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JUDICIAL INDEPENDENCE AND ACCOUNTABILITY: THE JUDICIAL COUNCILS REFORM AND JUDICIAL CONDUCT AND DISABILITY ACT OF 1980*

Honorable Edward D. Re**

I. INTRODUCTION

I am privileged and honored to deliver the Harold J. Siebenthaler Lecture at the Salmon P. Chase College of Law. The name of the lecture honors a generous benefactor and a distinguished graduate. The name of your school honors a United States senator, governor, secretary of the treasury, and a Chief Justice who did much to preserve and restore the prestige of the United States Supreme Court.

The subject of my lecture will be "Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980." It will deal with two complementary values of major significance in our scheme of government: judicial independence and the accountability of all public officials. The congressional enactment that will be discussed is of great importance because it is designed to improve judicial accountability and ethics, and, at the same time, preserve the independence and autonomy of the judiciary.

Judicial independence was meticulously established by the framers of the Constitution and jealously guarded by all concerned with the administration of justice. However, past mechanisms designed to protect that independence have created the appearance, if not the reality, of an insulated, privileged branch of government. Quite apart from legal considerations, the presence of such a class of persons, however small or exceptional, is an anachronism in a modern democracy. Comparatively recent congressional efforts to provide accountability for Federal judges, without infringing on the bounds of necessary judicial independence, have finally culminated in the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.1

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* The Harold J. Siebenthaler Lecture, Salmon P. Chase College of Law, Northern Kentucky University, February 20, 1981.

** Chief Judge, United States Court of International Trade. B.S., LL.B., J.S.D., D.Ped., LL.D., D.H.L., Distinguished Professor of Law, St. John's University School of Law.

Chief Justice Warren E. Burger has reminded us that "participation in legislative and executive decisions which affect the judicial system is an absolute obligation of judges just as it is of lawyers. . . . Any notion, therefore, that each of the three branches should hibernate in solitary isolation or logic-tight compartments has no basis in reason, law, history or tradition." In the spirit of enlightenment and judicial participation, eloquently advocated by the Chief Justice, I should like to discuss the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. This important legislation, which becomes effective on October 1, 1981, addresses a most difficult and sensitive area of law and government, and should be of interest to everyone concerned with the administration of justice.

II. JUDICIAL INDEPENDENCE

Canon 1 of the Code of Judicial Conduct, "A Judge Should Uphold the Integrity and Independence of the Judiciary," contains the following:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.

The Code stresses at the very outset the "independence of the judiciary." It would seem self-evident that, without judicial independence, there can be no principled decision-making. Judicial independence is the element which makes possible the deciding of important controversial issues on the basis of merit and principle rather than expediency. It permits resisting the pressures of hysteria and fanaticism. It is the ingredient which allows a judge to rise above passion, popular clamor and the politics of the moment. In

2. Remarks of Chief Justice Warren E. Burger accepting the Fordham-Stein Award, Pierre Hotel, New York, N.Y. (October 25, 1978). Chief Justice Burger stated that the separation of powers doctrine was not violated by the judiciary speaking out on the needs of the courts: "[T]he separation of powers concept was never remotely intended to preclude cooperation, coordination, communication and joint efforts by the members of each branch with the members of the other two on non-substantive questions." Id.

The Chief Justice quoted Justice Jackson in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952): "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Id. at 635.

3. ABA CODE OF JUDICIAL CONDUCT No. 1.
sum, it may be said that without judicial independence, no judge or justice, however well-prepared by qualities of heart, mind and professional training, can give full effect to the enduring values enshrined in our Bill of Rights.

Because of its historical vicissitudes, the quest for judicial independence has special meaning to those who reap the rich blessings of liberty and freedom enshrined by the common law. The battle to achieve it was fought by our English forefathers, and indeed, was ultimately won. Although that important chapter of English legal history will not be recounted here, it is well to remember that, at one time, patents given by the King which allowed the English judge to serve, could be revoked at regal whim. As a result, English judges served *durante bene placito*, that is, at the pleasure of the Crown.

The Stuarts reigned at the pinnacle of notions of absolute monarchy. It is, therefore, not surprising that Roscoe Pound said that “[a]lthough there were many strong judges,” the Stuart judiciary was “a politics-ridden bench, a seat on [sic] which was dependent on doing what the exigencies of royal government demanded, [which] sank to the lowest point in English judicial history.” With the passage of the Act of Settlement of 1701, English judges were privileged to serve *quamdiu se bene gesserint*, that is, during good behavior. By the time war broke out with the colonies, the English judge enjoyed a qualified judicial independence.

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"The English judges in earlier times held their offices at the royal pleasure, but this proved to be a dangerous power to vest in the executive, because it made the judiciary subservient to the crown, especially in state trials, and gave the King a control over the administration of justice at once dangerous to private rights and subversive of the liberties of the people." J. GARNER, INTRODUCTION TO POLITICAL SCIENCE 578 (1910).

6. Act of Settlement, 1701, 12 & 13 Will. 3, c. 2, § 3, at 360. "Judges' Commissions be made *quamdiu se bene gesserint*, and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them." "The clause in the Act of Settlement which changes the tenure of judges is justly regarded as one of the most important parts of the Revolution Settlement." C. McILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY 77 (1910). See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 59-60, 221-22 (2d ed. 1936).


8. Judges were responsible to Parliament and removal was possible upon joint address of
The American colonists were not as fortunate. The colonial judiciary was forced to serve at the pleasure of the Crown, prompting the signers of the Declaration of Independence to charge as a complaint against King George III: “He has made Judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.”

In a penetrating discussion of the “essence of judicial independence,” a learned jurist has written that the “independence of the federal judiciary has its origins in the courts of England, and in their subjugation, first to the will of the Crown, and then to Parliament.”

As a result of their experience with a dependent judiciary, the framers of the Constitution carefully dispersed the control of judicial tenure and compensation among the branches of the new government to assure American judicial independence. The power of judicial appointment was conferred upon the President with the advice and consent of the Senate, while the House of Representatives and the Senate shared the power of judicial removal through the process of impeachment and conviction.

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9. See Ervin, supra note 7, at 112; Feerick, supra note 4, at 12-13.
12. The President shall “with the advice and consent of the Senate ... appoint ... judges of the Supreme Court, and all other officers of the United States ...” U.S. Const. art. II, § 2. Id.
It is settled that Federal judges are "civil officers" within the impeachment clause of the Constitution which provides that "all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors."

Tenure was guaranteed "during good behavior." "Good behavior," however, is nowhere defined in the Constitution nor the manner for determining its breach. Hence, the difficulty of the subject and the conflicting opinions of scholars and judges who draw different inferences from the pertinent documents and lessons of history.

Hamilton praised the framers for their adoption of the good behavior standard:

The convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

Feerick, in his study of the constitutional provisions relating to impeachment, has concluded that the use of the words "during good behaviour" "can be viewed as the framers' way of saying that judges, unlike other public officers, have a lifetime tenure but, like

"The Senate shall have the sole power to try all impeachments." U.S. CONST. art. I, § 3.
16. "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their offices during good behavior . . . ." U.S. CONST. art. III, § 1.

It is interesting to note that although the Constitution in article I, section 6, clause 1, grants legislators immunity for legislative acts, article I, section 5, clause 2 nevertheless empowers each House to punish its members even by expulsion. "From time immemorial it has been deemed the right of legislative bodies to expel members thought unfit." R. Luce, LEGISLATIVE ASSEMBLIES, 278 (1924). Luce discusses some of the grounds "that have been held to warrant exercise of the power." Id. at 275-92.

In a scholarly article, Chief Judge Kaufman states that "[w]hile the constitutional text gives Congress the power to discipline its own members, the judiciary is not similarly vested with disciplinary authority." He states that the "separation-of-powers framework contemplates that the judiciary will hold its members accountable to the law and litigants through appellate review, rather than inquisitorial proceedings." Kaufman, The Essence of Judicial Independence, 80 COLUM. L. REV. 671, 699 (1980).
other civil officers, may be impeached."\textsuperscript{18} Although an act to be impeachable need not be "indictable or violate a specific statutory provision,"\textsuperscript{19} it must, nevertheless, fall within either of the following categories: "It must violate some known, established law, be of a grave nature, and involve consequences highly detrimental to the United States. In the alternative, it must involve evil, corrupt, willful, malicious or gross conduct in the discharge of office to the great detriment of the United States."\textsuperscript{20}

Reduction of judicial compensation for the Federal judges was expressly constitutionally prohibited.\textsuperscript{21} An idea borrowed from the English experience, and culminating in the Act of Settlement of 1701,\textsuperscript{22} the control or securing of compensation was seen as a way to insulate the judiciary from the threats to its independence by a hostile legislature. The Supreme Court recently enlivened the compensation clause of the Constitution by reiterating some of the reasons that inspired its insertion into the Constitution.\textsuperscript{23} Consequently, the compensation clause remains a significant barrier to infringement of judicial independence.

Judicial independence has also been safeguarded by the courts through the doctrine of judicial immunity. In \textit{Bradley v. Fisher},\textsuperscript{24} the Supreme Court affirmed the decision of a lower court which

\begin{itemize}
  \item\textsuperscript{18} Feerick, \textit{supra} note 4, at 52.
  \item\textsuperscript{19} \textit{Id.} at 53.
  \item\textsuperscript{20} \textit{Id.} at 54-55. He adds: "Acts which result from error of judgment or omission of duty, \ldots without the presence of a willful disregard, are not impeachable." \textit{Id.} at 55.
  \item\textsuperscript{21} "The Judges, both of the supreme and inferior Courts, shall \ldots receive for their services a compensation, which shall not be diminished during their continuance in office." \textsc{U.S. Const.} art. III, § 1.
  \item Hamilton explained the compensation clause: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support \ldots In the general course of human nature, a power over a man's subsistence amounts to a power over his will." \textsc{The Federalist} No. 79 (A. Hamilton) at 472 (New Amer. Lib. of World Lit. ed. 1961) (emphasis in original).
  \item\textsuperscript{22} "Judges' Commission be made Quamdiu se bene gesserint [during good behavior], and their Salaries ascertained and established \ldots ." \textit{Act of Settlement}, 1701, 12 & 13 Will. 3, c. 2, § 3. A statute, implementing the Act of Settlement prevented diminution of a judge's salary "so long as the Patents and Commissions of them, or any of them respectively, shall continue and remain in force." 1760, 1 Geo. 3, c. 23, § 3. Blackstone declared that the two statutes were designed "to maintain both the dignity and independence of the judges." 1 W. \textsc{Blackstone}, \textit{Commentaries} *267.
  \item\textsuperscript{23} \textit{See} United States \textit{v.} Will, 101 S.Ct. 471 (1980) (Supreme Court held that Congress could not rescind cost of living increases of Article III judges after increases had taken effect according to a pre-determined formula. Congress could, however, modify the formula for determining compensation, before the effective date of an increase, so as to rescind an expected increase.).
  \item\textsuperscript{24} 80 \textsc{U.S. (13 Wall.)} 335 (1871).
\end{itemize}
held that a judge was immune from liability for judicial acts. The Court wrote:

[I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.25

The Court went on to quote English precedent explaining the purpose of judicial immunity:

[A] series of decisions ... extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. ... It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear.26

It is significant that the Court added: “[T]his provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.”27

The immunity of judges from liability covers all judicial acts, regardless of the motivations of the judges since “[t]he purity of their motives cannot in this way be the subject of judicial inquiry.”28 The chilling effect of liability for judicial acts would severely hamper judicial independence.

The importance of judicial immunity was reaffirmed by Chief Judge Learned Hand in Gregoire v. Biddle.29 Confronting the conflict between immunity and accountability, he confirmed that the justification for judicial immunity

is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the

25. Id. at 347.
26. Id. at 349-50, accord, Scott v. Stansfield, L.R. 3 Ex. 220 (1868).
27. Id. at 350.
28. Id. at 347.
29. 177 F.2d 579 (2d Cir. 1949) (civil suit against Attorney General of the United States for damages for false arrest dismissed because federal officers had absolute immunity from liability).
innocent as well as the guilty, to the burden of trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. 80

Clearly, judicial independence was a goal constantly pursued during the nation's infancy. However, the conflict between that independence and the accountability that is also necessary in a democratic society, became obvious as the colonies cast off the remnants of colonial rule. Hamilton condemned sentiment in favor of judicial accountability in Federalist No. 79: "The want of a provision removing judges on account of inability has been a subject of complaint. But all considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose." 81 Hamilton went on to discourage efforts to provide a mechanism to remove senile judges as well. 82 Thus, the nascent United States of America struggled with the same tension that concerns us today.

The difficulty stems from the fact that both independence and accountability are values to be cherished and fostered. In decision-making, in general, and the judicial process, in particular, often the choice is not between good and evil. Rather, it becomes necessary to weigh, balance or accommodate competing values or ideals. 83


31. THE FEDERALIST No. 79 (A. Hamilton) at 474 (New Amer. Lib. of World Lit. ed. 1961). Hamilton continued,

[t]he mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts. An attempt to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good. Id.

32. Hamilton also addressed the question of judicial accountability regarding possible senility, stating:

In a republic where fortunes are not affluent and pensions not expedient, the dismissal of men from stations in which they have served their country long and usefully, on which they depend for subsistence, and from which it will be too late to resort to any other occupation for a livelihood, ought to have some better apology to humanity than is to be found in the imaginary danger of a superannuated bench. Id.

33. Weighing the hazards of judicial dependence against lack of judicial accountability in Gregoire v. Biddle, Chief Judge Learned Hand stated that "the answer must be found in a balance between the evils inevitable in either alternative." 177 F.2d 579, 581 (2d Cir. 1949). "Stability and progress, precedent and equity, justice that is universal and yet individual,
course, it may be added that these values are also related to the autonomy of the judiciary and the separation of powers.

III. JUDICIAL ACCOUNTABILITY

A. V. Dicey has described the rule of law as "the supremacy throughout all our institutions of the ordinary law of the land. This rule of law, which means at bottom the right of the courts to punish any illegal act by whomsoever committed, is the essence of English institutions."34 No discussion of judicial accountability, however brief, can omit a reference to Article 45 of the Magna Charta which expressly declared: "We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well."35

Goals of accountability permeate and are the essence of democratic institutions. Chief Justice John Marshall established in Marbury v. Madison36 that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."37 Our national ideal of Equal Justice under Law and the Rule of Law should prove adequate to prevent the development of a privileged tier of government whose existence would seem to be inconsistent with a democracy.

Recent national events have highlighted and accentuated the need for accountability in Government. In Butz v. Economou,38 the Supreme Court declared that "[o]ur system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law."39 The Court continued, quoting the imperishable words of Justice Miller in United States v. Lee:40 "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."41

It is pointed out by opponents of judicial discipline legislation are but a few of the 'opposites' that the jurist must 'reconcile' if his work is to be qualitatively acceptable." Re, The Partnership of Bench and Bar, 16 CATH. L. 194, 198 (1970). See also Re, Stare Decisis, 79 F.R.D. 509 (1979).

34. A. Dicey, LAW OF THE CONSTITUTION 466 (8th ed. 1915).
35. MAGNA CHARTA, art. 45.
36. 1 U.S. (1 Cranch) 267 (1803).
37. Id. at 275.
39. Id. at 506.
40. 106 U.S. 196 (1882).
41. Id. at 220.
that Federal judges, in common with all other citizens, are subject to the criminal law of the land. As was stated in *United States v. Isaacs*,

42 “[p]rotection of tenure [for Federal Judges] is not a license to commit crime,” and the Constitution “does not forbid the trial of a federal judge for criminal offenses committed either before or after the assumption of judicial office.”

Surely, the judge found guilty of a crime and unwilling to resign, may thereafter be impeached and removed from office. This possibility, however, does not answer the demands of the proponents of legislation intended to cope with and deter aberrant behavior or misconduct.

The demands for accountability have reached the judiciary, prompting one member, Chief Judge Frank Johnson, Jr., to remark “[j]udicial independence must incorporate some notion of accountability. . . . [J]udges must not retreat to strict constructionism when considering the matter of preserving their independence.”

44 Scholars, concerned citizens, and members of Congress, including Senators Tydings, Nunn and DeConcini, have continued to demand judicial accountability.

In a lecture delivered in 1978, Senator DeConcini, Chairman of the Subcommittee on Improvements in Judicial Machinery, in a discussion of judicial accountability, stated that “the American people have replaced respect for public officials with tolerance.”

45 He suggested that beyond personal integrity, we must revise our institutions to insure that “they are sufficiently strong and pliable to weather the worst of men without hampering the best from rising to greatness.”

Although, in 1789, the impeachment of Federal judges for misbehavior in office was reasonable, today, “this cumbersome procedure is only viable with respect to the Presidency

42. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974).

43. *Id.* at 1142. For statutes which involve criminal sanctions against members of the judiciary, see Feerick, *supra* note 4, at 56 n.287.


Chief Judge Kaufman has asserted that “the proponents of judicial discipline legislation have never documented a need for this unprecedented intrusion into our federal judges’ traditionally inviolate sphere.” Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 699 (1980).


47. *Id.*
and the Supreme Court." He indicated that it is unreasonable to expect the House of Representatives to investigate charges of wrongdoing or malfeasance, and the Senate "to suspend all its business for weeks, or even months, to try an impeachment case." He concluded that, "[a]s a consequence, there is a de facto lack of accountability by the Federal Judiciary," and that the "need to restore public confidence in our institutions demands that we remedy this situation."

IV. AMERICAN HISTORICAL ANTECEDENTS

The history of the United States judiciary is replete with attempts to provide accountability without diminishing independence. Until 1980, the various proposals had not been accepted largely due to fears of infringing judicial independence. In the words of one scholar: "[w]hen dealing with so fundamental and so fragile a notion as the independence of the judiciary, one ought to tread warily lest the ultimate cost far outweigh the immediate gains."

Until very recently, most of the attempts to achieve accountability would have created mechanisms for the removal of Federal judges from the bench by means other than impeachment. Scholarly debate has raged on the constitutionality of such removal provisions. The heart of the controversy is whether the impeachment process set forth in the Constitution is the sole and exclusive method for the removal of Federal judges who hold office under Article III of the Constitution. A great deal of scholarly writing can be found for the view that a Federal judge, appointed to hold office "during good behavior," can only be removed by the impeachment process described in the Constitution. Indeed, those who hold this view will emphasize that "during good behavior" denotes lifetime tenure subject to removal solely by impeachment, and that the express language of the Constitution is silent on any other method of removal. It must be stated, however, that there are

48. Id. at 325-26.
49. Id. at 326.
50. Id.
51. Id.
those who do not agree, and assert that impeachment is not the exclusive method for the removal from office of a Federal judge.\textsuperscript{84}

Those who advocate reform and an alternative or supplementary mechanism to impeachment suggest that \textit{expressio unius est exclusio alterius}\textsuperscript{85} is a weak canon of construction in interpreting this area of the Constitution. They assert that the canon is inapplicable since the framers knew of \textit{scire facias},\textsuperscript{86} and, therefore, were aware of common law means of removal other than impeachment.

At this juncture, however, it may be noted that the question of accountability is not necessarily limited to whether there is an alternative to impeachment as a process for the removal of Federal judges. The question to be addressed is whether impeachment is the sole or only process by which a judge may be made accountable for misconduct or unfitness.

Although no conclusive authority can be found, much has been written on the subject. In \textit{Glidden Co. v. Zdanok},\textsuperscript{57} Justice Douglas quoted Alexander Hamilton on the judiciary:

The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified from holding any other. This is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our Constitution in respect to our own judges.\textsuperscript{88}

Hamilton's statement leaves little doubt that, in his opinion, impeachment was the sole mechanism for removal of Federal judges.

On several occasions since the birth of the nation, the legislature has attempted to provide for judicial accountability. Raoul Berger, for example, noted that, in the first Congress, the Act of 1790 was passed which provided for the permanent disqualification of judges

\begin{itemize}
\item \textsuperscript{55} "The expression of one is the exclusion of another." As a canon in the interpretation of a statute, contract or will, the canon is invoked to fortify or justify the conclusion that, from the express inclusion of persons or things in the document, the intent may be inferred to exclude all others. \textit{See} text accompanying note 162, \textit{infra}.
\item \textsuperscript{56} \textit{See} note 8 \textit{supra}.
\item \textsuperscript{57} 370 U.S. 530 (1962).
\item \textsuperscript{58} \textit{The Federalist} No. 79 (A. Hamilton) at 491-93 (H. Lodge ed. 1908) \textit{quoted in} 370 U.S. at 595. These words are also quoted in House Report 96-1313, 96th Cong., 2d Sess. 2 (1980).
\end{itemize}
from holding any office upon conviction in court for bribery.\textsuperscript{59} During the debate over the repeal of the Judiciary Act of 1801,\textsuperscript{60} cries for judicial accountability were common. Philip B. Kurland paraphrases Representative Williams' remarks: "[c]ourts were created in the interest of the people, not of the judges, and the representatives of the people must, therefore, have final control. It is enough that judges are free from diminution of salary. The characterization of a life contract is inapt."\textsuperscript{61}

During the Reconstruction era, "an interesting forerunner of President Franklin D. Roosevelt's court-packing plan"\textsuperscript{62} was at issue. Representative Bingham advocated a procedure which would force judges over seventy who refused voluntary retirement to share their benches with newly-appointed judges performing the same duties, with the same power and compensation.\textsuperscript{63} The new judges would remain after the senior judge's retirement.

Opponents of the bill argued that the legislation would be unconstitutional since it would force the retirement of unwilling members of the Federal judiciary. Representative Kerr expressed the dangers of the proposal:

It seems to me that this provision will introduce into our judicial system and into the control of Congress over it a most dangerous

\textsuperscript{59} Berger, Chilling Judicial Independence: A Scarecrow, 64 Cornell L. Rev. 822, 846 (1979). In United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), the Court, in a per curiam opinion, stated:

Protection of tenure is not a license to commit crime or a forgiveness of crimes committed before taking office. Otherwise, a person upon assuming federal judicial office would receive amnesty and would not be accountable for his misdeeds, whenever they occurred. We believe that the framers of the Constitution did not intend such a result.

Our conclusion is supported by contemporaneous construction of the Constitution. The first Congress passed § 21 of the Act of April 30, 1790, now 18 U.S.C. § 201, which provided that a judge convicted of accepting a bribe is thereby disqualified to hold office. Thus the members of the Congress who must have been acutely aware of the provisions of the Constitution and the debate which preceded their adoption construed the Constitution to permit the removal of a judge without impeachment. Id. at 1142.

\textsuperscript{60} Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801). See F. Frankfurter & J. Landis, Business of the Supreme Court, 20-21, 23-25 (1927) for an explanation of the Judiciary Act of 1801. "The constitutional guaranty of life tenure was violated by the Jeffersonians, when sixteen circuit judges were deprived of their office after the Federalist Judiciary Act of 1801 was repealed and the judgeships involved were abolished." W. Wagner, Federal States and Their Judiciary 189 (1959).

\textsuperscript{61} Kurland, supra note 52, at 675.

\textsuperscript{62} Id. at 678.

\textsuperscript{63} Cong. Globe, 41st Cong., 1st Sess. 337 (1869).
principle of interference, one that will go to the very fundamental idea upon which that court was organized, upon which its great service as a coordinate department of the Government must always rest. It will go directly, most logically and most dangerously, to disturb the independence of that department of the Government, and to place it, as well as all others, under the power of the legislative department. 64

Although the enactment of an involuntary retirement law failed, provisions for voluntary retirement were passed by the House of Representatives. The tension or conflict between the values of judicial independence and accountability was evident in the debates over the legislation. Representative Butler summed up the conflict by stating, "I agree it is necessary to have an independent judiciary but it is equally necessary to have an effective judiciary." 65

During the furor over the short-lived Commerce Court, 66 in the early 1900's, Senator Overman proposed the concurrent elimination of the judgeships as well as the court, 67 reviving the debate of 1802. Could the tenure of sitting Article III judges be cut short through abolition of their office? Senator Sutherland debated Senator Cummins on the issue, prompting Senator Lodge to state:

There is a prevalent notion throughout the country that judges are appointed for life. This is not true. They are appointed during good behavior . . . I believe that there is misbehavior on the part of a judge for which he can be removed from office that does not arise to the dignity or severity of either crime or misdemeanor. 68

Although the controversial legislation was passed, President Taft vetoed the measure in the name of judicial independence, leading to the survival of the judgeships. That is to say, although the court was abolished, the judgeships were not, and the judges were assigned to other Federal courts. 69

64. Id. at 341-42.
65. Id. at app. 2.
66. See Kurland, supra note 52 at 683-86. The Commerce Court, with jurisdiction to review decisions of the Interstate Commerce Commission, was established over strong congressional opposition in 1910 and was abolished in 1913. See F. Frankfurter & J. Landis, The Business of the Supreme Court 153-74 (1928); Dix, The Death of The Commerce Court: A Study in Institutional Weakness, 8 Am. J. Legal Hist. 238 (1964).
67. 48 Cong. Rec. 7869 (1912).
68. Id. at 7999-8000.
69. The Act abolishing the Commerce Court provided:

Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act [the Act creating the Commerce Court], but such judges shall continue to act under assign-
The concepts of judicial accountability and independence continued to trouble the legislature and the nation. Strong political sentiment in favor of judicial accountability arose again in the Congress of the 1930's, creating sentiment in favor of passing a judicial good behavior bill. In the words of its sponsor, the bill "seems to have recognized . . . that . . . 'good behavior' is a justiciable issue." Chief opponent of the bill, Representative Emanuel Celler, rested his opposition on the asserted unconstitutionality of the provision. Agreeing that the desired justiciability of the good behavior clause was necessary, he maintained that such a provision had to be effectuated through a constitutional amendment. In his view, the removal of Federal judges was established by the founding fathers only through impeachment.

Presidents of the United States were also often involved in the battles over judicial independence and accountability. President Andrew Johnson argued, and Representative Celler agreed over fifty years later, that limiting the tenure of judicial office, though desirable, would have to be accomplished through a constitutional amendment. In 1868, President Johnson stated:

It is strongly impressed on my mind that the tenure of office by the judiciary of the United States during good behavior for life is incompatible with the spirit of republican government, and in this opinion I am surely sustained by the evidence of popular judgment upon the subject. . . .

I therefore deem it my duty to recommend an amendment to the Constitution.72

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71. Id. at 6170-73.

72. 6 Messages and Papers of the Presidents 643, 691 (J. Richardson ed. 1900).
During his presidency, President Taft argued for a constitutional amendment to require retirement of Federal judges. His arguments were later utilized in 1938 by Attorney General Cummings. Franklin D. Roosevelt's "court-packing plan," though effectively defeated, harkened back to Reconstruction efforts to discipline the judiciary. As Kurland concluded, "There is some irony in the fact that this proposal, so roundly defeated in Congress when it related to the Supreme Court, was later revived with regard to lower court judges . . . and was enacted into law by Congress and is now to be found in 28 U.S.C. § 372(b)." Under this provision, Chief Judges are empowered to certify the "permanent mental or physical disability" of a Federal judge who is eligible to retire but "does not do so." Such certification is delivered to the President, who may appoint another judge. Certification causes the judge to lose his seniority and assignment of any judicial responsibilities.

V. RECENT PRECURSORS OF THE 1980 ACT

Direct antecedents of the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act can be traced to 1939, when the judicial councils were created through the Administrative Office Act. Peter G. Fish has summarized the administrative functions of the councils from the comments of judges regarding the Administrative Office Act. These comments reveal that the functions included:

assigning judges to congested districts, and to particular types of cases, directing them to assist infirm judges, ordering them to decide cases long held under advisement, requiring a judge to forego his summer vacation in order to clear his congested docket, compelling multi-judge courts to arrange staggered vacations, and setting standards of judicial ethics.

73. Kurland, supra note 52 at 696-97. 28 U.S.C. § 372(b) has been described as "almost never invoked authority to certify that a district or circuit judge is eligible to retire on the grounds of physical or mental capacity but refuses to do so." R. Wheeler & A. Levin, Judicial Discipline and Removal in the United States 34 (Federal Judicial Center Staff Paper, July 1979) (hereinafter cited as R. Wheeler & A. Levin).


The structure of the judicial councils was commended since it provided for local, circuit level supervision as opposed to a centralized national mechanism. As stated by Chief Justice Charles Evans Hughes, "When you come to the supervision of the work of the judges, . . . there you have the great advantage of the supervision of that work by the men who know. The circuit judges know the work of the district judges by their records that they are constantly examining." 78

Section 332(d) of title 28 empowers the Judicial Council to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 79 The next sentence expressly provides that the "district judges shall promptly carry into effect all orders of the judicial council." 80

The statutory grant of powers to the Judicial Councils was before the Supreme Court in Chandler v. Judicial Council of the Tenth Circuit. 81 In the Chandler case, the Judicial Council, acting under the authority of section 332, made a finding that Judge Chandler was "unable, or unwilling, to discharge efficiently the duties of his office," 82 and issued an order reassigning his cases, and prohibiting the assignment of future cases. Judge Chandler, a district court judge, challenged the authority of the Council to issue the order, and applied to the Supreme Court for an extraordinary writ. Specifically, the judge contended that the Council "usurped the impeachment power, committed by the Constitution to the Congress exclusively." 83 The Supreme Court did not entertain the judge's application for an extraordinary writ. Although the application was denied, the various judicial opinions in the case highlight the sharp differences of views on judicial independence and the need for accountability to attain "the effective and expeditious administration of the business of the courts." 84

In delivering the opinion of the Court, that Judge Chandler had "not made a case for the extraordinary relief of mandamus or prohibition," Chief Justice Burger wrote:

80. Id.
82. Id. at 77.
83. Id. at 82.
The dissenting view of this case seems to be that the action of the Judicial Council relating to assignment of cases is an impingement on judicial independence. There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business. The question is whether Congress can vest in the Judicial Council power to enforce reasonable standards as to when and where court shall be held, how long a case may be delayed in decision, whether a given case is to be tried, and many other routine matters. As to these things—and indeed an almost infinite variety of others of an administrative nature—can each judge be an absolute monarch and yet have a complex judicial system function efficiently?  

Referring to the many internal rules necessary to manage the courts, the Chief Justice stated: "But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse."  

Concurring in the denial of the writ, Justice Harlan could "find no room for the constitutional argument so vigorously made by [his] Brothers Black and Douglas," and concluded:  

Throughout Judge Chandler's briefs, and in the dissents of my Brothers Black and Douglas, there are strong assertions of the importance of an independent federal judiciary. I fully agree that this principle holds a profoundly important place in our scheme of government. However, I can discern no incursion on that principle in the legislation creating the Judicial Councils and empowering them to supervise the work of the district courts, in order to ensure the effective and expeditious handling of their business.  

In an impassioned dissent, Justice Douglas would have vacated "the orders of the Judicial Council that brand Judge Chandler as unfit to sit in oncoming cases." For Justice Douglas there was no doubt that "[o]nce a federal judge is confirmed by the Senate and takes his oath, he is independent of every other judge." Specifi-
cally, in the view of Justice Douglas: “What the Judicial Council did when it ordered petitioner to ‘take no action whatsoever in any case or proceeding now or hereafter pending’ in his court was to do what only the Court of Impeachment can do.”

Justice Black, who concurred in the dissent of Justice Douglas, wished to add “a few words to emphasize . . . the gravity of the unconstitutional wrong” inflicted on Judge Chandler and, “more important, on our system of government and the Constitution itself.”

The following quotation best summarizes the views of Justice Black:

While judges, like other people, can be tried, convicted, and punished for crimes, no word, phrase, clause, sentence, or even the Constitution taken as a whole, gives any indication that any judge was ever to be partly disqualified or wholly removed from office except by the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate. Such was the written guarantee in our Constitution of the independence of the judiciary, and such has always been the proud boast of our people.

Justice Black concluded his dissent with a warning: “I fear that unless the actions taken by the Judicial Council in this case are in some way repudiated, the hope for an independent judiciary will prove to have been no more than an evanescent dream.”

In 1971, the Circuit Executive Act amended section 332 by providing for a circuit executive to staff the councils better to effectuate the councils’ functions. Despite the changes made in the coun-

91. Id. See Justice Douglas’ remarks on the occasion of the Columbia Law School’s Centennial celebration of “Legal Institutions in America,” in M. Paulsen, Legal Institutions Today and Tomorrow 274, 285 (1959): “There is, I think, no sturdier element in the democratic system than an independent judiciary . . . . The winds of passion can play, mobs can march, riots can take place, but there is long-run stability once the judiciary is viewed as the great rock that is unmoved by the storms that break over it.” Id.


93. Id. at 141-42. Justice Black stated that “Judge Chandler, like every other federal judge including the Justices of this Court, is subject to removal from office only by the constitutionally prescribed mode of impeachment.” Id. at 142.

94. Id. at 143. This statement inspired the title of Chief Judge Battisti’s article, “An Independent Judiciary or an Evanescent Dream.” Chief Judge Battisti states, that the Chandler case “points up the urgent need for the repeal of section 332(d).” He regards the language of the section to be “vague and overbroad,” and a “significant threat to the independence of the federal judiciary.” Battisti, An Independent Judiciary or an Evanescent Dream, 25 Case W. Res. L. Rev. 711, 714-15 (1975).

95. 28 U.S.C. §§ 332(e) and (f).
cils, they continued to suffer from criticism regarding the performance of their functions, including the handling of complaints regarding judicial behavior.\textsuperscript{96}

A serious attempt to enact judicial discipline legislation was made by Senator Tydings, who, in 1969, introduced a bill entitled the "Judicial Reform Act."\textsuperscript{97} This proposal would have established a Commission on Judicial Disabilities and Tenure. In sum, this Commission, composed of judges appointed by the Chief Justice, would have had power to investigate complaints of misconduct made by "any person," and recommend to the Judicial Conference the removal of a Federal Judge. The Judicial Conference would have been granted the power of removal with appeal to the Supreme Court by certiorari.\textsuperscript{98}

Continued criticism of the councils prompted Senate passage of the Judicial Tenure Act in 1978. Speaking in 1977, Senator DeConcini, after stating that the Judicial Tenure Act had the endorsement of constitutional scholars, the Department of Justice, the American Bar Association, and many Federal judges, including some members of the Supreme Court, remarked: "Surely, our critics will not argue that the political independence of the Judiciary requires that its members be answerable to no one."\textsuperscript{99}

The Judicial Tenure Act, S. 1423, first known as the Nunn bill and later the DeConcini bill, would also have created a national body to handle complaints regarding judicial misbehavior and discipline errant judges.\textsuperscript{100} The bill, as its predecessor introduced by


In an address delivered in 1958, Chief Justice Burger, then a judge of the Court of Appeals for the Washington, D.C. Circuit, stated that "the Judicial Councils have not fully lived up to the expectations of the sponsors" of the legislation as to their management functions. Burger, \textit{The Courts on Trial}, 22 F.R.D. 71, 77. In his "steps for the future," Chief Justice Burger stated that "[u]nder section 332 the Circuit Councils must operate as the active managing directors and give full effect to the policies and programs agreed upon in the expanded Judicial Conference of the United States." \textit{Id.} at 82.


\textsuperscript{100.} \textit{See} Wallace, \textit{Must We Have the Nunn Bill?} 51 IND. L.J. 297, 302-07 (1976). For
Senator Tydings, was modeled on the California "Commission on Judicial Performance," differing only in that the membership of the Commission under the Judicial Tenure Act would be composed of Federal judges. Although passed by the Senate in 1978, the bill was not considered by the House of Representatives that year. In the identical form, the bill was reintroduced in 1979 as S. 295.

S. 295 differs substantially from the bill signed into law in 1980, and which is the subject of this presentation. S. 295 sought to establish a Judicial Conduct and Disability Commission comprised of a judge representing each circuit, a judge representing the three special Article III courts collectively, and an Executive Director chosen by the Judicial Conference. The staff would deal with complaints of judicial unfitness, dismissing those related to the merits of cases and "not connected with his judicial office or which [do] not prejudice the administration of justice by bringing the judicial office into disrepute." Nondismissed complaints would be returned to authorized committees in the circuit which had to respond within a specific length of time. These committees would informally settle a problem, or recommend dismissal or further investigation to the Judicial Conduct and Disability Commission. The Commission could investigate and dismiss, or recommend a hearing before the Court on Judicial Conduct, another organ which was to be created by S. 295.

The proposed Court on Judicial Conduct would have been composed of one Judicial Conference member, as presiding officer selected by the Conference, and six other Conference members appointed by the presiding officer. The court would have possessed extremely broad powers, including the authority to retire involuntarily, remove, censure the judge or dismiss the complaint. Censure or removal would be prompted by behavior "inconsistent with the good behavior required by Article III, Section 1 of the Constitu-

"balanced analyses" of the various "Judicial Discipline and Tenure Proposals" see Appendix 4 in House Hearings, infra note 105, at 505-47.

101. For a history of the California Commission on Judicial Performance see R. WHEHLER, & A. LEVIN, supra note 73, at 22-24.

102. S. 295, 96th Cong., 1st Sess. § 383(a) (1979). Referring to S. 295, Raoul Berger concludes that "the proposed judicial removal procedure is not designed to curtail independence, 'absolute' or not, for it is not intended to deal with the judicial takeover of large-scale policy-making, but rather with judicial misconduct, criminal or otherwise, when it affects the functioning of the courts." Berger, Chilling Judicial Independence: A Scarecrow, 64 CORNELL L. REV. 822, 854 (1979). Berger's article is in response to Chief Judge Kaufman's article, Chilling Judicial Independence, 88 YALE L.J. 681 (1979).
tion," including "willful misconduct in office, willful and persistent failure to perform duties of the office, habitual intemperence, or other conduct prejudicial to the administration of justice that brings the judicial office into disrepute."103 The court's decisions were reviewable by certiorari to the Supreme Court. Members of the Supreme Court were subject only to the Judicial Conduct Court recommendations of censure, or impeachment before the House of Representatives.104

Although S. 295 was approved in principle by the Judicial Conference of the United States, certain resolutions were adopted by the Conference which pertained to judicial discipline and tenure legislation.105 These resolutions were incorporated into the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, prompting Representative Railsback to state that the law is "virtually without opposition and enjoys the active support of the Judicial Conference of the United States, the Department of Justice, the American Bar Association, the American College of Trial Lawyers [and] the Association of Federal Trial Judges."106

VI. THE ACT OF 1980

Supporters of the Act of 1980 will undoubtedly assert that the procedures established by the new law, within the existing judicial councils, not only make an appropriate accommodation, but also provide a proper balance between the values of judicial independence and accountability. Others, of course, will continue to say that it is an improper intrusion upon judicial independence, and will refer to its "chilling" effect.

104. For a discussion of S. 295 and its subsequent history see R. WHEELER & A. LEVIN, supra note 73 at 45-48.
105. Statement of the Hon. Elmo B. Hunter, Chairman of the Committee on Court Administration of the Judicial Conference of the United States in Judicial Tenure and Discipline—1979-80, Hearings before the Subcommittee on the Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary of the United States House of Representatives, 96th Cong., 1st & 2d Sess. 59 (1979-1980) (concerning processes and procedures for inquiries into the conduct of federal judges) [hereinafter cited as Hunter]. The Judicial Conference, as early as 1975, expressed approval in principle of the noted judicial conduct legislation. It expressed concern, however, on constitutional grounds, with any proposal that would remove an Article III judge by any method other than impeachment. See "Resolutions of the Judicial Conference of the United States" (March 1979), reprinted in House Hearings, supra at 365. Aside from resolutions relating directly to legislation, the Conference also recommended that the judicial councils promulgate and publicize procedures for the receipt and processing of complaints. Id. at 62.
It should be noted that the Act does not apply to justices of the Supreme Court. The House Report sets forth the reasons for this intentional exclusion:

First, high public visibility of Supreme Court Justices makes it more likely that impeachment can and should be used to cure egregious situations. Second, it would be unwise to empower an institution such as the Judicial Conference, which actually is chaired by the Chief Justice of the United States, to sit on cases involving the highest ranking judges in our judicial system. The independence and importance of the Supreme Court within our justice system should not be diluted in this fashion. ¹⁰⁷

A. Statement of the President

A fine summary of the aims of the Act is found in the statement of President Carter on signing S. 1873 into law on October 15, 1980. The President remarked that he was pleased to sign S. 1873, and stated its purpose:

This legislation creates a mechanism and uniform procedures by which members of the judiciary can respond to allegations of unfitness against Federal judges. It makes a sound accommodation between two essential values—preserving the independence of the Federal judiciary, and making judges, as public servants, accountable under the law for their conduct in office. ¹⁰⁸

The President noted the honorable history of the Federal judiciary: “Almost without exception, the judges who have served . . . have conducted themselves with intellectual and personal distinction. But judges are human and have on rare occasions acted in ways that have injured the effectiveness of their courts.” ¹⁰⁹


¹⁰⁸. Statement of President Jimmy Carter signing S.1873 into law, 16 WEEKLY COMP. OF PRES. DOC. 2239-40 (Oct. 15, 1980). In the words of a witness, Clark Mollenhoff, who testified at the Senate Hearing held on May 8, 1979, “Your problem . . . is to maintain the vital independence Federal judges must have from outside partisan pressures, and at the same time curb arrogant misconduct, corruption, and the other forms of judicial unfitness.” Judicial Discipline and Tenure: Hearings on S.295, S.522, S.678 Before the Subcommittee on Judicial Machinery and Constitution of the Senate Committee on the Judiciary, Serial No. 96-25, 96th Cong., 1st Sess. 3 (1979) [hereinafter cited as Hearings].

¹⁰⁹. Statement of the President, supra note 108, at 2240. In the history of the United States, fifty-four Federal judges and one justice have been investigated for possible impeachment, leading to nine impeachments and four convictions. R. WHEELER & A. LEVIN, supra note 73, at 11. Four Federal judges have been removed from office through the impeachment process: Judge John Pickering, who, in 1803, was impeached, tried and convicted for misconduct during a trial and being on the bench while intoxicated; Judge West H. Humphreys, who, in 1862, was removed from office for supporting the secession of Tennes-
Of course, although couched in language of "judicial conduct and disability," it is beyond question that the legislation was designed to curb *unfitness* as well as "disability" for judicial office. Hence, it is legislation designed to cope with or curb judicial *misconduct* and disability.

Impeachment was characterized by the President as a cumbersome procedure, leaving some valid complaints unremedied: "Most States have systems for dealing with unfit judges, and there is a need for a uniform, nationwide system to hear and fairly determine complaints against Federal judges."110

Discussing the goals of judicial independence with accountability, the President evaluated the Act:

Judicial independence—the freedom of judges to interpret and apply the law without favor or fear of retribution—is amply safeguarded by this legislation. The system created by this act is contained entirely within the judicial branch of the Government; only Federal judges are involved in the process. No judge need fear disciplinary proceedings as a result of decisions he or she has rendered, because this possibility is explicitly precluded. Furthermore, the bill assures the judges of fairness and confidentiality.111

While the President found that judicial independence was safeguarded by the Act, he also found that the goal of judicial accountability had been achieved by the statute:

[The legislation creates uniform, known procedures for dealing with an unfit judge. Citizens can be confident that a complaint filed under this system will receive fair and serious attention throughout the process. For all these reasons the new process should increase

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110. Statement of the President, supra note 108, at 2240.
111. Id.
public confidence in the quality of the Federal judiciary.\textsuperscript{112}

It is clear that the President manifested confidence in the collegial system which was established by the Act.

B. Summary of Procedures

Section 2 of the Act improves the effectiveness of the Judicial Councils of the Circuits. It requires the Chief Judge of each circuit to call, at least semiannually, a meeting of the judicial council of the circuit, and provides for the size and method of selection of council members. The Chief Judge must preside, and the number of courts of appeals judges is fixed by majority vote of all the circuit judges in regular active service. The number of district court judges is similarly fixed, except that if the number of circuit judges is less than six, the number of district court judges can be no less than two. If the number of circuit judges is more than six, the number of district court judges cannot be less than three.\textsuperscript{113}

Subsection (c) of section 2 contains the general grant of authority to the circuit councils to “make all necessary and appropriate orders for the effective administration of justice within its circuit.” Each council is expressly authorized to hold hearings, take testimony and issue subpoenas. Furthermore, all judicial officers and employees of the circuit “shall promptly carry into effect all orders of the judicial council.”\textsuperscript{114}

Section 3 contains the substance of the complaint mechanism established by the Act.\textsuperscript{115}

Section 3(c)(1) allows “any person” to complain that a circuit, district, bankruptcy judge or magistrate “has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or . . . that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability.”\textsuperscript{116} The complaint must be in writing and must

\textsuperscript{112} Id.


\textsuperscript{114} Id. § 2(c).

\textsuperscript{115} Id. § 3. See chart prepared by the Administrative Office of the United States Courts added as an appendix to this article.


A Bankruptcy judge holds office for a term of fourteen years and may be removed by the
be filed with Clerk of the Court of Appeals for the particular circuit.

By virtue of paragraph (17) of section 3(c), the national Article III courts, the United States Court of Claims, the United States Court of Customs and Patent Appeals, and the United States Court of International Trade are declared to possess the powers of a judicial council, and are required to establish procedures for the filing, investigation and resolution of complaints against their judges.117

Section 3(c)(2) retains the past informality of the discipline process by requiring that the complaint be transmitted by the Clerk to the Chief Judge of the circuit, or the appropriate Chief Judge of the court in complaints against judges of the United States Court of Claims, the United States Court of Customs and Patent Appeals, or the United States Court of International Trade.118

The Chief Judge can dismiss complaints which do not address conduct prejudicial to the administration of justice or disability. The Chief Judge will also dismiss complaints directly related to the merits of a case or procedural ruling, or frivolous charges.119 He may also conclude the proceeding if "appropriate corrective action has been taken."120 Fears of vexatious complaints chilling judicial independence would seem unwarranted because the mechanism al-

Judicial Council "only for incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. § 153(a) and § 153(b) (1976).


118. Id. § 3(c)(2). If the conduct complained of is that of the chief judge, the complaint is transmitted to that circuit judge in regular active service next senior in date of commission. 28 U.S.C. § 372(c)(2) (1976). By virtue of Paragraph (17) the procedure prescribed also applies to the national Article III courts, i.e., the Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court, now the United States Court of International Trade, and these courts "shall have the powers granted to a judicial council." Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, § 3(c), 94 Stat. 2035.


Under existing "Procedures for Processing Complaints of Judicial Misconduct" certain complaints have already been filed and processed. See, e.g., In re Charge of Judicial Misconduct, 613 F.2d 768 (9th Cir. 1980) (in view of judicial mechanism for disqualification of judges, resort to the procedures to remedy alleged bias was improper and complaint was rejected); In re Charge of Judicial Misconduct, 595 F.2d 517 (9th Cir. 1979) (judicial remedy available to deal with claim of partiality, complaint therefore rejected); In re Charge of Judicial Misconduct, 593 F.2d 879 (9th Cir. 1979) (utilizing procedures to speed disposition of litigation, absent claim of impropriety, is improper and complaint was rejected). For the procedures established by the Judicial Council of the Ninth Circuit see 593 F.2d at 880.

allows a fellow member of the judiciary to dismiss such complaints at the very outset.

This approach was specifically endorsed by the Judicial Conference of the United States. The resolution of the Conference stated:

The primary responsibility for dealing with a complaint against a United States judge should rest initially with the chief judge of the circuit as presiding judge of the Judicial Council, who may dismiss the complaint if it is frivolous or relates to the merits of a decision or procedural ruling, or may close the complaint after assuring himself that appropriate corrective action has been taken.¹²¹

If the Chief Judge dismisses a complaint, copies of his written order must be sent to the complainant, and the judge or magistrate who is the subject of the complaint.

