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In Memoriam

Kentucky Supreme Justice Robert O. Lukowsky died December 5, 1981. His untimely passing occurred during his fifty-fourth year of life and his thirty-second year of service to his beloved legal profession.

Justice Lukowsky began his judicial career in the Kenton County, Kentucky, Court as Judge Pro Tem and Trial Commissioner in 1952, ascended to the Kenton Circuit Court in 1962, was elevated to the former Court of Appeals in 1974, and became a Justice of the Kentucky Supreme Court upon its creation in 1976. During his almost twenty years on the bench, he looked upon the “job of judging” as a balancing of the rights of the individual against the impact of the exercise of those rights on society. He said, “What we are really talking about is an ordered sort of liberty, not license . . . For every right, there is a correlative duty.”

As a jurist who cared for his fellow lawyers and judges, Justice Lukowsky gave freely of his time in continuing legal education programs, as an Adjunct Professor at Chase College of Law and as faculty member of the National Judicial College in Nevada. Although possessing and displaying a keen sense of humor, he was demanding of his colleagues both on and before the Bench, but always on a legal and not a personal level.

Kentucky has lost a distinguished jurist. All who love the law should try to follow in his footsteps. His life truly exemplified the biblical admonition, “Do Justice, Love Mercy and walk humbly with thy God.”

—Richard S. Nelson
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of Kentucky Bench & Bar)
MAJORITIES, MINORITIES, AND MORALS: PENAL 
POLICY AND CONSENSUAL BEHAVIOR*

Francis A. Allen†

One interested in identifying the important concerns that have 
disturbed American society since the First World War, may be well 
advised to turn to the history of American criminal justice during 
the same period. For many, this may seem a melancholy observa-
tion; and it should be quickly conceded that there have been many 
matters—intellectual, aesthetic, and economic—not reflected or 
only faintly so in the developing criminal law and its administra-
tion in the past six decades. Yet it is remarkable how frequently 
the issues that have agitated and divided us found their clearest 
and most concrete expressions in criminal laws and criminal pro-
ceedings. Basic issues of first amendment freedoms were posed in 
the prosecutions of groups like the Industrial Workers of the 
World in World War I and in the criminal syndicalism laws in the 
1920's.† The Scottsboro litigation in the decade that followed held 
up to the gaze of the entire country and of the world all that was 
worst in the regime of white supremacy that persisted in the 
South.‡ The nagging realities of poverty and racial inequality in all 
parts of the country provided the predicate for much of the new 
constitutional law of criminal procedure fashioned by the Warren 
Court, even in cases in which those concerns were not made ex-
plicit in the opinions.§ Criminal prosecutions against war resisters 
and racial militants in the 1960's asked and left largely unresolved 
basic questions about the limits of legal obligation and fidelity to 
the law, questions that almost certainly will be revisited in the fu-
ture, perhaps before this decade ends.¶ At intervals throughout the 
period, a perception of increasing crime created widespread unease

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* The Harold J. Siebenthaler Lecture, Salmon P. Chase College of Law, Northern 
Kentucky University, February 19, 1982.
† Edson R. Sunderland Professor of Law, University of Michigan. A.B., Cornell College, 
1941; L.L.B., Northwestern University, 1946; LL.D. (Hon.), University of Victoria, 1980.
The syndicalism legislation was much involved in constitutional litigation. See, e.g., Gitlow 
2. The litigation was productive of important constitutional doctrine. See Powell v. Ala-
4. Revealing expressions of attitudes on legal obligation in the Vietnam era are collected 
and insecurity, a perception that has profoundly influenced American politics and may have even determined the outcome of at least one recent presidential election.6

With these matters in view, it may be argued that the formulation and application of penal policy are matters of broader significance than is sometimes supposed. It may be urged with equal reason that more systematic attention needs to be given issues of penal policy in the law schools than has occurred in the past, and this not only in the interests of a more enlightened and coherent criminal justice, but also in the interests of obtaining a vantage point for a more accurate and profound understanding of the society of which the system of criminal justice is a part.6

This is not to say that penal policy has been ignored in American legal scholarship. On the contrary, there are few areas of legal concern in which, in the course of a single generation, the quality and quantity of scholarship so flourished as the fields of criminal law and its administration. To make the point, one might mention the drafting of the American Law Institute's Model Penal Code,7 surely one of the most significant intellectual contributions to American law during the past half-century, and more recently, the new literature on criminal sentencing.8 Other examples abound. And yet, a comprehensive approach to penal policy as an area of thought and inquiry is discouraged by the realities of criminal law-making and criminal law administration. One of the obstacles is simply ignorance about the impact of sanctions, criminal and non-criminal, on the behavior of groups and individuals. But ignorance can be remedied by new knowledge, and slow accretions of knowledge are accumulating. Perhaps a point is being approached when a behavioral theory of legal sanctions may be realistically anticipated.9


7. ALI, MODEL PENAL CODE (1980).


There are, however, more obdurate obstacles to coherent penal policy. One of the most formidable of these resides in the fact that much criminal legislation is sponsored and drafted by persons who have given no consecutive thought to the criminal law or, indeed, to any of the other problems associated with the regulation of human behavior through the application of legal sanctions. Most such persons are concerned about the ends or objectives of such regulations and hardly at all with the means for attaining them. 10 Frequently the true objectives of proposed criminal sanctions are less instrumental than symbolic. 11 Thus, whether the ostensible social objectives of penal regulation may more likely be gained through non-criminal rather than criminal means or, if criminal sanctions are to be applied, what kinds and what levels of severity may be required to achieve the ends without unnecessary loss to other social values, are questions that often remain unasked and are almost always unpondered.

That these and other circumstances condition policy-making in the penal area is hardly surprising. The very involvement of criminal justice in many of the most contentious and strongly-felt issues of our social life makes it certain that, in practice, criminal law-making and administration will not be delegated to a coterie of philosopher kings. Yet, if coherence of legal doctrine is a good, if it is worthwhile cultivating concerns about what makes law efficacious and seeking to avoid the unnecessary destruction of important values as penal objectives are pursued, then there is a case to be made for treating penal policy as an area for serious and dispassionate inquiry, even though it appears from the outset that institutional practices will never be fully reformed. Something useful may be achieved, and, as already suggested, the efforts may provide insights about the nature of this society that will illuminate broader areas of social concern.

The area of penal policy that is the subject of this lecture is one demanding a certain amount of fortitude or, more accurately, of foolhardiness to enter. It is a difficult and complex area, and one already much trodden by some of the most distinguished personages in law and philosophy. 12 What is discussed here are penal reg-

11. Id. at 750.
ulations of such things as the sale and consumption of narcotic drugs and liquor, gambling and prostitution, obscenity, and other forms of sexual expression. While not centering on the abortion controversy, what is said perhaps has application to it. Note that the phrase "victimless crimes" is eschewed. While the shorthand term "victimless crimes" is most frequently applied to these offenses, it has proved unfortunate because it often diverts discussions from matters of substance to questions of labelling. At times, it appears to beg the very questions these statutes engender, and are most in contention in the community. One could refer to these offenses as those in which the victims, if there are any, do not ordinarily regard themselves as such; but this is cumbersome and not always descriptive. The title of this lecture refers to crimes of consensual behavior, which may be an improvement but is still unsatisfactory, for the phrase may well be understood as including forms of behavior it is not meant to encompass. Perhaps the purpose of the lecture may best be described as the discussion of a range of problems arising out of sumptuary criminal regulations enacted, in significant part, to vindicate certain moral attitudes—attitudes that typically are in great dispute within contemporary society.

The latter comment suggests that it may be desirable to say something about the relation of law and morals. Not very much shall be said. Many intrepid souls who have ventured into that treacherous terrain have never since been heard from. Let me suggest a dichotomy which I shall submit not as a scientific classification, but as a device to focus attention. Moral concerns in criminal law may serve either as a sword or a shield, and, in many instances, they may serve both functions simultaneously. It appears clearer to me than it apparently does to some positivist philosophers that, among the legislative purposes underlying the condemnation of certain homicides as murder, is the objective of vindicating a basic moral insight, namely the value of human life. The lawmaker de-

15. Thus, questions posed by the suicide pact are not within the scope of this discussion. See N. ST. JOHN-STEVAS, LIFE, DEATH, AND THE LAW 237-38 (1961).
16. But see H. HART, PUNISHMENT AND RESPONSIBILITY 37 (1968). The degree to which the value of preserving human life is expressed in the doctrines of justification and excuse is
clares that it is just and morally correct that persons committing homicides and displaying the requisite conditions of act and mind should be subjected to pains and penalties. This is not to deny that there may be other social purposes sought when homicides are made criminal. Reasonable security against homicidal threat is a basic condition for the achievement of any sort of satisfactory social existence and for the securing of the utilitarian advantages of social life. But, that the moral objective is intertwined, seems clear. Hence, the moral concern serves as a sword: it prompts the state to exercise its power and justifies its exertion.

Yet, in the murder case, the moral concern serves also as a shield, and this function is not of lesser importance. When the prosecution is unable to establish those conditions of mind and act that have been legally stipulated and that supply the grounds for moral condemnation of the murderer, the failure of proof shields the accused from a murder conviction. The concept of just punishment thus serves an important political function in that it not only releases state power in the criminal system, but also contains it. 17

Given the centripetal tendency in our times for authority to collect and burgeon at the centers of power, not only in the socialist autocracies but in western societies as well, the containment of powers exercised by systems of criminal justice becomes a matter of critical concern.

Also in need of mentioning is another characteristic of what is often referred to as the common-law crimes—those that involve serious threats to life or limb or unauthorized depredations of property. The moral concerns that unleash the sword of state power in these areas express something approaching a consensus in the community. It is not a complete consensus. Even in the areas of homicide, there are sharp divisions over the use of deadly private force to protect property, for example, and in the appraisal of politically inspired violence. 18

But, for the most part, the essential rightness of condemning murder, rape, larceny, and robbery is conceded. The present plight would be even more serious than it is if this were not true.

The characteristics of the common-law crimes are in rather sharp contrast to those of the sumptuary offenses discussed here.

discussed in Kadish, Respect for Life and Regard for Rights in the Criminal Law, 64 Cal. L. Rev. 871 (1976).
18. Id. at 29.
Many of the laws defining sumptuary offenses disclose a strong tendency on the part of their proponents to employ morality as a sword and a corresponding lack of concern or even hostility toward the uses of morality as a shield. Nor is this surprising. One who proclaims the virtue and necessity of intruding state power into the private relations of persons may not be well attuned to perceiving a morality that places restraints on the wielding of state power.

It is quite true that public advocacy of sumptuary regulation tends to rely heavily on utilitarian concerns and assertions of social advantage, as well as on moral principle. The public utterances of Anthony Comstock, that nineteenth-century defender of American society from the ravages of sin and art, illustrate the point. The toll of vice, whether in the form of liquor, gambling, or sexual irregularity, on family life, political virtue, and (equally emphatically) on the economy, was portrayed by Comstock in excruciating detail and was, of course, deplored. Perhaps it is not possible to disentangle utilitarian from moral considerations in Comstock's statements and in the voluminous popular literature of which they were a part. Nevertheless, it may be meaningful to say that Comstock's moral concerns appeared to be greater than the sum of their utilitarian parts.

There is a second point. The moral mandates expressed in much of the criminal legislation being discussed, in contrast to those articulated in the common-law crimes, bespeak a morality that in greater or lesser degrees is rejected and sometimes actively opposed by large groups within the community. What is dealt with here is much less than a moral consensus, a fact of prime significance in a pluralistic society.

Opposition to sumptuary criminal regulation and the attitudes that engender such opposition have played a prominent role in American culture, at least since the 1920's. Attitudes of opposition, in fact, have firmly occupied a central position in the liberal creed. It is a position subscribed to by what is probably a majority of college-educated persons in the modern era, including those dedicated to liberal politics and others whose orientations are primarily literary or aesthetic. The case in opposition takes a variety of

forms, but most frequently it advances the values of individual privacy and volition.

Very likely the most important statement of modern liberal opposition to extensive use of the criminal law for the purposes of sumptuary regulation was the Wolfenden Report, presented to Parliament by the Scottish Home Office in 1957.20 The Report recommended that criminal penalties be withheld from homosexual acts committed in private by consenting adults and that sanctions for prostitution be confined to acts of public solicitation. These specific recommendations have proved influential throughout the English-speaking world, but of even larger importance is the argument or theory that underlay the proposals. The strength of the argument is not in its originality, for, in fact, it derives in principal part from John Stuart Mill’s essay On Liberty.21 Rather, the Report expressed ideas congenial to the times and, in the United States at least, that responded to widespread concerns relating to the position of the individual confronted by increasingly intrusive and encompassing state power. Thus, the Report asserts: “We do not think that it is proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as guardian of that public good”;23 that “[a]s a general proposition it will be universally accepted that the law is not concerned with private morals or with ethical standards”;23 and that “there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”24

So unquestioning are modern liberal attitudes toward the concept of personal privacy that they are often expressed in extreme and even bizarre forms. Thus, it seems sometimes to be assumed, on what evidence it would be hard to say, that the private lives of political figures are simply irrelevant to their roles as public ser-

20. GREAT BRITAIN HOME OFFICE, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION CMND. No. 247 (1957) [hereinafter cited as WOLFENDEN REPORT].
21. The critical and much mooted proposition in Mill’s essay is as follows:
That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with liberty of action of any of their number, is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.
22. WOLFENDEN REPORT, supra note 20, at 21.
23. Id. at 80.
24. Id. at 24.
vants; that a person may be a cad or worse in his intimate relationships without any doubt being cast on his eligibility or capacity for public service. Yet the centrality of the value of personal privacy, not only to thought about penal policy but also, more importantly, to the strategy of freedom in these times, may hardly be doubted. It is difficult to conceive of a political philosophy that places great value on individual autonomy that does not, at the same time, make a distinction between the private world and the public world, substantially immunizing the former from the intrusions of state power. The particular horror evoked by the society imagined in George Orwell's 1984 (about which we are certain to hear a great deal during the next two years) stems in large part from its brutal and systematic destruction of the private worlds of its members. The same point may be extracted from the portraits of the ideal citizen drawn in the official propaganda of the Soviet Union and the Peoples Republic of China. The "Soviet Man," for example, appears to be one never in need of intervals of solitude, whose motives are wholly and enthusiastically social, whose unrelieved group existence proceeds under the benign and penetrating gaze of his fellows and the Party. 25

Thus, whatever reservations one may have about the ways in which the Wolfenden Report and others have argued the case for the immunity of the private world from state intrusions, the value of personal privacy must continue to figure prominently in modern thought about sumptuary criminal regulation. Yet, appeals to that value are not sufficient. Statements of support for the immunity of the private world by opponents of such regulation in the past did not prevent the enactment of some of the most oppressive criminal prohibitions, and there seems little reason to believe that they will prove sufficient against the groups and forces organized today to advance the enactment and to resist the repeal of legislation with similar purposes. There are several reasons for this. One is that the members of some of the groups simply do not share the liberal's sense of the priority of personal privacy and volition, at least in the areas under consideration. At best, these persons reveal attitudes similar to those of former Congressman F. E. Hebert who, in an-

25. "The interests of a Soviet 'saint' would coincide with the interests and demands of society as enunciated by the Party; he would be a creative though obedient, selfless, dedicated communist. This is the ideal New Man of Soviet society. This is the man Soviet leaders are trying to produce." See R. De George, Soviet Ethics and Morality 114-15 (1959). See also D. Munro, The Concept of Man in Contemporary China 118-19 (1977).
other context, is said to have remarked: "It's not that I love the First Amendment less; it's that I love my country more." 26

To characterize in this fashion all of those who have supported certain criminal regulations of private behavior, however, is to be seriously inaccurate and unfair. Privacy is not the only value that must be pursued in modern society. It is not an absolute, and competing values claim their due. Much of the controversy in this area arises from the incontrovertible fact that private behavior often has public consequences. There seem to be no limits to the disagreements over whether such public consequences are in fact produced by the private behavior, the seriousness of the consequences, and the importance of avoiding them. Thus, if it could actually be demonstrated that the private perusal of pornography transforms its readers into ravaging sexual beasts who roam the community committing violent rape and child molestation, it is likely that many persons, including some who concede high importance to privacy, would favor the abridgement of such private perusal in the interest of community security. So also, the perceived social consequences of private sales and consumption of narcotic drugs induce many persons, rightly or wrongly, to favor prohibition of the sale and use of heroin despite the serious and damaging invasion of personal privacy such prohibitions inevitably entail. 27 The question appears to resolve itself into an issue of how much presumptive weight is to be given to the value of personal privacy in the numerous and highly differing contexts in which the issue may arise. 28 It may well be that many modern proponents of sumptuary legislation concede all too little weight to the values of privacy and volition in the various contexts in which the issue emerges; but to make that demonstration requires more than assertions about the importance of privacy.

There is a related point. In the areas under consideration, the value of privacy manifests itself in the form of a political ideal, the ideal of the neutral state. The state, in this view, must scrupulously abstain from incursions into the private world. It may also be required to act affirmatively to protect the privacy of the pri-

27. A penetrating look at these issues is found in J. Kaplan, Heroin (publication pending).
The neutral state is thus the political paradigm for the pluralistic society. Experience suggests, however, that the state encounters formidable difficulties when it attempts to assume a persuasive posture of neutrality. In some areas, such as those involving the establishment of religion clause of the first amendment, neutrality of the state is constitutionally mandated: government may not favor one religion over another, religion over no religion, or no religion over religion. Nevertheless, thousands, and more likely millions, of Americans see judicial decisions banning Bible reading and prayers in the public schools not as evidence of neutrality, but rather as active secular hostility to the essentials of religion. These perceptions are likely to be especially strong when the government abandons a previous posture of support for religious practices or repeals a criminal sanction against behavior still widely regarded as immoral. Such moves are seen as active governmental partisanship with the enemies of religion and morality. The sense of grievance engendered by this perception is one of the most palpable social facts facing one concerned with penal policy in these fields.

It therefore appears that to describe the complexities confronting penal policy in these areas requires resort to a wider range of materials than has ordinarily been consulted, and that constructive thought about the problems disclosed entails more than exercises in value analysis. One resource that ought not to be neglected is the history of the American experience with sumptuary criminal legislation. It is a history that has not been completely written, but a literature is emerging; and, even in its present state of development, it may have light to shed on modern problems. Late in the nineteenth century, a young lawyer prosecuting an obscenity case in a federal courtroom arose to say: "[T]he United States is one great society for the suppression of vice." Most of us would prefer to believe that the American experience contains meanings that go beyond the forcible repression of sexual derelictions and other sins of the flesh. Yet the prosecutor's assertion, however sweeping, contained a truth. Efforts to extirpate immorality through social and

29. An exposition of this view may be found in the paper of my colleague, D. Chambers, The "Legalization" of the Family; Toward a Policy of Supportive Neutrality, in The Legalization of American Society (publication pending).
31. Quoted in H. Broun & M. Leech, supra note 19, at 89.
legal coercion constitute a persistent strand in American history—from the colonial period when the adulterer stood before his neighbors in church, dressed in a robe and holding a lighted taper; to the activities of Anthony Comstock’s Society for the Suppression of Vice in nineteenth-century New York, the Watch and Ward Society in Boston, the nationwide Anti-Saloon League; to the modern groups who have declared their custodianship of American morality.

In reflecting on the relations of law and morals, a reasonable *a priori* assumption may be that, in comparatively simple, homogeneous communities, sharp lines will not be drawn between legal prescriptions, on the one hand, and moral and religious mandates, on the other. The Puritan communities in seventeenth-century New England with their legal codes derived in substantial part from the Old Testament’s Pentateuch may illustrate this condition. Nor in such societies is the imposition of criminal sanctions in the few cases that arise likely to cause destructive tensions and disturbance, so long as the religious and moral consensus is maintained at high levels. On the contrary, punishment of the occasional dissentient may strengthen and reinvigorate the majority. It may remind them of who they are and encourage rededication to their goals. Such, however, is not the social context in which most American experience with sumptuary criminal regulation has occurred. For the most part, criminal sanctions have been resorted to during periods when the older consensus has broken down, and when the proponents of repression are experiencing grave anxieties about the survival of the traditional moral codes. Criminal enforcement of morals at such times displays a critical loss of confidence in the efficacy of persuasion, education, and example to preserve

34. Because Puritanism was a way of life, it had social and political implications of great magnitude. It assumed that its disciples would regulate not only their own conduct but that of others, so that the world could be refashioned into the society ordained by God in the Bible. . . . In its earlier stages, Puritanism looked to the Bible as containing all the precepts—however few or brief—by which man should be governed.
the traditional values. Often, the ultimate resort to official coercion follows a period of optimistic efforts to rehabilitate the erring elements of the community through education and exhortation in an atmosphere of humanitarian uplift. The history may constitute a corroboration of Lionel Trilling's well-known observation: "Some paradox of our nature leads us, when once we have made our fellow men the object of our enlightened interest, to go on to make them the objects of our pity, our wisdom, ultimately our coercion."36

The transition from exhortation to official force may be observed most clearly in the emerging nineteenth-century temperance movement, the aspect of American experience with sumptuary regulation most fully treated in the historical literature.37 The temperance cause was, in its origins, an effort at persuasion and conversion. In 1830, the American Temperance Society pledged itself "never to make any appeal to legislators or officers of the law, for the aid of authority in changing the habits of any class of their fellow citizens."38 This self-denying ordinance was soon abandoned by many temperance leaders, however, and antebellum debates on prohibition legislation reveal familiar disagreements over where the line separating the private from the public worlds was to be drawn. There is a contemporary ring to Horace Greeley's prohibition advocacy, written in 1845: "The fallacy here... lies in the assumption that the perpetrators 'injure nobody but themselves.' They do injure others; they bring scandal and reproach to their relatives; they are morally certain to prove unfaithful to their duties as parents, children, etc., and they corrupt and demoralize those around them."39

Most of the successes the movement enjoyed in securing prohibitory legislation in the states and cities before the Civil War proved temporary. Obviously there were elements in the antebellum world strongly resistant to the notion of coercive reform in these areas. One source of resistance was a tradition of personal privacy and

38. Quoted in H. Asbury, supra note 37, at 44-45. Note also the comment of Lydia Maria Child, cited in P. Boyer, supra note 37, at 77, that coercive legislation "'[i]n the moral world' is 'as useless... as machines to force water above its level are in the physical world.'"
39. Quoted in P. Boyer, supra note 37, at 76.
volition that prevented or obstructed resort to state power.\textsuperscript{40} There was also a hard-headed skepticism, lost in later years, about the feasibility of such prohibitions. The crusty old Federalist, Fisher Ames, observed early in the history of the Republic: "If any man supposes that a mere law can turn the taste of a people from ardent spirits to malt liquors, he has a most romantic notion of legislative power."\textsuperscript{41} Finally, many temperance reformers, convinced that theirs were the dominant values of American society, were able to maintain a faith that, with energy and patience, contending values might be overcome without resort to the public force.

By the 1860's, the prohibition movement was in disarray. The successes of the pre-war years had largely evaporated, and the prospects of future success were dim.\textsuperscript{42} Yet, in the course of the next two generations, the movement came to its extraordinary consumption in the ratification of the eighteenth amendment and the passage by Congress of the Volstead Act. The reasons for this remarkable transformation of the temperance movement from conversion to coercion cannot be adequately considered here. Such an analysis would of necessity concern itself, in part, with the burgeoning activities of that formidable engine, the Anti-Saloon League. More fundamentally, attention would need to be given to the sense of fragmentation in American culture that pitted the "Protestant[s], native-born, typically rural or small-town in [their] origin[s]"\textsuperscript{43} against the "liquor interests," the immigrants, and the very wealthy.

Whatever broad theories of social causation are employed to explain the metamorphosis of the American temperance movement, there were certain secondary causes and effects about which there can be little doubt. The movement toward coercion was accompanied by a new conception of those who were to be the objects of reform, a progression from persons requiring compassion and assistance to those seen as adversaries and enemies. A process of dehu-

\textsuperscript{40. Id.}
\textsuperscript{41. Quoted in H. Asbury, supra note 37, at 215.}
\textsuperscript{42. Throughout the long depressing period from the middle 1850's to the early 1870's the liquor traffic, particularly the brewing industry, waxed prosperous, powerful, and arrogant—the brewers even demanded that the government remove all restrictions from their operations and no longer require them to keep books. The temperance reformers, on the other hand, floundered helplessly, stripped of virtually everything save the shining armor of righteousness. Id. at 67.}
\textsuperscript{43. P. Boyer, supra note 37, at 215.}
manization occurred. In the Progressive Era, reformers spoke much about “the saloon” and “the brothel,” and these abstractions deflected attention from the concrete human realities pervading the problems of alcoholism and prostitution.

An element of harshness entered the reform movements and sometimes reached levels of high intensity. “The new Puritanism,” wrote H. L. Mencken, “is not ascetic but militant. Its aim is not to lift up saints, but to knock down sinners.” As the nineteenth century wore on, something very like a war psychology pervaded the temperance movement and the anti-vice crusades. Nowhere is the tendency more clearly revealed than in the career of Anthony Comstock. Two years before his death he could say with literal accuracy: “In the forty-one years I have been here I have convicted persons enough to fill a passenger train with sixty-one coaches, sixty coaches containing sixty passengers and the sixty-first almost full. I have destroyed 160 tons of obscene literature.” That it was a matter of regret to Comstock that the sixty-first coach was not entirely filled, cannot be doubted. Reformers unable to question the virtue of their causes become dangerous, for their convictions strip them of capacity to perceive the moral characteristics of their own behavior.

Resort to the public force in these areas has produced other consequences that are clear and demonstrable. One of these is a significant modification in the relations of individual right to governmental authority in the United States. For the purposes at hand, the most important thing that can be said about the fourth amendment is that, until the coming of national prohibition, nothing existed in this country that could be described as a corpus of constitutional law relating to search and seizure. State prosecutors in the 1920’s, faced with enforcing local legislation enacted to implement the eighteenth amendment and suddenly confronted by the host of privacy issues it spawned, sometimes discovered to their dismay that there was not a single judicial precedent in the state supreme court relating to such matters. The extraordinary proliferation of

44. Id. at 210.
45. Mencken, Puritanism as a Literary Force, in H. BROWN & M. LEECH, supra note 19, at 76.
46. Id at 15-16.
47. For a contemporary attack on Comstock, first published in 1878, see D. Bennet, Anthony Comstock (1971).
48. See Roberts, Does the Search and Seizure Clause Hinder the Proper Administration of Criminal Justice, 5 Wis. L. Rev. 195 (1929): “It can probably be safely said that the
search and seizure law in the past sixty years provides the best demonstration that sumptuary criminal regulation of liquor use, drug use, and gambling impinges heavily on the privacy of individuals. Nor can there be any doubt that the courts, seeking to accommodate such legislative regulations to the constitutional immunities of persons, have, particularly in the search, wiretap, and undercover-agent cases, significantly constricted the dimensions of the private world deemed immune from state intervention.

Among the factors that frustrate the achievement of coherent penal policy in the areas under consideration is the symbolic significance that sumptuary criminal regulation often possesses for the groups that sponsor and defend it. At times, the symbolic significance of inserting or retaining such precepts in the criminal law appears to be of greater importance than their capacity to eliminate the prohibited behavior. The nostalgia expressed by the fundamentalist religious groups deeply involved today in political activity looks back not only to an earlier period when a higher morality prevailed, but also to an age in which groups like theirs were the dominant norm-givers to American society. These groups, scorned and lampooned in the last generation by H. L. Mencken and Sinclair Lewis, today express the grievances associated with the loss of status and power. To understand the motivations behind the Arkansas law, recently much in the news, that demands equal time be given “creationism” whenever evolution is taught in the public schools, requires that account be taken of more than the devastating impact of evolutionism on fundamentalist theology. The very existence of the Arkansas law is a reassertion of political power by these groups, and symbolizes what to


50. Allen, supra note 10, at 748-49.

51. The thesis that attributes overriding importance to status concerns in interpreting the American temperance movement is ordinarily associated with J. Gusfield’s SYMBOLIC CRUSADE (1963). Some have felt that the thesis is overdrawn. Nevertheless, it constitutes a necessary part of social analysis in the field.


53. For an account of the history of this impact in the last century, see H. Hovencamp, SCIENCE AND RELIGION IN AMERICA, 1800-1860 (1978).
them may be the glittering prospects of their regaining social dominance and political hegemony.

The symbolic significance attached to sumptuary criminal legislation by its supporters also goes part of the way to explain another phenomenon that characterizes this history: namely, the willingness of the proponents to sponsor or urge the retention of criminal provisions that are patently unenforceable, or unenforceable without exorbitant costs even the proponents are unwilling to incur. The history of the prohibition experiment, again, provides a useful illustration. One salient fact in the American experience with national prohibition was that, at no time during its fourteen-year life, did Congress or the state legislatures provide resources of money or personnel that even approached the levels necessary for adequate law enforcement. Shortly before the ratification of the eighteenth amendment, the Anti-Saloon League, insisting that an overwhelming public demand existed for the total elimination of alcohol from American society, blithely predicted that enforcement expenses in any year would not exceed five million dollars. What is more surprising, when events demonstrated that the estimate was disastrously low, the prohibitionists were remarkably moderate in their demands for greater appropriations. The reason may very well be that the proponents recognized not only that there would be strong opposition to the increased taxation more adequate enforcement would entail, but also that anything approaching full enforcement would so impinge on the lives of so many persons that the public might rise up and demand an end to the entire effort. Accordingly, many of the prohibitionists acceded to a program of half-hearted measures and thereby created a situation in which law enforcement was demoralized, sanctions were applied capriciously and hence unjustly, and in which public life was corrupted and hypocrisy reigned. Ironically, it was these conditions, along with the impact of the Great Depression, that brought the experiment to an end. It is surely worth a moment's time to consider whether a somewhat similar history might be anticipated should current proposals for the recriminalization of abortion prevail.

54. H. Asbury, supra note 37, at 172; J. Gusfield, supra note 37, at 120-21.
56. J. Gusfield, supra note 37, at 121.
57. Partial enforcement has always been characteristic of laws prohibiting abortion. Thus, in the mid-1950's, long before the Supreme Court's entry into the field, the annual number
One final characteristic of sumptuary criminal regulation, and the social dynamics that produce and sustain it, needs to be considered. The history reviewed here makes clear that such penal legislation is often the product of groups practicing what in the modern vernacular is called single-issue or limited-interest politics. The problems created for representative government by such politics are not new, nor are they exclusively the product of groups concerned with the enforcement of morals. In the tenth of the Federalist papers, James Madison warned of the dangers threatened by such groups, which he described by the term “factions.” Today, observers of the national political scene describe the proliferation of limited-interest associations, pursuing ever-smaller loyalties, and producing what one writer has called “the Balkanization of America.”

# Appendix

of abortions in the United States was variously estimated at between 333,000 to 2 million, a large fraction of which were presumably illegal under the laws then in force. It was estimated that, in 1935, approximately 8,000 women died as a result of abortions, reflecting a death rate of 1.2 percent. This is in contrast to a mortality rate of .01 percent said to have been achieved in Russia during a period of liberal abortion policy. The authorities are collected in ALL, 2 MODEL PENAL CODE 426-28 (1980).

