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PROPHYLATIC ANTITRUST

by Murray S. Monroe*

I. THE NEED FOR COMPLIANCE

When discussing antitrust compliance programs, most companies first ask lawyers why they need one. The answer ought to be obvious. In many, if not most, cases it is a question of self-preservation. The cost of failure to comply can be extremely burdensome. The Sherman Act provides for a million dollar corporate fine,1 but that is not the end of it. In Tennessee, a series of indictments have charged that bids to construct public roads in Tennessee were rigged and that the practice has been going on for over forty years. Rather than a single, overall conspiracy, in most cases, the indictments treat each bid as a separate violation.2 Since there were approximately ten lettings a year, and fifteen or twenty contracts up for bids at each letting, it is readily apparent that potential fines may total not $1 million, but many millions of dollars.3 From one company, the government is seeking fines of $5 million for its alleged activity in only one state.4 In addition, some consideration was given to including in the indictments a claim or claims

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2. United States v. Ashland-Warren, Inc., 4 TRADE REP. REP. (CCH) ¶ 45,081 (M.D. Tenn. June 14, 1982). Bid-rigging on public highway projects has been the favorite target of the Antitrust Division's prosecutorial efforts in the last three years. Indictments have been returned from Connecticut to Texas. There are serious due process and double jeopardy problems with such an approach. In Ashland-Warren, the court rendered an extensive opinion after an evidentiary hearing, concluding that while prosecution on five indictments for bid-rigging in Tennessee was not foreclosed on double jeopardy grounds, such prosecution was so inconsistent with the Antitrust Division's prior practice that the government was required to show cause why the remaining indictment should not be dismissed after trial on one of the five indictments. In any event, double jeopardy claims have met with disparate degrees of success in criminal antitrust cases. Cf. United States v. Wilshire Oil Co., 427 F.2d 969 (10th Cir.), cert. denied, 400 U.S. 829 (1970) with United States v. American Honda, Inc., 273 F. Supp. 810 (N.D. Ill. 1967).


4. See supra note 2. The fines, totalling six million dollars, constitute the current record in criminal antitrust cases. Id.
that the companies violated the Racketeer Influence and Corrupt Organization Statute [hereinafter RICO]. While the fines under RICO are not huge, the statute gives the government the authority to impound the company's assets if the company is found guilty. Though only a few cases have actually pursued this course, the possibility is there. Beyond the criminal area, there is a potentiality for tremendous civil damage judgments. In one civil case, the district court rendered a judgment for $1.8 billion against AT&T.

The jeopardy is not limited to corporations. In many respects, the executives who may be involved in price-fixing or bid-rigging stand in greater danger than the corporation. The maximum sentence under the antitrust laws is three years incarceration per offense. Routinely, the government is asking for and obtaining jail terms both on guilty pleas and after conviction. In many instances, the individuals are actually agreeing during plea bargaining to accept jail terms. In addition, the government, again almost as a matter of routine, is including counts relating to mail and/or wire fraud in the indictments based on alleged price-fixing and bid-rigging violations. The basis of the mail fraud charges in the Tennessee cases is simply that the State of Tennessee mailed


6. Query whether eliminating a company from business is compatible with the overall objectives of the antitrust laws to promote competition?

7. Civil damages are only in part deductible if the conduct also gave rise to an indictment to which defendant pled guilty or nolo contendere or was found guilty. 26 U.S.C. § 162(g) (1976).

8. MCI Communications Co. v. AT&T, No. 74-C-633 (N.D. Ill. 1981).


11. See United States v. Duckworth, 4 TRADE REG. REP. (CCH) ¶ 45,080 (W.D. Tenn. 1980).

12. 18 U.S.C. §§ 1341, 1343 (Supp. 1979) (mail and wire fraud); see United States v. J. Ray McDermott & Co., Inc., 1970-79 Antitrust Cas. (CCH) ¶ 45,078 (E.D. La Mar. 26, 1979). See supra notes 2, 5 and 11 and cases cited therein, and Comment, supra note 5, at 1766. Courts have upheld the permissibility of charging mail fraud violations side by side with antitrust violations, rejecting a variety of cries of "foul." See United States v. Azzarell Constr. Co., 612 F.2d 292 (7th Cir. 1979), cert. denied, 447 U.S. 920 (1980). However, the "stacking" of such counts has offended some courts to the point of refusing to impose additional sentence over that permitted for the antitrust counts. United States v. McKinnon Bridge Co., Inc., 514 F. Supp. 546 (M.D. Tenn. 1981).
warrants to the contractors in payment of the contracts. There is a high degree of overlap between the facts which give rise to the basic charge and the mail fraud charge. While the fine is not large under the mail fraud statutes, the jail term is lengthy—five years per mailing. Under these circumstances, the jail terms can add up rather rapidly, although they have not to date.\textsuperscript{18}

Whether or not subject to the penalties provided in the statutes, there are serious problems facing the individuals involved. The toll on the human beings involved in these suits may be devastating. Even at the grand jury stage the tensions are extreme. Secretaries are asked to testify concerning memoranda that were dictated to them in confidence and telephone calls that they may have overheard. Low echelon employees are asked to testify to what their superiors instructed them to do and what they reported back to their superiors that they had done. One employee may find his personal liberty in jeopardy because of a cryptic instruction he gave to another employee, which that employee may have misunderstood.

The proffer system simply magnifies the problem.\textsuperscript{14} Under this system, an employee is asked to make a representation to the government of what he might say before the grand jury. If he is able to add "something new" to the investigation, he may be given immunity. "Something new" is a euphemism for implicating other people—including one's superior—and other companies. If the employee, in fact, was involved, he has a self-interest in obtaining immunity. If he has information which tends to implicate a superior, it is not unreasonable to expect that tensions will develop between the superior and the employee. Many practitioners in this area have seen relationships which have been built up over years destroyed in a matter of weeks or months. If the employee receives the immunity and the immediate superior is not indicted, the working relationship may become very disharmonious. In many cases, the employee will find it is better to leave the company than to work under such conditions. On its part, the company may have lost a valued and theretofore trusted employee. In the long run, the destruction of the human relationships that take place under these circumstances may be the most damaging part of the entire

\textsuperscript{13} Other statutes may be utilized to compound the penalties. See Comment, supra note 5, at 1769. These statutes include 18 U.S.C. § 1001 (1976) (false statements) and 18 U.S.C. § 371 (1976) (conspiracy to defraud the United States).

Despite its negative aspects, the positive things that can come out of a compliance program dictate adoption. The morale of the sales department and perhaps other departments in the company should be improved. The program should help sales managers and salesmen know what they can do and what they cannot do. If one knows where the line is, one can proceed with more confidence toward the line. House counsel is given an opportunity to learn more about the company and its operations. He should be able to build a firmer relationship with key employees. He ought to be able to build a relationship of trust so that employees will feel free to come to him with their problems before the fact, rather than after litigation has become inevitable. If effective, the program can be helpful in defending litigation. To the extent suits are avoided or even won, the corporate image should also be helped. A compliance program helps to avoid questions as to whether the board has discharged its fiduciary duties.

Finally, if the business community does not police itself, Congress may intervene. In recent years, there has been a great deal of antitrust legislation. The bulk of the legislation has broadened and strengthened the laws. If Congress perceives that the business community is flouting the present statutes, it is only a matter of time before additional legislation will be passed. Efforts toward compliance can be easily put off. They should not be.

II. WHERE TO START TO MINIMIZE THE RISK

The action any single company should take to minimize its risk proceeds. 15

15. The most extreme case was that of John Maines in United States v. McDonough, 1969 Trade Cas. (CCH) ¶ 69,482 (S.D. Ohio 1969). Mr. Maines committed suicide on his way to turn himself in to the U.S. Marshal after being sentenced to serve 90 days in jail. See also Comment, supra note 5, at 1772.

of exposure may take many forms. It will depend on the size of the company, the nature of the business, the size and type of distribution system, the attitudes of the personnel, the type of files, and a myriad of other factors. Any program should be adopted to meet the specific needs of the specific company. Having said that, it is possible to identify a number of common denominators in most programs. Many involve one or more of the following:

1) The most important step is the adoption of a policy under which the company commits itself to obey the antitrust laws and the adoption of a formalized program under which the company undertakes to explain and re-explain that commitment and its ramifications to its employees.

2) The program may provide for the creation of documents to be signed by various employees to memorialize the fact that the employees have complied with the overall policy of the company and to memorialize other facts which may have been the basis for decisions on certain critical aspects of the company’s business.

3) The company may elect to adopt a record retention policy under which its files are reviewed and to establish a schedule according to which any or most records are jettisoned on a specific date.

4) The company’s relationships with various trade associations or other groups of competitors may be examined to ascertain whether the benefits outweigh the costs and risks.

Since aspects (2), (3) and (4) are severable from (1), the discussion below will refer generally to the adoption of a policy and education of company personnel referred to in (1) as the "Compliance Program."

III. ESSENTIAL ELEMENTS OF A COMPLIANCE PROGRAM

There are at least three prerequisites to an effective compliance program. First, top management must wholeheartedly endorse a program which is tailored to the individual needs of the company. Second, the program must be clearly and effectively communicated to the employees. Third, the program must be systematically reviewed with employees.

(A) The Establishment Of A Compliance Policy

To be effective, the compliance policy must be endorsed in letter and spirit by the chief executive officer. No program is better than one that is not carried out. If a page history is really worth a vol-
ume of logic, a pious directive filled with highsounding but empty phrases is simply not going to be effective. The Department of Justice and civil plaintiffs will examine a compliance program and any documents generated under it with great care and suspicion. Their approach is likely to be that the company must have needed the program or it would not have adopted it. They will diligently search for the reasons and evidence which, in their judgment, led the company to adopt the program. They will examine in excruciating detail the program as it actually unfolded. If it has not been effective, there is a substantial possibility that that fact will be evident from the documents relating to the program. Even if the documents themselves are not incriminating, the fact the program was shoddily enforced can create adverse inferences in litigation. In absence of firm and unalterable commitment by top management, the odds are great that the program will not be effective.\footnote{Counsel has a multi-faceted role to play. It will probably fall to him or her to sell the program to the chief executive. In so doing, counsel should point out the various risks of not having a program. If the chief executive is not already aware of the exposure, it should not take him long to grasp the problems involved if the company confronts fines or damages in the amounts now being assessed in various court cases. Most executives also appreciate the trauma involved in such cases. Counsel should try to design a program which is fair. Within broad, general categories, it should apply to everyone and should not be a shield simply to protect top management. The program should be definite. While many areas of the antitrust laws are inherently indefinite, there is not much question about price-fixing and bid-rigging, either as to the law or as to the acts which constitute the offense. These are the most important areas covered by a program. In selling the program, counsel should not undermine the antitrust laws. In the past, there was a

\footnote{New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).}

\footnote{E.g., Murphy, How to Communicate Antitrust Philosophy to Corporate Personnel, 44 Antitrust L.J. 260 (1975); Galgay, Corporate Plans and Policies for Voluntary Antitrust Compliance, 19 Bus. Law. 637, 637-39 (1964); Whiting, Antitrust and the Corporate Executive II, 48 VA. L. REV. 1, 16 (1962). The Justice Department basically regards the adoption and maintenance of a compliance program as irrelevant. See Favretto, Criminal Antitrust Prosecution - The Gypsum Opinion, 5 Trade Reg. Rep. (CCH) ¶ 50,412 (March 2, 1980).}

\footnote{Cf., Galgay, supra note 18, at 637.}

\footnote{Galgay, supra note 18, at 638-39 (pursuant to “Compliance program,” damaging documents were xeroxed to excise the offending language in order to have “clean” files; this was discovered, to the witness’ great embarrassment).}

\footnote{Withrow, Making Compliance Programs Work, 7 Antitrust Bull. 607, 607-08 (1962).}
tendency to accuse the antitrust laws of being incomprehensible, uneven, unenforceable, unrealistic, unworkable and of typifying a variety of other epithets. Not only is most of this inaccurate, but also it is certainly unproductive in this setting. The way to sell the program is to support the antitrust laws.

Assuming counsel has sold the chief executive on the program, the next issue revolves around the form of the program. The company's policy on obeying the antitrust laws and the confines of the program should be in writing. Beyond that, the form of the program will vary from company to company. A small manufacturing company with a few employees has one type of problem. On the other hand, a big company with a large distribution system involving many dealers and distributors will face entirely different difficulties. The program will have to be tailored to the company, the industry, the company's functional level in the distribution system and related characteristics.

There will be some common aspects. First, most programs contain sanctions for violation of the program. There is a dispute as to how severe sanctions should be. Some practitioners argue that mandatory dismissal will only cause the employees to conceal any alleged violation and drive it underground. The opposite argument is that, in absence of severe sanctions, employees will simply take a calculated risk that the violation will not be discovered and proceed with business as usual. The program probably should provide for dismissal from the company in the case of egregious violations. Short of that, the chief executive officer should have discretion as to the imposition of sanctions. Second, the program should apply to everyone, at least in those departments having to do with pricing, costs and purchasing. Third, the program probably should not be amendable except by the chief executive officer. If lower echelon employees, such as the sales manager, have the authority to amend it, it will be easy for him to authorize deviations. This is the quickest way imaginable to destroy the program.

22. The Department of Justice's position on most per se offenses has been clear and consistent for years, and this includes price-fixing, market division, agreements, group boycotts, some tie-in agreements, and agreements among competitors pooling profits and losses. See, e.g., loevinger, The Rule of Reason in Antitrust Law, 19 ABA Antitrust Sec. 245, 247-49 (1961). Whatever else may be said about changes in antitrust policy in the new administration, per se offenses will continue to be criminally prosecuted. Ass't Atty. Gen. Lipsky, Address before Nat'l Utility Contractors' Ass'n. (July 31, 1981).

Fourth, there is substantial support for the position that the program should have a "safe harbor." This gives an employee the right to report violations directly to the chief executive officer or the chief officer in charge of the administration of the program without going through channels. For anything reported, he would receive "corporate immunity." 24

Once having decided on the form of the program, the next issue is its dissemination. The written program should be disseminated with a letter signed by the chief executive officer. At a minimum, it should be sent to all employees who have responsibility for purchasing, prices, costs, or who have exposure to competitors. Recipients probably should be required to acknowledge in writing that they have received copies of the program, understand it, and agree to abide by it.

(B) Educating Company Personnel

The written component of the program is usually not self-explanatory. It should be explained in detail face to face in a setting that permits a free exchange of ideas. The oral presentation should not be designed to make antitrust lawyers out of laymen, but it should make them sufficiently familiar with the antitrust laws that they will recognize a problem when it arises and, at a minimum, recognize the need for legal advice. The scope of the oral presentation will vary. Certain substantive and practical matters, such as the following, should be covered:

(1) Undoubtedly, in all cases, arrangements and dealings with competitors should be discussed first. The company should at all times exercise independent judgment and act independently. It should be wary of any agreement with a competitor. 25 Price-fixing, 26 bid-rigging, division of customers or territory, 27 boycotts, 28

24. See Shenefield & Favretto, Compliance Programs as Viewed From the Antitrust Division, 48 ANTITRUST L.J. 73, 77 (1980).
25. Certain activities may be carried on in cooperation with a competitor. See Monroe, Practical Antitrust Considerations for Trade Associations, 1969 Utah L. Rev. 622.
28. See, e.g., United States v. General Motors Corp., 384 U.S. 127 (1966); Com-Tel, Inc. v.
restrictions on production, and other per se offenses should be covered in detail, with explicit instructions to avoid these practices. Even this may not be self-evident to the employee. For instance, price-fixing is an elastic term which seems to be expanding. The term covers not only the fixing of price lists and discounts from price lists, but also the fixing of terms and conditions of sale to the extent they affect prices, trade allowances and any other element of price.

(2) Vertical agreements also may cause problems and should be discussed. In this area, there are some per se offenses. Resale price-fixing is still illegal per se. Tie-in sales and violations of section 2(c) of the Robinson-Patman Act are virtually per se offenses. There are other potential problems which are generally analyzed under the rule of reason. This includes customer or territorial restrictions on resale, exclusive dealing contracts, requirements' contracts, full line forcing, reciprocal buying, and, last but not

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29. Fashion Originators Guild of Am. v. FTC, 312 U.S. 457 (1941).


38. Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419 (6th Cir. 1978), cert. denied, 444 U.S.
least, the termination of distributors. All should be covered in more or less detail. In many respects, the termination of distributors may be the single most important problem in the area of vertical agreements. There are probably as many civil antitrust suits involving the termination of distributors as any other type. The problem can be particularly troublesome when other dealers have complained. Litigation in this area may be very expensive, so time on this subject is well spent.

(3) Some attention should be devoted to attempts to monopolize, conspiracy to monopolize, predatory pricing and, possibly, monopolization. In a spate of cases over the last five years, courts have said that sales below cost may be a surrogate for proof of a predatory motive in section 2 cases. In varying degrees, these courts have held that even sales below fully allocated costs may be suspect and relevant to the creation of an inference of predation. Sales below cost may also be an indication of fierce competition resulting from over-capacity or other factors. The difference between hard competition and predatory pricing at best is difficult to discern. The issue will probably involve the motive of the company in setting the prices. The cost of identifying and defending the company's "motive" can be enormous. Those who set the prices in the company should be aware of the nature of the problem, the necessity for avoiding pricing proscribed by this line of cases, and the importance of documenting the business reasons for taking the

particular pricing action.

(4) Another area which warrants some attention is the Robinson-Patman Act. Here it is particularly important to discuss the subject in terms that employees can understand. Most salesmen will not understand the significance of "price discrimination under section 2 of the Robinson-Patman Act." They probably understand terms such as functional discounts, quantity discounts, volume discounts, freight allowances, promotional allowances and advertising allowances. A discussion of the problems in the context of these types of practices should be meaningful to them. Though the Act is so complicated that no amount of education will adequately prepare employees to deal with it, they should at least be taught to recognize issues relating to the Act should they arise.

(5) Some mention should be made of mergers and acquisitions. While most businessmen appreciate that mergers and acquisitions may have antitrust overtones, many still do not realize the lengths to which the courts have gone to reach economically minute mergers and acquisitions. A distorted market definition can turn what appears to be a harmless acquisition into a hotly contested antitrust case. It may be that the acquisition or merger is not attacked on its merits, but is simply thrown into an attempt-to-monopolize case, or otherwise used collaterally to demonstrate that the defendant wears the black hat. Because of this possibility, some guidelines should be established so that the original acquisition and/or merger is cleared with counsel.

Having discussed substantive matters, it is also important to discuss practical ones.

