convicted of first-degree rape and third-degree assault. The jury fixed his punishment at fifteen years in the penitentiary for rape and at one year in the county jail for assault. Wagner, in the second stage of his bifurcated trial, was additionally found to be a persistent felony offender. His punishment was enhanced to life imprisonment.

The case presented by the prosecution during Wagner’s trial may be summarized as follows: On the afternoon of January 26, 1978, Amy Morrison was waiting for a bus in Louisville to take her to work at Suburban Hospital. An automobile passed by and stopped. Wagner emerged from the automobile and told Amy he was from the Courier-Journal and wanted to discuss her work and the bad weather. Wagner offered to drive Amy to Suburban Hospital, and she accepted.

After Amy had been in Wagner’s automobile for a short time, Wagner pulled a knife and placed it at her throat. Amy’s reaction to the sudden attack resulted in one of her fingers getting cut by the knife. Wagner then tied her hands together behind her back with one scarf, and with another scarf he tied her bound hands to her neck.

Wagner demanded Amy close her eyes, and he placed a gluey substance on them. This sealed her right eye shut and enabled her to only partially open her left eye. He then drove her to a house where he had a rented room, took her to his room, and raped her twice in the next two and a half hours.

After Amy’s assurances that she would tell no one about the incident, Amy persuaded Wagner to take her someplace where she could obtain something to remove the gluey substance from her eyes. Wagner drove to a Convenient Food Mart, left the keys and Amy in the car, and went inside to buy something that would help her cleanse her eyes. After Wagner entered the store, Amy took the car keys, hurried into the store, and accused him of raping her. Wagner attempted to leave but was detained by customers in the store until police arrived.

After the police arrived Amy and Wagner were interviewed. The police accompanied Wagner and Amy to Wagner's car and permitted him to lock and secure the vehicle. While this was being done, Amy pointed through the windows to the scarves and to a spot on the upholstery, which she told police was blood from her cut.

Wagner was subsequently arrested, and the police had his car removed to police headquarters. The police then conducted an "inventory" search of Wagner's car for the purpose of looking for evidence. Although the Supreme Court of Kentucky stated other grounds for reversal, the court held that the fruits of the warrantless search of the automobile hours after its impoundment on the parking lot of the Convenient Food Mart and its removal to the police station should have been suppressed. The court ordered that no evidence discovered during the inventory search could be used when the case is retried. However, the suppressed evidence would not include the blood stain and the scarves seen in plain view by police officers before the inventory search was conducted.

I. The Historical Evolution

In Danville v. Dawson, the court directly confronted the issue whether the automobile of an individual arrested for a traffic offense could be impounded and subjected to an inventory search by police pursuant to standard department policy. The Supreme Court of Kentucky stated the proper approach in this area was to assess the reasonableness of the police conduct in light of all the circumstances of the case, refusing to declare the use of the inventory search per se unreasonable. However, the court stated that "[i]t should only be in the atypical case that police officers would find it necessary to conduct a general inventory search of an impounded vehicle."

After Danville v. Dawson was decided, the United States Su-

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4. 581 S.W.2d at 355. In Wagner's trial he had not been permitted to cross-examine Amy Morrison, the prosecuting witness, as to her psychiatric history. Wagner, in an avowal, established that Amy had been committed to a psychiatric hospital prior to the events in issue for attempted suicide, severe depression, and drug abuse. Also by avowal, Wagner established that Amy was presently under psychiatric care and was receiving shock treatments which were affecting her memory. The court held the exclusion of this evidence required a reversal and a new trial. See Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. 1967).
5. 581 S.W.2d at 357.
6. Id. at 357 n.6.
7. 528 S.W.2d 687 (Ky. 1975).
8. Id. at 688, 690.
9. Id. at 690.
10. Id.
There the Court held the fourth amendment to the Constitution of the United States will allow a routine police search of the closed compartments of a locked automobile impounded for ordinary traffic violations. The Court stated three distinct needs served by the inventory search: the protection of the owner's property while it remains in police custody; the protection of the police against claims or disputes over lost or stolen property; and the protection of police from potential danger. The Court concluded its decision stating inventory searches "following standard police procedures, prevailing throughout the country and approved by the overwhelming majority of courts, . . . [are] not 'unreasonable' under the Fourth Amendment." The decision of the Supreme Court of South Dakota holding inventory searches constitutionally prohibited was reversed and remanded.

Wagner should be considered in light of the decisions of Dawson and Opperman. In Dawson the court recommended that if the police are unsure as to the legality of the contemplated search, they should obtain a prior judicial determination of their conduct and a search warrant. However, the court refused to declare inventory searches per se unreasonable.

Although the Kentucky court in Dawson mentioned the fourth amendment seven times, there was no mention of the Constitution of Kentucky. The court stated in Wagner that Dawson was an interpretation of the state as well as the Federal Constitution. The court noted that since Opperman, decided after Dawson, held inventory searches permissible under the fourth amendment, they would rest their holding in Wagner solely on section 10 of the Constitution of the Commonwealth of Kentucky.
The court in *Wagner* then delineated the circumstances in which a vehicle may be lawfully impounded without a warrant as follows:

1. The owner or permissive user consents to the impoundment;
2. The vehicle, if not removed, constitutes a danger to other persons or property or the public safety and the owner or permissive user cannot reasonably arrange for alternate means of removal;
3. The police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment the vehicle will be removed by a third party; or
4. The police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed. 19

After a vehicle has been impounded, there remains the more difficult question of whether a routine police inventory of the vehicle is permissible under section 10 of the Constitution of Kentucky. The court held such an inventory is impermissible unless the owner or permissive user consents, or unless there exists substantial necessity for the inventory grounded upon the need for public safety. 20 The court further stated that generally the need for public safety may not justify an inventory. In this case the police, in the absence of the owner's or permissive user's consent, are merely to lock the vehicle and leave it in place. In the absence of the owner's or permissive user's consent to inventory, such owner or permissive user assumes the risk that items contained in the vehicle will be lost or stolen. 21

Also, if the owner or permissive user consents to an inventory, the owner or permissive user has a right to have a representative present during the inventory and to limit the inventory to specific portions of the vehicle. 22 If the owner or permissive user refuses a police inventory of the automobile, police may prevent removal of the vehicle until a reasonable time has elapsed for the purpose of obtaining a search warrant.