There is probably no reason to doubt that the recriminalization of abortion would reduce the total number of abortions now being performed in the United States. It is also probably to be expected that the total number of abortions illegally performed would reach levels substantially in excess of those performed in the mid-1950's. This is true not only because of increased population, but also because there would be a significantly large segment of society unwilling to concede the legitimacy of the new criminal laws and who would, indeed, conceive of them as basically repugnant to a fundamental human right. That society would possess the will and resources sufficient to overcome this resistance in any complete way is surely problematic, and the consequences to the community of such massive uses of the public force for such a purpose could hardly be happy. If, as seems more likely, a regime of partial enforcement permitting a significantly large number of illegal abortions to be performed would ensue, the consequences, again, are not attractive. Effective prohibition would, in fact, be primarily directed, not toward the affluent and influential segments of the community, but toward the poor and ignorant. Demoralization of law enforcement and losses in public support for the institutions of criminal justice could be anticipated. For those whose sole concern is a reduction in the total number of abortions, such considerations will not be seen as relevant. For the rest of the community, however, they are entitled to careful deliberation.


59. “By a faction,” Madison wrote, “I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” THE FEDERALIST NO. 54 (J. Madison) (Mod. Lib. ed. 1937).

60. Kevin Phillips, quoted in N. ORNSTEIN & S. ELDER, supra note 58, at 229. See also the statement of Meg Greenfield: “It puts a premium on identifying yourself with the special subgroup and helps to thin, if not destory, whatever feelings of larger national loyalty vari-
Perhaps the most remarkably successful campaign of single-issue politics in American history was conducted by that agency of evangelical protestantism, the Anti-Saloon League. Its record of achievement might induce even the National Rifle Association to doff its hat (or perhaps fire a salute) in its honor. Founded in 1896, the Anti-Saloon League, within a quarter of a century, was largely responsible for the ratification of the eighteenth amendment and the enactment of implementing legislation by Congress and the states. Its interests were rigorously confined to the prohibitionist cause; it sought no ancillary reform objectives. It opposed or supported candidates for public office solely on the criterion of the individual’s record of adherence to the dry cause. It displayed unremitting energy in furthering its program, and implacable hostility toward its opponents.

What is most arresting about such groups, both those that flourished in the nineteenth century and those today, is their simplistic view of the social, and sometimes the physical, world and their inability to concede any value whatever to countervailing views. “An extremist group,” writes Edward A. Shils,

is an alienated group. This means that it is fundamentally hostile to the political order. It cannot share that sense of affinity to persons or the attachment to the institutions which confine political conflicts to peaceful solutions. Its hostility is incompatible with that freedom from intense emotion which pluralistic politics needs for its prosperity.

61. H. Asbury, supra note 37, at 101 et seq.
62. “Unlike the Temperance leaders of the nineteenth century, like Frances Willard, John St. John, and Lyman Beecher, the Anti-Saloon League officials had little past or later experiences with a wide gamut of reform activities or political programs.” J. Gusfield, supra note 37, at 108.
63. It is said that the League supported a candidate for Congress who had served a prison term for accepting a bribe in a prohibition case, on the ground that “he had always voted dry.” H. Asbury, supra note 37, at 182.
64. J. Gusfield, supra note 37, at 144-45.
65. E. Shils, The Torment of Secrecy 231 (1956). Professor Shils states at another point:
The apocalyptic mentality sees every issue as a conflict between diametrically opposed alternatives, and it sees the carriers of these alternatives as opposed to each other completely, fundamentally and continuously. The pluralistic mentality, believing the alternatives fall within a narrower range, believes also that the proponents of alternatives also have more in common with each other than do apocalyptic politicians.
Id. at 226.
Typically, and perhaps necessarily for their morale, members of these groups often attribute wholly unrealistic importance to the problems they attack and the solutions they demand. Thus, the most famous evangolist of the time, Billy Sunday, greeted the ratification of the eighteenth amendment as follows: "The reign of tears is over. The slums will soon be only a memory. We will turn our prisons into factories and our jails into storehouses and corncribs. Men will walk upright now, women will smile, and children will laugh. Hell will be forever rent." 66

The precise dangers to the areas of public policy under discussion, threatened by the groups practicing limited-interest politics, need to be carefully defined. The danger, it seems, is not that the fundamentalist groups will regain social hegemony in American society. The essential pluralism of our culture is deeply-dyed, and recent studies of the basic attitudes of the American people in the last quarter of the twentieth century reveal no disposition to embrace any single, authoritatively-prescribed version of morals and mores. 67 It has been asserted that public-opinion polls sometimes show a support going much beyond the membership of the sponsoring groups for legislation mandating equal time for "creation science" in biology classrooms. Such public response, if it exists, may be indicative, however, of the very public attitudes that in the long run will defeat the ultimate objectives of the fundamentalist groups. The response of the larger public may be an expression of the political instinct of a pluralist society, however misapplied in the particular instance. It signifies a willingness to compromise an issue that might prove unduly disturbing or divisive. The solution of "equal time" for contending views is seen as an expression of tolerance, of live-and-let-live. What is being revealed is an unconcern for the truth of the fundamentalist propositions, an agnosticism toward both religion and science, a willingness to "split the difference"—in short, a rejection of the very dogmatism that the fundamentalists seek to advance and impose.

This is not to suggest that the fundamentalist groups are powerless to affect public policy and in some localities to dominate many aspects of life, including many properly relegated to the private world. The situation is the familiar one in which highly organized groups whose members, afflicted by no doubts, confidently advance

66. Quoted in H. Asbury, supra note 37, at 145.
panaceas for problems bewildering the larger community, and
thereby gain an influence wholly disproportionate to their numbers
or the merits of their proposals. This is a time in which many
members of the larger community are immobilized by the magni-
tude and intricacy of modern problems. Disillusioned about their
capacities to define or achieve social purposes, they are appar-
ently incapable of organizing effective opposition to the practitioners of limited-interest politics.

Accordingly, the limited-interest groups, even when they are in-
capable of forcing affirmative changes in public policy, may on oc-
casion exercise a veto power. A striking example occurred in the
autumn of 1981 when the House of Representatives, for only the
second time since home rule was established in the District of Co-
lumbia, rejected a bill adopted by the District City Council, and
did so by a vote of more than two to one. The rejected bill would
have reduced or eliminated criminal penalties for sexual acts be-
tween consenting adults, and in its essentials resembled provisions
long since adopted by many state legislatures across the country. It is hardly credible that the action of the House signals any sud-
den and massive shift in the views of legislative majorities on the
merits of the issues posed. Quite obviously many members joined
the majority because they feared to do otherwise. The values of
local self-determination and of clarifying the boundaries of the pri-
ivate world proved not as compelling as avoidance of the hostility
of the private group sponsoring the resolution.

Many of the most troubling activities of such groups, such as
causing books to be removed from the shelves of school and public
libraries—complaints of which, according to one measure, in-
creased by a factor of ten in the last decade—occur outside the
legislative arena. In the area of legislative policy, and most par-

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68. There is a recent suggestion that groups like the Moral Majority have gained partial
and tentative credibility with many parents, whose views are otherwise fundamentally op-
posed, because of an acute unease in the latter about the hazardous and permissive moral
climate in which children live in modern America. See Yankelovich, Stepchildren of the
69. F. ALLEN, supra note 17, at 86-89.
72. During the early 1970's the office [of Intellectual Freedom of the American Library
Association] received approximately 100 complaints a year that library books had
been removed or threatened with removal. The complaints shot up to 300 a year in
the late 1970's, and are nearing 1,000 a year this year.
ticularly of penal policy, the groups sometimes act to eliminate options that good sense and sound policy require be considered. In most of the areas in which sumptuary criminal legislation has been enacted, there are genuine social pathologies requiring attention, but the coercive reformers often obstruct the proper identification of the problems and their amelioration. Characteristically, the avid prohibitionist neglects education in temperance designed to moderate drinking habits; those who most strongly champion enhanced penalties for drug offenses ordinarily show least interest in the treatment of addiction or the stabilization or narcotic intake at lower levels; the extreme law and order advocate stands athwart efforts to formulate a genuine correctional policy, and expresses attitudes little different from those manifested in the practices of outlawry that prevailed in Anglo-Saxon England. 73

This, then, is the social and political world from which the problems of sumptuary criminal regulation arise. Are there any contributions to more decent and efficacious law in these areas that can be made by those concerned with penal policy as an area for disciplined thought and research? At this point, it is doubtful anyone will be tempted to exaggerate the magnitude of the possible contribution. Here, as on so many other occasions in the modern world, one recalls Cardinal Newman's warnings about the fragility of human knowledge and reason as instruments to contain the passions and pride of men. 74

Yet, one ought not despair too easily of the contribution that lawyers as lawyers can make. In the welter of contentions concerning the relations of law and morals in this field, voices should be raised in support of the proposition that the law, too, has its morality, and that the claims of that morality should be heard. 75 No law should be passed imposing stigmatic penal sanctions on persons that does not clearly define the behavior that is made criminal. No such law should be enacted before realistic appraisal is made of the chances of its achieving its stated objectives; without estimating the social costs incurred and the personal values sacrificed in efforts to enforce it; without thinking about what is lost,

73. F. Allen, supra note 17, at 61-64.
74. "Quarry the granite rock with razors, or moor the vessel with a thread of silk; then you may hope with such keen and delicate instruments as human knowledge and human reason to contend against those giants, the passion and pride of men." J. Newman, Idea of a University 120-21 (1852).
not only if the enforcement effort fails, but also if it succeeds. One need not be a lawyer to raise such questions, but in many situations if lawyers fail to speak, no one will. Moreover, the lawyer's grasp of the institutional realities may often enhance the value of his statement. In many situations, of course, the statements will not be heard or, if heard, will not be attended to. But this is often the fate of reason in the modern world. Perhaps it has always been so.
Coal producers wishing to form export associations face problems which reflect changing realities regarding the United States’ role in international trade. These changing realities require coal exporters to be cognizant of various factors which may have been of only secondary importance in the past. One reality is the current state of the energy market and its effect on America’s international trade posture. Coal has become an internationally “hot” commodity. Thus, an industry that was depressed for decades has been vigorously revived and experts predict further escalation of both domestic and international use. Though the supply is there to meet it, demand for American coal may never reach predicted levels because of infrastructural, environmental and legal constraints.

One significant legal constraint, a subject of this article, is the existence of certain domestic antitrust restrictions on export trade, and the effort to clarify and ease them. For years America was its own largest market and most of American industry regarded international trade as secondary. In contrast, the Japanese and Europeans, being much more dependent on foreign commerce, developed highly specialized institutions and sophisticated personnel to handle international commerce. The disparity between United States and foreign success in international trade has, to a large degree,
been the result of America’s failure to develop specialized institutions. This need to develop a strong international economy has resulted in congressional efforts to facilitate export trade associations and trading companies through amendment of the Webb-Pomerene, Export Trade Act.\(^3\)

The second changing legal reality, which this article will discuss, is the potential impact of foreign antitrust enforcement on American coal export associations. There is an irony here. For years, the United States was a chorus of one chanting for strict rules to promote competition in open markets. Indeed, the vigor with which it has sought to apply its antitrust laws’ extraterritorially has incurred the wrath of some of its allies. But, now that the European Common Market has begun to take seriously such admonitions against trade restraints, American export associations may feel the sting of extraterritorial antitrust enforcement. Of course, this would impose a serious legal constraint on the concerted export activity that the proposed Webb-Pomerene amendments are intended to stimulate. While not antithetical to such activity, United States coal export associations may one day be the subjects of antitrust concern in Europe for activities which are protected at home by the Webb-Pomerene Act.

I. THE WEBB-POMERENE ACT

A. Background

In the expanding world of American coal exports,\(^4\) the existence of a sixty-three-year-old antitrust exemption has taken on new significance. The Webb-Pomerene Act of 1918\(^5\) (hereinafter the Act) promises to allow small and medium sized coal producers with no previous export experience to compete for overseas contracts with America’s large producers, the traditional coal exporters. This possibility is offered through the application of a limited exemption to the Sherman and Clayton Acts,\(^6\) which exists for companies forming associations solely for the purpose of export.\(^7\) The theory be-

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4. See, Greene, Gallagher & Wilson, supra note 1. The predictions vary, but it is generally accepted that, by the year 2000, the United States will control approximately thirty-eight percent of the world steam coal market. This includes predictions that the United States will control forty-seven percent of the European Market. Barovick, Sustaining the Coal Export Boom, Bus. Am., June 1, 1981, at 4.
hind the Act is that greater economy and efficiency may be achieved through joint marketing, thereby facilitating American export competition against integrated foreign cartels and large enterprises. Through the formation of Webb-Pomerene associations, the high costs and risks of entering the export market are proportionally reduced.

The usefulness of the Act has been debated over the years and, as recently as 1979, there were calls for its repeal. Not only has the Act survived, however, but proposed amendments to it ought to solve some of the major problems that the Act's opponents have cited as grounds for its repeal.

B. Legislative History

In 1916, the recently formed Federal Trade Commission published a report on conditions affecting United States exports. The two volume study included a report which blamed low exports upon American firms' lack of competitiveness in international markets. This failure to compete was blamed on large foreign buyers and sellers who were well established, organized and often cartelized. The report indicated that the failure of American firms to enter cooperative efforts to boost exports was the result of the perceived threat of antitrust prosecution. Congress responded to the FTC report by passing the Webb-Pomerene Act.

The purpose of the Act was to provide a limited exemption from the Sherman and Clayton Acts. The exemption permits American exporters to engage in joint ventures in order to compete with integrated foreign enterprises. Congress' intent was (1) to reduce the trade deficit by stimulating exports; (2) to allow greater economy of scale and efficiency through joint marketing, thus facilitating American export competition in the international marketplace; and


10. See Commission Report, supra note 7, at 86.
(3) to permit combinations of small businesses to offset the high cost of entering the export trade.11 While congress intended to provide assistance to smaller firms, it did not attempt to prevent larger firms from joining export associations.12

C. Terms of the Act

In order to qualify for the antitrust exemption under the Act, an association's activities must include "trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States."13 The Act's definition of "export trade" does not include production, manufacture, selling for consumption or resale within the United States, or the export of "services."14 This exemption is allowed solely for participation in export trade and is subject to three conditions: (1) the association may not restrain the export trade of any domestic competitor; (2) the association may not be engaged in any action "which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by the association or which substantially lessens competition;" and, (3) should the association actually restrain trade within the United States or any of its territories, the association may be subject to antitrust action.15

By providing an exemption from the merger provision of the Clayton Act,16 section 3 of the Webb-Pomerene Act17 allows competing sellers to join together in an export association. The Clayton Act prohibits "unfair methods of competition" as defined in the Federal Trade Commission Act18 and grants jurisdiction to the Federal Trade Commission over any "unfair" practices in the industry.19

Any export association taking advantage of the Webb-Pomerene exemption must file a statement with the FTC within thirty days of its creation.20 The required information includes the associa-

11. 50 YEAR REVIEW, supra note 7, at 4-6.
12. Id. at 4.
14. One reason for the proposed amendments to the Webb-Pomerene Act is to include "services," one of American's fastest growing industries.
17. 15 U.S.C. §§ 61-65 (1976). References to the Webb-Pomerene Act in the text of this article are to the section numbers prior to the Act's codification.
19. Id. § 45.
tion's officers, stockholders or members, its place of business, and a copy of its articles of incorporation or contract of association.\textsuperscript{21} Associations are required to refile annually with suitable corrections.\textsuperscript{22} While the FTC has the authority under section 5 of the Act to make inquiries and investigations into violations of the Act,\textsuperscript{23} the Justice Department's concurrent investigatory power has, since 1945, made the section 5 powers inconsequential.

D. Agency and Court Rulings

The Webb-Pomerene exemption has seldom been challenged, either by the FTC or the Justice Department. There are some notable decisions and cases, however, clarifying the scope of the Act.

In 1924, the FTC issued an advisory opinion known as the "Silver Letter."\textsuperscript{24} This controversial opinion was a response to questions raised by the Silver Producers Committee in contemplation of forming an export association. The most controversial passages dealt with cooperative agreements with foreign corporations and price fixing sales allocations.\textsuperscript{25} The FTC stated that nothing in the Act prohibited associations from forming cooperative agreements with foreign corporations provided the agreement operated in a foreign market and did not affect domestic conditions.\textsuperscript{26} This pronouncement caused great controversy. The FTC was charged with surpassing the scope of the congressional intent underlying the Act. This aspect of the Silver Letter was mooted, however, when it was administratively repealed in 1955.\textsuperscript{27}

Although the 1955 "repeal" prohibited price fixing agreements with foreign corporations (previously allowed by the Silver Letter), the policy that associations could qualify under the Act solely to fix prices and to allocate sales remained intact.\textsuperscript{28} Industry critics have complained that Webb-Pomerene associations have been ineffective as cartels.\textsuperscript{29} This argument against Webb-Pomerene as-

\begin{itemize}
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Letter from Vernon W. Vanfleet to C. F. Kelley (July 31, 1924) (discussing the "Silver Letter"), reprinted in 50 Year Review, supra note 7, Appendix D. See also McDermid, supra note 7, at 110.
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} Id.
  \item \textsuperscript{27} Note, The Webb-Pomerene Act: Some New Developments in a Quiescent History, 37 Geo. Wash. L. Rev. 341, 344 (1968) [hereinafter cited as New Developments].
  \item \textsuperscript{28} 50 Year Review, supra note 7, at 16.
  \item \textsuperscript{29} See Commission Report, supra note 7, at 87; Amocher, Sweeney & Tollison, supra
associations has been countered by recent FTC analyses indicating that most associations do not exist solely to fix prices. Proponents of the Act have argued that, because the congressional intent was not to establish cartels, the success of Webb-Pomerene associations cannot be measured by attention to price fixing and cartelization.30

During the 1940's, the FTC initiated eight proceedings31 against export associations which led to the following pronouncements:

(1) an association cannot collaborate with non-member competitors committing those non-members to the associations rules;32
(2) an agreement between an association and non-member competitors to fix non-members prices is invalid;33
(3) an association may not agree to assigned quotas with a foreign buyer in a manner which reduces the exports of a United States competitor;34
(4) acquisition of foreign competitors by an association, in order to protect the home market, is a restraint of trade not exempted by Webb-Pomerene.35

The year 1945 was a jurisdictional watershed for the Act. In United States v. United States Alkali Export Association (hereinafter ALKASSO),36 the district court ruled that the Justice Department did not have to await an FTC preliminary investigation before it could prosecute violations of antitrust laws. When the Justice Department succeeded against the United States Alkali Export Association in district court,37 a shift in investigative power took place and dampened the FTC's desire to regulate Webb-Pomerene associations.38

Judicial interpretation of the Act began with ALKASSO and has

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note 7, at 371; Larson, supra note 7, at 461.
30. McDermid, supra note 7, at 111-12.
32. 46 F.T.C. 1245, 1417 (1948).
33. 45 F.T.C. 917, 1061 (1948).
34. 43 F.T.C. 820, 978 (1947); 42 F.T.C. 555, 849 (1946); 40 F.T.C. 843, 866 (1945); 43 F.T.C. 980, 1084 (1947).
35. 43 F.T.C. 980, 1084 (1947).
38. New Developments, supra note 27, at 346.
continued where the FTC left off. To date, the Justice Department has brought six such cases; final decisions have been reached in three.\(^{39}\)

**ALKASSO\(^{40}\)** was an action for injunctive relief under section 1 of the Sherman Act. The Justice Department alleged that ALKASSO had entered into agreements with foreign cartels in order to divide the world markets by assigning international quotas and fixing prices in certain territories other than the United States.\(^{41}\) The association pled Webb-Pomerene immunity. The district court not only found the agreements to be antithetical to the American philosophy of free competition, but also “not . . . ‘in the course of export trade.’”\(^{42}\) This finding placed the agreements outside the Act, exposing the association to prosecution under the Sherman Act.\(^{43}\) This holding was the first judicial undercutting of the FTC “Silver Letter” prior to its reversal by the agency in 1955. The importance of this case was its identification of activities violative of the Act: 1) participating in foreign cartels; 2) engaging in practices which result in the “use of monopoly power to extinguish the competition of independent domestic competitors engaged in export trade”; and 3) carrying out practices which stabilize domestic prices by removing surplus products from the domestic market.\(^{44}\) The result was an injunction restraining the association from pursuing further agreements.

In 1946, the government sought injunctive relief and dissolution of a Webb-Pomerene association in United States v. Minnesota Mining and Manufacturing Company.\(^{45}\) The association controlled in excess of eighty percent of the industry’s entire export trade and the members’ jointly-owned foreign subsidiaries.\(^{46}\) The association’s policy was not to export to foreign markets which could be supplied more profitably from foreign owned subsidiaries.\(^{47}\) While the district court did not order the association’s dissolution, it did

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41. Id.
42. Id. at 70.
43. New Developments, supra note 27, at 347.
44. 86 F. Supp. 59, 60 (S.D.N.Y. 1949).
46. Id. at 951.
47. Id. at 953-54.
require the termination of foreign interests.\textsuperscript{48} The court also took the opportunity to delineate activities which were legal under the Act: 1) representing members of highly oligopolistic industry; 2) refusing to handle the products of the remaining non-members; 3) using the association as the member’s exclusive foreign outlet; 4) agreeing that goods will only be purchased from members; 5) fixing resale prices for the association’s foreign distributors; 6) fixing prices and establishing quotas for members; 7) agreeing not to withdraw from the association at will; 8) requiring foreign distributors to refrain from handling relevant products of competitors; and 9) charging higher prices to American exporters than to foreign distributors.\textsuperscript{49} 

By 1950, the combination of FTC and court decisions had effectively defined the limits of the Act for Webb-Pomerene associations. Whether it was due to the fact that the existing associations stayed within those bounds, or that the government simply lacked the initiative to prosecute, it was not until 1964 that the Justice Department again sought relief against a Webb-Pomerene association for violation of the antitrust laws.

In 1964, the Justice Department brought an action against the Concentrated Phosphate Export Association concerning eleven sales by the association to the Republic of Korea under the American Foreign Aid Program.\textsuperscript{50} In United States v. Concentrated Phosphate Export Association, Inc. (hereinafter the CPEA case),\textsuperscript{51} the government charged CPEA with illegal combination to fix prices and allocate business to Korea under the AID (Agency for International Development) program. While the Supreme Court found Korea to be the end user of the “exported goods,”\textsuperscript{52} it held that the transactions were initiated, controlled and financed by the United States government and, therefore, “were not exempt merely because the nominal purchaser” was a foreign government.\textsuperscript{53} The reasoning behind the opinion was based upon the history of the Act: the exemption for non-competitiveness should increase prices abroad, not create a burden on American taxpayers.\textsuperscript{54}

\textsuperscript{48} Id. at 966.
\textsuperscript{49} Id. at 964-66.
\textsuperscript{51} Id. at 264.
\textsuperscript{52} United States v. Concentrated Phosphate Export Ass’n Inc., 393 U.S. 199 (1968).
\textsuperscript{53} Id.
\textsuperscript{54} Id. at 206-08.
In 1967, prior to the Supreme Court ruling in the CPEA case, the Agency for International Development promulgated a rule excluding most Webb-Pomerene associations from collaborating to fix bids in sales open solely to American producers. The ruling did not prohibit individual members of associations from submitting bids, and associations are still permitted to submit fixed price bids when foreign procurements are allowed.

The final meaning of the CPEA case is unclear. While it is known that Webb-Pomerene associations may not bid on American foreign aid programs, how broadly will this be interpreted? What of a multinational development program to which the United States is providing the majority of the aid, and the procurements for which include goods over which an American Webb-Pomerene Association has world market control? In this situation, the crucial point is the definition of "solely" when an association, through price fixing and market control, may outbid the limited number of foreign competitors for the contract, that association is virtually the sole bidder. While the above example may be extreme, it suggests the possible difficulties which may arise when Webb-Pomerene associations are denied the right to bid on foreign aid programs.

Another issue arises from the CPEA case: what would be the ramifications of a Webb-Pomerene association's selling food to a foreign distributor who, in turn, resold those goods to American overseas installations? The reasoning in the CPEA case focused on the burden on the American taxpayer. In the foregoing example, the burden would fall upon the American taxpayer after the association had obtained a theoretically higher price for its goods from the foreign distributor. The other problem in the example is section 1 of the Act, which prohibits resale within the United States. American overseas installations such as embassies and army bases are considered the United States' extraterritorial possessions. It is possible that a resale to any of these facilities would constitute resale within the United States, assuming arguendo that the Act implicitly provides only an exception for the ultimate user.

E. Problems

An export trading association cannot determine with certainty how it should organize itself and operate in order to be assured

55. 22 C.F.R. § 201 (Appendix D) (1967).
immunity from antitrust laws. There is no mechanism for prior clearance. Certain activities may only be undertaken at great risk because an association is not able to determine in advance whether its proposed activity will violate antitrust law. This discourages formation of associations and thus undercuts the primary purpose of the Act.

F. Proposed Changes

A number of bills have been introduced proposing amendments to the Webb-Pomerene Act.

1. History

The push for new legislation encouraging formation of United States trading companies began in 1978 in the Subcommittee on International Finance. Also, in 1978, the National Commission for Review of Antitrust Laws and Procedures recommended amendments to the Act. Both ideas were promoted in the subcommittee's March 1979 report, which called for the establishment of export trading companies "to expand exports of the products of smaller U.S. producers." It also suggested that the Webb-Pomerene Act be revised to clarify antitrust treatment of export activity. Though the resulting bill was introduced in the Senate, and was passed on September 3, 1980, in a 77 to 0 vote, the House never took it up. With few changes, the Bill, S. 734, was again introduced in the Senate on January 19, 1981, by Senator Heinz, and was passed by a 93 to 0 vote on April 8, 1981. To date, the House has taken no action on it.

2. Purpose of Senate Bill 734

The purpose of Title I of the proposed legislation, The Export Trading Company Act of 1981, "is to increase United States Exports of products and services, particularly by small, medium-size, and minority concerns, by encouraging more efficient provision of export trade services to American producers and suppliers." Interest in the success of Japanese, European and Korean export companies was the moving force behind this bill, which removes

57. See McDermid, supra note 7.
60. Id.
many of the banking regulations, antitrust uncertainties, and insur-
larities of the United States market. By eliminating these obsta-
cles, Congress hopes to encourage the formation of export compa-
nies. Title II is meant to clarify the uncertainty and ambiguity 
surrounding the original Webb-Pomerene Act.

3. Terms of Senate Bill 734

"Export Trading Company" is defined in Title I of S. 734 as a 
United States firm organized and operated principally for the pur-
poses of a) exporting American goods and services and b) facilitat-
ing export by unaffiliated persons by providing trade services. The 
definition is intended to include "export management compa-
nies" presently existing, and to exclude those existing or newly 
formed that export for themselves, a parent company, or subsidiar-
ies. For export companies to qualify for and be able to take ad-
vantag of the antitrust exemption under Title II, they must pro-
vide services to unaffiliated persons, although no percentage of 
minimum has been designated.

The responsibility for promoting these export companies will lie 
with the Department of Commerce. The Secretary is to encourage 
the formation and operation of export trading companies and pro-
vide vital information about producers, new markets, new clients 
and exportable goods. The intent is to provide a two-way referral 
system between company and producer.

The most novel part of the bill for the American export industry 
is the provision that allows "ownership of export companies by 
banks, bank holding companies and international banking corpora-
tions." The success of foreign trading companies owned or con-
trolled by financial institutions has obviously made an impression 
upon Congress. Through passage of this bill, Congress hopes to 
similarly stimulate that success in the United States. Congress 
believes that, in addition to bringing assets to the trading com-
pany, banks will provide expertise in the making of marketing de-
cisions, investment forecasts, and in providing other supporting fa-

63. See Commission Report, supra note 7, at 3.
64. S. 734, 97th Cong., 1st Sess. 5 (1981).
at 5. (1980).
66. Id. at 7.
68. Id.
Section 105 (a)(b) provides that banks, bank holding companies, and international banking operations may own export trading companies, but only with the approval of the "appropriate federal banking agency." These financial institutions may also invest up to $1,000,000.00 (but no more than five percent of their individual consolidated capital) in one or more trading companies. If such an investment should make the trading company a bank subsidiary, however, approval is required by the appropriate federal agency. The bill also protects the traditional separation of banking and commerce by prohibiting risk-taking investments and requiring federal agency approval of other investments.

Export Trade Associations are defined in Title II of S. 734 as "any combination by contract or other arrangement. . .whether operated for profit or organized as non-profit corporations, which are created under and exist pursuant to the laws of any State of the United States." The antitrust exemption provided under the amended Act applies to export trading companies as well as export trading associations and expands "export trade" to include services as well as goods. The immunity from the operations of United States antitrust laws applies to export trade, export trade activities and methods of operation. All trade activities and operations must be specified in a certificate issued by the Secretary of Commerce as required by the Act. By specifying the activities which are to be antitrust-exempt, firms interested in forming export trade companies or associations are guaranteed immunity from prosecution for participation in those activities.

Export trade is logically the administrative concern of the Department of Commerce. Under the original Act however, the FTC had the responsibility for the Act's administration. Because a regulatory agency was in charge of the Act, interested exporters may have been discouraged from forming associations. This concern of exporters is especially understandable when one considers that no clear statement of exempt activities existed under the original Act.

70. Id. at 8.
72. Id.
73. S. 734, 97th Cong., 1st Sess. 27 (1981).
74. Id. at 23.
75. Id. at 27.
76. Id. at 23.
The amendment transfers the administrative responsibility from the FTC to the Secretary of Commerce, but the FTC and the Department of Justice retain the right to provide input with regards to the certification process.

Two new substantive standards are proposed in Title II: 1) export trade may not constitute trade or commerce in licensing of patents, technology, trademarks, or know-how, and 2) the export activity, to receive certification, must serve a "specified need." The second criterion presents a problem. What is the meaning of "specified need"? The bill adequately clarifies the meaning of export trade only to provide more fodder for litigation. Does "specified need" mean the need of a particular industry or the need to equalize our balance of payments? It appears from the comments of Senator Heinz that there is a particular need to export more: "we are faced with a situation in which our trade deficit is getting progressively worse. . .because it is through our earnings in exports that we pay our ever-increasing import bill." The legislative history is full of references to trade balances of payments and the need to compete with foreign export companies. Based upon this record, "specified need" may indeed have a broad definition.

III. EUROPEAN ANTITRUST LAWS

A. Introduction

The "Common Market" really consists of three economic communities: the European Coal and Steel Community (hereinafter E.C.S.C.), the European Economic Community (hereinafter E.E.C.) and the European Atomic Energy Community (hereinafter Euratom). The most important European economic powers are members of the Common Market. Since 1967, the three communities have operated as a single organization with a common (albeit weak) parliament, a single court of justice and common decision-making organs.

Those European antitrust laws which may concern potential

77. Id. at 31.
78. Id. at 27.
80. The nations which are presently members of the Common Market are Belgium, Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom.
American coal exporters are found in the Treaty of Paris (1951) (hereinafter E.C.S.C. Treaty), which established the European Coal and Steel Community; the Treaty of Rome (1957) (hereinafter E.E.G. Treaty), which established the European Economic Community; and regulations promulgated pursuant to these treaties. Both treaties contain antitrust provisions, and their language is similar but not identical. Therefore, some ambiguity exists concerning the scope of coverage of the two antitrust laws.