If the Chief Judge determines that the complaint should be investigated, he must promptly appoint himself, and equal numbers of circuit and district judges of the circuit, to a “special committee to investigate the facts and allegations” of the complaint.¹²² This provision, in providing for an equal balance of district and circuit judges, attempts to foster impartiality.¹²³ Written notice of the committee’s actions is required to be given to both the judge and complainant, thereby guarding their due process rights.¹²⁴

The judicial council of the circuit shall receive a “comprehensive written report” of the special committee’s investigation and recommendations.¹²⁵ Upon receipt of this report, the judicial council may

¹²¹ Hunter, supra note 105, at 62.
¹²² 28 U.S.C. § 372(c)(4)(A) (1976). An important practical consideration deals with the question of compensation of counsel who may be asked to represent the judge who is the subject of an investigation. Section 5 of the Act authorizes the Director of the Administrative Office of the United States Courts to provide facilities and pay necessary expenses in proceedings under the Act. Based upon information from the Administrative Office, the Congressional Budget Office, in its “cost estimate,” has stated that “it is also expected that the government will provide the judge assistance by counsel, resulting in estimated costs of over $100,000 in the first year.” That document also estimates that “approximately 2,300 complaints will be filed each year . . . , and that of this number 300-400 will merit serious consideration.” H.R. Rep. No. 96-1313, supra note 107, at 22. On the discretionary provision of counsel for a complainant who appears before an investigating panel see 126 Cong. Rec. S.13861 (daily ed. Sept. 30, 1980).
¹²³ This provision was recommended to the Congress by the Judicial Conference. Hunter, supra note 105, at 62, 67. The particular Conference resolution stated, “[a]ny complaint not dismissed or closed by the presiding judge should be referred to a committee appointed by the presiding judge, consisting of an equal number of circuit and district judges and the presiding judge.” Hunter, supra note 105, at 62.
¹²⁵ Id. at § 372(c)(5).
conduct "any additional investigation which it considers to be necessary," and "shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts."\textsuperscript{126}

The judicial council's choice of action can vary in severity. The flexibility of remedy allows the committee to utilize a sensitive approach to what is likely to be a delicate problem. The judicial council may take a variety of actions including, but not limited to, any of the following: certifying disability of a judge,\textsuperscript{127} requesting voluntary retirement,\textsuperscript{128} ordering a temporary freeze on the assignment of cases to the offending judge,\textsuperscript{129} and private\textsuperscript{130} or public censure or reprimand.\textsuperscript{131}

The council may also order "such other action as it considers appropriate" except for the statute's absolute express prohibition of removal from office of an Article III judge except by the impeachment process.\textsuperscript{132} Provisions for written notice\textsuperscript{133} of the council's actions again foster accountability and protect the due process rights of the parties.

In addition to the various actions authorized in paragraph (c)(6), the judicial council may refer the complaint and its recommendations to the Judicial Conference of the United States.\textsuperscript{134} In cases

\begin{itemize}
\item \textsuperscript{126} Id. at § 372(c)(6)(B). See also Hunter, supra note 105, at 62.
\item \textsuperscript{128} Id. at § 372(c)(6)(B)(iii).
\item \textsuperscript{129} Id. at § 372(c)(6)(B)(iv).
\item \textsuperscript{130} Id. at § 372(c)(6)(B)(v).
\item \textsuperscript{131} Id. at § 372(c)(6)(B)(vi).
\item \textsuperscript{132} Id. at 372(c)(6)(B)(vii). Some still believe that this express prohibition is inadequate to preserve independence.
\item \textsuperscript{133} 28 U.S.C. § 372(c)(6)(C) (1976).
\item \textsuperscript{134} Id. at § 372(c)(7)(A).
\end{itemize}
where the council determines that a judge has engaged in conduct “which might constitute grounds for impeachment,” the council must refer the matter to the Judicial Conference of the United States.\textsuperscript{135} If a judicial council refers a complaint to the Judicial Conference, it must give written notice to the parties “unless contrary to the interests of justice.”\textsuperscript{136}

The Judicial Conference of the United States may use any of the sanctions possessed by the councils and, when necessary, may transmit records to the House of Representatives regarding impeachment.\textsuperscript{137}

The special committees of investigation appointed by the Chief Judges, the judicial councils, and the Judicial Conference of the United States, all possess full subpoena powers in conducting their investigations.\textsuperscript{138}

Provisions for review, within the prescribed complaint mechanism, assure fairness for all parties. Complainants, judges or magistrates aggrieved by final orders of a Chief Judge or a judicial council may petition the judicial council or the Judicial Conference of the United States, respectively, for review. Denials of petitions for review are final. The finality of denial safeguards the judge from harassment, and also compels a justly sanctioned judge to abide by the decision.\textsuperscript{139}

The judicial councils and the Judicial Conference are encouraged to prescribe procedural rules for the process of investigation. Any such rules are required to guarantee to the judge prior written notice of any investigation. The rules also must allow the judge to appear at the proceedings, present evidence, compel attendance of witnesses and present oral and written evidence and argument. Clearly, a judge under investigation shall have ample opportunity to dispel the charges. The rules should require that complainants be allowed to appear at the proceedings “if the panel concludes that the complainant could offer substantial information.” These rules shall be a matter of public record, encouraging their full exercise by the public.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{135} Id. at § 372(c)(7)(B).
\item \textsuperscript{136} Id. at § 372(c)(7)(C). The words, taken from 28 U.S.C. § 1404(a) (1976), permit the Council to consider the interests of the judge, the complainant, the justice system, the public, and the appearance of justice. See House Report 96-1313, \textit{supra} note 107, at 12.
\item \textsuperscript{137} 28 U.S.C. § 372(c)(8) (1976).
\item \textsuperscript{138} Id. at § 372(c)(9)(A), (c)(9)(B).
\item \textsuperscript{139} Id. at § 372(c)(10).
\item \textsuperscript{140} Id. at § 372(c)(11).
\end{itemize}
Provisions designed to assure due process are not intended to mandate an adversary procedure. The House Report states that "[i]t clearly is not the intent of the legislation to place an individual judge or magistrate in the position of being a defendant in an adversary proceeding before a panel of his or her colleagues." 141

As a consequence, although not precluded, the legislation does not provide the complainant a hearing as of right, or the opportunity to cross-examine witnesses. The council may actively investigate the allegations of the complaint and control the nature of the inquiry as warranted by the circumstances. 142 Hence, the proceeding before the council is intended to be an "inquisitorial-administrative" model rather than an "accusatorial-adversary" one. 143

The integrity of the proceedings is protected further by provisions which exclude a judge under investigation from sitting on special committees of investigation, a judicial council, or the Judicial Conference of the United States until the matter is resolved. 144 Confidentiality is assured regarding all aspects of the investigation unless they reach impeachment. 145 Finally, public accountability is satisfied through provisions requiring written orders of the investigative bodies to be made available to the public. Written reasons for the orders will also be given, unless to do so would be "contrary to the interests of justice." 146

C. Statement of Senator DeConcini

Senate discussion of S. 1873, in its amended version which was finally enacted into law, was initiated by Senator Dennis DeConcini.

The Senator stated at the outset that he had "always preferred passage of a much stronger judicial discipline bill, such as the Judicial Tenure Act as passed [by the Senate in 1978] during the ninety-fifth Congress and subsequently reintroduced by Senator Nunn [and Senator DeConcini] in the early days of the ninety-

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142. Paragraph 11 of 28 U.S.C. § 372(c) (1976), provides that the rules for the conduct of proceedings shall contain provisions requiring that the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel if the panel concludes the complainant "could offer substantial information."
145. Id. at § 372(c)(14).
146. Id. at § 372(c)(15).
sixth Congress." Senator DeConcini favored the Judicial Tenure Act which he regarded as "both constitutional and appropriate." He also favored an independent court composed of sitting Article III judges to review the determinations initially reviewed by the circuit judicial councils. These controversial features were eliminated from the bill as presented and enacted into law. The Senator indicated, however, that the latest proposal authorized the establishment of a permanent standing committee of the Judicial Conference. He added that such a Committee, while not an independent court, would, nevertheless, provide for "uniformity of decisions and the building of precedents."

The Senator stated that the "Judicial Conference, the circuits and the special courts should have ample opportunity to demonstrate adherence to the provisions under this legislation," and significantly added:

As part of a vigorous oversight responsibility I plan to monitor implementation of the Judicial Conduct and Disability Act. I particularly expect to examine the way in which specific sanctions are imposed, as well as the method of appellate review of judicial council decisions, in order to see if statutory or other perfecting changes are necessary in the future.

Among the goals of the new legislation, Senator DeConcini spoke of improving "judicial accountability and ethics" and promoting "respect for the principle that the appearance of justice is an integral element of this country's system of justice."

The Senator stated that consideration of this type of legislation has occurred during a period when judges are being called upon to decide an increasing number of sensitive issues. Yet, this increased judicial involvement coincided "with a growing disenchantment concerning the trustworthiness of all public officials."

The Senator made specific reference to the actions of all eleven judicial councils that had implemented rules for the processing of complaints against Federal judges in response to a resolution issued by the Judicial Conference on March 9, 1979. He added, however, that "an examination of the various sets of rules adopted by

148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
the respective judicial councils indicates that they lack uniformity
and, in many instances, are silent on important issues." 153

While acknowledging that on the whole the general caliber of the
Federal judiciary has been "extremely high," Senator DeConcini
stated that "the problem of the unfit judge is a serious challenge
to our judicial system." 154 The existence of the problem has created
the need for the legislation. Furthermore, the number of Federal
judges has increased, and impeachment has ceased to be a real de-
terrnt to misconduct. The present exercise of peer pressure has
not always proven effective and "the only resolution may rest with
the eventual passing away of the judge." 155

The reference to the increase in the number of Federal judges
reminds us that the present Federal judiciary is not the small col-
legial body of the early days of the republic. The 1980 Annual Re-
port of the Administrative Office of the United States Courts
reveals that today's Federal judiciary consists of 677 Article III
judges, 181 territorial court judges, 444 United States magistrates,
and 236 Bankruptcy judges for a total of 1,538 Federal judges. 156

It is interesting and important to note that Senator DeConcini
states that the problem addressed in the legislation "is more one of
perception than actuality—the need to assure the public that for-
mal procedures are in place to deal with the rare instance justifying
a disciplinary inquiry." 157

Few would quarrel with the Senator's assertion that "[t]oday's
public demands that all branches of Government be made account-
able for their actions, including the Federal judiciary." Since the
success of the system depends on the support of the public, the
Senator notes that "it would be unwise to ignore this national con-
cern for accountability." 158

153. Id. at S13859. For disposition of complaints decided under existing procedures see
cases cited in note 119 supra.
155. Id.
156. Administrative Office of the United States Courts, Annual Report of the Di-
rector 19 (1980).
158. Id. In his opening statement at a joint hearing of the Subcommittee on Improvements
in Judicial Machinery and the Subcommittee on the Constitution held on May 8, 1979,
Senator DeConcini stated: "Legislation on this subject is necessary. The public with its in-
creased skepticism demands that all branches of Government account for their actions."
Hearings, supra note 108, at 2. House Report No. 96-1313 speaks of "a growing disenchant-
ment concerning the trustworthiness of all public officials." House Report, supra note 107,
at 3.
The statement quotes the introduction to the “Standards Relating to Judicial Discipline and Disability Retirement” adopted by the American Bar Association’s House of Delegates in 1978, which declares that the “major purpose of judicial discipline is not to punish judges, but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves.”\(^\text{159}\)

The Senator makes several noteworthy observations on the impeachment process. Apart from the fact that impeachment has ceased to be a deterrent to misconduct, he indicates that the judiciary, as well as the public, should be provided a less drastic means of discipline than impeachment. And, for the judge whose “aberrant behavior is the innocent product of a poor mental or physical condition,” there ought to be an “alternative to the stigma attached to impeachment proceedings.”\(^\text{160}\)

That impeachment is cumbersome and unwieldy, and is no real deterrent to aberrant behavior, may perhaps be best demonstrated by our national experience. In the words of the House Report:

Statistics manifest the difficulty of the process. Over the past 200 years, articles of impeachment have been voted against nine federal judges, four of whom have been convicted and removed from the bench. An additional 46 federal judges have been investigated by the House of Representatives under accusations of unfitness.\(^\text{161}\)

Senator DeConcini opposes the “exclusivist view” of those who believe that impeachment is the only method of investigating and

\(^\text{159. Cong. Rec., supra note 147, at S13859.}\)

\(^\text{160. Id. Lord Bryce has referred to impeachment as “the heaviest piece of artillery in the congressional arsenal,” and observed that “it is so heavy it is unfit for ordinary use.” J. Bryce, American Commonwealth 212 (1920). Hurst refers to the failure to convict Samuel Chase, associate justice of the Supreme Court, 1804-1805, and President Andrew Johnson in 1868, as two instances “crucial in limiting the meaning of the impeachment process.” J. Hurst, The Growth of American Law—The Law Makers 69 (1950). These cases show that, in the absence of crime or gross abuse of trust, officers could not properly be removed by impeachment merely for political disagreement, however deep-rooted or intemperate. Hurst speaks of the “practical ineffectiveness of impeachment” even when “used for its proper purposes.” Id. See interesting brief account of the impeachment of Samuel Chase in S. Morison, The Oxford History of The American People 363 (1965). While Justice Samuel Chase, a federalist appointed by George Washington, was not convicted, a Federal trial judge, Pickering, was convicted. Pickering, although insane, was clearly not guilty of “treason, bribery, or other high crimes and misdemeanors,” the constitutional grounds for impeachment. Some judges, rather than risk exposure and trial, have resigned. See R. Berger, Impeachment: The Constitutional Problems 166 (1973).}\)

remedying judicial misconduct. He espouses a "commonsense approach" stating that it is very unlikely that it was the intent of the Constitution to "leave Federal judges unaccountable for their behavior." In support of laws which reflect accountability, he refers to section 332(d) (Judicial Councils), and section 372(b) (Retirement for Disability) of title 28, and to the law enacted by the first Congress, which included many of the Constitution's framers, which provided for the fining and imprisonment of any judge convicted of accepting bribes.162

Reference could also have been made to those provisions of law which deal with the disqualification of a judge if "his impartiality might reasonably be questioned,"163 and the various powers that Congress has conferred upon the judicial councils.164

The Senator states that although the question has never been finally settled, "the committee has respected the position that removal of Federal judges by any means other than impeachment is arguably unconstitutional."166 He concludes: "Clearly, this bill is not unconstitutional since it leaves removal to be instituted by the House of Representatives, followed by a trial in the Senate,"166 and adds that the purpose of the legislation is to establish a mechanism "which deals with matters which for the most part fall short of being subject to impeachment. Where impeachment may be appropriate, traditional constitutional procedures continue to govern."167

VII. Conclusion

The 1980 Act is the law of the land and becomes effective on October 1, 1981. For many the debate is therefore over, and what is now required is a good faith effort to implement the law reasona-

162. CONG. REC., supra note 147, at S13859. For a critical discussion that "impeachment is exclusive," see R. BERGER, supra note 160, at 135-59.
163. 28 U.S.C. § 455(a)(b) (1976) (sets out circumstances which require disqualification). In cases before a judge, bias, abuse of discretion and impropriety may be checked or corrected by the appellate process. See, e.g., Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976).
165. CONG. REC., supra note 147, at S13860. See, e.g., statement of Senator Mathias: "For me, impeachment is not only the sole constitutional means for removing miscreant judges, it is the only constitutionally permissible means of disciplining [disciplining] Federal judges." Id. at S13862.
166. Id. See House Hearings, supra note 105, at 137, statement of Chairman Peter W. Rodino, Jr.: "[The impeachment] power that is vested solely in the House of Representatives to impeach is one that cannot be delegated."
167. Id.
bly and diligently. Although difficult to predict, it may very well be that an effort will be made to have the Act declared unconstitutional. As enacted, particularly in view of the elimination of provisions for the removal of Article III judges by a method other than impeachment, the likelihood of a successful constitutional attack seems slim.\textsuperscript{168} A challenge to the Act would fare no better than the effort made by some judges to have legislation mandating the reporting of extrajudicial income declared unconstitutional.\textsuperscript{169}

Senator DeConcini's statement is important for a variety of reasons. In addition to expressing the firm conviction that the Act is constitutional, it indicates that he and others would have preferred and regarded a much stronger law also to have been constitutional.

Of particular importance is his emphasis upon a "vigorous oversight responsibility."\textsuperscript{170} It cannot be doubted that the implementation of the law will be seriously examined with particular reference to the specific sanctions that will be imposed. It is equally clear that the purpose of the "oversight," and examination of the implementation of the law, is to determine "if statutory or other perfecting changes are necessary."\textsuperscript{171} It is obvious that by "perfecting changes" the Senator could only refer to stronger measures than those provided by the present collegial system wholly within the Federal judiciary. The Senator and others have made it clear that

\textsuperscript{168} Chief Judge Kaufman, however, states that a "law that stops short of providing for removal may be no less destructive of the constitutional scheme if it destroys the capacity of federal courts to execute their fundamental responsibilities." Kaufman, \textit{The Essence of Judicial Independence}, 80 COLUM. L. REV. 671-72 (1980).


In rejecting an argument of absence of congressional power based on separation of powers, the Supreme Court has stated that "in determining whether the Act [providing for custody of papers and tapes of former President Nixon with the General Services Administration] disrupts the proper balance between the coordinate branches the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Services, 433 U.S. 425, 433 (1977). The court thought it "highly relevant" that the law provided for custody within the Executive Branch. \textit{Id}. The complaint mechanism of the Judicial Conduct and Disability Act of 1980 is entirely within the judicial branch.

\textsuperscript{170} CONG. REC., \textit{supra} note 147.

\textsuperscript{171} \textit{Id}. 

\textit{JUDICIAL INDEPENDENCE}
they favored predecessor bills that provided for the removal of Federal judges by methods other than impeachment. Such considerations will be avoided if the procedures established by the Act prove to be effective, and provide the necessary independence with accountability.

Alexis de Tocqueville, that keen observer whose *Democracy in America* displays both scholarship and brilliance, had great respect and admiration for the American judicial system. He was particularly impressed by the Federal judiciary, and devoted special treatment to the “Federal Courts of Justice.” These comments about “Federal judges” have special significance for us:

Not only must the Federal judges be good citizens, and men of that information [learning] and integrity [qualities] which are indispensable to all magistrates, but they must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off, and the supremacy of the Union and the obedience due to the laws along with them.\(^ {172} \)

De Tocqueville's requirements of integrity, wisdom, and learning will endure as the indispensable qualities of judicial office. Indeed, they will remind the Article III Federal judge of the words of the certificate or commission of office which states that the President has nominated the judge because of the President's “special trust and confidence in the Wisdom, Uprightness and Learning” of the nominee. It is also important to note that the document declares that the nominee is empowered to “execute and fulfill” the duties of the office “during his good behavior.”

What is particularly relevant here is De Tocqueville's observation about the wisdom to “discern the signs of the times.” Senator DeConcini and others have referred to the “growing disenchantment concerning the trustworthiness of all public officials.”\(^ {173} \) No one has suggested that this disenchantment is especially applicable to judges. Crowded court calendars, which reflect the “due process explosion” and the American's seeming desire to take all questions

\(^ {172} \) 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 151-52 (P. Bradley trans. 1963). The original, “*des hommes instruits et probés, qualités nécessaires à tous magistrats,*” is even closer to the words on the commission of the Federal judge, because, in addition to wisdom, it speaks of “learning and uprightness, qualities necessary for all judges.” 1 A. DE TOCQUEVILLE, *DE LA DÉMOCRATIE EN AMÉRIQUE* 181 (troisième édition, Paris, 1850). For a brief but penetrating discussion of de Tocqueville's “book,” and an “examination” of his views, see 1 J. BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 319-58 (1901).

\(^ {173} \) CONG. REC., *supra* note 147.
to court, tend to show that the contrary is true.\textsuperscript{174} Yet, the claim of immunity from complaint and scrutiny would simply not be in keeping with the "signs of the times." In the words of the House Report, "a free and democratic society cannot tolerate judges who are wholly unaccountable at anytime to anyone."\textsuperscript{175}

Senator DeConcini has predicted that, "[i]n the long run, [The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980] will actually strengthen the judicial branch."\textsuperscript{176} If the 1980 Act proves effective in attaining its legislative purpose and goals, judicial accountability, long promised and required by our democratic heritage, will have been realized. What is equally important, our treasured tradition of judicial independence will not have been weakened.

\textsuperscript{174} The present attitude apparently is not new. "When a plain man who thinks that he has been wronged by another declares that he 'will have the law on him,' it expresses his conviction that he can get justice from the courts." S. BALDWIN, THE AMERICAN JUDICIARY 376 (1905). "English-speaking people, therefore, accepted with eagerness the principle [that an independent judiciary was necessary to constitutional government]. They were proud of and had confidence in their courts." F. GOODNOW, PRINCIPLES OF CONSTITUTIONAL GOVERNMENT 225 (1916).

\textsuperscript{175} House Report, supra note 107, at 2.

\textsuperscript{176} CONG. REC., supra note 147, at S13859.
APPENDIX
JUDICIAL CONDUCT REVIEW SYSTEM
(This chart was prepared by the Administrative Office of the United States Courts.)

COMPLAINANT
("any person")

File complaint

CLERK, CIRCUIT COURT OF APPEALS

Transmit complaint

All written orders of judicial council, Judicial Conference
(or Standing Committee)

Copies

JUDGE OR MAGISTRATE
NAMED IN COMPLAINT
(Right to appear, present evidence and
witnesses, cross-examine, prior
notice of any investigation)

Notice of any action taken

Not in conformity with statute,
Privileged, or
Directly related to merits of
decisions or rulings

DISMISS

CONCLUDE PROCEEDING

Corrective action already taken

SPECIAL COMMITTEE
(Chief Judge, equal numbers of
district and circuit judges)
(investigate and report)

File report of findings and
recommendations

SUBPOENA POWER

JUDICIAL COUNCIL
OF CIRCUIT
("appropriate action")

Possible ground for impeachment
or "not amenable to resolution"
by Council

"May refer" any complaint

Certify and refer with
recommendations

JUDICIAL CONFERENCE
or Standing Committees
(review, investigate further,
take "appropriate action")

"May transmit" record and
determinations

HOUSE OF REPRESENTATIVES
("whatever action considered
necessary")

*for Court of Claims, Court of
Customs and Patent Appeals or
Court of International Trade
THE SURFACE MINING CONTROL AND RECLAMATION
ACT OF 1977: THE CITIZEN’S “ACE IN THE HOLE”

By L. Thomas Galloway* and Tom FitzGerald**

I. INTRODUCTION

The signing into law of the Surface Mining Control and Reclamation Act of 1977[1] on August 3, 1977, represented the culmination of over a decade of intensive effort directed at enacting a federal law to regulate surface mining. The operative premise of the legislation was that because the individual states had shown themselves unable to regulate the social and environmental impacts of strip mining,[2] a federal “floor” for environmental degradation needed to be established.

At the core of the Act are a set of national environmental performance standards, in areas such as hydrology, geology, blasting, and handling of topsoil, designed to minimize the environmental surface impacts of strip and deep mining. The implementation of the Act is divided into interim and permanent regulatory phases. States wishing to retain primary authority for regulation of surface mining must submit a program which is in accordance with, and no less stringent than, the federal standards. Failure to submit an approved program results in the regulation of surface mining in a given state falling to the federal Office of Surface Mining.

The Act provides one of the most extensive citizen participation schemes ever enacted by Congress. Congress believed that if there were to be any chance for successful implementation of state programs and effective enforcement of the substantive standards of the Act the maximization of citizen input in program development, implementation and enforcement would be critical.* This article will concern itself with the rights granted to citizens under the Act and address the various avenues for their participation in the regu-

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* Counsel for Mining Project, Center for Law and Social Policy, Washington, D. C. J.D., University of Virginia School of Law; A.B., Florida State University.
** Reginald Heber Smith Community Fellowship Lawyer for the Appalachian Research and Defense Fund of Kentucky, Inc. J.D., University of Kentucky College of Law; A.B., Roger Williams College.

The authors wish to express their indebtedness to Susan K. Wagner for her invaluable assistance in the preparation of this article.
3. Id. at 59.
II. INVOLVEMENT IN THE PERMITTING PROCESS

Citizen involvement in surface mining regulation hinges on notice and access to information so that meaningful and timely involvement is possible. The Act provides that all surface mining operations in the state have permits, before mining occurs and that citizens who may be affected by such operations be allowed to participate in the permitting decision.4

Each applicant for a surface mining or deep mining surface disturbance permit must place an advertisement in a newspaper in the locality of the proposed operation, at least once a week for four consecutive weeks. The first advertisement is to coincide with the filing locally, and in Frankfort, of the permit application. The advertisement should contain the name and address of the applicant, a sufficient description to allow the citizen to identify the proposed permit area, and the place where a copy of the application may be inspected.

The citizen or citizen's representative faced with a proposed operation whose application is couched in technical jargon may be put off at first, but should not despair. The application is indelible on two levels: first, in terms of its technical compliance with the procedural and substantive standards set out in Ky. Rev. Stat. Ch. 350 and 405 K.A.R. Chs. 7 through 24; and second, in terms of its feasibility from hydrologic and engineering standpoints. Many academic institutions and environmental organizations have access to individuals with technical expertise in these areas who should be able to lend their assistance.

A concerned citizen may choose one or more of the avenues for participating in the permitting phase. Written comments may be submitted by governmental entities whom citizens may approach with their concerns. A citizen who is or may be adversely affected5 may file written objections to an initial or revised permit application within thirty days of the last published notice of intent to mine.

Another informal avenue of participation is a request for an in-

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4. Public participation provisions during the permitting process are found in 405 K.A.R. 8:010-040 (1980).
5. The language "person with an interest which is or may be adversely affected" refers to the liberal standing doctrine set out in Sierra Club v. Morton, 405 U.S. 727, 740 (1972), encompassing aesthetic as well as economic interests.
formal conference at the proposed permit locality. The conference offers an opportunity to voice concerns regarding the permit plans prior to the agency decision. Within thirty days of the decision to approve the permit, a citizen who is or may be adversely affected may request a formal administrative hearing. The hearing decision is reviewable in circuit court.

Involvement in the permit application phase can prove valuable for many reasons. In many situations, community concern may cause alterations in blasting, hauling and design plans, and deletion of critical acreage, or possibly the withdrawal of a permit. It has a desired effect of alerting the regulatory authority to the operation, so that technical review of the permit will not be cursory, and so that a record will exist if later problems or violations occur at the minesite. Finally, once a permit issues, attempts to revoke that permit or to challenge the issuance are more difficult because of the presumption indulged in by the courts of "administrative regularity."

III. CITIZEN INVOLVEMENT IN INSPECTIONS AND ENFORCEMENT

A. Inspections

Congress properly recognized that citizen participation in enforcement of the state law and regulations was crucial to successful environmental protection. The Senate Energy and Natural Resources Committee report states: "[t]he state regulatory authority or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing." The Kentucky Department for Natural Resources and Environmental Protection [hereinafter Department] has projected over 7,000 inspectable units of operation, many of which are small in scale, geographically isolated and dispersed throughout the coalfields. Citizen requests for inspection, and monitoring of local office response to inspection requests, will go far in insuring operator and agency compliance with the Act.

The primary citizen enforcement tools are the right to request an inspection and the right to accompany the inspector on the minesite. A citizen who suspects that a violation of the Act or reg-

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8. Citizen participation provisions for inspection and enforcement are found at 405
ulations, an imminent danger, or environmental hazard exists, may request an inspection by giving an inspector or Department official information which provides reason to believe a violation or condition exists. A citizen has the right to make an oral complaint followed by a written statement. The complainant's identity remains confidential unless that person elects to accompany the inspector on the inspection.

The novel provision permitting a citizen requesting an inspection to accompany the inspector was bitterly fought in Congress. The citizen may wish to be involved with the inspection to assure that the inspector is made aware of the particular violation or condition which concerns the citizen, or that sufficient evidence is taken of the suspected violation. The citizen making a complaint should alert the local office at that time whether he wishes to accompany the inspector. The citizen-complainant should be notified as far in advance as practicable of when the inspection will occur.

If a citizen reports a suspected violation, the inspection should occur within a set time, usually fifteen days. A decision not to inspect must be issued within ten days, and can only be made if the state believes the information is incorrect or does not constitute a violation.

If a decision is made not to inspect, the citizen may request informal review of the local office decision by a supervisory official in the Department. Alternatively, the citizen may wish to inquire as to the reasons for the decision, and supplement the information she or he has submitted to support the request.

Formal review of the inaction of the inspector may be undertaken by bringing an action under Ky. Rev. Stat. § 350.250 in the nature of mandamus against the Department and/or the inspector. As is explored more fully later, where damage results from agency inaction, a 42 U.S.C. § 1983 (1976) action for violation of civil rights may be asserted against the responsible individuals, and a civil damage action under Ky. Rev. Stat. § 350.250 may lie against an operator or permittee.

B. Enforcement

Effective citizen participation necessitates a familiarity with the enforcement process. Two enforcement mechanisms available to an inspector are issuance of a notice of noncompliance and order for
remedial measures, and cessation power.

Upon finding a violation of Ky. REV. STAT. Ch. 350, 405 K.A.R. Chs. 7 through 24, or any permit condition, an inspector must issue a notice of noncompliance and an order for remedial measures. The written notice must set out the nature of the violation, the remedial steps necessary to abate the violation, and set a reasonable time (not to exceed ninety days) in which to complete the remedial activity.

If the violation is not abated, and the abatement time is not extended, a subsequent order for cessation and immediate compliance must issue. Such order imposes upon the operator the obligation to comply in the most expeditious manner possible with the affirmative obligations imposed by the terms of the order. All coal extraction must cease in the affected area until a notice of compliance issues, and such order remains in effect until lifted or stayed by a hearing officer.

The issuance of a single notice of noncompliance or subsequent cessation order may result in numerous administrative review proceedings instituted by affected citizens or operators. An informal public "minesite" hearing must be held within thirty days of the issuance of a subsequent cessation order, at which time such order may be affirmed or modified for good cause. Notice of such hearing must be given to the complaining party, if the inspection was in response to a citizen complaint.

The key enforcement mechanism is the order to abate and alleviate, which must issue from a field inspector immediately upon observation of a violation, condition, or practice which causes or could reasonably be expected to cause an imminent danger to the health or safety of the public or a significant imminent environmental harm to land, air, or water. All extraction activity must cease until abatement of the imminent hazard is completed. As with subsequent cessation orders, an imminent hazard order imposes affirmative obligations to discontinue, abate and alleviate the harmful condition in the most expeditious manner physically possible.

The final tool, which may be incorporated into an order to abate and alleviate, is the power to suspend or revoke permits. The standard for suspension or revocation of a permit or exploration approval is a pattern of willful or unwarranted violations of the state statutes, regulations, or permit conditions. The regulations governing suspension or revocation of permits are specific with regard
to what constitutes a pattern of violations, and greatly limit the potential long-term abuses by willful violators such as may exist uncontrolled in Kentucky's coalfields.

C. Assessment of Civil Penalties

Under Section 518 of the Act, civil penalties may be assessed by the state when a notice of noncompliance issues. The assessment of civil penalties is mandatory where a subsequent order for cessation or order to abate and alleviate issues, and in other circumstances is discretionary with the regulatory authority.

The assessment of civil penalties can have a drastic impact on the effectiveness of surface mining regulation. For this reason, citizen involvement in review of penalty assessment can greatly enhance operator compliance with the Act.

The assessment of a penalty will in many cases result in numerous administrative proceedings, both informal and formal, as well as judicial review. Though the civil penalty proceeding is initiated by the Department, broad intervention provisions will enable the affected or interested citizen to become involved in the proceedings in order to insure that penalties bear a relation to the operator's mining history, the gravity of the violation, and other factors having an impact on the case.

D. Performance Bonds and Bond Release

The problems of acid drainage, sedimentation, and other offsite effects of unreclaimed surface mines have long plagued the communities of the coal regions. The Act establishes an Abandoned Mine Reclamation Fund to reclaim and restore lands mined and abandoned prior to August 3, 1977. For lands mined after the enactment of the Act, a bond designed to cover the cost of reclamation is required.

No surface mining permit may be issued unless the applicant files a performance bond conditioned upon faithful performance of all the requirements of the Act and the permit. The bond must cover the acreage proposed to be affected by the operation, and the permit site may be bonded incrementally under certain circumstances. The Department must set the bond at an amount which corresponds to the estimated cost to the Department if it had to perform the reclamation, restoration, and abatement work required to meet the standards of the Act and regulations. The Department

should consider estimated costs submitted by the permittee, additional costs which the Department might incur from public contracting of the reclamation work, and an additional amount accounting for cost increases for reclamation activities during the preceding five years. The Department has been reluctant to factor in the latter variable, which would go far to insure that the bond set when an operation is permitted will be adequate to reclaim the land if the need arises some three or four years later. The concerned citizen may wish to consider carefully the bonding provision of a proposed operation. An amount which appears to be adequate to cover reclamation costs at the outset may turn out to have been a gross underestimate years, and many disturbed acres, later.

The performance bond for an operation may be released gradually as different phases of reclamation are achieved. A permittee seeking release of all or part of a performance bond must file a request with the Department. The permittee must notify adjoining landowners and local government agencies of intent to request release, and place an advertisement in a newspaper of general circulation in the locality. The advertisement must contain information to alert the public to the area for which release is sought and the reclamation work done. Affected citizens may file written comments and objections, and may request an informal conference or public hearing on the bond release. Federal litigation has established the right of a citizen to an onsite inspection during the bond release process.

The Department has the duty to hold forfeit performance bonds of a permittee who violates bond conditions, fails to reclaim within time limitations set by the Act, or fails to comply with a required compliance schedule. The Department may forfeit a bond where the permittee becomes insolvent or cannot prove the ability to continue to operate in compliance with the state statutes, regulations and permit conditions. Bond forfeiture is a process initiated by the regulatory agency, but intervention may provide a vehicle for citizen involvement.

IV. PROCEDURAL RIGHTS IN THE ADMINISTRATIVE AND JUDICIAL PROCESS

Citizen access to the administrative and judicial process can have an important impact on surface mining regulation. It is natural, if regrettable, for the regulatory agency to tend to identify with the regulated industry over time. The Kentucky Department for Natural Resources and Environmental Protection has historically
been expected to be at once the regulator and facilitator of the state's most politically powerful industry. Citizen involvement insures the Department's continued commitment to its regulatory role.

The second dynamic which necessitates active citizen involvement is that the Department is a legislative creature of specialization, and tends to minimize or lose sight of human and environmental factors in its decisionmaking, in what has become a highly technical industrial process.

**A. Standing and Intervention**

The state program must provide as much access to the administrative review process and state courts as does the federal Act. Through initiation of formal administrative review, and intervention in cases already in progress, a citizen may aid in ensuring that the decision making is more complete and informed.

A person with an interest that is, or may be, adversely affected by an operation has the right to initiate formal review of the state agency's decisions, such as permit issuance, and of citations issued by the agency. Standing to initiate formal review of the Department's decisions must be as broad as the requirements set out in *Sierra Club v. Morton,* United States v. Students Challenging Regulatory Agency Procedures [hereinafter cited as SCRAP], and *Duke Power Co. v. Carolina Environmental Study Group.*

Standing has traditionally been a barrier to environmental actions on the state judicial and administrative level, since state courts and tribunals were not bound by federal decisions regarding the "case and controversy" requirement of Article III of the U.S. Constitution. The Act makes the broader "aesthetic" standing of *Sierra Club* and SCRAP applicable to state administrative and judicial hearings, since the state must provide for as much citizen access as is accorded in sections 520 and 526 of the Act in order to assume primary regulatory responsibility for surface mining.

The Act has also broadened existing agency regulations on intervention, expanding intervention as a matter of right and limiting the hearing officer's discretion in excluding interested parties.

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B. Costs and Expenses

Historically, the disparity in financial and technical resources which exist between the coal industry and the affected citizen or concerned citizens organization has severely limited the ability to successfully challenge an operator or the Department. Recognizing that this disparity could thwart citizen involvement in surface mining regulation, the Act provides for the recovery of costs and expenses, including attorney and expert witness fees, reasonably incurred as a result of participation in administrative proceedings resulting in final orders. The standard for an award to a citizen is a finding that the citizen made a substantial contribution to the full and fair determination of the issues. Awards are made against the citizen in favor of a permittee only where the citizen initiated the proceeding in bad faith. The one-way nature of the award of costs and expenses is designed to further the purposes of the Act, and to encourage citizens in their role as private attorneys general. The possibility of recovering costs and expenses incurred should encourage citizens to see, help from private attorneys, and assistance from technical experts in preparing to seek relief through administrative proceedings.

C. Discovery

In the area of discovery in the administrative review process, as in other procedural areas, the Act provides more certainly and regularity than has historically been present. State programs must provide for rules for discovery in the administrative process that are consistent with the discovery rules for the federal Office of Hearings and Appeals. It is anticipated that the Department will adopt, with modifications, the Kentucky Rules of Civil Procedure discovery provisions to govern agency prehearing discovery. The use of discovery provisions may be an invaluable tool for aiding the decision maker in arriving at an informed decision, but, largely due to the inequities of legal expertise and financial resources between industry and citizens, may be used in a dilatory fashion. Establishing timetables for discovery, and utilizing protective orders when necessary, will curb potential abuses of discovery procedures.

D. Petitions to Initiate Rulemaking

Another novel feature introduced by the Act is the ability of any person to petition the regulatory authority to initiate rulemaking.14

14. The authority for this mechanism is found at 30 U.S.C. § 1211(g) (1979) and 30 C.F.R.
The provision allows for public input into the process of refining regulations as their implementation shows this to be necessary.

A petition to initiate rulemaking may be geared to the issuance, amendment or repeal of a rule adopted pursuant to the federal Act or regulations. The petition must be in writing, and set forth the facts, technical justification, and law which support the proposed alteration. The petitioner may request a public hearing within thirty days of filing, and a decision is mandated within thirty days after the hearing. The Secretary's decision initiating a rulemaking will rest on the finding of a reasonable basis for the change or that such change is required by law. An order of the Secretary is subject to review by the Franklin Circuit Court.

The concept of petitions to initiate rulemaking more directly involves affected and interested parties in the ongoing regulatory process. Unlike the other rulemaking, which is reviewed by legislative committees, judicial review of the Secretary's decision is available. Kentucky's coal industry did not fight inclusion of the provision, since the bulk of such petitions during the interim program were brought by national coal organizations.

The utility of the petition process to make major changes in the state regulatory framework is circumscribed. Changes in regulations are constrained by state law, which forbids the adoption of provisions more stringent than the federal minimum, and the Act, which demands that state law and regulations be no less stringent than, and include all applicable provisions of, the Act and federal regulations. Nevertheless, many regulations of a procedural nature which may prove to be cumbersome or unnecessary to meet the goals and purposes of the Act may be refined through this unique provision.

The petition to initiate rulemaking provides an additional avenue for the citizen participation already existent in agency rulemaking. Under Ky. Rev. Stat. Ch. 13, which governs administrative regulations, interested parties may participate in routine agency rulemaking, though the proposed promulgation, revision or repeal of rules will arise from within the agency rather than from the public. Interested parties may comment and request hearings on proposed regulations, and the Department must consider and respond affirmatively to all significant public comments.

V. DESIGNATION OF LAND AREAS AS UNSUITABLE FOR MINING

Section 522 of the Act interjects rational land use planning considerations into the mining regulatory process. The concept of designating certain areas unsuitable for some or all types of coal mining is premised on the idea that other land uses, under certain conditions, may be of a higher benefit than surface mining. The Act mandates that each state program establish a process to gather technical data to make objective decisions as to which, if any, land areas should be designated unsuitable for mining.

The mandatory designation provision of the Act requires the designation of an area where it is determined that reclamation in compliance with the Act is not technologically and economically feasible. The Act provides that the agency, in its discretion, may designate an area unsuitable if such operation is incompatible with existing land use plans, or affects fragile, historic, natural hazard or renewable resource lands. Any persons having an interest which is, or may be, adversely affected may petition the Department to have an area designated unsuitable for surface mining operations.

The initial decision a petitioner must make is whether to proceed via the mandatory route, one or more of the discretionary routes, or some combination. The mandatory route decision is made utilizing a computer simulation module that determines the feasibility of a hypothetical operation in a particular land area. This route presents many obstacles to the petitioner, and may, in the final analysis, not provide the environmental protection it was designed to effect.

The major shortfall of the mandatory route is the approach the state has taken to designation due to infeasibility of reclamation. Rather than using an areawide analysis to determine feasibility, the Department intends to comb the petitioned area until a reclaimable operation site is found, if any, in order to reject a petition. Such a reductionistic approach threatens the rational planning concept which undergirds the designation process.

The mandatory designation route provides little long-range protection for a designated area for another reason. Since the decision hinges on the economic and technological feasibility of mining in compliance with the reclamation requirements of the Act, environmental protection of an area will fluctuate with the fair market value of coal—in a depressed market, designation will be achieved,

and terminated by petition when boom market conditions exist.

The discretionary designation routes may be more fruitful, since they concern values less transient than that of coal tonnage. The Department has compiled information on fragile, natural hazard lands and historic resources in an attempt to standardize and bring "hard" data to the discretionary decision. Nevertheless, the decision is ultimately a subjective, political one, balancing industrial values against human and environmental concerns.

A designation petition must contain allegations of fact with supporting evidence tending to establish the allegations. The filing of a petition under the Kentucky program sets in motion a process that stays the issuance of permits for mining in the petitioned area. Petitions will not be considered for lands on which surface coal operations were being conducted prior to the date of enactment of the Act, or where substantial legal and financial commitments in surface mining operations existed prior to January 4, 1977, or where a permit has been issued by the Department or is in the application phase for which the public comment period has closed.

The Department must decide within thirty days of submittal whether the petition is complete. Once the petition is found to be complete and not to be frivolous, the Department will begin a process of evaluating the petition, compiling data and soliciting comment from other state and local agencies and interested persons in order to arrive at an informed decision. Within ten months of petition receipt (or ninety days if there is a permit pending before the Department in the petitioned area at the time of petition filing), the Department will hold a public, legislative (fact finding) hearing in the locality of the petitioned area, with a final decision being rendered by the Secretary of the Department within sixty days of the hearing, or twelve months after receipt of the complete petition.

The state regulatory authority has more discretion in designating areas unsuitable for mining than is granted them regarding any other facet of mining regulation. Because of this, the effectiveness of the designation provisions as a tool for intelligent land use planning may be limited. However, the petition process may have a positive impact on the area under consideration, in terms of heightened scrutiny of proposed permits, public awareness of the potential problems associated with mining in the area, and in more active enforcement of permitted operations in the area. The peti-
tion process interjects broader considerations of the public interest and long-range social and environmental values into a process heretofore governed solely by the marketplace.

VI. CITIZEN SUITS IN KENTUCKY

The Kentucky program must provide citizen access to state courts to compel compliance with the Act, in order to achieve primary regulatory control over surface mining.16 The citizen suit provisions of the Act provide for several causes of action involving both governmental instrumentalities and operators, designed to enable persons with an interest which is, or may be, adversely affected to act to compel compliance, and to recover damages for violations of the regulations and permit conditions resulting in personal or property damage.

The initial submittal of the Kentucky program to the Office of Surface Mining was deficient with regard to the citizen suit provisions. Ky. Rev. Stat. § 350.250, which had been a mandamus provision, was altered by the 1980 Kentucky General Assembly, but failed to incorporate and sufficiently define the necessary elements of the state citizen suit provisions. It is anticipated that Kentucky will be granted program approval conditional on correcting this major flaw during the 1982 legislative session.

The citizen suit provisions must contain a mechanism allowing for an action of mandamus to compel the performance of nondiscretionary duties by officials of the Department. Unlike prior Kentucky regulations, those promulgated pursuant to the Act contain numerous duties and responsibilities regarding inspection, permitting and enforcement which are mandatory upon the Department, and amenable to mandamus actions. A person having an interest which is, or may be, adversely affected must provide sixty days notice to the Department of intent to sue under this and other citizen suit causes of action, except that such actions may be brought immediately after notification where an imminent threat to health, safety or a legal interest of the plaintiff is alleged.

The program must also provide for an action for damages by any person injured in his or her property or person through the violation by the operation of any rule, regulation, order or permit issued by the Department. The plaintiff may recover costs and expenses, including attorney fees, reasonably incurred. The damage action

16. Id. at 1270.
was intended to reduce the plaintiff’s burden of proof in recovering for damage which resulted from a violation of the Act or regulations, by requiring only a showing of the violation and resultant damage. It is unclear whether the state courts will interpret the action as it was intended, or will approach the damage action as one sounding in negligence or negligence per se. The legislative history of the Act, as well as the plain language of the statute, suggest that the proper approach is that of strict liability once the causal connection between the violation and damage is established to a reasonable certainty.

The citizen suit provision should also provide for an injunction action against any person alleged to be in violation of any rule, regulation, order, or permit. Finally, the provision must contain a savings clause which provides that the remedies and actions available under Ky. Rev. Stat. § 350.250 are cumulative and not restrictive or preemptive of available remedies under state law.

VII. UTILIZING THE CIVIL RIGHTS ACT TO ENFORCE CITIZENS’ RIGHTS

Two recent decisions of the Supreme Court have provided affected citizens a cause of action against the state for violation of the Surface Mining Control and Reclamation Act of 1977 which is independent of the Act and its citizen suit provisions. In Main v. Thiboutot and Maher v. Gagne, handed down by the Court on the same day, the Court held that 42 U.S.C. § 1983 (1976), which provides that anyone who, under color of state law, deprives another of any rights, privileges or immunities “secured by the Constitution and laws” is liable to the injured party, encompasses claims based solely on statutory violations of federal law. Prior to these decisions, it was unclear whether a § 1983 action alleging violation by a state of a federal statute was actionable unless pendent to an alleged constitutional violation. The Thiboutot and Maher decisions clearly provide that purely statutory violations of federal law by a state are actionable. The Court further held that the Civil Rights Attorney’s Fees Awards Act of 1976 authorizes the award to the prevailing party of attorney’s fees in such statutorily-based actions.

17. Id. at § 1270(f).
18. 100 S. Ct. 2502 (1980).
19. 100 S. Ct. 2570 (1980).
21. Id. at § 1988.
The instant cases involved actions brought under 42 U.S.C. § 1983 (1976), alleging state violations of the Social Security Act. The Court, over a strong dissent which voiced concern over the increased vulnerability of state and municipal officials under a plethora of federal-state cooperative agreements, held that the Civil Rights Act creates a cause of action for deprivations, under color of state statute, rule, or custom, of a federal statutory right.\textsuperscript{22}

The impact of these decisions in the area of surface mining is significant. First, a cause of action independent of the Act is available for aggrieved persons where state officials violate the provisions of the Act. Second, the possibility of an award of attorney's fees in such actions, whether brought in state or federal court, is raised. The future of the costs and expenses provisions of the Act, as interpreted by the Office of Surface Mining in the Office of Hearings and Appeals regulations, is uncertain. The Court's decisions in \textit{Thiboutot} and \textit{Maher} provide a vehicle for enforcement of the Act, and for recovery of attorney's fees, independent of the political pressure that will be levelled at the Act by the Reagan Administration.

VIII. \textsc{Federal Citizens' Rights Under the Approved State Program}

With a state's assumption of primary regulatory responsibility over surface mining the role of the federal government in surface mining enforcement under the Act diminishes somewhat, but remains an important option for assuring state compliance. The Secretary of the Interior and Office of Surface Mining are charged under the Act with overseeing the state administration of a program, and with assuring compliance with the requirements of the Act and regulations.

Many avenues for citizen participation in the federal oversight role exist during the permanent program and may be utilized to assure aggressive, continued commitment to surface mining regulation and enforcement by the state after primacy is achieved.

\textbf{A. Inspections and Enforcement}

The Office of Surface Mining is charged with the responsibility of conducting periodic inspections during the permanent program phase, to allow the evaluation of the state administration of the regulatory program. Citizens may initiate an inspection by federal

\textsuperscript{22} 100 S. Ct. at 2507 (Powell, J., dissenting); 100 S.Ct. at 2574.
inspectors upon the same grounds as the citizen's request for a state inspection. Upon receipt of a citizen request for inspection which the federal agency deems meritorious, the state will be notified and allowed ten days to take appropriate action or to justify their lack of responsive action. After that time, the federal inspector must inspect pursuant to the citizen complaint. Informal and formal review of the federal decisions are available, as under the state program, and the citizen has the right to accompany the federal inspector on a resulting minesite inspection.

A federal inspector has full authority to issue notices of violation, and cessation orders for imminent hazards and unabated violations. The citizen participation provisions during the enforcement and penalty process on the state program level support the federal oversight framework.

B. Rulemaking

Under the permanent regulatory program, the citizen in a state with primary regulatory responsibility retains the ability to participate in federal rulemaking. Citizen involvement can take the form of petitions to initiate rulemaking, or participation in agency-initiated rulemaking.