II. SEARCHES OUTSIDE OF THE WAGNER RULE

Since *Wagner* restricts the police from a warrantless inventory search after a vehicle has been impounded, the question remains as

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19. 581 S.W.2d at 356.
21. *id.* at 357.
22. *id.*
to which type of police activity involving automobile searches prior to impoundment is constitutionally tolerable. Some suggestions are offered as follows:

A. **Probable Cause + Exigent Circumstances**

William Cooper was stopped by Kentucky State Trooper Lee Arnold for speeding. The trooper smelled marijuana smoke emanating from the car as he approached and announced his intention to search. According to Trooper Arnold, Cooper revealed several marijuana "roaches" in the ashtray. The trooper arrested Cooper and subsequently searched the inside of the automobile, finding cocaine in a sealed case under the driver's seat.

Cooper claimed the warrantless search of his car was unreasonable and illegal under the fourth and fourteenth amendments to the United States Constitution and section 10 of the Constitution of Kentucky. The Court of Appeals of Kentucky upheld the search stating that probable cause accompanied by exigent circumstances justified the search. The court said the trooper was faced with a "now or never situation that justified an immediate warrantless search." The court reasoned Trooper Arnold had only a "fleeting opportunity" to search the car; and had Trooper Arnold attempted to secure a warrant before the search, Cooper could have fled the scene and disposed of the evidence.

B. **Items Seen in Plain View After a Lawful Stop**

If police officers have a bona fide reason for stopping an automobile the discovery of incriminating evidence in plain view may be shown in evidence against the accused. This includes items which

24. Id. at 35.
25. Id. at 38. A recent case, Arkansas v. Sanders, 99 S.Ct. 2586 (1979), may have an effect on the determination of the legality of a search conducted under these circumstances. There the Supreme Court stated "the exigency of mobility must be assessed at the point immediately before the search—after the police have seized the object to be searched and have it securely within their control." Id. at 2593. The Court further stated the warrant requirement applied to the contents of personal luggage taken from an automobile, see id. at 2593-94 and since the police had the luggage in their possession, no exigent circumstances existed to justify the warrantless search of the luggage. Id. See United States v. Chadwick, 433 U.S. 1, 8 (1977).
26. 577 S.W.2d at 38.
27. Id.
28. Taylor v. Commonwealth, 394 S.W.2d 895, 896 (Ky. 1965). The stopping of an automobile and detention of the driver in order to check his driver's license and registration has been held unreasonable under the fourth amendment, unless there is at least reasonable suspicion that a motorist is unlicensed, or that an automobile is not registered, or that an occupant is
become visible only after a flashlight is shone in the car\textsuperscript{29} or items which come into plain view during a good faith roadblock check of operator’s licenses, since the stopping of cars for this reason has been accepted.\textsuperscript{30}

C. Searches Made with Consent

It is well settled that one of the specifically established exceptions to both a warrant and probable cause is a search that is conducted pursuant to consent.\textsuperscript{31}

D. Weapons Found on the Person of Automobile Occupants Uncovered by an Officer Who Lawfully Stops the Automobile

Whenever an officer has an occasion to speak with the driver of a lawfully stopped automobile he may also order the driver out of the car.\textsuperscript{32} If the officer then reasonably concludes that the person whom he has legitimately stopped might be armed and dangerous, the officer may conduct a limited weapons search by patting down his outer clothing.\textsuperscript{33} A weapon uncovered during this search may subsequently be used in evidence against the accused.\textsuperscript{34}

E. Items Uncovered During a Search Incident to a Lawful Arrest

Under the rule of Commonwealth v. Hagen,\textsuperscript{35} if an officer has reason to believe a misdemeanor has been committed in his presence, or that a felony has been committed and that the person or persons whom he has stopped committed it, he may place him or them under arrest and may forthwith proceed to search the automobile incident to arrest. However, the rule excepts arrests for minor traffic violations.\textsuperscript{36}

III. Wagner Extended

Since Wagner and its exceptions have been discussed, a recent

\begin{itemize}
  \item \textsuperscript{29} Otherwise wanted for violation of the law. However, this constitutional prohibition is limited to stops which involve the unbridled discretion of police officers and would not include questioning of all on-coming traffic at roadblock-type stops. See Delaware v. Prouse, 99 S.Ct. 1391, 1401 (1979).
  \item \textsuperscript{30} 394 S.W.2d at 896.
  \item \textsuperscript{31} Commonwealth v. Mitchell, 355 S.W.2d 686, 689 (Ky. 1962).
  \item \textsuperscript{32} E.g., Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); see Wagner v. Commonwealth, 581 S.W.2d at 357.
  \item \textsuperscript{33} Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).
  \item \textsuperscript{34} Id. at 111-12.
  \item \textsuperscript{35} Terry v. Ohio, 392 U.S. 1 (1968).
  \item \textsuperscript{36} 464 S.W.2d 261 (Ky. 1971).
\end{itemize}
case involving an inventory search of an automobile prior to impoundment requires examination. In *Ewen v. Commonwealth*, the Court of Appeals of Kentucky upheld a warrantless inventory search of an automobile conducted prior to impoundment after the driver was arrested for reckless driving, and the only passenger in the car was arrested for public intoxication. After the arrests the police officer, before impounding the car, inventoried the contents of the vehicle pursuant to standard police procedure. When the officer unlocked the trunk, she found a basket of clothes. During a search of this basket a quantity of illegal drugs was discovered.

The Court of Appeals of Kentucky decided *Ewen* after *South Dakota v. Opperman* was decided by the United States Supreme Court, but before *Wagner* was decided by the Supreme Court of Kentucky. The *Ewen* court, in upholding the inventory search, followed the *Opperman* decision stating that "[i]f Kentucky wishes to declare more stringent controls under Section 10 of the Kentucky Constitution, as the South Dakota Supreme Court did on remand of *South Dakota v. Opperman* . . . then it is the sole prerogative of the Kentucky Supreme Court, not the Court of Appeals, to do so." *Ewen* appealed to the Supreme Court of Kentucky which remanded *Ewen* back to the court of appeals for consideration in light of *Wagner*. The court of appeals then ordered the conviction of *Ewen* reversed and that evidence discovered by the illegal search and seizure be suppressed and not used at any new trial.

**CONCLUSION**

In effect *Wagner* does not change the law of Kentucky regarding the inventory of a lawfully impounded vehicle. *Wagner* retains the more restrictive state rule established in *Dawson* rather than the lenient federal rule of *Opperman*. Generally, there must be a prior judicial determination of the reasonableness of the police search before an inventory is made of an impounded vehicle; however, should exigent circumstances exist which require immediate action, an inventory search may be permissible.

Although *Ewen*, as discussed above, was reversed in an opinion

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38. *Id.* at 5.
39. *Id.*
40. *Id.*
not to be published, the case conveys the concept that the court will prohibit inventory searches prior to impoundment as well as after impoundment in the absence of a warrant. At least this concept would logically follow from the Wagner decision. Wagner would be highly ineffective in its utility if the police could merely circumvent its purpose by conducting an inventory before impoundment. Since all of the exceptions to the general requirement of a warrant are limited exceptions, there is one remaining issue: at what point does a search under one of the exceptions turn into an inventory search, or the equivalent thereof.