Paragraph 1 of Article 232 of the E.E.C. Treaty states that the treaty shall not "affect the provisions of the treaty setting up the Coal and Steel Community." This only indicates, however, that, where the two treaties appear to cover the same area and would conflict in that area, the E.C.S.C. Treaty controls. It does not reveal whether the E.C.S.C. Treaty occupies the field in all matters regarding coal (including United States coal export associations selling to Europe), or whether room is left for E.E.C. Treaty regulation of coal issues not addressed by the E.C.S.C. Treaty. One authority has asserted that coal-related agreements between companies fall outside Article 85 of the E.E.C. Treaty. The European Commission has implied, however, that overlapping coverage could exist. Although the E.C.S.C. Treaty clearly appears to be more applicable to coal-related matters, neither treaty nor case precedent explicitly precludes the E.E.C. Treaty from governing the export association issue. It would follow, then, that the E.E.C. Treaty might reach those coal issues (e.g., imports from non-Community nations) not reached by the E.C.S.C. Treaty. Furthermore, even if rulings under the E.C.S.C. Treaty are controlling on this issue, precedents are so scarce that analogous E.E.C. rulings are bound to be significant.

82. Treaty Instituting the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 142 (1951) [hereinafter cited as E.C.S.C. Treaty].
84. The Treaties of Paris and Rome serve not just as agreements between states (thereby having effect in international law) but also as legislation binding directly on individuals under the municipal law jurisdiction of the Common Market Countries. See generally C. Bellamy, supra note 81.
86. C. Bellamy, supra note 81, at 66-67.
88. Another area of potential conflicting jurisdictions is between Community and National Law. It is conceivable that an enterprise may find itself exposed to both laws. How-
B. Restrictive Trade and the E.C.S.C. Treaty

The E.C.S.C. Treaty is “based on a common market, common objective, and common institutions,” and “is designed to ensure an orderly supply of coal and steel to the community, whilst at the same time taking account of the needs of the third countries,” and “promot[ing] orderly expansion and modernization of production.” Treaty provisions intended to promote the economic viability of these two vital industries include prohibitions on restrictive trade practices.

Article 65 of the E.C.S.C. Treaty applies to “[a]ll agreements, undertakings, decisions by associations, undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort normal competition within the Common Market.” Enterprises in Europe which have such an effect are prohibited from 1) price fixing, 2) restricting or controlling production, technical developments or investments, and 3) sharing markets, products, customers or sources of supply. Any agreement or decision violating Article 65 is “automatically void” and is subject to the “sole jurisdiction” of the Commission of the European Communities (hereinafter the Commission), which may impose substantial fines for the violation. The Commission may also grant — and has granted — exemptions where 1) “specialization or joint buying will make for a substantial improvement in the production or distribution of those products,” 2) the agreement in number 1 is not more restrictive than is necessary, and 3) the agreement will not give the “undertakings” the power to fix prices in derogation of competition. It is significant that Article 65 applies to distribution as well as production, thus exposing third nation exporters, who do not receive an exemption, to possible fines.

Article 66 of the E.C.S.C. Treaty addresses the dominant posi-
tion held in the community by one or more firms and the concentrations and mergers which lead to a dominant position. Approval of the Commission is needed for any mergers or concentrations which involve coal or steel production or wholesale distribution within the community. While a specific limit has not been defined by the Commission, the Treaty exempts from prior authorizations any merger below a certain size.

The impact of this treaty upon American coal exporters could be serious for those producers who wish to merge either with a European coal producer or a distributor. The Alkasso case, however, may prevent Webb-Pomerene Associations from ever encountering this problem.

C. Restrictive Trade and the E.E.C. Treaty

Particular "agreement[s] between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states" may be subject to antitrust action pursuant to Article 85 of the E.E.C. Treaty. This article applies to an agreement if there is a sufficient degree of probability (regarded objectively as a matter of fact and law) that such an agreement would or could affect (directly or indirectly) trade between community members. This prohibition applies particularly to agreements that

(a) directly or indirectly fix purchase selling prices or any other trading condition; (b) limit or control production markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contract.

All agreements which violate 85(1) are automatically void. A clearance may be provided, however, for arrangements contravening paragraph 1, when promotion or distribution of goods is im-

95. Id. art. 89.
96. Id. art 66(3).
100. Id. art. 85(2).
proved and the consumers receive a fair share of the benefit. 101

Article 86 of the E.E.C. Treaty regulates enterprises having a dominant position in the community. Obtaining a dominant position is not illegal in and of itself, but Article 86 regulates the “abuse” of a dominant market position. Although the Court of Justice has not defined what constitutes abuse of a dominant position, it has considered a firm’s share and strength, leaving the criteria flexible. 102 The 1979 case of Hoffmann-LaRoche & Co. v. Commission 103 held that a dominant position does not preclude the existence of a competitive market, but, the dominant position will not be tolerated if competition may be ignored without ill effects. It will probably be a long time before United States coal exporters are able to ignore competition from Poland, South Africa, Australia, and Canada. Therefore, it is doubtful that Article 86 of the E.E.C. Treaty will be of concern to American associations.

Regulation 17, 104 the first implementing tool for Articles 85 and 86, gave the Commission the power to investigate restrictive trading agreements. These investigations may be initiated by a party seeking a “negative clearance” (no violation of Article 85 or 86 exists), 105 or a “dispensatory clearance” under the 85(3) exemption. 106 It is also possible for parties to take an agreement before the commission in order to clarify its status under Article 85 and make modifications at the suggestion of the Commission so as to be eligible for a dispensatory clearance. 107 Parties seeking such clearance must notify the Commission pursuant to Articles 4 and 5 of Regulation 17. 108

The Commission of the European Community has the power to impose fines up to and including ten percent of the corporation’s turnover. 109 The corporate behavior must be committed “inten-
tionally or negligently" for these fines to be imposed. In the 1978 case of Miller International Schallplatten v. Commission, the court decided that one who has adopted or accepted a clause, and who must have known that one subject of the clause was the restriction of competition within the Common Market, must be held to have intentionally committed an act prohibited by the treaty, whether or not he was conscious of infringing the prohibition contained in Article 85. The existence of "intention or negligence" is only relevant to the levying of fines and not to the determination whether concerted practices or abuses have been committed. The determination that treaty provisions have been violated is an objective decision.

In addition to Article 17’s implementation of individual clearances, there exists a “Block Exemption” in Regulation 67/67 for certain bilateral exclusive dealing agreements and concerted practices which would otherwise fall within the provisions of Article 85. Agreements about which the Commission has not been notified as required by Regulation 17 may still benefit from Regulation 67/67. There are, however, limitations that must be considered. Regulation 67/67 does not apply where an agreement prohibits a “concessionaire” from re-exporting or importing such goods to another member State. In Bequelin Import Co. v. G. L. Import-Export, the Court of Justice held that an exclusive agency agreement with a manufacturer outside the E.E.C. was subject to the Article 85(1) prohibition, when that agreement prevented the distributor from re-exporting or importing such goods from other member States into the franchise territory. Again, the key is whether an agreement could or would either directly or indirectly affect trade between member States to the prejudice of a single E.E.C. market.

The effect of Article 85(1) upon parent companies and their subsidiaries depends upon their legal and economic relationship. If the

110. Id.
112. 3 C.M.L.R. 214 (1979).
116. Id.
parent and subsidiary form a single economic unit, then the actions of the subsidiary may be imputed to the parent.\footnote{118}{Imperial Chemical Industries Ltd. v. Commission, [1972] C.M.L.R. 557.} Their actions will not be considered an impermissible exclusive trading agreement.\footnote{119}{Kodak, [1970] 3 C.M.L.R. D19.} Nevertheless, a parent company and its subsidiary may still be found to have a dominant market position and, thereby, to violate Article 86.\footnote{120}{Laboratorio Chimico Farmaceutico Giorgio Zoja v. Commercial Solvents Corporation, [1973] C.M.L.R. D50.}

When a Commission investigation turns up evidence of violative practices, the Commission and the Court of Justice have found their jurisdiction to reach enterprises outside of the community. In Laboratorio Chimico Farmaceutico Giorgio Zoja v. Commercial Solvents Corporation,\footnote{121}{Id.} the Commission fined jointly an American company and its Italian subsidiary 200,000 units of account (approximately $216,000) for abuse of a dominant position in the nitropane market, and ordered them to cease the trading practices. After affirmation of the decision by the Court of Justice in 1974, the Commission also fined each company 1,000 units (approximately $1,080) for each day's delay in paying the fine. In In re Pittsburgh Corning Europe,\footnote{122}{[1973] C.M.L.R. D2.} the Commission rejected an application for negative clearance and imposed a fine upon the American parent company for discriminatory pricing arrangements between its Dutch and Belgian concessionaires in order to protect its German subsidiary.\footnote{123}{Id.} In another case, the Court of Justice held that, where a non-member State does not have laws to facilitate E.E.C. quasi-judicial procedures, the Community cannot be denied the right, on the basis of international law, to take the necessary steps to enforce its measures against distorting competition within the Community, even if those responsible reside outside the Common Market.\footnote{124}{[1972] C.M.L.R. 557.}

The extraterritorial scope of Article 85 was made clear in 1974 in In re Franco-Japanese Ballbearing Agreement.\footnote{125}{[1975] 15 C.M.L.R. D8.} Determining that an agreement to regulate imports and prices of ballbearings between French and Japanese manufacturers was invalid, the Commission took a broad view of the Article's scope and included

\begin{itemize}
\item 121. Id.
\item 123. Id.
\item 125. [1975] 15 C.M.L.R. D8.
\end{itemize}
within its jurisdictional reach "measures taken in Japan, at either
government or private level, with a view to controlling exports of
Japanese products to the E.E.C. either by restricting them or by
regulating them as regards price, quality or in any other re-
spect." Having declared that activities outside the Common
Market are within its investigatory ambit, the Commission distin-
guished four situations having different consequences: (1) agree-
ments between the Community and other nations, which are
outside the scope of Article 85; (2) measures imposed upon under-
takings due to sovereign compulsion, which are also outside the
reach of Article 85; (3) measures engaged in by an undertaking and
authorized by the undertaking's sovereign, which are likely to be
subject to Article 85 because the undertakings are free to refrain
from the activity; and (4) measures taken solely by private under-
takings either unilaterally or in concert with European undertak-
ings, which are clearly subject to Article 85.

Applying the holding in the Japanese Ballbearing case to Amer-
ican coal export associations, the third situation distinguished
by the Commission directly applies. Webb-Pomerene associations are
private undertakings which are simply authorized by the United
States government. While such authorization exempts the associa-
tion from the antitrust laws within the United States, the Commis-
sion may enforce its antitrust provisions for prohibited activity
which affects the Common Market.

The Commission's willingness to investigate and prosecute for-
eign undertakings for antitrust violations is currently being
demonstrated. A trade journal has reported that legal proceedings
have been initiated against several of the world's wood pulp manu-
facturers for their alleged deliberate price fixing, which has sup-
posedly caused a depression in the European pulp industry.

Among the defendant companies identified by the trade journal
are two major American pulp producers, International Paper and
Georgia Pacific. If the companies are found to be in violation of
Article 85, they may be fined up to ten percent of their sales to the
Community during the period of the violation. While it is unclear
what the outcome of the proceedings will be, the action emphasizes
the vulnerability of United States companies to the Community's

126. Id. at D14.
127. Id. at 14-15.
antitrust laws.

Hypothetically, if any action similar to that against the wood pulp producers was also directed at existing pulp Webb-Pomerene associations, they would be subject to the Community’s jurisdiction. Because associations are formed through concerted undertakings, all individual members would also be liable.

Conclusion

Significant antitrust constraints face potential American coal export associations, both here and in Europe. This article has indicated that the American restrictions may be eased in the near future and that the European ones are in a formative state of case law development. Continued monitoring of such legal barriers is necessary. There are, of course, other hurdles to be cleared. Experts in coal trade have pointed to the substantial problems concerning transportation and environmental limitations (both in the United States and in potential nations of receipt). If these logistic and regulatory requirements are not addressed adequately, antitrust considerations may be moot. All these problems—logistic, environmental, and legal—should be attacked concurrently, so that no one hurdle renders fruitless successful efforts to clear the others.

129. While the trade journal did not specify whether there was any investigation of a Webb-Pomerene association, both pulp producers are members of the same export association, the Pulp, Paper and Paperboard Export Association of the United States. See Federal Trade Commission, Webb-Pomerene Associations: Ten Years Later App. C. (1978).

130. See generally articles collected in note 2 supra.

131. Id.
ANOTATED BIBLIOGRAPHY OF LAW-RELATED JOURNAL CITATIONS ON HISTORIC PRESERVATION

Thomas R. French*

Introduction

Historic preservation refers to the restoration, preservation and rehabilitation of buildings, sites, neighborhoods or districts of cultural, architectural, or historical significance.¹ These efforts have been of interest to the legal community at least since 1896, when the United States Supreme Court, in United States v. Gettysburg Electric Railway Co.² upheld the use of eminent domain by the federal government to acquire historic property.³

Since the beginning of this century, hundreds of articles, notes, and comments have been published discussing the many legal issues involved in historic preservation.⁴ Often litigated issues include the use of eminent domain, zoning, police power, and taxation.⁵ Since the mid-Seventies, at least four law reviews and law-related publications have devoted whole issues or major portions of issues to the topic of historic preservation.⁶ Nearly every American state or territory has enacted legislation which facilitates preservation,⁷ as has the federal government.⁸

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² 160 U.S. 668 (1896).
³ Id. at 681.
⁶ See discussion of symposia infra.
⁷ See Beckwith, Appendix of State and Territorial Historic Preservation Statutes and
This annotated bibliography is intended to update and augment previously published bibliographies in American law reviews and other periodicals of interest to the legal community. Works published subsequent to the summer of 1981 were not able to be included. An appendix lists selected relevant articles published in legal newspapers, law journals published by sources other than law schools, and non-legal periodicals.

For works published before 1976, the reader is referred to the Bibliography to Legal Periodicals Dealing With Historic Preservation and Aesthetic Regulation and Historic Preservation Law: An Annotated Bibliography. Standard print bibliographic tools have been consulted in the preparation of this bibliography.

I. Symposia

SYMPOSIUM: PERSPECTIVES ON HISTORIC PRESERVATION. 8 CONN. L.R. 199 (1976).

Discusses a wide variety of topics associated with historic preservation. Authors, from various preservation, planning, economic and legal backgrounds, elaborate on the broad impact of the preservation movement rather than on any one


9. See note 4 supra.


11. See note 4 supra.

12. Id.

landmark or district. The articles, annotated below, address such major issues as police power, displacement, demolition, and environmental quality.


In an excellent introduction to the topic, Biddle, a leading advocate of historic preservation, discusses its scope and the tools used to accomplish it. Stating that historic preservation results in energy and resource conservation, brings cities back to life, salvages landmarks and instills a sense of history, the author argues that preservation is "one of the most exciting and constructive aspects of our times." Biddle discusses techniques for preservation such as protective easements, historic district ordinances, adaptive reuse of existing structures, and transfer development rights of landmarks.


Examines preservation law in Connecticut, Massachusetts, and New Hampshire. Discusses similar laws in other states and suggests provisions that might be included in a uniform preservation law.


Galbreath, a planner for the National Trust for Historic Preservation, describes successful projects aimed at halting neighborhood decline. Emphasizes funding programs for conservation and rehabilitation. Programs discussed include the Norfolk Private Loan Program, Pittsburgh's Neighborhood Housing Services, Seattle's Housing Rehabilitation Trust Fund, the Rehabilitation Assistance Program of San Francisco, and similar schemes in Dallas, St. Louis, Detroit, and Cincinnati. A twelve citation "recommended reading" list follows the article.


The author, an economist, examines economic arguments which support state intervention in historic preservation.

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14. See note 1 supra.
Delineates economic differences between the single building landmark and historic districts. Concludes that the use of eminent domain, providing just compensation for historic preservation, is economically legitimate.

Johnson. THE ROLE OF PUBLIC ATTITUDE AND INVOLVEMENT IN THE PRESERVATION MOVEMENT 370-381.

"This paper argues that national preservation goals cannot be achieved merely by safeguarding building and natural areas. Rather, the sense of community built by the 'social process' of preservation must be nurtured." This sense of community, an outgrowth of the preservation movement, is manifested by public involvement in the process of preserving structures and districts by increasing the feeling of community among individuals working toward preservation goals. Author cautions that community involvement is not enough to insure preservation; institutional support is also necessary.

Shull. THE USE OF TAX INCENTIVES FOR HISTORIC PRESERVATION 334-347.

Discusses tax incentives which have been or might be implemented to encourage historic preservation programs.

Tondro. AN HISTORIC PRESERVATION APPROACH TO MUNICIPAL REHABILITATION OF OLDER NEIGHBORHOODS 248-311.

The author, a law professor, discusses changes in redevelopment theory from demolition of deteriorated areas to preservation. Particular emphasis is placed on efforts in Hartford and Savannah that reflect this change. Describes legal techniques for implementing preservation-oriented urban renewal projects. Appendix illustrates design criteria for new buildings in the historic area of Savannah.

Wiedl. HISTORIC DISTRICT ORDINANCES 209-230.

Stating that the architectural significance of buildings has become important in the historic preservation movement, Wiedl, an attorney, notes a shift from single building protection to protection of historic districts or groups of build-

ings. Discusses protection given to historic districts, either by state statute or local ordinances, and court cases upholding these protections. Comments on *Maher v. City of New Orleans.* Appendix considers historic districts in Connecticut.

**Comment.** *CONSERVATION RESTRICTIONS: A SURVEY* 383-411.
Reviews Anglo-American laws dealing with easements, restrictive covenants and equitable servitudes. States that the law concerning conservation restrictions that operate as less than fee property interests remains relatively unsettled and developing. Examines state conservation restriction law and provides an appendix listing states with legislation providing for restrictions such as scenic easements, development rights, and less-than-fee interests for conservation purposes.

Symposium devoted to the general topic of historic preservation. Contributors discuss federal legislation and North Carolina statutes encouraging the preservation of historic structures. Recommendations are made for increased support of preservation efforts, weaknesses in current laws are pointed out, and a caution is issued that historic preservation efforts may infringe on personal liberty. Discusses preservation cases and provides a bibliography of articles on the topic, a listing of state statutes concerning historic district legislation, and statutes authorizing acquisition and maintenance of historic sites by state and local governments.

Beckwith. *DEVELOPMENTS IN THE LAW OF HISTORIC PRESERVATION AND A REFLECTION ON LIBERTY* 93-159.
Provides an overview of state historic preservation legislation. Discusses historic preservation cases as conflicts in land use in light of the Coase Theorem. Contrasts governmental and private techniques of historic preservation. Suggests revolving funds and adaptive reuse as viable means of private efforts for preservation. Argues that these methods are preferable to governmental techniques which might be

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16. 516 F.2d 1051 (5th Cir. 1975).
viewed as a threat to liberty.


Author calls for increased funding from private sources and government to encourage preservation efforts. Suggested programs include revolving funds, long-term low-interest loans, public guaranties of commercial loans and leases, the establishment of a national bank for historic preservation, tax reforms, and expanded educational programs in urban conservation, design, and preservation law.


Discusses NHPA in light of federal legislation, including the 1935 Historic Sites Act and the 1906 Antiquities Act.¹⁷


Arguing that historic preservation is one means to slow the depletion of resources and improve the quality of life, the author describes efforts in North Carolina to recognize and identify buildings in need of preservation and shows how preservation objectives may be accomplished. Analyzes North Carolina Statutes pertinent to preservation.


Notes decision by American Courts dealing with historic preservation concerning eminent domain, zoning, the NPHA and NEPA.¹⁸

*BIBLIOGRAPHY TO LEGAL PERIODICALS DEALING WITH HISTORIC PRESERVATION AND AESTHETIC REGULATION* 275-81.

Chronologically lists approximately 150 articles, notes, and comments published from 1922-1975.

*HISTORIC PRESERVATION SYMPOSIUM. 11 N.C. CENT. L.J. 195 (1980).*

Entire issue is devoted to historic preservation law. Articles

17. See note 8 supra.
18. Id.
and comments discuss reasons for historic preservation, commercial adaptive reuse, North Carolina's 1979 historic preservation legislation, revolving funds and historic preservation's influence on individual freedom. Extensive compilation of state statutes, and an annotated list of historic preservation court decisions are also provided, as well as a comprehensive bibliography of historic preservation articles updating that in the Wake Forest Symposium, discussed immediately above.

Discusses development of preservation law since 1975, raising questions concerning historic preservation's conflict with free market capitalism and a free society. Includes issues of police power, procedural due process, state financial assistance, and property rights. References are made to *Penn Central*, *Euclid*, and various state statutes.

Dennis. *An Annotated List of Major Historic Preservation Court Decisions* 341-61.
Annotates seventy-nine cases decided between 1896 and 1980 at all levels of the American court system.

Howard. *Revolving Funds: In the Vanguard of the Preservation Movement* 256-75.
Argues that, by using revolving funds, more properties could be preserved than would be possible through commissions retaining ownership of historic properties. Outlines methods for establishing revolving funds, selecting and buying properties, selling properties and enforcing preservation restrictions.

The author, a preservation planner for the state of North Carolina, discusses North Carolina legislation encouraging local historic preservation through eminent domain, easement, and covenant. Includes enabling legislation for local historic district and property commissions.

19. See note 5 supra.
20. Id.
The author reflects on the progress of historic preservation in terms of public policy and preservation philosophy. Discusses the impact of state, local, and federal programs, with special emphasis on North Carolina.

—. PRESERVATION LAWYERS-UNITE! 208-10.
Reprinted from the July, 1970, issue of Preservation News, this article is a plea to lawyers to enhance their skills in preservation law. Outlines several tasks that preservation lawyers need to undertake: publication of relevant legal documents, case histories, court decisions, and developing courses in preservation law.

Another reprint from Preservation News, this article discusses reasons for historic preservation: the relation of historic sties to the past, artistic value, appreciation of the past, and enhancement of our quality of life.

Ziegler. LARGE-SCALE COMMERCIAL ADAPTIVE REUSE: PRESERVATION REVITALIZES OLD BUILDINGS-AND NEW ONES TOO 234-42.
Contrasts earlier methods of urban development through demolition of older structures with historic preservation as a means of urban revitalization. Discusses neighborhood development in areas such as Chattanooga, Salt Lake City, Boston, and Pittsburgh. Concludes that preservation and re-use are more humane than demolition and new construction.

Comment. THE NORTH CAROLINA HISTORIC PRESERVATION AND CONSERVATION AGREEMENTS ACT: ASSESSMENT AND IMPLICATIONS FOR HISTORIC PRESERVATION 362-83.
Comment on North Carolina’s Historic Preservation and Conservation Agreements Act.21

BIBLIOGRAPHY TO LEGAL PERIODICALS DEALING WITH HISTORIC PRESERVATION AND AESTHETIC REGULATION 384-93.
Lists 156 citations to law review articles, notes, and com-

ments on the general topic of historic preservation published between 1975 and 1980. Is intended to update the bibliography published in the Wake Forest Symposium, discussed above.

**Special Symposium: Preserving, Conserving, and Reusing Historic Properties.** 12 Urb. Law. 3-215 (1980).

Series of articles prepared as part of the ABA symposium. Includes articles dealing with preservation law as an interrelation of federal, state, and local legislation and litigation; development of municipal historic preservation law with specific reference to *Penn Central*; the history of zoning, local real property taxation problems; "taking," and police powers. Leading historic preservation cases are discussed and suggestions for possible types of state laws, municipal ordinances, and model legislation for historic preservation tax incentives are offered.


Discusses methods used in historic preservation programs by the Galveston Historic Foundation: deed restrictions and contractual undertakings in revolving fund transactions, zoning, restoration grants and tax incentives.

Dennis. *Annotated List of Major Historic Preservation Cases* 87-101.

Reviews seventy-three historic preservation court cases.


Presents suggestions for improving lawyers' ability to work in the area of historic preservation. Views protection of property rights and regulation of property for the public's health and safety as the chief directions of preservation law.


Discusses preservation law as an interrelation of federal, state, and local statutes. States that preservation law treads on "that most sacrosanct of American Institutions: the rights of private property owners."²²

Describes the development of municipal historic preservation law. Emphasis on Penn Central.

Hershman. CRITICAL LEGAL ISSUES IN HISTORIC PRESERVATION 19-30.
Draws parallels between the history of historic preservation and the history of zoning, subdivision regulation and master planning. Suggests that the federal government's role provides one big difference between the two. Critical issues discussed include "taking," police power, and reduced market values of historic property.

Kellogg. ROLE OF STATE AND LOCAL LAWS AND PROGRAMS IN HISTORIC PRESERVATION 31-41.
With emphasis on New York, Vermont and Massachusetts laws, discusses leading cases which have developed the constitutional basis for historic preservation. Suggests possible types of state and municipal ordinances to be considered by persons planning a state historic preservation program.

Netherton. RESTRICTIVE AGREEMENTS FOR HISTORIC PRESERVATION 54-65.
Lists state laws authorizing acquisition, transfer and enforcement of less-than-fee interests for historic preservation and environmental conservation.

Oldham. FEDERAL TAX PROVISIONS AND THE FEDERAL FRAMEWORK FOR HISTORIC PRESERVATION 66-73.
Discusses aspects of the Tax Reform Act of 1976 affecting historic preservation.

Powers. TAX INCENTIVES FOR HISTORIC PRESERVATION: A SURVEY, CASE STUDIES AND ANALYSIS 103-33.
Examines the various methods used by the federal and state governments to achieve preservation of historic places. Provides an analysis of the justification and efficacy of tax strategies, suggests model legislation for historic preserva-

23. See note 8 supra.
tion tax incentives. Concludes with proposals for model legislation.

II. Articles


Summarizes how the investment tax credit (ITC) expanded in 1978 relates to rehabilitation of older buildings. Concludes its too early to tell if the ITC will serve as an attractive incentive, but it can be used to reduce taxes.


Discusses North Dakota's piece-meal legislation concerning historic preservation. Argues that this legislation has led to duplication, omission, and ambiguity.


Explores tax incentives such as investment tax credit, rapid amortization, accelerated depreciation, and component depreciation available for historic structures. Concludes that tax incentives are a viable means of encouraging rehabilitation.


Argues that while historic districts, transfer rights, landmark acts, and tax abatements have slowed destruction of historic buildings, they do not provide enough incentive for preservation. Declares that the Tax Reform Act of 1976\(^{24}\) and the Tax Reform Act of 1978\(^{25}\) provide stronger incentives. Suggests a combination of preservation techniques, tax provisions and reforms would be more effective. Discusses *Pennsylvania Coal Co. v. Mahon*\(^{26}\) as a keystone case for opponents of preservation “as they claim that landmark regulation which requires preservation or restora-

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\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) 260 U.S. 393 (1922).
tion constitutes a taking.”

Dillon. CONSERVATION AND PRESERVATION EASEMENTS REDUCE TAXES AND PROTECT PROPERTY. 119 Tr. & Est. 41-44 (1980).
Outlines three methods a land owner may use for preserving land: selling the property on the condition it will be maintained in its natural state, entering into a conservation or preservation easement, or making an outright gift to a group such as the Nature Conservancy or the National Trust for Historic Preservation.

Discusses the Penn Central decision, in which the Supreme Court upheld the New York City Landmark Preservation law as applied to Grand Central Terminal. The Court held that application of the law did not constitute a taking of private property requiring just compensation under the fifth amendment. Lang claims the case is important “as the Court’s imprimatur on historic preservation laws and as a step towards fairness in taking doctrine—a middle ground which neither deprives the government of important regulatory tools nor cavalierly imposes harsh economic burdens, without mitigation, on private property owners.” Nevertheless, the author argues that the Court perpetuated confusion by confusing police power with “taking” tests.

Sets out the Uniform Conservation and Historic Preservation Act approved by the National Conference of Commissioners on Uniform State Laws, convened July 26-August 1, 1980.

30. Id. at 105.
Author develops thesis that historic preservation is a means of strengthening local community ties and community organization. Discusses past and present views of preservation goals and legal procedures. Raises questions of displacement and cautions that "without a coherent rationale to explain and direct public involvement in preservation activities, the legal techniques for preservation become little more than new weapons for the politically adroit." Concludes that historic preservation is important for maintaining the physical environment and providing community organization and activity.

Concerned with section 2124 of the Tax Reform Act of 1976, which provides tax incentives to stimulate preservation and discourage destruction of historic buildings. Presents advantages and disadvantages of historic preservation.

Five section article explores confusion associated with the subjectivity of aesthetic regulation, its clash with the first amendment, and the concepts of privacy and autonomy as grounds for protecting aesthetic expression.

III. Comments

Discusses the development of eminent domain and police power regulation of land use. Examines New York City's landmark preservation law as representative of historic preservation legislation. Argues that historic preservation is

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a legitimate exercise of police power in furtherance of the
general welfare. Contends that case law developments in the
area of police power regulation of land use show the absence
of a uniform, consistently applied decisional standard.

ALLOCATING THE COST OF HISTORIC PRESERVA-
Argues that, because the impact of architectural controls
falls on landmark owners, the cost of preservation is being
borne by landmark owners rather than society as a whole.
States that effective implementation of preservation goals
must address the problem of financing costs of preservation.
Suggests that the cost of preservation be shifted from the
property owner to the public at large, balancing the public
benefit of preservation with the economic interests of the
owner. This could be accomplished through tax incentives,
transfer development rights and government acquisitions of
properties.

THE DISPARITY ISSUE: A CONTEXT FOR THE GRAND
CENTRAL TERMINAL DECISION. 91 Harv. L. Rev. 402-
Sees the Penn Central case as forging a middle way of land
use regulation between the paths of police power and emi-
inent domain. Argues that the Grand Central decision ac-
cepts the view that the financial burden of public interven-
tion in land use controversies should fall neither solely upon
the land owner, as police power would have it, nor upon the
government, as established eminent domain principles
would dictate.

FEDERAL HISTORIC PRESERVATION LAW: UNEVEN
STANDARDS FOR OUR NATION'S HERITAGE. 20
Reviews the National Environmental Policy Act, the Na-
tional Historic Preservation Act and section 4 (f) of the De-
partment of Transportation Act. Analyzes the points where
their protections overlap and where they diverge. Concludes
that they offer inconsistent treatment. Argues for a greater
uniformity of protection of historic properties.

FEDERAL TAX REFORMS AFFECTING HISTORIC
Argues that, before 1976, federal tax laws discouraged historic preservation. Suggests that the Tax Reform Act of 1976 accomplished a complete turnabout and the 1978 Act continued the policy of encouraging historic preservation with an expansion of investment tax credits for older buildings.

Calling for supportive legislation to assist historic preservation, this comment discusses the Tax Reform Act of 1976 as a renewed attempt by the federal government to facilitate historic preservation by private owners. Cautions that reforms may be viewed as a subsidy or tax shelter for high income taxpayers at the expense of lower class residents through increased rents or displacement.