(1) An agreement with a competitor does not have to be written in blood to be illegal. More conventionally phrased, an agreement may be implied from the surrounding facts. Contact with a competitor closely followed by price increases by both parties may be sufficient to create a jury question as to whether there was a conspiracy to fix prices. Sales personnel should be disabused of the

44. In Re Borden, Inc., 92 F.T.C. 669, 783 (1978), aff'd, 1982-1 Trade Cas. (CCH) ¶ 64,558 (6th Cir. Mar. 8, 1982), contains a lengthy list of recent cases using submarket analysis in a monopolization case. See Easterbrook, supra note 42, at 333-336.
45. "[A] knowing wink can mean more than words." Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965).
46. See United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397 (4th Cir. 1958), aff'd, 360 U.S. 395 (1959); Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965).
idea that they can go to a meeting where prices are discussed and not be in jeopardy simply because they did not participate in the discussion.

(2) The company and its personnel should avoid the appearance of evil. Unmarked envelopes, telephone calls to the home, midnight rides to out-of-the-way places, poker games with competitors in hotel rooms, and clandestine meetings with them at vacation spots will raise difficult to answer questions.47

(3) The company's employees should attend meetings with competitors with great caution. A membership in an association of competitors, coupled with actual or constructive knowledge that others are acting unlawfully, may be the basis of a finding of illegal conduct.48 If there are price discussions at such meetings, years later it may be difficult to prove that the company's employee was not at the meeting, if that be the case. If the employee is deceased, the company may have to rely on the truthfulness and trustworthiness of the memories of representatives of its competitors, some of whom may have an incentive to implicate the company. Even if the employee is alive, it may be his word against the word of others. It is important that the company's employees understand these risks and that they take action to protect themselves and the company.

(4) The employees should be reminded of the need for accuracy in memoranda, letters and even oral communication. They may need a brief course in writing.49 There is a tendency, particularly in the sales area, to be cryptic and to use words that may have one meaning in the industry but an entirely different meaning in antitrust parlance. How many documents have been written using the phrase "our markets," or something similar, simply to refer to a customer or two with whom the company has had a longstanding relationship? The document could be used and probably would be used in litigation to define the relevant market for antitrust pur-

poses. A reference in a memorandum to "industry prices," an ambiguous term at best, was the basis for upholding a jury verdict against a defendant. Annual reports also may be a source of trouble. A reference to a company's "domination" of a particular market in an annual report was found to be of great significance in an anti-merger case. On a more sensitive level, the use of "please destroy" was damaging to a defendant.

(5) The employees should be advised of how to handle inquiries from the Department of Justice, the Federal Bureau of Investigation, and government agencies, and even from private lawyers. The conventional wisdom is that they should not talk to members of these groups unless the company lawyer is present. Whether or not the employee even then should be allowed to talk to the representatives of any of these groups is probably a matter which has to be decided on the basis of the facts of the case, the company's prior experience with such conversations, the industry experience in this area, and other relevant facts.

(6) There may be some merit in discussing the background and purposes of the antitrust laws. If employees understand the underlying objectives of at least the Sherman Act, they will be in a better position to understand the potential problems and the areas in which conduct is suspect.

Who should conduct the educating program? Either outside counsel or inside counsel, and probably not a layperson, should do it. The choice between house counsel and outside counsel depends on the company situation. If the company is small and has a lim-

50. The courts have repeatedly stated that the manner in which the industry views a "market" is relevant to whether it is in fact a legally significant market for antitrust purposes. See Marathon Oil Co. v. Mobil Corp., 669 F.2d 378 (6th Cir. 1981), cert. denied, 102 S.Ct. 975 (1982); Brown Shoe Co. Inc. v. United States, 370 U.S. 294, 325 (1962); JBL Enters., Inc. v. Jhirmack Enters., Inc., 509 F. Supp. 357 (N.D. Cal. 1981); Grumman Corp. v. LTV Corp., 527 F. Supp. 86 (E.D.N.Y.), aff'd, 665 F.2d 10 (2nd Cir. 1981).
53. Esco Corp. v. United States, 340 F.2d 1000, 1010 (9th Cir. 1965).
54. The basic argument is that the employee, by so doing, risks waiving various rights, will have no record of what has been said, and may compound his and the company's problems by lying or telling half-truths. See 18 U.S.C. § 1001 (1976). Cf. United States v. Adler, 380 F.2d 917 (2nd Cir. 1967) with U.S. v. Brooks, 503 F.2d 813 (5th Cir. 1974). See also Hoerner, Misprision of Antitrust Felony, 28 CLEV. ST. L. REV. 529, 548 (1979).
ited or no legal staff, the assignment will fall to outside counsel. Such a task requires outside counsel to become familiar with what the company does, what it makes, how it distributes its products, how it sets its prices, with whom it competes, who are its personnel, who makes the various decisions in key areas, and numerous other matters. If the company employs house counsel who has a modest understanding of the antitrust laws, he or she should take the lead in such meetings. In some cases, it may be desirable to combine the talents of house counsel and an outside antitrust specialist.

The major part of the educational process should be conducted orally at a series of meetings. The chief executive officer of the company should tangibly evidence his interest in the program and ought to attend the first meeting. The meeting should be structured so there is both give and take. It is helpful to have a list of do's and don'ts, questions and answers, and illustrative examples. If the company is able to obtain the movie, "The Price," so much the better.

(C) The Program And Its Operation Should Be Reviewed Periodically

Next to having the chief executive officer behind the program, the most important aspect of the program is the follow-up. The effectiveness of the program will be directly proportionate to the amount of effort that is put into it. Repeat meetings are a must, not only to reinforce what has already been communicated, but also to educate new employees. Important files should be checked. Perhaps the most important file is the one in the bottom left-hand drawer of the sales manager's desk. He will probably part with it grudgingly, but this type of file ought to readily disclose whether the program is working.

The meeting should not necessarily be limited to the compliance program. The questions and answers may lead into other areas in which the company or its employees are having problems that present potential legal difficulties. The meeting also offers an opportunity for lawyers to attain a greater familiarity with the company's operations, its problems and its personnel, and to build a relationship with company employees that will encourage them to bring

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56. There have been a number of cases where a program did not prevent the company from being sued. E.g., United States v. Koppers Company, Inc., Crim. #79-85 (D. Conn. 1980); Galgay, supra note 18, at 637.
IV. OTHER PROCEDURES TO HELP MINIMIZE THE RISK OF EXPOSURE

(A) The Creation of Defensive Documents

Decisions are often made for what are perfectly valid reasons at the time, but, when are questioned years later, prove impossible to discern. There are several types of documents which the company may profitably elect to create which will help minimize this type of risk. Some of the general areas where documents may be helpful are discussed below.

There are many price increases which are the result of a cost increase. In a labor-intensive industry, costs probably will go up throughout the industry at the same time. All competitors will feel the same need for a price increase. Often prices will rise at substantially the same time for a perfectly legitimate reason—the increase in the labor costs. Similarly, in an industry where there is little add-on value to the cost of the raw materials, there will be the same pressure felt throughout the industry to raise prices when the cost of the raw materials rises. The government or private plaintiff will not accept at face value the fact that prices rose because of increases in labor and raw material costs. The employees that made the original decision to increase the prices may be dead or have left the company. It may be difficult or impossible to resurrect the reasons for the price increase, creating the suspicion that it was due to some conspiratorial activity. In an attempt-to-monopolize case, the same issue may be presented in a slightly different context. Assume that the charge is that the prices are below cost, fully allocated or even marginal. The issue is why they were below cost. Years later, it may be difficult to ascertain the costs allocable to that product. It will be impossible to ascertain what the marginal costs were that the decision maker anticipated would be allocable to that product. A document, made before the prices were set, setting forth the costs that the company anticipates incurring and the revenues it anticipates receiving, will be invaluable in any litigation in which prices are attacked for being too low.  

57. Richter Concrete Corp. v. Hilltop Basic Resources, Inc., 1981-1 Trade Cas. (CCH) ¶ 63,947, at 75,884 (S.D. Ohio April 20, 1981). This is because the primary consideration in analyzing a firm's pricing behavior is whether the firm considered its prices to be short-run profit maximizing at the time the prices were adopted. See O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3rd Cir. 1981), cert. denied, 102 S.Ct. 1711 (1982). California Computer Prosds.
In the same vein, in a highly competitive industry the company with a high cost structure will usually be ready for a price increase. As soon as the price leader increased its prices, other less efficient producers will follow suit. Thus, everyone will raise prices within a few days or a week of each other. From the outside, it may appear that competitors have conspired to raise prices. A potential solution is simply to wait until the leader raises its prices and then obtain a copy of the leader’s price list in the field. If the price list is obtained from a distributor after it was officially issued, and those facts are inscribed on the price list, the document may neutralize any adverse inferences which an opponent may seek to draw from the pattern of pricing behavior.

A not dissimilar situation presents itself when prices are cut to meet competition. In the real world, information concerning a competitor’s prices, even where mutual account is involved, at best will be imperfect. Chances are the company’s price will either be somewhat below or somewhat above the price of the competitor. This underscores the need for a document stating that the price ultimately quoted to the customer was at or above the price which the company was informed the competitor was currently quoting. In the context of litigation, if a company has a good paper case demonstrating that it legitimately tried to meet competition, it will have a substantial chance of prevailing, even if afterward it appears that it overshot the mark and quoted below the price of its competition.68

Many companies elect to give discounts in reliance upon section 2(a) of the Robinson-Patman Act, which permits the passing on of cost savings.69 In a litigation context, it is necessary to produce a cost study demonstrating that, in fact, there was a cost savings within the meaning of the statute. At some point, such a study must be generated. The only question is when the document should be prepared.60

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If the company's employees insist upon going to meetings with and talking to employees of competitors, the company should consider requiring each such employee to sign an exculpatory document immediately after the event certifying that the conversation or the meeting did not involve matters of antitrust significance. Expense accounts or testimony of other witnesses undoubtedly will place the employee at any such meetings. In given situations, price lists and numerous other documents may establish that there was a parallel price increase within days or weeks of the meeting. This is probably sufficient evidence to permit a jury to infer a conspiracy to fix prices and, hence, sufficient evidence to allow the case to go to the jury. The difficulty of disproving the inference years later is obvious. If the company has a document which explains that the purpose of the employee's attendance at that particular meeting was legitimate and not conspiratorial, that document will go a long way in defense of the company's position.

(B) The Elimination Of Documents Which Cease to be Useful to the Company

While creating documents to defend particular positions, the company must assume the reverse posture toward documents generated in the ordinary course of business that are no longer useful to the company. In short, there is much to be said for adopting a file life procedure under which documents are routinely disposed of after they have served their useful life. In this advanced age of duplicating machines, documents take up an inordinate amount of space. At some point, many, if not most, of them are no longer of use to the company. Either they are out of date or the indexing system is not sufficiently sophisticated that they are easily accessible. The expense of maintaining files can be considerable. If the

Cir. 1967), cert. denied, 390 U.S. 1012 (1968).
61. Esco Corp. v. United States, 340 F.2d 1000 (9th Cir. 1965); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397 (4th Cir. 1958), aff'd, 360 U.S. 395 (1959).
62. This type of certificate has been required in some consent decrees. United States v. Alton Box Board Co., 1979-2 Trade Cas. (CCH) ¶ 62,992 (N.D. Ill. Nov. 19, 1979); United States v. FMC Corp., 1970 Trade Cas. (CCH) ¶ 73,258 (E.D. Pa. Sept. 21, 1970). If the company also has a document which establishes that the price increase was the result of following someone else's price lists which it picked up in the marketplace, the defense is considerably strengthened.
63. The Bar is not universally in favor of such procedures. For a discussion of some of the pros and cons of a record retention policy, see Fedders & Guttenplan, Document Retention and Destruction: Practical, Legal and Ethical Considerations, 56 Notre Dame Law. 5 (1980), and Galguy, supra note 18.
company receives a subpoena, it may have to go through large parts of these files, a time-consuming, tedious and expensive task. For all of these reasons, the adoption of a reasonable file life procedure makes common sense. Two comments are in order. First, the company should not engage in selective destruction of documents. There are potential criminal penalties which may be applicable. In addition, the fact that a document has been selectively destroyed may itself be admissible in evidence, and if so, may be much more incriminating than anything the document could have said. As a practical matter, the "smoking guns" are few and far between. Most existing documents may be explained or any damaging effect at least minimized, but not so with a document that has been destroyed. Second, if the company does receive a subpoena or reasonably anticipates receiving one, it should place a hold on the file life procedure relating to documents that may be called for by the subpoena or the litigation.

(C) Examination Of The Costs And Benefits Of Membership In Trade Associations

As another precautionary measure, the company should re-examine its membership in trade associations. Though many trade associations often do valuable things for various industries, essentially they are combinations of competitors. Under the Sherman Act, all that has to be proved is the existence of a combination and that it engaged in an unreasonable restraint of trade. Membership in the association thus probably will prove the first element and the only remaining inquiry will be whether the restraints, if any, derived from membership are unreasonable. This warrants re-examination of the reasons the company is a member of the trade association. The analysis involves weighing the costs and risks against the advantages. In most cases, the company may be able...
to arrive at a satisfactory answer by closely scrutinizing the single question of its membership. Unless the answer demonstrates that there is a positive business reason for it, the company should seriously consider resigning.

(D) The Use Of Agency Review Procedures

Finally, one way the company can minimize its risks is to seek guidance from the enforcement agencies. Both the FTC\(^{68}\) and the Department of Justice\(^{69}\) have procedures to advise companies whether practices they contemplate adopting would violate the antitrust laws or at least provoke a suit by the agency. In addition, the Department of Justice has announced a procedure under which a company which has knowledge of a price-fixing conspiracy may obtain certain limited benefits in the nature of partial immunity if it makes a complete disclosure—a program some unkindly refer to as RAT.\(^{70}\) Each one of the programs has its pros and cons. While to date such procedures apparently have not made a great impact in this area, the possibility of using them should not be overlooked.

V. Considerations If the Compliance Program Develops Information That an Employee or Employees Are Violating the Law

If, in the course of the compliance program, information is developed disclosing that employees are, in fact, violating the law, the first thing the company should do is put a stop to the practice. Beyond that, appropriate treatment of any documents evidencing the violation and the amount of further investigation that is required are delicate problems. A complete analysis of the difficulties involved is beyond the scope of this paper.\(^{71}\) As a general rule, a memorandum should be placed in the file explaining the document and what action has been taken to rectify the situation. As suggested above, the selective destruction of documents can be illegal and unethical and certainly is counterproductive. There are a variety of other issues which should not be overlooked.


\(^{70}\) Shenefiel & Favretto, supra note 24, at 75; Panel Discussion, Is There an Obligation to Report Violations, 48 Antitrust L.J. 119 (1980).

\(^{71}\) See generally Hoerner, supra note 54; Block and Barton, Internal Corporate Investigations: Maintaining the Confidentiality of a Corporate Client's Communications with Investigative Counsel, 35 Bus. Law. 5 (1979).
(1) Should there be a detailed investigation of past events?
(2) Is any information developed in the program or in a follow-up investigation protected from discovery by the attorney-client privilege, or any other recognized privilege?
(3) What discipline, if any, should be imposed on the violator?
(4) Do the auditors have to be informed?  
(5) Does the S.E.C. have to be informed?  
(6) Does the file life procedure have to be halted as to documents relating to the alleged violation?
(7) Should the company advise the Department of Justice's voluntary disclosure program?  
(8) Is the violation sufficiently serious that the employee involved should be advised to obtain his own counsel?

VI. THE USE OF COMPLIANCE PROCEDURES IN DEFENSE OF ANTITRUST LITIGATION

An effective voluntary compliance program will have certain measurable benefits when and if the company becomes embroiled in antitrust problems. In some criminal cases, albeit a minority, the court has given an instruction to the effect that the voluntary compliance program is one factor to be considered in determining the company's guilt or innocence. The rationale was that the

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72. See Panel Discussion, supra note 70; Burke, The Duty of Confidentiality and Disclosing Corporate Misconduct, 36 Bus. Law. 239 (1981).
73. See Panel Discussion, supra note 70; Statement of Management on Internal Accounting Control - SEC Release #34-15772 (1979); 17 C.F.R. §§ 229.20, 240.14(a)-3, 249.310 (1980).
74. See Shenefield & Favretto, supra note 70 at 77; Panel Discussion, supra note 69.
76. United States v. International Paper Co., Crim. No. H-78-11 (S.D. Tex. 1978); United States v. Koppers Company, Inc., Crim. No. 79-85 (D. Conn. 1980). See also United States v. Hilton Hotel Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), cert. denied sub nom, Western Int'l Hotel v. United States, 409 U.S. 1125 (1973). However, as of March, 1980, in only one of the ten criminal cases postdating the Supreme Court decision in United States v. U.S. Gypsum Corp., 438 U.S. 422 (1978), has the Court given an instruction that the enactment and observance of an antitrust compliance program is a relevant factor in determining whether the corporation had the requisite intent to violate the antitrust laws. Favretto,
compliance program was relevant to the question of the company's intent. In addition, the Department of Justice will give some weight to a well-intentioned plan at the pre-indictment stage. In civil litigation, however, the compliance program per se is irrelevant, since most offenses do not require the existence of specific intent. Nevertheless, certain aspects of the procedures discussed above may individually be a great help in defending civil litigation. For instance, the documents referred to above establishing a meeting-competition defense, or that the company was not selling below reasonably anticipated marginal costs, may be extremely useful in the defense of litigation brought charging that type of violation. Along with the benefits, however, there are burdens. If defendant has a compliance program, the government or a civil plaintiff may inquire into all its aspects and use information uncovered as a result of the compliance program that indicates the deviation of one or more employees from procedures the program has established.