C. Federal Citizens Suits

The citizen suit provision of the Act provides federal causes of action against the United States, government instrumentalities, and operators. The citizen suit on the federal level enables the affected individual to utilize injunctive relief and the extraordinary writ of mandamus to compel compliance by the Secretary of the Interior and the state Department with the Act and regulations. The provision will ensure active federal oversight once the state assumes its primary regulatory role. As with the state citizen suit, the federal provision is not an exclusive or restrictive action to enforce the Act and attorney fees are recoverable. The federal citizen suit provides for a damage action in federal court for injuries resulting from violations of the Act, regulations, or permit conditions. The provision confers jurisdiction on federal district courts, without regard to amount in controversy or diversity of citizenship. Venue under the statute lies in the judicial district in which the surface mining operation is located, where the suit involves a particular operation. Actions in the nature of mandamus against the

federal or state regulatory authority are subject to the general federal venue provisions.

IX. SUBSTITUTING FEDERAL ENFORCEMENT OF A STATE PROGRAM AND WITHDRAWAL OF PROGRAM APPROVAL

The Act grants responsibility to a state, under an approved program, for implementing, enforcing, and maintaining the state program. The Regional Director of the Office of Surface Mining is responsible for monitoring the state program.

Each state program is subject to an evaluation at least annually. Any interested person may request the Director to evaluate the state program, by setting forth facts which establish the need for an evaluation. The Director must determine whether an evaluation is justified within sixty days.

If the Director has reason to believe that the state is not effectively administering or enforcing the program, the state regulatory authority will be notified of the concerns and reasons underlying them, as well as a specific time for accomplishing any remedial actions. An informal conference may be held, and if the Director still believes the state is failing to adequately maintain and enforce part or all of the program, the state shall be given notice and a public hearing in the state will be held.

After considering all testimony and written comments, three options are available regarding the state program. The Director could recommend continuance of the state program as approved. If the state has not demonstrated intent and capability to administer the program, or has failed to effectively carry out the regulatory program, the Director shall either recommend withdrawal of part or all of the state program or shall substitute direct federal enforcement of part or all of the state program.

The substitution of direct federal enforcement or withdrawal of approval of the state program in whole or in part is a drastic remedy for non-enforcement or maladministration of a state program. It is a tool to be utilized when violations of the Act by a state become systemic and are no longer amenable to individual or situational enforcement action.

CONCLUSION

The decade of the 1970's saw the passage of numerous state and federal statutes designed to increase citizen involvement in, and environmental awareness of, governmental decisionmaking. The Surface Mining Control and Reclamation Act of 1977 provides for
an unparalleled level of citizen participation in the development and administration of state regulatory programs.

The mere passage of a federal statute and the enactment of regulations do not, without more, result in responsible decisionmaking. The ultimate success of the Act and of the state regulatory program hinges on consistent and aggressive involvement of citizens affected by strip mining, and of organizations concerned with the quality of the human environment.
Ohio's supplemental mechanics' lien law,¹ became effective on January 1, 1978 as provided by section 2 of the Act. Section 3 provides that it applies only to home construction contracts² and home purchase contracts³ entered into on and after January 1, 1978. It does not amend nor repeal, except where inconsistent, any part of the existing law, although, section 1311.011(B) says in the first two lines: "Notwithstanding Sections 1311.02 to 1311.24 of the Revised Code." The new law is intended to protect home buyers and persons having work done on their property from having to pay for the same thing twice. Unless the provisions of the mechanics' lien law are strictly followed, a home buyer, after paying the original contractor or seller in full, could later be confronted with mechanics' liens filed by subcontractors, materialmen, and laborers whom the original contractor or seller failed to pay. In many such cases, the defaulting original contractor cannot be found or is financially irresponsible. The new law seeks to prevent double payment.

One of the basic provisions is set forth in section 1311.011(B)(1) of the Ohio Revised Code, which bars mechanics liens against home construction performed if the original contractor has been paid in full, or liens under a home purchase contract if the purchaser has paid the full amount of the home purchase contract before a copy of a mechanics' lien has been received by the party.

To further protect home purchasers and those having work done on their property and to protect the lending institution, section 1311.011(B)(4) requires a lending institution, before making any payment to the original contractor, to secure the contractor's affidavit stating that he has paid in full for all work performed and labor, materials, machinery or fuel furnished by him and by all subcontractors, materialmen, and laborers, except those so specified in the affidavit.⁴

* Of counsel in the Cincinnati, Ohio, office of Smith & Schnacke.

² Id. § 1311.011(A)(1).
³ Id. § 1311.011(A)(2).
⁴ Id. § 1311.011(B)(4).
From the point of view of the home buyer or person having work done, the reforms intended by the new statute give certain protection, but at the same time may take away some of the protection under the existing law, if the latter is not followed. However, there are a great many difficulties in connection with the practical application of this new bill.

II. DEFINITIONAL PROBLEMS

The new statute contains four key terms which require careful analysis: home construction contract, home purchase contract, lending institution, and original contractor.\(^5\) The first problematic term it defines is home construction contract:

(1) "Home construction contract" means a contract entered into between an original contractor and an owner, part owner, or lessee for the building, construction, repair, replacement, remodeling, alteration, conversion, modernization, or improvement of any single or double family dwelling or portion of the dwelling or a residential unit of any condominium property that has been submitted to the provisions of Chapter 5311 of the Revised Code; an addition to any land; or the construction, replacement, installation, or improvement of driveways, sidewalks, swimming pools, porches, garages, carports, landscaping, fences, fallout shelters, siding, roofing, storm windows, awnings, and other improvements that are adjacent to single or double family dwellings or upon lands that are adjacent to single or double family dwellings or residential units of condominium property, if the dwelling, residential unit of condominium property, or land is used or is intended to be used as a personal residence by the owner, part owner, or lessee.\(^6\)

How will lenders know whether the dwelling will be occupied by the owner-purchaser? It is questionable whether even a sworn statement by the owner-purchaser either on his loan application or separately would protect the lender, if that is not the actual fact. The lending institution should require such an affidavit, for whatever it may be worth, as well as copies of the owner's or purchaser's contract, all change orders, agreements for extras, and any other modifications of the contract.

The law does not apply to a building containing more than two residential units, nor to commercial, industrial, or recreational buildings, or to any improvements. It is strictly limited to a resi-

5. Id. § 1311.011(A)(1)-(4).
6. Id. § 1311.011(A)(1).
The Act clearly does not apply to refinancing if there are no improvements, alterations, additions, etc., as specified in subsection (A)(1). Neither does it apply to an assumption of a loan. Subsection (A)(3) defines a lending institution as a person who enters into a contract with the purchaser-owner to finance home construction or home purchase. An assumption does not usually contemplate the paying of any money or any contract by a lending institution. However, if the lending institution has a “due on sale” provision in its mortgage and requires its consent or even a modification of its mortgage before it will consent to the assumption, clearly a contract, does the Act apply? While the lending institution is providing financing by consenting to the assumption, and comes under that part of the definition, would such consent apply to the making of any direct disbursement to any original contractor, (which includes the seller), as prohibited in section (B)(4)? In effect the consent would be providing a substantial part of the purchase price. Would the prior recording of the mortgage before the assumption, probably long before the assumption, give complete protection to the mortgagor if it requires a modification by increasing the interest rate which increases the total amount to be paid eventually by the purchaser? Although the mortgage has been recorded, there is now a modification of the mortgage which may or may not be recorded before the conveyance. The question of protection given by prior recording will be discussed later in this article.

(2) “Home purchase contract” means a contract for the purchase of any single or double family dwelling or residential unit of a condominium property that has been subjected to the provisions of Chapter 5311. of the Revised Code if the purchaser uses or intends to use the dwelling, a unit of a double dwelling, or the condominium unit as his personal residence.

7. Id. § 1311.011(A)(2).

Because the definitions of home construction contract and home purchase contract include only contracts involving residential units to be occupied by the owner, the new law clearly does not apply to a market-built dwelling which, obviously, the builder does not intend to use as his personal residence. However, when the builder contracts to sell that dwelling, such contract is a home purchase contract to which the law applies.

8. See id. § 1311.011(B)(5), which provides, in part, that “[t]he lending institution shall not be financially liable to the owner, part owner, purchaser, lessee, or any other person, for any payments, except for gross negligence or fraud committed by the lending institution in making any payment to the original contractor.”
“Lending institution” means any person that enters into a contract with the owner, part owner, purchaser, or lessee to provide financing for a home construction contract or a home purchase contract, which financing is secured, in whole or in part, by a mortgage on the real estate upon which the improvements contemplated by the home construction contract are to be made or upon the property that is the subject of the home purchase contract, and that makes direct disbursements under the contract to any original contractor or the owner, part owner, purchaser, or lessee. 9

A person who makes an improvement loan which is not secured by a mortgage, therefore, is not a lending institution and does not come under this Section. “Original contractor” includes “any person with whom the owner, part owner, lessee, or purchaser under a home purchase contract has directly contracted.” 10 This statutory definition presents numerous difficulties. First, it is not really a definition, but is merely a specification of certain persons who will be considered to be “original contractors.” Secondly, it includes owners or purchasers under home purchase contracts, but does not include owners or purchasers under home construction contracts. Does this omission mean that one with whom a person contracts under a home construction contract, such as a builder-vendor, is not an “original contractor?” Third, it is too broad; by including any person with whom the owner-seller has directly contracted, the legislature has made the owner an original contractor, because an owner-seller always contracts directly with “a person,” namely the purchaser, under a home purchase contract. Similarly, every purchaser under a home purchase contract directly contracts with “a person,” namely the owner-seller; hence, every purchaser and every seller is an original contractor.

Nowhere in the entire mechanics’ lien law 11 is there a definition of the terms “original contractor” or “contractor.” 12 Therefore, in accordance with general principles of statutory construction, 13 an

9. Id. § 1311.011(A)(2)-(3).
10. Id. § 1311.011(A)(4).
11. Id. ch. 1311.
12. There is, however, an attempted definition of “subcontractor,” which, like the “definition” of original contractor in section 1311.011(A)(4) is merely a statement of what person will be considered to be a subcontractor: “ ‘Subcontractor’ includes any person who undertakes to construct, alter, erect, improve, repair, remove, dig, or drill any part of any structures or improvements under a contract with any person other than the owner.” Id. § 1311.01(D).
13. In interpreting the Ohio Revised Code, words and phrases are required to “be read in context and construed according to the rules of grammar and common usage. Words and
original contractor, in addition to those persons included in section 1311.011(A)(4) of the Ohio Revised Code is anyone who is commonly considered to be an original contractor.\textsuperscript{14} However, if the legislature chooses to say that, for the purposes of the mechanics' lien law, black is white, then black will be white. It can define an original contractor any way it sees fit. The legislature has made certain persons original contractors, even though those persons would not ordinarily fit under that designation. Therefore, anyone who contracts to buy, sell or finance even a completed house is dealing with an original contractor under the supplemental mechanics' lien law—namely, the seller or the purchaser.

Since the new law does not define "owner," "part owner," or "lessee," the definitional section of the general mechanics' lien law must be consulted. That section attempts to define specifically those three words as follows: "'Owner,' 'part owner,' or 'lessee' includes all the interests, either legal or equitable, which such person may have in the real estate upon which the improvements contemplated under such sections are made, including the interests held by any person under contracts of purchase, whether in writing or otherwise."\textsuperscript{15} Although the language is awkward, it is clear that the legislature intended to include those people with any interest whatever, legal or equitable, in the real estate upon which improvements are made. The express inclusion of interests of persons under contracts of purchase in this section signifies the legislature's intention to include purchasers under written or oral contracts.

Although original section 1311.01 might include a purchaser as

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\textsuperscript{14} It has been said that the word "contractor" "has a well-defined meaning in everyone's mind as indicating a person who makes a business of erecting buildings or making other improvements on property." 36 OHIO Jur.2d Mechanics' Liens § 19 (1959). The Ohio Supreme Court in Chapel State Theatre Co. v. Hooper, 123 Ohio St. 322 (1931) says: "A contractor is one who contracts directly with the owner to complete all or some part of an improvement within the scope of the act and to furnish labor and material or both."

\textsuperscript{15} OHIO Rev. CODE ANN. § 1311.01(A) (Page 1979). Note that this section refers to real estate upon which the improvements "contemplated are made," which might include completed improvements. The later section defining a lending institution refers to the real estate upon which the improvements "contemplated are to be made." See id. § 1311.011(A)(3). If this is inconsistent, the new section would control and new subsection 1311.011(B)(3) would not apply to a loan on a completed dwelling, would not give the lender on it nor its purchaser any protection, and "owner" would not include a purchaser of an uncompleted building. See first two lines of section 1311.011(B).
an owner, the new law seems to distinguish between "an owner, part owner or lessee" on the one hand, and "a purchaser" on the other. As a later enactment, it would control over the general mechanics' lien law. The new law uses the phrase "owner, part owner, or lessee" eighteen times without including the word "purchaser." In ten different places, the phrase "owner, part owner, purchaser, or lessee" is used. Twice, the word "purchaser" alone is used. Therefore, it appears the legislature clearly intended to make a distinction between "owner, part owner, or lessee" and "owner, part owner, purchaser, or lessee." 

This view is supported by the logic of omitting or including "purchaser" from some provisions of the law. For example, "home construction contract" means a contract entered into between an original contractor and "an owner, part owner or lessee" for certain work to be done upon a building or land if the building or land "is used or intended to be used as a personal residence by the owner, part owner, or lessee." Excluding "purchasers" from the definition indicates that home construction contracts are limited to those involving real estate already owned by or leased to the contracting party and do not include contracts for work on property owned by the original contractor and to be sold. If this is the legislature's intention, then the failure to include "purchaser" would be logical.

What the legislature actually intended is not at all clear. Numerous other provisions applicable to home construction contracts include the purchaser. The definition of "lending institution" twice includes a purchaser, each time in connection with both a home construction contract and a home purchase contract. Another section provides that no subcontractor shall have a lien for work done in connection with a home construction contract between the owner, part owner, or lessee and original contractor, or in connec-

16. If statutes enacted at different legislative sessions are irreconcilable, that last enacted prevails. See id. § 1.52(A).

17. The author has a copy of the printed draft of the bill as submitted to the governor for his signature and ordered reprinted by the Senate. In seven of the ten places in which the word "purchaser" is included, the word was inserted in pen in the phrase "owner, part owner, or lessee." The addition in seven places and the omission in the other eighteen places seem to indicate that the word "purchaser" was deliberately omitted in those eighteen places.


19. Id. § 1311.011(A)(3).

20. Unless otherwise indicated, the word "subcontractor," when used hereafter in this article, includes materialmen and laborers as well.
tion with a home purchase contract if the owner, part owner, or lessee has paid the original contractor in full before receipt of a copy of the subcontractor's mechanics' lien affidavit.\textsuperscript{21} Purchaser is not mentioned. However, in the same sentence, the section \textit{separately} provides that none of the above shall have a lien for work done in connection with a home purchase contract or a home construction contract if the \textit{purchaser} has paid in full for the amount of the home construction contract or home purchase contract before the owner's, part owner's, or lessee's receipt of the lien.\textsuperscript{22} This indicates that a purchaser may enter into a home construction contract, which obviously would not involve property owned by the purchaser. If it were owned by the purchaser, he would then be an owner, not a purchaser. By making one provision for an owner, part owner, or lessee, and separately repeating the \textit{same} provision for the purchaser, the legislature clearly indicates that "owner, part owner, lessee" does not include "purchaser." If it does, why a separate identical provision for "purchaser?"

Additional evidence of the distinction is found in that section of the statute which permits only an owner, part owner, or lessee, and not a purchaser, to record an affidavit of payment.\textsuperscript{23} While it may be argued that normally payment in full would not be made until the purchaser takes title (and becomes an owner), other provisions of the new law clearly contemplate the purchaser's payment, even in full, before title is conveyed.\textsuperscript{24} Nowhere, though, does the Act

\textsuperscript{21} See id. § 1311.011(B)(1).

\textsuperscript{22} Id. This section does not provide for the possibility of a receipt of the affidavit by the purchaser, which omission is correct, because the copy of the affidavit must be furnished to the person who is the \textit{owner} of the property at the time the affidavit is filed. Schuholz v. Walker, 111 Ohio St. 308 (1924).

\textsuperscript{23} Ohio Rev. Code Ann. § 1311.011(B)(1) (Page 1979). This section provides, in part: An owner, part owner, or lessee may file, with the county recorder of the county in which the property that is the subject of a home construction contract or a home purchase contract is situated, an affidavit that he has made payment in accordance with this division. Except if the owner, part owner, lessee is guilty of fraud, any lien perfected on the property by any subcontractor, materialman or laborer for work done, or for labor, materials, machinery, or fuel furnished shall be void and the property wholly discharged from the lien, if the lien was perfected after full payment was made in accordance with this division. The recorder shall index and record the affidavit in the same manner that releases of mortages and other liens are indexed and recorded. . . . \textit{Id.}

\textsuperscript{24} See, \textit{e.g.}, id. § 1311.011(B)(3). This section expressly mentions "full payment . . . by the . . . purchaser . . . for the amount of the home construction or home purchase contract." The word "purchaser" was added in pen after the bill was printed. \textit{See note 17 supra.}
provide for receipt of a copy of the lien by the purchaser. How can a purchaser make an affidavit that he has paid in full before the owner received a copy of the lien, unless the purchaser gets an affidavit from the seller or contractor to that effect? The law does not require such an affidavit. Moreover, where the purchaser pays in full, an affidavit by the owner that he (the owner) has paid in full would be false. Any affidavit by the purchaser, not having been provided for in the statute, would have no effect. While “owner” may be interpreted as always including “purchaser” despite the above analysis, it will ultimately require litigation to decide the question.

Hereafter, for brevity, the word “owner” shall be deemed to include “part owner, and lessee.” The words “owner-purchaser” shall be deemed to include all four.

III. INTERPRETATIVE PROBLEMS AND SERVICE OF AFFIDAVITS

A. Service of Mechanics’ Lien Affidavits

As previously stated, the new law protects the owner if he pays in full before he receives a copy of a mechanic’s lien. Just what is meant by a copy of an affidavit of mechanic’s lien? Does this mean that it must be a copy of a filed lien? In Ulmer v. Portage Construction & Finance Co., the court held that service of a copy of an affidavit of a mechanic’s lien on the owner a day or two before the original lien was filed with the recorder constituted compliance with the service requirements of the mechanics’ lien law, which calls for service of a copy of the affidavit “within thirty days after the filing thereof.” As far as the owner is concerned, it makes no difference whether he is served with a filed or unfiled copy of the mechanic’s lien. However, if the owner has been served with a copy of the lien before it is filed, Ulmer may present problems for a lending institution which checks the records prior to making disbursements, unless sections 1311.011(B)(4) and (5) protect the lending institution.

Section 1311.07 of the Ohio Revised Code provides for service of a copy of the mechanic’s lien affidavit upon the owner as follows:

25. This is an exceptionally strong case for application of the rule, expressio unius est exclusio alterius, that is, expression of one thing is the exclusion of another. See, e.g., Akron Trans. Co. v. Glander, 155 Ohio St. 471, 480 (1951); State ex. rel. Rowe v. Schirmer, 131 Ohio St. 90, 92 (1936); Robert v. Clapp Co., 124 Ohio St. 331, 336 (1931).
27. 26 Ohio N.P. 257 (1923), aff’d mem. (1925).
Every person filing [an affidavit] shall within thirty days after the filing thereof serve on the owner, part owner, or lessee of such premises or his agent, a copy thereof, but if none of such persons can be found within the county where such premises are situated, then such copy shall be served by posting the same in some conspicuous place on said premises within ten days after the expiration of said thirty days.\textsuperscript{29}

Under this section, the lien claimant has thirty days in which to serve a copy of the lien on the owner to perfect his lien, which then relates back to the time when the lien attached.\textsuperscript{30} It therefore requires a subcontractor to serve a copy of the lien on the owner as quickly as possible, or he will lose his lien if the owner pays the general contractor before a copy of the lien is served on the owner.

The new law does not prescribe the manner in which a copy of the lien shall be served, so the old law controls. Section 1311.07 of the Ohio Revised Code specifies how service must be made in certain cases. This permits only personal service or posting. In addition, section 1311.19 provides for service by the sheriff in the same manner as service of summons,\textsuperscript{31} and for service by registered letter.\textsuperscript{32} Section 1311.19 further provides that proof that the "affidavit, or copy was mailed by registered letter to the last known place of residence of such person, is conclusive proof of service."\textsuperscript{33} Therefore, it is possible under this section for the owner to be legally served although he never actually received a copy of the lien. Thus, an owner may be deemed to have been legally served with a copy of the lien when mailed, but because he never actually received it or may receive it days or weeks after it is filed, he may mistakenly make full payment before he receives it. The drafters of the bill obviously were aware of this provision. They provide for the owner's receipt of a copy of the affidavit and do not refer to service on the owner.

Section 1311.011(B)(1) of the Ohio Revised Code provides that the owner may file an affidavit of payment.\textsuperscript{34} Throughout the old

\textsuperscript{29} Id.
\textsuperscript{30} The lien is "effective from the date the first labor is performed, or the first machinery, materials, or fuel is furnished by the contractor under the original contract." Id. § 1311.13.
\textsuperscript{31} Id. § 1311.19. This would permit residence service by the sheriff only. No one else may make residence service. Crane Co. v. Koper Heating Co., 5 Ohio Op. 10 (1936).
\textsuperscript{32} Id. § 1311.19. Service may also be made by certified mail by virtue of section 1311.19.
\textsuperscript{33} Id. § 1311.19 (emphasis added). See A. C. Scagnetti & Sons, Inc. v. Pleister, 172 Ohio St. 260 (1961).
\textsuperscript{34} Id. § 1311.011(B)(1).
law, the owner or his agent could make and file affidavits. The new section, though, does not give an agent the authority to make the affidavit. Can the attorney or agent make the affidavit? In the author's opinion, no.

B. Lien Perfection or Lien Receipt

A lien may be perfected when a copy is mailed by registered mail service under section 1311.19 of the Ohio Revised Code before payment in full is made. Thereafter the owner pays in full after that perfection (i.e., mailing of the lien) but before his receipt of a copy of the lien. Section 1311.19 provides that proof that the notice or copy was mailed by certified mail to the last known place of residence of such person is conclusive proof of service. It is not proof of receipt. Therefore, service is completed with mailing, and although the owner may not know it, the lien was perfected before full payment was made, notwithstanding the fact that payment may have been made before receipt of a copy of the mechanic's lien. Does the lien attach? Section 1311.011(B)(1) of the Ohio Revised Code has two inconsistent answers to the question, and the inconsistency between the two paragraphs of this section creates the most serious problems under the new law.

The second paragraph of section (B)(1) provides that an owner, part owner, or lessee (purchaser is not included) may file with the recorder of the county in which the property is situated an affidavit that he has made payment in accordance with "this division" and, "except if the owner is guilty of fraud, any lien perfected on the property by a subcontractor . . . shall be void and the property wholly discharged from the lien, if the lien was perfected after full payment was made in accordance with this division." The first paragraph of this same section (B)(1), however, provides that a lien will not be valid if the purchase price is paid before the owner, part owner, or lessee receives a copy of an affidavit of the mechanic's lien.

While the first paragraph requires full payment before receipt of a copy of the mechanics' lien affidavit, the second requires full payment before the lien is perfected. The owner has not made payment "in accordance with this division" unless both conditions are met, namely payment before receipt of notice and before the lien is perfected. It is almost impossible for an owner to know

35. See, e.g., id. § 1311.06.
36. Id. § 1311.011(B)(1).
before receipt whether a copy of the affidavit has been mailed to him by registered mail, and the lien thereby perfected. He will only know when he has received the registered notice. He may even never receive it. 37

If a lien is filed and a copy mailed, and thereafter the owner makes and records the paid-in-full affidavit before receipt of a copy, how can a title examiner know that final payment was made before the copy was served personally, properly mailed or the notice posted (i.e. before the lien was perfected)? The owner’s affidavit is merely a conclusion of law. It is not conclusive if incorrect. If the matter is litigated and the evidence shows that the registered letter was mailed or the notice posted before final payment, the lien is not void under the second paragraph of this section. Moreover, the first paragraph does not void the lien nor discharge the property from the lien. The only way the lien can be voided of record is under the second paragraph and it is established as a matter of fact that the lien was perfected after final payment was made, or by court order. Any attorney who would disregard a filed lien because of the paid-in-full affidavit would be taking a great risk.

The same analysis applies where the lien is perfected by posting a copy of the mechanic’s lien affidavit pursuant to section 1311.07. The portion of the section providing that a copy shall be served by posting if neither the owner nor his agent can be found in the county where the premises are situated appears to be mandatory. If posting is permitted, the statute does not require that after posting a copy be mailed to the owner. The posted copy may be blown down or torn down and the owner may never know of the posting. The author has had the experience, after posting on a super-market store, of having a clerk immediately rush out and tear down the notice. Posting is a substitute for mailing. 38

38. Schubolz v. Walker, 111 Ohio St. 306, 317 (1924) (posting “is meant to be a substitute for the service of the notice on the owner, part owner, lessee”) (dictum). But see Balco Corp. v. D. H. Overmyer Co., 43 Ohio App. 2d 157 (1915). In Balco, the owner was a New York corporation which had a statutory agent in Cleveland, Ohio. Neither the owner nor the statutory agent could be found within the county, the court specifically holding that the statutory agent was not an agent within the meaning of the mechanics’ lien law and that the owner did not have an agent within the county. A copy of the affidavit was sent by certified mail to the owner’s statutory agent in Ohio, and to the owner’s counsel in New York, but no copy was posted. The court held that the service was good, and stated: “In point of fact, should there be any substantial doubt concerning this issue, notice through the statutory agent would become the key to the case.” Id. at 161. This statement appears ridiculous. It
to be mailed, there would be no logic in requiring posting.

When the lien is posted on the premises, the lien has been perfected, and, consequently, the second paragraph of section 1311.011(B)(1), which refers to perfection of the lien, would be applicable, and payment thereafter by the owner, even without actual knowledge of the posting, would not void the lien.\textsuperscript{99}

The first paragraph of section 1311.011(B)(1) requires receipt of a copy of the mechanic's lien affidavit by the owner. Will receipt by the owner's agent suffice? Section 1311.07 provides for service on the owner or his agent. Numerous sections of the old law specifically refer to the lien claimant "or his agent."\textsuperscript{40} This section does not use the word "agent" even once. Again, this is an example of careless draftsmanship of the new law which raises a serious question.

\textbf{C. Multiple Lien Claimants}

A subcontractor does not have a lien on property if full payment has been made prior to the owner's receipt of a copy of "an affidavit of mechanic's lien."\textsuperscript{41} If a subcontractor files a lien and then properly serves a copy of the affidavit on the owner before final payment, does this inure to the benefit of all subsequent lien holders who thereafter file liens, either before or after the owner makes full payment, but do not serve copies on the owner before full payment? Suppose further, that the owner then pays the amount due under this one lien, and the lien is cancelled, and that thereafter the owner makes payment in full. Here the owner has not made payment in full before receipt of a copy of an affidavit. Does the payment and cancellation of the first lien then permit the owner to make full payment and render all subsequent liens void? If the owner does not pay this lien claim but puts the funds in escrow, although the lien claimant may not accept the money or the escrow and refuses to cancel his lien, does this one lien and one notice

\textsuperscript{39} See, e.g., Ohio Rev. Code Ann. § 1311.02(A) (Page 1979).
\textsuperscript{40} Id. §§ 1311.04, .05, .06, .07, .11.
\textsuperscript{41} Id. § 1311.011(B)(1).
protect all other lien claimants if the owner is foolish enough thereafter to pay the original contractor in full? It is the author's opinion that the filing of one lien and service of a copy of that lien affidavit protects all other possible lien claimants. The owner knows from that one lien having been filed that the original contractor is not paying his subcontractors. The owner would be guilty of gross negligence if he does not do everything he can to protect himself, which would include insisting upon the section 1311.04 affidavits.

If the original contractor has not been paid in full, then a subcontractor may claim a lien, but not for an amount greater than the amount due the original contractor under a home construction contract or for an amount greater than the unpaid balance of the home purchase contract price under a home purchase contract. If the original contractor has not been paid in full, then a subcontractor may claim a lien, but not for an amount greater than the amount due the original contractor under a home construction contract or for an amount greater than the unpaid balance of the home purchase contract price under a home purchase contract. Furthermore, the total enforceable amount of all such liens cannot exceed the unpaid balance. If the amount under the above contracts still due is insufficient to pay all of the lien holders, then the lien holders are required to prorate the unpaid amount due the original contractor. Laborers, however, are given priority for work performed during their last thirty days on the job. Section 1311.05, which is part of the old law, contains a similar protection for the owner. It provides that if the owner makes any payment to the original contractor in accordance with this and prior section, he is not liable to the subcontractors, materialmen or laborers for any amount greater than that which he contracted to pay the original contractor, and "he may set off any damages which he sustains by reason of any failure or omission in the performance of such contract." The new section does not provide for setting off any dam-

42. Id. § 1311.011(B)(2).
43. The total amount of all liens for work done or for labor, materials, machinery, or fuel furnished in connection with a home construction contract that may be enforced in lien foreclosure proceedings shall not exceed the amount due under the home construction contract that has not been paid to the original contractor or the amount due under the home purchase contract that has not been paid to the original contractor.

Id.

44. If the amount due . . . to the original contractor is insufficient to secure the mechanic's liens of all lien claimants . . . , each mechanic's lien shall be secured by a pro rata share of the amount due to the original contractor, except that mechanic's liens filed by persons performing manual labor have priority for labor that was performed during the thirty-day period immediately preceding the date of the performance of their last labor.

Id.

45. Id. § 1311.05.
ages which the owner may sustain by reason of incomplete or improper work.

When a construction job gets in trouble, it usually means that the original contractor has underestimated the cost of the job and bid too low, or that costs have risen, or that the original contractor has not paid all of his subcontractors and materialmen out of his construction loan. In such cases, the cost to complete or correct the work, and to pay the lienholders, usually exceeds the balance due under the contract. The new act does not provide for completing or correcting the work; it merely requires the lien claimants to prorate the balance due under the contract. Therefore, the owner does not have the protection that he had under the old section, because he must now pay the lien claimants and then go to the expense of completing or correcting the unfinished or defective work. The same situation would affect the lending institution. In this respect, therefore, the consumer has less protection than he had under the old law. It may be argued that the balance due is subject to the same set-offs provided for in section 1311.05. However, because section 1311.05 specifically provides for such set-offs while section 1311.011 does not, it can also be argued that it was not the intention of the legislature to allow the set-off in home purchase or home construction contract situations. Actually it was poor draftsman-ship, but can the court add the omissions?

As mentioned earlier, section 1311.011(B)(2) provides that the lien claimants cannot have liens totalling more than the amount still due under the contract. When is this amount to be determined — when the first lien is filed, or when the owner receives notice of the lien? Should it be determined later, when the owner stops payment after having made additional payments after the lien is filed but before he receives notice? The answer cannot be found in the statute.

If two liens are filed at different times and the owner thereafter pays the original contractor before receiving notice of the first lien and before the filing of the second lien, is the first lien claimant entitled to a pro rata share of the amount due when his lien was filed or when he served a notice of filing? Is the second lien claimant entitled to prorate with the first or only in a pro rata share of the amount due when he filed his lien or when he gave notice to the owner? If the latter, there may be a different amount to be prorated every time a lien is filed.

It is possible that when the first lien claimant’s notice is received
by the owner, the owner will hold up that amount but continue payments to the contractor so that the amount he owes later is different. Is the owner liable to the first lien claimant for his entire claim out of the withheld amount, or does that lien claimant then prorate with later filed liens? Is this fair to the first? This is a serious question, and there is absolutely nothing in the statute that gives the slightest inkling as to the amount for which the owner is liable. Moreover, the statute permits unfair treatment of lien claimants, because the first who files and gives notice may be paid in full, whereas the others may not.

If the lien holder receives a written notice from the owner, part owner, purchaser or lessee that full payment has been made to the original contractor for the amount of the home construction or purchase contract and that the payment was made prior to the receipt by the owner, part owner, or lessee of a copy of a mechanic's lien affidavit, and the lien holder fails to cause the lien to be released of record within thirty days after he receives the notice, the lien holder is liable to the owner, part owner or lessee for all damages arising from his failure to cancel the lien. Nothing is said, however, about liability for damages sustained by a purchaser, although earlier in the same sentence the word "purchaser" is used twice—once in connection with giving the notice and again in connection with making the payment. Is the purchaser protected? In the author's opinion, he is not. This is not the only problem created by the draftmen of this section. Note that the section states that the lien holder is liable for "all damages." What damages may arise? The owner may have to bring suit to cancel the lien. In so doing, he would incur expenses for court costs, witness fees and attorneys' fees. Is he entitled to recover all of these costs contrary to the general law that attorneys' fees are not collectible in an ordinary civil suit? This again raises a serious question which will have to be decided by litigation.

The lien claimant has only thirty days in which to release his lien after receiving notice of full payment. The lien claimant, however, usually will not know whether the owner has made payment in full. If there are funds in escrow, the question may be raised as to whether the deposit of those funds constitutes full payment. If there is incomplete or defective work, questions may arise as to the exact amount due or paid to the original contractor. Must the lien holder blindly cancel his lien and lose his security without the opportunity to determine if the owner has done all that is required?
An attorney faces a difficult decision in advising his client whether he should cancel or refuse to cancel, risking litigation and liability if he chooses the latter course.

D. Multiple Owners

On whom is a copy of the lien to be served if there are multiple owners? In the case of Martin Co. v. Frautschi, two brothers, who were tenants in common, entered into a contract for repairs and alterations. A lien was filed, and a copy of the lien was sent by registered mail, the envelope having been addressed to “Messrs. Walter and Arnold Frautschi, Rossford, Ohio.” It was delivered to the place of business of the two parties, and the receipt was signed “Arnold and Walter Frautschi, Arnold Frautschi, Agent.” Walter Frautschi did not receive nor see a copy of the affidavit. The court found that the failure to serve Walter Frautschi voided the lien against either co-tenant’s interest in the realty. Every co-owner must be served to perfect a lien against the premises.

However, in Capital City Lumber Co. v. Ellerbrock which was certified to the Ohio Supreme Court as in conflict with Martin, the court held that the affidavit created a valid lien against the interest of the owner whose name was mentioned in the affidavit, but that it did not attach to the interest of the co-owner who was not named in the affidavit. Nowhere did the supreme court even discuss the question of service, which was the only question in Martin.

If the owners are husband and wife, would one letter addressed to Mr. and Mrs. John Smith but receipted by only one of the owners constitute valid service on both of the owners? In two Maryland cases, a notice was sent by registered mail to a husband and wife, who owned the property as tenants by the entirety. The notice was received by the wife who signed a receipt therefore, but it was not shown to have been received by the husband. It was thus held insufficient to support a lien. If the wife had shown the copy to the husband, would that have made the notice effective? In view of Martin, it is questionable, although in that case it was admitted

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46. 69 Ohio App. 283 (1941).
47. 177 Ohio St. 159 (1964).
49. See also Southgate Shopping Center Corp. v. Jones, 49 Ohio App. 2d 358 (1975) (holding that service of a summons was effective even though the summons was actually given to the defendant by the person who received it).
that the co-owner did not receive or see a copy of the notice.

The problem of service on a husband and wife was probably not settled by amendment of section 1311.10 of the Ohio Revised Code. This merely provides that if a married person is an owner of real estate and has knowledge of work being done on it under a contract with the owner’s spouse and without objection, the spouse is the authorized agent therein. How would a title examiner who seldom sees the contract know whether the spouse objected? Moreover, the section clearly refers only to one spouse owning the real estate and the non-owner spouse signing the contract. While the singular word “person” in the first line might include the plural, near the end, where reference is made to “the spouse of such person,” person obviously is singular. Therefore, this section would not apply if both spouses signed the contract, because it refers to the spouse having knowledge but not objecting. If both sign, both have knowledge and neither objects.

The old law provides that the original contractor may give the contractor’s affidavit to “the owner, part owner, lessee, or mortgagee, or his agent.” It also provides that the owner or his agent shall retain money due the principal contractor, and that the owner, part owner, lessee, mortgagee, or his agent may demand affidavits. Numerous other sections to which mention is made in this article specifically refer to an agent. However, nowhere in the new law is the word “agent” even mentioned. The new law refers to the owner, part owner, or lessee giving notice to release the lien, filing the affidavit of full payment, and requesting the original contractor’s affidavit. Similarly, it refers to contractors and subcontractors giving notice to the owner, part owner, lessee or lending institutions. The author submits that under the rule of “expressio unius est exclusio alterius,” while one spouse may, under section 1311.10, under certain circumstances, bind the other spouse to the contract, he is not an agent under any of the provisions of the new Act for service of notice, giving of notice, or making affidavits. Therefore, all notices have to be given to and by all

51. Id. § 1311.04.
52. Id.
53. See text accompanying note 40 supra.
55. Id. § 1311.011(B)(1).
56. Id. § 1311.011(B)(6).
57. Id. § 1311.011(B)(8).
husband-wife owners, not just to or by the contracting spouse. One letter, addressed to both, would not be good service, even if the spouse receiving it showed it, or even gave it, to the other.

IV. GROSS NEGLECT AND THE NEED FOR SUPPORTING AFFIDAVITS

A. When Affidavits Needed

One section of the old law provides that when any payment becomes due from the owner, part owner or lessee, or when the original contractor desires to draw money from them, or when any mortgagee makes a demand, the contractor must furnish an affidavit, supported by similar affidavits from all subcontractors and certificates from all materialmen and materialmen of subcontractors, showing the names and addresses of subcontractors and materialmen and setting forth the amounts due them. Until these were furnished by the contractor, neither he nor the subcontractors had a right of action or a lien against the owner, part owner or lessee. This section also prohibited the owner from making payments without first having received the affidavits:

[A]ny payments made by the owner, part owner, or lessee, before such statements are made or without retaining sufficient money, if that amount is due or it is to become due, to pay the subcontractors, laborers or materialmen, as shown by the said statements and certificates, are illegal and made in violation of the rights of the [subcontractors, laborers and materialmen], and their rights are not affected thereby.

The new law does not require the owner to obtain anything, and the owner may be protected if he has made payment in full before he receives a copy of a mechanic's lien affidavit and before the lien is perfected. An affidavit in accordance with section 1311.011(B)(1) that he has made full payment voids all liens perfected after the payment.

Section 1311.04 of the old law provided that the mortgagee might demand a contractor's affidavit, but did not require it to do so. In contrast, the new statute requires the lending institution to demand an affidavit from the original contractor before it makes any payment to the contractor. Thus the new section has com-

58. Id. § 1311.04.
59. Id.
60. Id.
pletely reversed the law: where the owner was previously required to obtain affidavits, he no longer need do so; and where the lending institution was previously not required to obtain an affidavit, it now must do so.63

B. False on Its Face

Section 1311.011(B)(5) provides that when the lending institution makes any payment under a home construction contract or on behalf of the owner or part owner (note that purchaser is not included here, even though a purchase contract is mentioned) under a home purchase contract, it may rely upon the original contractor's affidavit, unless the affidavit appears to be fraudulent on its face. It further provides that "if it receives the affidavit [t]he lending institution shall not be financially liable to the owner, part owner, purchaser,64 lessee, or any other person for any payments, except for gross negligence or fraud in making any payment to the original contractor."65 This is another instance where purchaser is omitted in one part but added in another part of the same paragraph. The question is thus raised whether the purchaser is protected here since the statute refers only to payments on behalf of the owner or part owner.

How can the original contractor's affidavit appear to be fraudulent on its face? If the affidavit complies strictly with the statute, how can it appear to be fraudulent on its face?

The section also imposes liability on the lending institution for gross negligence or fraud in making any payment to the original contractor. Section 1311.011(B)(4) only refers to payment by the lending institution to any original contractor. Do either of these sections apply to payments made to anyone other than the original contractor? Would payments made by the lending institution directly to subcontractors, materialmen, or to the owner fall within the purview of the negligence provision? If not, liens might be valid against the owner, but the mortgage has priority.

Attention has previously been called to the fact that the definition of original contractor makes every owner, seller, and purchaser under a home purchase contract an original contractor.66 Therefore, the lending institution must secure an original contractor's

63. Id.
64. Here, "purchaser" was added to the final draft. See note 17 supra.
66. See text accompanying notes 10-12 supra.
affidavit from the seller, the purchaser, and any other person who generally would be considered a contractor.

The new section also provides that the lien is void if the owner makes an affidavit of payment before the lien is perfected, except where the owner is guilty of fraud. If the owner's fraud validates an otherwise invalid lien, how is the lending institution, which does not know of the fraud, protected? Is it still protected in spite of the owner's fraud if it has obtained all necessary affidavits? \(^{67}\)

In a great many situations, work on a new house is not completed at the time of the sale when the loan is consummated. Moreover, certain work, such as grading, sodding, planting, and painting may be delayed because of the weather. Usually, funds are withheld to cover these items. Similarly, if any of the work is improper or defective, funds usually are withheld until the defects are corrected. These funds frequently are placed in escrow with the lending institution or with a title company. The owner, thus, cannot make an affidavit, stating that he has made full payment, and, consequently, cannot get the protection provided for in the law. The lending institution or the title company is merely the agent of the owner, not of the original contractor.

C. Supporting Affidavits

The affidavit of the original contractor must state not merely that the original contractor has paid for all labor, etc., furnished by the original contractor, but that he, the original contractor, has paid in full for all labor, etc., furnished by all subcontractors, materialmen and laborers prior to the date of the closing of the purchase or during and prior to the payment, except for those claims he lists as unpaid in the affidavit. \(^{68}\) How will the original contractor make such an affidavit that he has paid for materials furnished by subcontractors and their subcontractors or materialmen? How will he know that they have been paid? Normally, the original contractor will not pay the subcontractors' subcontractors, nor will he pay for materials furnished to subcontractors. The latter will pay their own materialmen, subcontractors, and laborers. Will it still be necessary for the original contractor to obtain the section 1311.04 affidavits from his subcontractors and statements from materialmen before he can make the affidavit? Even if he does, how can the original contractor state that he has paid for the

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67. See text accompanying note 23 supra.
68. OHIO REV. CODE ANN. § 1311.001(B)(4)(a).
work and material for which his subcontractors have actually paid?

Would the lending institution be guilty of gross negligence if it merely accepted the original contractor's affidavit without requiring proof of payments by subcontractors and materialmen to their subcontractors, materialmen and submaterialmen? The lending institution knows that the original contractor seldom pays the subcontractor's subcontractors and materialmen. Therefore, a statement that the original contractor has paid them is usually false, and the original contractor's affidavit is fraudulent on its face. The lender also knows that the original contractor has no way of knowing the subcontractors and submaterialmen have been paid unless he has the section 1311.04 affidavits.

A further weakness in this area is that submaterialmen cannot file a lien. How can an owner, contractor, or a lending institution protect itself, since the materialman merely has to give a certificate of the amount due him or that he has paid in full? The certificate says nothing about any materialmen from whom he purchased the material. This is also a weakness in the original law.

The attorney for the Ohio Lumbermen's Association has also raised this question. He states that the affidavit would place a burden upon the original contractor to determine the existence of claims against his subcontractors for labor and material, etc. The new law does not indicate how this may be done, but it is reasonable to assume that the original contractor could obtain this information by requiring all subcontractors to furnish the affidavits and materialmen's certificates provided in section 1311.04 which has been a part of the law for many years. If he does, we are again back to section 1311.04, and the new section protects nobody.

If it is reasonable to assume the contractor could or should obtain this information, but he does not do so, and the lender does not inquire whether he has done so, this might well constitute gross negligence on the part of the lending institution for which it is liable.

The statute says the lending institution shall not be liable to any person except for gross negligence or fraud in making payments to the original contractor. Should the lending institution be found grossly negligent, for how much will it be liable? The statute

69. Id. § 1311.001(B)(5).
70. Ivorydale Lumber Co. v. Cincinnati Union Terminal Co., 45 Ohio App. 353 (1933).
71. OHIO REV. CODE ANN. § 1311.001(B)(5) (Page 1979).
makes no reference whether it is liable for merely the amount of lien, interest thereon, attorney fees, court costs, any damage to the owner because of delay in completion of the job, or other possible damages.

Section 1311.011(B)(5) of the Ohio Revised Code provides that the lending institution may accept the affidavit of the original contractor and act in reliance upon it, unless it appears to be fraudulent on its face. The term "act in reliance upon it" obviously requires that the lender must pay all unpaid claims shown on the affidavit before paying the contractor the balance due him. It might be gross negligence if the lender pays the contractor this balance without requiring the listed amount of subcontractors' and materialmen's claims to be verified. If a figure on the affidavit is either deliberately false or incorrect because of a dispute, does the subcontractor lose his lien rights for the balance? We do not believe so. The affidavit merely gives the mortgage priority over the lien. Nothing in the Act addresses this issue. Does this provision affect the validity of a subcontractor's lien which has been omitted from the affidavit? The Act does not even so suggest. Section 1311.04 makes such a lien invalid.

Nowhere in the Act is there any statement that the lender's mortgage shall have priority over the subcontractor's liens if the proper affidavit is obtained, although that is obviously the intent. It merely says that the lender shall not be liable to anyone for payments made to the original contractor. Does this imply that the lender could be liable for payments to the owner-purchaser, subcontractors or materialmen, or others, and might have to repay the money it paid to others besides the original contractor? If it is not liable for payments to the original contractor or even others, the liens would not have priority over the first mortgage, but would still be good against the owner, subject to the provisions for prorating, and the possible protection given by the paid-in-full affidavit if proper and timely filed. This provision, however, does not protect either the owner or the lender against the filing of liens and an ensuing law suit.

The new lien law says that the owner may require an affidavit from the original contractor stating the amounts presently due the
subcontractors, materialmen, or laborers, or stating that the amounts have been paid. 74 However, it also says the owner shall not be prejudiced by his failure to request or obtain the affidavit. 75 It nowhere states that if he gets the affidavit, it gives him any protection. The old law specifically required the owner to obtain these affidavits together with supporting affidavits and certificates from materialmen and gave complete protection if he paid in accordance with them. Of course, the owner is protected under the new section, if he pays in full within the time specified and makes an affidavit to that effect. Since the latter cannot be done until final payment, is the owner required to get section 1311.04 affidavits from the original contractor on prior partial payments to fully protect himself? Yes. If funds are held in escrow, the owner cannot make the final payment affidavit, and he must likewise get such affidavits for complete protection. 76 Since the new affidavit is different from section 1311.04 affidavits, since the new law says the owner need not get the new affidavit while section 1311.04 says he must obtain its affidavits, the two are not inconsistent and the owner must always get the section 1311.04 affidavits until he has paid in full and at the appropriate times makes the appropriate paid-in-full affidavit, which will be his only protection. However, the owner may be protected under the proration section, subject to the objections herein raised to that section.

The new lien law offers no protection to the owner even if he gets the original contractor’s affidavit. It merely provides that he need not make any payments until he gets it. The statute does not even provide that the owner must pay all persons shown on the affidavit. 77 May the owner disregard them and pay the original contractor without seeing that the subcontractors are paid? If such is done, it is the author’s opinion he would be guilty of fraud or gross negligence. 78

D. Other Lender Problems

In Gardner Plumbing v. Cottrill, 79 the Ohio Supreme Court held that a lending institution was not obligated to get affidavits as described in section 1311.04 of the Ohio Revised Code before disburs-
ing. The new statute, however, requires a lending institution to se-
cure the affidavit set out in section 1311.011(B)(4)(a) of the Ohio
Revised Code. The latter affidavit is more abbreviated. Can the
lending institution still insist upon receiving the more complete
form? The lending institution, of course, can insist upon anything
it wishes before lending money. However, if it has given the owner
or purchaser a binding commitment and had him execute the nec-
essary note, mortgage, and other papers, it probably would be le-
gally obligated to make disbursements on the abbreviated affidavit.
Even if there is no legal obligation, the question of competition
enters; if your competitor does not require the more complete set
of affidavits, it might be necessary to go along with the abbreviated
affidavit or risk losing business when word gets around to brokers
and contractors of your position in the matter.

The last paragraph of section 1311.011(B)(5) of the Ohio Revised
Code provides that "[a]fter receipt of a written notice of a claim of
a right to a mechanic's lien by a lending institution, failure of the
lending institution to obtain a lien release from the subcontractor,
materialman, or laborer who serves notice of such claim is prima
facie evidence of gross negligence." The statute could have gone
further and said it is evidence of gross stupidity, for why would
any intelligent lending institution fail to obtain a lien release after
receipt of such a notice?