Considers the role of zoning laws in historic preservation, with special emphasis on Mississippi. States that *Penn Central* clearly confirms that historic preservation improves the quality of life and serves the general welfare.

Argues that *Penn Central* was an "easy case" in preservation law due to the fact that the court's doctrinal approach to the taking issue does not address the question of whether property owners are obligated to use their land in ways which preserve historical, cultural, or environmental issues. Calls on courts to adopt a strict reading of *Penn Central* and require compensation only in the clearest cases of arbitrary governmental action.

Examines role of Texas cities in historic preservation. Discusses *Penn Central*, Article 1, Section 17 of the Texas Constitution, local zoning, and tax exemption. Concludes that Texas law reflects the attitude of the dissent in *Penn Central*. 
Calls for Texas to adopt specific criteria and standards in the designation of buildings as of historic interest. Suggests that consideration of historic preservation statutes of other states would be instructive.

IV. Notes

Examines the "nexus that has developed between administrative procedure and historic preservation law as it relates to areas such as Green Springs."83 Explores the context of expanded notions of due process, involving federal preservation and environmental legislation. Contends that statutory procedural requirements along with the power of review by the courts as a method of historic preservation is an expanding area in administrative law.

Focuses on recent litigation concerning preservation of aesthetic landmarks under state and local ordinances. Note argues that because beauty is incapable of definition, judicial or legislative determination of what is aesthetically pleasing, can not properly be made. Discusses Penn Central, Foundation for San Francisco's Architectural Heritage and Charleston Center cases.83

CONSTITUTIONAL ISSUES FOR PRESERVATION LAW.
Discusses issues such as aesthetic regulation, takings, designation procedures, and the intersection between historic preservation laws and the first amendment right to freedom of religion. Provides sample cases.


33. See note 5 supra.
Examines legal protection afforded to cultural resources in the State of Ohio. Describes Ohio House Bill No. 418 as the first Ohio legislative effort to deal with cultural resource protection in a centralized and coordinated program, albeit confusing in its omission to define what constitutes archaeological or historical significance. Concludes with a suggestion for a more aggressive program based on cognate legislation in Ohio.


Discusses Penn Central, analogizing it and historic preservation to Euclid and zoning. States that, while Penn Central extended valid objectives under police power to include preservation, aesthetic consideration, and the maintenance of the amenities of a community, it fails clearly to define what constitutes a reasonable return or beneficial use for the owner of an historic property.


Note on Gunther v. Historic District Commission, one of the first situations in which a conflict between historical preservation and solar energy has resulted in litigation.


Provides an overview of federal, state, and local governmental action to preserve historic heritage, emphasizing their effect on preservation groups. Discusses the role of the private citizen, local historic zoning ordinances and incentives for private historic preservation contained in federal and Kentucky tax laws.


35. Euclid v. Ambler Realty, 272 U.S. 365 (1926), was the progenitor of the modern law of zoning.
Discusses WATCH v. Harris, in which the Second Circuit Court significantly expanded application of the NHPA. It held that, where a federal agency maintains continuous control over a federally assisted urban renewal project, the requirements of NHPA apply throughout the job rather than merely at the initial approval stage. This was the first time a court has construed NHPA as applying to ongoing projects (as long as the federal agency retains the authority to make funding approvals). States the Watch decision "fulfills judicial role in government's commitment to control the destructive engine of material progress."

MINNESOTA ENVIRONMENTAL RIGHTS ACT: HISTORICAL RESOURCES. 64 MINN. L. REV. 1215-16 (1980). Note on the case of Powderly v. Erickson, where the court held that historically significant houses with potential economic value could not be demolished. The court did not answer, however, the question whether a taking would occur if the owner of a historic resource was unwilling to make the necessary investment to make the resource economically valuable as an alternative to demolition.

Note on case in which court upheld the demolition of buildings by invoking the nondelegation and void-for-vagueness doctrine in regard to the Texas Antiquities Code.

NEW YORK CITY LANDMARKS PRESERVATION LAW AS APPLIED TO RADIO CITY MUSIC HALL. 5 COLUM. J. ENVTL. L. 316-43 (1979).
Contrasts the designation of Radio City Music Hall as an

38. Id. at 325-26.
40. 285 N.W.2d 84 (Minn. 1979).
41. Id. at 90.
42. Texas Antiquities Comm. v. Dallas Community College Dist., 554 S.W.2d 924 (Tex. 1977).
43. Id. at 927-28.
44. TEX. REV. CIV. STAT. ANN. art. 6145-9 (Vernon 1970).
interior landmark issue with *Penn Central*. The Radio City controversy does not question the constitutionality of the city's landmark preservation law, but rather whether the landmark preservation law "may be applied to a private landowner situation where the landmark designation (1) virtually destroys the economic viability of the affected property and (2) so severely limits the business potential of a commercial property as to prevent its owner from utilizing it for any purpose other than the one for which it had been used prior to the designation." Argues a court could find an unconstitutional taking and suggests amendments to the landmark preservation law.


Argues that historic preservation incentives have met with only limited success due to economic reasons. Suggests that preservation projects would be more successful if they were financially more attractive for individuals to undertake. States this could be accomplished through tax incentives. Discusses section of Tax Reform Act applicable to historic preservation, reviews state tax provisions, and argues that, generally, state governments have better engineered tax incentives than the federal government because the federal government has ignored the residential preservationist in deference to the commercial sector.


Examines the impact of preservation rights created by a Vermont statute on local property taxation by reviewing the tax status of the burdened property and by examining the possibility of separately taxing or exempting the newly created interest in land. Suggests that the Vermont General Assembly clearly define the taxability of preservation rights and proposes that the most equitable solution to the problem may lie in exempting preservation interests from taxation and limiting the types of organizations capable of holding them.

ZONING—HISTORIC DISTRICT ZONING IN NORTH CAROLINA—A-S-P ASSOCIATES V. CITY OF RALEIGH. 16 Wake Forest L. Rev. 495-512 (1980).

Discusses validity of historic district zoning and its advantages as a means of historic preservation. Argues that this case gives a green light to municipalities and counties that wish to preserve historic areas through the police power. Warns that courts must take care to prevent abuses in historic preservation.

V. Relevant Articles Published in Periodicals Other Than Law Reviews


Ballard. INCENTIVES AND DISINCENTIVES FOR CERTIFIED HISTORIC STRUCTURES. 9 Colo. Law. 2359 (1980).


Barnes. JERSEY CITY NEIGHBORHOOD. 36 J. Housing 395 (1979).


Cohen. NEIGHBORHOOD PLANNING AND POLITICAL

Collins. CHANGING VIEWS ON HISTORICAL CONSERVATION IN CITIES. Annals, Sept. 1980, at 86.
CONSERVATION OF COUNTY COURTHOUSE IN MICHIGAN. Architectural Record, Feb. 1980, at 91.
DIALOGUE ON CONSERVING ARCHITECTURAL LANDMARKS. J. Housing, March 1980, at 139.
Gilmore. TAX INCENTIVES FOR HISTORIC PRESERVATION. Practicing Planner, June 1979, at 33.


Myrick. NEW TOOLS FOR HISTORIC PRESERVATION AND COMMUNITY APPEARANCE. Popular Gov't, Spring 1980, at 15.


NEW LIFE FOR AN OLD FRIEND. J. Am. Ins., Spring 1979, at 1.

Nolon, HOUSING REHABILITATION AND CODE EN-
Oldham. HISTORIC PRESERVATION TAX INCENTIVES. URB. LAND, Dec. 1979, at 3.
Pierce & Hagstrom. PRESERVATIONISTS OPPOSE DEVELOPERS OVERUSE OF HUD ACTION GRANTS: THE HOUSING AND URBAN DEVELOPMENT DEPARTMENT'S ACTION GRANT PROGRAM IS BECOMING CONTROVERSIAL AS PROJECTS THREATEN HISTORIC BUILDINGS, 12 Nat'L. J. 933 (1980).
____. MUNICIPAL ORDINANCES FOR HISTORIC PRESERVATION IN NEW YORK STATE. N.Y. St. B.J., Jan. 1981, at 18.
Saline. THE NEW PHILADELPHIA: GET IT WHILE IT'S HOT! PHILADELPHIA, June 1979, at 122.
____. HOW TO USE THE TAX SYSTEM TO PROMOTE
Stipe. HISTORIC PRESERVATION THROUGH SPECIAL PROPERTY TAX TREATMENT. Popular Gov’t, Winter 1976, at 15.
Weber. TAX INCENTIVES FOR HISTORIC PRESERVATION: AN ECONOMIC ANALYSIS. J. Real Est. Tax’n, Fall 1979, at 31.
COMMENT

THE EXEMPTION PROVISION OF THE STAGGERS RAIL ACT, ITS EFFECT ON COAL EXPORTS AND THE N & W'S PETITION FOR EXEMPTION

The American railroad industry has been plagued with serious financial problems for the past several years. These carriers of coal have complained that the regulatory freight rate system has deprived them of capital needed for improvements. They have contended removal of these regulatory constraints is necessary in order for them to function more efficiently. In contrast, shippers have advocated the continuation of regulation, at least of coal mines that are captive to a particular railroad.

The Congressional response has been the enactment of the Staggers Rail Act of 1980. It completely deregulated many rail rates and permitted increases of those that continued to be regulated, according to two criteria: by a certain annual percentage and to recover the costs of inflation.¹

The railroads, however, are not completely satisfied and continue to seek removal of all regulatory rate barriers. This is the setting surrounding this article. First, an overview of the exemption provision of the Staggers Act is offered. Second, a capsulized account of the petitions for exemption of the Norfolk and Western Railway (hereinafter N & W) and the Coal Exporters Association (hereinafter CEA) is presented. Third, this article will examine the effect that the exemption of freight rates would have on the coal export market.

I. THE STAGGERS RAIL ACT OF 1980

A. Background and Legislative History

The Staggers Rail Act of 1980 was enacted on October 14, 1980. Its stated purpose is to provide for the restoration, maintenance and improvement of the physical facilities and financial stability of the United States railroads.² The statute balances two interests: the need for continued regulation of rail rates on coal and the desirability of increased revenues for the railroads.

Section 10505 of the Interstate Commerce Act (hereinafter

¹ Speech by John Oberdorfer, United States-Japan Coal Conference (July 13, 1981).
called the "Act"), as amended by Section 213 of the Staggers Rail Act of 1980, gave the Interstate Commerce Commission (hereinafter ICC) the authority to reduce the scope of railroad regulation when possible, and more specifically, to exempt certain classes of service from freight rate regulation where it is unnecessary to carry out the national rail transportation policy. This may occur when either the service is of limited scope, or where shippers do not need to be protected from the abuses of market power. Section 10505, which was enacted in 1976, is a formal indication of Congress’ intent to reduce rail regulation generally. A statement in the legislative history of the Act exemplifies this: “The Committee (Staggers Act Conference) believes that an exemption power in the Commission is very desirable, and the Commission itself has recommended for several years that it be given such power.”

However, between 1976 and 1980, only one exemption from freight rate regulation by the ICC was granted under Section 10505. Also, this was the only exemption proceeding during this period. Fresh fruits and vegetables were exempted based on the reasoning that motor carriers, who were the rail carriers’ chief competition for this commodity, were exempt from freight rate regulation. Therefore, it would be inequitable to require regulation of the rail rates.

In action which could be interpreted as an effort to spur the exemption process, Congress enacted Section 213 of the Staggers Act in 1980. Congressional intent to deregulate rail rates, except where regulation is needed to prevent the abuse of market power, is evident from the legislative history:

The bill permits exemptions wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition. The policy underlying this provision is that while Congress has been able to identify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. The conferees expect that, consistent with the policies of this Act, the Commission will pursue partial and complete exemp-

3. See Id. § 10505 (a)(1), (2). Staggers Rail Act of 1980. See also Id. § 10101a.
tions from remaining regulation. The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose. Particularly, the conferees expect that as many as possible of the Commission’s restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.7

Shortly after enactment of Section 213, the Commission exempted trailers and containers being transported on railroad flat cars, since no carrier involved in the subject movement of freight controlled a large majority of the market.8 The Commission stipulated that, in this case, deregulation would inure to the benefit of the public and that market forces should be allowed to establish reasonable rates.9

At present, these are the only rail rate exemptions which have been allowed since enactment of Section 10505 of the Act. It is important that the Congressional intention to deregulate rail rates, discussed above, be considered alongside the stated provisions. The Commission objective of less regulation must be balanced with maximum rate protection for captive shippers and captive traffic.

The role of coal in this controversy is evident from the fact that coal was the object of substantial concern to both the House and Senate during Committee hearings. The report of the Senate Committee on Science, Transportation and Commerce stated that the ICC should implement the rate flexibility structure so that coal did not bear an unfair amount of the carriers’ revenue needs:

The rates on coal are of particular concern in view of the many substantial increases imposed on this traffic in the last several years. While recognizing that not all traffic can be transported at a fully allocated cost level due to competitive considerations, it is the Committee’s intent that the Commission play an active role in insuring that such traffic bears its fair share of costs and that higher rated captive traffic is not unduly burdened.10

9. Id. at 14,349-50.
The report emphasized that the railroads had to improve their efficiency and could not expect to achieve revenue adequacy by simply increasing rates which were already at a high level in relation to costs. The Commission was directed to continue to provide protection in such situations. The Conferees intended that this policy include the encouragement and promotion of the transportation of coal by rail in accordance with the objectives of energy independence at rates which do not exceed a reasonable maximum where there is an absence of effective competition.11

B. N & W Petition, CEA Response and Analysis

Although the effect of the Staggers Act exemption provisions on the export coal market will not be known for some time, the deregulation versus continued regulation controversy should be settled within a shorter period. The N & W has filed a petition before the ICC to exempt export coal freight rates from regulation by the ICC.12 The CEA has filed a response urging immediate dismissal of the exemption petition.13 This response follows a complaint, filed by the CEA three days prior to the N & W’s petition, challenging the reasonableness of existing export coal freight rates to various export coal ports.14

The N & W generally contends an exemption would be consistent with Section 213 of the Staggers Act and that regulation impedes its ability to compete for export traffic by creating an obstacle to its ability to negotiate contracts on export coal. These same contracts would allow for necessary capital improvements. Moreover, the contracts would help ease the port congestion problems by permitting the railroad to exercise more operational control over export coal movements.15 The N & W’s Petition makes several contentions in support of the argument that exemption of export coal is fully warranted under the standards of Section 213 of the Staggers Act.

11. Id. at 8.
12. See note 6 supra.
15. Petition at 3.
1. REGULATION IS NOT NECESSARY TO CARRY OUT NATIONAL TRANSPORTATION POLICY

As contended by the N & W, continued regulation is actually antithetical to the goals of national rail transportation policy. These goals are

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
(2) to minimize the need for Federal regulatory control over the rail transportation system . . . ;
(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues. . . .

The N & W's rationale is that foreign purchasers are large, sophisticated and economically powerful, draining sources of coal all over the world. N & W mines must compete with coal from other countries, in addition to domestically-produced coal on other railroads. Further, the freight rates from the mines to the ports represent a small portion of the total delivered price of the coal. The N & W feels that, in order to enhance competition, the “minor” position of the N & W’s services should not be subject to continued regulation, but, that market demand should be the rate-setting mechanism. Because foreign buyers compare all components of the delivered price, they evaluate rail rates just as they do coal cost and ocean freight. The N & W, therefore, will have to maintain competitive pricing, since no single supplier, railroad, port, or ocean carrier can exert undue market power.

The focus of the Interstate Commerce Act, as noted in CEA's response, offers two reasons for dismissing the foregoing argument. First, it emphasizes the relationship between the shipper and the railroad, and is not concerned with the world market for the end use of coal. Second, the need for continued regulation turns upon the need for protection from abuses of market power in transportation from mine to port. Thus, only evidence concerning the availability of transportation alternatives should be considered.

16. Id. at 10.
18. Petition at 11-12.
19. Id. at 12.
20. Id. at 19.
22. Id. at 15-16.
Before analyzing these two arguments, it should be made clear that coal is not a homogeneous commodity, the salability of which depends only on price. Therefore, the N & W's strict supply and demand curve application will not work, exclusive of other factors. For certain types of coal, foreign buyers may not be able easily to turn to other sources of supply, if and when the rail rates cause United States coal to become non-competitive on a delivered cost basis.\textsuperscript{23}

Regarding the substance of each petition, it is a more reasonable position that the Interstate Commerce Act is concerned only with the domestic market, not with the world market as N & W contends. Based on these two factors, the domestic focus of the Act and the need for protection from market abuses, the N & W's argument seems to lack substance.

2. EXPORT COAL TRANSPORTATION VIA THE EASTERN RAILROADS AT ATLANTIC AND GULF COAST PORTS IS OF "LIMITED SCOPE"\textsuperscript{24}

According to the petition, export coal accounts for only three percent of the railroads' total carloadings and only thirty-three percent of the railroads' coal and coke traffic.\textsuperscript{25}

The response by the CEA challenges the "limited scope" of the requested exemption as actually being of very broad scope. The railroad's petition encompasses all Atlantic and Gulf Coast Ports, all carriers transporting coal to these ports, and all statutory sections applicable to rail transport.\textsuperscript{26} The N & W based its petition

\textsuperscript{23} A variety of coal qualities are required by foreign steam and metallurgical coal users. Specific types of coal needed by certain foreign users are found only in certain countries. For example, for steel making the United States uses two types of coal, which are not found in large amounts in other countries: (1) low ash, low volatile coal and (2) high fluidity, high volatile coal. Also, foreign buyers do not like to purchase a majority of a certain type of coal from one country. This protects them from a complete supply cutoff in the event of supply problems from one source country. Conversation with W. W. Mason, President, Coal Exporters Association, in Lexington, Kentucky (June 7, 1980).


\textsuperscript{26} Response at 9. The principal Gulf ports are in the New Orleans area and at Mobile. At present, if the N & W "serves" any Gulf ports at all, it does so only indirectly via shipments to points on the Ohio-Mississippi River system for transshipment by barge downriver to New Orleans-area ports. The other chief Gulf port, Mobile, is served by Southern Railway, N & W's prospective merger partner. It would seem doubly unwise for the Commission even to consider exempting service to the Gulf, given the pendency of the merger application and the increased potential for market dominance that would be possessed by a com-
on the precedents of the container transport and fresh fruit and vegetable exemption. The distinguishing factor in both of those situations, however, was that the railroad lacked market power over the transportation. In both cases, there was an availability of transportation alternatives, which served to create a very competitive situation. This is in contrast to the complete dominance exercised by the N & W and other railroads over the transportation of export coal. Unlike the volume of rail traffic concerned in the container transport and fresh fruit regulations, which was truly of limited scope, the rail shipment of export coal is anything but limited. It represented twenty-three percent of the total tonnage handled by the N & W in 1980.

Furthermore, export coal constitutes the eighth or ninth largest volume commodity on the American Association of Railroads' list of commodities transported by United States railroads. Every indication is that this growth will continue, due in large part to the rapidly growing export steam coal market. The recent World Coal Study projected world coal trade to double by 1990 and triple by 2000. Specifically, steam coal demand is expected to increase from 76.5 million tons in 1979 to approximately 280 million tons in 1990. Export coal contributes $4.8 billion to our balance of payments, supplies 36,000 jobs in the coal mines, and contributes substantially to the economy of the port areas, through which the coal is exported. One other, and possibly the most important contribution, is to the national energy goal of reducing dependence on

29. Response at 11.
30. Id. at 12. Yet N & W alone carried 31.7 million tons to its Lamberts Point piers at Norfolk, Virginia—up 32.4 percent from the 24.1 million tons handled in 1979. This tonnage represented approximately twenty-three percent of the total tonnage handled by N & W in 1980. See Verified statement of Bill Bales, Petition, Attachment G.
31. Response at 13 (footnote omitted).
32. MASSACHUSETTS INSTITUTE OF TECHNOLOGY, COAL: BRIDGE TO THE FUTURE 12-13 (1980).
34. Complaint at 7-8.
OPEC oil by strengthening the development of the United States coal industry.\(^{35}\)

It is inconceivable to classify, as the N & W did, the export of United States coal as a "limited scope" operation of the N & W Railway or of any other eastern United States railroad. Beginning in early 1980 and continuing to the present, it has been normal for vessels to wait at the port for thirty to fifty days before loading. The vessel charterers are liable to the vessel owners for demurrage charges of from $10,000-$20,000 per day for every day they must wait. From the fact that the vessels are allowed to wait this long, at this enormous expense, it is clear that the export of United States coal is not of "limited scope." It is an essential and large-dollar commodity to the foreign purchasers, the shippers and the carriers, which include the N & W.

3. REGULATION IS NOT NEEDED TO PROTECT SHIPPERS FROM THE ABUSE OF MARKET POWER, DUE TO THE COMPETITIVE NATURE OF THE EXPORT MARKET\(^{36}\)

N & W's petition stresses the fact that the competition existing in the "total" export coal market precludes any one coal supplier or transportation company from exercising dominant market power. It is contended that foreign purchasers may purchase from any number of countries; the United States portion of the market is not dominant, since it sells only one-fourth of the world market.\(^{37}\) Competition also exists within the United States among various coal producers.\(^{38}\) A lesser degree of competition exists between the carriers. In some cases, the same coal may move from the mine to either the Atlantic or Gulf Coast ports by a choice of railroads.\(^{39}\) Finally, intermodal competition (between truck, barge and rail) is said to be an important factor in preventing market dominance by the railroad.\(^{40}\)

The N & W also reflects on the relative stability of export coal rates over the past years.\(^{41}\) Verification of this lies in the fact that

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35. Id. at 8.
36. Petition at 15.
37. Id. at 16. See INTERAGENCY COAL EXPORT TASK FORCE INTERIM REPORT, supra note 31, at 21-33.
39. Id. at 18.
40. Id. at 19.
41. Id. at 22. See also Verified statement of William B. Bales, Vice President-Coal and
export coal rates have declined as a percentage of coal value since 1960. The railroad desires to be on equal footing with coal suppliers and have the same profit opportunities without regulatory constraints.

The CEA’s response focuses on the fact that the prevention of abuses of market power turns on a different standard than that for market dominance. The Conference Report shows Congress’ intention to differentiate these two: the bill permits exemption wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition. It is the relationship between the shipper and the railroad which is to be protected from market power abuses, thereby making the world market for the end use of coal an irrelevant consideration. Relying upon this explanation, CEA apparently feels no need to address further the overall competitive situation.

The CEA further argues that the captive nature of the export coal market makes it vulnerable to abuse of market power by the railroads. The N & W and other rail carriers of export coal control approximately eighty-five percent of the traffic, which is the market-dominance presumption level. The majority of mines are served by only one railroad and the coal must be shipped to that railroad’s port facility (unless an excessively higher rate is paid, which will allow for shipment to another railroad’s port facility). The CEA contends this is conclusive evidence of the need to protect shippers.

The contention by N & W that both intra- and inter-modal competition is an essential factor in the network is disputed by the CEA. In fact, there is no inter-modal competition among types of transportation hauling to Atlantic ports. Trucks are not an adequate alternative, due to the distance involved which makes such

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43. Response at 14.
44. Conference Report, supra note 7, at 105.
45. Response at 15.
47. Response at 17.
transportation uneconomical. It is not feasible to barge coal to the Atlantic and the barging of Appalachian coal to New Orleans is approximately nine dollars per ton more expensive than shipments by rail to the east coast.48

The dominance of railroads is obvious from their total control of the movement of export coal. Cars, rails, and port facilities are all owned by the same company. Special permit rules, which require each shipper to obtain a permit prior to shipping coal to the export piers, control the shipment of export coal. Several specific facts set forth in CEA’s response are strong indicia of monopolistic practices in the export market:

1. The number of railroads presently serving the Appalachian area has decreased to only four.49 This differs from the 1978 Department of Justice report that the coal industry is very competitive.50
2. Since 1974, there have been no reductions in export coal rates. During this period, the N & W, Chessie System and Southern Railroads have applied for the maximum increases allowed.51
3. The N & W and Chessie System Railroads have not published joint rates permitting coal to have joint access to alternative ports.52
4. The rail carriers have published rates on a single car basis only. As stated by the CEA, it would be expected that, in order to obtain a market advantage, competitive carriers would quote multiple car rates.53

As pointed out in the CEA response, some export coal is sold on an F.O.B. United States port basis. Therefore, the producer must absorb any rail increases occurring during the life of the contract. The importance of regulated rail rates is evident in this situation.54 Many contracts are being made, however, with a provision to pass along rate increases to the consumer. The customer will suffer in these situations.

Finally, the CEA contends revenue-to-variable cost ratios for export coal rates greatly exceed the jurisdictional thresholds estab-

48. It is approximately 400 miles from the eastern Kentucky coalfields to the Atlantic Coast export ports. The average trucking cost is eight cents a ton per mile. Therefore, the total cost of this movement would be thirty-two dollars, compared to a current rail rate of $14.80. Interview with Thomas G. Slone, Manager of Transportation, Island Creek Coal Sales Company (October 25, 1981).
49. Response at 20.
51. Response at 21.
52. Id.
53. Id.
54. Id. at 22.
lished under 49 U.S.C. § 10707(a)(d)(2)(A). In summary, the CEA posits that there is ample evidence of the need to protect export coal shippers of coal to the Atlantic and Gulf ports from the abuse of market power by the rail carriers.

The essential point on which the arguments of both the N & W and CEA turn is the interpretation of Section 213, as to whether or not competition should be considered in determining the necessity of protecting shippers from market power abuse. N & W’s argument is that, since export coal is so competitive on an international scale, as shown by evidence given in the Petition, market forces, based on supply and demand principles, will preclude the railroad from establishing excessive rail rates. On the other hand, CEA contends that competitive factors on the end use of coal are not relevant, but that the specific issue is whether or not deregulation of export rail rates will serve to eliminate the protection currently afforded shippers from abuses of market power by the rail carriers. It seems clear from the legislative history that Congress intended to protect the shipper from railroad abuse, due to its market power over a particular commodity.

As stipulated by the respondent, export coal shippers have no viable alternative methods of transporting coal to the export piers other than via the particular rail carrier’s railroad on which the mine is located. Without question, this situation lends itself to the possibility of abuse of market power. The argument by the petitioner does little to defray the possibility of abuse occurring.

4. REGULATION IS UNNECESSARY AND HARMFUL TO COMPETITION AND TO THE RAILROADS’ ABILITY TO ENTER INTO LONG-TERM RATE CONTRACTS

N & W contends long-term contracts, which are a principle objective of the Staggers Act, are necessary to enable the railroads to make large capital investments in assets essential to export coal traffic. Also, long-term rate contracts are valuable sales tools with foreign purchasers. And, finally, the N & W contends that regu-

55. Id. Many of these rates exceed 200 percent and some exceed the 300 percent level. See Verified statement of Banks and Miller, Complaint, Attachment 3, Table 2.

The statute limited annual rail freight rate increases to an amount not exceeding a figure which is x percent above variable costs. This percentage is graduated at a rate of 5 percent per year, beginning with 160 percent in 1981, escalating to 180 percent in 1984. Response at 22.

56. See H. CANNON, supra note 10, at 43.

57. Petition at 26.
tion has a chilling effect on its ability to negotiate long-term contracts.\textsuperscript{58} The regulatory "backstop" (resulting from being a common carrier) supplies the purchaser with a form of relief from the Commission. Therefore, the railroad is in a very weak negotiating position, there being a possibility that the contract rate will be reduced. Because of this chilling effect, free and open bargaining, which would benefit both parties, is impaired. In response, CEA stipulates that export coal producers have little or no power to negotiate rail transportation contracts with the railroads, as there is no effective competition. Without rate regulation, the railroads would have no incentive to enter into contracts for a particular rate with a captive shipper.\textsuperscript{59}

When considering the total export coal market, rate regulation may well be considered detrimental to the making of long-term contracts between rail carriers and foreign purchasers. N & W contends that the "backstop" clause acts as a disincentive to foreign purchasers to enter into long-term contracts. Foreign purchasers feel that other purchasers (competitors) may obtain a lower rate from the Commission. Although this might be problematic, foreign purchasers experience this same concern over coal sales contracts, but do not allow it to stop them from entering sales contracts with particular companies. N & W fears that the Commission will approve a reduced rate which will serve to diminish their projected revenues.\textsuperscript{60} This is a valid concern, but must be balanced against the interests of the shipper, in light of the intent of the Staggers Act to protect them from market abuse.

The facts clearly show that the railroad would have been in a stronger position in any contract negotiations with coal shippers, since there are no alternatives for the shippers. There is little, if any, incentive for the railroads to offer a lower rate to the shipper. The shipper cannot offer to ship more tonnage over the railroad, as opposed to another railroad, in exchange for a lower rail rate. Nor is there any other negotiable consideration to be given by the shipper. If regulation were removed, the railroad could charge any rate it desired. It seems elementary that the potential harm to the shippers outweighs the benefits to the railroads. This is especially true considering the fact that continued regulation does not prohibit

\textsuperscript{58} Id.

\textsuperscript{59} Response at 25.

\textsuperscript{60} Id. at 29.
the railroad from contracting, either with shippers or foreign purchasers, but merely reduces the potentially unchecked economic benefits to be gained.

II. Effect of Exemption

Currently, the export coal industry of the United States is experiencing both the best of times and the worst of times. The “best of times” is due to the present and projected future increased demand of United States steam coal and some of its types of metallurgical coal.61 The “worst of times” is due to the failure of the nation immediately to capture the majority of these markets.

To expand somewhat on the negative side of this parallel, there are three major factors accounting for the United States coal industry’s inability to capitalize on this market:62

1. Congestion demonstrates that United States ports are inadequate to handle a large volume of export tonnage.
2. The instability of our labor force has caused foreign purchasers to diversify their supply sources, which effectively reduces the amount of United States coal to be purchased.
3. The rail freight rates on export coal have increased excessively in the last six to seven years, thereby increasing the delivered price to the foreign purchasers.63

The coal industry is making a concerted effort to correct the first and second factors and is making substantial progress in both areas.64 Progress is being made in the port congestion problem as evidenced by recently announced construction plans for new port facilities on the east coast. Labor force instability seems to have been curtailed, viewing the absence of major wildcat strikes since the 1977 United Mine Workers Association labor strike. However, no progress is being made in correcting the excessive rail freight rates.65 Not only is no progress being made, but steps backward will be taken in the event control of export rail rates by the Commission is eliminated.

61. Both mid and high volatile, high fluidity metallurgical coal is in strong demand, since it is an invaluable component in the coke-making process. Poland and the United States have reserves of this type of coal. The demand for United States coal of this type has increased to account for a deficit in Poland’s shipment. Conversation with W. W. Mason, President, Coal Exporters Association, in Lexington, Kentucky (June 7, 1980).
62. Id.
63. Id. This increased cost has caused some foreign purchasers to intensify their efforts to purchase coal from supply sources located closer to the destination of the coal. Id.
64. Id.
65. See generally Complaint.
If deregulation of rail rates occurs, the price of United States coal delivered to an export pier will eventually reach maximum price level foreign purchasers are willing to pay. At this point, foreign purchasers will intensify their efforts to purchase coal from other countries. In addition to normal buy-sell transactions, purchasers will increase their investments in mines in other countries. The net effect will be that United States coal will be priced out of the export market.