VII. CORPORATE PRIVILEGE

As outlined above, a compliance program will generate a number of documents. It is unlikely that most of these documents will be protected by any recognized privilege. This suggests that the doc-

supra note 18.
77. Baker, supra note 64, at 53, 66.
80. The attorney-client privilege requires inter alia that a communication be made in confidence for the purpose of securing legal advice. It does not protect preexisting documents. United States v. United Shoe Mach. Co., 89 F. Supp. 357, 358-59 (D. Mass. 1950). The most recent Supreme Court case on the subject is Upjohn Co. v. United States, 449 U.S. 383 (1981). It is doubtful that the mass of documents generated in any of the programs referred to in Paragraph IV(A) will be treated with the confidentiality necessary to invoke the privilege or that they would be found to be "communications to an attorney." See, e.g., In Re Grand Jury Proceedings, 466 F. Supp. 863, 870 (D. Minn. 1979). Cf. Dunn Chem. Co. v. Sybron Corp., 1975-2 Trade Cas. (CCH) ¶ 60,561, at 67,461 (S.D.N.Y. Nov. 10, 1975). Left in the corporate files, they probably would be considered pre-existing documents. As to the application of the work-product doctrine, it is generally found that the doctrine only protects documents which are generated in anticipation of litigation. See, e.g., United States v. Leggett & Platt, Inc., 542 F.2d 655 (6th Cir.), cert. denied, 430 U.S. 945 (1976). While some courts have held that the document does not have to be generated for the specific litigation in which the doctrine is asserted, no cases have been found where the doctrine has been applied to documents which were generated for the defense of potential litigation in general with no specific case on the horizon. Furthermore, the doctrine is not an absolute bar to discovery, particularly as to documents simply setting forth facts. There is some limited
documents must be reviewed regularly. If a violation is discovered, as already mentioned, prompt action should be taken.

CONCLUSIONS

(1) Most, if not all, companies need to have a compliance program. The present-day price of not having one is simply too high.

(2) The form of the program will vary from company to company. In some cases, the program can be relatively simple and uncomplicated, while in others it may require more detail and formality.

(3) If the program is to have any reasonable chance of achieving its objectives, it will have to be accepted and promoted, in letter and spirit, by the chief executive officer. Bald statements that the executive's major objective is to make his division profitable cannot be allowed to subvert the company's commitment to obeying the law.

(4) The company constantly must work at making the program a success. Its effectiveness will be directly equivalent to the amount of effort put into it.

(5) Counsel for the company should search out other ways to minimize the company's exposure. It should consider a program recording the reasons for given corporate actions, particularly price moves; a program to eliminate nonessential records; and a program inquiring into the reasons for, and benefits it derives from, membership in any association of competitors.

I. INTRODUCTION

When Congress passed the Federal Surface Mining Control and Reclamation Act of 1977 (hereinafter the Act), there was little resistance to the premise that, since surface coal mining has adverse effects on our natural resources, federal regulation of such activity is imperative. Some of the express purposes outlined in the Act lucidly stated the unavoidable conflict between those persons concerned with protection of the environment and those persons committed to the maximum and efficient production of coal, a most important commodity: 1) to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations; 2) to assure that surface mining operations are not conducted where reclamation required by the Act is not feasible; 3) to assure that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with surface coal mining operations; 4) to assure that the coal supply essential to our energy requirements, as well as to our economic and social needs, is provided; and 5) to strike a balance between the protection of the environment and agricultural productivity and the national need for coal as an essential source of energy. The purposes ring of altruism but, in practice, have proven simplistically stated. The “balance” at times appears like the legendary Holy Grail—virtually unattainable.

The Act contemplates and provides for state implementation by way of submission to the Department of the Interior’s Office of Surface Mining Reclamation and Enforcement (hereinafter OSM) of reclamation plans which must be approved in order for the state(s) to avoid total federal regulation. The veritable deluge of federal regulations and the difficulty of many states to obtain the required approval have generated many doubts as to the necessity
for, or the advisibility of, stringent restrictions on surface mining activity imposed by the federal government. Indeed, the opinion has been voiced that, at times in the Act, Congress elected to draft regulations in legislative form, rather than to leave this task to the regulatory agency.4 This article will attempt to align and clarify these two opposing interests and to identify the areas in which their differences appear greatest.

II. LEGISLATIVE EFFORTS SUBSEQUENT TO THE ACT

Senate Bill 1403, the purpose of which was to extend the time by which states must submit reclamation plans to OSM for approval, and, more substantively, to reaffirm Congressional intent that the primary authority to enforce the Act lies with the states, was introduced to the Congress in 1979. A fundamental provision of the proposed amendment was the elimination of the necessity for states' compliance with title 30, section 731 of the Code of Federal Regulations.5 The bill, introduced by Senator Mark O. Hatfield, triggered widespread support, as expected, from the chief executives of the states where surface mining is prevalent.6 Support for its passage also came from non-coal producing states, largely as an affirmation of the principle that the states should be the ultimate regulator in such areas.7

The bill was approved by a not-overwhelmed Democrat-majority Senate.8 It suffered an untimely demise, however, when Congress' adjournment in 1980 occurred while the bill was still pending in the House Committee on Interior and Insular Affairs. No similar

5. 30 C.F.R. § 731 (1981). The regulation contains some 3 pages of elaborate mandates and requirements for inclusion in each state program.
6. Letters from Gov. John D. Rockefeller IV of West Virginia to the Hon. Mark O. Hatfield (July 6, 1979); Gov. John N. Dalton of Virginia to Mr. Hatfield (July 6, 1979); Gov. Dick Thornburg of Pennsylvania to Mr. Hatfield (July 20, 1979); Gov. James R. Thompson of Illinois to Mr. Hatfield (July 16, 1979); Gov. Bruce King of New Mexico to Mr. Hatfield (July 11, 1979); Gov. Arthur Link of North Dakota to Mr. Hatfield (July 6, 1979); Gov. Fob James of Alabama to Mr. Hatfield (July 17, 1979); Gov. Ed Herschler of Wyoming to Mr. Hatfield (July 16, 1979), reprinted in S. REP. No. 96-271, 96th Cong., 1st Sess., 17-19, 21-2, 24-25 (1979).
8. The vote was sixty-eight to twenty-six and thirty-six of those "for" votes came from the forty-one member Republican minority, S. 1403, 96th Cong., 1st Sess., 125 Cong. Rec. 115 (1979).
legislation has been introduced as of this date.

III. Litigation: A Case Study of Virginia Surface Mining and Reclamation Association, Inc. v. Andrus

A. Federal District Court Action

The inevitable challenge to the constitutionality of the Act came with the filing in a Virginia Federal District Court in 1979 of Virginia Surface Mining and Reclamation Association, Inc. v. Andrus,9 including a motion for preliminary injunction with respect to enforcement of certain provisions of the Act. The trial court judge's interlocutory order enjoining enforcement of sections 502-52210 was reversed by the Fourth Circuit Court of Appeals.11 The appellate court reasoned that the trial judge had incorrectly applied case law standards12 instead of the statutory prerequisites for such injunctions, as expressed in the Act itself, the latter containing more stringent requirements for the administration of a regulatory statute.13 This action by the appellate court, however, presented only a temporary setback for the petitioners. The district court, following a thirteen-day trial on the merits, issued the injunction holding sections 515(d), (e) and 52514 violative, respectively, of the tenth and fifth amendments to the United States Constitution.15

Subsection (d) and (e) of section 515, which lists the environmental performance standards and contains the controversial portions of the Act, require a post-surface mining return of

12. These standards were set forth in Blackwelder Furniture Co. v. Selig Mfg. Co., 550 F.2d 189 (4th Cir. 1977).
13. Under 30 U.S.C. § 1276(c) (Supp. II 1978), Congress set forth the following three prerequisites for temporarily enjoining any order or decision rendered by the Secretary of the Interior: (1) all parties to the proceedings must have been notified and given an opportunity to be heard on the request for temporary relief; (2) the person requesting the relief must have shown that there is substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and (3) such relief must not be granted as will adversely affect the public health or safety or cause significant environmental harm to land, air or water resources. The Circuit Court of Appeals found that the trial court had complied with neither the second nor the third statutory requirement. See 604 F.2d at 315.
14. 30 U.S.C. § 1265(d), (e) & 1275 (Supp. I 1978). In order to be consistent with the language of the court decisions, references to the Act in the text of this article, are to its section number prior to codification. See Pub. L. No. 95-87, 91 Stat. 447 (1977).
15. U.S. Const. Amend. X and V.
the land to its "approximate original contour." The district court dubbed this "the most intrusive practical aspect of the Act." Recognizing Congress' purpose and power in enacting the legislation to protect commerce and the national interest, the trial judge nonetheless held that the Act virtually divested the Commonwealth of Virginia of its right to determine the appropriate usage of its land and thereby to direct the economic development of the state. In so holding, the court pointed out that pre-strip mining value of southwest Virginia coal land is five to seventy dollars an acre, but such land is worth at least five thousand dollars per acre after leveling, sometimes as much as three hundred thousand dollars an acre or one thousand to five thousand dollars a front foot. Therefore, said the court, restoration to its original contours reverts the land to lower values. In addition, return of a steep slope to its original contour is "economically infeasible and physically impossible. The cost of production of coal is increased up to seventy percent." The court felt the ultimate irony to be the potential increase of environmental harm: the instability of the reconstructed mass of earth would cause erosion and, thus, sedimentation and eventual collapse would be imminent. Finding that the Act operates "to displace State's freedom to structure integral operations in areas of traditional governmental functions," the court held the return-to-original contours provisions of the Act to be in violation of the tenth amendment. The effect of enforcement, the opinion concluded, was to render the mining of coal economically and physically impossible and to prevent the state from using land for other purposes, such as for the construction of airports, schools, hospitals, or agricultural usage.

17. 483 F. Supp. at 433.
18. Id. at 431.
19. Id. at 435.
20. Id. at 434.
21. Id.
22. Id. at 435.
24. Id.
The fifth amendment violation found by the court resulted from the restricted usage of land mandated by the Act and the consequent diminution in value, causing a "taking" without just compensation. Citing Pennsylvania Coal Co. v. Mahon as precedent, the court found that, since the restoration of steep-slope surface-mined land to its "approximate original contour" made it "physically and economically impossible to mine the coal," the requirement was tantamount to taking property from the mineral owners without compensation. Even were such restoration possible, the court continued, such restoration clearly and significantly diminished the value of the land. The deprivation was, therefore, not only of the most profitable use of the land by its owners, but of any use whatever, since "mountainous terrain is unusable for all income producing activities unless it is level, which the Act is aimed at preventing."

In relying on Pennsylvania Coal, in which Justice Holmes' opinion invalidated a Pennsylvania statute which prohibited any mining that would result in subsidence of structure(s) used as human habitation owned by anyone other than the owner of the coal underlying the structure, the court noted the improper exercise by the Commonwealth of Pennsylvania of its police powers, which the Pennsylvania Coal court felt was not "justified as a protection of personal safety." There was no effort by the district court in Virginia Surface Mining to distinguish between the respective state and federal powers—police powers and Commerce Clause power—in using Pennsylvania Coal as authority.

The court also invalidated certain provisions of the Act as violative of the fifth amendment's Due Process Clause, specifically, the provision allowing summary cessation of mining operations without affording the operator a hearing in the event the inspector deemed an "immediate danger" to be present, and the provision requiring an operator against whom a civil penalty has been assessed to pay the penalty in escrow as a prerequisite to contesting

25. 260 U.S. 393 (1922).
27. Id. at 434.
28. Id. at 441.
29. See 483 F. Supp. at 441, where the trial court expressly calls the facts at issue to be "on all fours" with Pennsylvania Coal.
31. 30 U.S.C. § 1271(a) (2) (Supp. II 1978); See 483 U.S. at 448.
32. 30 U.S.C. § 1268(a) (Supp. II 1978); See 483 U.S. at 448.
its amount.\textsuperscript{[33]}

Pending appeal, the United States Supreme Court stayed enforcement of the federal district court judgment.\textsuperscript{[34]} It is a bit of an anomaly that one of the amicus curiae briefs filed in support of the position of the original petitioners, the coal producers seeking to have the Act declared unconstitutional, had been the work of James Watt, newly appointed Secretary of Interior, in his former capacity as Chief Counsel of the Mountain States Legal Foundation.\textsuperscript{[35]} His subordinates at the Department of the Interior later argued against the position taken in that brief.

It was the opinion of many that the district court holding, if affirmed by the Supreme Court on the fifth amendment issue, would necessitate a recomputation and reconsideration of the cost of attaining national environmental objectives.\textsuperscript{[36]} Their rationale took into account the illimitable monetary compensation that would be due those persons who, in compliance with the Act's steep-slope reclamation provisions, were precluded from what the district court considered an economic use of the property in its unrelcaimed state. According to this view, such an obligation to compensate, in practice, would have prohibited any comprehensive land use plans to protect the environment.\textsuperscript{[37]}

B. \textit{Supreme Court Holding: (1) The Majority Opinion}

On direct appeal, the Supreme Court, on June 15, 1981, unanimously reversed those portions of the district court decision holding that subsections (d) and (e) of section 515 and section 525 violated the tenth and fifth amendments.\textsuperscript{[38]} The Virginia case was consolidated for purpose of oral argument with \textit{Andrus v. State of Indiana},\textsuperscript{[39]} in which the constitutional issues were identical. The Indiana federal district court, however, also had held the Act to be an unconstitutional exercise by Congress of its Commerce Clause power. That court called the effect of surface coal mining on prime

\begin{thebibliography}{99}
\bibitem{33} 30 U.S.C. § 1268(c) (Supp. II 1978).
\bibitem{34} 445 U.S. 922 (1980).
\bibitem{37} Id. at 48.
\bibitem{39} Indiana v. Andrus, 501 F. Supp. 452 (S.D. Ind. 1980).
\end{thebibliography}
farmland "infinitesimal . . . or trivial," finding the "prime farmland" sections, all of which closely regulate surface mining activity in such areas, to be beyond the scope of Congress' power as set forth in the United States Constitution.

Justice Marshall's majority opinion affirmed that portion of the Virginia district court holding rejecting the litigants' Commerce Clause challenge, applying the "rational basis" test to determine whether Congress had properly exercised its power. Similarly, in the companion decision, the Court held that the Indiana district court had improperly substituted its judgment for that of Congress. The majority strongly emphasized the narrowness of the courts' task in deciding whether Congress' exercise of its Commerce Clause power has been proper. Once a court is satisfied that there exists a "rational basis" for Congress' finding that an activity affects interstate commerce, its role is reduced to determining whether "the means chosen by [Congress] is reasonably adopted to the end permitted by the Constitution."

The Court diverged sharply from the district court's finding that subsections (d) and (e) of section 515 violated the tenth amendment restrictions on Congress' exercise of its Commerce Clause power and interfered with the states' "role as a decision-maker in areas of traditional governmental services," including that of regulating the use of land within its borders. The majority deemed the district court's application of the Supreme Court's holding in National League of Cities v. Usery to be erroneous, since the Act is not, as National League of Cities requires, regulatory of "States as States." The Court based this conclusion on two facts: the steep-slope provisions of the Act regulate the activities of private coal mine operators, not those of the state of Virginia; and the state could indeed assume complete regulation of such activities by submitting a proposal for a permanent state plan of compliance to

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40. Id. at 458.
41. 30 U.S.C. §§ 1257(b)(16), 1258(a)(2)(C), 1260(d)(1), 1265(b)(7), 1265(b)(20), and 1269(c)(2) (Supp. II 1978).
42. U.S. Const. art. I, sec. 8, cl. 3.
43. 452 U.S. at 281.
47. 483 F. Supp. at 432.
48. 452 U.S. at 282.
50. Id. at 854.
Regarding the state’s contention that the state plan, required to meet mandatory minimum federal standards, consequently results in federal government regulation of the state’s function as an entity, the Court invoked the Supremacy Clause doctrine of allowable preemption by Congress of state laws regulating private activity. It urged that “nothing in National League of Cities suggests that the tenth amendment shields the states from pre-emptive federal regulation of private activities affecting interstate commerce.”

Perhaps the most consequential area of the Supreme Court decision is that portion reversing the district court finding that the federal government’s enforcement of the Act was a “taking” that violated the fifth amendment “just compensation” clause. The only applicable test, said the Court, is whether the Act “denies an owner economically viable use of his land.” In an almost cursory disposition of the issue, the Court stated that land owners are not prevented from making beneficial use of their land, since the Act, rather than “categorically prohibit(ing) surface coal mining . . . merely regulates the conditions under which operations may be conducted.” The Court emphasized the absence of any attempt whatever to regulate any alternative uses in the Act, which instead merely imposed certain requirements that must be met before surface mining activity is undertaken. The conclusion of this portion of the opinion rapped the procedural knuckles of the petitioning coal operators, since the record was devoid of any efforts by them to obtain a variance from subsection (d)’s “approximate original contour” provision, or to request a waiver of subsection (e)’s surface mining restrictions. The failure of the litigants to avail themselves of either of these potential solutions rendered the “taking” issue “simply . . . not ripe for judicial resolution.”

The Court then addressed the lower court’s holding that the “immediate cessation” provision violated the fifth amendment

51. 452 U.S. at 291.
52. Id. at 292.
53. Id. at 294, accord U.S. Const. amend. V.
55. Id.
56. Id.
59. 452 U.S. 296.
Due Process Clause. This section vests the Secretary of the Interior with discretion to order total or partial cessation of surface mining operations if he feels such operation violates the Act and thereby creates an "immediate danger to the health or safety of the public, or is causing, or can reasonably be expected to cause, significant, imminent environmental harm to land, air, or water resources,"61 such order to be issued prior to a hearing on the merits. The Court, conceding that the ordinary due process requirements include a hearing whenever one is deprived of a significant property interest,62 concluded that the summary administrative action provided for in section 521(a) (2) fell within the "emergency situation" exception,63 since the protection of the public and safety of the environment are of "paramount governmental interest."64 The Court disagreed with the district court's opinion that such orders may be issued summarily, despite the absence of statutory objective criteria, comparing the relatively specific standards of the Act and implementing regulations with those more generalized criteria of statutes in which such summary action has been upheld.65 Further, the majority stressed the availability to operators against whom such orders have been issued of prompt and expeditious administrative hearings and subsequent judicial review.66 The Court also upheld the five-day maximum time section 525(c)67 allows the Secretary to respond to requests by operators for temporary relief from immediate cessation orders, which the district court had suggested be reduced to twenty-four hours.68 There had been no introduction of evidence that less than the five-day period was feasible administratively.

Finally, the Supreme Court reversed the district court finding that the "payment under protest" provision69 pending appeal of a civil penalty violated due process, since there had been no evidence adduced that the parties litigant had ever been subject to any such

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61. Id.
63. Id. at 300, citing, inter alia, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 667-80 (1974).
64. Id.
65. Id. at 298.
66. Id.
68. 483 F. Supp. at 448.
civil penalties. 70

(2). The Concurring Opinions

While a concise concurring opinion by Chief Justice Burger reaffirmed the necessity that the basis of Congress' Commerce Clause action be a substantial effect on interstate commerce, 71 Justice Powell's concurring opinion emphasized that the "taking" issue must be determined on a case-by-case basis, agreeing that there had been no "taking" in the instant case. 72 Justice Powell added a word of caution regarding the Act's potential effects, wondering whether the drafters of the "approximate original contour" 73 provision had fully comprehended the likely economic prohibitions to surface mining which would result in areas with hilly terrain similar to Virginia's.