If no lien has been filed, how do you get a release of lien? If the
lending institution pays the lien claimant the full amount due or
claimed, the lending institution should in addition obtain a release
of the right to file a lien, since the statute requires a release of lien,
not merely payment. Whether the release would have to be a re-
lease of work done or material furnished to date, or whether it
would have to be a release of the right to a lien for future work to
be done or future material to be furnished remains to be answered.

There are problems that can arise in this seemingly simple re-
lease situation. Many associations have several offices. Suppose a
building association has a loan closing set for 10 a.m. in its down-
town office. At 9:30 a.m. subcontractor delivers a notice of a claim
of a right to a mechanic's lien to another office of the lending insti-
tution in the same or even another city. This is a receipt by the
lending institution. Unless the lending institution has a procedure
by which notice of that receipt is immediately recognized by the
manager of that office, and unless he immediately calls the main
office, the lending institution may disburse funds in one office after
the notice has been delivered to another office. It, therefore, would be prima facie guilty of gross negligence. The mail in a branch office may not be opened immediately, or, if opened, the mail clerk may not recognize the significance of the notice and not call it to the attention of the manager. This is a serious hazard to lending institutions having several offices.

V. SUBCONTRACTOR PROBLEMS

A. When and on Whom Notice is Served

Under the new section the only protection a subcontractor, materialman, or laborer has is to give notice of his claim to the lending institution, not to the owner or purchaser.80 Nowhere does this section authorize any notice to the owner or purchaser. The effect of a notice given to the owner or purchaser, either alone or in addition to the lending institution, is not covered. Could the owner disregard this notice and continue to pay the original contractor, who will solemnly swear that he will pay the subcontractor and materialmen? Would the owner be guilty of fraud in thereafter filing an affidavit of full payment? Probably not, in view of the fact that the act is intended to give the owner the right to blindly shut his eyes, make full payment to the original contractor if he has not received a copy of the lien affidavit, and avoid liability. The owner might be stupid to do so, but it is done every day. For example, one printed form of an original contractor’s affidavit prepared by a local company, which is frequently used by architects, provides that the contractor will pay all subcontractors and materialmen within five days after he receives a draw.

Where a subcontractor wants to give a notice of claim of a right to a mechanic’s lien to the lending institution,81 how will he know who the lending institution is if the loan was made while the work is in progress? The subcontractor may not even know who the prospective purchaser is, since nothing may appear of record. The title and mortgage loan might still be in the original contractor/builder’s name. The new lending institution may be an entirely different institution. Moreover, if the owner or purchaser pays out of his own funds, there will be no mortgage of record. The subcontractor in these cases has no protection.

The attorney for the Ohio Materialmen’s Association suggested

81. Id.
that a supplier send a letter to the lending institution immediately after its first delivery. The attorney does not claim this is a notice of a claim to a lien. Could it not be so construed, however?

Does a materialman who deals directly with the owner by giving him notice risk liability for interfering with the business relationship between the owner and contractor? The new law only provides for notice of a claim of right to a lien to be made to the lending institution,82 not the owner. Owners repeatedly have received notice from suppliers and subcontractors during and even before any work has been done. There are no reported cases, however, where suit was brought by the original contractor claiming such business interference.

What form this claim notice from the subcontractor must take is not clear. A subcontractor has a right to file a mechanic's lien for work done by him when his first work on the job is done. This lien is retroactive to the date the first work was done on the job by anybody, possibly even long prior to the lien claimant doing any work. Can a subcontractor or materialman who has contracted to work or furnish material give the notice of his right to a mechanic's lien immediately, before he has done anything? If he does have the right, frequently he cannot set out any definite figure, as in the case of a cost plus or cost plus a fixed fee contract, purchases on open account, purchase orders subject to cost escalation, and other cases. Even if he has done certain work, he may not know how much more he may have to do. Frequently there are extras on the job of which the subcontractor would not be aware when he gives the notice. It is the author's opinion that the notice to the lending institution need not specify the amount to be paid. If no amount is set forth, however, the lender as a practical matter is precluded from making any disbursements.83

Since the new law does not even suggest the form, section 1311.05 of the Ohio Revised Code, providing for a similar notice to the owner, offers some suggestions. While it is probably not binding, conformity to this latter section would probably comply with the new section, although conformity is not required by any section of the law.

B. Subcontractors Omitted From Contractor's Affidavit

Under section 1311.05, subcontractors and materialmen whose

82. Id.
83. Id. § 1311.04.
names have been omitted from the affidavits given by the contractor to the owner, may themselves give notice to the owner “of the nature of the machinery, material, or fuel furnished, or to be furnished, or labor performed, or to be performed, the amount due or to become due thereafter.” The statute sets out the form of notice. It then provides that the person serving the notice is entitled to “the rights which he would have if his name and the amount due him as set forth in said notice were contained in the affidavit of a contractor or subcontractor.” The owner or lending institution, if it receives notice of a claim of right to a lien, must retain sufficient funds to pay the claim whether the amount stated is presently due or will become due in the future for work done or to be done, whereas the contractor’s affidavit merely states the amount due to date of the affidavit. The subcontractor can estimate the amount to become due him for work not yet done.

Since the owner or lending institution must hold up the amount to become due for work not yet done, if the omitted subcontractor continues to furnish material or perform labor, and on final disbursement there is not enough to pay everyone, does he get paid in full the amount of the claim the owner is holding or must he prorate with all lien claimants whether or not they have given notice? Neither the statute nor the cases provide an answer.

The new Act refers to a receipt by the lender of a notice of a claim of a right to a mechanic’s lien. Nowhere does it refer to a notice to the owner. Consequently, section 1311.05 is not inconsistent with section 1311.011, and the former still is in effect and permits that notice to the owner, who then would have to hold the amount set out in that notice. Moreover, if a copy of the notice of a claim is also given to the owner and he disregards it and pays the original contractor, he unquestionably would be liable to that lien claimant.

Since section 1311.05 provides that a person whose name has been omitted from the contractor’s or subcontractor’s affidavit may serve on the owner the notice provided by that section, can the notice be given before the contractor’s or subcontractor’s affidavit is given to the owner? If he is listed but the amount is incorrect, can he give the notice? Since the Act says it shall be liberally inter-
Interpreted, the answer should be yes to both questions.

Edward A. McCarthy Sons Inc. v. Fleming\(^8\) held that a principal contractor must certify in his affidavit not only the names of those who have actually performed work and to whom money is due at that time, but also the names of all persons with whom he has contracted to perform work in the future and to whom money will become due. The Ohio Revised Code likewise so provides. If the amount stated in the affidavit includes money to become due for work not yet done, or names of persons who have not yet done work, the owner in effect must hold that amount in trust for those claimants. If, when the job is completed, there is not enough due the original contractor to pay all subcontractors, it appears that the omitted subcontractor who gave notice or filed notice of a claim would be entitled to be paid in full. The others would prorate.

Since the owner must retain enough money to pay the amount due or to become due, must he retain the entire amount estimated to become due for work not yet done? The statute contemplates that each draw must pay amounts due or to become due as shown on the affidavits for that draw, or the owner must hold enough to pay amounts to become due. This would play havoc with every draw and effectively stop all disbursements unless the owner could disregard all affidavits and notices, blithely pay the original contractor, and then file his paid-in-full affidavit. We do not believe the new Act goes that far. While the Act does not specifically so provide, section 1311.04 and the new Act contemplate the owner shall see that persons listed on the original contractor’s affidavit are paid in full. Can the owner disregard the creditors listed, still pay the original contractor, and then file his paid-in-full affidavit as the new Act seems to provide? We do not believe the new Act goes that far. While the Act does not specifically so provide, section 1311.04 and the new Act contemplate the owner shall see that persons listed on the original contractor’s affidavit are paid in full. If the owner can still pay the original contractor, why require him to give an affidavit? Moreover, no reputable lending institution would go along with this.

The owner or purchaser may require the original contractor’s affidavit and may withhold any payment due until such affidavit is

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88. 170 N.E.2d 269 (Ohio 1959).
provided. Unlike the lending institution, the owner need not require the affidavit, and he is not prejudiced by his failure to obtain it. This contemplates that the owner will pay according to the affidavit. If the owner does request and receive this affidavit, the statute nowhere says the affidavit protects him. The statute only protects the lending institution. Consequently, the only protection the owner gets from this affidavit is by ensuring that he or the lending institution pays all unpaid persons appearing on the affidavit. If they are not paid, the owner is not protected.

The new law does not govern a builder who is building a house for the general market. However, if during construction or upon completion, the original contractor enters into a contract to sell that house to a purchaser who will later occupy it, a home purchase contract is created and the new law applies. If the contractor has not paid some of his subcontractors prior to signing the contract of sale and still has not paid them before closing, will an affidavit omitting these unpaid subcontractors protect the lending institution? Will the owner who makes an affidavit that he has made payment in full to the original contractor be protected? In other words, can the original contractor, by signing a contract of sale, cut out the lien rights of subcontractors and materialmen, which rights relate back to the date of the first work by anyone on the job? Probably so.

No lending institution shall make any payment to any original contractor until he has given the lending institution the statutory affidavit. Suppose the lending institution foolishly makes payments to the owner, part owner, purchaser or lessee, or to a subcontractor who has given notice. Is the lending institution liable, since it has not made payment to the original contractor but to someone else? A lending institution is defined as one who makes disbursements to any original contractor or the owner, part owner, purchaser or lessee, thus contemplating that the lending institution may make payments other than to the original contractor.

How will a lending institution know whether the owner or purchaser has received a copy of the lien? While not required to do so, in making every disbursement the lending institution should re-
quire an affidavit from the owner or purchaser that he has not re-
ceived a copy of any lien. If the owner gives such an affidavit and
the affidavit is false, the building association may not be protected
unless it has strictly complied with its obligations under the law. If
it has, it will have a first mortgage prior to the lien. It may also be
protected under the open end mortgage statute.

An owner who wants to put his house on the market may engage
a contractor to make some repairs or improvements on his house so
that he can obtain a better price. If he then sells the house to a
purchaser under a home purchase contract and the purchaser goes
to a lending institution for a loan, the lending institution must ob-
tain an affidavit from the original contractor. Since every owner/
seller by definition is an original contractor, the lending institution
must obtain this affidavit from the seller. The lending institution
may also know of the work that has been done on the house. Can
the lending institution rely solely on the affidavit of the seller/origi-
nal contractor, or is it required to obtain a similar affidavit from
the former original contractor who has done work on the house? It
seems clear that the lending institution must obtain affidavits from
both the original contractor who has done work and from the origi-
nal contractor/seller. Since the definition of original contractor also
includes a purchaser, the lending institution may have to obtain an
affidavit from every purchaser as well. In other words, a lending
institution may be required to obtain three original contractors' affi-
davits.

C. Disputed Claims

Section 1311.011(B)(8) of the Ohio Revised Code states:

If a subcontractor refuses to supply a lien release to the original
contractor, owner, part owner, lessee, or lending institution [pur-
chaser is not included] because the amount of money that the origi-
nal contractor owes the subcontractor . . . is in dispute or is not yet
known, the owner . . . [or] lending institution shall withhold from
payment to the original contractor [the] amount claimed or esti-
mated to be due by the subcontractor . . .

95. Under the Open End Mortgage Law, the lending institution is not required to check
the records before each disbursement. Of course, if the lien has been filed and the lending
institution checks the records before each disbursement, as it should, it may be protected.
97. Id. § 1311.011(A)(4).
98. Id. § 1311.011(B)(8). This substantiates the author's opinion that in the claim of right
to a lien, the claimant need not set out any amount. It may not yet be known.
If the subcontractor refuses within five days after receipt of a written request from either the original contractor or the lending institution (owners and purchasers are not included here) to state the amount due or estimated to become due, the original contractor shall then state the amount. The owner or lending institution must pay the withheld amount to the original contractor when: the subcontractor gives written notice that he has been paid in full; or the subcontractor delivers a lien release; or the original contractor provides the subcontractor with a bond in a form satisfactory to the owner or lending institution and in an amount equal to the amount claimed to be due. The lien release shall be valid and enforceable without separate consideration for the release.

If the amount to be due the subcontractor is not yet known, then the statute specifically permits an estimate. If the subcontractor estimates low and the owner pays the contractor the balance due him, the subcontractor will have no claim or lien right against the owner for the difference. Consequently, the subcontractor would have to estimate high to be fully protected.

Even though the estimate is high, the owner must withhold that amount. This means that the contractor may not get all to which he may be entitled at the time, and the balance due on that draw may not be sufficient to pay out. Is the subcontractor liable to the original contractor for high estimates? There is nothing in the law on this question. If the subcontractor grossly overestimates, one may argue he is liable to the contractor or owner for any damage resulting therefrom.

D. Bonding a Lien

Section 1311.11 of the Ohio Revised Code provides for binding a lien, either before or after suit has been commenced on the lien. A surety bond must be provided by the owner for double the amount of the claim secured by the lien, conditioned upon payment of any judgment and costs. Judgments bear interest. The bond must be in favor of the lien claimant and executed by sufficient sureties. It must also be approved by the common pleas

99. Id.
100. Id. § 1311.011(B)(9). The decision in Beebe Constr. Corp. v. Circle R Co., 226 N.E.2d 573 (Ohio 1967), can thus be avoided. It was held in Beebe that waivers of a lien must be supported by valuable consideration to be valid and binding on the lienholder.
101. OHIO REV. CODE ANN. § 1311.11(C) (Page 1979).
court, and notice of hearing on the application for approval must be given to the lienholder or his agent or attorney. The only issue to be determined at the hearing shall be the sufficiency of the bond. If found sufficient, the court shall order the bond retained in the file. The security of the bond is substituted for the lien, and the lien is deemed void and the property wholly discharged therefrom. If a foreclosure action has already been filed, the court will dismiss that action, which then proceeds on the bond. The sureties are brought into the case as additional parties.\textsuperscript{102}

The new law, however, gives the claimant little protection. He has nothing to say about the form of the bond or the sureties. The statute nowhere states what its form shall be. There is also no provision for interest should the matter be delayed. The right to approve the form of the bond is limited to the owner or lending institution. The statute does not say who must approve the sureties as the old law provided. Does the owner, lending institution or subcontractor have anything to say about the sureties? Can they object to the sureties or can the original contractor cram the sureties down their throats? Moreover, the bond is only for the amount of money claimed to be due. Under the old law it must be \textit{double} the amount due.

Even if the contractor has a property owner sign the surety bond, there is nothing to assure the subcontractor that the owner actually has any equity in the real estate. It may be mortgaged to the hilt. The surety may not have good title to the real estate. If the surety does have clear title, he may mortgage it or sell it the next day. Then no one has any protection except through the personal liability of the surety. Nevertheless, neither the subcontractor, the owner, nor the lending institution has anything to say about that. Under the old law the court may require a surety company bond.

The new law provides the owner and lending institution \textit{shall} pay over the withheld money to the original contractor if the contractor provides the subcontractor with a bond.\textsuperscript{103} How will the owner know that a bond has been provided unless he actually sees it being handed to the subcontractor? The contractor may give the bond to the subcontractor, who may refuse to answer the owner's or lending institution's questions as to whether he has received the

\textsuperscript{102} Id.

\textsuperscript{103} Id. § 1311.011(B)(8)(c).
bond. There is nothing which requires a subcontractor to inform the owner or lending institution about receipt of the bond. Under the original section, however, the court orders the bond retained in the file so that it is available for public inspection. The original section also specifically provides that when the bond is approved, the lien shall be void and the property fully discharged therefrom. 104 There is nothing in the new section which provides for the discharge of the lien or dismissal of the foreclosure suit upon the giving of the bond unless the owner has paid the original contractor in full and the owner can make the paid-in-full affidavit. He cannot do this because he has not paid the original contractor in full before his receipt of a copy of the mechanics' lien nor before the lien was perfected.

Under the old section, even if the bond has been given, the owner does not pay his money until the validity of the lien has been determined. If there is a dispute as to the validity or the amount of the lien of a subcontractor, the owner continues to hold that amount until the matter is settled in court or by the parties. 105 Under the new section, though, the owner has no discretion in the matter, because the statute says that the owner, part owner, lessee and lending institution shall pay the withheld money to the original contractor when the bond is given. 106 If the court finds the lien valid and renders judgment against the owner for interest and costs, he must pay the judgment and try to collect from the contractor, since the sureties are liable only for the face amount of the lien, and the owner will have to try to collect his money from them, if solvent, but cannot collect interest and costs.

The new statute provides that bond can be given only if the amount due the subcontractor is in dispute or is not yet known. If the subcontractor has filed his lien, he may or may not have filed suit on the lien. Both the lien and the complaint, if already filed, will set out the amount of the lien, which may or may not be disputed by the original contractor. What is there of record to show that the amount is in dispute until the contractor files an answer? It may be that the contractor has miscalculated, and there will not be enough money to pay out. The contractor may be unable to complete the job and the owner may have to complete it at addi-

104. Id. § 1311.11(C).
105. Id.
106. Id. § 1311.011(B)(8)(c).
tional cost. The contractor may be broke. The owner may have paid the original contractor, hoping to rely on the owner's paid-in-full affidavit, and the original contractor may not have paid the subcontractor. There are numerous reasons why the amount may not be in dispute but still may not have been paid and the lien filed. In all of these cases, the original contractor could not provide the subcontractor with a bond, since the amount is not in dispute. Unless the contractor advises the owner or lender that the amount of the lien is in dispute or is not yet known, the bond is not a valid bond and no owner or lender should pay. It is also possible that, in the examples suggested above, the bond may not give the owner or lending institution adequate protection, because the other claims, together with the lien, may exceed the amount due from the owner.

The only effect of the bond seems to be to protect the original contractor so that he can get his money from the owner before paying the subcontractor by merely giving a bond. It thus seems contrary to the spirit of the new Act, which is to protect the owner and the lending institution.

Does the new bonding section preclude the use of the old section 1311.11 bonding section? The new section provides for a bond by the original contractor only, while the old section provides for a bond which the owner and possibly the mortgagee could give, the statute not being clear as to the mortgagee. The old statute provides for a method to cancel the lien, by giving notice to bring suit or by bonding. There is no real conflict between the two sections and the owner or mortgagee can still exercise his rights under the old law. However, the old law will not give the original contractor his money. He must exercise his rights under the new statute and give the bond. There may be a situation, therefore, where two bonds are held, one by the owner or lender and one by the original contractor. In the event of a law suit, which bondsman will pay the judgment should the court find the lien valid? Will the bondsmen prorate? Suppose the bond under the new statute is not collectible because the surety is financially irresponsible and has transferred or mortgaged his property. Is the surety under the old law liable for the full amount, or is he entitled to prorate even if the new bond is worthless? These questions are all unanswered.

E. LIABILITY THROUGH AN AGENCY RELATIONSHIP

Section 1311.011(B)(5) of the Ohio Revised Code, part of the new law, provides that if the lending institution accepts an affida-
vit from the original contractor that all subcontractors have been paid, and acts in reliance on it, the lending institution is absolutely protected unless the affidavit appears to be fraudulent on its face. The lending institution would also not be liable under section 1311.04 of the Ohio Revised Code, because the new section specifically preempts the old law, section 1311.011(B).

However, liability against the lending institution can still be found. In the case of Falls Lumber Co. v. Heman, the court of appeals held that "[a] savings association is liable in an action of tort for any loss suffered by the mortgagor which is proximately caused by the failure on the part of the savings association to exercise ordinary care in an agency undertaken to disburse funds of the mortgagors." The court held the association did not exercise ordinary care in failing to get section 1311.04 affidavits from the original contractor that the subcontractors had been paid.

In Gardner Plumbing v. Cottrill a similar question arose. The Ohio Supreme Court held that section 1311.14 of the Ohio Revised Code relieved a mortgagee from any statutory duty to make a written demand for affidavits under section 1311.04. However, the last paragraph of the opinion notes:

To hold appellant [the lending institution] liable on an agency theory for negligently disbursing the funds of the mortgage, appellees must establish by competent evidence that such a relationship existed, the burden of proving the agency being upon the party who will assert it. In the case at bar, the testimony before the trial court on this question was not only conflicting, but at times was unfavorable to appellees' position. Furthermore, appellant did not make direct payments to the contractor, but drafted each check "to the order of Charles F. Cottrill and Norma Jean Cottrill," thereby giving appellees the option of refusing to endorse the checks over to the contractor. Upon a review of the record in the instant case, it is our conclusion that no agency relationship was established from which appellant could be held liable for the damages sustained by appellees.

Therefore, notwithstanding the provisions of the new law, if an agency relationship is clearly established as in Falls, the lending institution will be liable. As the court said in Falls, the lending

107. Id. § 1311.011(B)(5).
110. Id. at 115-16, 338 N.E.2d at 759-60.
institution could have protected itself and the owner by obtaining affidavits under section 1311.04 of the Ohio Revised Code.\textsuperscript{111} The new law does not offer as much protection, since the original contractor may give a fraudulent or careless affidavit not supported by any other affidavits. Lending institutions should thus not be lured into believing that they are absolutely protected under the new section. They should obtain the section 1311.04 affidavits where there has been any work done on the property. Regarding preliminary payments, there is no question but that the lending institution must obtain those affidavits to be protected. However, if there is only one payment at the conclusion of the work, the lending institution should not rely on the new statute entirely.

VI. LIEN PRIORITY

It has frequently been thought that prior recording of the mortgage gives the mortgage priority over all liens. This is incorrect. The Ohio Supreme Court, in Wayne Building & Loan Co. v. Yarborough,\textsuperscript{112} effectively eliminated recording priority:

If, under a mortgage contemplating advances for the construction of improvements upon the mortgaged premises and properly recorded prior to the reasonably apparent commencement of such construction, disbursements are made by the mortgagee to the mortgagor, which disbursements are not made in the manner prescribed in section 1311.14 of the Ohio Revised Code, and are not actually used to pay for such construction, the lien secured by the mortgage is subsequent in priority to valid mechanics' liens arising out of such construction or to other properly recorded mortgage liens attaching to the subject property, to the extent that such disbursements are made after the attaching of such mechanics' liens, or such other mortgage liens, unless the mortgagee was in fact obligated to make such advances.\textsuperscript{113}

The question has been raised whether in a mortgage containing section 1311.14 provisions, those provisions are exclusive, or whether prior recording of such a mortgage with that provision in it still gave protection. In In Re Taylor,\textsuperscript{114} the trial court held that a construction mortgage must rely on its provisions and not on prior recording. This was reversed by the Sixth Circuit Court of

\textsuperscript{111} 114 Ohio App. at 265, 181 N.E.2d at 715.
\textsuperscript{112} 11 Ohio St. 2d 195, 228 N.E.2d 841 (1967).
\textsuperscript{113} Id. at 196, 228 N.E.2d at 843-44.
\textsuperscript{114} 16 F.2d 303 (1926).
Appeals, which held that the construction mortgage section does not affect priority of a mortgage filed before construction, although it contains the clause of that section. Wayne, however, states that if disbursements are not made strictly in the manner prescribed and are not actually used to pay for such construction, the prior recording does not protect the mortgagee unless the mortgagee was obligated to make such advances. In other words, prior recording was not sufficient to give protection under a construction mortgage unless the disbursements are made either as prescribed in section 1311.14, and in practice they are never made and can not be made that way, or unless the proceeds can be traced to the construction. If the mortgagee was obligated to make such advances, it has priority.

Although the mortgage in Wayne satisfied the formal requirements of section 1311.14, distribution was not made as required by it, nor was there any proof that the proceeds were actually used in such improvement.

The supreme court also said that the Wayne mortgage would not enjoy priority over a mechanic's lien unless its recording, which must take place prior to commencement of the first work, was valid and proper as to the parties. The court found the mortgage was a prior recorded mortgage. The fact that the mortgage may have been properly recorded prior to the commencement of construction does not prevent the mortgage from enjoying priority.

In other words, the fact the mortgage contains the construction mortgage provision does not take away its rights under prior recording. The supreme court stated:

However, the applicability of the doctrine of obligatory advances . . . , where the attaching of mechanic's liens intervenes between the recording of the mortgage intended to secure the advances and the actual making of the advance by the mortgagors, appears to be a question of first impression in this court. In Rider v. Crobaugh, priority was accorded to the construction mortgagee on the basis of the recording of the mortgage before the commencement of construction without discussion of the obligatory or nonobligatory nature of the advances involved.

115. 20 F.2d 8 (6th Cir. 1927).
116. 11 Ohio St. 2d at 209.
117. Id. at 210.
118. Id. at 213.
119. Id. at 214 (citation omitted).
The court noted that Rider was decided before Kuhn and, consequently, Rider could not have considered Kuhn:

Therefore, it is held that where nonobligatory advances are made after the commencement of construction and not in accordance with section 1311.14 of the Ohio Revised Code (or are not shown to have been actually used in the construction for which liens are claimed) under a mortgage contemplating future advances which was recorded prior to such commencement of construction, the lien of such advances is held subsequent in priority to the mechanics liens arising from such construction.120

The supreme court, therefore, effectively disposed of the theory of mere prior recording of a mortgage giving priority over mechanics' liens which attach, even for work commenced after the recording.

In Akron Savings & Loan Company v. Ronson Homes, Inc.,121 the supreme court copied Syllabus 5 of the Wayne case as Syllabus 1. Syllabus 3 of the Akron case reads:

In such case, where there is an oral agreement between the mortgagor and mortgagor, in addition to the written mortgage agreement, under which oral agreement the mortgagee states that money will be available in the mortgagee's loan in process account for the payment of advances, but there is no agreement that it is mandatory that the mortgagee disburse definite and certain sums under definite conditions or in a particular manner, such oral agreement does not make such advances obligatory where such advances are not made obligatory by the written agreement.122

VII. CONCLUSION

The Ohio Land Title Association paid two attorneys a substantial fee to prepare a comprehensive revision of the Mechanics' Lien Law, which passed the legislature a few years ago but was vetoed by the governor. This latest bill was not drafted by any lawyers' organization but by or on behalf of consumer advocates. It gives an owner or purchaser some protection he did not previously have. It does not give complete protection, as is evident by the questions raised in this article. If used in conjunction with the section 1311.04 affidavits, it would eliminate a great many of the foregoing questions. However, no law can protect completely against a dishonest or financially distressed contractor.

120. Id. at 219.
121. 15 Ohio St. 2d 6 (1968).
122. Id. at 6-7 (emphasis added).
A POTENTIAL THREAT TO LABOR ARBITRATION: THE CASE OF THE UNINVITED GUEST

By John Andrews* and Orville Andrews**

In the post-World War II era, few, if any, labor relation institutions have earned the exalted designation grievance arbitration. Final and binding grievance arbitration has become the quid pro quo for a no strike clause or, more accurately, the substitute for a strike.

Grievance arbitration systems have not been cast from a single model. The parties have developed systems to meet their own unique needs. Arthur Stark, in his presidential address to the National Academy of Arbitrators, listed a few of the many variants: steel, auto, rubber, and construction; expedited procedures in steel, brewery, fabrication, airlines, and broadcasting systems; appellate and quasi-appellate procedures in publishing, coal, railroads and the public sector.¹

There are certain hallmarks, however, which distinguish grievance arbitration:

1. It involves two parties. One is the employer and the other is the union, the exclusive collective bargaining agent.
2. The proceedings are essentially a private system of law.
3. The arbitration system and procedures are embodied in a written agreement which almost always includes a no strike provision.
4. The exclusive union selects and processes the cases it wishes to take to arbitration.
5. The arbitrator's jurisdiction is limited to applying and interpreting the collective bargaining agreement.

Arbitrators, well-wishers and critics alike have consistently overstated the case for arbitration. Eventually, arbitrators were urged to apply and interpret external law.² At the same time, Vaca v. Sipes³ continues to spawn its progeny.

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* Assistant Prosecutor, Cincinnati, Ohio. A.B., Kent State University; J.D., Salmon P. Chase College of Law.
** Arbitrator and member of the National Academy of Arbitrators.
3. 386 U.S. 171 (1967). Of course, this case sets the standards of liability for a union's
No wonder that it seemed quite reasonable to many that the individual employees, and their counsel should be allowed, even encouraged, to appear at and participate in the arbitration hearing created by contract. Never mind that this forum settled disputes between the parties as to the interpretation and application of that contract.

In this same vein, a number of authors urged the end of the exclusive state of the union. But if employees can appear at the arbitration proceeding with their own counsel urging his own theories and facts, then a big chunk of exclusivity has already fallen. The end of exclusivity would sound the end of labor arbitration as a system of private law.

In the last couple of years, the senior author has heard at least a half dozen cases in which persons other than the traditional parties appeared to participate in the hearing. In two of these cases, the union accepted the attorney for the individual as his “special counsel” and left the matter up to him. In two other cases, counsel for the individuals was permitted to remain as a nonparticipating observer by agreement of the parties. In one case, individual counsel, after hearing objections of both parties, withdrew but left his client at the hearing. The authors are unaware of any legal proceeding arising from any of these cases.

Most interesting was a recent case in which, as one of the authors entered the hearing room, company counsel walked over, had an intense conversation with the union's attorney and then turned to address the author even though he had not yet unloaded his brief case. The attorney had heard rumors that the grievants had obtained separate private counsel to represent them. Counsel for failure to fairly represent an employee. The court states that if a grievance is “ignored” or handled in a “perfunctory manner” by the union, the union has breached its duty of fair representation. Id. at 191. Cf. Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) (employer and union are not liable to employee discharged due to union’s failure to afford fair representation).


5. Id.

6. Schatzki, supra note 4, at 913.

the company wanted it known that if there were persons at the hearing other than union counsel, officers, members or witnesses, he would not proceed with the hearing. The arbitration provision, he said, clearly indicated that the employer had agreed only to arbitrate with the union and not with just anyone who happened to walk into the hearing room. In this case, there were no strangers in the hearing room and there was no separate representation of the grievants. The hearing proceeded. But someday, when push comes to shove and the magic accomodator is stilled, it will be necessary to face the issue. Even if both sides agree to permit individuals and their representatives to present their own cases, it does not appear that any problem is solved.

The scholars and the courts appear to believe that the leadership of various labor unions in this country are unresponsive and out of touch with the rank and file members. The solution proposed by the critics of the concept of exclusive representation is to allow the membership more control over the day to day affairs of the union. In this regard, the proposals usually ask that the employee have greater individual freedom and involvement in the handling of grievances through the grievance resolution machinery.

Two of the more provocative proposals are Eileen Silverstein’s “interest-group-veto system” and George Schatzki’s “more appropriate, albeit not perfect, solution under the existing statutes.”

8. See note 4 supra. This appears to be the conclusion drawn by both Schatzki and Silverstein.

9. Id.

10. Silverstein thus expresses her proposal:

I propose that workers having common economic concerns within unions be allowed to form interest groups, that unions be required to deal in good faith with each interest group, and that the NLRB assert its jurisdiction to review disputed union decisions. Additionally, these interest groups should possess a limited right to veto decisions of the majority, to assure that union leadership will heed their concerns. The interest-group-veto system would encourage conflicting interest groups to resolve their differences before the union leadership negotiates with management. It thus would permit the union to maintain a united bargaining front, while enhancing the likelihood that the membership would ratify and adhere to the eventual agreement. Silverstein, supra note 4, at 1519-20 [footnotes omitted]. Schatzki proposes a six point program:

1. If an employee is severed from employment, he or she is able to sue the employer on the contract without exhaustion of contractual remedies (so long as the employee does not seek reinstatement).

2. If the employee has not been severed from employment, or he or she seeks reinstatement as a remedy, the employee has the right to take up the grievance, although not the right to force the union to pursue it. If the union chooses not to support the grievance formally, the employee is entitled to a written reason why the
These suggestions are designed to liberate individual union members who are "prisoners of the union." The law in this area does not at this time support such proposals.

In the area of labor relations, no term is more self-explanatory than is the term exclusive bargaining agent or representative. This term signifies that a group of employees has sought and gained the right to represent "the appropriate unit" through the machinery of the Taft-Hartley Act as that act has been interpreted by the National Labor Relations Board. This concept, that a group elected by a majority of the bargaining unit can effectively and impartially govern, has of late come under fire.

No court case can be found directly on point dealing with the right of the member of a union to be represented by a person of his own choosing. At the arbitration hearing level, however, two cases have been found where the question presented was whether the union should bear the costs of representation either in court or

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union will not pursue the matter; the reason should set out what efforts the union made to investigate the grievance as well as the reasons for its abandonment. The union must follow reasonable procedures to investigate, and the union is expected to have reasonable grounds for not pursuing the matter. If its motivation was improper (unreasonable or irrelevant), the stated reasons would in no way bind the employee. If the evidence does not support the union's position, or if its reasons for not pursuing the grievance are improper, the employee should be successful in a fair representation action. A fair representation action should be permissible without proof that the employee was correct on the contract claim; it should be enough that the employee lost a chance of winning the contract claim because of the union's mal- or misfeasance.

3. The employer may be liable to the employee on the contract, even if the union does not pursue the grievance through arbitration and even if the employee is not separated from employment, if (a) the union is guilty of a failure to represent fairly, (b) the union does not agree with the employer's position but has failed to pursue the matter for reasons which do not violate the duty to represent fairly, or (c) although the union agrees with the employer, the union's reasons for not pursuing the grievance do not significantly or legitimately involve the interests of other employees covered by the contract.

4. The employee should not be required to join the union and the employer as defendants in order to succeed against either.

5. An employee should never be required to exhaust internal union procedures before suing either the employer on the contract or the union for failing to represent fairly in a grievance context.

6. If the union does choose to pursue a grievance to arbitration, an individual employee may employ his or her own representative for the proceeding.

Schatzki, supra note 4, at 906-08 [footnotes omitted].


through an arbitration hearing. These cases come to opposite conclusions: in *N.L.R.B. v. Local Union 396, Teamsters*, the court ordered the costs of representation paid and, in *Jacob v. East Meadow Bd. of Educ.*, the grievant had to bear his own costs.

The authors believe that this chipping away at the exclusiveness of representation will bring about the chaos foreseen by Judge Kaufman:

Our conclusion is dictated not merely by the terms of the collective bargaining ... structure, and history of section 9(a), but also by what we consider to be a sound view of labor-management relations. The union represents the employees for the purposes of negotiating and enforcing the terms of the collective bargaining agreement. This is the modern means of bringing about industrial peace and channeling the resolution of intra-plant disputes. Chaos would result if every disenchanted employee, every disturbed employee, and every employee who harbored a dislike for his employer, could harass both the union and the employer by processing grievances through the various steps of the grievance procedure and ultimately by bringing an action to compel arbitration in the face of clear contractual provisions intended to channel the enforcement remedy through the union. A union's right to screen grievances and to press only those it concludes should be pressed is ... valuable ... and inures to the benefit of all of the employees.

Our conclusion is in complete accord with the latest utterances of this Court: "[T]he right to arbitrate is in no sense an incident or a 'condition' of the employer-employee relationship as such, but depends, in exactly the same degree as does the union's right to arbitrate, on the existence of an agreement to arbitrate. In the absence of such an agreement no employee has the right to compel his employer to arbitrate any matter whatsoever." ... If employer and union deem it consonant with the efficient handling of labor disputes to repose power in the individual employee to compel the employer to arbitrate grievances, then they may do so, by incorporating such a provision in clear language in the collective bargaining agreement.

At present, the individual union member possesses greater pro-

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15. Black-Clawson Co. v. Machinists Lodge 355, 313 F.2d 179, 186 (2d Cir. 1962) [citation omitted].
tection and more freedom than at any time in modern labor history.\textsuperscript{16} To allow the individual employee to hire a representative of his own choosing for the grievance procedures would erode the union’s control of those proceedings to an unacceptable point. The employer, on the other hand, would not have any assurance that the settlement of one dispute would serve as a part of the common law of the shop in his plant.\textsuperscript{17} Thus, the two recognized parties to the collective bargaining agreement would face a situation in which the union would lack any control over the grievant and the employer would lack the precedential value of decisions being made during the grievance resolution procedure.\textsuperscript{18} The courts in the past, when considering a case where the decision involves the identity of the parties to a collective bargaining agreement, have uniformly come to the conclusion that the company and the union represent the only parties to that agreement.\textsuperscript{19}

The conclusion that the company and the union are the “real parties” to the collective bargaining agreement leads to the inescapable conclusion that, at an arbitration hearing, they represent the only parties with legal standing.\textsuperscript{20} The grievant’s rights arise from the collective power of the union, and unless the union fails in its duty to fairly represent that member,\textsuperscript{21} its collective decisions, as to what is right or wrong, will prevail. An analogy can be drawn between the relationship of a union member and the union leadership and a shareholder and corporate management. The union member and the shareholder both elect the leaders, who in turn make the policy and run the day to day operations. The


17. See supra note 7. The term the “common law of the shop” was coined in the trilogy. This phrase describes the private system of law which developed between parties to a collective bargaining agreement. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 580 (1960).

18. Id.


20. Id.

shareholder and the union member have the right to vote scoundrels out of office, but have no right to interfere with the operation of the leadership, unless the leadership fails in its fiduciary duty. 22 Thus, law and logic would dictate that a union member presently lacks the right to select counsel for himself for an arbitration proceeding. However, some authors, as noted above, call for a change in the law of labor relations to allow the individual union member this right. 23 The proposals, which have been made, fail to deal with the modern realities in labor relations.

**Conclusion**

The concern of this paper was the question how an arbitrator should rule when grievants seek to be represented at the grievance hearing by separate representatives of their own choice. We have been unable to locate any case in which an arbitrator has ruled on such an issue. 24 Schatzki's point 6 assumes that arbitrators should have the authority to and would grant such a request. Point 6 is deceptively simple, but with potential for serious harm to the American system of voluntary grievance arbitration. 25 Point 6 would not require a union to go to arbitration but, if it did, would permit the grievant to employ his or her representative for the hearing. 26 We assume that use of the term "employ" means that the grievant would pay the cost of his or her representative. This does not by any means resolve the issue. There are many other costs associated with arbitration. This includes arbitrators' fees, court reporter costs, rentals of hearing rooms, among others. The vast majority of arbitration clauses provide for the division of costs between the two parties. We assume that, under Schatzki's point 6, the costs will still be divided between the company and the

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22. It is recognized that this is an imperfect analogy. It is offered to provoke thought, not to invite criticism of its imprecision.
24. But see Pabst Brewing Co. [1979] 79-2 Lab. Arb. Awards (CCH) 5441, 5444. This case holds:
   In Short, the courts appear to have concluded that the right to arbitrate under a collective agreement is not ordinarily a right incident to the employer-employee relationship, but one which is incident to the relationship between employer and union. It is the union which has the right to take grievances to arbitration, not the individual employees. The wording of grievance procedure provisions clearly indicates that only the Union or the Employer can demand arbitration. Therefore, it is the Arbitrator's conclusion that [G.'s] claim cannot be heard on the merits unless supported by the Union bargaining rights with the Employer.
25. See note 4 supra.
26. Id. at 908.
The company, however, may not be willing to pay its share of the costs for an arbitration which it may not want and never agreed to.

Then, too, a grievance arbitration hearing raises problems of the conduct of the hearing such as cross-examination. While such procedures could be worked out (the Labor Board has done so), it would make the hearing a great deal more cumbersome and awkward. The final line is that the employer's assent is necessary to modify the arbitration procedure. He has not bargained to add another party to the arbitration proceeding.

The representation of grievants by separate counsel likewise raises problems and disadvantages for the union. The union loses control of the developing interpretation of the contract. It may very well be forced to take more cases to arbitration than it believes to be justified. As a matter of fact, many arbitrators already feel that Vaca v. Sipes has forced unions to take an increasing number of non-meritorious cases to arbitration. Serious problems are raised if multiple grievances are to be heard at the same time.

Based upon the existing law, as well as good labor relations, the authors are of the opinion that a labor arbitrator should not permit grievants to be represented by separate counsel in arbitration hearings except by the agreement of the company and the union or a specific contract provision permitting such intervention.

27. Because Schatzki fails to address the practical problems inherent in his proposals, assumptions must be made.
COMMENTS

ANALYSIS OF BLASTING LIABILITY IN KENTUCKY

In Kentucky, there are five distinct theories of recovery for damages suffered from blasting: (1) trespass, (2) urban strict liability, (3) rural strict liability, (4) storage or transportation of explosives and (5) violation of statute. Both trespass and urban strict liability are based on the doctrine that one who acts, acts at his peril regardless of precautions. The question at law is, "Did the defendant's blasting damage the plaintiff?" Rural strict liability is a hybrid of negligence and strict liability. Defendant's otherwise absolute liability for use of abnormally dangerous explosives is limited by the type of damages reasonable men would expect from blasting, given public policy considerations of circumstance and place. Recovery for damages as a result of non-intentional detonation of stored or transported explosives is established by proof of negligence. The blasting statutes relate primarily to mining and are strictly construed.

This article will address the history of blasting in Kentucky, negligence as a cause of action for blasting damages, current case law considerations relating to blasting, and the technical and statutory background for blasting liability. The terms "strict liability" and "absolute liability" are used interchangeably.

The United States Supreme Court, in Laird v. Nelms, presents the majority basis for recovery from blasting damages: "[i]t is quite clear . . . that the presently prevailing view as to the theory of liability for blasting damage is frankly conceded to be strict liability for undertaking an ultrahazardous activity, rather than any attenuated notion of common-law trespass."* In addition to Kentucky, twenty-seven states have agreed with Justice Rehnquist in Nelms that the theory of liability for blasting damages is liability without fault.3

2. Id. at 800.
I. HISTORY OF BLASTING IN KENTUCKY

The immediate act was confined to its own land; but the blasts, by setting the air in motion or in some other unexplained way, caused an injury to the [plaintiff]...

The aura of mystery and "unexplained way[s]" of blasting damages are well founded in the English history of blasting. Blasting was a form of penitence in the early English Church. It was depicted in an anonymous medieval painting which shows the penitent as a blaster in an underground mine, swathed in heavy protective robes striving to light the fuseless charge with a taper on the end of a long stick and yet protect his face from the blast. With such beginnings, it is understandable that section 519 of the Restatement (Second) of Torts characterizes blasting as an "abnormal" activity. Assuredly, the penitent blaster in the underground mine would grasp the underlying logic of strict liability stated in comment d of section 519: "The [strict] liability arises out of the abnormal danger of the activity itself, and the risk that it creates, of harm to those in the vicinity."

4. Definitions of blasting terms used in this comment may be found in the Appendix.


6. Restatement (Second) of Torts §§ 519-520 (1977) [hereinafter cited as Restatement]. Absolute liability is not absolute. Liability is limited by defining a zone of abnormal danger beyond which absolute liability falls away. The six factors set out in section 520 determine the inherent abnormality of a defendant's actions: (1) high degree of risk of harm to the person, land or chattels of others; (2) probability that resultant harm will be great; (3) inability to eliminate the risk by the exercise of reasonable care; (4) the extent to which the activity is not a matter of common usage; (5) inappropriateness of the activity to its surroundings; (6) the measure of the activity's value to the community balanced against its dangers. Foster v. Preston Mill Co., 44 Wash. 2d 440, 268 P.2d 645 (1954), provides a clear
An early precedent for the strict liability concept as it applies to blasting is *Rylands v. Fletcher*.\(^7\) Rylands, a prospective English mill owner, directed his engineers to construct a mill pond on top of ancient mine shafts, which collapsed under the water's weight, flooding and destroying Fletcher's adjoining coal mine. The clash of coexisting rights of the two adjoining property interests presents a legal labyrinth. Had Fletcher assumed the risk of his loss by mining close to the ancient mine works? Rylands lost the power source for his mill; Fletcher lost a producing coal mine. Which must respond in damages?

The clue to the labyrinth is the Roman nuisance maxim, "*Aedificare in tuo proprio solo non licet quod alteri noceat,*" meaning "it is not permitted to obstruct another's ancient lights, by building upon one's own land what may be injurious to another."\(^8\) Applied to the instant case, the maxim establishes that Rylands had no right to erect a new edifice on his grounds so as to prejudice what had long been enjoyed by Fletcher. Expanding this concept, Lord Cairns rather than basing the decision on prior rights to the use of the water, based his decision on the abstract principle that strict liability is imposed upon a "non-natural" user of the water.\(^9\) Therefore, (assuming no riparian agreement) prior to the dam's construction, the stream flowed naturally without prejudice to Fletcher's mine, but the potential for harm to Fletcher increased with the unnatural impounding of water. The *increased* risk had to be borne by Rylands because he had the right to the use and control of the stream. According to Prosser's discussion of Lord Cairns' opinion,

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[W]hat emerges from the English decisions as the “rule” of _Rylands v. Fletcher_ is that the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings.¹⁰

However, the _Rylands_ rule is generally misapplied by American courts. The House of Lords opinion by Lord Cairns¹¹ is frequently overlooked and the colorful intermediate Exchequer court language of Judge Blackburn is applied instead.¹² The latter opinion held that a defendant is strictly liable for that under his control which escapes and damages. In _Shell v. Town of Evarts_,¹³ Kentucky rejected the _Rylands_-Blackburn rule as “extreme.” Nevertheless, the Kentucky Supreme Court has permitted recovery within the Cairns principle labelling their theory nuisance.

The two distinct principles have been consistently confused by Kentucky and other American courts.¹⁴ During the forty year period between _Kinnaird v. Standard Oil Co._¹⁵ and _Winchester Water Works v. Holliday_,¹⁶ Kentucky favorably applied the Cairns rule. Subsequently, in _Rodgers v. Bond Brothers_,¹⁷ the court cited the Blackburn rule and rejected the whole of the _Rylands_ doctrine as “extreme.”

In _Louisville Refining Co. v. Mudd_,¹⁸ the court revived the Cairns rule by favorably citing it under the label of nuisance, but required additional proof of negligence for liability. _Lynn Mining Co. v. Kelly_, in 1965,¹⁹ removed negligence as a prerequisite to nuisance. Thus, it appears that, under the label of nuisance, Kentucky has returned to the Cairns rule. _Harris v. Thompson_²⁰ supports this analysis. This case rejected plaintiff’s argument that defendant’s frozen and burst water pipe, on the grounds of his rural dwelling, was an unreasonable and unnatural use of his property close to a

¹¹. L.R. 3 H.L. at 337-40.
¹². L.R. 1 E.X. 265, 277-87 (1866).
¹³. 296 Ky. 602, 178 S.W.2d 32 (1944).
¹⁵. 89 Ky. 468, 474, 12 S.W. 937, 938 (1890).
¹⁶. 241 Ky. 762, 45 S.W.2d 9 (1931).
¹⁷. 279 Ky. 239, 241, 130 S.W.2d 22, 23 (1939).
¹⁸. 339 S.W.2d 181, 186 (Ky. 1960).
¹⁹. 394 S.W.2d 755, 758 (Ky. 1965).
²⁰. 497 S.W.2d 422, 430 (Ky. 1973).
highway, creating an ice hazard for automobile drivers.

In order to appreciate the significance of Rylands, it is necessary to look at the spectrum of theories of blasting liability historically employed by the Kentucky Court. The idea of strict liability for blasting did not sit well with early twentieth century Kentucky. Vast mineral reserves were being purchased for rapid development by banking and manufacturing groups, and, by legislative franchise, railroads were pushing their rights of way through solid rock into rural areas. As Prosser described it,

[o]ne important reason often given for the rejection of the strict liability was that it was not adapted to an expanding civilization. Dangerous enterprises, involving a high degree of risk to others, were clearly indispensable to the industrial and commercial development of a new country and it was considered that the interests of those in the vicinity of such enterprises must give way to them, and that too great a burden must not be placed upon them.21

Cases concerning the blasting of river cliffs for the railroad right of way provided the precedent for early blasting law in Kentucky. Basing their theory on the ancient trespass-case distinction, the court allowed recovery for property damages by debris or rock thrown into the close of another:

The land was his, and, as against the defendant, by an absolute right from the centre usque ad coelum. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises, nor abstract any portion of the soil, nor cast anything upon the land by any act of their agents, neglect, or otherwise.22

Langhorne is a good example of an early group of "railroad" blasting cases. The Chesapeake and Ohio Railway Company was relocating a right of way up the Big Sandy River to Pikeville, Kentucky. Owners of land adjoining the right of way sued the railroad for blasting damages. The court carefully considered the railroad appellant’s legislative immunity argument:

It may be conceded that there is authority to the effect that the right to remove rock by blasting for a roadbed is one of the necessary incidents to the right of construction granted to a railroad by its legislative franchise, and the proper exercise of this right therefore does not give a cause of action to those who suffer consequential

22. Langhorne v. Turman, 141 Ky. 809, 815, 133 S.W. 1008, 1011 (1911) [citations omitted].
However, the court grounded its decision in the common law:

It seems to us that the correct rule is that, where the blasting operations result in a direct trespass upon the premises injured by casting soil or rocks thereon, the liability of the company causing the injury is absolute, and it must respond in damages irrespective of the question of negligence or want of skill.