An example of this occurred in the low volatile metallurgical coal market, specifically in Japan and generally throughout the world. Until the mid 1970’s, the United States experienced an excessive demand for premium quality, low volatile coal. Eventually, the price for this coal reached seventy dollars per net ton F.O.B. mine. At this point, the Japanese decided that something had to be done to replace this high priced coal, while continuing to produce a high quality coke. Within several years, a new coking process was discovered, which replaced the low volatile coal with a lesser quality coal, which is found in abundance in Australia and Canada. It is also priced much less than the premium quality low volatile coal. Today, the United States has an oversupply of this low volatile coal, which was in strong demand five years earlier.

If rail rates are deregulated and they are allowed to increase unchecked, as could very well be the case, the consequences could be disastrous for United States coal. Several developing countries, along with other established supplying countries, have large coal reserves, but need capital investments to develop their mining operations. The Japanese and other world coal users could reduce their purchases of United States coal, if the total price becomes uncompetitive. It does not matter whether new methods of consumption must be developed or whether new capital investments in other countries are required. Either way, other countries’ coal will be purchased at the expense of United States coal. If rail rates

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66. K. Tanaka, General Manager of Raw Materials for Nippon Steel, warned the United States export coal shippers of this situation in his address at the first annual United States-Japan Coal Conference at Norfolk, Virginia, August 15, 1980. He also stated that the increase in rail rates is the single biggest problem facing the United States export coal industry.

67. The new coking process is called “formed coke” and has been used successfully by all of the major Japanese steel mills. Conversation with W. W. Mason, President, Coal Exporters Association, Lexington, Kentucky (June 7, 1980).
are deregulated, this would be one more justification for foreign purchasers to reduce their purchases of United States coal.

Jerry Kelly
NOTES


Taxation, to some commentators, is a price willingly to be paid for being civilized. To others it is a begrudgingly paid, necessary evil. Regardless of which view is espoused, it is clear every taxpayer aspires to reduce his federal tax burden and be subject to the least amount of tax liability allowed by law. To accomplish this, tax planning is essential. Tax planning offers a multitude of tax-saving income, estate, and gift tax techniques. One such technique is the increasingly popular, but controversial, net gift, which, while allowing the donor to avoid gift tax liability on a transfer, may subject the donor to income tax liability as a result of such transfer. This device has engendered much debate among courts and commentators. The Internal Revenue Service (hereinafter IRS) maintains the position that a net gift has certain income tax consequences to the donor, whereas the taxpayer views a net gift as entailing no income tax liability.

This note examines the net gift theory in light of Owen v. Commissioner, a recent decision of the United States Court of Appeals for the Sixth Circuit. After a survey of the development of the net gift theory, the note will concentrate on the Owen decision and provide an analysis of its effect on the net gift. The note will also analyze the current status of the net gift and consider its future.

The facts that gave rise to this litigation are typical of a net gift case. Ralph and Lulu H. Owen (hereinafter taxpayers) each created five trusts for the benefit of their five grandchildren on January 2, 1973. That same day, taxpayers transferred to the trusts highly appreciated American Express Company common stock in which their combined basis was $1,200.00. The transfers were expressly conditioned upon the trustee's payment, out of the trust estate, of all federal and state gift taxes imposed on the donor. On March 29, 1973, the trusts, consolidated to five for administrative purposes, each borrowed an amount sufficient to pay the federal gift tax for

1. 652 F.2d 1271 (6th Cir. 1981). The decision rendered in this case was by a panel of the court. A motion for a rehearing en banc subsequently was filed and granted. As a result, the panel decision was removed from the permanent volume of the reporter.
the first quarter of 1973 and the Tennessee state gift tax for 1973, securing the loans with trust corpus. Each trust paid its pro rata share of the total tax liability, $1,557,060.80.2.

Taxpayers filed a joint federal income tax return for 1973 in which they did not report any gain as a result of the transfers. The Commissioner of Internal Revenue (hereinafter the Commissioner) determined that the transfers resulted in a taxable gain to the taxpayers in the amount of $777,930.40 and assessed a deficiency judgment of $502,266.83.3

Taxpayers petitioned the United States Tax Court for a redetermination of the deficiency the Commissioner found.4 The court entered a decision for the taxpayers, holding that they did not realize taxable income as a result of the payment of the gift taxes by the trust.5 The issue presented on appeal to the United States Court of Appeals for the Sixth Circuit was whether, as a result of a transfer of appreciated property to five trusts, subject to the condition that the trustee pay the resulting gift taxes, taxpayers realized income to the extent the gift taxes paid exceeded taxpayers' basis in the transferred property.6 The Sixth Circuit, in a panel decision, affirmed the Tax Court holding that the transfers of property conditioned upon payment of the donor's gift tax liability by the donees were net gifts involving no income tax consequences to the donor.7

BACKGROUND

A net gift is a gift of property subject to some encumbrance or obligation.8 The obligation may pre-exist or may arise at the time of the gift9 and is usually motivated by the donor's illiquid financial position or unwillingness to sell a portion of the property.10 It occurs when the donee, by agreement, assumes responsi-

2. Id. at 1272.
3. Id.
5. Id. at 277.
7. 652 F.2d at 1279.
8. Id. at 1273.
9. Id.
bility for payment of all gift taxes. The net gift is determined by reducing the gross value of the gift by the amount of the gift tax, and computing the gift tax on that amount.

Although the gift tax treatment of net gifts is well settled, the income tax consequences to the donor of a net gift have been the subject of much controversy, centering on divergent views held by taxpayers and the IRS. The case in which the issue of income tax liability to the donor of a net gift first arose is Estate of Staley v. Commissioner. In this case, the taxpayer wished to make gifts of stock to his five grandchildren but lacked sufficient funds to pay the estimated gift tax of $150,000.00. Taxpayer transferred the stock on condition that the trustee pay him, out of income received by the trust, an amount equal to the gift taxes owed. After a finding that the $150,000.00 was properly excluded from the value of the gift in computing the gift taxes, the Commissioner determined a deficiency in taxpayer's income tax for that year. The taxpayer argued that the transaction should have been viewed as a part sale, part gift—a partial sale to the extent of the $150,000.00 and part gift of the remainder—resulting in a nontaxable return of capital. The court rejected the part sale, part gift theory and held there was a gift of all the trust corpus and income to which the settlor retained a right. This income was taxable as ordinary income. Apart from being the first net gift case, the case is significant because it introduced two important concepts in the net gift context: the retained interest concept and the part sale, part gift concept.

The retained interest concept was applied again in Estate of

15. Id. at 260.
16. Id. at 264.
17. Id. at 265.
18. Brief for Appellant at 18.
Sheaffer v. Commissioner\(^\text{20}\) (hereinafter Sheaffer I), which involved the transfer of stock to irrevocable trusts created for the donors' children. The transfer was conditioned upon the trustee's payment of the resulting gift taxes out of accumulated trust income and borrowed funds secured by the stock. The trustee paid the gift tax for 1955 partly with trust income accumulated from 1954 and 1955 and partly with the proceeds of a loan.\(^\text{21}\) The Tax Court applied section 677 of the Internal Revenue Code\(^\text{22}\) and held that the accumulated trust income was taxable because it had been used to pay the gift tax.\(^\text{23}\) The Eighth Circuit affirmed, and, on the basis of section 677(a), viewed the donors as retaining an interest in the trust income.\(^\text{24}\)

Neither court in Sheaffer I, however, addressed the issue whether trust income used in a later year to repay a loan taken out by the trust to pay the donors' gift tax is taxable to the donor.\(^\text{25}\) This question was presented in Estate of Morgan v. Commissioner.\(^\text{26}\) The facts in Morgan are basically similar to those in Sheaffer I, but there is a significant difference. The trustee paid the donor's 1956 gift tax only with the proceeds of a loan, not with any accumulated trust income. The loan was then repaid with trust income earned after the tax had been paid.\(^\text{27}\) The Commissioner agreed that the payments made on the loan were in substance payments on the donor's legal obligation and taxable under section 677(a).\(^\text{28}\) The Tax Court held the trust income used to repay the loan was not income to the donor because the donor's gift tax liability had been discharged prior to repayment. The donor retained no interest in the trust.\(^\text{29}\) The donor effectively avoided the appli-
cation of section 677(a) to the subsequent realization of trust income.

The inconsistencies in the holdings of Sheaffer I and Morgan led to Estate of Sheaffer v. Commissioner (hereinafter Sheaffer II), in which the Commissioner determined deficiencies in the donors’ income tax for 1956 and 1958. The court followed the rule established in Morgan and held that the 1956 trust income, used to repay the balance of the 1955 loan secured to pay the gift tax, would not be taxable to the donor under section 677(a). The court reasoned that there was no theory under which a taxpayer could be taxed on trust income in years subsequent to the year in which the taxpayer’s legal obligation was discharged. On the issue of whether the donors realized income from 1958 gift tax deficiencies paid from accumulated trust income, the court followed its holding in Sheaffer I and determined that the donors realized taxable income under section 677(a) because they retained an interest in the trust.

After Morgan and Sheaffer II, it became apparent that careful tax planning could circumvent the application of section 677(a). In Turner v. Commissioner, the Commissioner adopted an alternative rationale: the concept of part sale, part gift. This case was the first in which the tax consequences of net gifts to individuals arose. In Turner, the donor had made nine separate transfers of low-basis securities each conditioned on the donee’s payment of the resulting gift taxes. Three transfers were made to individuals outright, six to irrevocable trusts. The individual donees assumed personal liability for the payment of the gift tax, whereas the trustees did not. The trustees paid the gift taxes out of the trust corpus. The individual donees paid either out of available cash or from proceeds of the sale of the transferred securities.

The Commissioner assessed a deficiency in the donor’s income tax, arguing the transfers were in part a sale and in part a gift, resulting in a taxable gain to the donor to the extent that the gift taxes paid by the donees exceeded the donor’s basis in the trans-
ferred securities. The issue before the Tax Court was whether the outright conditional transfers to the three individuals were part sale, part gift resulting in long term capital gain to the donor, or were net gifts with no income tax consequences. The court held the transfers to be net gifts, the value of the shares less the value of the gift tax payable on the transfers.

In reaching its conclusion, the Turnner court determined that the donor had retained an interest in the transferred property sufficient to pay the gift tax due on the transfer. The court also established a standard based on the intent of the donor. The court placed primary emphasis on the donor's intention, reasoning that, as long as the donor intended to make a gift, the fact that the transfer was conditioned on the donee's payment of the gift tax did not alter the result that the transfers were gifts. The finding that the donor intended only to make net gifts precluded any finding of a partial sale.

The rationale of Turnner was subsequently relied upon in two other net gift cases, Krause v. Commissioner and Estate of Davis v. Commissioner. In Krause, the Tax Court reiterated its previous decisions and held that only trust income accrued prior to the payment of the gift tax was taxable to the donor under section 677(a). The court, relying on Turnner, rejected the Commissioner's contentions that payment of the gift taxes with borrowed funds constitutes a purchase or liquidation of income interests retained by the donor, and, alternatively that the transfer was a part sale, part gift.

In Estate of Davis, the Tax Court addressed the Commissioner's

37. Treas. Reg. § 1.1001-1(e)(1), T.D. 7207, 1972-2 C.B. 106, 162 provides in part: Where a transfer of property is in part a sale and in part a gift, the transferor has a gain to the extent that the amount realized by him exceeds his adjusted basis in the property.

38. As to the trusts, the Commissioner conceded that there was no effective exchange of consideration between the grantor and the trustees because the trustees had not personally assumed the liability for the taxes. Therefore, in order to remain consistent, the transfers in trust were not considered partial sales. 49 T.C. at 362-63. For further discussion see note, Income Tax Consequences of Encumbered Gifts: The Advent of Crane, 28 U. FLA. L. REV. 935, 943 (1976).

39. 49 T.C. at 363.

40. Id.

41. Id.

42. 56 T.C. 1242 (1971). In an unpublished decision in 1981, the Sixth Circuit dismissed Krause's appeal.

43. 39 T.C.M. (CCH) 1363 (1971), aff'd per curiam, 469 F.2d 694 (5th Cir. 1972).

44. 56 T.C. at 1245.

45. Id. at 1248.
part sale, part gift argument with respect to the transfer of stock to an individual and the retained interest under section 677(a) argument with respect to the transfer to trusts. Based on Turner and Krause, both arguments were rejected.

The Commissioner did not acquiesce in these holdings and never accepted the notion that a net gift resulted in no taxable income for income tax purposes. The Commissioner’s non-acquiescence was finally rewarded in Johnson v. Commissioner, in which the taxpayer had borrowed $200,000.00 from a bank on a nonrecourse note secured by 50,000 shares of stock on which he had no personal liability. Subsequently, he created an irrevocable trust for the benefit of his children and transferred to it his rights in the 50,000 shares. After the transfer, the trustees executed a note secured by the 50,000 shares, cancelling the taxpayer’s note. The taxpayer then paid the gift tax of $150,000.00, leaving $50,000.00 for his own use, free from any obligation. The Commissioner determined a deficiency in the taxpayer’s income tax in the amount that the loan proceeds exceeded his basis in the stock transferred.

The Tax Court rejected the taxpayer’s argument that, based on Turner, the transaction was a net gift. Since the taxpayer had transferred property subject to an existing encumbrance, the court relied on the Supreme Court decision of Crane v. Commissioner, which held that the amount realized on a sale of encumbered property includes the amount of the debt as well as any cash received. The court distinguished Turner on the facts and issue, noting that Johnson neither conditioned the transfer on the payment of the

46. 30 T.C.M. at 1366.
47. Id. at 1368.
49. Brief for Appellant at 17.
51. This case involved a total of three taxpayers, but, since all three had engaged in similar transactions, only one is discussed.
52. Taxpayer had a basis in the transferred stock of approximately $10,000.00; the fair market value of the stock at the time of the transfer was in excess of $500,000.00. 59 T.C. at 795.
53. Id. at 796.
54. Id.
55. Id. at 812.
56. 331 U.S. 1 (1947).
57. Id. at 13.
gift tax, nor retained any interest in the trust. The court held the transfer to be a part sale, part gift resulting in taxable income to the taxpayer.

On appeal, the Sixth Circuit affirmed the Tax Court's holding, but rejected its designation of the transfer as a part sale, part gift. The court discussed three alternative approaches under which the transfer could be taxed on the amount of gain realized. First, the court reasoned that the $200,000.00 received free and clear by the taxpayer constituted gross income under section 61 of the Internal Revenue Code. Since the donor is primarily liable for the gift tax under section 2502(d), the discharge of that obligation by a third person constitutes income to the donor according to Old Colony Trust Co. v. Commissioner. The third, and perhaps primary, finding was that the transfer fell within the bounds of the Crane doctrine. Although the court did not choose between the approaches, it found that under any approach the taxpayer realized the amount of the encumbrance and recognized capital gain to the extent by which this amount exceeded his basis. The court rejected Turner's emphasis on the donor's intent in favor of the more objective standard of economic benefit to the donor.

The court also felt obligated to comment on Turner. The court stated that "Turner has no precedential value beyond its peculiar fact situation."
In the two most recent net gift decisions prior to Owen, Hirst v. Commissioner, and Diedrich v. Commissioner, a split in the circuits developed. The Fourth Circuit followed Turner and held that the donor only intended a net gift and received no economic benefit from the transfer. The Eighth Circuit followed Johnson and held, on facts indistinguishable from Turner, that the donor of a net gift realized income.

**THE COURT'S REASONING**

The majority in Owen found it necessary to follow the decision in Turner, noting that Owen was indistinguishable from Turner and Hirst. The majority observed that "[i]n all three cases gifts of unencumbered property were made contingent upon payment of the donor's gift tax by the donee." Recognizing the persuasiveness of the Commissioner's position, however, the majority went on to state that there was no substantive distinction between the pre-existing encumbrance in Johnson and the donee's assumption of the gift tax in Turner and Hirst. The majority reasoned that "[f]or tax purposes, the effect is identical whether the debt preceded the transfer or was created simultaneously with or subsequent to the transfer."

The majority based its decision on the principles of stare decisis and found that since the transfers occurred prior to Johnson, the taxpayers were correct in their reliance on Turner. The majority noted, in dicta, that Johnson rendered Turner of very little precedential value.

Chief Circuit Judge Edwards' dissent was critical of the majority opinion and argued that the majority had repudiated the result reached in Johnson and overruled it sub silentio. The majority, however, took great care to point out that stare decisis would be served by the preservation of the coexistence of Johnson and Tur-

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72. 572 F.2d 427 (4th Cir. 1978), aff'g, 63 T.C. 307 (1974).
73. 643 F.2d 499 (8th Cir. 1981).
74. 572 F.2d at 431.
75. 643 F.2d at 504.
76. 652 F.2d at 1277.
77. The Commissioner's argument is based on the three alternative approaches found in Johnson v. Commissioner. Id.
78. Id.
79. Id. at 1278.
80. Id. at 1279.
81. Id. at 1283. (Edwards, J., dissenting).
ner and refused to overrule Johnson.82 In a footnote,83 the majority contended that the dissent had misread the decision. The majority emphatically argued that Johnson was the preferred approach and, but for the indistinguishable precedent of Turner, would have been applied.84

ANALYSIS

Since the Sixth Circuit’s decision in Johnson, courts have recognized two distinct approaches to the income tax consequences of net gifts. These approaches look at the intent of the donor to make a gift and the economic benefit realized by the donor of a net gift.

The intent of the donor approach originated in the controversial Turner decision.85 In Turner, the Commissioner argued that the payment of the donor’s gift tax liability by the individual donees was part sale (to the extent that the donees gave consideration for the transfer) and part gift (to the extent that the value of the property exceeded the consideration received by the donor).86 The Tax Court dismissed the argument and concluded that the transactions were net gifts, in which the donor retained an interest sufficient to pay the gift tax due on each transfer. The court was not persuaded by the Commissioner’s concession87 that the gifts in trust were in no part sales because the donor had not surrendered all interest in the property. Even though the court correctly recognized there was no basis for the concession, it failed to analyze the validity of the part sale argument towards the individual donees. If the court had carried the part sale argument to its logical conclusion, it would have recognized that had the donor physically retained a portion of the property, she could not have used that portion to discharge her gift tax obligation without realizing any appreciation in the value of the retained portion.88 By failing to recognize this conclusion, the Tax Court established that net gift transfers were nontaxable events even when the donor transferred

82. Id. at 1278.
83. Id. at 1278 n.16.
84. Id.
85. See text accompanying notes 34-41 supra.
87. See note 38 supra.
88. Note, supra note 86, at 1077.
appreciated property. The underpinning of Turner is that the donor of a net gift intends only a net gift, not a sale. The Turner court’s emphasis on donative intent may well be misplaced. The court found that, rather than a part sale, a net gift had been made with a wholly gratuitous motive. A more realistic approach to the transaction would have been to view the initial motive to make a gift as separate from the decision to make a net gift. There is no doubt that the donor had a wholly gratuitous intent to make a gift of the property, but it should also be clear that the decision to make a net gift was prompted by a self-serving desire to avoid the gift tax liability. According to Commissioner v. LoBue, a gift is made out of “detached and disinterested generosity.” Practically, when the donor conditions the gift on the payment of the resulting gift tax, “detached and disinterested generosity” is conspicuously absent by virtue of the donor’s desire to avoid the tax. The fact that the donor intended only that the donee receive a net gift does not negate the economic reality that the donor received some benefit.

In addressing Turner, the Owen court paid only lip service to the donative intent standard. The court attempted to rationalize its holding by considering the type of obligation assumed by the donees. The court stated, “[w]e see no substantive distinction between the donee’s assumption of the gift tax in Hirst and Turner and the donee’s assumption of the debt obligation in Johnson.” By addressing this issue, it is clear that the court intentionally avoided dealing with the donative intent approach. Admittedly, the court favored the Johnson approach, but felt constrained by stare decisis to follow Turner. However, the court took care to preserve Johnson.

The Owen court did speak to the economic benefit approach of Johnson and found it persuasive. Under that approach, the characterization of a transfer as a part sale, part gift depends on the receipt of an economic benefit. In Johnson, the Sixth Circuit applied the Crane doctrine and found that an economic benefit

89. Id.
91. Id. at 246.
92. 652 F.2d at 1277.
93. Id. at 1278 n.16.
94. Id. at 1278. See text accompanying notes 50-71 supra.
95. 495 F.2d at 1083.
96. See text accompanying note 56 supra.
inures to the donor in the transfer of encumbered property, regardless of the donor's liability. The court was not concerned with the artificial classification of the transfer as a part sale, part gift or net gift, but rather with the fact "that each taxpayer received something of value upon transferring his encumbered stock."\(^9\)

The Owen court addressed the Commissioner's alternative approaches in Johnson and found them highly persuasive.\(^8\) The court also considered the rationale of Helvering v. Bruun,\(^9\) in which the Supreme Court stated that economic gain would be realized from payment of the taxpayer's indebtedness or relief from liability. Clearly the donor of a net gift is relieved of liability.\(^10\)

Under the notions of either Old Colony Trust Co. or Crane, the donor realizes an economic benefit.

Although not specifically addressed in Owen, there are certain policy considerations involved in the taxability of net gifts. The Johnson court recognized these considerations and noted that relief from liability is a pecuniary benefit and the donor, as the person enjoying it, should bear the burden of the resultant tax. Thus, it is not inequitable to impose a capital gain tax at the time of transfer, because the money with which to pay it could easily be obtained.\(^10\)

**CONCLUSION**

Since the Owen court refused to overrule Johnson, but deemed it necessary to follow the precedent of Turner, both approaches are still viable. The court, in its first opportunity to apply its decision in Johnson, found the economic benefit approach to be the preferred view.

Reliance on the economic benefit approach espoused in Johnson will result in the determination of tax liability of net gifts by objective standards rather than by the subjective questions of fact surrounding the donor's intent. The reliance on this approach will lead to more consistent and predictable results than would reliance on the intent approach. The economic benefit approach, with its basis in reality, is the sounder approach. To argue that the donor of a net gift receives no gain is futile, for it is well settled that

97. 495 F.2d at 1083.
98. 652 F.2d at 1277.
100. Id. at 469.
101. 495 F.2d at 1084.
relief of a taxpayer's liability results in a gain to that taxpayer. The consistency, predictability, and equity of the economic benefit approach will, in the long run, benefit both the taxpayer and the IRS by avoiding unnecessary controversy.

The importance of Owen should not be overlooked. The Sixth Circuit's attempt to resolve the controversy surrounding the net gift may be achieved by a rehearing en banc. But, in light of the split in the circuits, the future of the net gift may rest in the hands of the Supreme Court.

Lawrence J. Barry

Ohio has traditionally placed the burden of proving the existence of the affirmative defense of self-defense on the defendant. Ohio maintained this common law position until January 1, 1974, when a new statutory revision changed the state's posture and gave rise to litigation seeking to clarify the allocation of the burden. Two seminal decisions of the Supreme Court of Ohio construed the new statute and determined the effect of its new construction upon subsequent appeals. Federal constitutional issues surfaced immediately, and the United States Court of Appeals for the Sixth Circuit was called upon to evaluate the due process implications of the new construction.

Facts

In 1975, Lincoln Isaac was indicted for felonious assault in Ohio. Isaac asserted at his trial that he had acted only in self-defense. The trial court, without objection by Isaac, instructed the jury that the law of Ohio required a defendant to demonstrate self-defense by a preponderance of the evidence. The jury, concluding that Isaac failed to carry this burden, found him guilty of the lesser included offense of aggravated assault. Isaac was then incarcerated to serve his sentence of six months to five years imprisonment.

One year later, the Supreme Court of Ohio concluded that the new statutory revision had changed the previously accepted common law rule allocating the burden of proof in criminal cases. A defendant now, under the law of Ohio effective January 1, 1974, had only the burden of creating the issue of the existence of an affirmative defense. Once such evidence was presented, the burden of disproving such an affirmative defense beyond a reasonable

2. OHIO REV. CODE ANN. § 2901.05(A) (Page 1975): “Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is upon the prosecution. The burden of going forward with the evidence of an affirmative defense is upon the accused.” Id.
3. See State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976) (construing the statute to have shifted the burden of proving an affirmative defense to the prosecution). See also State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977) (appellant could not avail himself of this new construction because he had not objected at trial to the jury instruction).
5. Id. at 1132.
doubt fell upon the prosecution. The Supreme Court of Ohio concluded as a natural extension of its reasoning that any jury instruction placing the burden of proving an affirmative defense on the defendant constituted prejudicial error.\(^7\)

Isaac appealed his conviction, relying on this new construction. Nonetheless, the Court of Appeals for Pickway County held that Isaac had waived any error in the jury instruction by failing to make objection to it at trial. Isaac's ensuing appeal to the Supreme Court of Ohio was dismissed \textit{sua sponte} for want of a substantial constitutional question.\(^8\) Nonetheless, on the same day in a similar case,\(^9\) the court reaffirmed the new interpretation of the statute placing the burden on the state to prove absence of affirmative defenses. Concurrently, however, the court held that a defendant could not avail himself of this new interpretation unless he had objected to a contrary jury instruction at trial.\(^10\)

Isaac subsequently sought habeas corpus relief in federal district court. The court dismissed his petition without reaching the merits of his claim, concluding that federal habeas corpus relief was precluded by an adequate state procedural rule.\(^11\)

Finally, on February 8, 1980, a panel of the Sixth Circuit Court of Appeals reversed the decision of the district court, finding that Ohio's contemporaneous objection rule did not bar consideration of Isaac's underlying constitutional claim, and that Ohio's failure to grant Isaac the benefits of the change in the law governing the allocation of proof of an affirmative defense constituted a denial of due process of law.\(^12\) While the panel unanimously reached this conclusion as to the merits of Isaac's claim, it divided as to the appropriate basis for reaching such a conclusion.\(^13\)

On petition by the state, the court granted a rehearing \textit{en banc}\(^14\) to consider the central issue presented by Isaac's case: does a state's limiting of the retroactive benefits of a new statutory interpretation through the use of a state procedural rule violate a defendant's right to due process of law? Reinstating its earlier decision...

\textsuperscript{7.} \textit{Id.} at 110-11, 351 N.E.2d at 93-94.
\textsuperscript{8.} 646 F.2d at 1132.
\textsuperscript{9.} See \textit{State v. Humphries}, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).
\textsuperscript{10.} \textit{Id.} at 103, 364 N.E.2d at 1359.
\textsuperscript{11.} 646 F.2d at 1132.
\textsuperscript{12.} 646 F.2d 1122 (6th Cir. 1980).
\textsuperscript{13.} \textit{Id.} at 1127-28. Judge Celebrezze delivered an opinion concurring in the judgment but not its rationale.
\textsuperscript{14.} 646 F.2d 1129 (6th Cir. 1980).
sion, the court en banc held that the state had denied Isaac fundamental fairness and, therefore, due process.\textsuperscript{15} The court directed that Isaac be released from custody unless the state chose to retry him within a reasonable time. This 5-4 decision, supported by a majority opinion, two concurring opinions, and three separate dissents, reverberated throughout the state's legal community. None was surprised when it became apparent that Isaac would face one final day in court, this time before the United States Supreme Court.\textsuperscript{16}

**Background**

No doubt existed that, prior to 1974, Ohio required a defendant in a criminal case to prove self-defense by a preponderance of the evidence.\textsuperscript{17} In fact, a defendant faced two burdens: initially, he had the burden of going forward with evidence to create an issue as to the affirmative defense; subsequently, the defendant faced the more substantial challenge of proving such an affirmative defense by a preponderance of the evidence.

The 1974 statutory revision was not initially considered to have affected the allocation of the burden. In fact, some three months after the revision, the Supreme Court of Ohio categorically stated, albeit in dictum, that the burden of proving the issue of an affirmative defense by a preponderance of the evidence fell squarely on the accused.\textsuperscript{18} In 1976, however, the Supreme Court of Ohio concluded that the substantive law concerning the allocation of this burden had been reversed by the 1974 statutory revision.\textsuperscript{19} The court construed the statute as adopting the majority rule that a defendant is required only to proffer evidence sufficient to raise the affirmative defense. Once such evidence is raised, the court held, the prosecution must assume the burden of disproving such an affirmative defense beyond a reasonable doubt.\textsuperscript{20}

Later, in 1977, the Supreme Court of Ohio attempted to limit the retroactive application of this interpretation.\textsuperscript{21} The court held that an appellant could not enjoy the benefit of this change in the law unless he had specifically objected at trial to a jury instruction.

\textsuperscript{15} Id. at 1135-36.
\textsuperscript{17} See State v. Seliskar, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973).
\textsuperscript{18} See State v. Rogers, 43 Ohio St. 2d 28, 330 N.E.2d 674 (1975).
\textsuperscript{20} Id.
which was inconsistent with the new state law. The basis for this decision was grounded in Ohio Criminal Rule 30, popularly described as the contemporaneous objection rule.

Such an interpretation had the net effect of precluding federal habeas corpus review. The United States Supreme Court had only two months previously restated that federal habeas corpus review was precluded when an adequate state procedure existed to resolve the question. However, the Court did enumerate a standard under which an exception to the adequate state grounds rule could be made. The bar to federal habeas corpus review would be lifted when a defendant could show cause for non-compliance and prejudice resulting from a constitutional violation. This “cause” and “prejudice” exception proved to be Isaac’s salvation.

Federal Due Process

When the Sixth Circuit Court of Appeals finally heard Isaac’s appeal, both the panel and, subsequently, the entire bench were clearly ill at ease with the apparent inequity of allowing the contemporaneous objection rule to bar review of the underlying constitutional claim. The theme of the court’s decisions was simply that an error in the allocation of the burden of proof affects the basic fairness of a defendant’s trial. Furthermore, a majority of the justices believed that to dictate that a defendant carry the burden of proof of self-defense is to require him to disprove criminal intent. Such a requirement, the court suggested, was an absolute affront to the quintessential rule that all defendants are presumed innocent until proven guilty beyond a reasonable doubt. With these policy considerations as bottom-line reference points, the court stretched its analysis to afford Isaac the relief he sought.

The initial panel decision held that the use of the contemporaneous objection rule to limit the retroactive benefits of a new statutory interpretation is, ipso facto, violative of due process. The

22. Id.
23. “No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection.” Ohio R. Crim. P. 30.
25. Id. at 87.
26. 646 F.2d at 1134.
27. Id. at 1136. Chief Judge Edwards used his concurring opinion to restate his discomfort with the traditional common law approach.
28. 646 F.2d 1122, 1126-27 (6th Cir. 1980).
court sitting *en banc* was hesitant to render such a categorical de-
nunciation. It recognized two concerns in this regard: 1) the Su-
preme Court had specifically mentioned in a footnote that use of a
state procedural rule might be a valid and effective means of limit-
ing the retroactive benefit of a new constitutional principle,\(^6\) and
2) that, as a matter of comity, the manner in which states apply
their own procedural rules is entitled to some deference.\(^5\) Rather
than fly in the face of these considerations, the full court neatly
switched the focus of its review from an examination of the state
procedural bar to an analysis of the due process implications of
Isaac’s jury instruction in light of the statutory revision of 1974.