Justice Rehnquist's concurring opinion expressly stated that Congress' Commerce Clause power is not so broad as to be limitless, which he feared the majority opinion suggested. Indeed, he regarded this particular exercise by Congress to have been "to the 'nth' degree." 74

It is important to note that the unanimity of the Court strengthened the Act, particularly the portions to which due process and tenth amendment objections had been made. Only the possibility of future claims that an enforcement has resulted in a "taking" without just compensation remains, and the Court seems to indicate that such must be scrutinized on a case-by-case basis and will require much more than a showing of diminution of property values.

IV. Opposing Views
A. The Environmentalists' Perspective

The Act has been called "perhaps the most comprehensive environmental legislation yet to be enacted." 75 The "restoration to its approximate original contour" provision, 76 which had been struck

70. 452 U.S. at 294.
71. Id. at 295.
72. Id.
73. Id. at 296.
74. Id. at 307 (Rehnquist, J., concurring in the judgment).
down before the United States Supreme Court held it constitutional, has been criticized by the coal industry as only aesthetically beneficial. Indeed, W.E. Guckert, Director of Pennsylvania Bureau of Surface Mine Reclamation, after a 1976 tour of Virginia strip—mining sites, stated, "I have never seen such utter devastation, exploitation and destruction of the land as I saw in Wise County [Virginia]." Environmentalists' response to this position in the Congressional hearings which led to the Act's passing was that, irrespective of aesthetic effects, improper or inadequate reclamation has led to water pollution, safety hazards, and increased flooding; correlative, they reasoned, a proper implementation of this provision would drastically reduce soil erosion and minimize water pollution, thereby protecting all mine-site residences and establishing new habitats for the wild life deemed vital to the ecosystem of an area.

Much of the opposition has been directed toward the federal assumption of regulation, as opposed to allowing the states to control their surface mining activities. Was the federal effort necessary? Many states had attempted to pass adequate legislation, several quite comprehensively. For example, the West Virginia effort in 1971 was widely regarded as the strictest such statute in the United States. The Congress, after six years of intensive debate, apparently was convinced that the need for federal action was imperative. The statute itself concisely expressed the reason: "Surface mining and reclamation standards are essential in order to ensure that competition in interstate commerce among sellers of coal produced in different states will not be used to undermine the ability of the several states to improve and maintain adequate standards on coal mining operations within their borders." In deeming federal regulation of surface mining necessary, Congress viewed the natural urge of the states to shield their coal industries from inherent disadvantages of competition as an impassable deterrent

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77. 483 F. Supp. at 435.
79. Grandis, supra note 75, at 455.
81. W. VA. CODE §§ 20-6-1, 20-6-32 (1980).
to passage of sound reclamation legislation. As Senator Morris K. Udall, one of the bill’s sponsors, stated, “[W]ithout federal standards political reality militates in favor of loose controls.”^{84} The feeling of the majority in the Congress was that the need for minimum environmental standards and uniform priorities for mining and reclamation was evident, since the states’ programs were so different as to have resulted in drastically varied standards being applied in each state.^{85}

Essentially, the Act provides a safeguard: it is prophylactic legislation, designed to prevent deterioration of the environment by actions which, because of insufficient or hurried planning, have transgressed far more than had been anticipated prospectively. The complexities of dealing with natural resources and the inability to comprehend those complexities or to predict the long-range effects of surface mining dictate that industry exercise rational control so as to prevent unnecessary destruction.^{86}

Perhaps the ills the Act was designed to prevent and, to the extent possible, to correct have been most articulately stated by Senator Udall in reconstructing the concerns of the Senate during the drafting of the legislation:

I do not believe I will ever forget the people — the citizens of Appalachian coal fields, the farmers of the Midwest or the ranchers of the Northern plains. They understand the nation’s need to mine and burn coal, but they are not so sure the nation understands what bad mining practices can do to their communities and way of life. For six long years these people expended their limited resources again and again to come to Washington to tell their story. At every opportunity during our field investigations they met our delegations to point to the creek that once ran clear, to the mountain where they used to hunt or to the road once safe for a school bus. These people made an

85. See Grandis, supra note 75, at 458.

The incredible proliferation of our species and demand for resources has forced us to operate far beyond our understanding, possibly at great expense to the future generations. The most important single concept of ecology is that there exists a vast complex interrelationship between all elements of our natural world. Not even the simplest of natural systems is understood. The worth of maintaining our natural diversity cannot be underestimated.

*Id.* at 49.
impact on the federal law, and those of us who came to know them believe that their influence should continue.87

The endeavor was not easily nor perfunctorily undertaken, and those supporting it have voiced a very real and fundamental frustration with previous inadequate controls.

B. The Need for Coal Production: The Position of the Industry

It is elemental that the extraction of coal must be effected in a manner most protective to the environment. The “balance” listed among the Act’s purposes88 must be remembered, however, lest environmental concerns strangle the coal production essential to the nation’s economy and energy supply. In his March 16, 1978, address to the Houston Law Review Energy Conference, Carl E. Bagge of the National Coal Association called coal “the nation’s principal energy reserve, a reserve that can and must be fully utilized.”89 Bagge proposed that a simultaneous achievement of all national objectives is not possible, enumerating such goals as (1) an adequate supply of energy to meet our needs at “affordable prices;” (2) improved quality of the environment; and (3) a sound and healthy economy, including full employment and a continual rise in our standard of living.90 The United States’ recoverable reserves, that is, coal of known locations deemed mineable from an economic perspective utilizing present technology, are approximately 260 billion short tons,91 making allowance for unrecovered fractions of fifty percent in deep mining and fifteen percent in surface mining.92 While fifty-six percent of the nation’s coal production came from surface mines in 1976,93 the reported present figure is thirty-three and two-third percent.94

The negative environmental characteristics of surface mining are countered, according to its proponents, by its more positive ones: for example, it is a safer method than the underground extraction procedure, and it yields more miner productivity.95 These humani-

87. Udall, supra note 84, at 557.
88. See note 2 supra.
90. Id. at 1086.
93. Id. at 1105.
95. See Holdren, supra note 92 at 1105.
tarian and economic consequences must not be lightly discounted.

It should be noted that a further environmental obstacle has proven harmful to the industry. Because of their reluctance to assume the necessary pollution control costs, electric utilities, long coal's chief consumers, have limited their usage of coal, which has resulted in an over-capacity in the industry of 100,000,000 tons per year and approximately 20,000 unemployed miners. And former President Carter's proposal that usage of coal be significantly increased is deterred by the provision in the 1977 amendment to the Clean Air Act forbidding significant deterioration of the air. This legislation and its requirements for compliance further compound the problem of achieving the "balance" the Act recommends.

V. FEDERAL REGULATIONS ADOPTED AND/OR PROPOSED SINCE VIRGINIA SURFACE MINING

The approach to these problems of the Reagan Department of the Interior, the parent department of OSM, has been under the controversial guidance of President Reagan's appointee, Secretary James Watt, who was confirmed by the Senate by an 83-12 vote, on January 22, 1981. Watt's pre-confirmation statement to the Senate Energy and Natural Resources Committee gave insight into his views, which clearly favor production over environmental values:

[T]his country must commit itself to a reasoned, environmentally conscious program for developing and utilizing the tremendous energy resources our nation possesses. Unless we have such a program, economic, social and political pressures will grow to such an extent that the federal government will be forced in a crisis situation to mount a crash program to develop coal, uranium, oil shale, tar sands and oil and gas. All too often, the federal government moves in a crisis, not with the precision of a surgeon's scalpel, but with the force of a meat ax. Those of us who love and are committed to preserving the beauty and values of our environment, fear this possibility. We want the right kind of development to come over time, not the wrong kind of development to come in a crisis.

Secretary Watt had indicated his responsibility to be to balance demands of environmentalists with the demands of those persons

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concerned with proper and maximum use of the land. Accordingly, he has announced his intent to reorganize OSM, reducing its staff from the present one thousand to six hundred.\textsuperscript{100} Indeed, as a move toward implementation of this plan, he ordered the Denver, Colorado, office closed, effective August 31, 1981.\textsuperscript{101} Such reorganization, according to Secretary Watt, will place primary enforcement responsibility of the Act with the individual states, as Congress intended.

Some of the regulations which have become final under Secretary Watt are changes that came in response to complaints from state agencies that the existing regulations did not provide sufficient flexibility for meeting the varying needs of the several states. The section of the Act setting forth the standard for federal approval of state programs\textsuperscript{102} was amended,\textsuperscript{103} changing the wording of the standard required for a state's regulations from "no less stringent than" the Act and the federal regulations\textsuperscript{104} to "no less effective than" the regulations of the Secretary. The so-called "state window" provision,\textsuperscript{105} was deleted. It had required a state requesting approval of a procedure proposed as an alternative to those in the regulatory sections relating to OSM\textsuperscript{106} to meet certain conditions, including a showing that the substitute procedure is "necessary because of local requirements or local environmental or agricultural conditions."\textsuperscript{107} These changes unquestionably give the states more discretion in adopting a plan which OSM will approve.\textsuperscript{108}

The regulation\textsuperscript{109} limiting time for abatement of a violation before OSM will automatically issue a cessation order, previously ninety days, was expanded by an amendment, which allows an extension of time to a permittee who can show that timely abatement is not feasible because of the reasons specified in sub-section (e),\textsuperscript{110}

\textsuperscript{100} See James Watt's Land Rush, Newsweek, June 29, 1981, at 22.
\textsuperscript{101} Id.
\textsuperscript{102} 30 C.F.R. § 730.5(b) (1981).
\textsuperscript{103} 46 Fed. Reg. 53,376 (1981) (to be codified at 30 C.F.R. § 730.5(b)).
\textsuperscript{104} § 503(a) of the Act requires, in order for a state program to be approved, that the state law be "in accordance with" the Act and that the state's rules and regulations be "consistent with" those of the Secretary.
\textsuperscript{106} Id. ch. VII.
\textsuperscript{107} See note 105 supra.
\textsuperscript{108} See note 103 supra.
\textsuperscript{110} 46 Fed. Reg. 41,702 (1981) (to be codified at 30 C.F.R. § 722.12(e)) (proposed Dec. 1,
one of which is that timely abatement would result in more environmental harm than it would prevent. Among those regulations not yet approved as final is a proposed change of the regulation that requires a permittee to pay a penalty as a prerequisite to contesting the violation or the penalty. The Supreme Court did not address the constitutionality of this requirement in Hodel, but the proposed regulatory amendment would allow a waiver of this pre-payment requirement, if paying would prevent the permittee from continuing his business.

There have been no changes, nor proposed changes, to the “approximate original contour” regulatory provisions. The existing statute and regulations do permit variances from the requirement in steep slope reclamation, if such variances will both improve watershed control of the permit area and adjacent lands and make the permit land suitable after reclamation for an “industrial, commercial, residential, or public use, including recreational facilities.” Such proposed use, however, under the current regulation, must be “an equal or better economic or public use,” than the pre-mining use. Secretary Watt’s easing of restrictions, if they are characteristic of his construction of the Act’s reclamation provisions and their implementation, may be the forerunners of a proposal drastically relaxing, if not eliminating entirely, the “approximate original contour” requirement. Indeed, he has expressly stated his plans to reverse the opposition of the federal government to mountaintop mining.

As Secretary Watt perceives his charge, it is to “swing the pendulum back to center” from an environmentalist position he
deems extreme and impractical; he does not agree that such will effect a policy favorable to the mining industry, but, rather, one committed to a proper maintenance of the land’s usability. He is often criticized for his fundamentalist religious belief, expressed to the House Interior Committee after his approval, that, although natural resources should be preserved for future generations, it is sheer conjecture as to how many generations will be around “before the Lord returns.” Watt seems to imply that perhaps it is not the intent of the Creator that we handicap ourselves regarding present use of our resources by a futile attempt to conserve what we cannot “take with us.” Recent attempts to influence the president to replace Watt are indicative of contagious feelings among environmentalists that his position is neither a reasonable nor an impartial one. Others concerned with possible irreversible environmental damages have questioned Watt’s policy to eliminate the need to prepare an environmental impact statement regarding the proposed and adopted regulatory changes. The National Wildlife Federation filed suit in the District of Columbia District Court against Watt in his official capacity, seeking a stay of enforcement of these regulatory changes and an injunction against promulgation or adoption of any additional changes until an environmental study has been prepared.

VI. Conclusion

Despite the escalating costs imposed by environmental regulations, coal remains today “the cheapest of the fossil fuels on an energy basis.” Perhaps the only solution to the nation’s energy problems is a marked decrease in our consumption of energy. National energy demands in the past, however, have been consistently high; if the demand continues, the deployment of every possible energy source will be forthcoming on a “crash basis.”

124. Id.
125. Evans & Novak, The Campaign to Kill-a-Watt, Richmond Times-Dispatch, August 21, 1981. See also, Chamberlain, Sense and Nonsense about Natural Resources, Richmond Times-Dispatch, October 30, 1981, at A-14, in which the Sierra Club’s “Watt Petition Week” of October, 1981, is discussed. The organization had instigated an attempt to obtain a million “anti-Watt” signatures to give to Congress. Apparently, the President was not influenced by this effort, since he has given no outward indication of displeasure over his choice of Secretary of the Interior.
127. See Holdren, supra note 92, at 1094.
128. Id. at 1108. Mr. Holdren reaches the rather sobering conclusion that “In the context of near-term and medium-term alternatives, coal is too good not to use.”
Syndicated columnist John Chamberlain recently wrote of the "emotionalism" of environmentalists, stating that alternative sources of energy, such as hydrogen fuel, are met with "a mysterious combination of hostility and indifference." Similarly, development and use of nuclear power is surrounded by a multitude of doubts with regard to its acceptability, from the perspective of both society and politics. Expansive use of solar energy, although derived from an abundant source, will require considerable technological development. The reliability of the comparatively abundant supply of coal, compounded with the relative economics of its cost and extraction, when viewed alongside other energy sources, make coal, although concededly not ideal, indeed "too good not to use."

It is hoped that the nation's leadership will provide the necessary paring down of the myriad of regulations, which will ensure reasonable extraction of all our energy resources, including coal and will not result in an inordinate amount of harm to the environment. Jenkin Lloyd Jones recently commented on over-regulation problems that "Uncle Sam has a legitimate role as policeman to prevent misuse of everybody's heritage. But as a manager? Well, look at the post office." Simultaneously with the revitalization of a property regulation coal mining industry, an economically beneficial "shot-in-the-arm" to the mounting problem of unemployment should result.

It is not plausible that Congress' 1977 effort was intended to effect a near cessation of the strip mining of coal; surely the Act was intended to regulate reasonably strip mining's devastating effects on the environment. The coal industry has made unparalleled strides in efforts and expenditures to minimize environmental harm, and it is necessary for those proponents of a complete absence of adverse effects on the environment to realize the inherent elements of risk in the production and usage of the energy our nation demands and needs. It is, similarly, necessary for the industry to accept the inevitable responsibility of land preservation and reclamation to the greatest extent practicable. The conflict is not irreconcilable, but much negotiation and compromise must take place before a resolution may occur.

130. Id. at 1109.
HISTORICAL AND PRACTICAL COMMENTS ON ABSTRACTING LAND AND MINERAL TITLES IN KENTUCKY

by Bruce Stephens, Jr.*

INTRODUCTION†

As most lawyers are well aware, particularly those in the eastern part of the state who are called upon to abstract land and mineral titles, our state is unique, or virtually unique. Except for that portion of the state known as the Jackson Purchase in far western Kentucky, no part of the state was surveyed and laid off in sections and townships. Hence, deed boundaries more often than not are understood with great difficulty, if at all. Unless streams or watercourses, ridges and other identifiable natural boundaries are used, the only means left to determine the description of the property under abstract are trees, stones, and temporary stakes or, more often, merely the names of the adjoining land owners. The author has been told of a Leslie County deed that has for its beginning corner a shock of fodder. That story is no doubt exaggerated, but the author himself has seen a recorded deed that began “at the cliff where the hogs used to waller.” The point made here, directed toward any potential abstractor of Kentucky mineral titles, is that he or she is sure to encounter a very real and difficult problem of boundary description.

I. HISTORY OF LAND TITLES IN KENTUCKY

Difficult and troublesome descriptions are not what make Kentucky titles unique. Rather, it is the history of land titles in this state which makes the life of the abstractor both a misery and a supreme legal challenge. No other state is like Kentucky, in that much of the state’s lands are covered by three, four, five or more titles, each deducible from and under the great seal of the Commonwealth itself, or that of its mother Commonwealth, Virginia. No other state has been and still is such a fertile field for litigation over land titles. Indeed, the litigation began even before Kentucky became a state. The first volume of Kentucy Reports, covering

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the period from 1785 to 1801, contains nothing but land cases. And that was only the beginning of a situation that later provoked Collins, in his History of Kentucky\(^2\) to declare that "[t]he laws of Virginia for the appropriation of lands were the greatest curse that ever befell Kentucky. Sometimes as many as five or six patents covered the same piece of land; and the occupant, besides the title under which he entered, frequently had to purchase two or three times more, or lose his home and labor."\(^2\)

The curse he refers to came about in the following manner. In the year 1777, the General Assembly of Virginia named that portion of Fincastle County lying west of the Tug Fork of Big Sandy as Kentucky County. Kentucky County encompassed most of what today is the state of Kentucky. In order to reward its veterans of the French and Indian War and the Revolutionary War, as well as to encourage the settlement of its western lands, in 1782, Virginia established land offices and appointed resident surveyors who, pursuant to warrants issued by Virginia, were authorized to enter and survey a given number of acres of vacant and unappropriated land to be granted to the holders of the warrants. In the meantime, Kentucky County, Virginia, had been divided into the three counties of Jefferson, Lincoln, and Fayette, and the surveyors appointed for each county opened their offices for business. Man Butler, in his Valley of the Ohio,\(^3\) written between 1853-1855, tells what happened:

Now commenced that scramble for land, which has distressed and disabled society in Kentucky almost as calamitously as pestilence or famine. The original source of this misfortune was issuing warrants for quantities of land without boundaries, to be surveyed under private direction, instead of its being done by public authority previous to any location by the purchaser. Could the public lands of Virginia have been laid off by public appointment, how happily might the claims of her regular soldiers have been satisfied. . . . The residue might have been snatched from the speculator and offered in open market, for the benefit of the treasury. . . . But other counsels prevailed, and Kentucky was laid open to the conflicting claims of innumerable locators and surveyors on the same ground, till they produced a labyrinth of legal perplexities, through which it became necessary to pursue the landed estate of the country and to place it

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1. 2 L. Collins, History of Kentucky (1877).
2. Id. at 663.
in a state of certainty and security.4

Once the floodgates were opened, the land grants issued by Virginia between 1782 and 1792 inundated and covered virtually all of the eastern half of the state. They are recorded in sixteen books containing some 9,564 grants, some of which cover many thousands of acres. And, as noted already, these grants often covered the same land theretofore granted.