Railroads did not fear injunctions seeking to halt their blasting, so they developed the strategy of ignoring complaints, so as not to delay their schedule. Generally, the blasting contractor did not confront the plaintiffs until facing them in court. *Brooks-Calloway Co. v. Carroll,* showed the railroad contractor-blaster balancing the cost of drilling delays against the benefit of decreased risk of a court suit. Plaintiff sought recovery for damages to his large three story brick residence from blasting done by Southern Railway's contractor. On two occasions, plaintiff gave notice to the blaster that his residence has sustained ground motion damages, but the blaster did not meet with plaintiff until the trial. The complaints were notice to the contractor-blaster of potential liability. A responsible blaster would have altered his drilling and blasting methods.

Besides potential liability, *Brooks-Calloway* illustrates other factors a contractor-blaster weighs in deciding the amount of explosives used to charge the drill holes. The cost-benefit analysis must also include the applicable work days remaining in the year and the excavating system. Excavating decisions and blasting methods were in 1930, and are currently, based on drilling technology:

The method used was this: They would drill six or eight large holes from 6 to 8 inches in diameter, then drill about forty jack hammer holes, which were about an inch and one-fourth in diameter. The large holes were drilled about 20 feet deep, and the jack hammer holes 12 or 14 feet deep. The dynamite used was of different strengths, some being referred to as “40's” and some as “60's,” [refers to the percentage of nitrate explosive], and into these jack hammer holes they would then load between 700 and 800 sticks of dynamite, and would load between 600 and 800 sticks into the large holes, thus making a total of between 1,300 and 1,600 sticks fired at

23. *Id.* at 813, 133 S.W. at 1010.
25. 235 Ky. 41, 29 S.W.2d 592 (1930).
a time. The evidence for the defendant is that this is the usual and customary way of doing work of this kind, and the defendant relies on these cases in support of its contention. 26

The salient fact is that everything waits on the blaster. Regardless of how many steam shovels, bulldozers, or wheelloaders a contractor utilizes, the blaster must blast the rock and blast it sufficiently to be moved, or all must wait. As the court pointed out, however, delay and extra expense do not justify damaging another's property:

It is no defense that the use of proper care or smaller shots would cause extra labor, expense or delay or diminish the profit of the business. The company must have regard for what it is doing to other people’s property as well as what it is seeking to do to the property upon which it is at work. 27

The foregoing quotation also evinces that negligence did not work as a theory of blasting recovery in Kentucky. The negligence language of the court is strained to allow recovery for nontrespassory ground motion damages. The opinion illustrates this inconsistency. It begins by restating the current rule of no recovery unless, "it is shown the work was negligently done." 28 Yet, the court’s reasoning eventually shifts to the strict liability maxim, "Sic utero...non laedas," and allows recovery. 29

Kentucky’s highest court has been most willing to apply the theory of strict liability when there is a direct invasion by blasting debris of the property of another. 30 In Aldridge-Poage, Inc. v. Parks, 31 defendant-contractor was blasting for a waterline for the City of Nicholasville. The blast shook plaintiff’s home by ground motion and caused flyrock to strike her barns and outbuildings. The court reversed plaintiff’s circuit court judgment of $10,200 and sustained a directed verdict against plaintiff for failure “to show what the normal or usual methods of blasting would be in this particular situation." 32 The judgment against defendant-contractor was affirmed with respect to the $200 awarded for trespass of the

26. Id. at 43, 29 S.W.2d at 593.
27. Id. at 45, 29 S.W.2d at 594.
28. Id. at 44, 29 S.W.2d at 593.
29. Id.
30. Williams v. Codell Constr. Co., 253 Ky. 166, 69 S.W.2d 20 (1934); Campbell v. Adams, 228 Ky. 156, 14 S.W.2d 418 (1929); Langhorne v. Turman, 141 Ky. 809, 133 S.W. 1008 (1911).
31. 297 S.W.2d 632 (Ky. 1956).
32. Id. at 633.
flyrock.

As illustrated by Aldridge-Poage, the court could not avoid harsh results when injured plaintiffs were required to prove negligence from evidence that had literally "gone up in smoke." To avoid harsh results, when possible, the court developed two doctrines that coexisted with strict liability for trespass injuries and proof of negligence for indirect injuries. These two relief valves for the trespass-case harsh results were the doctrine of nuisance and res ipsa loquitur.

Nuisance has had the most extensive application. In the case of Dumesnil v. Dupont, the court defined nuisance:

If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without waiting for the result of a trial. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere.

Subsequent railroad blasting cases simplify this definition and rely on the majority American rule that, "blasting is not necessarily a nuisance, but may become a nuisance by reason of the circumstances under which it is done." In a recent nuisance case, the court mentions the Cairns rule, "liability characterized by the place and its circumstances," but returns to nuisance as a basis of liability:

We have concluded, however, that the rule of nonliability for damage by concussion or vibration without negligence is inconsistent with the principles set forth in Louisville Refining Company v. Mudd for the determination of what is a nuisance. In that case we abandoned the theory that a "reasonable" (in the sense of non-negligent) use of property cannot be a nuisance, in favor the principle that in the light of all the circumstances of a case a use that is otherwise "reasonable" may be rendered unreasonable by the gravity of its effect upon the use and enjoyment of other property.

33. 57 Ky. (18 B. Mon.) 800 (1857).
34. Id. at 804-05.
36. Associated Contractors Stone Co. v. Pewee Valley Sanitarium & Hosp., 376 S.W.2d 316, 318 (Ky. 1964)(citation omitted). It is clear that the Cairns rule, "[s]o use your own as not to injure another's property," is the underlying principle of Associated Contractors. The development of Kentucky's nuisance law and its use of the two Rylands opinions during the past one hundred years are interwoven. A brief historical survey demonstrates Kentucky's rejection and attempted burial of Rylands, followed by recognition of its appealing logic and revival of the doctrine.
The resonance of 2,000 pounds of dynamite and the resulting

In Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S.W. 937 (1890), the court notes in support of plaintiff's recovery for defendant's pollution of his never-failing stream that "one must so use his property as not to injure his neighbor, and because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently." Id. at 474, 12 S.W. at 938. Thereafter, in Winchester Water Works v. Holliday, 241 Ky. 762, 45 S.W.2d 9 (1931), in which plaintiff's dam burst, damaging defendant's riparian property, the Cairns rule was persuasive enough to overcome a well-supported act of God defense. Rejecting the proffered "extraordinary rainfall" jury instruction of defendant, the court states:

The principle embodied in all of the definitions is that the act must be one occasioned exclusively by the violence of nature and all human agency is to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God.

Id. at 767, 45 S.W.2d at 11.

The initial confusion and rejection of the Cairns and Blackburn rules is noted in Rogers v. Bond Bros., 279 Ky. 239, 130 S.W.2d 22 (1939). While the language of Blackburn's opinion, L.R. 1 E.X. 265, concerning the "duty of one maintaining a deleterious substance to prevent its escape" is quoted, the Cairns' opinion, L.R. 3 H.L. 330, is cited. The Kentucky Court then questions the whole of the Rylands decision as "extreme" and further distinguishes Rylands from nuisance:

The extreme doctrine of Rylands v. Fletcher, has been expressly rejected in Kentucky. It is observed in Harper on Torts, section 180, that "nuisance differs from those cases which fall within the rule of Rylands v. Fletcher in that, by the doctrine of nuisance as developed by the American courts, the damage must be a continuing one rather than an isolated invasion of the plaintiff's interests."

Id. at 241, 130 S.W.2d at 23 [citations omitted].

This confusion was reaffirmed five years later in Shell v. Town of Evarts, 296 Ky. 602, 178 S.W.2d 32 (1944):

[I]t is said the extreme doctrine of the English rule, as announced in the leading case of Rylands v. Fletcher, that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape, has been expressly rejected in Kentucky.

Id. at 608, 178 S.W.2d at 35 [citation omitted].

The court's criticizing the Blackburn rule as "extreme" is understandable given the "he-who-breaks-must-pay" consequences of its implied standard of conduct. See Prosser, supra note 10, at 592. Had the court rather than rejecting, limited the rule, the equitable alternative would have remained to weigh the conflicting values of industrial and commercial properties. See Randall v. Shelton, 293 S.W. 2d 559 (Ky. 1956).

Federal environmental legislation, known generally as the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1955), the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1972), and the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 (Supp. II 1978), share the common underlying principal that the miner or manufacturer is strictly liable for that under his control (e.g., silt or toxic chemicals), which escapes or damages. Therefore, by legislative enactment, American courts must now apply the Rylands rule once rejected as extreme. It is a matter of speculation whether federal legislation would differ had Rylands been correctly stated and moderately applied.
ground motion in Pewee Valley tolled the end of Kentucky's adhe-
sion to the principle of lawful use of one's own property regardless
of harm to others:

There was a time when a man's right to the unmolested enjoyment
of his property was nearly absolute, but the industrial revolution
changed all this, and there came a time when industry could do no
wrong so long as its activities were lawful and it committed no direct
trespass. Today the policy of the law is to achieve a reasonable bal-
ance between the peace and dignity of the individual, especially in
the enjoyment of his home and community, and the needs of
commerce.8

Res ipsa loquitur was the theory used by the court to avoid the
occasional harsh results of negligence applied to blasting damage.
Establishing evidence of negligence in blasting caused problems in
that most of the proof was in the control of the defendants, and
expert witnesses were generally hostile. To rectify this situation,
the court applied res ipsa loquitur in Marlowe Construction Co. v.
Jacobs:38 "[e]ven though our present rule requires negligence to be
proven . . . , plaintiff's proof of defendant's acts and the nature of
the damage caused may raise an inference of negligence under the
doctrine of res ipsa loquitur and thereby shift the burden of going
forward with the evidence to the defendant."39 Res ipsa loquitur is
no longer employed in intentional blasting cases because negli-
gence need not be proven. But in the closely related area of trans-
portation and storage of explosives, res ipsa loquitur may be used
if the statutes and regulations do not apply.

In Vandiver v. Wilson,40 plaintiffs sought recovery for destruc-
tion of their mobile home by explosion of dynamite in a storage
magazine. Plaintiffs alleged: "(1) the storage of dynamite by the
defendant in a magazine under his control,41 (2) the explosion of
the magazine and (3) property damage directly caused thereby."42
The court grappled with defining the nature of the case:

Plaintiffs contend that the occurrence was similar to that found in

37. Associated Contractors Stone Co. v. Pewee Valley Sanitarium & Hosp., 376 S.W.2d
316, 319 (Ky. 1964). See note 30 supra, and accompanying text.
38. 302 S.W.2d 612 (Ky. 1957).
39. Id. at 613.
40. 446 S.W.2d 650 (Ky. 1969).
41. The nature of the stored explosives is relevant to liability, since nitroglycerin, dyna-
mite, and blasting caps are susceptible to unexpected explosions, as opposed to the less
volatile nitrate oxidizer.
42. 446 S.W.2d at 651.
our blasting cases and that no negligence need be proved. The blast-
ing cases are in a different category for the reason that the explo-
sions were intentionally detonated by the defendant. Not so here. The rule appears to be that one who stores explosives is not liable for damages caused by an accidental explosion unless he is negli-
gent, assuming the storage does not constitute a public nuisance.\textsuperscript{43}

The court noted that unexplained or non-intentional explosions of stored or transported explosives give rise to a reasonable inference of negligence, but the court stopped short of strict liability for non-
intentional explosions: "The doctrine here invoked does not im-
pose absolute liability. The defendant may satisfactorily explain the occurrence."\textsuperscript{44}

In Vandiver, using the blaster's intent as a determinative factor, the court establishes a double standard to be used in storage of explosives cases. The recently adopted strict liability standard is imposed on intentional explosions. The old standard of negligence, supplanted by nuisance and res ipsa loquitur, is imposed on non-intentional storage and transportation explosions. It seems para-
doxical for the court to consider defendant's intent in detonating explosives when defendant's liability rests not in his use of explo-
sives but in the abnormally dangerous use of his property which is adjacent to plaintiff's dwelling. Had defendant placed the storage magazine on his own property such that the magazine was at a safe distance from plaintiff's adjoining dwelling, detonation, intentional or unintentional, would be irrelevant.\textsuperscript{45}

The Kentucky surface mining statutes and regulations set forth requirements for explosive storage pursuant to mining activity.\textsuperscript{46} In addition to relief provided by statute, violation of these safety stat-
utes is negligence per se and civil liability in tort may lie, as long as all conditions of the valid statute or regulation are satisfied.\textsuperscript{47}

II. NEGLIGENCE AS A CAUSE OF ACTION FOR BLASTING DAMAGES

As stated previously, adjacent landowners were protected from the abnormally dangerous activity of blasting by strict liability for

\textsuperscript{43} Id. [citations omitted].

\textsuperscript{44} Id. at 653.

\textsuperscript{45} The authoritative case on storage of blasting material is Exner v. Sherman Power Constr. Co., 54 F.2d 510 (2d Cir. 1931).


\textsuperscript{47} See Andricus' Adm'r v. Pineville Coal Co., 121 Ky. 724, 90 S.W. 233 (1906) (distin-
guished as to unrelated matter of master-servant relationship in Wagner v. Hatcher, 137 Ky. 6, 125 S.W. 1063 (1910)).
trespass-style direct invasions. For indirect ground motion injuries the theory of negligence was thought to be sufficient to carry the case to the jury. In practice, the theory did not function well as demonstrated by Aldridge-Poage.48 The damages and proximate cause could be established, but the duty of the blaster and his breach thereof were difficult to prove. In these negligence cases, the burden of proof was on the plaintiff, and plaintiff first had to establish the normal or usual method of blasting. The earlier cases seem to establish the standard of care for blasting as that employed by an "ordinarily prudent blaster" in the given location and circumstances. This view is supported by later Kentucky cases in which the court did find a successful pleading of negligence where plaintiff presented an expert witness to show that the blaster was not ordinarily prudent. For example, in Marlowe,49 the court commented, "Plaintiff introduced an expert witness who undertook to testify that the damage sustained on plaintiff's property indicated that more dynamite than necessary was used in the blasting operation."50

Prosser has noted that the concept of no recovery for ground motion damages except on the basis of negligence is "a marriage of procedural technicality with scientific ignorance."51 An early Ohio case adds an appealing argument to Prosser's comment:

If the means employed [blasting] will, in the very nature of things, injure and destroy his neighbor's property, notwithstanding the highest possible care is used in the handling of the destructive agency, the result to the adjoining property is just as disastrous as if negligence had intervened. If one may knowingly destroy his neighbor's property in the improvement of his own, it is little consolation to the neighbor to know that his property was destroyed with due care and in a scientific manner.52

III. CURRENT CASE LAW CONSIDERATIONS OF BLASTING LIABILITY IN KENTUCKY

Despite the approximately 3,000 words of federal blasting regulations53 which generated approximately 8,900 words of Kentucky

48. 297 S.W.2d 632 (Ky. 1956).
49. 302 S.W.2d 612 (Ky. 1957).
50. Id.
51. PROSSER, supra note 10, at 514.
52. Lowden v. City of Cincinnati, 90 Ohio St. 144, 153, 106 N.E. 970, 972 (1914).
53. 30 C.F.R. § 816.61-68 (1980).
blasting regulations, Kentucky case law remains important because abrogation of Kentucky case law is not presumed; the intention to repeal it by statute must be apparent.

The court used the forum of a 1965 nuisance case, *Lynn Mining v. Kelly*, involving excessive coal dust emissions from a coal tipple, to clear the air concerning nuisance as a cause of action for abnormally dangerous activities: “The injection of the concept of negligence into various aspects of the law of nuisance has caused endless and unnecessary difficulties. The time has come to remove it.” In the same case, the court consolidates the exceptions and rules concerning plaintiff's cause of action from indirect ground motion damages caused by blasting.

For reasons difficult to understand, we have held it necessary to prove negligence in blasting cases where the damage was caused by concussions or vibrations as opposed to the casting of physical objects on the plaintiff's land. The present Kentucky law is that a plaintiff, claiming to have been injured by the creation or maintenance of a nuisance, may be entitled to relief without allegation or proof of negligence on the part of the defendant. The Parks and Jacobs cases, just above cited, and those of similar import, are expressly overruled to the extent they adopted a contrary rule.

The court, in overruling Jacobs and Parks in *Lynn Mining*, tells blasting contractors that negligence and the standard of the reasonably prudent blaster is out and that Kentucky views blasting as abnormally risky and the blaster as likely to cause harm.

The majority of current cases are in harmony with *Lynn Mining*. Most of these cases involve blasting by coal miners in rural areas. Proof of ground motion damages in rural locales requires relating the negligence standard of care to strict liability. In this gray area, the witnesses, such as engineers or experienced blasters, are crucial to plaintiff's case in order to shift the burden of his loss or in defendant's case in order to leave the alleged loss with the plaintiff. Rapid advances in blast hole drilling technology have made expert witnesses difficult to locate for proof of ground motion damages. Therefore, given the 20,000 miles of strip mine highwall in Appalachia and the thousands of acres of stripping in western Ken-

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55. See Gussler v. Damron, 599 S.W.2d 775 (Ky. 1980).
56. 394 S.W.2d 755 (Ky. 1965).
57. Id. at 758.
58. Id. [emphasis added][citations omitted].
tucky, the court has determined that for proof of causation the plaintiff himself or his friends may be credible witnesses:

River Queen contends that the appellee Anton Mencer was not qualified to give opinion evidence that River Queen had used explosives in excess of those necessary. Since it was shown that Mencer had used and observed the effects of explosives for nearly thirty-five years, there was no error in admitting this testimony, and it was competent for other witnesses to testify to damages to or observations made upon other property as far or farther from River Queen's operation.\(^{59}\)

Another important aspect of proof of mining blasting damages in rural areas requires determining the ability of the ground motion vibrations to reach the plaintiff whether under or aboveground. Generally the largest component of ground motion is the radial component. Depending on geologic or lithologic conditions, measurements occasionally show vertical ground motion exceeding radial. The following cases involved strong vertical ground motion. In the first case, plaintiff was underground when injured by blasting on the surface and in the second case, plaintiff was on the surface when injured by blasting underground. In *Caney Creek Coal Co. v. Ellis*,\(^{60}\) a deep miner of coal sued a surface miner of coal for blasting damages. Plaintiffs were deep mining coal from existing entries on the number nine seam, located on a 120 acre lease obtained from lessor Blue Diamond Coal Company. Plaintiffs had mined for seven years in the number nine seam and had acquired at the time of the original lease in 1957 the option for the overlying number eleven and number twelve seams. Following accepted procedures of mining, plaintiffs were removing recoverable coal from the lower seam first. Evidence showed plaintiffs mined at a determined pace, but usually suspended mining operations from April 1 until September 1. Thereafter, lessor Blue Diamond cancelled plaintiffs' option to the number eleven seam and the number twelve seam, and granted the lease and right to strip mine number eleven and number twelve to defendant, Caney Creek. Due to the damage caused by the defendant's heavy blasting to remove the overburden, plaintiffs obtained a verdict and judgment of $45,000, for lost profit and damage in the underground mine.

Defendant's first defense was that "it was not negligent and was

\(^{59}\) River Queen Coal Co. v. Mencer, 379 S.W.2d 461, 464 (Ky. 1964) [citation omitted].

\(^{60}\) 437 S.W.2d 745 (Ky. 1969). For OSM regulations dealing with the effects of surface blasting on underground coal mines, see 30 C.F.R. § 816.65(j)(1) (1980).
entitled to peremptory instructions."\(^61\) The court dealt with defendant's argument succinctly: "It has been held that negligence is not a prerequisite for recovery of damages from blasting anyway."\(^62\)

The more prevalent pattern of an injured rural homeowner suing a coal company for blasting is found in *Wolf Creek Collieries Co. v. Davis*.\(^63\) Four years after *Lynn Mining*, which contains the current theory of blasting recovery,\(^64\) the court restates the basis of liability for blasting damages in Kentucky:

> Liability in this kind of case (from blasting) does not rest on negligence. Therefore it was unnecessary to prove negligence, and it was immaterial whether or not the mining operations came within 25 feet of Davis' boundary line in violation of KRS 352.490. The only issues to be submitted to the jury were (1) causation and (2) damages. Upon another trial the proof and instructions will be confined to those two issues.\(^65\)

The case is noteworthy in that only ground motion damages were alleged, since the blasting complained of was underground in defendant's advancing shoot and load coal operation.

As noted by the court, defendant's violation of section 352.490 of the Kentucky Revised Statutes is immaterial; the issues are causation and damages, not negligence per se. Considering Kentucky's well-founded blasting statutes, an argument could be made that because most of the blasting statutes were established in answer to prior occurrences of blasting injuries, violation of sections 351.315 through 351.330 of the Kentucky Revised Statutes should be material to the limited issue of notice of responsibilities in the causative role of defendant. In addition, violation of these sections should be material in determining the limits of the consequences of the blast in order to ascertain damages. Currently, Kentucky must apply federal blasting regulations in addition to its own. It is conceivable that the federal regulations will establish a comprehensive standard that may relate to non-mine blasting litigation such as highway construction, or other blasting affecting the rural public.

If the Office of Surface Mining and Reclamation Enforcement [hereinafter OSM] has undertaken to "[p]revent harm to public

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61. 437 S.W.2d at 747.
62. Id. at 748.
63. *Wolf Creek Collieries Co. v. Davis*, 441 S.W.2d 401 (Ky. 1969). For OSM regulations dealing with the effects of underground blasting on the surface estate, see 30 C.F.R. § 817.61-68 (1980).
64. See note 58 *supra*, and accompanying text.
65. Id. at 402 [citation omitted].
health and safety, which includes prevention of severe annoyance to people,\textsuperscript{66} then any member of the public entitled to this protection may have a right of action under the Federal Tort Claims Act.\textsuperscript{67} Raymer v. United States,\textsuperscript{68} a landmark case concerning a governmental agency's duty to prevent injuries,\textsuperscript{69} permitted recovery under the Federal Tort Claims Act for the agency's failure to take affirmative protective action. Judge Ballatine's well-reasoned opinion established federal tort liability when an agency disregards its statutory duty to provide protection and when the agency's affirmative act perpetuates an obviously hazardous condition. In Raymer, defenses were resolved in plaintiff's favor by distinguishing situations of "passive failure," where inspectors "observe" a violation but do not "find" the violation.\textsuperscript{70} Raymer further held that it is the inspector's undertaking to protect and subsequent failure to do so, perpetuating an obviously hazardous condition, which entitles plaintiffs to damages.\textsuperscript{71} Thus, under the Federal Tort Claims Act, recovery by plaintiffs injured by blasting, including damages for severe emotional distress, may be supported by either of two rationales: (1) OSM perpetuated an obviously hazardous condition by initially accepting the blaster's bond and granting the permit to blast in light of the comprehensive pre-blast surveys notifying OSM of potential hazardous conditions; or (2) by allowing the blasting to continue once a resident's complaint was received thereby perpetuating the hazardous condition. The Raymer decision indicates that by merging the miner's administrative decision-making process with that of federal agencies, the federal government has accepted substantial risk of tort liability.

Once the plaintiff has successfully proved the requirements necessary to establish blasting injury, the court must determine his damages. The principal blasting damages case, which sets out the proper standard to be employed, is Edwards and Webb Construction Co. v. Duff.\textsuperscript{72}

The measure of damages in this type case [blasting] is the cost of

\textsuperscript{68} 482 F. Supp. 432 (W.D. Ky. 1979).
\textsuperscript{70} 482 F. Supp. at 437.
\textsuperscript{71} Id.
\textsuperscript{72} 554 S.W.2d 909 (Ky. App. 1977).
repair, if repair may be readily accomplished or, if not, then the difference in market value before and after the alleged damage . . . .

(1) [I]f the property can be reasonably repaired, the measure of damages is the reasonable cost of repairs, or (2) if repairs cannot be reasonably made, the measure of damages is the difference in market value of the property before and after the injury. A test of whether or not property may be reasonably repaired is whether or not the cost of repair exceeds the difference in market value before and after the injury. If the cost of repairs (or rebuilding) exceeds the difference in the market value of the property before and after the injury, then such cost is manifestly unreasonable and the building may not be reasonably repaired at the expense of the tort-feasor, although repair is technically possible.78

Two years after Lynn Mining,74 the Sixth Circuit Court of Appeals added its definition of strict liability damages for blasting in Duckett v. Clement Brothers, Inc.75 In this case, the defendant claimed error below because of plaintiff’s failure to use in his pleadings the magic word "negligence": "The complaint did not use the word 'negligence' in describing the alleged tortious conduct of defendant and appellant's brief here emphasize such fact in support of a claim that negligence was not established."76 The court severed negligence from blasting and opened the door to a new rule:

In the past, Kentucky courts have required a showing of negligence before a defendant, conducting blasting operations, is liable for damages caused by vibrations or concussions; and this case, as we have indicated, was tried on that theory. It now appears that Kentucky has come close to adopting a rule of absolute liability for injuries to property from blasting.77

The conclusion of the opinion in Brewer v. Sheco Construction Co.,78 sums up the current basis of blasting liability in Kentucky: "In Kentucky an individual is absolutely liable for the harm he does to another's property resulting from blasting or detonating activities."79

73. Id. at 911 [citations omitted].
74. 394 S.W.2d 755 (Ky. 1965). See notes 55-58 supra, and accompanying text.
75. 375 F.2d 963 (6th Cir. 1967).
76. Id. at 964.
77. Id. at 965.
78. 327 F. Supp. 1017 (W.D. Ky. 1971).
79. Id. at 1019.
IV. Technical and Statutory Background for Blasting Liability

Blasting is difficult to define. It is both an art and a science. It is an art because of the trial and error skills required to control the blast effects within a given boundary. Yet it is a science because of its ability to reduce outgoing vibration by allowing the explosive force to heave against itself using precise seismic monitors and ground motion controls subject only to millisecond delays.

A brief overview is required to explain blasting industry developments reducing the ground motion and airblast variables from a charge of explosives. A grasp of these technical developments is necessary for the court's determination from the blasting record of the blaster's efforts, or lack thereof, to minimize ground and air vibrations, and for an evaluation of valid blasting complaints. The applicable statutes and technology will be discussed together because the focus of federal and state statutory regulations is to use technology to impose subjective limits on the blaster.

The blaster's job begins with his ascertaining the distance from the blast site to the nearest dwelling. In charging the round, the blaster must consider the cost of explosives, the required degree of material fracture, and the statutory imperative to minimize vibrations. A general pre-detonation safety survey must be completed before the blaster allows his assistants to subcharge the individual drill holes. The licensed blaster decides: (1) the quantity of explosives in each hole; (2) the total quantity of explosives; and (3) the millisecond timing delays to be used. As provided in the Kentucky administrative regulations, he is responsible for the detonation and has a statutory duty to resist instruction from non-licensed persons, if such instruction would result in an unlawful effect of the blast.

Many of the variables the blaster must deal with are noncontrollable variables such as distance and condition of buildings and

80. See Appendix for definitions of technical blasting terms.
81. Congress provided that "[t]he Secretary, acting through the Office [of Surface Mining] shall... (2) publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." 30 U.S.C. § 1211(c)(2) (Supp. II 1978). Therefore, it appears the regulations do not have the specifically delegated force of law, but merely interpret and apply the law.
82. 30 C.F.R. § 816.65 (1980).
83. Under penalty of fine or imprisonment, true and accurate post-blast records must be kept for five years, listing in addition to the three factors above, fifteen other factors. 805 K.A.R. 4.050 (1980).
structures, and geology and lithology of the area to be blasted. Ground motion velocity at the foundation of any dwelling or institutional building exceeding two inches per second (Ips), in the peak vibration immediately after the blast, is prohibited. It should be noted that ground motions decrease with distance due to spreading and absorption. Kentucky’s requirement is in accord with that of a majority of states, and establishes a standard of two Ips. Massachusetts and New Jersey are the exceptions with a standard of 1.92 Ips.

The Kentucky minimum standard of two Ips is considered a “threshold below which blasting damage is unlikely to occur.” The federal minimum standard is one Ips. As to which standard will be followed by Kentucky blasters, two Kentucky statutes provide that the federal standard of one Ips will prevail. The general criticism of the federal Surface Mining Control and Reclamation Act [hereinafter the Act], that it utilizes distorted technical data to obtain myopically specific results, rather than required results, is well founded as to its blasting vibration provisions. The federal limitation of one Ips is primarily based upon an OSM task force evaluation of a comprehensive 1971 field study by the Federal Bureau of Mines. Although most authorities recommend two Ips as a reasonable limit below which damage is unlikely to occur, OSM chose the contrary.

It is probable that Kentucky and all other states that have of necessity adopted the Act are establishing an unnecessary aesthetic and artificial level of one Ips unrelated to structurally safe blasting. To illustrate this standard, the vibration from an average adult jumping in the center of a room of an average residential structure produces an average ground motion of 1.5 Ips. If .5 Ips or twenty-five percent more force is added to the jumping, the ground motion would be two Ips, the Kentucky statutory limit for ground

84. SME MINING ENGINEERING HANDBOOK 11-110 (1977) [hereinafter cited as SME HANDBOOK].
86. SME HANDBOOK, supra note 84, at 11-111.
88. 30 C.F.R. § 816.65(i) (1980).
92. Id. at 15,197(3)(b). See In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1360 (D.C. Cir. 1980).
motion.

Another troublesome noncontrollable variable with which the blaster must deal is the possibility of preexisting damages to the dwelling. Cracks in walls and foundations often appear without any reference to vibrations and generally result from inefficient building practices such as failure to make footings wide enough or to dig them below the frost line, lack of cement in concrete, and building the house on loose fill. The blasting could be a causal factor in cracking the wall or foundation or the damage could occur independently. Kentucky law provides that upon the request of a resident or owner of a dwelling within one-half air mile of any portion of the permitted area, the permittee shall promptly conduct a pre-blast survey.

Noncontrollable variables such as geology and lithology of the area to be blasted also need to be taken into consideration. Transmission of ground motion is influenced by the geology of the blast site. For instance, heavy blasting at any point within a bowl shaped geologic trough could generate excessive vibrations at the rim.

It is also important to consider the lithology of the blast site and the corresponding lithology of the sites of nearby buildings. Structures on alluvium or fill dirt are more susceptible to ground motion than structures on consolidated ground. Recent tests by the United States Bureau of Mines indicate that it is foreseeable that extensive testing and greater caution are required for large scale blasting in solid rock when nearby structures are on unconsolidated ground. If, after the pre-blast survey, it appears likely that the resident is unsatisfied with the remedies provided by citizen’s participation provisions of the Act and will eventually file suit, litigation may be avoided by pilot shots of one to two sticks of dynamite. The seismograph recording can illustrate to the resident the presence or absence of seismic trouble spots and that the blaster is making preparations necessary for that particular geology.

The significant variables within the control of the blaster are concentrated in two areas: (1) technical blasting factors and (2) public relations. Ground motion and airblast are the technical factors that the blaster must control in order to prevent complaints.

95. SME Handbook, supra note 84, at 11-110.
The major concern of the contractor, for whom the blaster works, is balancing the efficiency of large blast charges such that the rock can be easily moved, against the strict liability for seismic and airblast energy propagated in all directions.

By delayed interval blasting and seismic testing, generation of excessive ground motion may be prevented. Airblast damages (usually causing shattered glass) may be minimized by delaying blasting when wind velocity exceeds fifteen miles per hour in the direction of residences or when a sound focusing temperature inversion exists over the blast area. The federal airblast regulation limits the noise vibration to a maximum level in decibels. No comparable Kentucky statute may be found, presumably because Kentucky wisely declined to attempt regulation based on inconsistent factors such as wind, atmospheric pressure gradients and individual sensi-

96. Airblast shall be controlled so that it does not exceed the values specified below at any dwelling, public building, school, church, or commercial or institutional structure, unless such structure is owned by the person who conducts the surface mining activities and is not leased to any other person. If a building owned by the person conducting surface mining activities is leased to another person, the lessee may sign a waiver relieving the operator from meeting the airblast limitations of this paragraph. 30 C.F.R. § 865.65(e)(1) (1980).

Because the decibel standard on which the airblast regulation is based is an indistinct and inaccurate standard, it could be found void for vagueness, in violation of blaster's fourteenth amendment due process rights. Further, since the standard lacks necessary substantiation, it might be invalidated for being “arbitrary and capricious,” in violation of 30 U.S.C. § 1276(a) (Supp. II 1978).

See In re Surface Mining Litigation, 627 F.2d 1346, 1360 n.16 (D.C. Cir. 1980).

One example of the unreliability of the standard is the “focus” of sound levels. Ground motion vibrations decrease with distance from the blast site, but airblast vibrations, on days when inversions occur, refract and return to earth at different locations forming a varying decibel level at indeterminate distances from the blast site. The Office of Surface Mining's [hereinafter OSM] narrow view of airblast effects is understandable from their consistent rejection of the practical experience of non-government witnesses at hearings. The Department of the Interior's Surface Mining task force, composed of “ninety people from twenty federal agencies,” relied essentially on a single source for its substantive information, the Bureau of Mines. 42 Fed. Reg. 62,639 (1977). It supports this choice by noting that “[t]he Bureau of Mines had been the nation's leading research organization in the field of blast vibration for over twenty years,” and in the following paragraph sums up the non-government commentators' “mere arguments” by saying, “[n]one . . . [has] given any compelling rebuttal to the study.” 44 Fed. Reg. 15,191 (1979).

OSM's reliance on and use of federally employed engineers from the Bureau of Mines to compile federal data and, therefore, to promulgate federal regulations with the effect of law, is questionable given the United Kingdom's experiences with this legislative format. H. Nicholls, BLASTING VIBRATIONS AND THEIR EFFECTS ON STRUCTURES (U.S. Bureau of Mines Bull. No. 656, 1971). In addition to the blaster's constitutional rights and the lack of rational basis for airblast regulations, an appealing objection may be voiced by the small, independent operation blaster who is most affected that, in general, our system should not operate so as to take advantage of a person in this fashion.
tivity to noise. 97

Along with the variables inherent in blasting technology which the blaster must consider, new burdens have been imposed upon him as a result of the passage of the Act. A comprehensive analysis of the regulations promulgated pursuant to the Act reveals an initial question concerning the new blasting regulations’ effective date. The Kentucky General Assembly has mandated that the Kentucky statutes modeled on the federal regulations “shall become effective simultaneously with approval of the State program by the United States Secretary of the Interior.” 98 Resolution of the question is pending, but regardless of the regulatory means used, it

97. People tend to react to ground motion vibration (gross structure movement at low frequency) at predictable values: at 0.10 Ips, 1.2% of the surrounding families complained; at 0.20 Ips, 3% complained. But substantial variation exists in the way people react to noise vibration (wall and window excitation at higher frequency): “There is wide variation in the way people react to loud noises—some are not appreciably affected while others may not only hear but feel the intensity of the noise.” Blaster’s Handbook: Explosives and Practical Methods of Use 429 (15th ed. 1969). OSM cites the following from the Act as authority for federal airblast regulations:

- Wall motions and associated rattling caused by airblast cause not only human annoyance, but can also cause minor damage such as falling bric-a-brac and dislodgement of items from shelves. Furthermore, the Act requires preventing harm to public health and safety, which includes prevention of severe annoyance to people. (See § 515(b) (15)).

44 Fed. Reg. 15,191 (1979) [emphasis added]. This severe annoyance if neither impliedly nor expressly found in section 515(b) of the Surface Mining Act, the purpose of which is to limit the type of explosives and detonating equipment, the size, the timing and frequency of blasts based upon the physical conditions of the site so as to prevent (i) injury to persons, (ii) damage to public and private property outside the permit area, (iii) adverse impacts on any underground mine, and (iv) change in the course, channel, or availability of ground or surface water outside the permit area.

30 U.S.C. § 515(b)(15) (Supp. II 1978) [emphasis added]. There is no legal or rational justification for attempting to regulate mere annoyance. Such is not within the purposes of the Act.

According to the Restatement (Second) of Torts, emotional distress “liability clearly does not extend to . . . annoyances.” Restatement, supra note 6, § 46, comment d. Neither does reason support OSM’s position: if the result sought is heightening miners’ awareness of the controllable effects of blasting, annoyance confuses the issue. For policy reasons, it would seem OSM would be wary of undertaking a duty to prevent annoyance. Following Kentucky’s substantial factor negligence test, if a hypothetical resident within one-half air mile of the permit suffered severe emotional annoyance from the impact of an airblast and OSM, after notice, negligently perpetuated the harm by allowing the annoyance to continue, under the Federal Tort Claims Act, OSM’s omission would be a substantial factor in causing the plaintiff’s harm and it would be liable. For a well-reasoned explication of the substantial factor test and the impact rule, see Deutsch v. Shein 597 S.W.2d 141 (Ky. 1980). Recovery for emotional distress under the Federal Tort Claims Act is discussed in McClean v. United States, 613 F.2d 603, (5th Cir. 1980).

is manifest that OSM, if it can obtain executive and congressional support, would like to dictate the manner of blasting in Kentucky. Thus, the following Permanent Regulations would have to be complied with by surface coal mine blasters:

1. A blasting plan must be developed detailing the type and amounts of charges, sequences of firing, and description of all safety procedures.99

2. A blasting schedule identifying location and time of blast is required.100

3. The blasting schedule is to be published and distributed by mail to residents within one-half air mile of the permit.101

4. The owner or resident of a dwelling within one-half mile of the permit may request a prompt preblast survey.102

5. The blasting schedule may be modified by the regulatory authority.103

6. The blasting must be between sunrise and sunset.104

7. The blaster must keep in mind the limit of one Ips when adding explosive weight and millisecond delays to the charge.105

8. The blaster may conduct seismic monitoring of peak particle velocity to determine if explosive weight per millisecond delay may be increased.106

V. Conclusion

Currently, there are five theories under which one may recover for blasting damage in Kentucky: (I) Trespass, (II) Urban Strict Liability, (III) Rural Strict Liability, (IV) Storage or Transportation of Explosives and (V) Violation of Statute.

(I) Trespass - (1) If the blaster has thrown flyrock or other debris onto the property of plaintiff, he is strictly liable for damages.

(2) Proof of damages for trespass, (and by analogy for ground motion) retraces the path of the flyrock to the site of the blast. “Since injury caused by blasting operations is in the nature of a trespass . . ., negligence need not be pleaded or proved.”107

100. Id. at § 816.61(b).
101. Id. at § 816.64(a)(2).
102. Id. at § 816.62(a).
103. Id. at § 816.65(b).
104. Id. at § 816.65(a).
105. Id. at § 816.65(k).
106. Id. at § 816.67(b).
(II) Urban Strict Liability - The court will hold defendant strictly liable for damages, but the site of the blasting is considered in determining damages, e.g., blasting near a school, an urban area, a church, or highway.

(III) Rural Strict Liability - Following a hybrid Rylands rule, the defendant is strictly liable if the blasting is abnormally dangerous in relation to the surroundings. Affirmative defenses and counterclaims are available to the defendant blasting in a rural area.108

(IV) Storage or Transportation of Explosives - Recovery for damages as a result of non-intentional detonation of stored or transported explosives must be established by proof of negligence, the uncertain doctrine of res ipsa loquitur or nuisance.

(V) Violation of Statute - Blasting liability as a consequence of violation of statute will be determined by the viability of the statutes that survive constitutional challenge or legislative review. The reasonableness of statutory imposition of absolute liability on coal mine blasters is pending. Therefore, statutory liability for mine-related blasting damages cannot be accurately determined.

The following definitions from section 351.310 of Kentucky Revised Statutes apply to this comment:¹⁰⁹

(1) "Explosives" means any chemical compound or other substance or mechanical system intended for the purpose of producing an explosion, or that contains oxidizing and combustible units or other ingredients in such proportions or quantities that ignition by detonation may produce an explosion, capable of causing injury to persons or damage to property;

(2) "Blasting operation" means the use of explosives in the blasting of stone, rock, ore or any other natural formation, or in any construction or demolition work, but shall not include its use in agricultural operations;

(3) "Blaster" means a person licensed to fire or detonate explosives in blasting operations;

(4) "Charge" means a quantity of explosive or equivalent that is to be detonated within a period of five (5) seconds; generally the entire group of forty drill holes to be exploded;

(5) "Subcharge" means a quantity of explosive or equivalent that is to be detonated within a period of less than eight (8) milliseconds, generally a single drill hole within a grouping of forty holes.

The following are general definitions:¹¹⁰

(1) "Ground motion velocity," (or "ground motion") refers to the velocity of a particle in the ground and anything placed on the ground as a result of the passage of a seismic wave due to blasting.

(2) "Ips" (inches per second) refers to the quantitative unit that describes ground motion velocity. By analogy, the velocity of a car is measured in miles per hour.

(3) "Kentucky ground motion requirement" refers to the fact that in blasting operations except as otherwise provided, the maximum ground motion shall not exceed two inches per second immediately following the blast.

(4) "Strict liability:" (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the per-

¹¹⁰. Restatement, supra note 6, § 519(d).
son, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

COY HOLSTEIN, JR.
EXCLUSIONARY ZONING: ITS DEVELOPMENT, EFFECTS AND AN ANALYSIS OF CHALLENGES IN SELECTED FORUMS

I. INTRODUCTION

Historically, most American cities were not planned. They just grew. Following the Civil War, as the Industrial Revolution struck the United States, the population of American cities grew at an astounding rate, a phenomenon that continued unabated well into the next century. By 1920, the United States had become an urban nation, with fifty-one percent of its population residing in urban areas. The result of this rapid, unplanned growth was almost equally rapid degeneration and decay, as the cities that had been social and economic magnets of hope for millions turned into unattractive and hazardous leviathans, burdening government with new and unmet service demands, and generating significant physical, social, and psychological problems among municipal residents. In the late 1910’s, municipal governments began to utilize zoning in a belated attempt to control urban growth and to improve the housing and environmental conditions of urban dwellers.

A. The Political Nature and Processes of Zoning

Traditional zoning, or “use zoning,” has been defined as “the division of a community into zones or districts according to the present and potential use of properties for the purpose of controlling and directing the use and development of those properties.” Grounded in the police power, zoning is the “most comprehensive restriction on property,” and is concerned primarily with the segregation of land uses based upon the height, bulk, and uses of

2. From 1850 to 1900, American cities experienced a 100 percent increase in population. From 1900 to 1920, the population of cities had doubled again. Id. at 17-19.
3. The causes of this rapid growth were many, and included: massive immigration; revolutionary technological developments in agriculture, industry, architecture, and transportation; and significant advances in medicine and sanitation. Id. at 24-27. See also B. STILL, URBAN AMERICA 209-54 (1974).
7. J. PHILLIPS, supra note 4, at 477.
buildings, and the density of population of a given area. One component tool of the city planning process, comprehensive zoning, is accomplished by means of municipal ordinance, dividing the city into land use districts. An official map, generally part of an ordinance, illustrates the normal threefold classification of zones: residential, commercial, and industrial. Enforced by a building commissioner or zoning officer, the ordinance generally details building height, minimum lot and house size, and the proportion of the lot the structure may cover.

The zoning plan may be prepared by an autonomous or quasiautonomous planning commission, by a staff department under the chief executive, or by the city council directly. Regardless of the method of preparation, a high degree of citizen input during the preparation and approval stages is possible and probable. Historically, and often today, the most influential input has come from the business community, especially from realtors.

Regardless of the manner in which zoning ordinances are prepared, approved, and enforced, the zoning process is fundamentally political in nature because it involves the authoritative allocation of values and resources within any given community as well as

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9. J. Phillips, supra note 4, at 478. It was assumed that once a community had been zoned, future growth would proceed in an orderly and automatic fashion. In reality, traditional zoning has not worked in that manner in most communities. Rather, zoning has been characterized by ad hoc expediency in the form of a flurry of amendments and variances:

The running ugly sore . . . of zoning administration is exposed as a process under which isolated social and political units engage in highly emotional altercations over the use of land, most of which are settled by crude tribal adaptations of medieval trial by fire, and a few of which are concluded by confused and ad hoc injunctions of bewildered courts.

Babcock The Chaos of Zoning Administration, 12 Zoning Digest 1(1960).

10. J. Bolleis & H. Schmandt, The Metropolis 194-96 (3d ed. 1975). The planning process is defined broadly as “the process of deciding in advance what to do in order to achieve desired goals.” Besides zoning, the other components of planning include subdivision regulations, building codes, housing codes, and capital improvement programs. Id. at 194, 197-99.

11. Id. at 196-97. Local zoning powers are granted by the state via a state enabling act, generally modeled on the Standard State Zoning Enabling Act prepared by the Department of Commerce in 1922. See N. Williams, American Land Planning Law ch. 14 (1974).

12. The autonomous commission is used generally by larger cities and is becoming a disfavored method. Professional planners favor the executive staff preparation method, and this method is becoming increasingly popular in large and medium sized cities today. Small communities tend to use the direct legislative council method. Wingfield, Administrative Functions, in Managing the Modern City 299-303 (J. Banovetz ed. 1971).


14. C. Adrian & C. Press, supra note 1, at 473-74. See also J. Bolleis & H. Schmandt, supra note 10, at 203-05.
among communities in any metropolitan area. Exclusionary zoning, the focus of this comment, is part of the overall process of zoning within metropolitan areas and is, therefore, also political: “Exclusionary zoning ordinances are essentially devices to regulate access to, and allocation of, all resources.”

The broader planning process, of which zoning is a part, is likewise fundamentally political in nature; and the planner, regardless of degree of training and “professional” orientation is required “to take a political stand [in proposing] allocation of resources.” It is important to keep in mind the political nature of planning and zoning in order to fully appreciate the relatively small role the courts, especially the federal courts, have thus far played in exclusionary zoning.

The first comprehensive zoning plan to be tested in court, in 1926, was that of the village of Euclid, Ohio. The Supreme Court held Euclid’s ordinance to be constitutional, stating that it would find zoning measures to be unconstitutional only if they were clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, or general welfare. In sustaining the ordinance as a reasonable exercise of the police power, the decision stimulated the growth of similar ordinances across the nation. Yet the development of comprehensive zoning ordinances by the nation’s large cities was still slow and generally far too late to achieve maximum efficiency of land use. The larger cities’ land use patterns already had been established, largely by private developers, and following World War II, the bulk of zoning activity took place in the mushrooming suburbs that surrounded and choked the cen-

15. In this comment, politics is defined as those processes and interactions, involving conflict and/or cooperation, which authoritatively allocate values/resources within and among all social units.


17. “While the planner may feel most truly at home when he is at his drawing board, he finds his major work as sociologist, economist, and political scientist, or just plain politician. The congeries of problems which call for planning in their solution run the gamut of the professions. . . . [The planner’s] . . . plans are in reality political programs. In the broadest sense they represent political philosophies, ways of implementing differing conceptions of the good life.” Long, Planning and Politics in Urban Development, 25 J. Am. Inst. Planners 167, 168 (1959). See A. Alshuler, The City Planning Process 354-92 (1965).


20. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). After this decision, traditional “use” zoning was also frequently known as “Euclidean” zoning.
B. Suburbanization and the Uses of Zoning

Many causal factors may be attributed to the suburban population explosion following World War II. Commonly cited factors include: population pressure; a pent-up housing demand resulting from the Depression and World War II; new techniques of transportation, communications, and other technological developments; social, psychological, and aesthetic desires and needs of central city residents; and the increased purchasing power made possible by Veteran Administration and Federal Housing Administration loans. Typically small in population and geographic size, these new suburban communities quickly enveloped the central city and its older suburbs. While market considerations largely had determined land use decisions for older central cities, most post World War II suburbs began with land use restrictions already in force and were able to control their growth through zoning. Initially,


22. For purposes of this comment, suburbs are defined as those communities lying within the SMSA (Standard Metropolitan Statistical Area) but outside the legal boundaries of the core or central city.