A reasonable interpretation of this issue would prohibit warrantless police searches of the locked compartments of an automobile and of sealed containers, trunks, luggage, and other such items taken from a vehicle by police. After the police obtain possession of an item taken from an automobile, the element of exigency ceases to exist in the absence of a good faith belief by the police that the item in their possession may contain materials which would cause harm to person or property if not immediately neutralized. At the point where the exigency ceases to exist, the issue should be presented to a detached and impartial magistrate for a determination of whether a warrant based upon probable cause will issue.

TIMOTHY E. EBLE
Admissibility of Evidence of Other Crimes—Emphasis on Use in Prosecution of Sex Crimes—for which the Defendant had been Acquitted, Under Similar Crimes Rules, at Subsequent Trial—Oliphant v. Koehler, 594 F.2d 547 (6th Cir. 1979).

Introduction

On March 6, 1979 the United States Court of Appeals for the Sixth Circuit denied a habeas corpus petition. The court's ruling upheld the admission, at a subsequent and distinct rape trial, of evidence of two witnesses claiming that the defendant had raped them in the past. The impact of this evidence is emphasized by the fact that the defendant, Charles E. Oliphant Jr., had already been charged on separate occasions for the two previous rapes of these witnesses. But, even more significantly, he had been acquitted of both rapes.

In all the charges, Oliphant, a black man, was accused of rape by the complainants who were young, white, female college students. The alleged victims testified that he initially offered them a ride, engaged them in seemingly friendly conversation, and finally drove them to a remote, unfamiliar area where he forcibly had intercourse with them.

Background

In Oliphant v. Koehler the record before the court reflected that in two previous rape trials the defendant, Oliphant, was acquitted by both juries. The complainants in each of these cases were called by the prosecutor at the later rape trial as rebuttal witnesses. Oliphant applied for a writ of habeas corpus to the district court contesting that their testimony was improperly admitted. Effectively, evidence of the prior charges was introduced in the prosecution of this later charge.

In the present action, Oliphant, after one mistrial due to jury disagreement, was convicted on charges of forcible rape and gross indecency involving an eighteen year old female student at Michigan State University. This conviction was affirmed by the Michigan

2. Id. at 550.
3. Id. at 550-52.
4. 594 F.2d 547 (6th Cir. 1979).
5. Id. at 550.
Court of Appeals\(^7\) and by the Supreme Court of Michigan.\(^8\)

The major contention of the accused on appeal was that during the trial certain evidence, specifically testimony of two prior rape victims, put him in double jeopardy for the same offense and should have been barred by collateral estoppel.\(^9\) He argued that the primary purpose of the introduction of this evidence was to stress that in the event he had actually committed the two prior offenses, he more than likely committed this one. Stressing the prior acquittals, Oliphant claimed that he was prejudiced, because the prosecutor improperly used the evidence to show a propensity to commit the charges by relitigating the prior offenses through the accusations in the testimony of the two prior rape victims.\(^10\)

The basis for this objectionable testimony, Oliphant claimed, was supported by the decision of *Ashe v. Swenson*.\(^11\) The United States Supreme Court held in *Ashe* that the doctrine of collateral estoppel was a necessary ingredient in the constitutional guarantee against double jeopardy in criminal cases.\(^12\) The facts of the case involve the robbery of six persons at the same time.\(^13\) The defendant was prosecuted for the robbery of one of them, but was acquitted.\(^14\) The record indicates that the only conceivable basis for the acquittal was the jury’s conclusion that the defendant was not one of the robbers. This barred subsequent prosecution of the defendant for the robbery of any of the other victims.\(^15\) Collateral estoppel, as defined in *Ashe*, “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”\(^16\)

**Holding in Oliphant**

The Sixth Circuit decision echoed the decisions of the Michigan state courts. The majority view in the decisions held that such evidence was “material” under the state similar acts statute.\(^17\) Specifi-

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10. Id.
12. Id. at 445.
13. Id. at 437.
14. Id. at 439.
15. Id. at 446.
16. Id. at 443.
17. MICH. COMP. LAWS ANN. § 768.27 (1968).

In any criminal case where the defendant’s motive, intent, the absence of, mistake or
cally, the similarities highlighted by the prosecutor through the testimony of the two prior rape victims are as follows: the alleged rapes occurred during a five month period; all involved college age women; all victims were white; all incidents began with an initially friendly conversation; in every instance there was a discussion of race and eventually of marijuana; and lastly, in every case the perpetrator became suddenly threatening and demanding." "The many similarities . . . tend to show a plan or scheme to orchestrate the events surrounding the rape of complainant so that she could not show nonconsent and the defendant could thereby escape punishment." 18

The Sixth Circuit justified the use of the testimony of these two witnesses holding that the juries in the two previous cases could have concluded that the defendant "orchestrated" the events surrounding these sexual encounters in such a clever manner as to make it appear that the women had consented to these acts. 19 Thus, the court found no merit in the argument that there was any relitigation, but rather supported the view that the prosecutor could use it properly, within the limitation of the similar acts statute, to show Oliphant’s scheme during prior criminal conduct, and not mislead the jury. 20 The majority felt the issue of whether certain evidence should have been excluded at the state prosecution because the jury might have been mislead or misused this evidence is solely a question of state law.21

Chief Judge Edwards in his brief dissenting opinion from the decision of the Sixth Circuit stresses the constitutional problem faced by allowing the two witnesses to testify under the fifth amendment’s double jeopardy clause of the United States Constitution.22 His opinion, similar to the more lengthy and detailed dissent of Judge Levin of the Supreme Court of Michigan, addresses the un-

19. Id. at 552.
21. Id.
22. Id. at 555. See FED. R. EVID. 403.
23. Id. at 556.
fairness of the relitigation of the issues in which Oliphant was found “not guilty.” Both of their opinions rely heavily on the protection afforded the defendant in the Ashe decision. Judge Edwards, citing Ashe, stated that “to allow these same complainants to testify to these same events to buttress another complainant’s charge of the same offense . . . allow[s] the appellant to be put in jeopardy twice . . . .” This type of relitigation through testimony of complaining witnesses, after juries acquitted the defendant, should work as an estoppel of any further state prosecution on the same issues previously involved.

Analysis

The general rule that character evidence is not admissible to prove guilt or to show a propensity to commit a crime is qualified by the similar crimes rule exception, referred to in Oliphant and which exists in virtually all jurisdictions either by decisional law or statute. It provides that evidence of other crimes is admissible to prove motive, intent, knowledge, opportunity, preparation, plan, identity, or absence of mistake or accident.