In 1792, Kentucky became a state. Under the provisions of the Virginia Compact with Kentucky, it was specifically provided that Kentucky would recognize and honor these land grants. It may not reflect credit upon our Kentucky forbears, but the fact is that almost immediately upon admission to statehood, Kentucky began to flagrantly violate its solemn agreement with Virginia. In 1793, Kentucky began to issue its own grants of land in much the same manner as had prevailed under the Virginia system. It continued to do so until 1856. In Jillson’s index of Kentucky Land Grants,5 there are listed 9,034 Old Kentucky Grants, 15,730 Grants South of Walker’s Line, and Warrants for Headrights.6

Virtually all of Kentucky was now covered several layers deep in land titles, and one would assume that enough havoc had been wrought. Not so. Further entangling this legal thicket, in 1852, the Kentucky General Assembly approved an act authorizing each and every county to issue warrants upon which the state would issue grants for land, again in much the same manner as had long prevailed.7 Jillson, whose index was published in 1925 and listed only the grants issued up to 1924, listed, in addition to those already enumerated above, 69,356 separate land grants issued pursuant to county warrants.8 It is not known how many have been issued since 1924, but the author has personal knowledge of such a grant being issued as late as 1953,9 and, the process is still going on under the authority of section 56.190 to 290 of Kentucky Revised Statutes.10 Indeed, according to the Land Office in Frankfort, on December

4. Id. at 53.
5. W. JILLSON, KENTUCKY LAND GRANTS (1925). A follow-up work by Jillson, OLD KENTUCKY ENTRIES AND DEEDS (1926), was reprinted in 1969 and 1972. It supplemented the 1925 work and contains additional lists of grants made from 1770's to the 1840's.
6. Id. at 7-11.
8. See note 5 supra.
Governor Carroll signed a patent for twenty-five acres in Wayne County.\footnote{11} The vast legal problems brought about by this system, which Collins called "a curse,"\footnote{12} not to mention the unrest and, in many cases, bloodshed, has not gone unnoticed by the legislature or the courts. Kentucky has passed various laws in its efforts to untangle the mess it has so relentlessly insisted upon creating. The most effective and famous of these laws was adopted in 1906 and was known as the Forfeiture Act.\footnote{13} It stayed in force until 1938, when it was, for some unknown reason, repealed. This act provided for the forfeiture and sale of land grants for failure to list and pay taxes.\footnote{14} Its constitutionality was upheld in the very famous case of \textit{Eastern Kentucky Coal Lands Corp. v. Commonwealth.}\footnote{15} The opinion in the case, which was written by Judge E.C. O'Rear and covers fifty-five pages in the \textit{Kentucky Reports}, is required reading for any serious abstractor of titles in Kentucky. The appellant claimed to own some 447,500 acres, crossing four Kentucky counties under original patents from the Commonwealth of Virginia, issued prior to 1789, when Kentucky separated from Virginia to become a state. The county courts of those counties refused to record the titles as not sufficiently definite to comply with the statute.\footnote{16} From adverse decisions of lower courts, the appellant appealed to the state court of appeals to have the statute declared a violation of the separation compact with the Commonwealth of Virginia, among other challenges.\footnote{17} The court of appeals upheld the statute on the several challenges and determined the grants not specific enough for the recorder to define location or ownership rights.\footnote{18}

\footnote{11} Kentucky Land Patent No. 70205, issued December 19, 1975, to Eugene Goodman, for twenty-five acres in Wayne County.

\footnote{12} See note 2 \textit{supra}.


\footnote{14} \textit{Id.} at §§ 1, 10.

\footnote{15} 127 Ky. 667, 106 S.W. 260 (1907), \textit{aff'd}, 219 U.S. 140 (1911). The opinion extensively discusses the Forfeiture Act and the history of grants in Kentucky, all of which effectively discloses the source of confusion. That confusion led, in 1890, to an amendment of section 251 of the then Kentucky Constitution to protect Kentucky grants and adverse settlers. It further led, according to the opinion, to the passage of the Forfeiture Act in 1906 to negate dormant titles and to protect the treasury and increase revenues: After 115 years of court battles, the state "realized that sometimes sternness is justice, and further leniency injustice." \textit{Id.} at 697, 106 S.W. at 269.

\footnote{16} \textit{Id.} at 698, 106 S.W. at 271.

\footnote{17} \textit{Id.} at 700-02, 106 S.W. at 272.

\footnote{18} \textit{Id.} at 719-22, 106 S.W. at 276.
Pursuant to the Forfeiture Act, a considerable number of old grants were forfeited and sold, often to the claimant in possession under some other title. Therefore, a great number of the problems associated with these old and dormant grants were eliminated. Some also have been settled by litigation brought about by the acquisition of a large portion of the land and mineral rights, particularly in eastern Kentucky, by land holding companies. These acquisitions occurred between 1880 and 1915 and were the occasion for numerous land suits involving both title and boundary disputes. The old grants and the problems associated with them simply refuse to die and pass into history, however. As late as 1957, a claim under an old Virginia grant covering some 750,000 acres in Pike and Floyd Counties was seriously asserted. After a 1911 forfeiture of the land to the state, the court upheld the action because subsequent purchasers had relied on the action and millions of dollars had been spent in development of the area in the fifty years that had elapsed. A subsequent action by the same plaintiff held that, even though the grant holder did not have actual notice of forfeiture, such forfeiture was still valid. Some knowledge, therefore, of the history of Kentucky land titles would seem helpful, if not essential, to any would-be abstractor of these titles today.

II. ABSTRACTING MINERAL TITLES

A. Establishing Title to Land

The sovereign, that is the Commonwealth of Kentucky, is deemed to have possessed the original title and has the ultimate ownership in and to all lands within her boundaries. Essentially, therefore, there are only two methods of establishing title to land in Kentucky: (1) By regular chain of conveyances from the claimant back to the original grant from the sovereign, or (2) title based upon possession by the claimant and/or his predecessors in title, which is adverse or antagonistic to the true title under the original grant from the sovereign.

22. "The Commonwealth of Kentucky is deemed to have possessed the original, and has the ultimate property in and to all lands within her boundaries." KY. REV. STAT. § 381.010 (1972).
The law presumes that the holder of the true legal title to real property also has possession of it. This presumptive possession is commonly called constructive possession as opposed to actual physical possession or enclosure by a well-marked and defined boundary. The paramount title, or the senior of contending titles, carries with it constructive possession. Constructive possession is a fragile possession, however, and may be defeated by actual possession to the extent of the area actually under physical possession or by actual possession under a color of title to the well-defined boundaries of the color of title. Thus, a junior patent or grant may ripen into paramount title, even though it be entirely within the boundaries of a senior grant, if the requisite actual possession is had by the owner of the junior grant for the statutory period along with the intent of claiming to the extent of his boundary.23

The color of title afforded by a junior grant is to no avail, however, in the absence of actual possession within its boundaries and, in the case of any overlap of a junior grant onto a senior grant, the requisite possession by the junior grant owner must be within the overlap, if the owner of the senior grant has any actual possession anywhere on his grant. If the owner of the senior grant has no actual possession anywhere on his grant and has only the constructive possession thereof, then any actual possession by the junior grant owner of any part of the junior grant will extend his possession to the whole. In such a case, it is said that the actual possession of the junior grant owner, together with the intent to claim to the boundaries of his grant, extends his possession by construction to the full extent of his boundary.24

It may be seen, therefore, that (1) actual possession on the junior grant, plus (2) intent to claim to the extent of the boundary, is

23. See, e.g., 3 American Law of Property § 15.11; Elliott v. Hensley, 188 Ky. 444, 222 S.W. 507 (1920).
24. See, e.g., Tennis Coal Co. v. Sackett, 172 Ky. 729, 190 S.W. 130 (1916) (a case extensively defining adverse possession and its effect on dormant Eastern Kentucky patent rights); Bates v. Wright, 201 Ky. 420, 257 S.W. 45 (1923) (prior patent is superior where junior patent can only acquire title by adverse possession); Combs v. Algoma Block Coal Co., 283 Ky. 160, 138 S.W.2d 1033 (1940) (defines superiority of senior patent and relates that any overlap of conflicting patents gives priority to senior patent, unless that portion be subject to actual and adverse possession by the junior); Gillis v. Martin, 284 Ky. 714, 145 S.W.2d 1051 (1940) (patent, although void, was sufficient for color of title and valid to the full extent of its defined boundaries, unless part was adversely possessed by another); Carlson v. C. & C. Coal Co., 115 F. Supp. 666 (E.D. Ky. 1953), aff'd, 218 F.2d 384 (6th Cir. 1954) (junior patent was found to be sufficient color of title to vest rights of ownership upon adverse possession).
sufficient to overcome the bare constructive possession of the senior grant. But if the senior grant owner has actual possession of any part of his grant, his constructive possession extends to the whole thereof and is superior to the constructive possession under the junior grant. Thus, in the case of an overlap by a junior grant, title to that portion of the junior grant creating the overlap is void.\textsuperscript{25} It is said that the constructive possession of the junior grant is not sufficient to oust the constructive possession of the senior grant under such circumstances. In general, these same rules prevail when there is a conflict between two or more junior grants. That is, the oldest in point of time will prevail. A statutory expression of this rule is contained in section 56.190(2) of Kentucky Revised Statutes.\textsuperscript{26}

As pointed out in the historical note above, Kentucky is covered many layers deep in these titles, and the vast majority of both land and mineral titles today will ultimately depend on possession under a junior patent or grant. It should be clear, then, that any serious abstractor of titles must have a working knowledge of these rules, some of which are peculiar to Kentucky. His task is to trace the chain of title back to the original senior grant, and confirm as a matter of fact possession under that grant. If that cannot be done, and generally, it cannot, then his efforts are directed toward tracking the chain of title back to the Commonwealth under a junior grant, and establishing the possession necessary under it to oust any bare constructive possession that may have existed under the original or any other senior grant.

\textbf{B. Establishing Title to Minerals}

These concepts of possession and constructive possession must be thoroughly understood by the abstractor of land titles, since construing most land titles depends upon possession. Nonetheless, in abstracting a mineral title, it is easy to be misled by possession. For example, it is rarely safe to place any reliance in a title examination going back thirty, forty, or even fifty years. Such a mineral

\textsuperscript{25} Combs v. Algoma Block Coal Co., 283 Ky. 160, 164-65, 138 S.W.2d 1033, 1036 (1940).
\textsuperscript{26} Every entry, survey, or patent is void insofar as it embraces land previously entered, surveyed, or patented, unless the previous entry, survey, or patent itself is void; in which case the first subsequent lawful entry, survey, or patent, whether issued before, on, or after June 13, 1944, shall be valid and be accorded the same force and effect it would have been entitled to have been accorded, had the void entry, survey, or patent never been issued.

title examination is generally useless because most mineral titles were severed from the surface estate much earlier. Therefore, for the minimum mineral title search, it is necessary to run the chain of title and the off conveyances back to the severance deed of the common grantor of the mineral estate and the present surface owner in possession. When this is accomplished, reliance may then be placed on the possessory title of the surface owner, which inures to the benefit of the mineral owner.

Under section 381.430 of Kentucky Revised Statutes, the grantor of mineral rights and his successors and assigns are deemed to hold possession for the benefit of the mineral owner. That is, the surface owner is made a trustee and holds the mineral in trust for the benefit of the mineral owner. This has the effect of precluding the surface owner from claiming the mineral by adverse possession unless he specifies repudiates the trust. The surface holder, being a trustee in possession, can never acquire title against his cestui que trust by any length of possession, for his possession never becomes adverse. Therefore, if it can be determined that the present surface owner in possession derived his title from the same source as the mineral title, then the mineral title is sound and worthy of reliance. As a caveat, however, it should be pointed out that the abstractor must make sure that the claimant in possession of the surface is not claiming through another superior source of title.

27. Wherever the mineral or other interests in or right appurtenant to land in this state have passed, or shall hereafter pass, in any way, from a claimant in possession of the surface of the land, the continuity of the possession of such mineral, interests and rights shall not be deemed thereby to have been broken; but the possession of the surface by the original claimant thereof, from whom such mineral, interests or rights passed, or by those claiming through or under him, or by virtue of a judgment against him in an action to which the holder of the mineral, interests or rights is not a party, shall be deemed to be for the benefit of the person, his heirs and assigns, to whom the mineral, interests or rights have passed.

Id. § 381.430.

28. See, e.g., Scott v. Laws, 185 Ky. 440, 215 S.W. 81 (1919) (a surface owner could not adversely possess the mineral rights conveyed away by previous owner); Piney Oil & Gas Co. v. Scott, 258 Ky. 51, 79 S.W.2d 394 (1935) (owner can only lose rights to mineral by physical adverse possession and partial mining not sufficient to sever legal title of remaining mineral estate held by another); Ward v. Woods, 310 S.W.2d 63 (Ky. 1955) (surface owner holds severed mineral estate as trustee for legal title owner and periodic taking of coal by surface owner does not affect mineral estate title in adverse possession claim); Kentucky River Coal Corp. v. Singleton, 36 F. Supp. 123 (E.D. Ky. 1955) (in absence of an explicit disclaimer of ownership, surface owner holds mineral estate in trust for separate legal title holder).

29. Kentucky River Coal Corp. v. Bayless, 318 S.W.2d 554 (Ky. 1955). In this case, it was held that the subsequent purchase of a quit claim deed by the surface owner preempted a coal company's mineral estate claim based on a deed granted earlier by the surface owner's
C. Locating Boundaries

Finally, the abstractor of Kentucky titles must also have a working knowledge of the rules governing the location of boundaries for, as emphasized earlier, rare is the chain of title that does not contain boundary descriptions requiring the greatest of patience in their deciphering. Many of these rules are elementary but will bear repeating here.

In general, natural and permanent monuments and objects, such as streams and ridges for example, are the most satisfactory evidence and control all other means of boundary description. Artificial monuments and markers, courses, distances and area or acreage follow in order of importance with area, or acreage being the weakest of all means of description.

In Metropolitan Life Insurance Co. v. Hoskins,30 in which it was determined that metes and bounds recited in a deed controlled an incorrect recitation of the acreage, Kentucky’s highest court summarized the basic principles it employed: “In determining boundaries, the general rule is that natural and permanent monuments are the most satisfactory evidence and control all other means of description. Artificial marks, courses, distances, and area follow in the order named, area being the weakest of all the means of description.”31

There are many limitations, however, on the general rule. For example, although natural and permanent objects control courses and distances, if it can be shown that the original surveyor called for an object, believing it to be located in one place, when in fact it was located elsewhere, it has been held that courses and distances will control. The case of Asher v. Fordson Coal Co.32 is the authority for this exception to the general rule. Asher concerned a dispute over timberland that had been filed some twenty-five years before, prompting the court to compare the suit to Rip Van Winkle and to accuse it of having “laid down on the sword . . . and slept as long or a little longer.”33 With resigned prolixity, the court pronounced the rule, deciding the suit in favor of the distances cited in the deed:

predecessor in title. The quit claim deed was obtained from a superior chain of title originating in an original patent. Id. at 556-57.
30. 273 Ky. 563, 117 S.W.2d 180 (1937).
31. Id. at 568, 117 S.W.2d at 182.
32. 249 Ky. 496, 61 S.W.2d 20 (1933).
33. Id. at 496, 61 S.W.2d at 20.
The case must come within the qualification of that rule that, where in making a survey for a grant the original surveyor, in ignorance of the position or location of an object which he makes the terminus of one of his lines, calls for the object under the mistaken belief that it is at one place when in fact it is at an entirely different place, the bearings and distances reported by the surveyor will control the lines, and the call for the object will be disregarded.44

It is remarkable that, even after being the cause of a suit that occupied the courts for a quarter of century, the surveyor's misapprehensions were patiently excused.

Another exception to the general rule, similar to that in Asher, is the principle, pronounced in Cornett v. Kentucky River Coal Co.,35 that distances will not give way to courses when the facts are peculiar and the error in distances is not "reasonable:"

[The] rule of sacrificing distances to courses is only a general rule, and is subject to many exceptions where . . . some other more satisfactory method of adjusting the error is disclosed . . . A frequent reason given for departing from this general rule is where, by following it, a figure is produced that does not correspond with the original survey and plat upon which the patent is issued, and which always may be looked to in determining the proper mode to be adopted in closing the survey.36

In Cornett, which upheld "a contract for the sale of a tract of land on Clover fork of Big Leatherwood creek of the north fork of the

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34. Id. at 500, 61 S.W.2d at 22. Language from the case describing the mistaken survey evinces a genuine colorfulness and rich historical flavor that is found in many boundary disputes:

The first and second lines of the survey have always been agreed upon as being the proper calls. The fourth line is, "N. 45 E. 100 poles to the gap in the divide between Buzzard's Branch and Mace's Branch." Abandoning different claims made in the trial court, both sides now agree upon the identity of the gap. But the call is 22 poles short of reaching that gap. The next call, which is that causing the dispute, is, "N. 83 E. 130 poles to Carter Helton's line." That falls far short of reaching Helton's line. Extending the course an indefinite distance, the line would miss Helton. In order to reach Helton at the closest point, a variance of 18 ¼ degrees and an extension of 173 poles are required. So this fifth call must be made to read, "N. 64 1/2 E. 303 poles to the southermost corner of Carter Helton's patent." The next call is, "N. 25 W. 270 poles to a stake on top of the divide between Marrowbone (Creek) and Turkey Branch." In order to get from Helton's southermost corner to the ridge, the call must be made to read, "N. 55 ¼ W. 262 poles," instead of "N. 25 W. 270 poles." The seventh call requires a change of only one degree in the course, the distance remaining the same. The eighth and last call works out all right.

Id. at 499, 61 S.W.2d at 21.

35. 175 Ky. 718, 195 S.W. 149 (1917).