To sidestep the *Wainwright* rule, the court found that Isaac had
both “cause” for non-compliance with the state procedural rule
and “prejudice” resulting from the constitutional violation. The
“cause” for non-compliance element was satisfied by the determi-
nation that a defendant cannot be required to predict a change in
the law. The resulting “prejudice” element was met by the court’s
forthright holding that prejudice may be presumed when an error
affects basic fairness. The net result of these determinations of
“cause” and “prejudice” was to allow the court to examine Isaac’s
underlying constitutional claim.\(^3\)

**The Sixth Circuit *En Banc* Decision**

The *en banc* majority opinion ultimately concluded that the
state had denied Isaac due process by placing the burden on him
of proving self-defense by a preponderance of the evidence. In
reaching this final understanding, the court determined that, in en-
acting the statute, which the Sixth Circuit opinion construed as
placing the burden of proving absence of self-defense on the state,
Ohio had made absence of self-defense an element of the crime.\(^3\)

The court examined three leading Supreme Court cases which
addressed the due process requirements a state must meet in bear-
ing its burden of proof. *In re Winship*’s\(^3\) rule that the prosecution
must prove beyond a reasonable doubt every fact necessary to con-
stitute the crime became the bedrock of the court’s decision favor-

be able to insulate past convictions by enforcing the normal and valid rule that failure to
object to a jury instruction is a waiver of any claim of error.” *Id.* at 244 n.8.

\(^30.\) 646 F.2d at 1126-27.

\(^31.\) *Id.* at 1127.

\(^32.\) *Id.* at 1135.

ing Isaac. Although the court recognized that *Mullaney v. Wilbur* should not be read as establishing that a state could not shift to the defendant the burden of any fact which decreased the degree of culpability, the court construed *Mullaney* and *Patterson v. New York* together as requiring a state to meet the burden of proving absence of an affirmative defense if such a defense negates an element of the crime. The court then declared that, once a statute had been construed as requiring the state to prove absence of self-defense, there was no practical difference between describing this requirement as an element of the crime or an assumed burden. Thus, the jury instruction had in essence required Isaac to disprove an element of his own alleged crime. This requirement, in the final analysis, constituted a denial of due process, entitling Isaac to relief.

The *en banc* decision, reasoned yet convoluted, fair and yet manipulative, inspired several separate opinions. In his concurrence, Chief Judge Edwards noted that "[f]ew cases in the history of this court have resulted in as much soul-searching thought and debate as has this case." The separate opinions offered varied and contradictory analyses of critical issues arising from the collision between Ohio's tangled revision of self-defense and federal due process requirements.

Chief Judge Edwards asserted that the United States Constitution commands that the burden of proof of criminal intent be placed on the prosecution, and that the concurrent presence of criminal intent and self-defense is an impossibility. He denounced requiring the defendant to carry the burden of proof of self-defense as the equivalent of requiring him to disprove criminal intent, the most fundamental element of his alleged crime.

Judge Jones' concurrence began reluctantly with the claim that it was motivated by his concern at the *en banc* court's failure to agree both on the issues to be decided and their correct resolution. Nevertheless, though characterizing the heart of the majority's opinion as dicta, he arrived at the same conclusions, albeit through

34. *Id.* at 364.
37. 646 F.2d at 1135.
38. *Id.* at 1136 (Edwards, C.J., concurring).
39. *Id.*
different reasoning.  
Judge Jones returned to the panel decision, supporting its finding that Ohio's use of the contemporaneous objection rule did not have a real and substantial relation to the ends sought to be obtained by its use. He also pointed to the concurrence to the panel opinion, which held that a state cannot deny full retroactive effect to a change substantially affecting the truth-finding process of a criminal trial. For these several reasons, Judge Jones felt free to conclude that Isaac's imprisonment was in violation of due process of law.

Judge Lively provided a lengthy dissent in which he reconstrued the troublesome 1974 statutory revision and concluded that it had not affected the allocation of the burden after all. Judge Lively found that the language had only affected the quantum of proof required of the defendant to raise the affirmative defense, and not the burden of proof required to be borne once self-defense was put in issue.

Judge Lively characterized the self-defense as an issue separate from the elements necessary to prove the crime of assault. The prosecution must first establish all aspects of the offense beyond a reasonable doubt. The defendant could, in fact, admit the existence of the elements of the crime, and then claim an independent ground for escaping conviction—self-defense. Lively interpreted Patterson as allowing the state to require that the defendant prove the existence of these separate and mitigating facts by a preponderance of the evidence. There had been no impermissible shifting of the burden, since the prosecution was required initially to prove all elements of the crime beyond a reasonable doubt.

Judge Lively refused to let Hankerson v. North Carolina compel reversal by distinguishing the definitions of the crimes in Ohio and North Carolina. While the latter had defined the elements of murder to include absence of self-defense, Ohio, according to Lively's interpretation, had chosen not to particularize absence of self-defense as an element of assault. Lively suggested that the

40. Id. (Jones, J., concurring).
41. 646 F.2d 1122 (6th Cir. 1980).
42. Id. at 1128-29 (Celebrezze, J., concurring).
43. 646 F.2d at 1138 (Jones, J., concurring).
44. Id. at 1138 (Lively, J., dissenting).
46. Id. at 1138 (Lively, J., dissenting).
state court’s only failure in Isaac’s case was in following a state procedural statute as it has been construed by the state supreme court. Thus, no constitutional error had been made at Isaac’s trial.\(^{48}\)

Furthermore, Judge Lively accepted Ohio’s ability to limit the retroactive application of the construction of a state procedural rule. He cited the United States Supreme Court as authorizing the court which construed a state procedural statute to determine the extent of its retroactive application.\(^{49}\) In fact, he pointed to a footnote in *Hankerson*\(^{50}\) as specifically encouraging the states to insulate past convictions by enforcing their contemporaneous objection rules.\(^{51}\) Thus, Judge Lively used Ohio Supreme Court case law\(^{52}\) to define self-defense as a separable issue which the defendant must prove by a preponderance of the evidence. Hearing Isaac’s appeal could be avoided because a state may limit the retroactive benefit of a new construction of a state procedural statute.\(^{53}\)

Judge Kennedy, also in dissent, accepted Judge Lively’s rejection of Isaac’s constitutional claim, but explained that he would deny Isaac’s writ of habeas corpus in the first instance, without reaching the merits.\(^{54}\) Judge Kennedy acknowledged the threat to the orderly administration of justice if a flood of new trials were compelled by applying a new statutory revision retroactively. This policy consideration, employed by the United States Supreme Court,\(^{55}\) invites states to use Rule 30 to bar review. Judge Kennedy did not accept that a defendant inherently and automatically satisfies the “cause” exception of the *Wainwright* rule whenever a statute is reconstrued.\(^{56}\) Judge Kennedy relied on *Hankerson* to void Isaac’s satisfaction of the *Wainwright* exception and concluded that federal habeas corpus review was precluded. In fact, he commended the Fourth Circuit for having recently protected its states from a flood of new trials which might have resulted from a case\(^{57}\)

\(^{48}\) 646 F.2d at 1139 (Lively, J., dissenting).


\(^{50}\) 432 U.S. at 244 n.8. See note 29 supra and text accompanying it.

\(^{51}\) 646 F.2d at 1139 (Lively, J., dissenting).

\(^{52}\) See State v. Poole, 33 Ohio St. 2d 18, 294 N.E.2d 888 (1973).


\(^{54}\) 646 F.2d at 1140-41 (Kennedy, J., dissenting).


\(^{56}\) 646 F.2d at 1141 (Kennedy, J., dissenting). See Rachel v. Bordenkircher, 590 F.2d 200, 204 (6th Cir. 1978).

\(^{57}\) See Cole v. Stevenson, 620 F.2d 1055 (4th Cir. 1980).
similar to Isaac's.  

Judge Merritt, also dissenting, disagreed with Lively's conclusion that absence of self-defense is an element of the crime, but accepted Lively's conclusion that Hankerson allows the states to insulate past convictions by enforcing the contemporaneous objection rule as a bar to review.  

Analysis

Ohio is faced with an anomaly as it confronts the conflict between its approach to self-defense and the concurrent federal due process implications. Until 1974, Ohio clearly required a defendant to prove self-defense by a preponderance of the evidence. The statutory revision of 1974 apparently reversed this tradition and brought Ohio into line with the majority rule that requires the state to prove absence of self-defense as an element of criminal offenses. After the Ohio Supreme Court's decisions in Robinson and Humphries, the state legislature again amended its code to re-adopt the common law requirement that the defendant carry the burden.

The difficult questions which have resulted from this flip-flop, highlighted in Isaac v. Engle, have thrown into question all criminal convictions in Ohio between 1974 and 1976 in which an affirmative defense was an issue. The Sixth Circuit recognized this problem and yet resolved it against the state. The 1978 re-adoption of Ohio's traditional requirement that the defendant carry the burden of proving an affirmative defense, however, suggests that the legislature never intended to shift the burden in 1974. Although the courts may have legitimate cause to consider the language of the 1974 revision ambiguous, and to interpret it arguably as shifting the burden, the court's application of this new, and temporary, construction should be strictly limited to protect the orderly administration of justice in Ohio from unfortunate and unintended

58. 646 F.2d at 1141 (Kennedy, J., dissenting).
59. Id. at 1140 (Merritt, J., dissenting).
60. See State v. Seliskar, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973).
62. See text accompanying notes 6-10 supra.
63. Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

legislative draftsmanship.

When the United States Supreme Court considers *Isaac v. Engle*, it will probably take a narrow view of the convoluted issues the case presents. Significantly, the case does not present the question whether a state court may constitutionally place the burden of proving self-defense upon the accused. The fundamental issue is simply whether a state court may rationally use the existence of a contemporaneous objection rule as the basis for withholding the full retroactive benefits of a new statutory interpretation.\(^6\)

The Court has long recognized that a petitioner's failure to comply with a state procedural rule represents an independent and adequate state ground barring federal habeas corpus review of a constitutional claim.\(^6\) The Court has even specifically suggested in the famous *Hankerson* footnote that the states should use the normal rule that failure to object to a jury instruction is a waiver of any claim of error to insulate past convictions.\(^6\) By denying Isaac's appeal, the Court will simply be supporting the reasoning it expressed in the *Hankerson* footnote.

A further problem when *Isaac* comes before the Supreme Court will be the Sixth Circuit's suspect determination that the procedural bar to Isaac's appeal may be lifted due to his adequate showing of cause for non-compliance with the procedural rule and resulting prejudice.\(^6\) The Court may dismiss Isaac's exception to the *Wainwright* rule by rejecting his rationale for non-compliance. Objection to the jury instruction allocating a shifting burden could have been made in all faithfulness by Isaac. In fact, some creative counsel began making objection as soon as the 1974 statutory revision appeared, some sixteen months before *Robinson*.\(^6\) The assumption that a contemporaneous objection rule presupposes the contemporaneous existence of a legal principle applicable to the proceedings at trial relieves the defendant from any obligation to present to the court his reasons for anticipated appeal. In essence, Isaac's failure to object to the instruction allocating the burden to him was an admittance that such a requirement would not deprive him of a fair trial. Thus, the Court should reject Isaac's claim of cause for non-compliance with the state procedural rule.

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64. 646 F.2d at 1131-33.
67. 646 F.2d at 1134.
By barring the retroactive application of Ohio's short-lived shifting of the burden, the Court will serve the best interests of the state's system of administration of justice. In 1975, Ohio proved beyond a reasonable doubt, to the satisfaction of a jury, all the elements of assault in Isaac's case. Isaac was unable to convince twelve of his peers that he had been forced to act in self-defense. To require that the state must, some six years later, recreate the proof which led the jury to disbelieve Isaac's excuse would be, in essence, an implicit acknowledgement that none of Ohio's criminal convictions between 1974 and 1976, in which an affirmative defense was at issue, should stand. Ohio's clogged court system would preclude speedy retrials, and the result would be wholesale releases of individuals convicted of violent crimes. The Court may avoid this disaster with a simple, brief and rational decision that an adequate state procedural ground bars federal habeas corpus relief.

Conclusion

Such a holding also meets the policy consideration that states are due some deference in the manner in which they apply procedures under which their laws are carried out. Furthermore, the Court has acknowledged that it is within the authority of a court that construes a statute to determine the extent of its retroactive application. Limiting the retroactive benefit of a decision which merely construes a state procedural rule does not violate federal due process.

A holding by the Supreme Court barring Isaac's appeal for retroactive benefit of a change in a procedural rule he accepted at trial would calm the waters in Ohio. Ohio could finally get on with promoting orderly administration of justice as the fallout from the confusion reigning between 1974 and 1976 is mitigated and extinguished. Today, Ohio is clearly back in its traditional posture requiring the defendant to prove self-defense by a preponderance of the evidence. Perhaps at a later date, an Ohio litigant other than Isaac will approach the Court with the simple claim that the due process clause of the United States Constitution commands that criminal intent include absence of self-defense, which must, therefore, be proven by the state.

TIMOTHY S. BLACK

Some of the problems in determining the depletion deduction for vertically integrated cement miner-manufacturers were analyzed in Commissioner of Internal Revenue v. Portland Cement Company of Utah\(^1\) [hereinafter Portland Cement], which resolved a conflict between the Tenth Circuit and several other circuits. Sections 611 and 613 of the Internal Revenue Code allow, as a deduction for depletion, a statutory percentage of the taxpayer's gross income from mining.\(^2\) The Portland Cement Company of Utah [hereinafter PCCU], however, not only mines cement but also incurs expenses from manufacturing cement prior to selling its product. Therefore, in computing its depletion deduction, PCCU had to determine what portion of its gross income resulted from mining processes and what portion resulted from manufacturing, the latter not being eligible for the depletion deduction.\(^3\)

The Treasury Regulations provide a method for determining an integrated miner-manufacturer's "constructive" gross income from mining, since the actual gross income from mining cannot be determined when a miner utilizes the goods he has mined in his own manufacturing operations.\(^4\) The first step in applying this method of calculation (known as the "proportionate profits method") is to determine the taxpayer's "first marketable product" and compute the taxpayer's gross sales from its first marketable product. The next step is to devise a fraction, the numerator of which is the total mining costs incurred in producing the first marketable product and the denominator of which is the total of mining and manufacturing costs incurred in producing the first marketable product. This fraction is then multiplied by the gross sales from the first marketable product to determine the taxpayer's constructive gross

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income from mining. This equation is illustrated as follows:

\[
\text{Mining Costs} \times \text{Gross Sales} = \text{Gross Income of First Marketable Product from Mining}
\]

\[
\text{Total Costs}\quad \text{able Product}
\]

The theory underlying this method is that “each dollar of the total costs paid or incurred to produce, sell, and transport the first marketable product ... earns the same percentage of profit.”\(^7\) According to the Tax Court, “The purpose of the proportionate-profits formula is to separate the sales price of a product into its mining and nonmining components.”\(^7\)

**History of the Case**

PCCU, during the three tax years in question (1970-1972), sold approximately ninety-two to ninety-four percent of its finished cement in bulk and six to eight percent in bags. In each of these years, the costs incurred in its bagging operations exceeded the “bag premium” which PCCU charged its customers for this service, although PCCU still received a profit on the cement it sold in bags. On its return for these years, PCCU took the position that cement sold in bulk was its first marketable product. Therefore, it excluded the bagging premium it received from gross sales in the proportionate-profits formula and also excluded the bagging costs incurred from the total costs figure. PCCU also excluded from total costs the expenses it incurred for storage, distribution, and sale of its cement.\(^8\) This resulted in a greater constructive gross income from mining under the proportionate profits formula and, therefore, a correspondingly greater depletion deduction. The Commissioner took the position that PCCU should have included the bagging premiums and bagging costs in the formula because PCCU’s first marketable product is cement, whether sold in bulk or in bags, and that the expenses for storage, distribution and sales should have been included in the total costs figure.\(^9\)

The issues in *Portland Cement* were whether PCCU’s first marketable product under the proportionate profits method is cement, whether sold in bulk or in bags, or only cement sold in bulk, and

\(^5\) *Id.*
\(^6\) *Id.* § 1.613-4(d)(4)(i), T.D. 7170, 1972-1 C.B. 178, 183.
\(^7\) North Carolina Granite Corp. v. Commissioner, 56 T.C. 1281, 1291 (1971).
\(^8\) 450 U.S. at 156.
\(^9\) *Id.*
whether the costs for storage, distribution and sales should be included in calculations under the proportionate profits method. The Tax Court\(^{10}\) and the Tenth Circuit\(^{11}\) held that PCCU's first marketable product was cement sold in bulk but not bags and that the costs of storage, distribution and sales should be excluded from calculations under the proportionate profits method, relying upon *United States v. Ideal Basic Industries, Inc.*,\(^ {12}\) a prior Tenth Circuit decision. The reasoning of *Ideal Basic Industries* was that bulk cement is the first marketable product, since it is possible to sell it in that form, and, therefore, the costs of bagging, storage, distribution and selling should be excluded from the formula since they are "applicable to finished cement after it has become 'first marketable product.'"\(^ {13}\)

**Proportionate Profits Method**

Since PCCU does not have actual gross income from mining, it computes "constructive" gross income from mining. The regulations provide that, if a representative market or field price may be ascertained, it must be used in determining constructive gross income.\(^ {14}\) In *Portland Cement* there was no representative price. This was due to the fact that all of the cement miners in the industry are integrated: upon completion of the mining processes, all of the mined minerals are manufactured into cement and none are sold. Where no representative market price may be ascertained, the general rule is that gross income from mining will be computed under the proportionate profits method.\(^ {15}\) A taxpayer may request permission, however, to use a method of computation which is more appropriate.\(^ {16}\) In each of the years in question, PCCU used the proportionate profits method.

Section 611 of the Internal Revenue Code provides that the allowance for depletion shall be made under regulations prescribed by the Secretary in all cases.\(^ {17}\) The regulations speak directly on the issues presented in *Portland Cement*. They state that bulk and

\(^{10}\) 36 T.C.M. 578 (1977).

\(^{11}\) 614 F.2d 724 (10th Cir. 1980).

\(^{12}\) 404 F.2d 122 (10th Cir. 1968).

\(^{13}\) *Id.* at 126.


\(^{15}\) *Id.* § 1.613-4(d)(1)(i), T.D. 7170, 1972-1 C.B. 178, 182.

\(^{16}\) *Id.* § 1.613-4(d)(1)(ii), T.D. 7170, 1972-1 C.B. 178, 182.

\(^{17}\) I.R.C. § 611(a).
packaged products are considered to be the same. Some federal circuits have upheld this regulation in favor of the Commissioner by ruling that bagging costs and income should be included in the proportionate profits formula, while the Tenth Circuit has excluded these items from the formula. The regulations also provide that bagging, storage and distribution costs are treated as nonmining expenses, and that a portion of the selling expenses are allocable to mining, if unintegrated miners in the industry typically incur such costs. While some circuits have held for the Commissioner on the issue of inclusion of these expenses in the proportionate profits formula, the Tenth Circuit has held in favor of the taxpayer.

Portland Cement

In ruling for the Commissioner, the Supreme Court first pointed out that the regulations involved support the Commissioner's position, and that courts of appeals have ruled in favor of the Commissioner on the basis of these regulations, both in determining first marketable product and inclusion of bagging, storage, distribution and selling expenses in the proportionate profits formula. The Court also pointed out that the regulations command respect because Congress delegated the task of administering the tax laws to the Secretary of the Treasury, not to the Court. The regulations will be followed "unless unreasonable and plainly inconsistent with the revenue statutes," especially in the area of depletion where Congress has delegated broad authority.

Next, the Court responded to PCCU's reasoning. PCCU had not contended that the regulations were unreasonable per se, but argued that the Commissioner's position yielded a distorted con-

20. See United States v. Ideal Basic Indus., Inc., 404 F.2d 122 (10th Cir. 1968).
22. Id. § 1.613-4(d)(3)(iv), T.D. 7170, 1972-1 C.B. 178, 183; Treas. Reg. § 1.613-
23. See General Portland Cement Co. v. United States, 628 F.2d 321 (5th Cir. 1980),
24. See United States v. Ideal Basic Indus., Inc., 404 F.2d 122 (10th Cir. 1966).
25. 450 U.S. at 169.
constructive gross income from mining because the particular circumstances in this case were not taken into account. The Court viewed PCCU's argument as erroneous because it was based on two incorrect assumptions: that gross income from mining means market value of the mining product and that the United States v. Cannelton Sewer Pipe Co. case stood for the proposition that the mining phase should be considered an independent business selling its product to another independent business. The first assumption was incorrect in the Court's view because PCCU could not cite any authority for the proposition and because Helvering v. Mountain Producers Corp. rejected the notion. The Court considered PCCU's interpretation of Cannelton incorrect because that case had not involved the proportionate profits method. These underlying assumptions being mistaken, the Court reasoned that PCCU's theory for excluding the elements at issue from the formula must be invalid.

Since PCCU had received a profit on the bagged cement that it sold, the Court said that it was reasonable to infer that the costs of bagging contributed to that profit and, therefore, the excess bagging costs did not warrant a deviation from the regulations' definition of first marketable product. As far as the storage and distribution expenses were concerned, the Court noted that section 613(c)(4)(F) of the Internal Revenue Code defines mining as including processes up to the introduction of the kiln feed into the kiln, but not any subsequent processes. The regulations recognize these expenses as being "subsequent" to the mining process and, thus, included in total costs as a nonmining cost, and the Court held that the regulations are reasonable. The sales expenses might possibly be treated as a benefit to both the mining and nonmining operations since even an unintegrated miner might incur selling expenses, but the Court found no showing by PCCU to warrant treating them as anything but nonmining costs.

In conclusion, the Court stated that the proportionate profits method, which PCCU conceded was reasonable, could do no more than approximate constructive gross income from mining. Since the respondent, PCCU, did not seek the Commissioner's approval

27. 303 U.S. 376 (1938).
of any other method, it must apply the proportionate profits method as prescribed by the Commissioner.

Analysis
The first and most obvious effect of *Portland Cement* is that it resolves a conflict among the circuits. It also provides guidelines for the cement industry, which is made up solely of miner-manufacturers, and perhaps other industries where no representative market price is available for the value of minerals at the end of the mining process. *Portland Cement* illustrates that the proportionate profits method will be applied strictly as it is set out in the Treasury Regulations, in the case of a miner-manufacturer who chooses to use this method rather than to request the Commissioner's approval of another method under section 613-4(d)(1)(ii) of the Treasury Regulations. This may place a heavy burden on the taxpayer when, as in *Portland Cement*, there is no unintegrated miner from which relevant data may be obtained. PCCU had no way of proving that an unintegrated miner would incur selling expenses because there was none. Thus, all of PCCU's selling expenses were included in the formula as nonmining expenses.

*Portland Cement* also illustrates that great weight will be placed on Treasury Regulations in the area of depletion. The Court did little more than declare that these regulations were reasonable, then strictly apply them to the taxpayer. No serious discussion was given to the possibility that the regulations, although they appear reasonable, result in an unreasonable distortion of the taxpayer's constructive gross income from mining. In view of the Court's reasoning, the many arguments and theories enunciated in PCCU's and the government's brief appear strictly academic. PCCU illustrated, in its brief, that the depletion deduction will be different for cement sold in bulk and cement sold in bags, due to the inclusion of bagging premiums and costs in the formula, even though these are obviously post-mining activities and should not affect gross income from mining.\(^{31}\) This distortive effect is due to the fact that the formula assumes that each dollar of costs will generate sufficient revenue to offset such costs. Since the bagging operation is conducted at a loss and is a nonmining activity, it results in a lower constructive gross income from mining. PCCU further illustrated the distortion by showing that two integrated miner-manu-

facturers in the same market, and all other things being equal, would have different depletion deductions if one sold its finished cement in bulk and the other sold its cement in bags. Obviously, the effect is distortive because a depletion deduction based on gross income from mining is dependent upon a manufacturing activity.

PCCU took the position that the bagging costs and premiums should be excluded from its computation under the proportionate profits formula either on the basis of cement in bulk being its first marketable product or because of the unjustifiably distortive effect of its bagging operations. It also pointed out that section 1.613-4(d)(1)(iii) of the Treasury Regulations excluded the cost of “purchased transportation” from the formula. There the Commissioner had recognized the distortive effect of costs on which a profit is not earned, and there actual facts were taken into account without unduly jeopardizing either administrative convenience or the central premise of the proportionate profits method.

The Portland Cement Court failed to mention, much less resolve, these issues. It responded to PCCU’s contentions by merely stating that they were based on invalid assumptions, one being that gross income from mining is the same thing as the market value of the mineral. PCCU had not cited any authority for this proposition, while the Commissioner had cited Helvering v. Mountain Producers Corp. on the premise that it rejected that theory. Mountain Producers, however, did not deal, as Portland Cement did, with the determination of constructive gross income. The miner in Mountain Producers received actual gross income from mining and attempted to add to that income the cost of production defrayed by a sub-contractor on the theory that this normally would be a part of gross income from mining. But, under the current regulatory scheme, it is obvious that gross income from mining is linked closely to market value. In fact, if a representative market or field price for a mineral may be obtained, that market price will be used to determine the taxpayer’s constructive gross income from mining. This method is first in order of preference under the regulations and must be applied if a representative mar-

32. Id.
33. Id. at 12.
34. Id. at 25.
ket price may be determined. It is only reasonable to assume, then, that the intent of the proportionate profits method, which is the second alternative, is to approximate as closely as possible the market value of goods mined by PCCU in determining its constructive gross income from mining, since it is only to be used when a market price is not readily available.

The government's rationale was that, since the physical characteristics of the cement were identical whether it was sold in bulk or in bags, the first marketable product was the cement, whether sold in bulk or in bags. It argued that excluding the bagging costs from the formula resulted in putting its allocable share of profits within the depletion base. In sustaining the Commissioner, the Court held that, since an overall profit was made on the sales of bagged cement, even though the bagging decreased the profit, it was reasonable to infer that the bagging costs contributed to profits from sales of bagged cement. To support its position, the Court merely cited lower court decisions holding that bagging costs and premiums are included in the proportionate profits formula. The Court did not explain why its inference was reasonable. It appears somewhat illogical to proclaim that a process which incurs expenses in excess of the marginal revenue created by the process helps contribute to profits. The only apparent basis for determining that bagging costs contribute to profits is that the bagging operation is a marketing strategy designed to ensure the sale of cement in bulk, making bagging costs responsible for profits on the sale of bulk cement. Neither side specifically addressed this possibility in its brief, so it is not clear whether this might be a reason for conducting the bagging operation at a loss.

Portland Cement affords the Commissioner great discretion in applying the proportionate profits formula. For integrated manufacturers of products that do not have a market value, the regulations allow taxpayers to apply to the Assistant Commissioner for permission to use a method of computation which is more appropriate than the proportionate profits formula. This alternative will hardly be an attractive one in view of the holding in Portland Cement, since the regulations in regard to the proportionate profits

37. Id.
39. Id. at 29.
formula were upheld as reasonable. If the Assistant Commissioner rejects the taxpayer's proposed method, the Service might become aware of areas in the taxpayer's business to which the proportionate profits method would accord unfavorable tax treatment.

Conclusion

In *Portland Cement*, the Commissioner effectively included a processing operation, which was arguably subsequent to the completion of the first marketable product, in the proportionate profits formula, adversely affecting the taxpayer's gross income from mining and his depletion deduction. Without a supporting rationale, the Supreme Court held that the regulations applying the proportionate profits method were reasonable. This acquiescence without justifying its decision demonstrates the Court's willingness to defer to the Commissioner when there is more than one reasonable interpretation of a statute—an inevitable consequence of the complexity of the tax laws. Such deference seems mistaken, given the fact that the Commissioner usually takes the position that raises the most revenue, not the position that most logically or reasonably interprets the Internal Revenue Code.

MICHAEL DOPPES
I. INTRODUCTION

In Donovan v. Dewey,¹ the United States Supreme Court addressed an issue which had been a source of litigation and confusion for many attorneys and business owners since close government and administrative regulation began. Warrantless administrative search issues had transgressed various barriers posed by challenges even in recent years. Many of the questionable areas seemed settled, since courts had limited claims of privacy rights in homes, small businesses and, most recently, large operations.² As with many legal questions, however, the limit had only apparently been reached. Donovan v. Dewey answered the question whether a warrantless administrative search is constitutional within the meaning of the fourth amendment,³ when applied to mining operations as broadly defined by The Federal Mine Safety and Health Act of 1977 (hereinafter the Mine Act).

In July, 1978, a federal mine inspector, Walter Brey, attempted to make an inspection of a limestone quarry owned by Waukesha Lime and Stone Company in Wisconsin. The purpose of the inspection was to ascertain whether the company had corrected dust exposure violations cited in an earlier inspection. Douglas Dewey, president of Waukesha, challenged Brey’s right to inspect the premises without a search warrant. Although on several earlier visits, other inspectors had been allowed access without a warrant,

³. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. AMEND. IV.
⁴. 30 U.S.C. § 813(a) (Supp. III 1979) provides in part: “Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards . . . .”
Dewey refused to permit Brey to continue the inspection, claiming a fourth amendment right against an unreasonable search. Brey issued a citation to the company for interference with the official's duty. The Secretary of Labor sought a permanent injunction in district court against Waukesha to prohibit further interference. This action failed, however, when the court in summary judgment held such warrantless inspections prohibited by the fourth amendment. On appeal, the United States Supreme Court disagreed, holding that the search was permissible under the fourth amendment.

When the Supreme Court, in an opinion by Justice Marshall, reversed the district court it somewhat surprisingly limited the prior law of administrative search by distinguishing the rules established in Marshall v. Barlow's, Inc., United States v. Biswell, and Colonnade Catering, Corp. v. United States. With only Justice Stewart dissenting, the Court refused to differentiate a limestone quarry from a coal mine for the purposes of inspection under the Mine Act. More importantly, it ignored the previous requirement that an industry must have a "long history of pervasive government regulation" before an administrative agency can subject it to unannounced, warrantless searches. The opinion clearly reiterated the Court's policy to uphold congressional legislation, if rationally based and narrowly defined. In doing so, it distinguished

5. 30 U.S.C. § 814(a) (Supp. III 1979) provides in part: "if upon inspection . . . , the Secretary . . . believes that an operator . . . has violated this chapter, . . . he shall, . . . issue a citation . . . ."
8. Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), is the primary precedent in favor of the owner. There, ruling on validity of warrantless OSHAct inspections, the Court found that the owner of a plumbing and electrical business was not subject to warrantless searches because there was no long history of pervasive government regulation. Id. at 313.
9. United States v. Biswell, 406 U.S. 311 (1972), involved gun control legislation and warrantless inspections. The Court held that, since the industry was pervasively regulated, the owner could be expected to submit to inspection. Id. at 315.
10. Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), involved government inspection of a business subject to liquor regulation. The Court held that, if a business has a "long history of government regulation," an owner should have a lowered expectation of freedom from inspection amounting to consent. Id. at 75.
11. 101 S. Ct. at 2537 n.2.
12. Id. at 2542.
13. This test has been used in many cases. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (where the Court weighed whether the state law was rationally aimed at a legitimate state interest or was actually arbitrary).
this case and the Mine Act from Barlow's, which concerned the Occupational Safety and Health Act of 1980.