23. Without the automobile and highway systems and other mass transit systems, without the telephone, without the extension of utility facilities, and without money, most central city residents could not afford to move to the isolated suburban areas. See C. ADRIAN & C. PRESS, supra note 1, at 41-44. During the ten years preceding 1960, suburban populations of metropolitan areas, increased by forty-seven percent, reaching a total of over fifty-three million persons, and accounting for two-thirds of the entire population increase of the nation. Since 1950, nearly three-fourths of the nation’s population growth has taken place in the suburbs. Id. at 44. See also Marsh & Kaplan, The Lure of the Suburbs, in SUBURBIA 37-58 (P. Dolce ed. 1976).

24. Most suburban communities incorporated into municipalities, creating a patchwork quilt of corporate entities that competed among themselves and against the central city they surrounded. The average is ninety-one local governments per metropolitan area, forty-six per metropolitan county. (Municipalities are the dominant local government form, although the above figures include townships and special districts as well.) COMMITTEE FOR ECONOMIC DEVELOPMENT, RESHAPING GOVERNMENT IN METROPOLITAN AREAS 13 (1970). Hamilton County contains thirty-seven municipalities (three are surrounded by Cincinnati; the remainder surround the central city’s Ohio perimeter), twelve townships, and twenty-nine special districts. I. HESSLER, HAMILTON COUNTY’S PATCHWORK QUILT 10 (rev. ed. 1969).

25. Of course, this did not apply to pre-World War II suburbs. Moreover, many early post World War II suburbs were a product of such explosive population and industrial growth that much development had already been established, minimizing the effect of zoning power in those communities. Still, generally, zoning in post World War II suburbia was far more popular, extensive, and effective than it had been in the older central cities. See Schwartz, The Evolution of the Suburbs, in SUBURBIA, supra note 23, at 1, 5-11, 13-18. See also C.
immigrants into a suburban community were able to use zoning to insure that their embryonic demographic and socioeconomic imprints on the area would take root and be perpetuated. Thus, although overall suburban and metropolitan growth was heterogeneous and dynamic, development within most suburban municipalities was homogeneous and oriented to maintaining the peculiar characteristics of that community.

II. EXCLUSIONARY ZONING

There probably is no “average” suburb, but suburbs may be typed or classified according to various criteria, including function and socioeconomic status. The purpose and type of suburban zoning varies with the classification. Thus, a low income residential suburb with a desire to keep personal property taxes low and municipal service levels high may wish to zone to attract industry. Other suburbs, especially middle and upper-income residential suburbs, whose residents can more readily bear the burden of increasing costs of local government, have no need or desire for traditional “use” zoning. These communities use their zoning power to preserve the pristine character of their residential greenbelt by excluding industry. Similarly, their zoning power is used to retain their homogeneous demographic character by excluding lower income persons.

The methods of exclusionary zoning, also known as “social” zoning, “selection” zoning, and “snob” zoning, are several and in-

\footnotesize{Green, The Rise of Urban America 178-83 (1965); and Z. Miller, The Urbanization of Modern America 41-51, 70-86 (1973).}

\footnotesize{26. See T. Murphy & J. Rehffuss, Urban Politics in the Suburban Era 73-92 (1976); and C. Adrian & C. Press, supra note 1, at 44-55. Adrian and Press classify suburbs by functional characteristics: dormitory, industrial, enclave, recreational, formerly autonomous communities, and heterogeneous. They classify dormitory suburbs by socioeconomic status: wealthy, middle-class, working-class, and racial/ethnic.}

\footnotesize{27. The more affluent the population of a community, the more its citizens are able to bear the increasing costs of local government without the assistance of an industrial or commercial tax base. Paradoxically, however, it is in the wealthiest suburbs that the demands for local governmental services are lowest. See generally T. Murphy & J. Rehffuss, supra note 26, at 92-119 and 120-44.}

\footnotesize{28. In most middle class and wealthy residential suburbs, the desire to maintain demographic homogeneity through exclusionary zoning is intense. This intensity is illustrated by the comments of a resident of the very exclusive community of Greenwich, Connecticut: “In Greenwich, no one can get elected unless he swears on the Bible, under a tree at midnight, and with a blood oath, to uphold zoning.” Quoted in R. Lineberry & I. Sharkansky, Urban Politics and Public Policy 313 (1971).}

\footnotesize{29. For purposes of this paper, exclusionary zoning is defined as the use of zoning ordinances to exclude certain types of uses and persons, including low-income persons generally}
clude: large-lot size requirements for single family homes, possibly together with high minimum square footage and high minimum lot frontage requirements for such housing, along with setback requirements mandating a certain amount of unbuilt land on some or all sides of the structure; a ban on multiple dwelling units, or if such units are allowed, high minimum floor area requirements for the dwellings, possibly along with a maximum number of bedrooms required per living unit; a prohibition on publicly subsidized housing; a ban on mobile homes. Individually and collectively, these techniques effectively exclude or severely circumscribe the admission of low-income persons from the community. 30 Yet, another technique of exclusionary zoning is increasing reliance on public referenda to ratify zoning decisions. Such referenda subject the zoning decisions of professional officials and planners to the whims of the resident property owners who generally have a strong desire to maintain the status quo. 31

Exclusionary uses of zoning have proved very popular and quickly have become institutionalized in suburbia, prompting one urban affairs scholar to observe that “[t]he standard hypothesis in zoning literature is that zoning does to suburban areas what national boundaries and immigration quotas . . . do for nations—that is, restrain influx of potential immigrants or restrict them to a very special class of persons.” 32

III. EFFECTS OF EXCLUSIONARY ZONING

The effects of exclusionary zoning are many and profound. The fact that the states historically have been quick to bestow zoning powers on local communities, in hindsight, is unfortunate. Local zoning power has been a major factor in creating and perpetuating the gross governmental fragmentation that exists within the nation’s large metropolitan areas. The National Commission on Urban Problems has pinpointed the zoning-fragmentation connection and its resulting problems:

Today, a basic problem results because of the delegation of the zon-
EXCLUSIONARY ZONING

ing power from the states to local governments of any size. This often results in a type of Balkanization, which is intolerable in large urban areas where local government boundaries rarely reflect the true economic and social watersheds. The present indiscriminate distribution of zoning authority leads to incompatible uses along municipal borders, duplication of public facilities, [and] attempted exclusion of regional facilities.88

In this context of many separate, unequal, competitive, yet interdependent communities, the exclusionary effects of middle class and wealthy suburbs are not confined within their borders. Suburban zoning practices, through consequences known as "externalities,"34 affect all or sizeable portions of the metropolitan area. Through the exercise of their exclusionary zoning powers, the suburbs haphazardly dictate the course of metropolitan development, including employment opportunities and the location and type of available residential housing. The inescapable conclusion is that the aggregate effect of suburban zoning decisions largely determines the quality and manner of life in the overall metropolitan area.35

A. Effects on the Central Cities

Most adversely affected by the externality of suburban exclusionary zoning are the central city and its residents. One commentator notes that exclusionary zoning causes the central city to become "a receptacle for all the functions the suburb does not care to support."36 Of course, the central city increasingly is also the re-

34. See Lineberry, Reforming Metropolitan Governance, 58 Geo. L.J. 675 (1970). Lineberry lists four broad dimensions of the problem of metropolitan fragmentation: externalities or spillover effects; governmental irresponsibility; lack of coordination in problem solving; and fiscal and service inequalities. For an analysis and lengthier enumeration of the problems of governmental fragmentation, see J. Strayer, American State and Local Government 190-96 (2d ed. 1976).
I fear we have leaped over and left neglected and isolated, millions of Americans in our central cities who are most in need. The nation's critical human problems are highly concentrated in only forty-eight of our cities: They contain half of the five million urban substandard housing units. They have three times the urban death rate. They have four times the national maternal death rate. They contain two-thirds of the urban poor.
Quoted in R. Sherrill, Governing America 485 (1978). For a general overview of the ef-
ceptacle for all of the people the suburb does not care to contain (much less support), specifically, the urban poor. 87

Not only have the central cities lost much of their affluent population to wealthy suburbs; in addition, they have lost much of their industry and commerce to industrial and heterogeneous suburbs. 88 Moreover, newly created industry and commerce tend to locate in the suburbs rather than the central city. 89 Increasingly, resources have been isolated from needs, and profound social and economic disparities have been created. The Advisory Commission on Intergovernmental Relations has found the plight of the nation’s central cities to be desperate and has stated that “federal legislative action is necessary and urgent to bring fiscal needs and resources of our urban governments into better balance.” 40 While losing their personal and industrial tax base, the central cities have been stuck with an increasingly large percentage of “high cost” citizens and an increasing fiscal inability to provide its citizenry with adequate services. At the same time, the loss of industry and commerce to the suburbs has left the central cities without enough jobs for its remaining unskilled labor force. 41 Thus, the disparity between the central cities and surrounding suburbia is growing, not lessening, as the Advisory Commission on Intergovernmental Affairs has noted:

Taxable wealth and personal income are growing faster in suburban areas than in their central cities and the disparity continues to widen. As suburbs grow, central cities, for the most part, face the problems of population loss; increasing concentrations of poor, non-

37. In 1966, the suburbs had thirty-five percent of the total United States population, but only twenty percent of the poor. NATIONAL COMMISSION ON URBAN PROBLEMS, supra note 33, at 50.

38. Between 1951 and 1970, manufacturing employment declined significantly within twelve of the thirty largest cities in the nation, chiefly in the older industrialized cities of the Northeast and Midwest. In contrast, suburban employment increased around twenty-nine of the thirty largest cities. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY (1974).


40. 2 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, FISCAL BALANCE IN THE AMERICAN FEDERAL SYSTEM 7 (1967). For a detailed analysis of the plight of the central cities, see Wingfield, supra note 12, at 424-30.

41. See generally T. MULLER, GROWING AND DECLINING URBAN AREAS (1975).
white, and elderly; ever-increasing obsolescence in housing; and above average crime rates. 42

B. Effects on the Poor and on Racial and Ethnic Minorities

Like the central cities, the poor contained within are in a downward spiral. Suburban exclusionary practices have simultaneously labeled the city's poor as undesirables while denying them the opportunities required to escape either the city or the cycle of poverty in which they live. 43 They are unable to find jobs in the city, yet their lack of personal transportation plus inadequate metropolitan transit systems often limit their employment market range to the city. Access to quality schools in suburbia is denied while the quality of the city's schools continues to deteriorate. They are denied access to housing in suburbia, and are limited to the often substandard housing in the city that "white flight" has left behind. 44

Excluding the poor from suburbia also means, of course, excluding racial and ethnic minorities. The urban poor are disproportionately nonwhite, 45 and the nation's nonwhite poor are disproportionately located in the central cities. The percentage of central city poor who are black has increased rapidly, from thirty-seven percent in 1959 to forty-seven percent in 1974. 46 Correspondingly then, the suburbs contain a fair share of neither the poor nor of


43. Oscar Lewis has explained the nature and effects of this cycle of poverty:

Once it comes into existence, it tends to perpetuate itself from generation to generation because of its effect on the children. By the time slum children are age six or seven, they have usually absorbed the basic values and attitudes of their subculture and are not psychologically geared to take full advantage of the changing conditions or increased opportunities that may occur in their lifetime.


44. For additional and more detailed treatment of inadequate housing, transportation, and schools within the central city and the effects of this inadequacy on the urban poor, see F. Piyen & R. Cloward, Regulating the Poor (1971); C. Perin, Everything in Its Place (1977); R. Rist, The Urban School (1973); and O. Ornati, Transportation Needs of the Poor (1975).

45. A large majority of the poor are white (sixty-nine percent), but the incidence of poverty among whites is only ten percent. Conversely, only thirty-one percent of the poor are black or members of other nonwhite minorities, but the incidence of poverty among these groups is nearly one-third. C. Stone, R. Whelan & W. Murin, Urban Policy and Politics In A Bureaucratic Age 215 (1979).

the nonwhite. The National Commission on Urban Problems has noted this phenomenon:

The suburban ring has a majority of the residents of the metropolitan area. It also has less than its proportionate share of the poor and only five percent of American nonwhites. . . . The suburbs, however, contain nearly half the white metropolitan poor—a figure which suggests that the suburbs discriminate more on the basis of race than on the basis of economic status.47

For the foregoing reason, the National Association for the Advancement of Colored People has called the suburbs "the new civil rights battleground" and has urged blacks "to do battle out in the townships and villages to lower zoning barriers and thereby create new opportunities for Negroes seeking housing closer to today's jobs at prices they can afford to pay."48

C. Effects on the Suburbs

A final effect of exclusionary zoning has struck the suburbs themselves. Exclusionary zoning, and zoning powers in general, have been key causal factors in local governmental fragmentation and in urban sprawl. These are foundation weaknesses which over time produce cracks in suburbia's picture window, as the American Bar Association's Advisory Commission on Housing and Urban Growth has observed:

As land is divided and subdivided for scattered, small scale development, irreplaceable natural and recreational resources are unnecessarily consumed. Basic services such as water supply and sewage removal must be extended over great distances, resulting in higher per capita costs. Existing roads prove inadequate to accommodate newly scattered populations commuting into the increasingly distant city. Schools also prove inadequate to handle the increased suburban population; consequently, new schools and new roads must be constructed, and local residents must bear additional taxes.49

While the extremely affluent suburbs can afford to be indifferent to high-unit-cost services, most suburbs cannot. Either the tax rates go up or the service levels go down, or both. Paradoxically, as

47. NATIONAL COMMISSION ON URBAN PROBLEMS, supra note 33, at 52. The percentage of blacks living in the suburbs is misleading, for they tend to be concentrated in older, inner ring suburbs.


49. HOUSING FOR ALL UNDER LAW, supra note 21, at 9.
the fiscal problems of middle class residential suburbs increase, these suburbs will be even less prone to add to their financial burdens by allowing the less affluent into their communities, and the pressure to use exclusionary zoning will increase in a dismal cycle. It is in part for this reason that Anthony Downs argues that "in the long run, I expect economic class discrimination to be even more persistent in American neighborhoods than racial discrimination, even though the latter has been stronger until now."50

IV. APPROACHES TO, AND LIMITATIONS ON, EXCLUSIONARY ZONING

CHALLENGES

Actions and measures which constitute direct or indirect challenges to exclusionary zoning have taken place at the grass roots, in the policymaking branches of the national government, in the federal courts, and in the state courts. No action or measure in any of these arenas has been fully effective, however, many have been complete failures.

A. ACTIONS AT THE GRASS ROOTS

The obvious fundamental problem with anti-exclusionary grass roots efforts is simply that the victims of exclusionary zoning are outside the political decision-making mechanisms of the community which has excluded them. Thus, there is little political influence which the poor can bring to bear upon those mechanisms. Nonetheless, exclusionary zoning practices have generated the formation of numerous local open-housing interest groups. Michael Danielson has identified a number of open-housing interest groups in metropolitan areas and has made some generalizations about them and the efficacy of their work:

Among these organizations, substantial differences exist in size, resources, and constituency base. Their objectives, programs, priorities, vitality, visibility, and effectiveness also vary considerably. In general, diversity reduces the incidence of cooperation and cohesion among open-housing interests within a particular community or suburban area. Collective action is also impeded by the fragmentation

50. Suburbs in this situation, however, might be tempted to drop exclusionary barriers against industry in order to ease the tax burden of residents. This would only have the effect, though, of adding to the burdens of the poor by draining yet more of the central city's industrial tax base. This action would also add to the general suburban sprawl found in the area.


of local government in suburbia, since supporters of open housing
are typically scattered among a variety of local jurisdictions. And
the combination of group diversity and dispersed constituency sup-
port handicaps efforts to change local housing policies in the hostile
political climate of the typical suburban jurisdiction.\footnote{Danielson,
Sci. Q.} 1, 9 (1976).}

Thus, says Danielson, grass roots challenges to exclusionary zon-
ing are likely to result at best only in occasional victories and
piecemeal changes in local policies. Even when such challenges are
successful, the impact is limited to a particular locality and
"whatever housing results often falls short of the needs of local
residents, to say nothing of a particular suburb's 'fairshare' of the
housing needs in the metropolis as a whole."\footnote{\textit{Id.} at 18. Danielson
notes that challenges to exclusionary zoning at the local level
usually come from an amorphous coalition of civil rights, civic, and religious groups. \textit{Id.} at 10.}
For these reasons, many broader based interest groups which support open housing\footnote{Danielson lists the American Civil Liberties Union, the Lawyers' Committee for Civil Rights under Law, the NAACP Legal Defense and Education Fund, the National Housing and Economic Development Law Project as groups focusing almost exclusively on the courts. Groups lobbying before Congress and national executive agencies include the Leadership Conference on Civil Rights, the Center for National Policy Review, and the Housing Opportunities Council of Metropolitan Washington. Groups acting primarily as clearing houses for information include the National Urban Coalition, the Exclusionary Land-Use Practices Clearing House, and the National Job-Linked Housing Center. Of the national open-housing interest groups, only a few have been active at the local level. The latter include the National Committee Against Discrimination in Housing, the League of Women Voters, some local affiliates of the Urban League and of the American Jewish Committee, and a number of the NAACP's 1700 branches. \textit{Id.} at 8.}
have focused their attention and efforts on higher levels of govern-
ment, attempting to win at national or state levels what cannot be
obtained from local governments.

\section*{B. \textit{The Bias of Federal Programs}}

While the federal government has never had a national land-use
or growth policy,\footnote{\textit{See generally Congressional Research Service, Resolved: That the Federal Gov-
ernment Should Adopt a Comprehensive Program to Control Land Use in the United States} (1975) [hereinafter cited as \textit{A Comprehensive Program to Control Land Use}].} a number of national programs have signifi-
cantly affected land use and growth in the metropolitan areas.
Most have had negative impacts, however, in the sense that they
have contributed to urban sprawl, suburban racial and social-class
segregation, central city deterioration, and a general worsening of
the lot of the urban poor.\textsuperscript{57} While the effects of all national programs are beyond the reach of this comment, the effects of several national housing programs need to be highlighted, specifically the FHA and VA programs, Urban Renewal, the Housing and Urban Development Act of 1968, and the Housing and Community Development Act of 1974.

The federal programs which provided the greatest impetus to rapid post World War II suburbanization were the mortgage loan programs of the Federal Housing Administration (FHA) and the Veteran Administration (VA). The latter constitutes the largest program ever enacted for a single target group, monetarily exceeding all other federal programs for the poor, the elderly, the handicapped, or minority groups.\textsuperscript{58} Facilitating low down payment, long-

\textsuperscript{57} See M. Palley & H. Palley, supra note 6, ch. 7. Two general reasons for the existence and perpetuation of the crisis in urban America is that federal spending is not targeted at those central cities with the greatest needs and the fact that, in general, federal funding is statistically unrelated to urban needs and resources:

[F]ederal spending in cities is not directed at the cities with the greatest recognized needs. Moreover, HEW spending is not closely associated with poverty, female-headed households, aged, death rates, segregation, inequality, or even social dependency. HUD spending is not closely related to room crowding, inadequate housing, non-home ownership, or the age of the city. OEO spending is not closely related to poverty . . . . These findings should provide added impetus to the search for a rational, redistributive, comprehensive, and integrated, federal urban policy.

Dye & Hurley, The Responsiveness of Federal and State Governments to Urban Problems, 40 J. Pol. 196, 206, 207 (Feb. 1978). This astounding lack of correlation is compounded by that peculiar politically popular animal known as revenue sharing, which allows local governments to spend with few or no strings attached. (Revenue-sharing funds are not used to help the poor, but are being used instead to meet operating costs and to ward off property tax increases. See M. Mann, supra note 8, at 76). Of course, even without revenue sharing, federal monies are often awarded on a political basis which ignores genuine need. (The chief purpose of the Model Cities program was to preserve and strengthen the Democratic party's advantage in the industrialized states. The chief effect of the program was not aiding the poor but enhancing the power of black leaders by providing them with services, funds, and patronage. See F. Piven & R. Cloward, supra note 44, at 260-62). The point that Dye and Hurley make, however, is simply that lack of correlation between spending and problem solving is largely due to the lack of a coherent and comprehensive national urban policy. Thus, the federal approach to urban problems has been what Anthony Downs calls "disjointed incrementalism." A. Downs, Urban Problems and Prospects 37 (1971) (footnote omitted). Incremental policy development plus program fragmentation lead to ludicrous results. In one metropolitan area, the Office of Economic Opportunity and HUD were using the Community Action and Model Cities programs to strengthen neighborhood leadership and organization. At the same time, the Department of Transportation was planning to construct an interstate highway through the area, and HUD's urban renewal office was supporting a project that would supplant the residents with an office building. T. Murphy & J. Rehfuess, supra note 26, at 269.

\textsuperscript{58} U.S. Department of Housing and Urban Development, Housing in the Seventies 8, 10 (1974).
term loans, these programs greatly encouraged suburban growth and were responsible for the construction of two million single-family dwellings. By 1950, the vast majority of them had been built in the suburbs.\(^5\)\(^9\)

FHA and VA programs and policies were blatantly racist and contributed extensively to the exclusion by racial and ethnic groups from the suburbs. Implicitly endorsing the National Association of Real Estate Boards' code of ethics,\(^6\) the FHA Underwriting Manual warned against the infiltration of "inharmonious racial groups" in new neighborhoods, citing the danger of introducing "incompatible racial elements."\(^7\)\(^8\) The FHA actively encouraged restrictive covenants and exclusionary zoning as means of blocking entry into suburbs of racial and ethnic minorities, and the VA had granted only two percent of its mortgage loans to nonwhites by 1950.\(^6\)\(^2\) FHA administrative policy continued informally even after the Supreme Court struck down judicial enforcement of racially restrictive covenants in 1948.\(^6\)\(^3\) Realtors learned the agency had no objections to various "gentlemen's agreements" that were restrictive covenants in disguise.\(^8\) At the same time, the FHA was refusing insurance for mortgage loans in large areas of the central cities, thus denying federal assistance to the black housing market.\(^6\)\(^6\)

The second federal program having an effect on residential housing patterns was the Urban Renewal Program, launched in 1954 and tracing its ancestry back to the Housing Acts of 1937 and 1949.\(^6\)\(^8\) Ostensibly designed to greatly increase the nation's public

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59. M. CLAWSON, SUBURBAN LAND CONVERSION IN THE UNITED STATES 43 (1971). Federal income tax law, which allows deductions for property taxes and mortgage interest payments, also provided a great impetus to the construction of single-family suburban homes following World War II. The lost revenue as a result of this aspect of tax law exceeds the costs of all programs designed for low income families. See Gurko, Federal Income Taxes and Urban Sprawl, 48 DEN. L.J. 329 (1972).

60. First adopted in 1924, the code read in pertinent part: "A Realtor should never be instrumental in introducing into a neighborhood... members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." D. JUDD, THE POLITICS OF AMERICAN CITIES 185 (1979).

61. Orfield, supra note 39, at 786.

62. Id. at 788, 789.


64. Orfield, supra note 39, at 788.

65. Id. at 786.

66. A concise review of the history of the federal government's role in housing is contained in CONGRESSIONAL QUARTERLY, URBAN AMERICA 61-67, 3A-45A (1978) [hereinafter cited as URBAN AMERICA]. A useful bibliography is contained in the same publication at 47A-50A.
housing supply while renewing the central cities, the program was a dismal failure, which did "nothing but move slum dwellers into other slums." By the end of 1971, roughly 600,000 housing units had been demolished on urban renewal sites, but only 201,000 new units had been completed. Moreover, of the new units, less than three percent were located within the original demolished area.

Urban Renewal was consolidated with the Housing and Urban Development Act of 1968, which called for the construction of six million new units of public housing for low and moderate income families by 1978. Showing a marked antipathy toward public housing, the Nixon Administration suspended the 1968 programs in 1973, at which time only 655,923 units of low and moderate income housing had been constructed. The 1968 Act was superceded by the 1974 Housing and Community Development Act which emphasized rental subsidies rather than construction funds.

69. Orfield, supra note 39, at 787. Urban renewal displaced thousands, forcing them to move to other slums within the city. Urban renewal plus highway construction displaced 40,000 people (mostly blacks) in Cincinnati's West End during the late 1950's and early 1960's, pushing them into other city slums, and leading to frustration that resulted in the racial riots of 1967. The Cincinnati Post, April 4, 1981, at 6A, col. 1. The Cincinnati experience was not atypical. Highway construction alone was displacing 35,000 citizens a year in the early 1960's. See Leary & Turner, The Injustice of "Just Compensation" to Fixed Income Recipients, 48 Temple L.Q. 1 (1974).
70. Urban America, supra note 66, at 61-67.
71. D. Judd, supra note 60, at 191-92. The units constructed represented only ten percent of the program's goals, but resulted in more housing for low and moderate income families than all that had been produced between 1937 and 1968. Housing Report, 1974 Nat. J. Rep. 1376 (Sept. 1974).
72. Urban America, supra note 66, at 61-67. M. Palley & H. Palley, supra note 6, at 178, comment:

The assumption underlying the 1974 legislation that is now the framework for our national public involvement in housing is that the private sector should be providing housing for the needy. Public funding is no longer available for the construction of new structures or for the renovation of existing structures. The private market, which to date has not been able or willing to house the poor and near poor in adequate dwellings, is now charged with the responsibility to do so if they so choose. If it is more lucrative to continue to build houses in the suburbs for the middle class and the rich, then private builders may continue to do so. Local public housing authorities may build facilities for the needy, but they too now depend on the private money market for capital.

Regarding the above-mentioned local public housing authorities, thirty-two of the nation's largest public-housing agencies, representing nearly a third of the 1.2 million public-housing

In sum, national programs, especially housing programs, have provided for public housing that has been numerically insufficient and often structurally substandard, and which has concentrated the poor within the central cities and older "inner ring" suburbs while encouraging the more affluent to escape to the outer suburban areas. Palley and Palley summarize:

FHA and VA mortgages led to the suburbanization of urban areas. It was the replacement of middle class populations by the poor and the needy and the concurrent loss of industry and tax revenues to the central cities that aided in the decay of many such cities. More recently the availability of these guaranteed loans has led to the speed-up of the urbanization of the suburbs and the spread of "city problems" to many of the older suburbs. Our national consciousness has not yet been raised to the point where we as a nation understand that this government encouraged deterioration of the cities is costly to the whole nation in the forms of higher taxes to provide housing, income, compensatory education and other services to the units, currently face bankruptcy. Since the 1974 legislation, every large public-housing agency has run yearly deficits in spite of the rental subsidies provided by HUD. The Cincinnati Post, April 4, 1981, at 4D, col. 5.

73. Gary Orfield explains:

When black public housing was constructed the projects usually offered a concentrated and intensified version of ghetto life. In order to maintain segregation the local public housing authorities usually purchased and cleared expensive, intensely used ghetto land. Since the site cost was so high, the planners could stay within the federal per-unit cost ceilings only by constructing high-rise buildings. Many housing experts knew from the start that high-rise buildings with hundreds of apartments built on ghetto sites were unsuitable for families with small children. As the policy of constructing "vertical ghettos" unfolded, thousands of black families desperate for decent housing found themselves trying to survive in the midst of social chaos and even physical terror.

Orfield, supra note 39, at 787. One of the most infamous of such "vertical ghettos" was the Pruitt-Igoe complex in St. Louis. Constructed in 1955, the project consisted of thirty-three eleven-storey buildings housing 12,000 people. It quickly became a social disaster:

Robbers, burglars, narcotics pushers and street gangs roamed at will through the buildings. Anarchy prevailed. Windows were broken faster than they could be replaced. . . . The steam pipes were not covered and children were seriously burned. People fell out of windows or walked into elevator shafts to their deaths. Drainage was not proper and water would back up on the grounds. . . . [T]he poorest of the poor would rather live in a dilapidated hut than endure Pruitt-Igoe's concentrated misery.

A. SHANK & R. CONANT, URBAN PERSPECTIVES 348 (1975). On official declared the project "a complete and colossal failure from a social, moral, and economic standpoint," and in 1972 the $100 million complex attained the dubious distinction of being the first federally funded housing project to be dynamited, dismantled, and carted away. See generally E. MEHAN, THE QUALITY OF FEDERAL POLICYMAKING (1979).
remaining city dwellers.\textsuperscript{74}

Federal programs, then, have had a cumulative reinforcing effect in excluding impoverished racial and ethnic minorities from the suburbs and concentrating them instead in the central cities. The enactment of legislation which would reverse the effects of this historical bias represents a formidable task. The task is greatly enlarged by the marked increase in suburban political power since the reapportionment revolution of the 1960's,\textsuperscript{75} the Reagan Administration's pronounced antipathy toward the poor,\textsuperscript{76} and the increasing tendency on the part of Congress to avoid voter wrath by defaulting to the non-elective judiciary on sensitive political issues with socioeconomic ramifications.\textsuperscript{77} In this climate, it is understandable that while some open-housing interest groups do lobby before Congress, most have taken their cause to the courts.\textsuperscript{78}

C. The Federal Courts

Unfortunately for the cause of open housing, efforts to strike down exclusionary zoning barriers have had virtually no success in the federal courts. Since \textit{Village of Euclid v. Ambler Realty Co.},\textsuperscript{79} the courts have generally treated zoning ordinances as valid legislative exercises of state police power. Thus plaintiffs who challenge exclusionary zoning ordinances as violative of their equal protection rights under the Fourteenth Amendment find the federal

\textsuperscript{74} M. Palley & H. Palley, supra note 6, at 179.


\textsuperscript{76} See, e.g., \textit{Time}, April 6, 1981, at 17.

\textsuperscript{77} This increasing fear of social initiative is partly a reflection of traditional congressional conservatism and partly a reaction to the growing power of single-issue groups. It is well illustrated by a quotation from former United States Senator (Ohio) William Saxbe: "If you don't stick your neck out, you don't get it chopped off." R. Sherrill, \textit{Governing America} 369 (1978).

\textsuperscript{78} See note 55 supra.

\textsuperscript{79} 272 U.S. 365 (1926). \textit{Euclid} established three principles that have influenced subsequent federal litigation: the elasticity of the police power, the failure of economic values alone to serve as a basis of constitutional attack, and the presumption of validity. R. Babcock & F. Bosselman, supra note 30 at 26.
courts deferring to local legislatures, treating the ordinances as presumptively valid, and willing to subject the ordinances only to the "rational basis" or "reasonable relation" test.\textsuperscript{80} Since the courts only subject an ordinance to minimal scrutiny, the ordinance will be upheld unless the plaintiff can meet the burden of proving that the ordinance is "clearly arbitrary and unreasonable, without any substantial relation to public health, safety, morals, or general welfare."\textsuperscript{81} Strict judicial scrutiny, requiring the state to show a compelling state interest in perpetuating the zoning ordinance, will not be invoked unless the ordinance impinges a fundamental interest or a suspect class. Since the Supreme Court has held that housing is not a fundamental interest,\textsuperscript{82} and that wealth (or its absence) is not a suspect classification,\textsuperscript{83} a general exclusionary zoning challenge on equal protection grounds, absent the involvement of a racial minority, is not at all likely to succeed:

While the Supreme Court would clearly strike down a zoning ordinance which could be shown to be intended to exclude residents on the grounds of race, it has shown very little disposition to searchingly examine zoning policies and other land-use and property regulations which exclude people on the basis of economic status and thus, indirectly, reinforce racial segregation. Its decisions assume local exclusionary actions are taken in good faith unless there is compelling evidence to the contrary. This puts an exceedingly heavy burden on civil rights groups.\textsuperscript{84} The Supreme Court has shown no indication of departing from its position in \textit{Euclid}. In \textit{Village of Belle Terre v. Boraas},\textsuperscript{85} the Court emphasized that zoning was a purely legislative function,\textsuperscript{86} requiring that the zoning ordinance in question bear only a "rational relationship to a state objective."\textsuperscript{87} The permissible objective the Court found was the municipality's desire to preserve environmental and family values:

\begin{itemize}
  \item The "rational basis" test has been described as providing "minimal scrutiny in theory and virtually none in fact." Gunther, \textit{In Search of Evolving Doctrine on a Changing Court}, 86 \textit{Harv. L. Rev.} 1, 8 (1972).
  \item M. Mann, \textit{supra} note 8, at 58. See, e.g., Ybarra v. Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974).
  \item Lindsey v. Normet, 405 U.S. 56 (1972).
  \item Orfield, \textit{supra} note 39, at 796.
  \item 416 U.S. 1 (1974).
  \item Id. at 8.
  \item Id.
\end{itemize}
A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a landuse project addressed to family needs. . . . The police power . . . is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clear air make the area a sanctuary for the people. 88

The Court, accordingly, found that the ordinance did not violate the plaintiffs' equal protection rights, nor, their rights of travel, association, or privacy. 89 Moreover, the Court typically viewed the local community as if existing in a vacuum and did not attempt to relate the effects of local zoning to regional housing needs. Of the decision's impact, one authority observes that:

[I]n upholding Belle Terre's housing restrictions, the Court seemed to endorse a wide range of exclusionary devices—such as apartment house prohibitions, large lots, minimum house sizes and moratoriums on development—which could be justified by suburbs on the grounds that they were essential to provide "a quiet place where yards are wide" and "people few." 90

The Court has gone far beyond Belle Terre in its support of exclusionary zoning. As noted earlier, 91 one method of exclusionary zoning is the use of referenda to overturn decisions of the local legislature. The Court has approved such referenda in James v. Valtierra 92 and in City of Eastlake v. Forest City Enterprises, Inc. 93 In Valtierra, the Court upheld a provision of the California Constitution that mandated endorsement by community referendum of the construction of any proposed public housing project. In rejecting the plaintiff's equal protection challenge, the Court implied that voter participation in municipal elections was more important than any resulting unequal treatment of low income nonresidents seeking housing in the community: "[A] lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all." 94 Ignoring the obvious correlations between race and poverty, the Court held that even though only public housing required such mandatory referenda,

88. Id. at 9.
89. Id. at 7.
91. See note 31 supra, and accompanying text.
94. 402 U.S. at 142.
the state's constitutional requirements "demonstrate devotion to democracy, not to bias, discrimination, or prejudice."

Lamb and Lustig found that statement begged the question: "But this simple-minded justification of zoning referenda ignores the one question that must be asked: democracy for whom? Democracy for the elite of affluent suburbs? Or democracy for nonresident indigent minorities who . . . cannot significantly affect the outcome of the electoral process?"

The Valtierra decision was reaffirmed and expanded upon in Eastlake v. Forest City Enterprises, Inc., where the Court upheld a municipal charter requirement that all proposed zoning changes be submitted to a city-wide referendum requiring a fifty-five percent favorable vote for final approval. The charter provision, which had been adopted by initiative immediately after the city council had rezoned a site to allow a high-rise apartment, was struck down by the Ohio Supreme Court as an invalid delegation of legislative power which denied Forest City due process by permitting the police power to be exercised in a standardless manner. Adopting the Ohio Supreme Court's labeling of the rezoning as "legislative" in nature, the Supreme Court reversed. It held that a referendum is a legislative power which, since reserved by the people, does not constitute a delegation required to be accompanied by discernable standards.

Id. at 141. In a dissent, Justice Marshall stated he would hold the state constitutional provision violative of the equal protection clause because the provision singled out the poor:

It is rather an explicit classification on the basis of poverty—a suspect classification which demands exacting judicial scrutiny . . . . It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.

Id. at 145 (Marshall, J., dissenting).


Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).

426 U.S. at 672-78. This line of reasoning was not accepted by the entire court. In dissent, Justice Stevens, quoting Justice Stern, pointed out the true purpose of the ordinance:

There can be little doubt of the true purpose of Eastlake's Charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. The Charter provision was apparently adopted specifically to prevent multifamily housing. . . . There is no subtlety to this; it is simply an attempt to render
use of referenda as obstacles to low-cost housing construction permitted by Valtierra: “A consistent use of the referendum process to block construction of low-cost public housing is permissible under Valtierra. A similar use of the referendum to block all low-cost housing proposals, private as well as public, would be allowed under Eastlake.”

While bestowing a subtle blessing on exclusionary practices in Eastlake, the Court took a more activist stance in Warth v. Seldin, and erected a formidable barrier against exclusionary zoning challenges. Four separate groups of plaintiffs attacked the zoning ordinance of Penfield, New York (a predominately white suburb of Rochester), as violative of plaintiff’s rights under the First, Ninth, and Fourteenth Amendments and also under the Civil Rights Act of 1866. Never reaching the merits of the case, the Court denied standing to all classes of plaintiffs, disposing of each plaintiff’s standing claim “with such metaphysical nit-picking, hole-punching, and point-shaving as to suggest the hand of a Philadelphia lawyer.” The Court required that nonresident plaintiffs must show that the ordinance has harmed them personally, that they have suffered injury in fact, and that the remedy prayed for will redress the alleged injury.

Warth significantly limits exclusionary zoning challenges by limiting standing to plaintiffs seeking site-specific relief, as opposed to general access to low-cost housing. Either these plaintiffs will generally have to be residents of the community or have a substantial probability of becoming members of the community:

Indigent nonresidents were not primarily concerned with the denial of a particular project but, rather, with opening up the suburbs to prevent the exclusion of all or most low and moderate cost housing. In narrowing the issue to a specific project, the Court precluded even the most superficial attack on the loathsome effects of exclusion.

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100. Comment, Exclusionary Zoning and a Reluctant Supreme Court, 13 Wake For. L. Rev. 107, 127 (1977).
102. See M. Mann, supra note 8, at 126-27, for a detailed table of the parties in interest in Warth.
103. 422 U.S. at 493, 496.
105. 422 U.S. at 504.
The Warth Court raised procedural barriers which avoided resolution of the controversy on its merits, causing Justice Douglas in dissent to accuse the majority of reading the complaint and the record "with antagonistic eyes."\(^{107}\) Justice Brennan's dissent agreed that the opinion, "which tosses out of court almost every conceivable kind of plaintiff who could be injured by the activity claimed to be unconstitutional, can be explained only by an indefensible hostility to the claim on its merits."\(^{108}\)

That hostility manifested itself once more in Village of Arlington Heights v. Metropolitan Housing Development Corp.\(^{109}\) The plaintiffs, who met the rigid standing requirements of Warth, alleged that the refusal of the village to rezone to allow construction of a low and moderate income housing project had violated plaintiffs' rights under the Fourteenth Amendment, the 1866 Civil Rights Act, and the 1968 Fair Housing Act.\(^{110}\) The Court held that equal protection rights had not been violated, even though the decision not to rezone bore "more heavily on racial minorities."\(^{111}\) To violate equal protection rights a showing of negative impact or effect was not sufficient. Rather, a racially discriminatory intent or purpose had to be shown.\(^{112}\)

The effect of Arlington Heights, according to some commentators, is "that the Fourteenth Amendment will be of little value, at least during the Burger Court era, to plaintiffs challenging exclusionary zoning practices in the federal courts."\(^{113}\) The specific showing of intent to discriminate that the court requires is virtually impossible to demonstrate because "local legislative and administrative officials are far too clever to exhibit their prejudices and malevolent intentions so flagrantly."\(^{114}\)

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106. Lamb & Lustig, supra note 96, at 215.
107. 422 U.S. at 518 (Douglas, J., dissenting).
108. Id. at 520 (Brennan, J., dissenting).
110. Id. at 252-59.
111. Id. at 269.
112. Id. at 265-67.
113. Lamb & Lustig, supra note 96, at 197.
114. Id. at 203. While the federal courts have effectively precluded exclusionary zoning challenges on constitutional grounds, such challenges, though limited in scope, are possible under the statutory provisions of the 1968 Fair Housing Act. The problem is that fair housing is but a small portion of open housing. Litigation under the Act involves only site-specific relief and is limited to discrimination on the basis of race, not income. See 42 U.S.C. §§ 3601-3619, 3631 (1976). An authority pinpoints the problem:
D. The State Courts

With a few recent exceptions, state courts have tended to follow the general federal pattern of deferring to local legislatures, upholding exclusionary zoning ordinances in the process:

When local practices have been contested, the courts have tended to view such cases largely as matters of police power versus private property rights, with little consideration of the broader social implications or the rights of those who are excluded. Courts have often lost sight of the fact that a local jurisdiction, in exercising zoning powers, is acting only as a delegate of the state—and that the “general welfare” that must be served extends beyond the borders of the particular community.115

Like the federal courts, state courts have tried to avoid judicial solutions to the problem of exclusionary zoning, referring those

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Issues successfully litigated under the Civil Rights Acts [1964 and 1968] invalidated decisions relating to specific projects by government decision makers. They are a valuable contribution to the growing body of law which continues to make progress against racial discrimination. What is needed, however, in order to provide low-cost housing to disadvantaged low-income persons, is access to affordable housing. The goals achieved in the federal courts . . . have not realized these needs.

M. MANN, supra note 8, at 122-23. The 1974 Community Development Act seemed at first glance to be designed to meet these needs by requiring communities applying for community developments funds to submit to HUD a housing assistance plan (HAP) that must assess the housing assistance needs of “lower-income persons residing in or expected to reside in the community.” 42 U.S.C. § 5304(a)(4) (1976). There are many possible defects in the legislation, most of them obvious. Communities need not comply if they do not want or have a need for community development funds, and many wealthy suburbs do not. Data regarding the housing needs of lower-income persons “residing in or expected to reside in” the community may be deliberately biased or skewed, and plans generated may be unrealistic. The legislation certainly seems to be a positive step forward, but the Advisory Commission on Housing and Urban Growth has offered some caveats:

It is still too early to tell whether the new approaches embodied in the 1974 Act can successfully achieve . . . objectives for promoting social and economic integration. The answer will depend largely on the manner in which local governments respond to the greater discretion and more sophisticated planning responsibilities presented to them, the extent to which local actions and HAP’s are scrutinized by HUD for compliance with the Act’s objectives, and HUD’s ability to make the new Section 8 program truly operational.

HOUSING FOR ALL UNDER LAW, supra note 21, at 25 (footnotes omitted). Regarding compliance with the Act’s objectives, the Advisory Commission notes that a preliminary HUD report indicated that the Section 8 program is not achieving significant dispersal of low-income families into new neighborhoods. Id. at 25 n.127. In 1975, twenty-five million dollars in community development funds were turned down by local governments. Said the mayor of one Detroit suburb: “We turned down the program because we feel that such housing plans would encourage inner-city people to migrate.” Conceding his suburb of 180,000 could have used the $1.6 million in HUD funds, the mayor said his suburb didn’t want the money “at the price of inviting poor people here.” M. MANN, supra note 8, at 76.

115. HOUSING FOR ALL UNDER LAW, supra note 21, at 57.
who challenge the practice to the political branches of state and local governments. Comments such as the following are typical illustrations of this attitude: "[T]his court does not sit as a super-zoning commission. . . . With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community through their appropriate legislative body and not the courts, govern its growth and its life." 116

Recently, in a few state courts, this attitude has changed, sometimes markedly. New Jersey, which used to firmly favor pro-exclusionary zoning, 117 dramatically reversed its position in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel. 118 This landmark case is significant not only because the court recognized the fundamental importance of housing, 119 but also because it was willing to attack the problem of exclusionary zoning on the basis of economic discrimination, 120 and to propose a regional rather than a purely local remedy. 121 Speaking for a unanimous New Jersey Supreme Court, Justice Hall concluded:

[E]very . . . municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefore. 122

The court justified its "fair share" concept on the grounds that the municipality used its zoning power only as an agent of the state. It should, therefore, take an expanded view of the "general welfare" and not confine the concept to its own borders. 123 As authority for this proposition, the court cited City of Euclid v. Ambler Realty Co., referring to "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand

117. See M. MANN, supra note 8, at 84, for a listing of "pro-developer" versus "pro-zoning" states as of 1976.
119. 336 A.2d at 725, 727.
120. Id. at 723, 728.
121. Id. at 724, 734.
122. Id. at 724.
123. Id. at 726.
in the way." By requiring the municipality to zone for regional general welfare, the court recognized the interests of nonresidents and extended them standing. Since the decision was based on the equal protection and due process provisions of the state's constitution and on the state's zoning enabling act, federal constitutional issues and a reversal by the United States Supreme Court were avoided.

While Mt. Laurel has been widely cited and followed in one fashion or another in New York, Pennsylvania, California, and Michigan, most states have not jumped on the bandwagon. The Burger Court has assumed an attitude of meaningful silence on the subject:

The Burger Court's denial of certiorari in the Mt. Laurel case was a clear signal that aggrieved parties should look to state courts for vindication of their constitutional rights. While this ideal is perhaps workable, and on occasion other state courts have been active in striking down exclusionary zoning practices, the overwhelming majority of states have not acted. In the final analysis, there can be no effective substitute for an authoritative declaration of a national standard requiring suburbs to provide for regional housing needs of nonresident indigents . . . . Yet so far the Burger Court has generally refused to follow this wise course; and there is little indication that the Court will alter its philosophical posture on exclusionary zoning in the future.

V. CONCLUSION

One national civil rights group, the National Committee Against

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124. Id.
125. Id. at 717 n.3.
126. 423 U.S. 808 (1975). In subsequent decisions by the New Jersey Supreme Court, the Mt. Laurel decision was further refined. In Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977), the court refused to define "region," rejected attempts to quantify the concept of "fair share," and retreated to the requirement of "least-cost" housing rather than "low-income" housing. See Rose, A Tactical Retreat to Preserve the Mount Laurel Principle, 13 URBAN L. ANN. 3 (1977). In Pasiack Association, Ltd. v. Township of Washington, 74 N.J. 470, 379 A.2d 6 (1977), the court held that fully developed communities had no "fair share" obligation, that Mt. Laurel was limited to developing communities. See McDougall, The Judicial Struggle Against Exclusionary Zoning: The New Jersey Paradigm, 14 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 625 (1979).
127. For a list of the decisions in these states, see Bagne, The Parochial Attitudes of Metropolitan Governments: An Argument to a Regional Approach to Urban Planning and Development, 22 ST. LOUIS U.L.J. 271, 285 (1978). Bagne also notes that Mt. Laurel has been specifically rejected by the Ninth and Sixth Circuits and impliedly rejected by the Supreme Court (Warth and Arlington Heights). Id.
Discrimination in Housing, has stated that there can be no effective progress in halting the trend of impoverished and largely black central cities being surrounded by affluent and largely white parasitic suburbs “until local governments have been deprived of the power to exclude subsidized housing and to manipulate zoning and other controls to screen out families on the basis of income and, implicitly, of race.”¹²⁹ To a large extent, New Jersey and a handful of other states, through judicial action, have deprived local governments of exclusionary powers. Most states have not. Certainly the federal courts have not, nor has the Supreme Court shown any indication of doing so in the future. In a game of political hot potato, the national and state legislatures attempt to avoid action and look to the courts for resolution of the exclusion problem while the courts call zoning a legislative function and defer to the “policy” branches of government. Where lies political responsibility?

Justice Marshall said in his dissent in Belle Terre that “it is appropriate that we afford zoning authorities considerable latitude ..., [b]ut deference does not mean abdication.”¹³⁰ Moreover, it seems incongruous for the Court to call for political solutions when political motivations were responsible for the ordinances that denied benefits to the excluded groups.¹³¹

Admittedly, zoning has traditionally been viewed as a legislative function of state and local governments. Education and apportionment were viewed in the same manner, but the lack of legislative solutions to social inequities in these areas led the Court to intervene, in Brown v. Board of Education and Baker v. Carr.¹³² Admittedly, property and property values have held a position of near sanctity in this country’s historical tradition,¹³³ but exclusionary zoning has created profound economic and social inequities which will not readily yield to legislative solutions, either because of political apathy, or infeasibility, or both. In this situation, the judiciary must carry the remedial burden:

¹²⁹. Quoted in Danielson, supra note 53, at 1.
¹³¹. Although the courts will not admit that they act politically, they do definitionally. See note 15 supra. When the courts refuse to overturn exclusionary zoning ordinances and defer to the legislatures, they also defer to the status quo of the existing political, economic, and social order. By refusing to take the initiative in reallocating resources, the courts act politically in the sense that they perpetuate the existing inequitable allocation of land-use resources.
In light of the current inadequacy of the housing stock and growing pressures for additional housing, there is a manifest need for leadership in the exclusionary zoning area. Local politics, steeped in the tradition of exclusionary practices, cannot be expected to provide a solution. State legislatures are paralyzed by suburban resistance to regionalization of the zoning power. Federal legislative efforts at comprehensive land use planning invariably conflict with state demands for control of their own territory and encounter distrust of federal bureaucracy. Thus, it is up to the courts to provide the centralizing guidance in this area by requiring that the zoning power be employed for the purpose of advancing the regional welfare.¹³⁴

Given the political realities of the situation, it seems clear that the courts, especially the Supreme Court, have the primary responsibility to remedy the economic and social inequalities that result from exclusionary zoning, by forcing state and local governments to reallocate land-use resources. To the extent the courts refuse to shoulder this burden and to the extent that the legislatures refuse to act on their own initiative, then to that extent the impoverished racial and ethnic minorities trapped in the nation’s central cities will continue to be equal with the wealthy in the suburbs only in the sense expressed by Anatole France: “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”¹³⁵ This same sentiment was expressed in contemporary terms by an official of St. Louis County, where 90,000 acres were zoned for three-acre lots. Asked if this zoning did not discriminate against the racial and ethnic minorities in the central city, the official replied that the suburbs in his county welcomed anyone “who has the economic capacity [to enjoy] the quality of life we think our county represents . . . be


“In yonder pleasant valley a dozen men penguins are busy knocking each other down with spades and picks that they might employ better in tilling the ground . . . . Alas! Bulloch, my son, why are they murdering each other in this way?”