36. Id. at 726-27, 195 S.W. at 153.
Kentucky river, in Perry County,"37 another "reason for departure from the . . . general rule" is set forth: courses and distances do not control "where a known error in established lines may be offset by a corresponding change in the lost line opposite, when the course or distance called for in the lost line opposite the known error, or both, may be changed to close the survey."38

Still another important limitation on the general precepts concerning the priority of objects and lines is the rule that a boundary line of a named adjoining owner is considered a natural object, and a deed or patent calling for such an adjoining line must run with the adjoining property line if that line may be located. In Fidelity Realty Co. v. Flahaven Land Co.,39 the word "east" was determined to have been incorrectly substituted for the word "west," due to the clear indications of the boundaries of the property in question in terms of their proximity to the boundaries of adjoining owners.40 The court recognized that while "distances yield to courses,. . . . both courses and distances yield to natural objects."41

Another exception to the basic principle that distance yields to course controls the situation in which the perimeters of property are uncertain. Combs v. Valentine42 is the embodiment of the rule that a lost corner of a boundary may be found by extending a line from the known or proven corners on the courses called for until they come together and intersect.43 Combs summarizes the rather complicated legal guidelines for locating the lost corner of a survey, so that the survey may be made to "close," that is, return to the point at which it began:

From one of the adjacent corners which remain, the courses and distances of the lost lines ought to be run, as called for in the plat and certificate of survey, and, if they close with the other adjacent corner which remains, the true situations of the lost corners, and consequently the true situations of the lost lines, will be satisfactorily ascertained. But of the courses and distances thus run do not close the survey, it must be accomplished by running the same courses, and either lengthening or shortening the distances, as each case may require, and in proportion to the length of each line, as called for in

37. Id. at 719, 195 S.W. at 150.
38. Id. at 727, 195 S.W. at 153.
40. Id. at 359, 236 S.W. at 261-62.
41. Id.
42. 144 Ky. 184, 137 S.W. 1080 (1911).
43. Id. at 189, 137 S.W. at 1082.
the plat and certificate of survey. And, if the survey cannot be made to close by this means, then, and not otherwise, a deviation from the courses called for must also aid in accomplishing the purposes.\textsuperscript{44}

After a quite complicated series of machinations, the court locates the proper boundary, unfortunately on the wrong side of "seventeen valuable white oak trees," which the defendants had sawed into logs and for which the plaintiffs sought recom pense.\textsuperscript{46}

In cases in which a lost corner of a boundary is sought, it is important that proper variation for declination in a magnetic survey be given, based upon the proper declination from true North at the date of the original survey. This rule was first announced in \textit{Bryan v. Beckley},\textsuperscript{48} which declares other principles for "restoring and renewing lost lines and corners," and makes clear that partial inaccuracies will not vitiate a claim to land.\textsuperscript{47} Noting that a court ought to take judicial notice of "the laws of gravitation, the descent of the waters, the diurnal revolution of the earth or the change of seasons, in cases where they would apply," the \textit{Bryan} court recognized that since the time of the original survey of the land in question in 1774, the magnetic meridian had "progressed eastwardly" disclosing that "a gross error was committed in running the existing line."\textsuperscript{48} When a similar problem arises today during the abstracting of a title, very helpful meridian tables may be obtained from the National Oceanic and Atmospheric Administration in Rockville, Maryland.

It may be useful to conclude with one final comment from the courts on the purpose served by the rules for locating boundaries.

\textsuperscript{44} Id.

\textsuperscript{45} Id. at 184, 137 S.W. at 1080. The case offers an excellent example of the deed description employed during this era and its reliance on line trees:

Beginning at the head of the Robert Bowling branch, where the road crosses the mountain, to the Coal branch at a beech, dogwood, and sourwood; thence with the meanders on the top of the ridge to a chestnut oak, a corner of one thousand acres survey made in the name of Justus Bowling; thence a straight line to a black oak, being a corner of one thousand acres survey made in the name of Justus Bowling; thence a straight line to a black oak, being a corner to said Eversole tract, N. 9° E. 92 poles, to a stake; thence N. 47° E. 4 poles, to a walnut; thence N. 67° E. 36 poles, to a black gum; thence N. 42° E. 36 poles, to two poplars; thence S. 5° E. 74 poles, to a beech and maple; thence S. 14° W. 34 poles, to a chestnut; thence S. 40° E., to the top of the ridge. . . .

\textit{Id.} at 185, 137 S.W. at 1080.

\textsuperscript{46} 16 Ky. 91 (Litt. 1809).

\textsuperscript{47} Id. at 92-93.

\textsuperscript{48} Id. at 95.
In Rogers Brothers Coal Co. v. Roberts, the Kentucky Court of Appeals asserted, "The object of all rules for the establishment of boundaries is to ascertain the actual location of the boundary as made at the time." Thus, where the boundary cannot be located, either by the description in the original document, or by other means such as recognition, long-standing acquiescence in its claimed location by the parties, estoppel, or practical location, the deed is void for indefiniteness.

CONCLUSION

It is hoped that this brief commentary, intended to make their task somewhat easier, will not discourage any lawyers from taking on the formidable task of abstracting land and mineral titles. Such work is financially rewarding, partly because the "land lawyer," whose forerunners included many of the best legal minds ever developed in Kentucky, has now become a vanishing breed. A list of these worthies would have to include Judge Monroe Fields, Lewis Harvie, Jesse Morgan, Cleon Calvert, Peyton Hobston, Francis Rice, and Charlie Carpenter. Of course, there are many others. All of them were proud to be called Kentucky "land lawyers." Though aspects of modern law might confound them, the rules employed in abstracting titles, which seem so complex today, were second nature to them.

49. 216 Ky. 214, 287 S.W. 725 (1926).
50. Id. at 216, 287 S.W. at 726.
51. Id.
SELECTING JUDGES IN THE STATES: A BRIEF HISTORY AND ANALYSIS

I. INTRODUCTION

"There is no guarantee of justice . . . except the personality of the judge."

—Justice Benjamin Cardozo

"The quality of our judges is the quality of our justice."

—Professor Robert Leflar

The quotations above not only rebut the overly simplistic notion that our government is one of laws, not of men; they also explain why there has been such controversy and debate concerning the methods by which judges should be chosen for office. If the quality of justice is, at least in large measure, dependent upon the quality of the judges, then the manner of judicial selection becomes a question of critical importance.

Historically, the meaning of judicial quality, the best means of securing judicial quality, and the role of judges have all been subject to disagreement among societies and to debate among various groups within societies. The European continental democracies have tended to emphasize professionalism, almost in a civil service sense, in the selection and retention of their judges.8 The United States has emphasized partisanship, demanding both judicial accountability and responsiveness to the public. These demands have politicized the American judiciary to an extent greater than that found in other democracies.

. . . Compared with the judicial system in almost every other modern polity, American judges exercise extraordinary influence over the course and resolution of public issues. . . . Judges are either elected by the people or appointed by highly placed elected officials. As a result, not only are courts for the most part in politics, they are at times highly political and vitally linked with traditional political


processes. Since judges rely upon political party processes for selection, retention, and evaluation, it is not surprising to find a highly complex weave of mutual aid and interdependence between courts and political parties. This relationship is virtually inevitable.4 (emphasis in original)

For all of this politicization, however, the goal of professionalism has rarely been explicitly abandoned. In essence, the United States has sought two models of a proper judiciary. These models, while they may not be mutually contradictory, are generically quite distinct, representing very different sets of goals. One model envisions a democratic judiciary, one elected by the people and, hence, both responsive and responsible to them. A second model insists on a judiciary imbued with what former Chief Justice Arthur T. Vanderbilt of New Jersey described as the three “essentials” of a true judge: impartiality, independence, and immunity.5

Patrick Winston Dunn has compiled, from both historical and contemporary sources, lists of judicial selection qualifications pertaining to the second model.6 From these lists, Dunn arrived at six fundamental selection qualifications for a judge: (1) a thorough working knowledge of the law; (2) impartiality; (3) decisiveness; (4) independence of action; (5) honesty, fairness, and moral courage as well as the capacity to project an honest, fair, and morally courageous image; and (6) an ability to encourage a mutual trust between those who sit on the bench and those who may appear before it.7

While few, if any, would fail to agree that a judge should possess all six of the characteristics listed by Dunn, it should be emphasized that few, if any, of the six elements relate to the first model of the judiciary, the democratic model. Over the years, different

7. Id. at 274. Among the lists of selection criteria examined by Dunn is the list compiled by Rosenberg. Professor Rosenberg surveyed 144 judges at the 1965 summer session of the National College of State Trial Judges, asking the judges to rate 23 qualities they felt would best equip a lawyer to become a trial judge. Most highly rated qualities, in the following order, were: (1) Moral courage, (2) Decisiveness, (3) Reputation for fairness and uprightness, (4) Patience, (5) Good health, physical and mental, and (6) Consideration for others. In general, these qualifications can be found within the lists of good judicial attributes prepared by Sir Francis Bacon and by the 17th century British judge Sir Matthew Hale, both of which can also be found in Dunn. Id. at 271-74.
modes of judicial selection have been championed in an attempt to secure one or the other or both of the above models. Dunn has his own suggested mode, which will be examined later.

II. HISTORICAL PATTERNS IN JUDICIAL SELECTION

Judges in Medieval England, as a part of the Crown, were chosen and lost their offices on the basis of loyalty to a particular monarch. Exercise of this capricious royal prerogative was weakened by the Glorious Revolution and it ended with the Act of Settlement of 1700, which gave judges tenure "for good behavior" and which provided for their removal only by action of both houses of Parliament. The commissions of judges still expired upon the death of the monarch, but that was rectified in 1760 by an act of Parliament which provided for tenure for "good behavior notwithstanding the demise of his majesty."

The Act of Settlement did not apply to the American colonies, however, and so colonial judges were appointed by the King and served at his pleasure. This inequity was one of the abuses cited by the colonists in the Declaration of Independence. After the Revolution, the states continued to select judges by appointment, but all states took steps to eliminate the one-man control of the judiciary which they had experienced prior to the Revolution.

Election soon became the dominant mode of judicial selection in the nineteenth century. The followers of Jefferson and Jackson embraced the English philosophy of Philosophical Radicalism, and judicial appointment by governors fell to Jacksonian calls for long

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8. For historical material generally, see E. Haynes, Selection and Tenure of Judges (1944).
9. Id. at 54-55, 78.
10. Dunn, supra note 6, at 276.
12. "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." Declaration of Independence, Ninth Specification. (U.S. 1776).
13. Seven states provided for legislative appointment of judges. Five states provided for appointment of judges by the governor, but only with the consent of his council. One state provided for gubernatorial appointment with the consent of the legislature. E. Haynes, supra note 8, at 12-16.
ballots in the name of popular sovereignty. Real control over the selection of judges, however, tended to lay in the hands of the leaders of the increasingly powerful, and corrupt, political parties. The legal profession became progressively more disenchanted with the elective system and eventually sought its reform or abolishment. State and local bar associations, prominent jurists, the American Judicature Society, and the American Bar Association all actively supported the abandonment of the elective system over a fifty year period during the late nineteenth and early twentieth centuries.

In 1940, Missouri became the first state to allow certain judges to be selected from nominees recommended to the Governor by a nonpartisan nominating commission. The Missouri Plan, known also as the merit plan or commission plan, proved to be a popular compromise between purely elective or appointive methods, and is now established, at least in part, in thirty-one states. Certain features are common to the merit plans in use. Generally, a variety of public and private officials appoint a permanent, nonpartisan commission composed of lawyers and non-lawyers (although lawyers usually constitute a substantial majority). The commission actively recruits and screens prospective candidates, and then forwards a list of three to five qualified individuals to the governor, who must make an appointment from the list. Normally, appointees serve a one-year probationary term, after which they must run unopposed in a retention election. The sole question on the ballot is, "Shall Judge [ ] be retained in office?" A judge must win a majority in


15. A. Ashman & J. Alfini, supra note 11, at 10; R. Watson & R. Downing, The Politics of the Bench and the Bar 7-8 (1969). William Howard Taft opined that it was "disgraceful" to see state judges engaging in political campaigns, and Roscoe Pound claimed that "putting courts into politics" had "almost destroyed" respect for the bench. Berkson, Judicial Selection in the United States: A Special Report 64 JUDICATURE 176, 177 (1980). Of course the comments of Taft and Pound reek with aristocratic elitism and show a haughty disdain for the democratic model. Perhaps that disdain was not without merit, but Pound conveniently ignores the fact that it was Federalist John Marshall who put courts into politics when he assumed the power of judicial review. Pound would give courts power and glory, but would deny democratic accountability. Pound would have his cake and would eat it too.


17. Berkson, supra note 15, at 178. The Berkson article contains an excellent series of tables at 179-193, detailing the mode of judicial selection for all courts in all states. The tables are more readable and up to date than similar tables found in S. Escovitz, JUDICIAL SELECTION AND TENURE (1975). The same tables, with more detailed provisions, can be found in L. Berkson, S. Beller & M. Grimaldi, JUDICIAL SELECTION IN THE UNITED STATES (1980).
order to continue in office.\textsuperscript{18}

While all merit plans contain the foregoing common elements, no plan is identical in any two states, and few states use the plan for selecting judges at all levels of the judiciary. Thus, in one sense, there are three competing modes of judicial selection: appointive, elective, and combined (the merit plan). More specifically, there are five competing and overlapping modes:

1. Executive appointment. Four states allow the governor the power to appoint some judges without a nominating commission.\textsuperscript{19}

2. Legislative or judicial appointment. In three states the legislature selects most, if not all, of the judges. One state allows the legislature to choose only supreme court judges. In two states, judges themselves appoint some of their colleagues.

3. Merit Plan. Thirty-one states use the commission system to aid the governor in selecting judges. Only twenty states use panels for initial selection; the other eleven use panels only to help fill vacancies.

4. Partisan elections. This method is used to select most or all judges in thirteen states. It is used to select some judges in eight other states.

5. Non-partisan elections. This method is used to select most or all judges in seventeen states. It is used to select some judges in three other states.\textsuperscript{20}

While there has been a discernible trend among states toward the adoption of the Missouri Plan, it is in widespread use only in a minority of states. Only four states use the merit plan to select all their judges. Seven others use the merit plan to select judges in all but the lower courts. Election, on either a partisan or nonpartisan basis, is the dominant selection mode in thirty states. In the remaining nine states, there either is no dominant mode or the legislative selection mode dominates.\textsuperscript{21}

III. Analysis of Judicial Selection Plans

In a fully rational world, free of bias and devoid of self-interest, one might expect to see a plethora of quantitative and qualitative studies on the various selection systems, demonstrating the efficacy

\textsuperscript{18} Id. at 177-78.

\textsuperscript{19} Most states allow the governor to appoint a judge without resorting to a nominating commission, to fill a vacancy due to death or retirement.

\textsuperscript{20} These figures are derived from the tabular data in Barkson, \textit{supra} note 15, at 178-193.

\textsuperscript{21} Id.
of each system and determining whether the most efficacious system (that which produces the most qualified judges) is compatible with democratic theory and practice. In this biased and self-interested world, however, there has been "virtually no vigorous scrutiny of the various selection systems."\(^{22}\) The political nature of state courts is equal to that of state legislatures and executive agencies even though the courts appear to be less partisan. Compounding this political nature is the fact that the courts are dominated by a single profession which is allowed to involve itself in nearly every aspect of state politics.\(^{23}\) That "single profession" is the legal profession. That profession, so deeply rooted in the philosophy of \textit{stare decisis}, is by nature profoundly conservative, the bench more so than the bar, "although there are liberal and conservative dimensions within this framework."\(^{24}\) One conservative characteristic is a distrust of man, especially the "common" man.\(^{25}\) The legal profession, then, has adopted the Merit Plan (and the pure appointive plan as its second choice), and seems unwilling to embark on any research that might disclose flaws in the Merit Plan or that might expose advantages of elective systems (systems over which the legal profession will not exercise such a firm degree of control). Thus, the criticism has been levelled that "[t]he legal community . . . has failed to utilize its own resources and those of other disciplines—especially political science, sociology, and history—to examine the operation and ramifications of this plan, and that "[t]his ‘hands-off’ treatment of the Missouri Plan has seriously retarded efforts to reform the judicial selection process."\(^{26}\) Moreover, as one commentator has suggested, the narrow, formalistic, and advocacy-oriented training that lawyers and judges received in law school does not provide them with either the ability or the inclination to appreciate and engage in the openness, imagination, and suspense-of-judgment required of broader-based intellectual research.\(^{27}\) Analyses of judicial selection systems by the legal profession tend to be relatively sparse and superficial. The bulk of analyses, especially those employing quantitative methodologies,

\(^{22}\) Dunn, \textit{supra} note 6, at 298.
\(^{24}\) N. Henry, \textit{Governing at the Grassroots} 141 (1980).
\(^{25}\) For a discussion of liberal and conservative tenets and characteristics, see D. Minar, \textit{Ideas and Politics} 411-19 (1964).
\(^{26}\) Dunn, \textit{supra} note 6, at 297-98.
\(^{27}\) L. Friedman, \textit{supra} note 14, at 593-94.
have come from outside the legal profession, and those have suffered to the extent they were produced without "insider" insight.

A. Elective Plans

In general, proponents of elective systems argue that judges, who actually make policy decisions, should be subject to direct control by the public which, in a democracy, is supposed to be sovereign. If other public officials are held accountable for their behavior in public office, why should not judges, whose actions also affect large numbers of people, also be required to seek periodic public approval of their official performance? 28

In terms of empirical research, David Adamany and Philip Dubois compared Wisconsin's nonpartisan electoral system with other selection systems and concluded that partisan elections are best, for both theoretical and practical reasons. On a practical level, partisan elections encourage voter turnout and produce high levels of legitimacy (low levels of legitimacy can result in widespread civil disobedience, and, potentially, can lead to revolt). More theoretically, they fall back on the standard democratic argument: makers of policy which affects large numbers of people must be held accountable to those people.29

The opponents of elective systems argue that the popular election of judges may subject judges to a host of political pressures and make it difficult if not impossible for them to maintain impartiality and independence. The argument against elective systems has remained pretty steadfast throughout history: the judge's dignity would suffer as a result of involvement in an election, 30 and voters aren't sufficiently sophisticated to determine which qualities are necessary for the making of a good judge, and choose accordingly.31

28. An example of a typical pro-election viewpoint can be found in Kennelly, Elect Judges? - Yes, The Rotarian, June, 1961, at 40.
30. "The people are the worst possible judges of those qualifications essential to a good judge. They could select an orator . . . . But the chief objection to an elective judiciary is the effect it has upon the office; its dignity; its just weight; its hold upon the general confidence." ALBANY L.J. 18 (July 5, 1873), quoted in, L. FRIEDMAN, supra note 14, at 324-25.
31. "[T]he voters . . . know little more about the candidates than what their campaign pictures may reveal. Nor do they have any great desire to know much more . . . . Their concern is centered on the executive and legislative candidates because these candidates are identified with the only issues and causes which interest the voters. Roseman, A Better Way to Select Judges, 48 JUDICATURE (1964), quoted in E. Dvorin & A. Misner, Governments Within the States 63 (1971).
Partly because of the above objections, seventeen states resort to nonpartisan judicial elections. Supporters argue that the nonpartisan elective system enables judges to be held accountable to the public, while avoiding the disadvantages of forcing judicial candidates to take partisan positions on issues during the campaigning period. In fact, considerable research has shown that nonpartisan elections have serious disadvantages. The underlying premise—that politics can be removed from politics—is ludicrous. Elections by their very nature are partisan affairs involving contestants for some designated prize. Party partisanship exists, then, covertly in nonpartisan elections. Astute citizens find it easy to determine the party affiliation of the candidates. Less informed or less intelligent voters are penalized.