The prior offense must be similar in some manner to the instant offense charged but need not be based on a conviction. With the proper instructions to the jury as to the limited use of such evidence to prove one or more of the aforementioned elements and not for retrial of the prior similar crime, such is not unfairly prejudicial or unconstitutional when introduced by the prosecutor. The Sixth

27. Id.
Circuit opinion of *Oliphant* closely reflects this rule in finding that the testimony of the two women was a material exception to the general rule and properly admitted to prove a scheme by Oliphant in which he “orchestrated the events surrounding the prior sexual encounters” to give the appearance of consent, and thereby elude successful prosecution.\(^{32}\)

However, the evidence of crimes where the defendant has been acquitted has been held not admissible at a subsequent trial in various cases.\(^{33}\) The rule of *Ashe* does not forbid the admissibility of all evidence of acquitted collateral crimes, but only that evidence which the state is collaterally estopped from introducing.\(^{34}\) To advance the *Ashe* double jeopardy protection standard, the Fifth Circuit decision in *Wingate v. Wainright*\(^{35}\) went so far as to prohibit the state from relitigating, for any purpose, any issue already litigated in a prior prosecution of the same party. Crucially, *Wingate* made no distinction between relitigation of an ultimate fact and an evidentiary fact, but simply held that neither can be relitigated.\(^{36}\)

In *State v. Perkins*,\(^{37}\) the Florida Supreme Court held that it was fundamentally unfair to admit evidence of acquitted crimes. The *Perkins* court, first, upheld the theory of fundamental fairness; and, secondly, it expanded the scope of the double jeopardy clause.\(^{38}\)

Regardless of these and similar cases, “the overriding policy of presenting all relevant evidence to the jury apparently has convinced the majority of jurisdictions to admit evidence of prior acquittals despite its probable prejudice to the defendant.”\(^{39}\) Thus, *Oliphant* upholds the idea that evidence which tends to show a plan or scheme on the part of the defendant in previous sexual encounters is both relevant and material within the meaning of the statute. The court’s ruling permits, under certain circumstances, evidence of other prior acts of the defendant to be introduced, regardless of the acquittals.\(^{40}\)

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34. 397 U.S. at 443.
35. 464 F.2d 209 (5th Cir. 1972).
36. Id. at 213.
37. 349 So. 2d 161 (Fla. 1977).
38. Id. at 163.
Judge Levin of the Supreme Court of Michigan, in his dissenting opinion, offers a critical and thorough analysis of the evidentiary problems in *Oliphant.* He was unable to join in the majority holding because of its failure to state an adequate basis for an exception to the general rule against the admission of other crimes evidence. Accordingly, he found no justification in the admission of the testimony of the two prior rape victims. His reasoning was that sexual offenses generally speak to the issue of consent, thereby the prosecution is "largely dependent on the testimony of the complainant, due to the nature of the offense and not to the orchestration" or any special scheme or plan. He emphasized that at the earlier trials where Oliphant was acquitted of raping the two witnesses the only issue was consent. Furthermore, the doctrine of collateral estoppel, as expounded in *Ashe,* barred the relitigation of the issue of whether these women actually consented to any sexual activity with Oliphant. He commented on the fact that the court recognized the *Ashe* opinion as being narrowed by the "same transaction limitation" which effectively eliminates this collateral estoppel doctrine in state criminal prosecution unless the issue for relitigation is in a subsequent trial of an offense arising out of the same transactions. The position taken by Judge Levin followed the theory for relitigation found in *Wingate* which rejected the "same transaction limitation" as the standard for applying collateral estoppel. He believed that requiring Oliphant to confront the testimony of the two prior rape victims would force him to "run the gauntlet" of double jeopardy.

Perhaps his concern is best reflected in his finding that this testimony was distinct and not material and was "of no probative value to the prosecution unless the jurors conclude that Oliphant raped them." And this is what Judge Levin believed the prosecutor was asking the jurors to conclude—that being, that Oliphant was a rap-

42. *Id.* at 506, 250 N.W.2d at 457.
43. *Id.*
44. *Id.* at 508, 250 N.W.2d at 458.
45. *Id.* at 511, 250 N.W.2d at 460.
46. *Id.*
47. *Id.* at 512, 250 N.W.2d at 460.
48. *Id.*
49. *Id.* at 513, 250 N.W.2d at 460.
ist and had a propensity to commit the charged offense.  

Judge Levin in the summation of his opinion stated that "the exception created in the affirmance of this conviction will, if emulated in other cases, provide a basis for engrafting exceptions on the newly declared policy." His concern is that the state will seek to identify similarities in the social and sexual histories of the defendant. As well, the defendant, by invoking the court's power to control evidence, will seek to identify a pattern of complaintant behavior in support of the defendant's assertion that the sexual activities were consensual.

**Application in Kentucky**

Admissibility is the growing majority view. Yet, a minority of jurisdictions, at one time or another, did not admit evidence from prior acquittals "even for the generally recognized exceptions" such as to show a plan or scheme by the defendant. The minority view relies heavily on both the theories of collateral estoppel and of fair play and justice in the criminal system.

Kentucky case law, with a few exceptions, holds similar crimes evidence to be admissible. Such evidence is admissible so long as it is relevant and material. Generally, admission of similar crimes evidence is justified to show motive, opportunity, plan, intent, preparation, knowledge, identity, and the absence of mistake or accident. Notably, similar crimes evidence is also admissible to prove a lustful disposition and the identity of a weapon used in the commission of other crimes.

The similar crimes rule of evidence in Kentucky is embodied in case law, unlike the situation in Oliphant, which provided for admission under a state statute. However, the decisions of the Kentucky courts have formed guidelines very similar to this Michigan statute. The early decision in Thomas v. Commonwealth allowed the prosecutor to introduce evidence that the defendant committed

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50. Id. at 515, 250 N.W.2d at 461.
51. Id. at 528, 250 N.W.2d at 467.
52. Id.
54. Note, supra note 39.
55. Id. at 307.
56. See Asher v. Commonwealth, 324 S.W.2d 824 (Ky. 1959).
57. J. Richardson, supra note 53, at 369-70.
60. 185 Ky. 226, 214 S.W. 929 (1919).
another wholly independent crime where such evidence tended di-
rectly to prove identity, motive, intention, or knowledge on the be-
half of the defendant. In *Caldwell v. Commonwealth*, a more re-
cent decision, the old Court of Appeals of Kentucky held that even
though evidence of other crimes is generally incompetent in a crimi-
nal trial, it can be introduced and admitted when such testimony
"is so interwoven with the crime on trial as to make it necessary and
appropriate to mention it." The *Caldwell* decision may very well
correspond the majority view of *Oliphant*. The Sixth Circuit, in
*United States v. Nemeth*, a case from the district court of the
western district of Kentucky, held that when intent, motive, or lack
of mistake are an issue, evidence of prior offenses, tending to show
a consistent pattern of conduct, is admissible if accompanied by
appropriate cautionary instructions. Furthermore, the evidence of
prior similar acts must relate to acts reasonably near in time to the
charged offense to be admissible for the purpose of showing a consis-
tent pattern of conduct.