“From a spirit of fellowship, father, and through forethought for the future,” answered Bulloch . . . . “Those penguins you see are dividing the ground among themselves . . . . They are creating law; they are founding property; they are establishing the principles of civilization . . . . performing the most august of function. Through-out the ages their work will be consecrated by lawyers, and magistrates will confirm it.”

Id. at 19.
they black or white.”

The ultimate danger in this type of political and social irresponsibility should be obvious. One commentator on the 1981 housing riots in the Federal Republic of Germany (West Germany) touched the essence of the problem: “Distribution conflicts are unavoidable in a free society, . . . [but] they become particularly acute when there is a lack of political or financial means needed to resolve them.”

It would indeed be tragic if our courts and legislatures responded to the frustrations caused by exclusionary politics only after our nation’s central cities were once again engulfed in flames.

DENNIS E. SIES

136. Quoted in D. Judd, supra note 60, at 188.
137. The German Tribune, March 29, 1981, at 3, col. 3.
RELINQUISHMENT OF JURISDICTION FOR PURPOSES
OF CRIMINAL PROSECUTION OF JUVENILES

INTRODUCTION

Before the turn of the century, juveniles were tried in a criminal court, and upon a finding of guilt were sent to prison. But for eighty years, juveniles who violate the law have been given an opportunity for rehabilitation by the juvenile courts rather than being placed in the punitive criminal justice system. Since the earliest juvenile court statute, enacted in Illinois in 1899, every state has adopted statutes based on the philosophy of care, guidance, and control of children. The intent of these statutes is that youths under a certain age are not to be treated as criminals, but rather as delinquents. Such youths are not to be punished; instead, the attempt is made to rehabilitate them.

Significantly, most states have enacted laws concerning juveniles which take into account certain extreme conduct which because of its "shocking criminality" allows for the transfer of juveniles to a criminal court. This transfer procedure, referred to by terms such as transfer, waiver, bind-over, removal, or certification, is in reality a safety valve for the juvenile justice system. Provisions for waiver of jurisdiction are typically intended for those juveniles who are over a specified age and who allegedly committed a crime of specified severity.

REQUIREMENT OF A WAIVER HEARING

The Supreme Court, in Kent v. United States, first reviewed juvenile court procedures. That landmark case specifically dealt with the problems of waiver of jurisdiction by the juvenile court. That opinion nullified the transfer of a juvenile to criminal court because the juvenile court had not held a hearing on the issue. Under a statute calling for a "full investigation" before a transfer decision is made, the Court required a hearing measuring "up to the essentials of due process and fair treatment." Prior to the

4. Resteiner, supra note 1, at 2.
6. Id. at 562.
Gault decision,\textsuperscript{7} there had been substantial doubt as to the constitutional dimensions of Kent. However, most courts now assume that the holding of Kent established a constitutional right to a hearing in state juvenile transfer proceedings.\textsuperscript{8}

A waiver hearing is usually held before a determination of delinquency. However, some statutes allow the transfer decision to be made either during or after the juvenile court's adjudicatory hearing.\textsuperscript{9} There may be an issue of double jeopardy, if the transfer decision is made after the adjudicatory hearing.\textsuperscript{10}

Statutes in most states give the juvenile court the exclusive right to order a transfer to criminal court. The transfer procedure is ordinarily set in motion by a law enforcement official, a probation official, or an appropriate official.\textsuperscript{11} He simply files a motion or petitions the juvenile court by requesting the transfer of the juvenile to criminal court. A juvenile court can consider the question of transfer on such a motion, \textit{sua sponte}, or, when no transfer petition has been filed, the court can formally or informally direct its filing.\textsuperscript{12} Typically, the statutory conditions for transfer include age, type of offense, and characteristics of the juvenile. These provisions for transfer should be adequately specific so as to avoid constitutional infirmity.

Some jurisdictions recognize transfer as a right of the juvenile to request transfer to criminal court.\textsuperscript{13} Because the majority of statutes limit transfer provisions to cases of serious criminal behavior, it is not probable that a juvenile would ordinarily desire to be transferred to a criminal court setting. Other jurisdictions give the prosecuting attorney the power to determine which forum will try

\textsuperscript{7} In \textit{re} Gault, 387 U.S. 1 (1967).

\textsuperscript{8} See, e.g., United States \textit{ex} \textit{rel.} Turner v. Rundle, 438 F.2d 839 (3d Cir. 1971); see also Powell \textit{v.} Hocker, 453 F.2d 652 (9th Cir. 1971); see P. Hahn, \textit{The Juvenile Offender and the Law} § 19.1 (1978).


\textsuperscript{10} Benton \textit{v.} Maryland, 395 U.S. 784 (1969) (applying the double jeopardy clause to the states through the Fourteenth Amendment).

\textsuperscript{11} See \textit{In re} John Doe 1, 50 Hawaii 620, 446 P.2d 564 (1968).

\textsuperscript{12} See, e.g., \textit{CAL. WELF. \\& INST. CODE} § 707 (Supp. 1980); \textit{MO. ANN. STAT.} § 211.071 (Vernon Supp. 1981).

\textsuperscript{13} See, e.g., \textit{FLA. STAT. ANN.} § 39.02(5)(a) (West Supp. 1979); \textit{ILL. ANN. STAT.} § 702-7(5) (Smith-Hurd 1980).
the juvenile. Some states provide for an automatic transfer for certain classes of offenses, such as those punishable by death or life imprisonment. These effectively deprive the juvenile court judge of any discretion in the matter.

THE HEARING AND DUE PROCESS REQUIREMENTS

The decision to waive jurisdiction is certainly a critical determination in so far as it affects subsequent treatment accorded the juvenile. Therefore, the content of the hearing is of utmost importance. Most jurisdictions will not consider any determination of the juvenile’s guilt as part of the transfer decision because this would result in two inquiries into the juvenile’s guilt. Other states consider it irrelevant whether the juvenile committed the offense, for the purpose of the transfer hearing. Some courts have held that evidence of a juvenile’s connection with the alleged offense is neither necessary nor admissible. Yet, in some jurisdictions a judicial finding of probable cause to believe the accused guilty is a consideration at the transfer hearing. Although it may not be required by statute in all states, perhaps better practice calls for the determination of probable cause prior to the transfer hearing.

Specifically, the Kent decision set forth four basic safeguards required by due process during the transfer hearing:

1. If the juvenile court is considering waiving jurisdiction, the juvenile is entitled to a hearing on the question of waiver.
2. The juvenile is entitled to representation by counsel at such a hearing.
3. The juvenile’s attorney must be given access to the juvenile’s social records on request.
4. If jurisdiction is waived, the juvenile is entitled to a statement of reasons in support of the waiver order.

Most jurisdictions that permit waiver of jurisdiction require by statute a hearing on the waiver. Hearings have also been required

in a number of instances by judicial decision.\footnote{21} There is ordinarily a requirement that the child and his or her parents or guardian be given notice of the time, place, and purpose of the hearing. But the various states differ as to the effect when there is a failure to observe this notice requirement.\footnote{22}

**FACTORS CONSIDERED FOR WAIVER**

Under the juvenile justice system, the transfer decision is unique in that of all the decisions that can be made it alone can result in a referral to the adult criminal court system. Thus, the factors that lead to this decision are critical and should depend upon various objective considerations that evaluate the child's receptiveness to treatment within the juvenile justice system. As an appendix to its decision in *Kent*, the Supreme Court suggested the following criteria to be used in determining whether to waive jurisdiction over a child for transfer to criminal court:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, for example, whether there is evidence upon which a grand jury may be expected to return an indictment.
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the criminal court.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environment, emotional attitude and pattern of living.
7. The record and previous history of the juvenile.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the juvenile court.\footnote{23}

A number of states have codified waiver criteria identical or similar to those enumerated in *Kent*. Others have implemented crite-
ria of their own that reflect the essential concerns suggested in the Kent decision.

For the purposes of the transfer decision, the juvenile's dangerousness or need for treatment is generally determined by severity of the offense, which is presumed true simply on the basis of the charges. More often the most heavily weighed factors in the decision to waive jurisdiction are the seriousness of the offense and the past history of the juvenile. Other factors are also considered, including the availability of services in and out of court, the juvenile justice system's currently available treatment facilities and community interest and pressures.24

Because a basic issue is the juvenile's amenability to rehabilitation if kept under the supervision of the juvenile court, the past history of the juvenile's involvement and treatment with the system is closely scrutinized. A pattern of continual or increasingly severe criminal activity in the face of fruitless attempts to rehabilitate the juvenile may indicate that allowing the juvenile to remain in the juvenile justice system would help neither the juvenile nor the community. The escape valve, namely the juvenile court's waiver of jurisdiction to criminal court, is often felt to be the proper way out when the juvenile has had constant opportunities for rehabilitation or when the crime a juvenile is alleged to have committed is both serious and vicious.

In determining whether to opt for a transfer to criminal court, a stable home with parents ready and able to take part in a program of treatment may be seen as an indication that the juvenile should remain in the juvenile justice system.26 Likewise, first offenders, except in extraordinarily serious cases, will usually be deemed to be amenable to the rehabilitative processes of the juvenile court, if for no other reason than the lack of a record to show that the opportunity was a wasted effort.26

Some statutes specifically require the additional consideration of factors such as the juvenile's amenability to treatment in facilities that are currently available and the state's interest in protecting the safety of the public.27 Other statutes are solely interested in

26. Id.
the issue of amenability to treatment as currently available. The latter criterion is seemingly too vague to be the real standard for a proper decision. Other statutory variations establish the juvenile’s suitability for treatment and the need to protect the public as alternative criteria. Another such statute requires a finding that a juvenile is not amenable to treatment and that the safety of the community is at issue. In another, the juvenile court must find that retaining jurisdiction over the juvenile will not serve the best interest of the juvenile and the public prior to transferring the case to criminal court.

As indicated, earlier a finding of probable cause should be a factor considered in the transfer decision. It must be stressed that the waiver hearing is far more than just a probable cause hearing. In reality, the finding that probable cause does exist should be one of the many cumulative factors available to the court.

The quantum of proof may vary state to state. However, the Supreme Court, relying on what has been called the “fair treatment standard,” has said that it has never attempted to prescribe the quantum of evidence necessary to support a determination of transfer, other than that “the hearing must measure up to the essentials of due process and fair treatment.” The quantum of evidence necessary for the probable cause issue should be based upon the preponderance of the evidence since this aspect of the proceeding is somewhat similar to its counterpart in a criminal prosecution. As to the standard of proof borne by the state on the issue of nonamenability, the usual burden to be met is either substantial evidence or at least preponderance of the evidence. Some have advocated that there should be a greater burden of proof, clear and convincing evidence, since the transfer would deprive the juvenile of the benefits to which, by reason of his age, he would otherwise be entitled.

The previous factors can be described, at best, as merely typical considerations entering into the waiver. It should be noted that in

34. Id.
35. Id. at 19.
this rather subjective decisional process many other factors come into play. Several surveys have been taken of the most commonly relied upon factors. One such survey set forth what it considered the five most commonly used factors:

1. Issues of contestable fact which would prolong a juvenile hearing.
2. The commission of a serious offense after previous correctional treatment.
3. The fact that the juvenile appears “hopeless.”
4. The need to punish the juvenile for his attitude.
5. The availability of better treatment resources and the maximized protection of the public safety afforded by criminal court.6

A survey by the President’s Commission on Law Enforcement and Administration of Justice on the other hand, determined that eleven different factors were commonly relied on:

1. The seriousness of the alleged offense;
2. The record and history of the juvenile;
3. The aggressive, violent, premeditated or willful manner in which the offense was committed;
4. The sophistication, maturity and mental attitude of the juvenile;
5. The proximity of the juvenile’s age to the maximum age of juvenile jurisdiction;
6. The availability of better rehabilitative facilities in the adult court;
7. The possible need for a long period of incarceration;
8. The sufficiency of the evidence connecting the juvenile with the alleged crime;
9. The fact that associates of the juvenile will be charged in adult court for that crime;
10. The effect of the court’s transfer decision on the public’s respect for law and order;
11. The community’s attitude toward that specific offense.7

THE TRANSFER DECISION: ESSENTIAL STATEMENT AND PROCEDURAL DEFENSES AVAILABLE

Most jurisdictions do not set forth clearly ascertainable, absolute standards by which the waiver determination can be made. Broad terminology such as “amenability to treatment” or “the best interests of the child and the community” are excellent examples. Some courts will limit the standards to those expressed in the statute.

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7 Juvenile Delinquency and Youth Crime 78, app. B. Table 5 (1967).
while other courts will feel free to infer whatever standard they may find applicable.

In light of frequently broad or seemingly uncertain standards, it is crucial that the court's order of transfer detail the reasons for the court's action. The Kent decision held that to do otherwise makes the transfer invalid. It may be argued that as a matter of constitutional law, where a juvenile court transfers jurisdiction over a juvenile to the criminal courts, "as a condition to a valid order, [the juvenile is] entitled to . . . a statement of reasons for the [court's decision]." The transfer of jurisdiction is a "critically important" proceeding which requires careful consideration, and since the reviewing court "should not be remitted to assumptions, a statement of reasons [must be set forth by the court] motivating the waiver including . . . a statement of relevant facts.

Consequently, there are a number of grounds to challenge an adverse transfer decision. Any procedural defects in the waiver hearing can be raised if they violate statutory or due process requirements. The transfer may be attacked if the court does not have sufficient evidence to support its finding. If irrelevant or insignificant criteria are relied upon to support the decision, grounds for challenge exist. The essential statement of reasons for the transfer must be carefully viewed not only by the court, but also by the prosecutor and counsel representing the juvenile.

Jurisdictions vary in the methods they provide for attacking the transfer order. Generally, the permitted procedures include: direct appeal; extraordinary writ; motion to dismiss in the criminal case; appeal from the criminal conviction; and habeas corpus.

A further procedural concern is the issue as to whether a transfer order is immediately appealable or is reviewable only upon appeal of a conviction in criminal court. The solution depends on the state law, in that the various statutes provide for the kinds of orders that are final and appealable directly. Notably, some courts have held that a transfer order is not appealable due to its interlocutory nature, because it may not determine the rights of the

38. 383 U.S. at 552.
39. Id. at 557.
40. Id. at 561.
41. L. Arthur, supra note 33, at 19.
parties, and thus is not appealable as a final order. Conversely, other jurisdictions do hold that a transfer order is final and appealable because it operates to terminate the juvenile court's jurisdiction. When the proper means of review of a transfer order is to appeal the order directly, some courts have held that if a juvenile fails to request review of the transfer order by the approved means, the order cannot be challenged on appeal of the juvenile's conviction in criminal court. Most courts hold that even if the juvenile is convicted in criminal court, a defect in the transfer is not cured, and the juvenile does not waive his right to appeal an invalid transfer. The criminal court, without a valid transfer, cannot assume jurisdiction over the case, and any judgment rendered is void.

TRANSFER TO CRIMINAL COURT: KENTUCKY

Even though transfer proceedings from a statistical standpoint do not account for much of the juvenile court's activity, the importance of this process to the juvenile offender cannot be overstated. This section is intended to set forth the various steps by which this most crucial process should be carried out. In reality, the decision will determine whether the juvenile is to be deprived of the opportunities for rehabilitation within the juvenile justice system and be exposed to the often harsh, punitive criminal courts. Without a doubt, this is not a decision to be taken lightly and should be viewed perhaps only as a last resort.

Early decisional law has reflected the significance of transfer procedures. Case law has held "that it should affirmatively appear in the prosecution in the circuit court of a juvenile . . . not only that the juvenile court had made an order transferring the prosecution to circuit court, but it also should so appear that all necessary steps to give juvenile courts jurisdiction . . . were followed." The procedure for transfer of jurisdiction to the circuit court in Kentucky is governed by statute, although case law has interpreted

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44. See note 42 supra.
47. Edwards v. Commonwealth, 264 Ky. 4, 6, 94 S.W.2d 25, 28 (1936). Note that failure of such showing will not transfer jurisdiction to circuit court. Anderson v. Commonwealth, 465 S.W.2d 70, 72 (Ky. 1971).
various provisions of the statute.\textsuperscript{48} Section 208.170 of the Kentucky Revised Statutes, entitled "Proceedings against children suspected of felony," is the basic reference for juvenile transfer.\textsuperscript{49} Careful analysis of this statute is essential so that the rights of the alleged juvenile offender are not abridged and, if the situation calls for a transfer order, such decision constitutes a valid legal order.\textsuperscript{50} First, it is important to note that juvenile court makes a decision prior to any adjudicatory hearing as to whether there is reasonable cause to

\textsuperscript{48} Benge v. Commonwealth, 346 S.W.2d 311 (Ky. 1961).

\textsuperscript{49} 1. If, prior to an adjudicatory hearing in the juvenile court, it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of commission of the offense the child was sixteen (16) years of age or older, or was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense, and the court is of the opinion that the child be tried and disposed of under the regular law governing crimes, the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed. No child shall be considered a felon for any purpose until transferred to trial and convicted of a felony by a circuit court.

2. The hearing held to consider the transfer of a juvenile to the circuit court shall determine if there is probable cause to believe that an offense was committed and that the child committed the offense.

3. If the court determines that probable cause exists, it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against person; the maturity of the child as determined by his environment, the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

4. If, following completion of the transfer hearing, the court is of the opinion that the best interest of the child and of the public would be protected by such transfer, the order of transfer shall state the reason for such transfer.

5. When the juvenile court so transfers a case to the circuit court:
   a. If a grand jury considers the case and is satisfied there is sufficient evidence to indict the child, it shall be instructed that it may either return an indictment or may return a written report to the circuit court recommending that the child be transferred to the juvenile court. If the court believes that such transfer would be proper, it may order the child transferred to the juvenile court.
   b. If an indictment is returned, the court may in its discretion order the case transferred to the juvenile court.
   c. If an indictment is returned and the court does not transfer the case to juvenile court, the child shall be tried as any other defendant.
   d. While under the jurisdiction of the circuit court, the child shall be subject to bail same as an adult.

\textsuperscript{50} Hancock, \textit{Juvenile Transfer—The Juvenile Court Stumbling Block}, 38 Ky. B.J. 44 (1974).
believe that the child committed a felony, when at the time of occurrence of the offense, the juvenile was sixteen years old or older, or less than sixteen years old in offenses such as murder or rape (including accessory to either murder or rape before the fact). The court must be of the opinion that the "best interests" of the juvenile and the public call for the juvenile to be transferred to circuit court to be tried as an adult. The case will be transferred to the circuit court in the county in which the crime was allegedly committed.

If the juvenile court believes that the proper course of action is to institute a transfer proceeding, the statute requires a formal hearing as to which notice to all parties is required. The procedural steps involved in this required hearing are set out in various sections of the Kentucky Revised Statutes: basic jurisdiction and a requirement of preliminary inquiry as to the interests of the child and the public; the conduct of the hearing, including explanation to the child and his or her parents or guardian of their respective rights to counsel, the availability of counsel if financially unable to retain, the privilege against self-incrimination, the right to confront and cross-examine the accusers, the right to appeal; that these "due process" rights belong to the child and only he can waive them; a demand for a separate, formal transfer hearing; and social and psychological investigation to aid the court in a proper disposition. A failure by the juvenile court to observe these steps may invalidate a decision to transfer jurisdiction to the circuit court.

Under section 208.170(2) of Kentucky Revised Statutes another consideration at the transfer hearing is a determination as to whether there is probable cause to believe the alleged offense was committed and that the juvenile committed this offense. This provision is yet another safeguard to a possibly hasty and emotionally prompted transfer. The idea that is stressed here is that there is far more to the allegation that a certain juvenile was involved in a serious offense than merely his being formally charged. The quantum of evidence to establish the probable cause rests on the state and the burden of preponderance of the evidence, at least, is required. Typically a measure of proof in the range between prepon-

52. Id. § 208.060.
53. Id. § 208.170.
54. Id. § 208.140, construed in Baker v. Commonwealth, 500 S.W.2d 792 (Ky. 1973).
derance and clear and convincing evidence is essential to find probable cause. After a finding of probable cause, the court must find that it is in the best interest of the child and the public before it can require that the child be tried and disposed of under the regular criminal court system. The factors that are to be considered are found in section 208.170(3):

1. Seriousness of the alleged offense;
2. Whether the offense was against person or property (against persons being worse);
3. Maturity of the child as determined by his environment;
4. Child's prior record;
5. Prospects for adequate protection of the public and likelihood of rehabilitation of the child in light of current facilities.55

Section 208.170(4) discusses the transfer order. It is perhaps one of the most successfully appealed areas from the standpoint that often the order fails to state the reasons for transfer. The order of transfer must contain a statement of the reasons for the transfer in specific language. Additionally, case law has held that the waiver of jurisdiction order, an accompanying statement, or the juvenile court record must include a showing of a hearing at which the juvenile was represented by counsel plus the essential statement of reasons for such transfer.56 The record must show that a hearing was held which satisfied the fundamental requirement of due process as set forth in Kent v. United States.57

The last provision, section 208.170(5), deals with the discretion of the circuit court when it acquires jurisdiction from a valid transfer. Even at this point, the circuit court in its sound discretion may order the child back to juvenile court. If the circuit court does retain jurisdiction and brings criminal charges against the juvenile, he is subject to bail as is any adult.58

As to the potential issue of double jeopardy, a waiver hearing in juvenile court confines itself only to the determination of whether the case should be transferred to circuit court and is not a proceeding that could possibly result in the adjudication of guilt or punishment. Further, a transfer order found to be defective or invalid

56. Id. § 208.170(4); Hubbs v. Commonwealth, 511 S.W.2d 664 (Ky. 1974); Risner v. Commonwealth, 508 S.W.2d 775 (Ky. 1974). See also Mayes v. Commonwealth, 563 S.W.2d 4 (Ky. 1978).
after a juvenile conviction in circuit court has the effect of making the circuit court judgment void. Therefore, any subsequent disposition should not be considered a second determination to enable a double jeopardy claim to arise. 9

Last, it should be noted that Kentucky statutes do not require or demand that a transfer of jurisdiction take place. Currently, there are proposed statutory changes in the juvenile code before the Kentucky Legislature and such changes, including some alterations of the transfer process, may be effective as early as January, 1982.

TRANSFER TO CRIMINAL COURT: OHIO

The transfer procedures and requirements are incorporated into Rule 30 of the Juvenile Rules and section 2151.26 of the Ohio Revised Code. Both the rule and code section are similarly entitled, "Relinquishment of jurisdiction for purposes of criminal prosecution." And what is incorporated into the rule is substantially equivalent to what is contained in the code section, with some alterations. It becomes evident in reading both the rule and the code section that each clearly allows for the constitutional prerequisites called for in Kent v. United States. 60

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A. After a complaint has been filed alleging that a child is delinquent by reason of having committed an act that would constitute a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after making the following determinations:
   1. The child was fifteen or more years of age at the time of the conduct charged;
   2. There is probable cause to believe that the child committed the act alleged;
   3. After an investigation, including a mental and physical examination of the child made by the Ohio Youth Commission, a public or private agency, or a person qualified to make the examination, that there are reasonable grounds to believe that:
      a. He is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
      b. The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority.
B. The court, when determining whether to transfer a case pursuant to division (A) of this section, shall determine if the victim of the delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of commission of the act. Regardless of whether or not the child knew the age of the victim, the fact that the victim was sixty-five years of age or older or permanently and totally disabled...
The bind-over or transfer process in Ohio can be initiated by the

shall be considered by the court in favor of transfer, but shall not control the decision of the court.
C. The child may waive the examination if the court finds the waiver competently and intelligently made. Refusal to submit to a mental and physical examination by the child constitutes waiver of the examination.
D. Notice in writing of the time, place, and purposes of such hearing shall be given to his parents, guardian, or other custodian and his counsel at least three days prior to the hearing.
E. No child, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen, unless the child has been transferred as provided in this section. Any prosecution that is had in a criminal court on the mistaken belief that the child was over eighteen years of age at the time of the commission of the offense shall be deemed a nullity, and the child shall not be considered to have been in jeopardy on the offense.
F. Upon such transfer the juvenile court shall state the reasons for the transfer and order the child to enter into a recognizance with good and sufficient surety for his appearance before the appropriate court for any disposition that the court is authorized to make for a like act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint.

In comparison, OHIO Juv. R. 30 reads:

A. Preliminary hearing. In any proceeding where the court may transfer a child fifteen or more years of age for prosecution as an adult, the court shall hold a preliminary hearing to determine if there is probable cause to believe that the child committed the act alleged and that such act would be a felony if committed by an adult. Such hearing may be upon motion of the court, the prosecuting attorney or the child.
B. Investigation. If the court finds probable cause, it shall continue the proceedings for full investigation. Such investigation shall include a mental and physical examination of the child by the Ohio Youth Commission, a public or private agency, or by a person qualified to make such examination. When the investigation is completed, a hearing shall be held to determine whether to transfer jurisdiction. Written notice of the time, place and nature of the hearing shall be given to the parties at least three days prior to the hearing.
C. Prerequisites to transfer. The proceedings may be transferred if the court finds there are reasonable grounds to believe:
   1. The child is not amenable to care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
   2. The safety of the community may require that the child be placed under legal restraint for a period extending beyond the child's majority.
D. Retention of jurisdiction. If the court retains jurisdiction, it shall set the proceedings for hearing on the merits.
E. Determination of amenability to rehabilitation. In determining whether the child is amenable to the treatment or rehabilitation processes available to the juvenile court, the court shall consider:
   1. The child's age and his mental and physical health;
   2. The child's prior juvenile record;
   3. Efforts previously made to treat or rehabilitate the child;
   4. The child's family environment;
   5. School record.
F. Waiver of mental and physical examination. The child may waive the mental and physical examination required under subdivision (B). Refusal to submit to a mental and physical examination or any part thereof by the child shall constitute waiver.
court, prosecutor, or the child, a somewhat similar situation to that in Kentucky. The process is initiated by a motion which can be made at any time following the filing of a delinquency complaint but prior to the entry of an order of final disposition. Thus, Ohio’s transfer provisions differ from those in Kentucky in that Ohio permits the transfer decision to be made prior or subsequent to an adjudicatory hearing or after an adjudication of delinquency.

As evidenced by the criteria of Rule 30 and section 2151.26 of Ohio Revised Code, a hearing on the transfer is required. Three days written notice must be given to the parties, and the child may not waive his right to counsel at the hearing. This hearing to effect a valid bind-over is two-fold. First, if the juvenile court, upon the motion for a preliminary hearing to determine whether there exists probable cause to believe that the child, who was fifteen years old or older, committed the offense alleged and that such offense would be a felony if committed by an adult, finds probable cause, then the court must continue the proceedings for full investigation. In this initial stage, the primary factors are age, criminal complicity, and whether on the surface the case appears to be one in which bind-over might be appropriate. The burden upon the state to show probable cause is typically by a preponderance. And unless the court is proceeding to an adjudication of delinquency, it is not necessary to establish the fact of delinquency beyond a reasonable doubt. Probable cause in this instance may be established by the failure of the child to dispute the jurisdictional fact of delinquency. Second, as to the investigation, it shall include a mental and physical examination of the child by the Ohio Youth Commission, a public or private agency, or a person qualified to make such an examination. The mental and physical examination may be waived by the child, but it must be done competently and intelligently. A refusal on the part of the child to submit to these examinations constitutes a waiver thereof.

Crucially, the proceedings may be transferred if the court finds thereof.

G. Order of transfer. The order of transfer shall state the reasons therefor.
H. Release of transferred child. The juvenile court shall set terms and conditions for the release of the transferred child in accordance with Criminal Rule 46.

63. Id. See also In re Jackson, 21 Ohio St. 2d 215, 257 N.E.2d 74 (1970).
64. See note 61 supra.
there are reasonable grounds to believe that the child is not ame-
nable to care or rehabilitation in any facility designed for the care,
supervision, and rehabilitation of delinquent children; and, the
safety of the community may require that the child be placed
under legal restraint for a period extending past the child’s
majority.

Exactly what is required to determine amenability or the com-
munity’s need for protection is not a simple task. There appears
to be a general misconception that the more serious the criminal
act, the greater the danger; and the longer the sentence of confine-
ment, the better protected the community. This is a definite prob-
lem area and counsel for the juvenile must advocate it not be
determinative.

As to the amenability issue, the rule goes beyond the particulars
of the code section. The five factors to be considered are

1. Child’s age and his mental and physical health;
2. Child’s prior juvenile record;
3. Previous efforts at rehabilitation;
4. Child’s family environment;
5. School record.

Note that it is not essential to find that the juvenile cannot be
rehabilitated, but only that there are reasonable grounds to believe
he cannot be rehabilitated. Further, the court need not find that
all five of these factors are adverse in order to determine the issue
of amenability. The decision will often involve a balancing of the
factors.

Significantly, these factors do not mention, explicitly, the seri-
ousness of the offense, whether it was violent, premeditated, will-
ful, or committed against persons or property. Again, the advocate
representing the juvenile may wish to prevent consideration of
these factors at the hearing, unless these factors cast a favorable
light upon the juvenile.

The issue of community safety, a conjunctive consideration with
amenability, presents the problem of determining what is neces-
sary to insure such safety. Both elements must be found to coexist;
they are not to be viewed alternatively. It is not a situation in

66. Ohio Juv. R. 30(E)(1)-(5).
67. See note 61 supra.
68. See note 65 supra.
which the court can simply rest upon the basis of one and not the other. What criteria use in considering community safety are not provided for in the rule. Thus, a great deal of latitude is available to the court as to what it values as relevant in deciding whether the juvenile is a risk to the community safety.

The code section provides that the order of transfer shall state the reasons for waiving jurisdiction. The rule sets forth that a juvenile transferred to the jurisdiction of the adult court shall have terms and conditions governing bail similarly available to adults. When the bind-over is ordered, the juvenile court is to fix an appearance bond before the appropriate court for disposition of the case as in any adult criminal act. Although a controversial issue, the transfer order is held to be not a final appealable order. The obvious shortcoming of this postponement of appeal is that the juvenile must go to trial sometimes unnecessarily when the transfer was not proper or valid.

A subsequent determination that the bind-over process was somehow improper, after exposing the juvenile to a full criminal trial, brings up the consideration of double jeopardy. Ohio case law has held that double jeopardy does not apply to a delinquency proceeding which is preliminary to a transfer order. The thought behind this is that the proceedings prior to the transfer could not result in a determination of the juvenile's guilt or punishment and the invalidation of the bind-over order made the trial in adult court void. The appellate courts throughout Ohio have held this not to amount to a second determination on the merits that would invoke the defense of double jeopardy.

JAMES R. PIERCE

70. Id. § 2151.28(F).
71. Ohio Juv. R. 30(I).
A SURVEY OF SEXUAL HARASSMENT: A WRONG REDRESSABLE UNDER TITLE VII ONLY WHEN DISCRIMINATION IS SHOWN

Introduction

As a cause of action, sexual harassment is as controversial as it is new. However, it has quickly become as complex as traditional fields of law with significant impact upon the economy and the social fabric of the nation.

It has been said that "[s]exual harassment is not so much a sexual act, as it is a form of domination." As such, it is comparable to actions for infliction of emotional distress, which courts have traditionally resisted for "various reasons" including, (1) difficulty in proving the measuring damages, (2) injuries so fleetingly insignificant and subjective as not to be foreseeable by the defendant, and (3) opening the door "not only to fictitious claims, but to litigation in the field of trivialities and mere bad manners." In addition to the resistance to this type of action, there is the traditional resistance to change in the stereotypical roles assigned to each sex. These traditional objections and reservations have not been entirely abandoned.

In a recent poll, the Harvard Business Review found that its readers considered the sexual harassment guidelines of the Equal Employment Opportunity Commission [hereinafter EEOC] "reasonable and necessary" and believed the problem to be a "very serious matter." However, the male readers tended to downplay the frequency of the problem at the workplace, a reaction reminiscent of the downplaying of the impact of women's votes which was common when the suffragettes demanded equal rights some seventy years ago.

In the rapid development of this area of law, the dust has settled quickly to reveal issues which are only collaterally related to the timeless battle between the sexes. The first issue to arise is

1. Sexual Harassment is Psychological Rape, Director Says, Cincinnati Enquirer, May 10, 1981, § B, at 9, col. 5 (quoting Jessica Schiker, Director of Kentucky's Commission on Women).
5. Id.
whether women in the world of work are economically exploited, dominated and disadvantaged by such harassment to a significant degree. In the last seven years, the majority of courts in which the issue has been raised have answered in the affirmative and allowed actions based on harassment.6

The second issue is whether such actions will flood the administrative and judicial courts so as to cripple the administration of justice. As of April 22, 1981, the EEOC was engaged in processing some 118 complaints of sexual harassment which were supported with some corroboration.7 A cause of action has been available since 1974 in New Hampshire.8 Moreover, it is argued that, by allowing such suits, there will be less and less need for them.

Need the average man fear that casual conversation will be taken out of context or that innocent conduct will be impugned? Not if the law requires reasonably certain proof of the elements of the charge. Not if the boundaries of the rules, which are judiciously set, are known and honored.

Small wonder that, in the time of affirmative action struggles, a backlash in the sex discrimination field should arise against the emancipation of women. The chief of Bendix could not hold on to the talented but too attractive Mary Cunningham after her meteoric rise past top level male executives. As some Swiss cantons (states) continue to deny the vote to women,9 some men continue to resist the erosion of male prerogatives. But the trends are apparent. “We the people” has meant the rise of the common man in the past 200 years and the rise of the common woman in this century. Moreover, litigation has become an American way of life. With an expanding number of lawyers in the population, the trend is not likely to be reversed.

Wrongly accused males also have access to the courts. Similar to the countercharge of malicious prosecution in medical malpractice suits, countersuits have begun to be used in this new area of law.10 But an accusation of harassment can result in damaging consequences to a defendant’s reputation, career or family life whether or not he is ultimately cleared. After the Personnel Board of the

6. See notes 23 and 24 infra.
10. Fields, Accused of Sexual Harassment, Male Professor Sues Female Complainants for $23.7 million, Chronicle of Higher Education, May 4, 1981, at 1, col. 3.
Commonwealth of Kentucky decided against him, 11 State Agriculture Secretary Barkley filed a countersuit. 12 Denying the charges and suggesting a political conspiracy was responsible, Barkley accused the Governor and his administration of “playing a very high-powered political public-relations game.” 13 He further charged that the use of governmental resources “to investigate civil matters is illegal and ‘can be used as a powerful tool of repression of state workers and officials.’” 14 Barkley maintained that the “investigatory hearing” before the Personnel Board closely resembled a “criminal trial.” 15

Beyond individual action, challenges to sexual harassment have arisen in newspapers, 16 legislative hearings, 17 and the courts. 18

The Development of the Action

It is only in the past five years that courts have considered using Title VII 19 to encourage employers to take actions designed to deter sexual harassment. In the first reported case, a federal district court in Arizona held there was no cause of action for sexual harassment under Title VII. 20 Three years later, the Arizona court reaffirmed itself and refused to allow sexual harassment to be the basis of a suit against employers. 21 However, courts in twenty-one states 22 and the District of Columbia 23 have recognized that sexual

15. Supra note 11.
20. Supra note 18.
harassment can give rise to a federal or state cause of action against an employer. In addition, on April 11, 1980, the EEOC adopted "Interim Interpretative Guidelines" concerning sexual harassment. After public comment was received the Guidelines were revised on September 23, 1980. The Guidelines defined sexual harassment and set out, in general terms, when the EEOC will find an employer responsible for acts of sexual harassment.


26. (c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or su-
Thus, sexual harassment has been officially recognized by the federal courts and the enforcing administrative agency. Business and government entities and the lawyers who represent them must take steps to avoid sexual harassment suits and must prepare to defend against such suits. Avoidance and defense are not alternative strategies. Management must take an active role in preventing sexual harassment. Management must respond appropriately and in a timely manner to complaints of harassment if it hopes to successfully defend suits filed against it. To enable management to fulfill its role, it is essential that the scope of liability be clearly defined. The cases and the guidelines give some hint as to that scope.

The cases range from those which indicate some form of encouragement of sexual harassment by management to cases where positive steps were taken to prevent sexual harassment. Employers have been found liable where non-supervisory personnel physically assaulted a co-worker, where an employee was verbally abused by a supervisor or by co-workers, and even where the abuse stemmed from customers. In several cases, employers have been found liable for unsolicited sexual propositions made by supervisory employees) knows or should have known of the conduct unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.


30. 23 EMPL. PRAC. DEC. (CCH) 16,161.
That the employee had engaged in adulterous affairs with other employees was no defense for the employer. When a supervisor had in the past received sexual favors to which a subordinate freely consented, he could not later recommend sanctions against the now unresponsive employee without a candid disclosure of the problem to the authority making the decision. In one case, the extremely liberal Judge Skelly-Wright found no “tangible job benefits need be lost, so long as the employer created or condoned . . . [an] environment” which caused “anxiety” for the plaintiff.

On the other hand, employers have been exonerated where supervisors assaulted employees on the theory the employer did not know or did not approve of the conduct. It has been held that verbal propositions did not rise to such a level as to constitute a violation of Title VII. In Price v. John F. Lawhon Furniture Co., the employer was held not liable despite the court’s finding that plaintiff was fired because of her refusals of supervisors’ sexual advances, since the employer maintained a firm rule against sexual fraternization among its employees and plaintiff never complained to any of defendant’s officers. In Neely v. American Fidelity Assurance Co., the supervisor of the public relations department made sexual remarks, told “dirty” jokes, exhibited pictures of sexual activity and affectionately touched the shoulders of some of the female employees. However, the court found no liability under Title VII since neither continued employment nor employment-related benefits were conditioned upon the employee’s acquiescence to the behavior which the court found was not intended to be offensive and since the supervisor’s acts were personal and not sanctioned by the employer. In Alaska District, Corps of Engineers and American Federation of Government Employees, Local 1712, the arbitrator exonerated the employee from government

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41. 16 EMPL. PRAC. DEC. (CCH) 5785 (N.D. Ala. 1978).
42. 17 EMPL. PRAC. DEC. (CCH) 6009 (W.D. Okla. 1978).
43. 80-2 LAB. ARB. AWARDS (CCH) 4607 (Wash. 1979) (Sinclitico, Arb.).
liability. The plaintiff there complained that she had been passed over for a promotion because of the improper conduct of both the interviewer and a competitor for the job. She specifically alleged that the interviewer improperly "emphasized . . . that the successful applicants would be traveling overnight with employees of the opposite sex." Other circumstances were presented to show that the selection had been improper. These circumstances, however, raised only an inference of wrongdoing. For instance, it was argued that the inordinate amount of time the successful applicant had spent in the interviewing office indicated that she and the interviewer had engaged in "sexual relations." The arbitrator rejected the innuendoes of the plaintiff and found for the employer. The arbitrator indicated that the case involved more than the question of employer liability, since the reputation of both the interviewer and the successful candidate might be injured by an adverse award. This sensitivity would seem to appropriately comply with the announced position of the now resigned head of the EEOC, Eleanor Norton, who stated the EEOC would make "no attempt to persecute men" and would "apply the rule of common sense and fairness." The few reported cases in Ohio and the absence of reported court cases in Kentucky do not present a serious problem since Title VII is federal legislation and decisions of federal courts in other jurisdictions have precedential value.

The cases illustrate that violation of Title VII requires more than innuendo, even more than unsolicited, obvious or even repeated sexual advances or impositions. The action must be attributable to the employer, and the plaintiff must allege some job-related deprivation or impairment of career or ability to work. Having accepted sexual harassment as a cause of action, the courts still must establish the norm to govern these two critical criteria.

**Under What Circumstance is the Objectionable Conduct Attributable to the Employer?**

An employer is under a duty to maintain an atmosphere reasonably free of harmful discriminatory conduct. This does not mean

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44. Id. at 4610.
45. Id.
46. Id. at 4609.
49. See Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1972) (national origin discrimina-
that the “mere utterance” of an epithet which engenders offensive feelings in an employee is proscribed by Title VII. However, if the workplace is “heavily polluted with discrimination so as to destroy completely the emotional and psychological stability of minority group workers,” a court may find an unlawful employment practice. Mere failure to investigate and correct discriminatory conduct may result in employer liability, even though there was no intent upon the part of the employer or its supervisor to discriminate. Thus, where management investigates complaints and takes appropriate action to eliminate harassment, and where neither management nor supervisory personnel participates in any form of harassment, the employer should not be held liable.  

Simply because an employee is exposed to verbal abuse and must work with openly bigoted and prejudiced co-workers does not, in the absence of the employer's condoning such harassment, give rise to a cause of action against the employer: “It must be remembered that while [the employer] has the power to discipline employees for violation of its rules, it must [also] be prepared to defend its decision.” Employers are “acutely aware” of the probability that union workers will file grievances whenever “any disciplinary action [is] imposed.”


50. 454 F.2d at 238. But see Bundy v. Jackson, 24 FAIR EMPL. PRAC. CAS. (BNA) 1155, 1160 (D.C. Cir. 1980), which appears to stretch the Rogers holding to an extent unintended by the Rogers court.

51. 454 F.2d at 238.


54. Id. at 606.


56. Id. at 1137. See Underwood Glass Co., 58 LAB. ARB. 1139, 1140 (1972) (Hon, Arb.) (the local was informed by the international that it could deny no employee the right to file a grievance); Minnesota Mining & Mfg. Co., 56 LAB. ARB. 553 (1971) (Jacobs, Arb.) (suspension of harassing male employees was found to be unjustified); Kentucky Textile Industries, Inc., 53 LAB. ARB. 1315 (1969) (Williams, Arb.) (discharge of male employee who urinated within view of several female employees was too severe). See generally Marmo, Arbitrating Sex Harassment Cases, 35 ARB. J. 35 (March 1980).
employer taking disciplinary action. Where a union is not involved, the employer must still be wary lest an employee who was unjustifiably disciplined file an action in court for breach of contract or some other civil cause of action. The courts should not adopt a damned if you do, damned if you don’t position which would only erode respect for justice. In summary, the employers should only be liable where circumstances permit them some control over the situation whereby they might prevent or remedy the harassment.

When Has the Employee Asserted Some Job Related Impairment or Career Deprivation?

To collect from the employer, the plaintiff must show an injury which arose out of alleged discriminatory practices or policies of the employer. That is, the plaintiff must show that sexual misconduct led to adverse employment consequences which were attributable to the employer. In short, the employee must show that the employer discriminated invidiously. To understand the concept of invidious sex discrimination, one must look to legislative history and case law.

There is sparse legislative history surrounding the inclusion of sex in Title VII. However, what little there is indicates that those few legislators, who were sincere in their support of the inclusion of sex in the act, intended to abolish paternalistic protection of women. The amendment was supported by these legislators, not to provide women with opportunities on account of their sex, “but on account of merit.” The purpose was to provide women with greater “opportunities” to prove that they are the “mental” equals of men. The policy was adopted to promote integration of women into positions of power, respect and dignity.

Sex discrimination is therefore a refusal to recognize the real worth and value of women to society. It is paternalistic stereotyping which “is patently capable of stigmatizing all women with a

57. Tomkins v. Public Service & Gas Co., 568 F.2d 1044, 1048-49 (3d Cir. 1977). See Bundy v. Jackson, 24 FAIR EMPL. PRAC. CAS. (BNA) 1155, 1160 (D.C. Cir. 1981) (since adverse employment consequences may be intangible, the relevant consideration is whether the employer created or condoned the activity).
59. It is clear that inclusion of “sex” in Title VII was proposed by an opponent of the Civil Rights Act as an attempt to defeat its passage. 110 Cong. Rec. H2577-84 (daily ed. Feb. 8, 1964). See Vaas, supra note 59, at 441.
61. Id. at H2583 (remarks of Rep. Kelly).
62. Id. at H2581 (remarks of Rep. St. George).
badge of inferiority." The effect of such a stigma is to irreparably foreclose employment opportunities to members of the group so stigmatized. The cases, the legislative history and the EEOC Guidelines all indicate a concern that women are not to be perceived as less fit for responsibility than men. The statute thus addresses itself primarily to the sometimes subtle, sometimes gross, degradation of women.

When are the employment practices and policies of an employer degrading in a discriminatory manner? There is a case which clearly illustrates such discrimination from a sexual harassment perspective. In *Kyriazi v. Western Electric Co.*, a middle-aged woman of 200 pounds was sexually harassed by three male coworkers. They made jokes speculating and wagering on her virginity, remarked loudly about her marital status and, on one occasion, placed upon her desk a crude, obscene cartoon obviously intended to depict her. When she complained to her supervisors and to the personnel manager, she was told that she should be complimented that these young men had paid her attention and that they were merely engaging in horse play. Later, she was told that this manner of treatment must be expected "in a working man's world." Once, after these three men had taunted her about her virginity and she had responded by calling one of them a "homosexual," she was reproached by the same supervisors who took no action in regard to sexist taunts directed at her.

Prior to the harassment, the plaintiff was out of favor with the supervisors because of her complaints that the work she was assigned was not sufficiently challenging to a person of her ability and education. At the core of her complaints was an allegation that "there was a difference in the level and nature of work assigned to men and women." The court found her testimony credi-

66. *Id.* at 924 (plaintiff received a B.S. in 1952).
67. *Id.* at 934.
68. *Id.* at 934-35.
69. *Id.* at 936.
70. *Id.* at 939.
71. *Id.*
72. *Id.*
73. *Id.* at 933.
74. *Id.*
ble in this regard, especially in light of the statistics she offered. The attitude of her superiors is convincingly revealed by the statement of one superior that the plaintiff should become a school teacher, "the best profession a woman can have."

In this case, the men abused her not because of any attraction they may have felt toward her. They simply used sexual remarks and taunts in an attempt to keep the plaintiff in an inferior posture. Sexual harassment in this case was the product of an attitude that women are mentally inferior to men and fit only to serve men in menial or lowly tasks.

Sexual harassment is thus a form of slavery, a bondage to physical and subservient roles. This attitude is aptly illustrated by the words of the harassing male in Continental Can Co., Inc. v. Minnesota, who stated that "he wished slavery days would return so that he could sexually train her and she would be his bitch."

For a woman to work in an atmosphere polluted with a presumption of female baseness can only be detrimental to her satisfaction in the job and her career. When such discrimination is attributable to the employer, then she has a cause of action. She has the right to proceed against an employer in court, even where she has not been discharged, denied promotion, or otherwise tangibly harmed or deprived. The imposition by or tolerance of such psychological stress in the workplace on the part of the employer amounts to the constructive discharge of the employee.

This was precisely the position taken by the Oklahoma federal district court in Brown v. City of Guthrie. The court found that intimidating and offensive working environment maintained by an employer operated to erect barriers to employment opportunities. The court, in making its finding, relied heavily upon the newly published Guidelines, giving them great credence. Even so, in the absence of a congressional grant of lawmaking power to the EEOC, the Guidelines remain only persuasive and not controlling as to

75. Id. at 927-30.
76. Id. at 927.
77. 23 EMPLOYMENT PRACTICE DECISIONS (CCH) 16,161 (Minn. 1980).
78. Id. at 16,163.
80. Id.
81. Id.
82. Id. at 1631.
what the law is. 84

The Guidelines have been criticized by both employers and women's organizations. 85 Employers are concerned that the "highly subjective" definition of sexual harassment will "invite an avalanche of questionable charges, involving difficult credibility resolutions." 86 The Guidelines define sex harassment in terms of three types of circumstances, 87 all of which involved either an unwelcome sexual proposition or other verbal or physical conduct of a sexual nature. Under the Guidelines, sexual harassment occurs when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment." 88 It also takes place when "submission or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual." 89 Last, sexual harassment exists when conduct has "the purpose and effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 90

These Guidelines are admittedly subjective. However, it is difficult to conceive of guidelines which would not be somewhat subjective and still be effective. The question what is harassment involves a value judgment. The conduct should be judged in terms of whether the average person would expect and not be offended by such activity if it were directed at his or her person, spouse, parent or child. 91 The standard applied might reflect community standards. 92 Such judgments are inescapably subjective. Courts and juries are frequently called upon to make subjective judgments, to determine whether testimony or evidence is credible or not. Our system routinely leaves the resolution of difficult credibility issues to the discretion of judges and juries.