II. RECENT HISTORICAL DEVELOPMENTS IN WARRANTLESS ADMINISTRATIVE SEARCHES

The right of a person to be free from an unreasonable search is grounded in the fourth amendment of the United States Constitution.\textsuperscript{14} The fourth amendment was largely the product of the colonists' frustrated conflicts with the King's agents' at-large searches for smugglers.\textsuperscript{15} The initial challenge to warrantless administrative searches came in Frank v. Maryland.\textsuperscript{16} Recent decisions of the Supreme Court say that the fourth amendment protects people not places.\textsuperscript{17} In a recent case, Rakas v. Illinois,\textsuperscript{18} the Court reiterated the test of Katz v. United States\textsuperscript{19} that fourth amendment protection applies if the person has a reasonable expectation of privacy in the invaded area.\textsuperscript{20} Following these guidelines, the Court has held that health department inspectors cannot enter private residential dwellings in order to inspect for municipal building code violations without a search warrant.\textsuperscript{21} A residence, however, intuitively seems to be surrounded by an aura of privacy and, clearly, in the criminal procedure realm, there are stringent requirements for probable cause. Alternatively, a commercial environment does not possess an automatic reasonable expectation of privacy.\textsuperscript{22}

As recently as 1978, the Court recognized a businessman's right of privacy in his commercial operation.\textsuperscript{23} Barlow's provided ample ammunition for businessmen who felt compelled to submit to ever-

\textsuperscript{14} See note 3 supra.
\textsuperscript{15} United States v. Chadwick, 433 U.S. 1, 7-8 (1977).
\textsuperscript{16} 359 U.S. 360 (1959).
\textsuperscript{17} Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Katz was concerned with searches in the criminal law context. Without a warrant, an electronic listening device was connected to the exterior of a public telephone booth in which Katz was talking. The Court held that the defendant had a reasonable expectation that his conversation would not be overheard by such method.
\textsuperscript{18} 439 U.S. 128, 143 (1978). Rakas involved the right of a defendant to allege standing to suppress a rifle discovered following a stop of a vehicle not owned by defendant in which defendant was a passenger.
\textsuperscript{19} 389 U.S. 347 (1967).
\textsuperscript{20} Id. at 352-53. Prior to Katz, the law of search and seizure had been governed by proprietary concepts. These rules limited the scope of privacy to area and space. Katz broadened this view to include areas and subjects one could reasonably expect to remain private.
\textsuperscript{21} Camara v. Municipal Court, 387 U.S. 523 (1967).
\textsuperscript{23} See note 8 supra.
growing regulatory inspections by both federal and state agencies. It sustained the rule stated earlier in Camara v. Municipal Court that warrantless searches of both homes and commercial premises are generally unreasonable. In Barlow's, an electrical and plumbing installation business was the object of an inspection under section 8(a) of the Occupational Safety and Health Administration Act of 1970 (hereinafter OSHAct). The OSHAct was enacted to protect American workers from work-related injuries and health hazards by encouraging affirmative action of employers. It applies to any business affecting interstate commerce and is of very broad scope. In Barlow's, the owner of the business refused to permit the inspection without a search warrant, asserting a fourth amendment privilege. Although other cases had approved warrantless administrative searches of businesses, the Court found no compelling state interest which justified a violation of the warrant requirement. The OSHAct was found not to be definitive enough to show a need to inspect Barlow's operation.

Nevertheless, the Barlow's Court cast a definite shadow over its seemingly clear holding. Late in the opinion, Justice White pointed out that the OSHAct itself was a limitation on the holding, and that Barlow's would be limited to its facts, offering a possible "fin-

26. Id. at 309.
28. Id. § 651(b) in part: "The Congress declares it to be its purpose . . . to assure so far as possible each working man and woman . . . safe and healthful working conditions . . . (1) by encouraging employers and employees in their effort to reduce the number of occupational safety and health hazards at their places of employment . . . ."
29. Id. §§ 651(a), 653(a).
30. 436 U.S. at 314.
31. 436 U.S. 321-22. Justice White's opinion stated:
The reasonableness of a warrantless search, however, will depend upon the specific enforcement needs and privacy guarantees of each statute. Some of the statutes cited apply only to a single industry, where regulations might already be so pervasive that the Colonnade-Biswell exception to the warrant requirement could apply. Some statutes already envision resort to federal court enforcement when entry is refused, employing specific language in some cases and general language in others. In short, we base today's opinion on the facts and law concerned with OSHA and do not retreat from a holding appropriate to that statute because of its real or imagined effect on other, different administrative scheme.

Justice White proceeded to give an example of such an act which would be different from OSHA by citing, in note 18, the then controlling Federal Metal and Nonmetallic Mine Safety Act, Pub. L. 89-577, 80 Stat. 772 (repealed 1977).
"ger in the pie" in footnote 18 by citing the Mine Act's predecessor:

The Federal Metal and Nonmetallic Mine Safety Act provides: "Whenever an operator . . . refuses to permit the inspection or investigation of any mine which is subject to this chapter . . . a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the Secretary in the district court of the United States for the district . . . ."

Such an acknowledgment that different legislation could produce opposite results gave the Dewey Court grounds for change. But this footnote was not the only groundwork the Court had lain for the Dewey decision. Two earlier cases helped to strengthen both the arguments of the Dewey dissent and majority.

In 1970 and 1972, the Court had debated the warrantless search of businesses closely regulated by the government. The 1970 case of Colonnade Catering Corp. v. United States held that, because the liquor industry had a long history of pervasive government regulation, the proprietor of a liquor store implicitly consented to warrantless inspections, being aware of their probability when he entered the business. In the second case, United States v. Biswell, the Court dropped the "long history" language, perhaps signifying the intent to establish a more lenient standard. Dewey brought the issues of these cases into focus.

Prior to Dewey, three federal courts of appeals had upheld similar warrantless inspections under the Mine Act to be applicable to large mining operations. In the Third Circuit case, Marshall v.

35. Two other courts of appeals have addressed similar issues relating only to single owner-worked coal and quarry operations. In Marshall v. Sink, 614 F.2d 37, 39 (4th Cir. 1980), the court said warrantless inspections under the Mine Act were valid when applied to a single owner-worked coal mine. The court held that under the precedents of Marshall v. Nolichuckey Sand Co., 606 F.2d 693 (6th Cir. 1979) and Stoudt's the intention of Congress was to regulate the dangerous conditions in coal mines regardless of the fact that only Sink was subjected to the hazards, that the hazards may be prevalent as in any other mine. However, eight months later, in Marshall v. Wait, 628 F.2d 1255, 1259 (9th Cir. 1980), this court held that such inspections did not apply to a single, owner-worked stone quarry and that they were a violation of fourth amendment rights of the owner. The court reasoned that a greater expectation of privacy existed in this case. The court relied on Colonnade and Biswell but did not agree that quarry regulation had been pervasive. The court, unlike the Supreme Court in Dewey found the Mine Act to grant too much discretion to individual field officials.
Stoudt's Ferry Preparation Company, Inc., the court found a dredging operation, which separated usable fuel from river bottom sand, to be a mine within the intention of the Mine Act. Further, it expressly refuted the defendant's claim that Barlow's controlled. Stoudt's was followed by the Sixth Circuit decision, Marshall v. Nolichucky Sand Company, Inc., in which the court concluded that Stoudt's was better reasoned than three district court decisions holding similar inspections unreasonable. The third case which upheld a warrantless inspection of a large operation under the Mine Act was the Fifth Circuit decision, Marshall v. Texoline Company. Texoline was the case nearest in time to Dewey with similar facts. Both Nolichucky and Texoline involved quarry operations, a point in controversy since quarry operations traditionally have not been considered "mines," nor subjected to a long history of pervasive government regulation. The quarries were only questionably within the valid scope of the Mine Act. Finally, the businesses in all three cases had been subjected to warrantless inspections under authority of the Mine Act. The only material difference between Nolichucky and Texoline and Dewey was that the Sixth Circuit held the search in Dewey unreasonable. With different results in different circuits, the issue was ripe for decision.

III. THE COURT'S DECISION

The opinion of the Supreme Court in Donovan v. Dewey addressed two primary issues: First, does Congress have the power to validate a warrantless administrative search of commercial property? Second, if so, can the warrantless search clause of the Federal Mine Safety and Health Act of 1977 be sustained by that

37. Id. at 594.
38. 606 F.2d 693 (6th Cir. 1979), cert. denied, 446 U.S. 908 (1980).
40. 612 F.2d 935 (5th Cir. 1980).
41. The primary stumbling block the courts faced was due to the language of Colonnade which indicated that unless the business had had a long history of regulation the court might not consider an owner as reasonably expecting an unannounced inspection and that Congress could not, by statute, make such an implication. The argument is made that since quarry operations had not been regulated under federal safety laws prior to the Federal Metal and Nonmetallic Mine Safety Act of 1966 (supra note 31) the owners of quarry operations should be given relief by the courts.
42. 493 F. Supp. at 966.
power? In Dewey, the Court finally disposed of the central question, what length of time government regulation must have gone on to create the implication of consent to search, which had produced inconsistency in the results of previous cases.

A. Congressional Power to Regulate

Justice Marshall began by recognizing Congress' power to pass legislation which circumvents the warrant requirement. He cited the cases See v. City of Seattle, Biswell, and Colonnade as examples of previous decisions granting such recognition. The primary consideration was said to be the reasonable expectation of privacy an owner has in his business operation. The distinction was made initially between a private home and a commercial operation. To satisfy the fourth amendment requirement of "reasonableness," Justice Marshall said that the interest may be adequately protected by a comprehensive regulatory scheme.

Early in section II of the opinion, Justice Marshall laid the foundation of the decision. He noted that, in Barlow's, the Court had said that an inspection may be constitutionally objectionable if so random, infrequent, or unpredictable that the owner has no real expectation that he will from time to time be subjected to inspections. Randomness and unpredictability cause a search to fail to meet "arbitrariness" guidelines used by the Court to determine reasonableness. Before fully evaluating the Act itself, however, Justice Marshall pointed out an even more important factor considered in testing reasonableness and the primary reason for the Act and decision: "The assurance of regularity provided by a warrant may be unnecessary under certain inspection schemes." Quoting Colonnade, he noted that "Congress enjoyed 'broad power to design such powers of inspection . . . as it deems necessary to meet the evils at hand.'"

43. See v. City of Seattle, 387 U.S. 541 (1967).
44. See note 9 supra and accompanying text.
45. See note 10 supra and accompanying text.
46. 101 S. Ct. at 2538.
47. See note 20 supra and accompanying text.
48. U.S. Const. amend. IV. (quoted supra note 3) (see, e.g., Stoner v. Calif., 376 U.S. 483 (1964)).
49. 101 S. Ct. at 2538.
50. 436 U.S. at 323.
52. 101 S. Ct. at 2538.
53. Id. at 2538 (quoting 397 U.S. at 76-77).
In Biswell, the underlying "evil at hand" was improper use of guns. Congress' object was to prevent the "evil" by regulating the sale and distribution of illegal guns.\textsuperscript{54} In Colonnade, the "evil" sought to be prevented was illegal sale and distribution of liquor.\textsuperscript{55} Essentially, the Court said that the interest of the government in controlling an industry is of material concern in determining whether a warrantless search is reasonable. Justice Marshall referred to a "strong federal interest" as mandatory.\textsuperscript{56}

In Dewey, the "strong federal interest" was protection of workers in the mining industry.\textsuperscript{57} The interest seemed to dictate the warrant exception. Finding the interest to be strong, the Court could then evaluate whether the mode of control was arbitrary in order to determine constitutionality. The congressional enactment in question in Dewey is specifically limited to the mining industry. The preamble of the Mine Act states clearly that the legislature's intent is regulation of a highly dangerous industry.\textsuperscript{58} The language encompasses not only coal mines, but also "other mines." The legislative history contains statistics evidencing that the mining industry is among the nation's most hazardous.\textsuperscript{59} Additionally, there is evidence that quarries had continued as a source of industry deaths after enactment of the legislation preceding the Mine Act, the Coal Mine Safety Act, while coal mine deaths had declined in frequency.\textsuperscript{60} Since the Coal Mine Safety Act did not cover quarry operations as mines,\textsuperscript{61} by including them in the Mine Act, Congress intended to attack a primary source of public danger. The strong congressional interest in preventing such danger gave Congress the power to validate warrantless searches of quarries. In Dewey, the Court accepted this power and passed on to the second element of the reasonableness test: whether the Mine Act was sufficiently particular in what it required to obviate the need for a warrant.

\begin{itemize}
\item \textsuperscript{54} 406 U.S. 311 (1972).
\item \textsuperscript{55} 397 U.S. 72 (1970).
\item \textsuperscript{56} 101 S. Ct. at 2538.
\item \textsuperscript{57} 30 U.S.C. § 801(a) (Supp. III 1979) ("The first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner . . . ").
\item \textsuperscript{58} 30 U.S.C. § 801 (Supp. III 1979).
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Stone quarries were initially regulated by the Federal Metal and Nonmetallic Safety Act of 1966. See note 31 supra.
\end{itemize}
B. Sufficient Certainty and Regularity

Justice Marshall stated, "[t]he only real issue before us is whether the statute's inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant." In arriving at the conclusion that it did, Marshall compared the Mine Act to the one in Barlow's—OSHA Act—which did not provide adequate specificity in the program it set out for inspecting businesses. After evaluating the OSHA Act provisions according to a three step test, Justice Marshall analyzed the Mine Act.

First, the OSHA Act did not specify the frequency of inspections, nor did it define the health and safety concerns relevant to the many industries subject to the act. On the other hand, the Mine Act specifically stated that surface mines were subject to at least two annual inspections and an underground operation to four inspections. Other, more specific, guidelines were set out as to follow-up inspections and mines subject to generate explosive gasses.

Second, the OSHA Act provided broad scope carte blanche authority for the search of any operation or work place affecting interstate commerce, including inspection of any pertinent condition or apparatus therein. Alternatively, the Mine Act provided detailed guidelines for inspections with standards set forth in either the Mine Act or Title 30 of the Code of Federal Regulations. Finally, the OSHA Act gave full discretion to inspectors as to selection of which businesses to inspect and the frequency and scope of inspections, limiting them only to reasonable times, manner, and extent of search. The Mine Act, however, made predictable and defined by established federal regulation the frequency and purpose of in-

62. 101 S. Ct. at 2540.
63. Id. at 2539.
64. Id. at 2540.
65. Id. (citing 30 U.S.C. § 813(a) (Supp. III 1979)).
66. Id. (citing 30 U.S.C. § 813(i) (Supp. III 1979)).
67. Id. at 2539.
68. Id. at 2541.
69. Id. at 2539. OSHA defined as its purpose, encouraging all employers to affirmatively work to reduce sources of injuries to workers. 29 U.S.C. § 651(b)(1) (1976). Additionally, under § 657, inspections are allowed at discretionary frequency, scope, and direction. No limitation is made as to what business is subject to regular inspection nor would an employer be able to predict whether his operation would be one of great concern to the inspector or what standards the business must comply with without constantly checking the Code of Federal Regulations.
Marshall's evaluation pointedly disclosed what the Court believed was the distinction between Dewey and Barlow's, and unequivocally fulfilled the prophecy of Barlow's that another act might have other specific enforcement needs and privacy guarantees.

Almost as an afterthought, Justice Marshall pointed out that, if a mine operator should feel that his fourth amendment rights are violated, he does have one alternative to automatic submission. The Act provides that, should the operator have need to protect a special privacy interest, he may seek an injunction to protect that interest. Such a provision is not included in OSHAct and does in fact provide a device which favors the special privacy of the operator.

C. Duration of Regulatory History

After determining that the Act was reasonable in allowing warrantless searches of mine sites, the Court turned to the part of the decision which altered the existing mode of the law. At the end of section I of the opinion and in footnote four, Justice Marshall summarily dispensed with the question whether a quarry is validly within the scope of the Act.

The qualification of Colonnade, that the industry be one which has had a long history of pervasive government regulation, was a material factor in challenging the application of the Mine Act to quarry operations. Because quarry mines had been under the um-

70. 30 U.S.C. § 813 (Supp. III 1979). In § 813, the Mine Act delineates purposes, frequency and guidelines of each inspection. It defines that for each underground mine there will be at least four inspections, while for each surface or other mine at least two inspections. The secretary must promulgate all regulations through notice and comment procedures if not specifically covered in any other section of the act. The section provides in (c) for maintenance of records by the company subject to inspection. It provides in (e) that any information needed must be gathered so as not to impose an unreasonable burden on the operators. Any representative of the operator, or the operator himself, may accompany the inspector. Specifically, in (i), the act provides for weekly spot checks for mines which emit excessive amounts of methane or other explosive gasses. Other provisions specifically define targets of interest to the secretary: § 814(f) dust levels, and (g) untrained miners. Additionally, at § 816 the act provides a source of review in any court of appeals for an operator who may believe his rights are violated by action of the Secretary of Labor. All mine operators are required to be familiar with the act and all regulations promulgated under it.

71. Id. § 816(a)(1) (Supp. III 1979).

72. 29 U.S.C. § 655(f) (1976), (OSHA does provide for judicial review of any regulation promulgated under the act).

73. 101 S. Ct. at 2537 n.4.

brella of federal regulation only since 1966,\textsuperscript{76} appellees argued that the short twelve years of regulation did not bring the industry within the definition of \textit{Colonnade}. After all, \textit{Colonnade} concerned the liquor industry, regulation of which had begun prior to the Revolution.\textsuperscript{76}

Justice Marshall pointed out, however, that, "if the length of regulation were the only criterion, absurd results would occur."\textsuperscript{77} This comment, acknowledging that new industries may arise which will need close supervision requiring surprise inspections, brought the concurrence of Justice Stevens.\textsuperscript{78} Justice Marshall offered, as an example, the nuclear power industry.\textsuperscript{79} With this contention, the Court negated the distinction asserted in the circuit court's \textit{Dewey} decision,\textsuperscript{80} and the three earlier appeals courts' decisions validating the Mine Act inspections.

In dissent, Justice Stewart maintained that the weight of \textit{Colonnade}, \textit{Biswell}, and \textit{Barlow}'s required a contrary decision. He stated that \textit{Colonnade} required that the business be one subjected to a long history of regulation and that the Court should adhere to that precedent.\textsuperscript{81} Justice Stewart insisted that a businessman cannot give prior consent to regulation imposed after he enters the field\textsuperscript{82} and, thus, the reasoning that he was aware of, and acquiesced in, inspection is fallacious. In \textit{Barlow}'s, the Court had applied both \textit{Colonnade} and \textit{Biswell} to find that Barlow had been subjected to an unwarranted search, and the same result was required in \textit{Dewey}. Justice Stewart noted that quarries had only been regulated since 1966, which did not constitute a "long history."\textsuperscript{83}

IV. Analysis

The major question addressed in this analysis is whether a quarry may validly be considered a Mine so as to fall under the Mine Act. Additionally, other arguments offered to the \textit{Dewey} Court by

\textsuperscript{75} See note 41 supra and accompanying text.  
\textsuperscript{76} 101 S. Ct. at 2541.  
\textsuperscript{77} Id. at 2542.  
\textsuperscript{78} Id.  
\textsuperscript{79} Id.  
\textsuperscript{80} 493 F. Supp. at 965-66.  
\textsuperscript{81} 101 S. Ct. at 2543 (Stewart, J., dissenting).  
\textsuperscript{82} Id. at 2545.  
\textsuperscript{83} Id. It should be noted that the parties stipulated that the present owner had been aware that the quarry was subject to safety regulations when purchased in 1967. Statement of Facts at 25a, \textit{Marshall v. Dewey}, 493 F. Supp. 963 (E.D. Wis. 1980).
parties to the action, which may help litigants should a similar future action arise, are discussed.

A. Regulating Quarry Operations as Mines Under the Mine Act

Because section 802(h)(1)(A) of the Mine Act defines "coal or other mine" as an area of land from which minerals are extracted in non-liquid form and, subsequently, section 803 explicitly states that such mines are the type covered by the Act, a quarry is undoubtedly meant to be regulated by the Act. Further, in the legislative history, statistics were offered to demonstrate that gravel mines are equally as hazardous as coal mines per million man hours worked. Congress relied on such statistics in deciding to amend the previous act to specifically add "other mine" to its coverage. The nature of a quarry is the same as that of a coal surface mine and in some respects quarries are more dangerous. Many quarries that have been in operation for years have walls reaching to heights of one hundred fifty feet. These walls are often subject to unexpected fracturing as a result of blasts aimed at loosening large deposits of stone. On the other hand, most surface coal mines have walls of only twenty-five to fifty feet. Surface coal mines are dangerous, but no more dangerous, and in many cases, less dangerous, than quarry operations. As noted in the government's brief, the fatality rate in 1979 at surface stone mines similar to appellee's, was reported as three and one-half times greater than that at surface coal mines, while the injury rate was one and one-third times as great.

In adding "other mines" to the amended Mine Act, the Senate Committee reporting the bill cited the 1974 Annual Report of Occupational Safety and Health to the effect that about "one out of every 1500 mine workers . . . was killed on the job or died from work related injuries or illnesses in 1973, compared with one out of every . . . 12,400 for all workers covered by the OSHAct."
Another report specifically rejected any exclusion of the sand and gravel industry from the coverage of the earlier Federal Metal and Nonmetal Mine Safety Act of 1966.90

A report to Congress in 1965 indicated that thirty-three states required inspections of all mines and none limited inspections to mines producing a certain commodity,91 although as noted in the appellee's brief, in Wisconsin where appellee's quarry was located, there was no authorization for warrantless searches of any business through state statute.92 It should be made clear, however, that Congress' purpose was not to transpose prior state legislation but to prevent injury and death to the workers.93 Once it was established that quarries are dangerous work areas, the balance of countervailing governmental interest in preventing the danger became controlling. As pointed out by Justice Marshall, to allow the length of time of government regulation to control Congress' power to avoid public hazard through legislation, would be absurd.94 Congress frequently proposes legislation meant to limit exposure of the public to hazards. Whether a hazard is old or new should have no bearing on whether it may be regulated. The critical consideration should be the reality and probable severity of the hazard. These considerations should determine the reasonableness of the inspections. The form of legislation must follow its function.

Certain practical, economic and social considerations affect the balance of government interest in regulating hazards. Practically, the power to make warrantless inspections will have an effect on safety because it will eliminate an operator's ability to camouflage or shut down hazardous areas of the mine. In Dewey, the violation was excessive dust levels in the crushing house. Had the manager been warned of an inspection, wanting to avoid a second citation, he would have shut down the crusher. By surprise inspection, the inspector was able to discover the violation and take appropriate action to protect the workers exposed to excessive dust levels. From an economic standpoint, though the effect on the quarry and costs of its product may be a concern of those opposed to warrant-

92. Brief for Appellees at 16 n.3 (referring to Wis. Stat. § 66.122, 123 which specifically provide for special inspection warrants to be used in making health and safety inspections).
94. 101 S. Ct. 2542.
less inspections, the more costly effect on the worker of undetected violations outweighs mere money. Socially, permitting warrantless inspection should have positive effects on the labor force, evidenced by the participation in the oral arguments for appellants by the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and American Civil Liberties Union (ACLU). To exclude large quarry operations from the definition of mines would be impractical in view of the purpose of the Mine Act to prevent dangers to workers and the public.

B. Other Arguments in Dewey

As an aside to the issues considered by the majority in Dewey, the parties, through amicus curiae, offered other arguments which are of interest, though they were not considered by the Court in its opinion.

The American Civil Liberties Union Foundation of Southern California, citing Schneckloth v. Bustamonte,96 argued an implied consent of the workers to the search.96 The argument was that the employees of the company had sufficient interest in the area by access, so that they were capable of a valid third-party consent. The contention was that, since employees have a close relationship to the work area, it is reasonable to conclude that an employee has authority to give such consent.97 Had the Court accepted this argument, control of any business operation would be difficult. Inspection would create broad repercussions and further constitutional questions. It is hard to accept that any employee, regardless of his status, has the power to waive fourth amendment protections for or against his employer. This argument also contradicts Barlow's in that an owner could not protect any interest subject to an employee's area of licensed movement. There would be no right to claim any reasonable expectation of privacy except in an area under exclusive control of the owner.

Also noted in arguments of appellant, is the fact that, if the Court were to require a warrant, the process would probably become mechanical. The additional burden on magistrates would be substantial, since more than 100,000 inspections occur annually.98

97. Id. at 5.
98. Brief for Appellant at 25 n.11.
The financial burden alone is quite considerable, although not justly dispositive against a fourth amendment right.

Additionally, the government pointed out that consent to conduct similar inspections had been given previously by Waukesha to other agencies including labor unions and insurance carriers, as well as consent to regular checks by state safety engineers, and to regulatory measures produced by the United States Department of Treasury in relation to use of explosives. Such inspections, it was argued, effectively lowered the expectation of privacy enjoyed by the quarry owner.

V. Conclusion

Congress specifically chose to regulate an industry shown to be one of the most dangerous in the nation, and the legislation it enacted was based on a compelling state interest in limiting hazards to workers and the public. Because the standard of reasonableness applied to fourth amendment violations must be judged by comparing the loss to the individual with the benefit to the nation as a whole, the provision for warrantless administrative inspections may be easily justified in terms of reduction of industry casualties. As the Court decided in Dewey, the warrantless inspection provision of the Mine Act should rightly be applied to quarry operations to encourage the employer to take affirmative action to assure suitable working conditions for his employees.

ROBERT L. MCCLELLAND

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99. Id. at 6.
102. See note 86 supra. Statistics indicate that from 1966 through 1976, coal mine fatalities have been reduced approximately fifty percent, while metal/nonmetal type mine fatalities have remained constant in percentage figures. With a junction of coal mine and metal/nonmetal mine classification under one act, theoretically equal inspection focus would reduce fatalities in the latter industry as well.

Introduction

In McPherson v. Barksdale, the Sixth Circuit addressed the issue whether violation of a plea bargain between a state prosecutor and a defendant is a proper ground for federal habeas corpus relief. The question is unsettled at this point because it has been raised in very few cases, and those courts which have examined it have reached differing results. The instant case, while not one of first impression in the Sixth Circuit, is one of only two decided by it.

In McPherson, the court also struggled with the added problem of whether the federal courts have the supervisory authority to enforce a breached plea bargain on the state level. McPherson is an interesting example of a federal court’s attempt to define its role in an action involving both state and federal powers and remedies.

The Facts

Albert McPherson apparently was involved in two separate drug sales, one occurring on November 6, 1975, and the other at an earlier date. On January 7, 1976, pursuant to a plea bargain agreement with the state prosecutor, McPherson pleaded guilty to the earlier of the two drug sales, which involved five indictments charging him with possession of heroin with intent to sell and four

1. 640 F.2d 780 (6th Cir. 1981).
3. Cf. Bercheny v. Johnson, 481 F.Supp. 1165 (E.D. Mich. 1980), 633 F.2d 473 (6th Cir. 1980). Bercheny's defense to a charge of attempted murder was temporary insanity. Bercheny agreed with the state court prosecutor that he would plead guilty to a charge of assault with intent to commit murder if the prosecutor would agree to his being evaluated by a court-appointed psychiatrist prior to sentencing. A psychiatrist was never appointed, but Bercheny was sentenced to forty years in jail. Bercheny exhausted his state court remedies, appealing unsuccessfully to the Michigan Court of Appeals and Supreme Court. Bercheny then filed for a writ of habeas corpus in the federal district court. That court held that Bercheny's writ of habeas corpus would be granted unless the state court vacated Bercheny's sentence and resentenced him after a psychiatric examination. The state then appealed that decision to the Sixth Circuit Court of Appeals, which held that Bercheny should be given a psychiatric examination, and then resentedenced. Id.
counts of receiving stolen property. At that time, he received concurrent five-year sentences on these charges.\(^4\)

In June of 1976, McPherson was indicted for the November 6, 1975, drug sale. In June of 1977, he was convicted on that charge and was sentenced to a seven-to-twelve year term, to run consecutively with the prior sentence.\(^5\)

McPherson contended that the state prosecutor breached the plea bargain that had been worked out in January of 1976. He claimed that there was an implicit agreement between himself and the prosecutor that he would not be prosecuted for the November 6, 1975, sale, and that that agreement was the basis for his agreeing to plead guilty to the other nine indictments.\(^6\)

The Tennessee state court held a hearing on McPherson's motion to dismiss the June 1976 indictment, and stated that the record of the plea showed that the plea disposed of all of McPherson's crimes of which the state was aware, and that the state knew of the November, 1975, sale at the time the plea bargain agreement was reached.\(^7\) However, the state court refused to dismiss the June, 1976, indictment, since McPherson had not filed a motion for post-conviction relief, under Tennessee law, the proper remedy for a breached plea bargain.\(^8\)

McPherson appealed this decision to the United States District Court for the Western District of Tennessee.\(^9\) The District Court found that the state prosecutor had not deliberately misled McPherson, and that the November 1975 heroin sale was not included in the plea bargain.\(^10\) McPherson appealed from this decision to the Sixth Circuit.

**Discussion**

The Supreme Court recognized, in *Brady v. United States*,\(^11\) that "at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty."\(^12\) In *Brady*, the Court held the plea bargaining process constitutional, stating that there was
mutuality of advantage in it to both prosecution and defense. The Court said that a "substantial benefit" accrues to the state by means of guilty pleas because "scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof."\textsuperscript{13} Of course, there is also an economic advantage to the state, considering the numbers of additional prosecutors and judges that would have to be hired if each criminal case came to trial.

There are advantages to the defendant, too, in entering into a plea bargaining agreement: "his exposure is reduced, the correctional process can begin immediately, and the practical burdens of a trial are eliminated."\textsuperscript{14} Also, most prosecutors are amenable to offering a lower sentence, recommending none, or lessening or dropping charges, in exchange for a guilty plea. Therefore, it is often in the defendant's best interests to enter into a plea bargain arrangement.

But what happens when the prosecutor does not live up to his part of the agreement? The defendant has already acted in reliance, and presumably in good faith, on the agreement. What remedies can the defendant pursue when a state prosecutor breaches the agreement?

The seminal case dealing with a reneged plea bargain is Santobello v. New York.\textsuperscript{15} The Supreme Court held that it is up to the state courts to decide whether there should be specific performance of the agreement or whether the defendant should be allowed to withdraw his guilty plea and go to trial on the original charge.\textsuperscript{16} At the trial level, Santobello tried to rescind his guilty plea when he discovered that the prosecutor was not going to fulfill his part of the bargain. The trial court's refusal to allow him to rescind was ultimately reversed by the United States Supreme Court.\textsuperscript{17}

Justice Douglas wrote an in-depth analysis of the due process requirements as he saw them in Santobello. His opinion was that, depending on the circumstances of each case, due process requires either that the plea bargain be specifically performed or that the

\begin{itemize}
  \item \textsuperscript{13} Id.
  \item \textsuperscript{14} Id.
  \item \textsuperscript{15} Santobello v. New York, 404 U.S. 257 (1971).
  \item \textsuperscript{16} Id. at 263.
  \item \textsuperscript{17} Id. at 258, 263.
\end{itemize}
defendant be given the option to go to trial on the original charges. Justice Douglas felt that decision should be made on a case-by-case basis at the state court level, and that "[i]n choosing a remedy . . . a court ought to accord a defendant's preference considerable, if not controlling, weight inasmuch as the fundamental rights flouted by a prosecutor's breach of a plea bargain are those of the defendant, not of the State." 18

Justice Marshall wrote a separate opinion, in which he was joined by Justices Brennan and Stewart, concurring in part and dissenting in part. He contended the decision should be made by the defendant, not by the trial court, "at least where the motion to vacate [the agreement] is made prior to sentence and judgment." 19

Granted that either rescission or specific enforcement of the bargain are the proper remedies, the question of which court has the power to enforce them remains to be solved. In Santobello, the Court did not specify any federal remedy for a state prosecutor's breach; the case came to the Supreme Court on certiorari from the appellate court of New York State, not through the federal court system. Therefore, although Santobello is an important case, it does not quite cover the situation which occurred in McPherson.