In nonpartisan elections, turnout is generally smaller because the information and incentive provided by overt party competition is lacking. Lower socio-economic groups (who traditionally align themselves with the Democratic Party) disproportionately fail to vote in nonpartisan elections. Thus, considerable evidence has shown that nonpartisan elections are characterized by a "Republican bias." The real losers in nonpartisan elections, however, are not the Democrats but both the general public and the concept of judicial accountability. While the voter in a partisan election may not know the specifics of the candidate's platform, the voter can easily identify the political party behind the candidate and thus vote according to his or her general understanding of the ideals for which the party stands. Partisan elections, therefore, allow the less informed or less sophisticated voter to cast a comparatively well-reasoned vote and, in this way, increase the judge's accountability to the voters.


33. If the public knows little about judicial candidates, they might nonetheless cast intelligent votes in a partisan election. At the simplest level, party labels permit voters, especially the "have-nots," to identify those in power, to fix responsibility by party, and to make retrospective judgments on judicial conduct. But more important is the correlation between party affiliation and policy preference. Voters' party allegiances are not random; there is a high correlation between party identification, ideological outlook, and issues preference . . . . Party labels . . . provide useful guidance to voters, who can usually be confident that a Democratic judicial candidate will favor liberal decisions on the bench and Republican aspirants conservative positions . . . . By sharp contrast, the voter has little guidance in nonpartisan elections . . . .
Although nonpartisan election is the most popular judicial selection system, being the dominant mode in seventeen states, compared to thirteen states using partisan elections and eleven using merit systems, empirical research has consistently characterized it as the worst selection system. It requires judges to compete in electoral contests, but it affords none of the advantages of partisan elections. The system thwarts informed voting, discourages voter participation, and makes a farce of the principle of accountability. In other words, nonpartisan elections encourage and reward ignorance, apathy, and irresponsibility.  

B. Appointive Plans

Proponents of pure executive appointive plans (without prior nomination by commissions) are somewhat rare. Jacksonian democracy and the ideology of popular sovereignty drove most supporters of executive appointment into America’s closets. Only four states have a judicial selection system in which executive appointment is the dominant mode and, in all four states, the governor’s appointments must be ratified by senate majorities or, in the case of New Hampshire, by a five-member elected council. In a nation with universal suffrage, it is far more popular to support neo-appointive merit plans, which combine executive appointment with a retention election. Supporters of executive appointment and proponents of merit plans have much in common. They argue that executive appointment protects the dignity of the judiciary in removing judicial selection from the battleground of partisan elections. In fact, of course, only elections are removed. Partisanship remains: “Indeed, most scholars who have studied the recruitment of judges have concluded that it is one of the most political or partisan aspects of our judicial system. This conclusions holds true even with regard to those attempts to keep partisanship to a minimum, i.e., the Missouri Plan.” Intensive partisanship has been candidates. Nor did they know the issue stances of those aspirants. And they had little information about their qualifications . . . . Nonpartisan ballots and campaigns vastly reduce the accountability of judges to voters.  

Adamany & Dubois, supra note 29, at 775-76.  
34. Research and articles on the evils of nonpartisan election are legion. See e.g., Vines, Courts as Political and Governmental Agencies, in Politics in the American States 266-67 (H. Jacob & K. Vines eds. 1965); Barber, Ohio Judicial Elections, 32 Ohio St. L. J. 762 (1971); Judicial Selection and Tenure, 42 U. Cin. L. Rev. 255, 263-65 (1973).  
the rule in the national governmental system,\textsuperscript{37} and the state executive appointment systems are just as partisan as the national model. As some judges themselves have expressed it, "[A] judge simply is a man who knew the governor."\textsuperscript{38}

Proponents of executive appointment of judges argue, however, that the governor is in a better position to evaluate judicial candidates than is the electorate, and even claim that it would be "undemocratic to impose on the democratic process burdens it is not equipped to bear."\textsuperscript{39} The notion that the judgment of one man is superior to the judgment of the electorate in some cases may be correct, but it is hardly a proposition that will meet with public approval and therefore, it is generally not a practical recommendation for determining the system of judicial selection in most states.

The three eastern seaboard states in which legislative appointment is the dominant judicial selection mode avoid the stigma of one-man control over the judiciary. The legislative appointment system, however, is just as partisan as the executive appointment system. The only significant difference lies in the fact that these states choose judges who are not only of the same party as the majority party in the legislature, but who are also ex-legislators.\textsuperscript{40} No study has ever demonstrated that ex-legislators have characteristics that make them more suitable for the bench than members of other demographic groups.

Direct judicial accountability to the public is, of course, a casualty of both the executive and legislative appointment systems. Indirect accountability is possible in those executive appointment states that allow the governor to run for reelection. But indirect accountability is not really feasible in legislative appointment states, because the accountability must be spread throughout the legislature. No citizen can, under the plurality (single member district) electoral system used in the United States, vote for more than two members of the legislature. Those voters in minority party districts, then, are denied even indirect accountability, while voters in majority party districts are allowed only a weak and dif-
fused indirect accountability.

Like nonpartisan electoral systems, which exist in spite of their deficiencies, pure executive and legislative appointment systems seem to possess few advantages and appear to have no future outside of the states in which they currently exist.

C. The Missouri Plan Systems

A plan which, supporters argue, eliminates the worst and preserves the best of both appointive and elective systems, is the Missouri Plan. Used exclusively in four states and partially in another twenty-seven, this merit plan has the alleged advantage of removing partisanship from judicial selection by requiring the governor to appoint judges from candidates who have been initially screened and selected by a knowledgeable, nonpartisan judicial nominating panel. Proponents of the plan argue further that use of the plan results in the selection of better qualified judges while, at the same time, reducing the partisan nature of judicial selection. Finally, its supporters point to the fact that the plan makes judges accountable to the public by providing for a retention election in which the judge runs only against his own record, not against an opponent.

Critics of the Missouri Plan argue that it combines the worst rather than the best of the appointive and elective methods. Detractors insist that there is nothing in the plan to prevent either the selection panel nor the governor from choosing candidates on political or partisan grounds. Considerable research has validated this criticism. One typical study concludes that "governors have used their appointments to reward friends or past political supporters and have implemented the plan very largely from a personal and political viewpoint." Partisanship exists, then, but in a covert form, and critics say it is all the worse precisely because it is hidden.

A second, more common criticism is that, since most nominating panels are dominated by lawyers, the politics of the bar association is substituted for the politics of the contested election. Critics point out that, not only is the concept of judicial nominating panel elitist, but the panels themselves are elitist and unrepresentative of the legal profession because they tend to be staffed by the most conservative lawyers: "The people are not qualified to choose their own judges . . . . Rather their judges would be chosen for them by

the wise, the virtuous and the well-born, [in other words], the leaders of the state bar association."

The retention election is the focus of a third criticism, with detractors declaring that, since judges run without opposition, they face no serious threat of defeat. Moreover, the voters, deprived of the debate and publicity of a partisan contest, lack the information necessary to adequately evaluate the judge. Thus, voter turnout is low, and the Missouri Plan judges are almost never voted out of office. Research once again validates this criticism. One study showed that out of 179 merit plan judges running in retention elections, only one was not retained.

IV. CONCLUSION

The debate over which judge selection plan is best is largely dependent upon the assumption that it makes some kind of measurable difference which plan is used—that one plan results in better qualified judges. Rhetoric aside, research to date shows few discernible differences among the various plans in terms of the quality of judges selected.

In terms of prior experience of judges, the various plans produced few significant differences. The percentages of judges who held prior judicial office, legislative office, state administrative office, or public legal office such as district attorney, municipal council, or deputy or assistant state attorney, were the same regardless of which selection plan was used. The only exception was the previously noted tendency of legislative appointment systems to select high percentages of ex-legislators.

The educational credentials of judges tend to be reasonably good regardless of selection plan, although the gubernatorially-appointed and legislatively-selected judges have slightly higher qualifications than elected and Missouri Plan judges. Also, contrary to what one might expect, "there is a greater tendency for graduates..."

43. Wormuth & Rich, Politics, The Bar, and the Selection of Judges, 3 Utah L. Rev. 459, 461 (1953). One study found that of 371 members of judicial nominating panels, 97.8% were white and 89.6% were male. Among lay members of the panels, banking and business interests held the highest percentage of membership. A. Ashman & J. Alfini, supra note 15, at 38-40.

44. R. Watson & R. Downing, supra note 15, at 335.

45. Borowiec, supra note 3, at 285. Borowiec concludes that this indicates "... the beginnings of a de-facto professional career pattern ... This pattern involves an 'apprenticeship' in a public law position and demonstrated competence as a trial judge." Id. at 284.

46. Id. at 283-85.

47. Glick, supra note 38, at 525.
of night law schools—not of prestigious institutions—to ascend to the bench under the Missouri Plan than under the preceding elective system."

Certainly, no system has an advantage over another in terms of either uncovering judicial misconduct in office or preventing potential wrongdoers from obtaining office.

Finally, both decisional styles and the pattern of decisions are substantially similar among the various selection systems. A study of all fifty state supreme courts tested the hypothesis that courts arranged according to selection method would produce different levels of support for different categories of litigants. No clear pattern emerged based on the type of selection system, although other studies do show a distinct difference in decisions based on the party affiliation of judges. It appears that, whatever method of selecting judges is used, there is little difference in results. As one author has stated, "How judges are placed on the bench appears to be more a result of passing social fancy than of matching a selection process with preferred judicial behavior."

The primary apparent reason for the lack of differences seems to be a desire on the part of nominators and appointers to nominate qualified candidates whose past and future actions are not likely to cause embarrassment to the nominators and appointers. Clearly, it is in the best interests of the nominator or appointer to not only choose a candidate who has been a party activist, but also to select a well-qualified jurist.

48. Dunn, supra note 6, at 299 (summarizing the Watson-Downing findings).
49. Glick, supra note 38, at 531.
50. Id. at 536.
51. See generally Stecher, supra note 4; Nagel, Party Affiliation and Judges’ Decisions, 55 Am. Pol. Sci. Rev. 843 (1961). In general, these studies show that compared to Republican judges, Democratic judges more frequently decide in favor of the defense in criminal cases, the injured in motor vehicle cases, the consumer in sale of goods cases, the injured in motor vehicle accident cases, the employee in employee injury cases, and they were more likely to find a constitutional violation in criminal cases. In other words, "Democratic judges tend to be more liberal, Republican judges more conservative." Adamany & Dubois, supra note 29, at 762, 778.
52. Henry, supra note 24, at 146.
53. Even though a partisan governor and political parties are active in the selection of judges, recruitment does not automatically result in judges with poor reputations for integrity or intelligence, or in judges who can only be described as "party hacks." Little is gained by electing obviously unqualified people to the bench. . . . In order to present the best image of the party to the voters and to encourage others to become politically active, party leaders generally try to accomplish two goals when making appointments: to reward their own party activists, and to fill the vacancy with a respected, qualified candidate. Accomplishing both goals in one appointment serves the party's best interests . . . . Consequently, the election or appointment of clearly
To the extent that there is no appreciable difference among the selection plans in terms of the quality of the judges selected or the pattern of judicial decisions rendered, and to the extent that there is a correlation between a judge’s party affiliation and the decisions he renders, then the original rationale for partisan judicial election is substantial. Partisan elections may not produce “better” judges than other means of selection, but neither, apparently, do they produce “worse” ones. Thus, in terms of both contemporary theory on “legitimacy” and traditional theory on democracy, it would seem more fitting to have republican judges for a republican polity. As one writer has observed, “An elective system may not yield more scholarly judges, or harder working judges, than other methods of judicial selection, but it is likely to produce judges who reflect the partisan composition of the electorate.”

Because of the tendency of the legal profession to ignore research findings and to blindly and steadfastly continue to support “its” Missouri Plan, the prospects for the spread of partisan elections are not promising. An alternative suggestion then, is to “reform” the Missouri Plan by making it more democratic and by rectifying its fundamental weaknesses. Various reform proposals to improve one or more aspects of the Missouri Plan have been made. One of the most comprehensive reform proposals is that offered by Patrick Dunn. Dunn would make the nominating commission more representative of various interests in the state, thereby breaking the dominance of the governor and the organized bar over the panel. This would be accomplished by having seven different entities appoint the eleven members—six lawyers and five non-lawyers—of the selection commission. In addition, the enabling legislation would assure better representation by requiring that members of the selection commission be chosen by geographic area.

Dunn’s plan also contains suggestions concerning the commission budget, confidentiality of proceedings, efficiency of commis-

unqualified or incompetent individuals is not common, regardless of which recruitment system is used.

Glick, supra note 38, at 540.
54. Stecher, supra note 4, at 181.
55. Glick, supra note 38, at 509, 510.
57. Dunn, supra note 6, at 304-25.
58. Id. at 304-05.
sion operation, and terms of office for commission members. The plan's second key reform aspect, however, is the involvement of the legislature in the selection process. The commission would submit three names to the governor who would choose one and then forward it to the judiciary committees of both houses of the legislature. The judiciary committees would then hold a joint open hearing on the candidate. To become final, the appointment would have to pass by a majority vote in both houses.59

The third major reform suggested by Dunn is the elimination of the retention election on the grounds that "experience has shown that such elections have not proved to be a practical evaluative tool."60 Dunn would achieve increased representation of the public interest and indirect accountability through his suggested changes in the composition of the commission and through the nominating process itself. Because of this, the retention election, of dubious value anyway, is not needed. The elimination of the retention election does, however, make it "imperative" that strict tenure and discipline procedures be adopted.61 Actually, such procedures are imperative even with retention elections, since the elections have proven ineffective as democratic devices to ensure judicial competence.62

In view of the slow but apparently inexorable trend of Missouri Plan adoptions, the Dunn proposal merits serious attention.63 It provides for indirect judicial accountability and indirect public representation in the selection process while maintaining judicial "dignity" by freeing judicial candidates from the burden of participating in electoral campaigns.64 As such, it offers a viable alternative to both the "old" Missouri Plan and to partisan elections.65

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59. Id. at 307-10.
60. Id. at 312.
61. Id. at 311-12.
62. One can hardly argue in good faith that merit retention elections are examples of the public exercising its free and informed choice about who should occupy judicial office. As a result, the importance of judicial tenure and disciplinary commissions grows. Since the public is reluctant, for whatever reasons, to remove a judge from office, it has fallen upon the various judicial oversight commissions and committees to ensure the integrity and competence of the judiciary. Jenkins, Retention Elections: Who Wins When No One Loses? Jurisdiction, August 1977, at 86.
63. H. Glick & K. Vines, supra note 23, at 55.
64. Dunn, supra note 6, at 305.
65. Id. at 311.
EQUAL PROTECTION OF THE SEXES IN KENTUCKY:
THE EFFECT OF THE HUMMELDORF DECISION ON A
WOMAN'S RIGHT TO CHOOSE HER SURNAME

INTRODUCTION

In Kentucky, a married woman does not have complete freedom to use the surname she chooses. Section 403.230(2) of the Kentucky Revised Statutes states that, when a married woman with children is granted a divorce, the judge may determine what name she shall have.¹ In addition, a married woman in Kentucky was, until January of 1982, required by administrative action² and legislative inaction³ to use her husband's surname on her driver's license regardless of her own preference.⁴ Although the administrative order was withdrawn,⁵ the United States District Court for the Eastern District of Kentucky upheld the validity of the requirement in the case of Whitlow v. Hodges.⁶ This precedent would allow either a sub silentio or affirmative reinstatement of the order at any time.

The purpose of this comment is to determine the application of the decision Hummeldorf v. Hummeldorf⁷ to the issue of a woman's right to use the surname she desires. In Hummeldorf, the newly devised intermediate standard of equal protection review was adopted in Kentucky for the first time.⁸ To review this decision, appropriate background to the two other levels of equal protection review—rational basis and strict scrutiny—is necessary. Also, a synopsis of the history of women's rights is needed to understand the previous legal atmosphere. Next, the development and application of the intermediate level of review to gender-based discrimination is presented. Finally, the context in which Hummeldorf was decided and its relationship to a woman's legal right to establish her own identifying name are analyzed.

¹. “Upon request by a wife whose marriage is dissolved or declared invalid, the court may, and if there are no children of the parties shall, order her maiden name or a former name restored.” Ky. Rev. Stat. § 403.230(2) (1972) (emphasis added).
². See note 147 infra and accompanying text.
³. See note 175 infra and accompanying text.
I. EQUAL PROTECTION REVIEW—THE TWO—TIER APPROACH

The fourteenth amendment guarantees all persons "the equal protection of the laws." Originally, the claim of a denial of equal protection was interjected only as "the last resort of constitutional arguments." Except in suits based on racial discrimination, the Supreme Court applied a standard of review that was highly permissive and required minimal scrutiny. This standard of review—the rational or reasonable basis standard—was succinctly outlined in *Lindsey v. Natural Carbonic Gas Co.* First, a court will interfere with a state's power to legislate only when the purpose of the law is "without any reasonable basis" and is "purely arbitrary." Second, a classification with any reasonable basis is sufficient and does not require exactness in its application. Third, the reasonable basis or purpose does not have to be the actual basis, but may be any state of facts reasonably conceived or assumed. Finally, the challenger of the classification has the burden of proving the classification is essentially arbitrary. This still viable model is best explained by the late Chief Justice Earl Warren:

The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them.