The admissibility of other crime evidence in Kentucky cases in-
volving the prosecution of sex crimes differs from the statutorily
defined admission in *Oliphant*. A distinct view from that found in
*Oliphant* is presented in the decision of *Messmear v. Common-
wealth*, which held that in prosecutions for sex crimes, evidence
of sex activities other than those giving rise to the prosecution is
competent when all activities are of the same nature and have
been committed upon the same person. Significantly, *Messmear*
allows this evidence to be more remote in time. In comparison,
*Oliphant* in admission of other crimes evidence under the Michi-
gan statute dealt with charges occurring within months of one
another. *Oliphant* also permitted "the introduction of evidence
concerning other activities in sex cases tending to indicate an affin-
ity or lustful desire or incestuous disposition."

62. Id. at 489.
64. Id. at 705.
65. Id. at 706.
67. Id. at 684.
1938), in which it was held that evidence concerning an act of intercourse some eight years
before the date of the present offense was not too remote.
69. *Oliphant* v. Koehler, 594 F.2d at 548.
70. *Messmear v. Commonwealth*, 472 S.W.2d at 684.
The decision in *Messmear* was expanded in *Russell v. Commonwealth.* In *Russell,* the court held that evidence of prosecutions of prior sex crimes of the same nature committed upon the same person is competent for the limited purpose of showing corroboration and design, disposition, or intent by the defendant. In contrast, the decision in *Oliphant* admitting similar crime evidence after prior acquittals involved a different victim in each case. The court in *Russell* addressed this issue by stating the following:

Evidence of separate and distinct prior acts of a similar or identical nature, not too remote in time, committed upon children victims other than those charged in the indictment is admissible for the purposes of showing disposition and intent as to the act charged, lustful inclination, motive, a common pattern, scheme, or plan. The separate and distinct acts with other children victims to be admissible must have a reasonably close relation in scheme and pattern and in time to the act charged.

**Application in Ohio**

Evidence of other crimes is admissible in Ohio for the limited purposes defined by a statute concerning proof of the defendant's motive. The statute provides for almost identical exceptions as those found in the Michigan statute relied upon in *Oliphant.*

The general rule, found in the decision of *State v. Hector,* disfavors introduction of evidence tending to show that the accused may have committed another crime wholly independent of the offense for which he is on trial. But, the decision in *Hector* recognizes exceptions to this general prohibition where the prior offense is part of a common plan or scheme or where it tends to prove motive, intent, knowledge or identity. This evidence is not admitted to prove that the defendant has a propensity for criminal activity, "but in spite of such fact . . . on the theory that the circumstances involved in

71. 482 S.W.2d 584 (Ky. Ct. App. 1972).
72. Id. at 588.
73. Id.
74. Ohio Rev. Code Ann. § 2945.59 (Page 1975). In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.
75. 19 Ohio St. 2d 167, 250 N.E.2d 279 (1969).
76. Id. at 174.
the prior offense or offenses comprise substantial probative evidence."

Similarly, *State v. Flonnory*,78 guided by the same statutory restrictions as *Hector*, held evidence of other acts are admissible when introduced by the prosecutor for a limited purpose such as proving intent. In fact, the decision held that "[i]f such other acts 'tend to show' any of those things [exceptions within the Ohio statute] they are admissible notwithstanding they may not be 'like' or 'similar' to the crime charged."79

The prerequisites of relevancy and materiality for admission of other crimes evidence noted in the *Oliphant* decision are also requirements under Ohio law.80 The court held in *State v. Snowden*81 that where the defendant places in issue his "particularized intent" to commit the crime for which he is on trial, it becomes material and relevant.82 Thereby, the evidence of other acts of a similar nature becomes admissible.

In the prosecution of a rape case, *State v. Curry*,83 the court found testimony concerning prior alleged incidents failed to meet the relevancy and materiality requirements of the statute. The evidence of other acts of the criminal defendant are admissible only if one or more of the matters enumerated in the statute is a material issue at the trial and if this evidence directly tends to prove this enumerated matter.84 As in other decisions in Ohio, the court in *Curry* followed admission standards for evidence of other crimes similar to those found in *Oliphant*. The evidence must tend to prove one or more of the matters in the statute, and this matter must be both a material and relevant issue at the trial.

There are several distinctions derived from case law, as well as the exceptions within the statute, that control the admission of other crimes evidence in the prosecution of sex crimes in Ohio. First, the court in *State v. Jackson*,85 held that evidence of other crimes to prove degenerate and perverted emotion impelling the conduct of the defendant was admissible. Second, the decision in *State v.
Chapman\textsuperscript{86} required other crimes evidence in the prosecution of sex offenses to be closely related in time and nature to be admissible. Third, the court held in \textit{State v. White}\textsuperscript{87} that both motive and intent on behalf of the accused to commit a sexual offense was relevant and material.

\textbf{Conclusion}

The impact of \textit{Oliphant} in the Sixth Circuit as it affects the legitimate use of similar crime evidence is significant, because the case law in Kentucky does not directly address this issue of admissibility of similar evidence in sex crimes after an acquittal. Yet, the discussion of the leading case law in Kentucky would seem to indicate that the fact of an acquittal would not bar the prosecutor; under a collateral estoppel claim, from properly introducing this evidence under one of the exceptions, such as to show a plan, scheme, or disposition of the defendant.\textsuperscript{88} The court, giving the appropriate cautionary instructions, would be properly exercising its discretion in allowing such evidence to be admitted for this limited purpose.

In contrast, the impact of \textit{Oliphant} in Ohio emphasizes an established principle of law that the general rule of exclusion will not apply where other crime evidence is relevant, material, and tends to prove a particular element or fact included as an exception under the Ohio statute. Significantly, the admission of other crime evidence in sex crime prosecutions is restricted. The other crime must be closely related in time and nature.