Since Santobello, many district courts have assumed that habeas corpus will lie, and therefore they will hear cases brought to them on an appeal from a state court. This assumption has been affirmed by many of the circuit courts. 20 As the Court of Appeals for the Sixth Circuit said in McPherson, referring to its decision in Bercheny v. Johnson, "this Court . . . has recently assumed rather than held that a habeas petition is an appropriate means to enforce a state prosecutor's plea bargain." 21

The McPherson decision should not be considered a complete breaking away from this federalist trend. The Sixth Circuit appears not to be trying to turn away from the granting of habeas corpus, but genuinely attempting to distinguish McPherson from Santobello and Bercheny on the facts, and to define its proper role in a situation different from any it had encountered before. Unlike Santobello and Bercheny, in McPherson the defendant had not exhausted all of his state court remedies before applying to the

18. Id. at 267 (Douglas, J., concurring).
19. Id. at 267-68 (Marshall, J., concurring in part and dissenting in part).
21. 640 F.2d at 781.
district court. This appears to be a major reason for the court’s decision.

Furthermore, the Sixth Circuit is in doubt that federal courts actually have the power to direct the state courts’ sentencing, although some circuits seem to believe they do. As noted in McPherson, “Santobello did not explicitly hold that breach of a plea bargain was a violation of constitutional guarantees.” The court noted that, in Santobello, the decision what remedy to give the defendant was left to the discretion of the state courts. The court thus reached the conclusion that “a state prosecutor’s breach of a plea bargain is a violation of the Federal Constitution cognizable under 28 U.S.C. § 2254, but federal courts lack the supervisory authority to specify the remedy for such a violation.”

Santobello left the remedy within the discretion of the state court. This decision was recently followed in Patrick v. Camden County Prosecutor. In that case, the District Court for the District of New Jersey heard the case on appeal from the state court and decided that the state prosecutor had broken the plea bargain agreement. Therefore, the District Court ordered the trial court to resentence the defendant. The defendant, however, who wanted to withdraw his plea and be tried on the original charge, appealed to the circuit court. The circuit court agreed that the defendant was entitled to habeas corpus relief and affirmed that part of the district court’s opinion. Nevertheless, it reversed the segment of the opinion dealing with the resentencing, holding that the state court had the right to exercise its discretion to determine whether to enforce or strike the plea bargain. The court held that “where, as in this case, the due process violation can be cured by either of these remedies, the state judge should be given the opportunity to decide which remedy is more appropriate in the first instance.”

On the other hand, one circuit court has upheld the granting of relief by the district courts, rather than automatically remanding to the state courts. In Palermo v. Warden, the state prosecutor

22. Id.
23. Id. (citations omitted).
24. 630 F.2d 206 (3d Cir. 1980).
25. Id. at 207. The opinion of the district court is unpublished.
26. Id.
27. Id. at 208.
28. Id.
29. 545 F.2d 286 (2d Cir. 1976).
had promised the defendant a one-year prison term and a five-year probation period if he would plead guilty and return certain stolen jewels. The defendant relied on the prosecutor's promise to his detriment: he received a twenty-five year sentence. When the case came to the District Court for the Southern District of New York, the defendant had already served more than the one-year sentence, as well as the five-year probation period promised him. Therefore, after holding that the prosecutor had breached the agreement, instead of remanding to the state court for resentencing, the district court held that “specific performance of the plea bargain would constitute the only meaningful relief in the context of this case.” The district court ordered Palermo's unconditional release, and the Court of Appeals for the Second Circuit affirmed.

The facts of Palermo are distinguishable from those in McPherson. The promises made by the prosecutor to Palermo were unfulfillable, and the defendant had already served the sentence promised him, plus five years. Palermo does, however, show a willingness in other circuits toward relying on federal rather than state court discretion. According to two commentators, “there is a definite trend among the lower federal courts toward ordering the remedy of specific performance for broken plea agreements whenever the defendant seeks that remedy.”

In affirming the lower court's decision, the McPherson court said that “federal courts lack the supervisory authority to specify the remedy for such a [plea bargain] violation.” Perhaps it is true, as has been said, that the federal courts are acting pursuant to their supervisory authority in granting habeas corpus to remedy broken plea bargain agreements: “This argument is supported by the fact that several federal courts, in considering habeas corpus petitions for relief from state convictions based on broken plea agreements, have deferred to the state courts' judgment with respect to the appropriate forum for relief.”

It appears that the Sixth Circuit's decision in McPherson is based on two points: the fact that the defendant did not pursue all

31. 545 F.2d at 296.
32. Id. at 297.
34. 640 F.2d at 781.
35. Westen, supra note 34, at 520.
his state rights before bringing the federal habeas corpus action, and the court's jurisdictional philosophy that it was not competent to order the state court to take a particular action. The Sixth Circuit seems to have been within its rights in deciding that it did not have this power. After all, the federal courts were not expressly given such a right by Santobello. Since the circuit courts must follow the holdings of the Supreme Court, but are not bound by the holdings of sister circuits, the Sixth Circuit was able to hold, as it did, that the district court could not grant habeas relief to McPherson.

Conclusion

There have been very few decisions based on the question whether federal habeas corpus is a proper remedy for a state prosecutor's breach of a plea bargain agreement. The cases cited in this article are the only ones dealing with this particular question, although there are a few cases dealing with a federal prosecutor's plea bargain breach. It seems clear that McPherson will be the lodestar of the Sixth Circuit decisions in this area, since Bercheny can be distinguished on its facts. Furthermore, due to the lack of decisions in most other circuits, the circuits which have not yet addressed this question will certainly look to McPherson for guidance in formulating their decisions.

McPherson follows the holding in Santobello more closely than does Palermo, but Palermo is an example of a hard case making hard law. McPherson, Bercheny and Patrick all hold that state and not federal courts should determine a petitioner's remedy. McPherson, however, is the only case that holds that the federal courts do not have the supervisory authority to direct the state court's sentencing. The Sixth Circuit could not find authority in Santobello to permit it to usurp the power given to the state court.

This decision may well have future implications not only in the event of breached plea bargains, but also in situations in which other controversies arise between state and federal courts. By its close adherence to the limitations of Santobello, McPherson upholds the sovereignty of the state courts, yet allows the federal court its right of review on constitutional grounds. While this may be criticized as a conservative approach, it is one that is faithful to the Supreme Court's holding in Santobello. It sets a standard that may be followed with confidence by sister circuits.

Maureen L. Moore

INTRODUCTION

Following the tragic and historic events of May 4, 1970, on the campus of Kent State University, those who had been injured and the families of those who had been killed retained counsel to represent them in pursuing their claims for civil damages. Twelve of the thirteen plaintiffs, either directly or derivatively, retained Steven A. Sindell and the law firm of which he was a member. Each of the plaintiffs who retained Sindell signed a written agreement promising to pay him thirty-three and one-third percent of the proceeds of any damages that might be recovered on their behalf. The agreements also provided that, in the event no damages were awarded, the plaintiffs would not be indebted to Sindell or his law firm.

Sindell thereafter pursued his clients’ claims in several courts: the Court of Common Pleas of Cuyahoga County, Ohio, Ohio Court of Appeals for the Eighth Judicial District (Cuyahoga County), Ohio Supreme Court, United States District Court for the Northern District of Ohio, United States Court of Appeals for the Sixth Circuit, United States Supreme Court, and again in the United States District Court for the Northern District of Ohio. Sindell represented the plaintiffs in the United States District Court for the Northern District of Ohio throughout a jury trial which consumed approximately fifteen weeks. While that trial resulted in a defendant’s verdict, Sindell was instrumental in identifying and pressing for appellate review, the issue upon which the

1. Mr. and Mrs. Scheuer, parents of Sandra Scheuer, were represented by the American Civil Liberties Union. Opening Brief on Behalf of Appellants at 4, Krause v. Rhodes, 640 F.2d 214, 215 (6th Cir. 1981) [hereinafter Opening Brief].

2. The twelve plaintiffs originally hired Steven A. Sindell's former law firm, Sindell, Sindell, Bourne, Markus, Stein and Spero, however, this appeal is taken by Steven A. Sindell and Sindell, Lowe and Guidabald, the latter firm being the successor by contract to the rights of Steven A. Sindell's former law firm. Brief of Appellee at 2 n.1, Krause v. Rhodes, 640 F.2d 214 (6th Cir. 1981).


Sixth Circuit reversed and remanded the case for a new trial.\textsuperscript{5}

The American Civil Liberties Union took the responsibility of representing the plaintiffs during the new trial granted by the Supreme Court. On January 4, 1979, after four days of trial, the cases were settled for $675,000.00 to be paid by the State of Ohio, and a statement of regret, to be signed by all the defendants.\textsuperscript{6} Although Sindell participated in the November 12, 1978, settlement conference,\textsuperscript{7} the day the first significant settlement discussions began, he did not consent to the settlement ultimately approved by the court.\textsuperscript{8} As a condition of payment to the court of the settlement fund, however, and in disregard of existing contract rights, the State insisted the settlement fund be apportioned so as to limit the amount of attorney's fees which could be paid to plaintiffs' counsel, both by the State and by the plaintiffs from the recovery. The trial court ruled that attorney's fees could be limited to $50,000.00 not only with respect to the assessment that the defendants were to pay, but also with respect to any private contractual rights existing between the plaintiffs and their attorneys. The trial court's ruling extinguished the plaintiffs' attorneys contingent fee contracts without a hearing, without evidence, and without allowing the parties an opportunity to present the court with briefs on the issue.\textsuperscript{9} In a matter of minutes, Sindell, who had represented the plaintiffs for eight years in seven different courts without any compensation, witnessed the destruction of the contracts he had made with twelve plaintiffs and his hopes of obtaining his rightful fees. The United States Court of Appeals for the Sixth Circuit affirmed the trial court.\textsuperscript{10}

\textbf{Reasonable Attorney's Fees Under 42 U.S.C. § 1988}

The traditional American rule concerning compensation of attorneys requires each party to absorb the cost of his own attorney's fees.\textsuperscript{11} The general American rule which precludes recovery of fees by successful litigants differs from the approach of many other nations, including Great Britain, where fees are automatically

\begin{itemize}
  \item \textsuperscript{5} Opening Brief at 5.
  \item \textsuperscript{6} Brief of Appellee at 9, Krause v. Rhodes, 640 F.2d 214 (6th Cir. 1981).
  \item \textsuperscript{7} Opening Brief at 6.
  \item \textsuperscript{8} Transcript of March 9, 1979 Hearing at 62-63, Krause v. Rhodes, 640 F.2d 214 (6th Cir. 1981).
  \item \textsuperscript{9} Opening Brief at 12.
  \item \textsuperscript{10} 640 F.2d at 221.
  \item \textsuperscript{11} Alyeska Pipeline Serv. Co. v. Wilderness Soc'y., 421 U.S. 240, 247 (1975).
\end{itemize}
awarded to the prevailing party in all lawsuits. There are, however, judicially created exceptions to the American rule, such as the "bad faith" and "common benefit" doctrines. The narrowness of their application often gives rise to harsh results. Another exception to the American rule, the "private attorney general" doctrine, was developed by the lower federal courts to award attorney's fees to litigants who had vindicated important statutory rights of all citizens. The attempt to create a third exception to the American rule was short lived, when the United States Supreme Court called for legislative rather than judicial justification for the awarding of attorney's fees to successful civil rights litigants. The Civil Rights Attorney's Fees Awards Act of 1976 was intended to fill the void created by the repudiation of the private attorney gen-

13. The bad faith exception to the American rule of attorney's fees allows a court to shift fees to any party found to have instituted an action or asserted a defense in "bad faith, vexatiously, wantonly, or for oppressive reasons." 421 U.S. at 258-59.
14. Originally, application of the common fund doctrine (common benefit doctrine) was limited to suits which had resulted in judgments of damages or recovery of monetary funds from which fees could be paid. Hall v. Cole, 412 U.S. 1, 5-6 (1973). See also Dawson, Lawyers and Involuntary Clients: Attorneys Fees from Funds, 87 Harv. L. Rev. 1597 (1974). In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970), however, the Supreme Court held that the benefit recovered need not be pecuniary in nature for application of the common benefit concept. Justice Harlan delivering the opinion for the Court stated:

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses. Mills was a shareholder derivative suit in which the plaintiff challenged the corporation's use of misleading proxy statements. The Court held that the plaintiff's initiative in compelling company compliance with federal statutory requirements had benefited the other shareholders by protecting their statutory right to an informed corporate election. The beneficiary class in Mills was limited in number and the Court could reasonably determine that each member had benefited from the suit. In a civil rights action, however, such a determination is not possible. The beneficiaries of civil rights suits are often members of large segments of the public. Thus, courts would be unable to assess accurately the impact of fees upon individual members of those groups. Lytle v. Commissioners of Election, 541 F.2d 421, 426 (4th Cir. 1976). Nevertheless, the Mills emphasis on the value of private enforcement of statutory rights formed the basis of the private attorney general doctrine.
15. Lee v. Southern Homes Sites Corp., 444 F.2d 143, 144 (5th Cir. 1971). For an analysis of the private attorney general doctrine, as well as a discussion of the cases utilizing this exception, see Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L. J. 733 (1973).
16. 421 U.S. at 247.
eral doctrine.\textsuperscript{18}

Offered by Congress as “an appropriate response”\textsuperscript{19} to \textit{Alyeska Pipeline Service Co. v. Wilderness Society},\textsuperscript{20} the Civil Rights Attorney’s Fees Awards Act of 1976 (hereafter the Act) provides in part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.\textsuperscript{21}

The general intent of the Act, as expressed by the State Judiciary Committee, was to award attorney’s fees in a manner consistent with the practice of federal courts prior to the \textit{Alyeska}\textsuperscript{22} decision.

While the Sixth Circuit recognized \textit{Krause} as “unique in the annals of litigation of the United States Courts,”\textsuperscript{23} it is certainly not unique when viewed as Congress intended.\textsuperscript{24} Prior to the \textit{Alyeska} decision, the plaintiffs would not have been precluded from contracting to retain counsel and from providing for his payment on a contingent fee basis. Clearly, the contingent fee contracts agreed to by the twelve plaintiffs and Sindell were consistent with the practice of federal courts prior to \textit{Alyeska}.\textsuperscript{25} The overriding concern of 42 U.S.C. § 1988 is adequately compensating competent counsel in civil rights litigation.\textsuperscript{26} The Act is very clear to provide “the court,
in its discretion, may allow . . . a reasonable attorney's fee." 27

Generally, a court's discretionary decision as to the amount of fee awards is reviewable only for abuse of discretion. 28 One element, however, that is vital to encouraging private civil rights suits is assurance that fees awarded to prevailing plaintiffs will be adequate. Congress expressly referred to certain cases which were deemed to exemplify the proper standards to be applied. Specifically, the Senate Report 29 cited Johnson v. Georgia Highway Express, Inc., 30 with approval. Johnson enumerated the relevant criteria in arriving at a reasonable fee:

(1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal services properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. 31

In Krause, there was no need for the court to determine attorney's fees since the parties had disposed of the issue by contracts consistent with the statements of the Act. The Senate Report 32 noted that private vindication of civil rights will be promoted by a judicial discretionary standard that does not financially penalize an attorney. Presumably, this refers to an attorney such as Sindell, who devoted his time to the Kent State cases, making the result of Krause contrary to the legislative intent of Congress.

Public interest litigation often involves a great expenditure of money and labor. For example, in Keyes v. School Dist. No. 1, 33 the court granted an award of $360,000.00 as reasonable attorney's fees under the Act. Similarly, in Commonwealth of Pennsylvania

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30 488 F.2d 714 (5th Cir. 1974).
31 Id. at 717-19.
v. O’Neill, the plaintiffs received a fee award of $200,000.00 pursuant to the Act. Viewed in light of the twelve factor test set out in Johnson, the legislative intent of Congress and the case law interpreting the Act, the $33,740.00 fee the Sixth Circuit awarded Sindell in Krause is clearly unreasonable, if for no other reason that it financially penalized Sindell for his participation in the litigation.

ANALYSIS OF THE SIXTH CIRCUIT DECISION

Even the casual observer of contemporary social issues must realize that the history of the “Kent State Cases” is extensive, filled with shock, anguish, and agony. Chief Judge Edwards accurately depicted the unfortunate occurrence as a “tragic drama which so bitterly divided our nation in the decade of the 70’s.” The reaction of Americans to what occurred in Kent, Ohio, on May 4, 1970, was strong, vocal, and bitterly divided. Ex-Vice-President Spiro T. Agnew stated less than one week after the shootings that, if the guardsmen had not deliberately murdered four students, they were at least guilty of manslaughter. Arthur Krause, father of victim Allison Krause, on the other hand, related phone calls he received in the weeks after the shooting from persons informing him that if he had done his duty as a parent his daughter would not have been shot. Mr. Krause also received letters depicting his daughter as a “hippie,” “cheap slut,” and a potential killer herself. The litigation of Krause raised many interesting legal issues, however, this note will only address the awarding of attorney’s fees.

Both the trial judge and the Sixth Circuit found no exact controlling precedent for their decision in Krause. Perhaps some insight into the result may be found in a consideration given weight by Judge Thomas in his February 6, 1979, opinion.

35. 488 F.2d at 717-19. See text accompanying note 21 supra.
36. 640 F.2d at 220-21.
38. Id. at 21.
39. Id.
40. 640 F.2d at 218.
41. Judge William K. Thomas, Federal District Judge for the Northern District of Ohio, Eastern Division, served as trial judge for the second trial, which lasted four days and resulted in the disputed settlement agreement.
42. 640 F.2d at 217.
Thomas stated that it was clear from the express wording of the offered settlement agreement that, without the limitation of attorney's fees, there would have been no settlement of the Kent State cases by the State of Ohio. In order to effectuate a settlement of a case depicted by the trial judge as one that "seemed as if it would never end," the court interpreted 42 U.S.C. § 1988, as amended, to allow it to consider all the circumstances in the action, abolish any previous fee agreements and substitute a reasonable attorney's fee of $50,000.00.

Appellant Sindell argued that the contingent fee arrangement which he had with twelve plaintiffs was invalidly extinguished and the substituted settlement constituted a constitutionally impermissible impairment of contracts. Further, Sindell contended the order restricting attorney fees was in violation of the legislative intent of Congress in passing The Civil Rights Attorney's Fees Awards Act of 1976. The Sixth Circuit disagreed, relying on the broad equity power of a federal district judge to supervise the collection of attorney's fees under contingent fee contracts.

Citing Cappel v. Adams, the 1970 Fifth Circuit case, the court concluded that where an attorney contracts with a client to be compensated only from the fund he creates, the court having jurisdiction of the subject matter of the suit has power to fix the attorney's compensation and direct its payment out of the fund. While it is true that an attorney's right to contract for a contingent fee is not completely beyond judicial control, the facts of Cappel certainly do not support a similar finding in Krause.

Cappel was an action for wrongful death, wherein the plaintiff's counsel contracted for a contingent fee of thirty-three and one-third percent of whatever monies were collected whether by trial or

43. Id. at 218. The following statement was contained in Judge Thomas' opinion of February 6, 1979:

Because I knew that the State of Ohio would not make payment of a settlement fund of $675,000 if the contingent fees were charged against the fund or against any of the individual plaintiffs, I fixed $50,000 as payment in full for all attorney fees.

Without this limitation of attorney fees, there would have been no settlement of the Kent State cases by the State of Ohio. That is made clear by the express wording of the State Controlling Board request No. E47 which I have just read, as it was approved on January 4, 1979.

Id.

44. Id.

45. Opening Brief at 11.

46. 640 F.2d at 218.

47. 434 F.2d 1278 (5th Cir. 1970).
settlement. Only a few months after the action was filed, the case was settled for $100,000.00. The court limited the contingent fee, which would have amounted to $33,333.33, to a reduced amount of $25,333.33.

Numerous material differences distinguish Cappel from Krause. Contrary to the few months that Cappel was litigated, Steven Sindell worked for many years in many courts to prosecute the plaintiff's claim. The amount of time and labor required is the first of the twelve factors expressed in the Congressionally approved Johnson test, to be considered in determining a "reasonable" fee. The difference in the amount of time and labor required to prosecute a plaintiff's claim is a material difference and should be noted in awarding attorney's fees. Cappel was a diversity action brought in federal court in 1969 based on negligence. The Act applies only to the awarding of attorney fees in actions brought for the deprivation of civil rights. The Cappel court was not required to consider section 1988 in limiting the attorney's fees. In fact, when the Cappel decision was rendered, the Act had not yet been legislated. Cappel, therefore, has little precedential value since it was the result of a different court in a different jurisdiction, on a far different set of facts having no application to the statute that was the subject of Krause. Thus, while the statement of the Sixth Circuit that an attorney's right to contract for a contingent fee is not completely beyond judicial control is quite correct, its application to Krause was misleading and certainly limited.

The second factor of the twelve factor test set out in Johnson is consideration of the novelty and difficulty of the questions involved. Cappel was characterized by the district judge as a case involving "absolute liability or practically absolute liability." In Krause, on the other hand, the liability was dubious from the outset, a question of law litigated to the day of the final settlement.

48. Id. at 1279.
49. 488 F.2d at 717-19.
50. The Cappel decision was rendered December 9, 1970, and The Civil Rights Attorney's Fees Awards Act of 1976 was enacted October 19, 1976, almost six years thereafter.
51. Since Cappel was a Fifth Circuit Court of Appeals decision, and Krause was litigated in the Sixth Circuit, Cappel, while persuasive, did not have to be followed by the Sixth Circuit.
52. 640 F.2d at 218.
53. See text accompanying note 21 supra.
54. 434 F.2d at 1279.
55. The second trial, which commenced December 5, 1978, would have determined the issue of liability, but for the settlement accord.
Obviously, the cases are materially different as to the difficulty of the questions involved. *Cappel*, therefore, does not provide authority for the blanket limitation of attorney fees for which the court argues.

The Sixth Circuit noted in its opinion, a 1978 Second Circuit Court of Appeals case, *Zarcone v. Perry*, which recognized in some circumstances contingent fees may be charged while additional attorney fees under section 1988 may not be allowed. In *Zarcone*, the court probed the legislative history of the Act and found the impetus for attorney's fees legislation was Congress' concern, substantiated by the testimony of members of the legal community in Senate and House hearings, that private parties would be deterred from enforcement of the civil rights laws unless they could anticipate that success would result in a recovery sufficient to cover their costs, including reasonable attorney's fees. The obvious legislative intent of both the House and the Senate when section 1988 was enacted was to provide an inducement to the plaintiffs' trial bar to prosecute valid civil rights cases, otherwise plaintiffs might not be able to attract competent counsel.

*Zarcone*, like *Krause*, experienced no fee payment problems. Both plaintiffs' attorneys agreed to prosecute the cases on a thirty-three and one-third percent contingent fee basis and both proved successful in obtaining a recovery from which the fee was to be paid. In *Zarcone*, the Second Circuit allowed the contingent fee but refused to award additional attorney's fees under section 1988. Perhaps a prudent course for the Sixth Circuit would have been for it to adopt a similar plan.

The Act clearly states that the district court "may allow a reasonable attorney's fee," but the statute does not allow the trial judge discretion to abolish existing contractual relations as was done in *Krause*. If the fee contracted for adequately compensated

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57. In the hearings conducted by the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing in the field, testified to the devastating impact of the case on litigation in the civil rights area.
58. 581 F.2d at 1041.
59. *Id.* at 1045.
plaintiff's counsel and was not illegal or clearly excessive under the American Bar Association Model Code of Professional Responsibility (hereinafter the Code), the trial court should not have been concerned with it. The need of the trial court to determine attorney's fees was no longer present since the plaintiffs had successfully attracted competent counsel to prosecute the action, and thus, had satisfied the rationale behind Congress' enactment of the statute. 60

The Code has two sections, DR 2-106 and EC 2-20, 61 that may


61. DR 2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historic bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desired that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal
seem to limit an attorney's contingent fee contract. Neither of the provisions were used to support the trial court's order to limit attorney fees, though both were noted in the Sixth Circuit opinion. The opinion further recognized the ability of the court to supervise the reasonableness of contingent fee contracts by citing Canon 13 of the American Bar Association Canons of Professional Ethics. The primary authority for current ethical standards is the Code, which was adopted by the House of Delegates of the American Bar Association August 12, 1969, and became effective January 1, 1970. The current Code replaced the earlier Canons of Professional Ethics which had been adopted in 1908. Canon 13, being a provision of the Canons of Professional Ethics, is no longer good law. DR 2-106 and EC 2-20 are applicable, however, and neither section contains a provision that would prevent the performance of the contingent fee contract. DR 2-106 prohibits an attorney from charging or collecting an illegal or clearly excessive fee. The formula provided to determine a clearly excessive fee is that the fee would impress a lawyer of ordinary prudence with a definite and firm conviction that the fee was in excess of a reasonable fee. The Code also provides a list of factors that are to be considered in determining the reasonableness of the fee. Interestingly, the factors set out in the Code overlap the factors set out in the Johnson test, the latter being the model favorably commented on in the legislative report underlying the Act.

A quick review of the facts and history of Krause clearly present a situation in which none of the calculations for payment would adequately compensate plaintiff's counsel. Not only is the contin-

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62. 640 F.2d at 219.
63. Id. Concerning contingent fees, Canon 13 provides: "A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness." ABA CANONS OF PROFESSIONAL ETHICS No. 13.
65. ABA CANONS OF PROFESSIONAL ETHICS DR 2-106.
66. Id.
67. 488 F.2d at 717-19.
69. The following calculations are based on data collected by the author in a telephone conversation with Steven A. Sindell on October 27, 1981:
1. Court Awarded Attorney Fee = $33,740.00
2. Contingent Fee Contract = $211,666.67
gent fee contracted for clearly not excessive under DR 2-106, but it is inadequate.\textsuperscript{70} Any attempt by the court to justify a limitation of the attorney's fees on the rationale that such fee, if enforced, would be clearly excessive is unquestionably inconsistent with the facts of the case.\textsuperscript{71}

The court further relies upon EC 2-20 for the proposition that it may impose considerable limitations on the ability of lawyers to contract for contingent fees.\textsuperscript{72} EC 2-20, in reality, supports Sindell's claim that contingent fee arrangements have long been commonly accepted in the United States in civil proceedings to enforce claims.\textsuperscript{73} The Code provision indicates that it is not improper to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. The Code provisions relied upon by the court to restrict the contract actually support the sustaining of Sindell's contingent fee. Because the failure to rigidly adhere to the settlement statement would preclude any recovery by the plaintiffs, the trial court found the strict enforcement of the contingent fee contracts "totally unreasonable."\textsuperscript{74}

The unreasonableness of the extinguishment of the contract in \textit{Krause} was based upon the fact that the State of Ohio refused to settle the litigation unless the settlement restricted attorney's fees.\textsuperscript{75} The State of Ohio, in effect, was allowed to dictate the amount of plaintiffs' attorney's fees. Perhaps an illustration would

\begin{itemize}
  \item $675,000 settlement awarded
  \item - 25,000 costs awarded
  \item $650,000
  \item - 15,000 Sandra Scheuer award (represented by the ACLU)
  \item $635,000 Total recovery of Sindell's clients
  \item $635,000/3 = $211,666.67
  \item 3. "Reasonable" Attorneys' Fees = $390,000.00
  \item The reasonable attorneys' fee calculation was based on the number of hours Steven A. Sindell devoted to the litigation of this action, multiplied by the hourly rate considered reasonable in light of the factors set out in \textit{Johnson v. Georgia Highway Express, Inc.}, 488 F.2d 714, 717-19 (5th Cir. 1974).
  \item 6,000 hours x $65.00 per hour = $390,000.00

\textsuperscript{70} According to the foregoing calculation, Sindell was financially penalized for taking the Kent State cases.
\textsuperscript{71} The contingent fee alone inadequately compensates plaintiff's counsel. Therefore, any attempt to limit that fee based on its being "clearly excessive" is inconsistent with the facts.
\textsuperscript{72} 640 F.2d at 219.
\textsuperscript{73} \textit{ABA Canons of Professional Ethics EC 2-20}.
\textsuperscript{74} 640 F.2d at 219.
\textsuperscript{75} \textit{Id.} at 217.
be useful in examining the great danger of allowing this practice to continue. Plaintiff A retains counsel on a contingent fee basis, promising to pay counsel thirty-three and one-third percent of any recovery obtained, to redress an alleged deprivation of the A's civil rights by the State of X. Assume the reasonable value of the case to be $30,000.00. If the State of X were to insist that it would pay no more than $25,000.00 into a settlement fund and only upon the condition that plaintiffs' counsel be paid $2,500.00 in full for all attorneys' fees, it is then obvious that the plaintiff, the defendant State, and the trial court, as in Krause, are all in a better position if the settlement is made. Only the private lawyer, Sindell in this case, is left to complain. The true legislative intent of section 1988 was to induce competent counsel to prosecute actions for deprivation of civil rights.\(^7\) If settlement demands restricting attorney's fee contracts continue to be given effect just the opposite will occur.

**CONCLUSION**

It may be true that the court in Krause was influenced by a strong desire to settle a long and bitterly fought case in order to bring down the curtain on a tragic drama. Nevertheless, the Sixth Circuit allowed the State of Ohio to dictate the terms of the plaintiff's attorney's fees in the settlement, a precedent that is clearly in violation of the legislative intent of 42 U.S.C. § 1988. Though no controlling precedent was discovered by either the trial court or the Sixth Circuit, the intent of Congress in enacting The Civil Rights Attorney's Fees Awards Act of 1976 was to provide an inducement to competent counsel to prosecute cases wherein a deprivation of civil rights has occurred. The express language of the statute provides the trial court with broad discretion in awarding the prevailing party attorney's fees. There is no indication, however, that Congress intended to grant the federal bench the power to abolish existing valid contractual relations and rewrite the fee arrangement to comport with its interpretation of a reasonable fee. Such an approach in the future can only serve to discourage counsel from litigating civil rights cases and will throw another obstacle.

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76. *Krause* further damaged the professional reputation of Steven A. Sindell by forcing him to sue for his rightful fee. The public may now perceive Sindell as having represented the plaintiffs for the wrong reason. In fact, he represented the plaintiffs for eight years without compensation. The harsh result is that Sindell has suffered damage both financially and professionally.
in the path of those seeking vindication of rights important to us all.

STEVE O. THORNTON