When the Guidelines were first published in tentative form, employers voiced concern that a certain section might be interpreted

84. S. Agid, Fair Employment Litigation 516 (2d ed. 1979).
86. Id.
87. Guidelines, supra note 26, § (a).
88. Id. § (a)(1).
89. Id. § (a)(2).
90. Id. § (a)(3).
92. Cf. id. at 31-34 (community standard adopted in obscenity case).
to extend their liability to acts of customers or clients.\textsuperscript{93} The revised Guidelines removed the uncertainty by providing that "[a]n employer may also be liable for acts of non-employees."\textsuperscript{94} Such liability was indeed imposed in \textit{EEOC v. Sage Realty Co.}\textsuperscript{95} In that case, the court held an employer liable where the employee complaint alleged that the newly redesigned uniform of the employer caused the employee to be subjected to "sexually provocative remarks."\textsuperscript{96} However, the actions of the employer in redesigning the uniform and requiring it to be worn can be said to have provoked the sexual comments.

The next question must be whether the employer should be liable for unprovoked and unexpected comments of clients and customers. If the employer becomes aware of such unprovoked comments is he under a duty to act? The Guidelines state that an employer will only be held liable where the employer "knows or should have known of the conduct."\textsuperscript{97} Furthermore, an employer may rebut apparent liability for such acts by showing "that it took immediate and corrective action."\textsuperscript{98} This implies that there will be no liability for the unforeseeable actions of customers. The safe course is for the employer to counsel and advise the client or customer in a friendly manner that there have been complaints of harassment. The employer should go into sufficient detail in a non-accusatory way so the client understands that such conduct will not be tolerated. The employer is caught in the middle. The situation confronting it is by its nature explosive and requires delicate treatment. Employers are justly concerned, since an offended client or customer may mean the loss of business. The duty to act must be interpreted in light of the "rule of common sense and fairness."\textsuperscript{99} Employers should not be liable for conduct which is beyond their control.

The EEOC is not oblivious to the employers' limited control of non-employees.\textsuperscript{100} The Guidelines make the employer "responsi-

\textsuperscript{93.} See Marcus, \textit{supra} note 85.
\textsuperscript{94.} Guidelines, \textit{supra} note 26, § (e).
\textsuperscript{96.} Kohn, \textit{Lobby Attendant Sues for Job; Refused to Wear Sexy Uniform}, \textit{N.Y.L.J.}, June 16, 1980, at 1, col. 2.
\textsuperscript{97.} Guidelines, \textit{supra} note 26, § (e).
\textsuperscript{98.} \textit{Id.}
\textsuperscript{99.} Lublin, \textit{supra} note 47.
ble” for acts of sexual harassment by non-employees when they occur “in the workplace.”101 Despite the clearness of this statement, certain groups have argued that the language of this section should be read so as to incorporate situations which arise when “women [are] required to attend conferences and/or travel as part of their jobs.”102 Unfortunately, women sometimes experience certain sexual impositions whenever they travel or attend a social gathering. They occur whether or not the socializing and traveling is work related. Employers are not able to eliminate society’s shortcomings. Even though the travel may have arisen out of the victim’s employment, the employer should not be held solely and totally responsible for the “high probability” of harassment under such circumstances. The proposition, that holding employers liable for actions of non-employees at places far distant from their premises will effect substantial change in social behavior, is without empirical support. It seems more reasonable to hold that, in certain situations, the risk of harassment is assumed by the employee.103 For example, a woman employed in a strip tease showhouse necessarily is exposed and expects far more in the way of sexual pranks and carryings-on than a woman employed at the local family restaurant. In applying for the job, the former knows what to expect. Although many moralists may desire to change society, it is hardly the role of the legal system to legislate personal concepts of morality. Where there is neither harm to third parties nor any unreasonably disproportionate balance of power, the law should merely seek to create a free society, in which people may openly contract without government intervention.

The Guidelines have also been attacked as “schizophrenic on the topic of preventive measure.”104 This criticism emphasizes that although the Guidelines warn the employer to take a number of preventive measures, it provides no immunity to the employer who complies with its provisions.105

Business critics have also charged the EEOC with being an “imperial bureaucracy.”106 Such a charge imputes more power to the EEOC than it has. In the first place, “Title VII does not give the

101. Guidelines, supra note 26, § (e).
102. Marcus, supra note 88, col. 2.
105. Id.
106. Lublin, supra note 47, at col. 4.
EEOC formal rulemaking power.”¹⁰⁷ EEOC Guidelines do not have the force or the effect of law.¹⁰⁸ They are, nonetheless, given great deference by the courts.¹⁰⁹ Even though the EEOC has been given enforcement powers by Congress, the courts are free to interpret the statute differently.¹¹⁰ The Guidelines are only highly probative evidence of the legality of practices under Title VII. In the end, the interpretation which the courts make is determinative as to what will be the law. The courts will make that determination not only in light of what the Guidelines state, but in light of precedent and the legislative history of the act.

Conclusion

Sexual harassment creates a cause of action against an employer when it arises out of discriminatory practices and policies of the employer. The plaintiff in such an action has the burden of showing: (1) that the conduct arose from a discriminatory practice or policy which is attributable to the employer; (2) that the employee suffered some job related deprivation or impairment. Since this cause of action is a recent development, the law in this area is vague. The Guidelines published by the EEOC provide a standard. They are, however, enveloped in a storm of controversy. The controversy was not completely resolved by the revised Guidelines. The case law is not yet sufficiently developed to provide clear standards. In a period of transition, the accompanying uncertainty cripples the conscientious in their attempts to comply with the law.

Guidelines which accurately anticipate the decision of the courts could greatly alleviate the uncertainty. Guidelines which fail to reflect policy consistent with the conception of the law propounded by Congress and the courts, only increase the confusion. The EEOC may seek to establish an ideal society by its proscriptions. The courts must face the reality that not all wrongs are amenable to judicial correction. Instead, a balance must often be struck between what is desirable and what is possible. When that balance is not struck, judicial correction may substitute a greater evil for a lesser.

¹⁰⁷. S. Acip, supra note 84.
A realistic and fair approach is necessary to avoid inundating the legal system with suits. The EEOC has attempted to avoid such a result by encouraging private settlements. Although this approach tends to promote filing of claims and often leads to some injustice, administrative agencies have been unable to find a viable substitute to settlement as a means of relieving crowded dockets. The effect is to compel employers to take those steps which will effectively reduce sexual harassment where such employer action is possible. Employers, where they have programs which discourage sexual harassment and where they are responsive to complaints, will not be liable for conduct which is beyond their control. Such an approach will encourage employers to affirmatively cooperate with the EEOC in its efforts to eliminate sexual harassment.

RONALD X. GROEBER
NOTES

NEGLIGENCE—LESSOR AND LESSEE—LIABILITY FOR CONCEALED DANGEROUS CONDITIONS KNOWN TO THE LESSOR—Milby v. Mears,
580 S.W.2d 724 (Ky. Ct. App. 1979)

I. FACTS

The facts that gave rise to this litigation are not unusual, especially in the “burley belt” in which Kentucky is located. In the spring of 1975, the plaintiff James H. Milby, entered into an agreement, known to burley tobacco producers as a “base agreement,” with the defendant Clell R. Mears, whereby Mears leased a plot of land located on his farm to Milby for tobacco production. The trial court held that the legal relationship between the parties was that of landlord and tenant, rather than that of master-and-servant, or joint adventurers. That holding was not questioned on appeal.¹

The base agreement was on a “50-50” basis: Mears provided the land for producing and the barn for storing the tobacco; Milby provided the labor needed for producing and preparing the crop for market. The parties further specified that they would divide the cost incurred in purchasing fertilizer and other materials. The agreement was valid and the parties’ true intentions were manifested in their mutual assent to it.²

Mears prepared the barn for Milby’s use and made considerable repairs. Because the barn had not been used for several years, Mears testified that he inspected the interior of the barn, including all tier poles and stringers.³ Tier poles and stringers are customarily made from rough hewn lumber and used to construct a network of racks in a tobacco barn. The freshly cut tobacco is hung on the racks for a period of drying before it is shipped to the market. This network of timber serves a two-fold purpose. First, it supports the tobacco for an extended period of time, and second, it must support the workers during the process of hanging the tobacco.

As Milby was housing the tobacco in the barn, a stringer broke causing him to fall and severely injure his left arm. For these inju-

2. Id.
3. Id.
ries Milby brought suit against Mears. Milby testified, and Mears conceded, that Mears had not warned Milby of any defects in the barn.4

The case was appealed from an order of the Green Circuit Court, which granted a motion notwithstanding the verdict, and dismissed Milby's complaint. The trial court jury, prior to the motion, had returned a verdict for Milby in the sum of $38,000. The trial court held (1) that no evidence existed that the landlord, Mears, had actual knowledge of the defective stringer that broke and caused Milby's injury, and (2) that the tenant, Milby, as a matter of law, failed to exercise ordinary care for his own safety, which failure was the cause of his injury.5

Two questions were presented in Milby's appeal. The first was whether Milby had waived his right to challenge the trial court's findings that he was contributorily negligent as a matter of law by failing to raise that issue in his original brief on appeal. The second was whether or not the evidence supported the trial court's action in granting judgment notwithstanding the verdict on the grounds that (1) there was no evidence that Mears had actual notice of the defect, and that (2) Milby was contributorily negligent as a matter of law.6 This casenote will address the latter issue.

On January 26, 1979, the Court of Appeals of Kentucky held that (1) there was evidence from which the jury could find that a readily observable defect existed and that Mears had actual knowledge of the defect as a result of his inspection of tier poles and stringers in the barn prior to the use thereof by Milby,7 but (2) that Milby was contributorily negligent as a matter of law in failing to make an examination of the tier poles and stringers in the barn before his fall since he had testified it was customary to do so.8

The requests for rehearing and discretionary review were denied on March 23, 1979, and June 5, 1979, respectively.9

II. LANDLORD'S LIABILITY FOR A KNOWN CONCEALED DANGER

The trial court judge instructed the jury that they could find for Milby only if they believed that the landlord, Mears, had actual

4. Id.
5. Id.
6. Id.
7. Id. at 728.
8. Id. at 729.
9. Id. at 724.
In its opinion, the court of appeals stated the longstanding rule in Kentucky regarding landlord liability to tenants. The rule is that the tenant takes the premises as he finds them, and the landlord need not exercise even ordinary care to furnish reasonably safe premises. Further, the landlord is not generally held liable for injuries caused by defects therein.11

In support of this rule, the court cited Dice v. Zweigart.12 In Dice, Kentucky's highest court dealt with the liability of a landlord for personal injuries sustained by a member of his tenant's family. A small child of the tenant drowned when he fell into a cistern after the child removed a temporary covering. The landlord had promised, but had not yet begun, to repair it. The court stated, "The tenant takes the premises as he finds them. As to him the doctrine of caveat emptor applies."13

The Dice court emphasized that the law imposed no liability on the landlord for not repairing the premises or for personal injuries which resulted from the defective condition. The court said further:

In fact, it is generally held that a tenant, a member of his family or his guest cannot sue a landlord in tort for personal injuries due to his omission to repair premises which have passed into the possession and control of the tenant, even if the landlord has agreed to make repairs.14

This line of reasoning has some basis in the law of property, where a lease is equivalent to a sale of the premises. The lessee acquires for a period the ownership and occupancy of the land as well as the responsibilities of a possessor of land. The principle was once adhered to widely. According to Prosser, "There is . . . , as a general rule, no liability upon the landlord, either to the tenant or to others entering the land, for defective conditions existing at the time of the lease."15

However, Prosser goes further and recognizes that modern social policy has changed the general rules of nonliability of the lessor:

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10. Id. at 728.
11. Id.
12. 161 Ky. 646, 171 S.W. 195 (1914).
13. Id. at 648, 171 S.W. at 197.
One exception developed by the common law is that the lessor, like a vendor, is under the obligation to disclose to the lessee concealed dangerous conditions existing when possession is transferred, of which he has knowledge. It is not necessary that the lessor shall believe the condition to be unsafe, or even that he have definite knowledge of its existence, before he is under any duty in regard to it. It is enough that he is informed of facts from which a reasonable man would conclude that there is danger; and the decisions run the gamut of 'reasonable notice,' 'reason to know,' or 'should have known.'

The *Milby* decision also recognized the concealed dangers exception to the general rule of nonliability, and cited several supporting cases. In one of them, *Speckman v. Schuster*, the Court of Appeals of Kentucky held that a landlord was not liable for personal injuries received by a tenant, when loose attic boards collapsed and precipitated her fall down a stairway. The tenant, although aware of the defective condition of the attic floor, testified that she did not know there was a stairwell under it. The court, in holding for the landlord, said:

The tenant takes the premises as he finds them, and the landlord is not liable for injuries growing out of the defective condition of the premises, unless such condition is known to the landlord and is not known to, or discoverable by, the tenant on a reasonable inspection, and the landlord conceals, or fails to disclose, such condition to the tenant.

The *Speckman* court explained that the liability of the landlord for concealed dangers is founded upon the "notion of deceit." In cases where the tenant knows of the defect, or should know of it by reasonable inspection, the element of deceit is lacking and the landlord is not liable.

In *Consolidated Coal Co. v. Zarvis*, the Court of Appeals of Kentucky again addressed the issue of landlord liability for concealed defects. In that case, the litigation arose from an injury received by a tenant while she was operating a water hydrant in a washroom provided by the landlord. The court held that there was

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16. *Id.* at 401.
17. 580 S.W.2d at 729.
18. 183 Ky. 326, 209 S.W. 372 (1919).
19. *Id.* at 329, 209 S.W. at 374.
20. *Id.*
21. 222 Ky. 238, 300 S.W. 615 (1927) (the latter reporter spells defendant's name "Zarirs").
no implied convenant on the part of the landlord to repair premises that were leased for the exclusive use of the tenant. The court repeated the exemption, as heretofore stated, that if a latent and hidden defect existed, known by the lessor but unknown to the lessee, there would be liability.

The case introduced another exception, however, upon which the decision depended: "[A]n implied convenant on the part of the landlord to repair does arise when the structure or thing producing the injury is used in common by a number of tenants . . . ." The court held for the landlord because the tenant failed to prove that the washroom was used in common with other tenants. This was the only means by which a duty could have been imposed on the landlord. Use of a common area was not an issue in Milby, since the landlord had not retained the use of any part of the leased property.

The court of appeals reiterated the general rule of nonliability of landlords for latent or hidden defects of which they have no knowledge in Larkin v. Barker. The tenant was injured when a mill owned by the landlord and operated by the tenant exploded or fell apart. The court again held for the landlord, the tenant having failed to prove the landlord's negligent construction of the mill. The court stated that it was possible that some defective condition of which the landlord was unaware caused the accident.

In a more recent decision cited in Milby, Carver v. Howard, the concealment issue is more complex. The question presented there concerned a landlord's liability to tenants and a guest for personal injuries attributable to an allegedly defective gas line located within the leased premises, but through which the landlord furnished gas for the tenant's use. In that decision, the court acknowledged the distinction between cases where the tenant is put in complete control, with no statutory or contractual obligation on the landlord to repair, and cases where the defective condition is located in a common area. In keeping with precedents, the court noted that

[i]n the first situation, the landlord is liable only for the failure to disclose known latent defects at the time the tenant leases the premises. In the last situation the landlord must exercise ordinary

22. Id. at 240, 300 S.W. at 616, accord Richmond v. Standard Elkhorn Coal Co., 222 Ky. 159, 299 S.W. 359 (1927).
23. 308 Ky. 364, 214 S.W.2d 379 (1948).
24. 280 S.W.2d 708 (Ky. 1955).
care to keep in a reasonably safe condition the premises reserved for the common use of his tenants.\textsuperscript{28}

The \textit{Carver} court held that there was evidence tending to show that the landlord possessed knowledge of the defect, and remanded the case to the lower court, indicating that if knowledge were proven the tenants should recover.

The \textit{Milby} court also cited \textit{Parson v. Whitlow,}\textsuperscript{28} which restated the \textit{Carver} holding with regard to latent and hidden defects. The \textit{Parson} court found the landlord owed no common law duty to the tenant, since the injury-causing defect was not latent. This decision follows the uniform rule that, with a few exceptions, the landlord owes no duty to a tenant.

\textbf{III. \textit{Milby v. Mears}}

In \textit{Milby v. Mears}, the court determined that in fact there was evidence from which the jury could find that a prior defect existed and that Mears may have been negligent in not warning Milby.\textsuperscript{27} The court's twofold rationale was based on the evidence.

First, Milby and his uncle testified that after the accident they examined the stringer and found an old split at the point where the stringer broke. This was not surprising since the barn had not been used for several years. Also, tier poles and stringers are items that are normally used for many years without being replaced. These facts give weight to the possibility that the stringer may have contained an old split which deteriorated over the years.

Second, Mears testified that he had inspected every tier pole and stringer, even the stringer which broke, and that he had made necessary repairs. The court stated that Mears was under no duty to inspect for defects. However, by undertaking inspection, he created a duty to do so with reasonable care. The court said that Mears, having claimed he looked, was barred from claiming he did not see.\textsuperscript{28}

To support this principle, the \textit{Milby} court cited two decisions, \textit{Kentucky Bus Lines, Inc. v. Wilson}\textsuperscript{29} and \textit{Renfro v. Fox}.\textsuperscript{30} Though their facts are dissimilar from \textit{Milby}'s (the cases involved the duty of an automobile driver), the concept they illustrate is applicable.

\begin{footnotesize}
25. \textit{Id.} at 711.
26. 453 S.W.2d 270 (Ky. 1970).
27. 580 S.W.2d at 729.
28. \textit{Id.}
29. 258 S.W.2d 486 (Ky. 1953).
30. 418 S.W.2d 761 (Ky. 1967).
\end{footnotesize}
In *Kentucky Bus Lines, Inc. v. Wilson*, the court imposed on the driver of a truck the duties mandated by statute: to look and to give a signal before changing directions. The court said, "The law not only requires a person to look when he should look, but also requires him to see what he should see." The driver of the truck in that case should have seen a bus that was in plain view before he made his turn into another lane. In *Renfro v. Fox*, the driver of a truck was found to be contributorily negligent in failing to see a train, after he had stopped and looked in the direction from which it came.

These cases should be distinguished from the *Milby* case. In *Kentucky Bus Lines* and *Renfro*, the duty to look, and to see what one should see is quite different from the duty suggested in *Milby*. In the former cases, the courts imposed a duty upon the drivers to exercise a degree of care to protect themselves. One driver was held at fault for not seeing a bus, the other for not seeing a train. However, in both cases, the duty that is imposed—to take a quick look around before proceeding—is one required of every driver. It seems a fair assumption that a driver, if he looks, will see an object as large as a bus or a train.

In *Milby*, however, the court imposed a special duty of care upon the landlord, who in good faith, and not being obligated to do so, undertook to inspect and repair the interior of his barn. No doubt the defect may have been observable, but it seems to be a poor analogy to draw between an object as large as a bus or train and a relatively small split in a stringer pole. This is a heavy burden on one who is acting in good faith, and of his own accord. Nevertheless, the *Milby* court concluded that there was evidence from which a jury could find that Mears had actual knowledge of the defect as a result of his inspection of the tier poles and stringers.33

Having drawn this conclusion as to the knowledge possessed by Mears, the court then turned to the issue of Milby’s contributory negligence. The court stated that even though a landlord has a duty to disclose a known defect, the tenant may be barred from recovery if he fails to exercise ordinary care for his own safety.34

One of the authorities cited to substantiate this principle was *Wright and Taylor, Inc. v. Smith,*34 in which the court examined

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31. 258 S.W.2d at 488.
32. 580 S.W.2d at 728.
33. *Id.* at 729.
34. 315 S.W.2d 624 (Ky. 1958).
the issue of contributory negligence. An employee of the tenant was injured when the cover of a grease trap in the basement floor gave way when she stepped on it. The plaintiff admitted that she did not look down at the manhole as she walked along the basement floor. She also admitted that the basement hallway was lighted well enough for her to see. It was held that the landlord had retained the hallway as a common area for use by other tenants and delivery men and that the landlord’s failure to maintain the common area was presumed to have been the cause of injury: “According to common experience, and knowledge and in the absence of negligence, one is not caused to fall into such grease traps or manholes.” The court applied the doctrine of res ipsa loquitur, presuming the landlord’s negligence and thereby his notice of the condition.

The Wright court concluded, however, that the question of the plaintiff’s contributory negligence was correctly submitted to the jury:

It was not plaintiff’s duty to look directly down at the manhole as she stepped on it but it was her duty to observe generally the surface upon which she was about to walk. Failure to perform this duty, however, would preclude her recovery only if the proof showed that the condition causing her injury would have been revealed to her by looking.

Similar issues relating to control and third parties were addressed in a recent decision by the Court of Appeals of Kentucky, not cited in Milby. In Starns v. Lancaster, the landlord did not fit any of the recognized exceptions to the general rule, and the plaintiff, a guest of the tenant, could not recover from the landlord for injuries she had received. The landlord had not retained the area where the injury occurred as a common area for use by all of the tenants.

These decisions differ from Milby in that they involve third parties injured while on the premises under the tenant’s title. In Milby, the injured person was the tenant himself, and not one of his employees or guests. The law draws no distinction between the tenant and his guest when either is injured in an area retained by the landlord.

There is an exception, however, with regard to an invitee’s obli-

35. Id. at 627.
36. Id. at 628.
37. 553 S.W.2d 696 (Ky. 1977).
gation to inspect. In *Dean v. Martz*, the court said, "An invitee is not obliged to make a critical inspection of the premises or the conditions to assure himself they are safe, or to provide him with protection." The *Milby* court noted that an invitee is contributorily negligent only when the peril would be obvious to a person of ordinary prudence in a similar situation.

But when the area where injury occurs is under the sole possession of the tenant, then the tenant is liable for defective conditions which might injure a third party present under his title. This would hold true unless, of course, the landlord has failed to warn of a known and concealed defect.

Another case considered in *Milby* on the issue of the tenant's lack of care is *Spurling v. Paterno-Mayflower, Inc.*, where a tenant was injured when he removed a radiator cover. The court held that by assuming there was some negligence on the part of the landlord who failed to properly adjust the radiator cover, the tenant was contributorily negligent as a matter of law in failing to take proper protective measures for himself when he tried to remove it.

In *Spurling*, the court discussed the issues of contributory negligence and assumption of risk. It distinguished the two doctrines by saying that the former is present when one departs from the standard of reasonable conduct required to protect himself, while the latter is present when one has knowledge of a particular risk, and intelligently proceeds to encounter it. The court, in regard to the latter doctrine, "recognize[d] that before a person may be said to assume a risk he must know and appreciate the danger."

*Milby* properly follows the *Spurling* decision. The tenant, *Milby*, was not aware of any defect so he could not be said to have assumed that risk. However, that did not relieve him of the duty to exercise reasonable care for his own safety.

Another significant case relating to the assumption of the risk

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38. 329 S.W.2d 371 (Ky. 1959).
39. *Id.* at 374-75.
40. 358 S.W.2d 503 (Ky. 1962).
41. *Id.* at 505.
42. In *Totten v. Parker*, 428 S.W.2d 231 (Ky. 1967), the court of appeals held the issue of contributory negligence is a question of fact which must be determined by a jury. In that case, it was evident that there was negligence on the part of the plaintiff's decedent. The court held, however, that the jury should determine to what extent that negligence was chargeable to the decedent. *Id.* at 233.
doctrine is *Houchin v. Willow Avenue Realty Co.*,⁴³ in which the court held that the question of contributory negligence of a plaintiff who voluntarily encounters a known risk, that is created by antecedent negligence of a defendant, must be answered in light of the substantial necessity of the plaintiff's conduct. The tenant, Houchin, was injured when she fell from a stairway after having proceeded with the knowledge that the area was dark and unlighted. She had notified the landlord's agent two weeks prior to the accident that the light over the staircase was out. The landlord did not replace the light, and the tenant brought the action for damages she sustained in the fall.

The court held that the defendant-landlord was negligent but that the plaintiff-tenant was aware of that negligence. The defendants relied on language that was cast in terms of assumption of risk. The *Houchin* court stated:

> We are one of the few jurisdictions in the United States that has squarely abolished the doctrine of assumption of risk as a separate defense . . . . [W]here known antecedent negligence creates a known risk at the time the plaintiff chooses to subject himself to the risk, the question of whether the plaintiff's subjection of himself to the risk constitutes 'unreasonable' conduct, also called 'contributory negligence,' is tested in part by the necessity of the plaintiff's conduct."⁴⁴

The *Houchin* court concluded that the tenant was not acting with such urgency that she could not have secured a means to have eliminated the risk, and that she was contributorily negligent as a matter of law. The court asserted, however, that it was not adopting the comparative negligence doctrine, "under which the defendant is relieved from compensating an injured plaintiff to the extent of the plaintiff's contributory fault."⁴⁵

*Houchin* set forth a balancing formula to determine contributory negligence:

> The character of the risk accompanied by the plaintiff's knowledge of it as balanced with the purpose of the mission and the ease with which the risk could have been eliminated impel the conclusion that the plaintiff's conduct was unreasonable in the circumstances and that she was contributorily negligent as a matter of law. Of course, where reasonable minds could differ about the presence or applica-

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⁴³. 453 S.W.2d 560 (Ky. 1970).
⁴⁴. *Id.* at 562.
⁴⁵. *Id.* at 563.
bility of the criteria to determine the question of substantial necessity or urgency or the degree of difficulty in effectively eliminating the risk prior to encountering it, a jury issue is presented . . . .

This formula is properly applied by the *Milby* court. It would seem logical to assume that the very nature of climbing would involve the risk of falling. The fact that Milby was in a hurry to house the tobacco did not relieve him of the duty to inspect for his own safety. This inspection could have been accomplished relatively easily. Milby testified that an inspection of the tier poles and stringers is customary before using them. Weighing these factors, it seems obvious that Milby's conduct was unreasonable.

The *Milby* court held that the trial court was correct in finding that Milby was contributorily negligent. Since the evidence clearly demonstrated that Milby failed to exercise any care for his safety, and that his neglect was a substantial factor in his fall, he was contributorily negligent as a matter of law. The court cited *Pease v. Nichols*, which supported its finding that Milby was the sole witness on the issue of the care he exercised for his own safety.

In *Pease*, the tenant was held contributorily negligent for walking from a lighted room into a comparatively dark hall. Though aware that there was a throw rug on the landing, the tenant proceeded and fell down a stairway. The court declared that "[i]t is not for a jury to determine whether a plaintiff has exercised a proper degree of care for her own safety when she has been the sole witness on the point and when her testimony affirmatively shows the exercise of none."

The *Milby* court concluded by reiterating the principle, stated in *Speckman*, that a tenant may not recover from a landlord for failure to disclose a defect if the tenant has knowledge of the defect, or could discover it by a reasonable inspection. The *Milby* court stated that Milby had every opportunity to inspect the premises, but as he testified, he did not. The court repeated the language of *Spurling* which says, in effect, that since the tenant failed to inspect the premises, he was negligent as a matter of law for not having taken proper precautions for his safety. Also applicable is

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46. Id.
47. 580 S.W.2d at 729.
48. Id. at 730.
49. 316 S.W.2d 849 (Ky. 1958).
50. Id. at 853.
51. 580 S.W.2d at 729.
the language found in Wright, according to which a tenant is precluded from recovery if, by looking, he should have seen the dangerous condition. The Milby court stated that if the defect should have been apparent to Mears, then it should also have been apparent to Milby.

Milby v. Mears correctly follows Kentucky precedents. The decision is based on principles that have gone through a steady process of evolution. The holding reflects both the early common law precedents which favor the landlord over the tenant, and the influence on the law of changing social policies in the area of landlord liability. In the event that Kentucky should adopt the comparative negligence doctrine, however, a fairer judgment might be obtained in cases such as this one. Here, the landlord was negligent and the tenant was contributorily negligent. It does not seem equitable totally to bar the tenant from recovery because he was negligent, when the landlord was primarily negligent.

JAMES M. LAWSON
LANDLORDS AND TENANTS — FORCIBLE ENTRY AND DETAINER —
EV ICTION ACTION FOR NONPAYMENT OF RENT — DEFENSES — Smith

FACTS

On August 30, 1978, Willie Smith, a landlord, filed a forcible entry and detainer action for nonpayment of rent against Curtis Wright, Smith's tenant. In a second cause of action, Smith alleged that Wright owed him $120 in back rent. Testimony given in Cleveland Municipal Court established that Smith had given Wright appropriate notice to vacate the premises and that Wright had not paid his rent because of roach infestation.

However, since Wright had not deposited his rent with the Clerk of Courts prior to the filing of the eviction suit, the referee stated that the condition of the premises was not at issue, and he refused to allow further testimony concerning the premises' condition. Although neither party received a copy of the referee's report, the trial court journalized its judgment for Smith.

1. Ohio Rev. Code Ann. § 1923.081 (Page Supp. 1980), allows for the joiner of these two actions:
   A trial on an action in forcible entry and detainer for residential premises ... may also include a trial on claims of the plaintiff for past due rent and other damages under a rental agreement, unless for good cause shown the court continues the same. For purposes of this section, good cause includes the request of the defendant to file an answer or counterclaim to the claims of the plaintiff or for discovery, in which case the proceedings shall be the same in all respects as in other civil cases. If, at the time of the trial, the defendant has filed an answer or counterclaim, the trial may proceed on the claims of the plaintiff and the defendant.
2. Id. § 1923.04 reads:
   (A) Except as provided in division (B) of this section, a party desiring to commence an action under this chapter, shall notify the adverse party to leave the premises, for the possession of which action is about to be brought, three or more days before beginning the action, by certified mail, return receipt requested, or by handing a written copy of the notice to the defendant in person, or by leaving it at his usual place of abode or at the premises from which the defendant is sought to be evicted.
   Every notice given under this section by a landlord to recover residential premises shall contain the following language printed or written in a conspicuous manner: "You are being asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance."
   (B) The service of notice pursuant to section 5313.06 of the Revised Code constitutes compliance with the notice requirement of division (A) of this section.
3. Id. § 5321.07 requires depositing rent with the court.
4. Smith v. Wright, 65 Ohio App. 2d 101, 102-04 (1979). On September 29, 1978, Wright filed his notice of appeal, on October 2, 1978, he was granted a stay of execution pending appeal; and on October 10, 1978, he filed an answer and counterclaim to Smith's second cause of action in the original complaint. Although Wright's answer
On appeal, Wright assigned the following errors:

(1) The trial court erred in refusing to allow Wright to defend on the basis that Smith as a landlord had breached his duties under Chapter 5321 of the Ohio Revised Code;
(2) The trial court erred in failing to comply with Rule 53 of the Ohio Rules of Civil Procedure in that: (a) the referee's report provided no information upon which the judge could base his decision; (b) no copy of the referee's report was mailed to the parties; (c) judgment was entered on the day of the referee's hearing.

The court of appeals overruled Wright's first assignment of error because in an action for forcible entry and detainer, the unfit condition of the premises can be in issue only if the tenant is current in rental payments, having paid rental payments directly to the landlord or having deposited rental payments with the court. Therefore, the trial court properly excluded evidence of the condition of the premises in the eviction proceeding since Wright was presently in default of his rental payments, notwithstanding the fact that the court, in its discretion, did not order him to pay his rent. However, Wright's second assignment of error was well taken. Therefore, the judgment of the trial court was reversed and the cause remanded for further proceedings concerning only the second assignment of error.

ANALYSIS OF OHIO LAW

A forcible entry and detainer action is a summary civil remedy intended to affect only the possession of real property, and its general purpose is to assure that, regardless of the actual condition of the title to possession of property, the party in peaceable and quiet enjoyment shall not be forced from the premises by strong hand, violence or terror. Thus, it is widely recognized that the issue to be decided in forcible entry and detainer is the right to possession. In Ohio, a proceeding in forcible entry and detainer is

and counterclaim were filed beyond the twenty-eight day time limit, (see Ohio Civ. R. 12(A)(1)), Smith did not object below, and further, filed an answer to the counterclaim. Thus, the second cause of action and counterclaim were still pending and the court of appeals could not address those issues.

6. 65 Ohio App. 2d at 109.
7. Id. at 110, 111.
10. See notes 8 and 9 supra.
a creature of statute. The Ohio Landlord Tenant Act, not the Uniform Residential Landlord Tenant Act of 1972, presently governs all rights, obligations and remedies between landlords and tenants in Ohio, while Chapter 1923 of the Ohio Revised Code governs forcible entry and detainer.

It is established by statute that a landlord can bring a forcible entry and detainer action under Chapter 1923 of the Ohio Revised Code for possession of premises for several enumerated reasons, one of which specifically allows the landlord to regain possession if the tenant is in default of his rent. It should be noted that if the landlord is acting in retaliation against the tenant, the landlord will be unsuccessful in a forcible entry and detainer action. However, if the tenant is holding over on his lease or rental agreement, the defense of retaliatory conduct will not defeat the landlord's forcible entry and detainer action.

Except for this minor exception, a tenant can assert any valid defense to a forcible entry and detainer action in an eviction proceeding. The traditional defenses which have been recognized and which may still be asserted in a forcible entry and detainer action pursuant to section 1923.061(A) of the Ohio Revised Code are (1) a tenant's right to possession under a contract of purchase; and (2) a tenant's right to possession pursuant to payment of rent; and (3) a tenant's right to possession pursuant to late payment of rent when such is the established course of conduct. Two additional defenses are statutorily defined in the Ohio Landlord Tenant Act: (1) a landlord's proceeding with a forcible entry and detainer action as retaliation against the tenant and (2)
a tenant depositing his rent with the clerk of the appropriate court or the landlord.\textsuperscript{28}

Basically, the application of section 1923.061(B) of the Ohio Revised Code (the forcible entry and detainer provision) is a court imposed version of section 5321.07 (the deposit of rent provision), which may save the tenant’s right to possession. However, the use of the court ordered payment is clearly within the discretion of the trial court when it deems it appropriate.\textsuperscript{28} Needless to say, a tenant cannot complain when the trial court fails to demand payment of rent since he always has the right to do so pursuant to section 5321.07 of the Ohio Revised Code.\textsuperscript{27} This provision has been viewed as a tenant’s “weapon” against the landlord and it is thought that tenants should be urged to use it to their advantage:

Without doubt, the rental deposit remedy is the Ohio tenant’s greatest weapon in the struggle for adequate housing conditions. While no financial benefit inures to the tenant as it would through the non-payment or reduction of his periodic rental amount, the legislature has firmly come down in favor of letting the landlord know of any deficiency in fulfilling his obligations. Once the rent is deposited with the court after proper notice to the landlord of the non-compliance and subsequent failure to remedy the condition within a reasonable time, the lessor must then bring the premises up to the statutorily established standards or forfeit the rent.\textsuperscript{28}

Other jurisdictions, such as Pennsylvania, employ similar escrow

\begin{itemize}
\item \textsuperscript{25} Id. § 1923.061 reads:
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\item (A) Any defense in an action under Chapter 1923 of the Revised Code may be asserted at trial.
\item (B) In an action for possession of residential premises based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he may recover under the rental agreement or under Chapter 3733 or 5321 of the Revised Code. In that event the court from time to time may order the tenant to pay into court all or part of the past due rent and rent becoming due during the pendency of the action. After trial and judgment, the party to whom a net judgment is owed shall be paid first from the money paid into court, and any balance shall be satisfied as any other judgment. If no rent remains due after application of this division, judgment shall be entered for the tenant in the action for possession. If the tenant has paid into court an amount greater than that necessary to satisfy a judgment obtained by the landlord, the balance shall be returned by the court to the tenant.
\end{itemize}
\item \textsuperscript{26} Smith v. Wright, 65 Ohio App. 2d at 107.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Comment, Covenant of Habitability and the Ohio Landlord-Tenant Legislation, 23 CLEV. ST. L. REV. 539, 561 (1974) (citations omitted), accord, OHIO REV. CODE ANN. § 5321.07(B)(1) and (2) (Page 1981). At the time of printing of that article, the section was Ohio Bill 103 § 5321.07.
\end{itemize}
arrangements which are applicable when the premises have been deemed unfit for human habitation, setting a six month limit to the escrow period after which time the money is to be returned to the tenant if the improvements have not been made. Moreover, the provisions set forth in section 5321.07 of the Ohio Revised Code are very similar in application to section 4.105(a) of the Uniform Residential Landlord and Tenant Act, which provides:

In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he may recover under the rental agreement or this Act. In that event the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court, and the balance by the other party. If no rent remains due after application of this section, judgment shall be entered for the tenant in the action for possession. If the defense or counterclaim by the tenant is without merit and is not raised in good faith, the landlord may recover reasonable attorney's fees.

Although in several instances similar to the Uniform Act, Ohio's Act tends to be more restrictive and less oriented to the needs of tenants. In the Uniform Act, there is a provision for self-help for

29. PA. STAT. ANN. tit. 35, § 1700-1 (Purdon 1977) reads:

[D]uring any period when the duty to pay rent is suspended, and the tenant continues to occupy the dwelling, the rent withheld shall be deposited by the tenant in an escrow account in a bank or trust company . . . and shall be paid to the landlord when the dwelling is certified as fit for human habitation at any time within six months from the date on which the dwelling was certified as unfit for human habitation. If, at the end of six months . . . such dwelling has not been certified as fit for human habitation, any moneys deposited in escrow on account of continued occupancy shall be payable to the depositor except that any funds deposited in escrow may be used for the purpose of making such dwelling fit for human habitation and for the payment of utility services for which the landlord is obligated but which he refuses or is unable to pay. No tenant shall be evicted for any reason whatever while rent is deposited in escrow.


the repair of minor defects. This provision allows the tenant to notify the landlord of his intention to correct the condition at the landlord's expense, and if the landlord fails to respond within fourteen days, the tenant may cause the work to be done and deduct from his rent the reasonable cost of the work. However, the cost of repair cannot exceed $100 or an amount equal to one-half the periodic rent, whichever is greater. It seems that a self-help provision under Ohio's Code would alleviate problems for both the landlord and the tenant. There would be no delay in repairing the premises, the landlord would not be burdened with having the repairs made, and there would be no court involvement which would otherwise create a time delay. As a result of a self-help provision, the tenant would have that which he bargained for, a habitable place to live, and the landlord would have that which he bargained for, the fair rental value of the premises.

It appears that more emphasis should be placed on the rights of Ohio's tenants, raising the question whether a tenant's defenses to an eviction proceeding should be limited to only the ones statutorily defined above. Specifically, should not the breach of one or more of the landlord's duties to the tenant be permitted to be raised as a defense to a landlord's eviction proceeding? Ohio landlords' obligations are specifically listed in section 5321.04 of the Ohio Revised Code. Under this section, the landlord shall keep

32. Id. § 4.103 reads:
(a) If the landlord fails to comply with the rental agreement of Section 2.104, and the reasonable cost of compliance is less than [$100], or an amount equal to [one half] the periodic rent, whichever amount is greater, the tenant may recover damages for the breach under Section 4.101(b) or may notify the landlord of his intention to correct the condition at the landlord's expense. If the landlord fails to comply within [14] days after being notified by the tenant in writing or as promptly as conditions require in case of emergency, the tenant may cause the work to be done in a workmanlike manner and, after submitting to the landlord an itemized statement, deduct from his rent the actual and reasonable cost or the fair and reasonable value of the work, not exceeding the amount specified in this subsection.
(b) A tenant may not repair at the landlord's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent.

33. Id.
34. Id. § 5321.04 reads:
(A) A landlord who is a party to a rental agreement shall:
(1) Comply with the requirements of all applicable building, housing, health, and safety codes which materially affect health and safety;
(2) Make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
(3) Keep all common areas of the premises in a safe and sanitary condition;
the premises in a habitable condition, yet in Smith v. Wright, Wright's premises were infested with roaches, and this clearly presents an unfit and uninhabitable condition creating a breach of Smith's duty as a landlord. Other jurisdictions hold that the tenant's duty to pay rent depends upon the landlord fulfilling the warranty of habitability. In those jurisdictions, proof of the landlord's breach of his duty to make the premises habitable, as a defense to a forcible entry and detainer action, demonstrates that no rent is in fact due.

In Smith, however, the court felt that the unfit condition in and of itself was not a defense in a claim for forcible entry and detainer. Their rationale was based upon the following interpretation of the Ohio Landlord Tenant Act:

A thorough review of the Act leads us to conclude that the unfit condition of the premises is a matter of [counterclaim] and not a matter of defense in a forcible entry and detainer action unless R.C. § 5321.02 (retaliatory conduct of landlord prohibited), R.C. § 5321.07 (notice to remedy conditions), and/or R.C. § 1923.061(B) are applicable. . . . The Act does not create a right for a tenant to re-

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(4) Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, and air conditioning fixtures and appliances, and elevators, supplied or required to be supplied by him;

(5) When he is a party to any rental agreements that cover four or more dwelling units in the same structure, provide and maintain appropriate receptacles for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit, and arrange for their removal;

(6) Supply running water, reasonable amounts of hot water and reasonable heat at all times, except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

(7) Not abuse the right of access conferred by division (B) of section 5321.05 of the Revised Code;

(8) Except in the case of emergency or if it is impracticable to do so, give the tenant reasonable notice of his intent to enter and enter only at reasonable times. Twenty-four hours is presumed to be a reasonable notice in the absence of evidence to the contrary.

(B) If the landlord makes an entry in violation of division (A)(8) of this section, or makes a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful which have the effect of harassing the tenant, the tenant may recover actual damages resulting therefrom and obtain injunctive relief to prevent the recurrence of the conduct, and if he obtains a judgment reasonable attorneys fees, or terminate the rental agreement.

35. Id. § 5321.04(A)(2).
36. 65 Ohio App. 2d at 101.
37. See generally notes 48, 56 infra.
38. Id.
main in possession without paying his rent, either to his landlord or into court, which presumably will protect any right the landlord has in those funds. The Act does create the right of tenants to recover damages from their landlord for the reduced value of their leasehold interest due to the unfit conditions of the premises, but it does not create a right for a tenant to live rent-free or to determine on his own the actual rental value of the premises as opposed to the agreed rental. 39

This rationale is somewhat confusing since Ohio's Rules of Civil Procedure state that, "when a party has mistakenly designated . . . a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation." 40 Nonetheless, the court in Smith reasoned that the Ohio Landlord Tenant Act has made the court an escrow agent, securing a tenant's right to get that which he pays for and securing for the landlord that which is due and owing him. To hold otherwise would be to totally disregard the legitimate rights of landlords. 41

A summary of Ohio's present law reveals that if the landlord fails to remedy the unfit conditions of the tenant's premises within the sooner of a reasonable time or thirty days, the tenant, only if current in rental payments, may do one of the following: 42

(1) deposit all rent that is due and thereafter becomes due with the appropriate clerk of courts; 43
(2) apply to the court for an order directing the landlord to remedy the condition, and for an order reducing the periodic rent due until the condition is remedied; 44 or
(3) terminate the rental agreement. 45

Also, a tenant may recover for damages caused by the landlord's breach of duty. 46 Furthermore, should a landlord bring forcible entry and detainer for non-payment of rent, the tenant may: (1) assert any valid defense; 47 and (2) counterclaim for damages for any breach of duty by the landlord which is owed to the tenant. 48

39. 65 Ohio App. 2d at 108.
40. Ohio Civ. R. 8(C).
41. 65 Ohio App. 2d at 110.
42. Id. at 105.
44. Id. § 5321.07(B)(2).
45. Id. § 5321.07(B)(3).
46. 65 Ohio App. 2d at 105.
48. Id.
OTHER JURISDICTIONS

Tenants of large apartment buildings in larger cities, by virtue of their numbers, may have more strength to organize against a landlord, and therefore, landlord/tenant laws in such areas tend to be a better guard for the tenant against abusive landlords than Ohio's Landlord Tenant Act. Thirteen states have adopted the Uniform Residential Landlord Tenant Act while other jurisdictions have enacted their own acts which, of course, vary according to the demands of the tenants and landlords in those jurisdictions.

Minnesota courts\(^49\) allow the uninhabitability of the premises to be asserted as a defense by the tenant to a landlord’s eviction action. In Fritz v. Warthen,\(^50\) the court reasoned that a covenant in a lease for payment of rent and the covenants of habitability of residential premises imposed by statute\(^51\) are mutually dependent rather than independent, and a breach of habitability may be asserted as a defense in forcible entry and detainer actions. The objective in the Minnesota courts in enacting the implied covenants of habitability statute is to assure adequate and tenantable housing within the state. Otherwise, the landlord would be able to regain possession of the premises in spite of his failure to fulfill the covenants.\(^52\)

In the New York case of Amanuensis, Ltd. v. Brown,\(^53\) three situations were recognized in which tenants have valid defenses to eviction proceedings for non-payment of rent: (1) the presence of substantial violations of housing codes affecting the habitability of the premises, accompanied by the landlord’s lack of bona fide remedial efforts; (2) ineffective implementation of housing code enforcement procedures; and (3) intentional neglect of the premises attempting to force the tenant’s abandonment.\(^54\) It was also recognized in Maryanov v. Peters\(^55\) that the covenant to pay rent is dependent on the implied covenant to furnish reasonably decent and safe housing, and therefore, the landlord may not recover rent or possession until he or she has proven performance of all obligations on his or her part to be performed, including compliance with

\(^{49}\) Fritz v. Warthen, 213 N.W.2d 339 (Minn. 1973).
\(^{50}\) Id.
\(^{52}\) 213 N.W.2d at 341.
\(^{54}\) Id.
the warranty of habitability. Massachusetts has taken an even more aggressive step by allowing a tenant to withhold rent without considering whether the landlord is at fault or is taking reasonable steps to repair.

The landmark California case of Green v. Superior Court of the City and County of San Francisco analyzed urban residential leases under modern contractual principles. It concluded that the tenant's duty to pay rent is mutually dependent upon the landlord's fulfillment of his implied warranty of habitability and thus the breach of a warranty of habitability may be raised as a defense in an unlawful forcible entry and detainer action.

Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact "due and owing" to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises.

Although it was argued in Green that the defense of unfit condition would "completely undermine the speedy procedure contemplated for unlawful detainer actions," the court made it clear that the state's interest in preserving a speedy repossession remedy cannot justify the exclusion of essential matters in resolving the question of possession.

CONCLUSION

It may seem that the Smith court correctly decided to refuse Wright's testimony of the unfit condition of the premises in the landlord's eviction action, since according to statutory interpretation of Ohio's Act, the unfit condition is allowed to be raised as a defense by a tenant to a forcible entry and detainer action only if the tenant is current in rental payments. Moreover, it appears that

56. Id. at 774, 409 N.Y.S.2d at 692.
59. Id. at 1181.
60. Id. at 1182.
61. Id. at 1181.
62. Id.
63. Id.
the courts prefer the unfit conditions of the premises to be raised in the form of a counterclaim rather than as a defense, regardless of the tenant's rental payment status.\footnote{65 Ohio App. 2d at 108.}

It seems only fair and equitable for Ohio to recognize that the tenant's duty to pay rent and the landlord's warranty of habitability are mutually dependent. The ultimate result of this rationale, would allow the tenant to raise the unfit condition of the premises to a forcible entry and detainer action regardless of whether rental payments are current. Ohio's restrictive requirement of demanding the tenant to establish a current rental payment status before asserting the "unfit condition defense" affects the question of possession which has been recognized as the issue to be decided in a forcible entry and detainer action.\footnote{See notes 8 and 9 supra, and accompanying text.} Since the restrictive requirement works to the detriment of the tenant, especially if the landlord and tenant's duties are recognized as being mutually dependent, it should be modified if not abolished.

However, this would require a major statutory change in Ohio's Act which, to be realistic, will probably not occur in the near future. Nevertheless, it would be of great benefit to the tenant and to the landlord if Ohio's Act was expanded in scope to allow a tenant the remedy of self-help as provided in the Uniform Residential Landlord and Tenant Act of 1972.\footnote{See note 32 supra, and accompanying text.}

\textbf{Thomas A. Powell}