However, like the similar crimes statute in \textit{Oliphant}, the specific working of the Ohio statute is silent as to a particular fact situation in which other crime evidence following an acquittal is sought to be introduced by the prosecutor. But, neither statute requires the other crime evidence to be established beyond a reasonable doubt. The case law regarding the application of the Ohio statute would most probably allow such evidence, where it is a material issue and the other crime evidence tends to establish an exception. As in Kentucky, the admission, at the discretion of the court, of similar crime

\textsuperscript{86} 111 Ohio App. 441, 168 N.E.2d 14 (1959).
\textsuperscript{87} 116 Ohio App. 522, 189 N.E.2d 160 (1962).
\textsuperscript{88} See Ky. REV. STAT. § 505.040 (1975) (effect of former prosecution).
evidence, regardless of an acquittal, because of its restricted use would not likely be barred by a collateral estoppel claim.89

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89. See Ohio Rev. Code Ann. § 2943.05-.10 (Page 1975) (judgment of conviction, acquittal, or former jeopardy).

Introduction

In Inman v. Inman, the Kentucky Court of Appeals held that where the only asset acquired during a seventeen year marriage was a dental degree and license earned by the efforts of both spouses, equitable considerations require upon divorce that these intangible assets be divisible marital property. During their seventeen years of marriage, the Inmans had come “to possess an expensive home and several vehicles, but these items were so heavily encumbered that the couple’s net worth was zero.” The only unencumbered asset which John and Sue had acquired was John’s dental license to which John and Sue had both contributed financially. Just before the divorce, John had begun to study orthodontics and might, over the long run, benefit financially from his continued study. However, in the short run, he might well go bankrupt. The Inman majority stated that “[i]mmediately prior to dissolution . . . John and Sue had a lifestyle that reflected prosperity but in fact they were on the brink of bankruptcy.”

The court indicated there was some evidence in the record that the Inman’s indebtedness stemmed almost entirely from John’s “poor management of his own business and some disastrous investments.” Furthermore, the fact that John’s net income had dropped substantially in the last three years supported what the court had said regarding the ominous prospects of John’s financial affairs.

The trial court awarded Sue the house. John, having acquired his education during the marriage, was awarded the mortgage. The court of appeals learned during oral argument that due to John’s default on mortgage payments, there had been a foreclosure and the house was lost. This event brought into execution a contingent provision of the trial court’s judgment which was made in anticipation of such event, requiring John to pay Sue $60,000 over ten years.

1. 578 S.W.2d 266 (Ky. Ct. App. 1979).
2. Id. at 267.
3. Id.
4. Since the record was not clear on this point, the court of appeals asked that the trial court, on remand, determine to what extent Mrs. Inman had a part in the indebtedness and adjust the settlement award accordingly. Id. at 270-71.
5. Id. at 267.
6. Id.
The principle issue which the court addressed was whether a professional license or educational degree is marital property divisible in dissolution proceedings. The court of appeals found that it could not award Sue maintenance under the Kentucky statute which deals with awards of maintenance.

The Kentucky Court of Appeals then affirmed the trial court's allowance of a professional degree as marital property stating that in certain cases "to refuse to find any sort of property interest would work the grossest injustice." Thus, the majority limited its holding to situations where the couple has acquired no substantial assets during the marriage.

Judge Wilhoit, dissenting, argued that the equitable result which the majority sought could be reached through an award of maintenance. Such a remedy, he argued, would be less difficult to apply. He stressed that in 1974, the highest court in Kentucky in Casper v. Casper read the Kentucky maintenance statute in a broader manner. In light of Casper, Judge Wilhoit would allow a maintenance award but would not treat the professional degree as prop-

   (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
   (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
   (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
   (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
   (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
   (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
   (c) The standard of living established during the marriage;
   (d) The duration of the marriage;
   (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
   (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.
8. Inman v. Inman, 578 S.W.2d at 270.
9. Id. at 268.
10. 510 S.W.2d 253 (Ky. 1974).
property, suggesting that such a redefinition of what is marital property, should be reserved for consideration by the legislature. 11

Comparison to Decisions in Other Jurisdictions

The court in Inman reached a novel solution to a problem that has increasingly perplexed modern courts. Other state courts have treated the problem in one of two ways. They have either refused to find a property interest in educational degrees or professional licenses, 12 or they have held it was a property interest but not an interest divisible as marital property. 13

The Inman majority cited a Colorado case, In re Marriage of Graham, 14 and argued that it reached an inequitable result. 15 The Graham court held there was no property interest in educational degrees or professional licenses. Citing the dissenting opinion in Graham, the Inman majority emphasized that Anne Graham was ineligible for maintenance. 16 The finding of her ineligibility by the Graham court, however, did not turn upon a narrow interpretation of the Colorado maintenance statute as implied by the Graham dissent 17 but on the failure of Ann's lawyer to seek maintenance. 18 The Graham majority stated that contribution to the education of the other spouse clearly is a relevant factor to be considered in determination of maintenance awards to spouses. 19 To bolster this proposition the Graham court cited Colorado decisions where education is a consideration in maintenance awards. 20 The Graham majority also cited Todd v. Todd, 21 a California case, in order to justify its decision. 22

In Todd, the California Court of Appeals held that while the goodwill of a law practice is community property divisible upon divorce, neither the right to practice law nor a law degree are to be considered as divisible community property despite being property

11. Inman v. Inman, 578 S.W.2d at 271.
15. Inman v. Inman, 578 S.W.2d at 269.
16. Id. at 271.
17. 574 P.2d at 78-79.
18. Id. at 77-78.
19. Id. at 78.
22. 574 P.2d at 77.
interests. The Todd court went on to state that even if education acquired with community funds could be classified as community property, "a proposition which is extremely doubtful...it is manifestly of such character that a monetary value cannot be placed upon it." A California Court of Appeals case, In re Marriage of Aufmuth, recently reaffirmed Todd and stressed that "[t]he value of a legal education lies in the potential for increase in future earning capacity of the acquiring spouse."

California decisions in this area are, of course, governed by that state's community property laws. Community property is property held in common. It is defined by the California Civil Code as "property acquired by husband and wife, or either, during marriage, where not acquired as the separate property of either." The Code further calls the property interest of the spouses "present, existing, and equal." All the property acquired during the marriage of the couple is treated as being equally owned regardless of how acquired, or by whom, except where there is a contractual agreement indicating otherwise. Where a married couple seeks a divorce the property acquired during marriage, which is community property, is divided equally between the spouses.

In contrast to the equal division of property under the community property states is the division of property based on contribution as evidenced in states like Kentucky. Despite the differences in the statutory law, the cases' similarity overcome any suggestion that the rationale of Todd is not applicable to Inman. In Inman there was no question that Sue had contributed to the acquisition of John's

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23. 272 Cal. App. 2d at 789, 78 Cal. Rptr. at 135.
24. Id. at 788, 78 Cal. Rptr. at 134.
26. 89 Cal. App. 3d at 461, 152 Cal. Rptr. 678.
27. CAL. CIV. CODE §§ 4800, 5100 (West 1970).
29. CAL. CIV. CODE § 687 (West 1954).
32. CAL. CIV. CODE § 5110 (West 1970).
33. See Marvin v. Marvin, 18 Cal. 3d 660, 676, 557 P.2d 106, 117, 134 Cal. Rptr. 815, 826 (1976) (the court held that in the absence of either the benefit of marriage or an express contract, the woman is entitled to share property only in proportion to her contribution to its acquisition).
34. See KY. REV. STAT. § 403.190 (1) (a) (1972) (provides for distribution of marital property without regard to marital misconduct but with regard to the "contribution" of each spouse to its acquisition including contributions as a homemaker). See generally Colley v. Colley, 460 S.W.2d 821 (Ky. 1970).
degree and license.\textsuperscript{35} Similarly, there was no question as to the contribution of Alyce Todd to Leo Todd's education.\textsuperscript{36} Alyce Todd would have been eligible under the Kentucky marital property law just as she was under California's community property law. Both states have no fault divorce laws.\textsuperscript{37}

After making the initial determination that the husband's education was either marital or community property, the courts of both states are then logically required to award the wife some portion thereof. Thus, the differences between the community property system and the marital property system are determinative of the amount to which each spouse is entitled. In these cases the difference in the two property law systems is only relevant as to the amount, not to the initial determination of whether to make such an award.

\textit{Todd v. Todd},\textsuperscript{38} a landmark case, was the first decision to clearly define professional licenses and educational degrees as a property interest not divisible as community property. It has been cited with approval by the courts in New Jersey,\textsuperscript{39} Iowa,\textsuperscript{40} Oklahoma\textsuperscript{41} and Colorado.\textsuperscript{42} These states hold that even though an education or a professional license might create property interests, such interests are not marital property which can be divided upon divorce. As in \textit{Todd}, these states, which are not community property states, find such a division impractical in view of the intangible and nonvested nature of the increase in future earnings which are expected to flow from such degrees and licenses. Therefore, these states hold that such degrees and licenses are not marital property which can be divided upon divorce. In contrast, \textit{Inman v. Inman}\textsuperscript{43} held that such degrees and licenses are not to be considered in awarding maintenance but are to be considered in the distribution of marital property.\textsuperscript{44}

\textsuperscript{35} Inman v. Inman, 578 S.W.2d at 267.
\textsuperscript{36} 272 Cal App. 2d at 789, 78 Cal. Rptr. at 135.
\textsuperscript{37} See, \textit{e.g.}, Chapman v. Chapman, 498 S.W.2d 134 (Ky. 1973). In dissolution of a marriage, fault is not to be considered except in regard to the amount of any maintenance. \textit{See also} Silvers v. Silvers, 23 Cal. App. 3d 910, 100 Cal. Rptr. 731 (Ct. App. 1972).
\textsuperscript{38} 272 Cal. App. 2d 786, 78 Cal. Rptr. 131 (1969).
\textsuperscript{40} \textit{In re Marriage of Horstmann}, 263 N.W.2d 885 (Iowa 1978).
\textsuperscript{41} \textit{See} 5 FAM. L. REP. (BNA) 2538 (Mar. 20, 1979).
\textsuperscript{42} \textit{In re Marriage of Graham}, 574 P.2d 75 (Colo. 1978).
\textsuperscript{43} 578 S.W.2d 266 (Ky. Ct. App. 1979).
\textsuperscript{44} \textit{Id.} at 268.
Kentucky Precedents

The unique feature of the Inman decision is that a dental license and education, under section 403.190 of the Kentucky Revised Statutes, are not only property but are divisible marital property. Judge Wilhoit, dissenting in Inman, argued that such an expansion of the concept of property creates more problems than it solves. He, no doubt, is referring to the difficulties inherent in placing a value on such property and unforeseeable changes of circumstances which would make such awards inequitable. Traditionally, educational degrees and professional licenses were not even remotely conceived as property. Instead, the Kentucky high court in Beggs v. Beggs considered the wife's support of her husband while he acquired an education a "factor" in adjusting the property rights of the couple on dissolution. However, that case may be distinguished in that the couple had accumulated substantial assets in comparison with John and Sue Inman, who had accumulated no assets. In consequence, there was no need for the court to spread out the property payments over time as the court did in Inman. The early Kentucky high court decision in Halcomb v. Halcomb found that "in view of the evidence that the wife worked and contributed her earnings to the support of the family during a substantial part of the eight year period the husband was attending medical school, the husband is hardly in the position to complain of the amount of alimony." These cases indicate that Kentucky courts have traditionally taken a flexible approach in the fashioning of remedies in divorce proceedings.

The Rule of Casper v. Casper

Judge Wilhoit's dissent is, in part, an appeal to the majority to apply the flexible interpretation given to section 403.200 of the Ken-
tucky Revised Statutes by the Kentucky high court in Casper v. Casper. In Casper, the court held that the maintenance statute was to be interpreted as a whole. Specifically, the decision held that section 403.190(1) requiring that the spouse seeking maintenance make a sufficient showing of need is to be read in conjunction with section 403.190(2)(c), and thus, the court in determining whether such spouse is entitled to maintenance must consider the “standard of living established during the marriage.” The decision in Casper was so well written that it has been cited in various cases in Arizona and Missouri. Judge Wilhoit’s dissent interprets Casper as allowing maintenance whenever a spouse is unable to support herself or himself “according to the standard of living established during the marriage.” This interpretation is consistent with the Kentucky decision in Sharp v. Sharp in which the high court allowed an employed divorcée maintenance so that she would not have to live on a salary only slightly above the poverty level. In consideration of these high court decisions, the Inman majority finding that it could not award Sue Inman maintenance appears to be a substantial break with precedent. It would be presumptuous to interpret the decision of the court of appeals in 1979 as overruling or supplanting a 1974 high court decision equivalent to a Kentucky Supreme Court decision. The Inman decision appears not only to be a maverick in light of what courts in other jurisdictions have held when the Inman issue was presented to them but also in light of the tendencies of Kentucky’s prior decisions.

Where Is the Equity?

The Kentucky Court of Appeals attempts to justify its decision in terms of the requirements of equity. However, a careful examination of the facts of the case reveal a substantial and imminent

55. 510 S.W.2d 253 (Ky. 1974).
56. Id. at 255.
57. Id.
59. Brueggemann v. Brueggemann, 551 S.W.2d 853, 857 n.3 (Mo. 1977).
60. Casper v. Casper, 510 S.W.2d at 255.
61. 516 S.W.2d 875 (Ky. 1975).
62. Inman v. Inman, 578 S.W.2d at 270.
63. In 1974 there was no Supreme Court in Kentucky. The high court at that time was called the Court of Appeals. That court’s decisions prior to Jan. 1, 1976 are deemed the equivalent of Kentucky Supreme Court precedent by virtue of Ky. Rev. Stat. § 21A.100 which reads in part, “court of appeals records become Supreme Court records. . . . And such records shall be given the same full faith and credit as are records of the Supreme Court.”
danger that the decision, allegedly fashioned to benefit Sue Inman, may actually not benefit her in the least. The court risks the likelihood of a discharge in bankruptcy of the property settlement by giving her an award of property. 64 Property debts are dischargeable in bankruptcy under the law, 65 whereas maintenance awards are not. 66

The court stated that the Inmans "were on the brink of bankruptcy" just prior to the dissolution. The record shows evidence of John Inman's financial peril. The Inman majority states that the Inmans had not accumulated any assets during the seventeen years of marriage during which they each had steady incomes, including Doctor Inman's "well above average" income. 67 Further the court added that "[t]he record suggests . . . the couple's indebtedness resulted entirely from Dr. Inman's poor management of his own business and some disastrous investments." 68 Trouble is indicated through the income trends of Dr. Inman's practice. Although he grossed $90,000 a year from 1975 through 1977, he netted well under $40,000 in 1975 and 1976; and his net income dropped to less than $18,000 in 1977. 69 Expert testimony indicated that "with reasonable business practices, a dentist in Dr. Inman's position should net 45 or 50 per cent of his gross." 70

An award of maintenance presents no danger of being discharged in bankruptcy. 71 Also in Kentucky, awards of maintenance are difficult if not impossible to modify. Modification is made difficult by section 403.250(1) which provides that "provisions of any decree respecting maintenance or support may be modified only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." 72 In fact, it is impossible when the court adopts a contractual settlement agreement providing for maintenance prior to the divorce litigation as part of its judgment. 73

64. Cunningham v. Cunningham, 497 S.W.2d 941, 942 (Ky. 1973).
65. Bankruptcy Act, 11 U.S.C. § 35(a)(7) (1970) provides an exception for debts which are "for maintenance or support of wife or child."
66. Inman v. Inman, 578 S.W.2d at 267.
67. Id. at 270.
68. Id.
69. Id. at 267.
70. Id.
73. U.S. CONST. art. I § 10, cl. 1 reads in part "No State Shall . . . pass any . . . law impairing the Obligation of Contracts."
Therefore, it would be more advantageous to Sue Inman to have an award of maintenance of $60,000 instead of the present court order that her husband pay her $60,000 in the next ten years in lieu of mortgage payments.\(^7\)

**Conclusion**

The *Inman* decision though limited to specific facts seems to be ill founded and should be reversed. This decision is novel both in terms of what other jurisdictions have held and in terms of prior Kentucky precedents. Furthermore, the weight of authority would seem to allow consideration of licenses and degrees earned during a marriage in determining amounts of maintenance but not in distributing property. This appears to be a superior and more equitable approach to the problem in view of the bankruptcy laws.

RON GROEBER

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74. Inman v. Inman, 578 S.W.2d at 271.
BOOK REVIEW


Reviewed by Larry C. Deener*

The latest of several books written by the Watergate principals and bystanders has been published.¹ Judge John J. Sirica was a central figure in the resolution of this national tragedy and triumph, and he has provided the public with a review of Watergate from his perspective as the trial judge in the majority of the judicial proceedings which occurred.

Judge Sirica begins the book with an autobiographical prologue which is neither modest nor boastful. It simply points out the fact that just as the vast majority of the daily judicial decisions of this country are not made by panels of constitutional scholars in an ivory tower but instead come from ordinary mortals with a political background, so it was with Watergate. Judge Sirica’s rise from an impecunious beginning to a federal district judgeship is similar to that of hundreds of successful men and women across the country; yet, we should remember that each success story is distinct from the others and deserving of attention. I found Judge Sirica’s prologue allowed me an interesting perspective upon his Watergate actions.

Perhaps the major criticism which should be leveled at this book is that the reader soon gets the impression that the chief judge of the district court had the messianic role in the Watergate play. This result is unfortunate, because it is clear that Judge Sirica and his fellow district judges did an important service to this nation by keeping the federal courts untainted by outside political influence (although Judge Sirica tacitly admits to being influenced by his perception of the public’s demand to get to the truth). Part of this adverse impression follows the several expressions by Judge Sirica of his utter contempt for Richard Nixon as a result of his participation in the coverup conspiracy and is not abated by the Judge’s


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patronizing and repeated statements that he had worked and/or voted for Nixon in his previous campaign. Judge Sirica makes no secret of the fact that he is dissatisfied because Richard Nixon was pardoned and did not appear before the court as a criminal defendant. He is not, of course, alone in this opinion. However, it does detract from his reputation of impartiality.

Generally, the book makes good reading. Judge Sirica has obviously made a conscious effort to write his story in lay terms and to avoid peculiar legal usages. The book can be divided into the initial Watergate trial, the first breaks in the coverup, the relentless “Battle for the Tapes,” and the conspiracy trial. For the convenience of some readers (and, undoubtedly, the confusion of many more), Judge Sirica has provided in an appendix selected tape transcripts and the major reported opinions on Watergate matters by himself, the District of Columbia Court of Appeals, and the United States Supreme Court. The book tells a seemingly objective story from the interesting viewpoint of the trial judge rather than from that of an advocate before the court. The Judge attempts to explain some of his decisions and actions in the many months of proceedings. Perhaps the only warranted criticism of the book in this area is Judge Sirica’s recount of what he was prepared to do and would have done had the President not complied after the “Saturday Night Massacre” with the court order to produce the tapes. He intended to “hit him in the pocketbook” because “I knew the president [sic] loved money” and, therefore, fines of $25,000 to $50,000 per day “would have brought him around in a short time.” Although I must admit to a rising suspense as I read the story, wondering how Judge Sirica intended to meet the challenge, it must be noted that the Constitutional confrontation did not take place as the tapes were given to the court. When the other side folds, there is no need to show your cards and gloat. Judge Sirica represents a federal court which does not, traditionally, decide questions gratuitously, without the necessity to do so. Watergate, or the telling of a good story, does not make it proper to do so now.

The book is easily read and is interesting. I would recommend it if you are interested in the Watergate crisis as seen from a new vantage point. The biggest problem with the book is that the Watergate mess, for all of its publicity, can basically be boiled down to a

3. Id. at 180.
burglary, a coverup, the tapes struggle, and the conspiracy trial. After one has read a few of the books concerning Watergate which have been published, one comes to recognize the same plot and the same characters, the story differing only by whether the author saved the country or was not really to blame altogether.