This test presumes the purpose of the classification to be valid and results in the Court's upholding almost every scheme that is not

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9. U.S. CONST. amend. XIV, § 1. See 16 Am. Jur. Constitutional Law § 737 (1979). Equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, . . . . Equal protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary . . . . in relation . . . . to the public purpose sought to be achieved by the legislation involved. Id. at 738.


11. See Note, Equal Protection and the "Middle Tier": The Impact on Women and Illegitimates, 54 Notre Dame Law. 303, 305 (1978).

12. 220 U.S. 61 (1911).

13. Id. at 78.

14. Id.


16. 220 U.S. at 79.

entirely arbitrary or irrational.\textsuperscript{18}

A second level of review applies to classifications which threaten either a fundamental right\textsuperscript{19} or involve a suspect class.\textsuperscript{20} This level of review requires a "more searching judicial inquiry,"\textsuperscript{21} and the ordinary presumption in favor of a statute's constitutionality is not invoked.\textsuperscript{22} Rather, the state must demonstrate that the classification meets a compelling purpose or a compelling state interest.\textsuperscript{23} Also, the classification is not deemed necessary if its purpose may be achieved by less drastic means.\textsuperscript{24} Classifications reviewed under this "strict scrutiny" test rarely survive, since the standard "demands nothing less than perfection."\textsuperscript{25} Constitutional scholar Gerald Gunther describes the result of strict scrutiny review as "‘strict’ in theory but fatal in fact."\textsuperscript{26}

A related approach to the Court's review of purpose is the doctrine of irrebuttable presumptions.\textsuperscript{27} When employing this doc-
trine, the Court must first decide if a state interest is sufficiently compelling to warrant an irrebuttable presumption of the disputed action's constitutionality; if not, the Court will allow individual hearings to rebut the presumption. When considering either the purpose or presumption, the Court must determine if the classification or presumption applies "equally" to all persons similarly situated. If the presumption or classification applies only to a part of a larger group, it is "under-inclusive." But if persons not characteristically a part of the group are included, then the statute is "over-inclusive." Neither an over- or under-inclusive classification or presumption meets the requirements of equal protection review.

In sum, under equal protection review, the legislative scheme must meet both a purpose test (whether rational or compelling) and an inclusion test (not over- or under-inclusive). Often, the choice of review determines the result. Generally, if strict scrutiny is invoked, the legislation is negated; if the rational basis standard is used, the legislation is sustained.

II. EQUAL PROTECTION FOR WOMEN: 1800-1970—"GLUED TO THE PEDESTAL"

A survey of congressional and judicial protection afforded women prior to the application of equal protection intermediate review displays a pattern of constitutional discrimination against women. During colonial times, women had a legal status similar to children and slaves. Gender-based laws were historically designed
to protect women by virtue of the cultural fixation on the identity of women as "housekeepers, childrearers, and husband custodians."35 Ironically, the first women's rights convention grew out of the sexist treatment of women who participated in the anti-slavery movement.36 In 1840, Lucretia Mott and Elizabeth Cady Stanton were told they had to sit in a special gallery, for women only, while attending the World Anti-Slavery Convention in London. Upon their return to the United States, they organized the first women's rights convention in Seneca Falls, New York, in 1848. But twenty years later, the fourteenth amendment used the word "male" for the first time in any portion of the Constitution.37 Even though the first section of the fourteenth amendment contained language implying equal protection for all, the threefold use of the word "male" in its second section signified, at best, a qualified application to women.38 The fifteenth amendment also failed to include voting privileges for women by specifying only race and national origin as classifications for which states may not deny persons the right to vote.39 Although the women's suffrage movement sought to unite with advocates of Negro suffrage, the response from leaders of the Anti-Slavery Society was "not [to] mix the movements. [Such an alliance] would lose for the Negro far more than we would gain for the woman."40 Some fifty years later, in 1920, women finally were granted the constitutional right to vote.41

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36. S. Nicholas, supra note 33, at 4.
37. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.
U.S. Const. amend XIV, § 2 (emphasis added).
38. S. Nicholas, supra note 33, at 5.
39. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend XV.
41. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend XIX.
The Supreme Court has followed congressional patterns of discrimination by keeping women in their "natural role" as wives and mothers. Subsequent to the passage of the fifteenth amendment, a woman in Illinois was denied application to be a licensed attorney in that state solely because she was a woman. Myra Colby Bradwell had studied law for years with her husband—attorney, published a leading legal publication, the Chicago Legal News, and passed the Illinois bar examination in 1869. However, the Illinois Supreme Court denied her application to practice law. Subsequently, the United States Supreme Court found nothing in the fourteenth amendment to protect against this form of exclusion. In a concurring opinion, Justice Bradley wrote that there is no sex based right to work in any profession. Rather, civil and natural law, as well as female limitations, natural delicacy, and destiny require women to "fulfill the noble and benign offices of wife and mother. This is the law of the Creator." For nearly another hundred years, the Supreme Court and the states continued to "protect" women in other employment-related situations stressing women's child-bearing capacity, regardless of whether the woman in question had children or was past child-bearing years. In Muller v. Oregon, in 1908, the Court upheld an Oregon statute limiting women to ten hour work days because of the perceived need to protect them. In the Court's words: "the supposed differences in body structures, functions and capacities for labor justified the legislative distinctions." Forty years later, the Court continued to uphold statutes permitting different treatment of men and women in employment. During World War II, women had successfully held many jobs usually restricted to men, including bartending. In 1945, the male-controlled bartenders' union in Michigan won enactment of a state statute that allowed only women who were the wives or daughters of male owners of liquor establishments to serve as bartenders. The Court upheld the statute under the guise of "protecting" women, although no evidence was offered of the need or desire for such "protection." The Court based its result on the rationale

42. Bradwell v. Ill., 83 U.S. (16 Wall.) 130 (1873).
43. Id. at 141-42 (Bradley, J., concurring).
44. 208 U.S. 412 (1908).
45. Id. at 422.
47. S. NICHOLAS, supra note 33, at 50 (footnote omitted).
that "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." 48

This attitude continued into the 1960's. In Hoyt v. Florida, 49 a Florida statute was upheld which required women to serve on juries only when they voluntarily and affirmatively registered themselves for jury duty. Men who met jury requirements were automatically registered. The Court determined that the Florida statute was based on "some reasonable classification" 50 because, "[d]espite the enlightened emancipation of women from restrictions and protections of bygone years, and their entry into many parts of the community life formerly reserved to men, a woman is still regarded as the center of home and family life." 51 In 1966, the Court dismissed an appeal of a case 52 in which the Mississippi Supreme Court upheld the total elimination of women from juries. The Mississippi Supreme Court allowed the total exclusion so women could "continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial." 53

As these cases indicate, the protection historically afforded women served to restrict their equal participation in important societal institutions such as the marketplace and the courtroom. All women were, in effect, kept in their "place" as wives and mothers. 54

48. 335 U.S. at 466.
50. Id. at 61-62.
51. Id.
53. Id. at 863.
54. Contrary to the presumption of the Court and states, all women were not mothers or wives. In 1890, 30.6 percent of American women were either single, widowed, or divorced; in 1950, 34 percent. In 1979, 36.5 percent were not married. U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, 15 (1961). U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, Marital Status of the Population by Sex and Age; 1979 43 (101st ed. 1980).

In 1940, 36.6 percent of women ever married between the ages of twenty to twenty-four were childless, and 27.7 percent of the women twenty-five to twenty-nine were childless. In 1975, 42.8 percent of the women twenty to twenty-four years of age were childless, with 21.1 percent of the women between twenty-five to twenty-nine also childless. U.S. DEPT. OF COMMERCE, PERSPECTIVES ON AMERICAN FERTILITY, 10 (1978).

Finally, since the 1890's women have consistently constituted at least 17 percent of the labor force. K. DAVIDSON, R. GINSBURG, & H. KAY, TEXT, CASES, AND MATERIALS ON SEX-

In the 1970's, the United States Supreme Court implemented a new standard of equal protection review based on modified concepts of the identity of women. In Reed v. Reed, in 1971, the Court for the first time implicitly required more than its traditional rationality of a legislative classification of women. In Reed, the Court unanimously invalidated an Idaho statute that preferred a man's appointment as estate administrator when the choice was between two equally entitled persons, one male and one female. Although the decision was ostensibly based on the rational basis test, the Court did state that "[t]o give a mandatory preference to members of either sex . . . [was] to make the very kind of arbitrary legislative choice forbidden by [equal] protection." Tribe and Gunther suggest that "only by importing some special suspicion of sex-related means . . . can the result [in Reed] be made entirely persuasive." Thus, the Court implied that gender-based classifications require a level of review applicable to a "quasi"-suspect class.

Just a year and half later, in Frontiero v. Richardson, four of the justices did assume that a special sensitivity was applicable to gender when used as a classifying factor. There, a plurality of the Court declared a federal statute unconstitutional because of the distinction made between spouses of male and female members of the armed services in conferring military benefits. The Court described the effect of the scheme as "romantic paternalism" operating to "put women not on a pedestal but in a cage." In addition, the Court stated that any "statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving admin-


57. 404 U.S. at 73.
58. Id. at 76.
59. L. Tribe, supra note 56, at 1063 (quoting Gunther, supra note 26, at 34).
60. Note, Equal Protection and Due Process: Contrasting Methods of Review under Fourteenth Amendment Doctrine, 14 Harv. C.R.-C.L. L. Rev. 529, 541 (1979) [hereinafter cited as Equal Protection and Due Process].
62. Id. at 684.
istrative convenience, necessarily commands dissimilar treatment for men and women who are similarly situated and, therefore, involves the very kind of arbitrary legislative choice forbidden by the Constitution."\(^{63}\)

In 1975, two more equal protection cases were determined on the basis of the changed status of women. Prior to *Weinberger v. Weisenfeld*,\(^ {64}\) a woman decedent's social security survivor's benefits were not awarded to her husband despite his responsibility but a man's benefits would accrue to his widow and dependent children. The Court invalidated this provision of the Social Security Act and asserted that "the Constitution . . . forbids the gender-based differentiation that results in the efforts of female workers required to pay Social Security taxes producing less protection for their families than is produced by the efforts of men."\(^ {65}\) And, in *Stanton v. Stanton*,\(^ {66}\) a Utah statute which required parental support of a son until twenty-one and a daughter only until eighteen was held unconstitutional. The Court invalidated that statute on the ground that "a child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family."\(^ {67}\) To deny the daughter equivalent length of support reduced her opportunity for further education and training and "coincide[d] with the role-typing society has long imposed."\(^ {68}\)

In Tribe's analysis of the foregoing cases, each case either "prevented, or economically discouraged departures from 'traditional' sex roles, freezing biology into social destiny."\(^ {69}\) In each instance, the government's assumptions based on traditional female roles were recognized as merely a self-fulfilling prophecy.\(^ {70}\) The changed status of women and new social standards no longer permitted these assumptions to operate.

In 1976, a majority of the Court held that assumptions based on gender classifications were subject to a new intermediate level of

\(^{63}\) *Id.* at 690 (quoting *Reed v. Reed*, 404 U.S. 71, 76-77 (1971)).

\(^{64}\) 420 U.S. 636 (1975).

\(^{65}\) *Id.* at 645. The Court held the gender-based classification to be "entirely irrational" and objected to the presumption that the surviving parent was a dependant mother. The Court noted that "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female." *Id.* at 651-52.

\(^{66}\) 421 U.S. 7 (1975).

\(^{67}\) *Id.* at 14.

\(^{68}\) *Id.* at 15.

\(^{69}\) L. Tribe, *supra* note 56, at 1065.

\(^{70}\) *Id.*
equal protection. In Craig v. Boren,\textsuperscript{71} the Court required that gender-based classifications must serve important governmental objectives and be substantially related to the achievement of those objectives.\textsuperscript{72} The quarrel in Craig v. Boren was with an Oklahoma statute which forbade the sale of 3.2 percent beer to males under twenty-one and to females under eighteen. The state contended that the statute served the governmental objective of enhancing traffic safety and attempted to use statistics of alcohol-related driving offenses to prove the substantial relation of the statute to its objectives. The Court found the evidence to be "an unduly tenuous 'fit'" and noted that "[t]he very social stereotypes that find reflection in age differential laws...are likely substantially to distort the accuracy of these comparative statistics. Hence 'reckless' young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."

The intermediate level of equal protection review adopted in Craig v. Boren has four analytical elements.\textsuperscript{74} First, the governmental objective to be served must be "important,"\textsuperscript{75} a standard lying between the "reasonable" and "compelling" requirements. Second, the means of achieving the important objective must be a close fit or "substantially related to the achievement of...objectives."\textsuperscript{76} Third, there must be a "current articulation"\textsuperscript{77} of the rationale to support the legislative classification. Furthermore, the legislature must clarify the governmental objective at the time the statute was enacted; the Court will not supply a purpose and the purpose cannot be supplied by hindsight. Finally, the legal scheme under challenge, if not struck down altogether, permits rebuttal of the classification in individual cases.\textsuperscript{78} In summary, equal protection intermediate review requires a "tightly focused legislative choice of means to ensure that the aim of the challenged classification is not simply to impose a burden on the group defined by the classification, but is rather an efficient means of dealing with some

\textsuperscript{71} 429 U.S. 190 (1976).
\textsuperscript{72} Id. at 197.
\textsuperscript{73} Id. at 202, n.14.
\textsuperscript{74} Fox, Equal Protection Analysis: Laurence Tribe, the Middle Tier, and the Role of the Court, 14 U. SAN FRAN. L. REV. 525 (1980).
\textsuperscript{75} 429 U.S. 190, 197 (1976).
\textsuperscript{76} Id.
\textsuperscript{77} See Fox, supra note 74, at 530.
\textsuperscript{78} Id. at 531 (footnotes omitted).
important legislative end."79

Although the Hummeldorf decision, with which this comment is primarily concerned, relied on Craig v. Boren, subsequent United States Supreme Court cases are also good precedent for use of the intermediate standard of equal protection review in testing the constitutionality of gender-based practices.

In Califano v. Goldfarb,80 a closely divided Court held unconstitutional another Social Security Act provision similar to the previous provision in Weinberger.81 In Goldfarb, a widow received survivor's benefits without any restrictions, while a widower was required to have received at least half his support from his deceased wife. The Court rejected this paternalistic distinction between men and women. The Court commented that a gender-based differentiation "is forbidden by the Constitution, at least when supported by no more substantial justification than archaic and overboard generalizations or old notions, such as assumptions as to dependency that are more consistent with the role typing society has long imposed than with contemporary reality."82

In 1979, in Orr v. Orr,83 the Court invalidated an Alabama statute which required the husband to provide alimony, but not the wife. Again the Court applied the Craig v. Boren84 requirements of important governmental objectives and a substantial relation to achievement of those objectives. The appellant asserted that the state's purposes were to impose the "provider" (and, therefore, protector) role on the husband, to provide financial help for needy wives from a broken marriage, and to compensate women for past discrimination in marriage.85 In summarizing this case, the Court commented that gender based distributions of burdens or benefits risk "reinforcing stereotypes about the proper place of women and their need for special protection," and "must be carefully tailored."86 In addition, when a gender neutral classification equally

79. Equal Protection and Due Process, supra note 60, at 532.
84. 429 U.S. 190 (1976).
86. Id. at 283 (quoting United Jewish Org. v. Carey, 430 U. S. 144, 173-74 (1977)).
serves the state's purposes, "the State cannot be permitted to classify on basis of sex." 87

That same term, in Personnel Administrator of Massachusetts v. Feeney, 88 all nine members of the Court accepted and adopted the intermediate standard of judicial review for gender-based discrimination cases. In Feeney, the Court held that a Massachusetts statute granting veterans preference in civil service jobs did not violate the equal protection clause of the fourteenth amendment. The important consideration was the purpose behind the law, not the disparate impact or result. 89 However, in dicta, the Court stated that a statute, gender-neutral on its face, if proved to be overtly or covertly designed to discriminate on the basis of sex, would require an "exceedingly persuasive" justification to withstand a constitutional challenge under the equal protection clause. 90 Since, in Feeney, the Court determined that the veterans preference statute was neither covertly or overtly designed to discriminate against women, the Court did not have to determine if the purpose of the statute was exceedingly persuasive. 91 The Court found that the intent of the statute was to benefit veterans, rather than to discriminate against women. 92

In the last ten years, the Court has taken significant steps to end the legal protectiveness long attached to classifications affecting women. As a minimum, states no longer may enact gender-based legislation that does not meet important governmental objectives and which is not substantially related to such achievement. It is also possible that gender-based statutes with an overt or covert purpose to discriminate may require exceedingly persuasive justification, a seemingly stricter requirement than "important." In any event, discrimination against women now may not be justified by assumptions based on stereotypes or classifications that are merely "rational."

87. Id. at 283.
90. 442 U.S. at 273.
91. Id. at 276-78.
92. 442 U.S. at 276, 280.
IV. **Hummeldorf v. Hummeldorf and the Adoption of Intermediate Review in Kentucky**

**Hummeldorf v. Hummeldorf**\(^95\) is the first case in which the intermediate level of equal protection review has been applied to a gender-based distinction in Kentucky.\(^94\) The impetus for Hummeldorf was a husband's filing for divorce in Boone County, Kentucky, where he had moved after separation from his wife. His wife and children continued to reside in Kenton County. The trial court dismissed the husband's petition due to improper venue pursuant to section 452.460 of the Kentucky Revised Statutes, which places divorce venue in the county of the wife.\(^95\) The husband then appealed the dismissal as a denial of equal protection under the fourteenth amendment, as well as Section Two of the Kentucky Constitution.\(^95\) The Court of Appeals reversed the circuit court and directed the trial court either to proceed on the husband's original petition or reject jurisdiction based on other guidelines outlined in the opinion. The result was the Court of Appeals' decision that the Kentucky divorce venue statute was unconstitutional, based on its failure to withstand the intermediate level of equal protection review.

Kentucky's divorce venue statute, originally adopted in 1852, was directed toward the convenience of women.\(^97\) According to the Kentucky court: “The real object, we have no doubt, was to regulate the jurisdiction as to subservie the convenience and possibly the interest of the wife by making the jurisdiction local to that county in which she should, at the time of the commencement of the suit have an actual residence.”\(^98\) This attitude of protectiveness toward women was based on the status of a woman in the mid-nineteenth century. At that time, a wife or mother was simply an extension of her husband and dependent on him.\(^99\) Without any economic independence, women were restrained and possessed lim-

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95. “An action for alimony or divorce must be brought in the county where the wife usually resides, if she have an actual residence in this state; if not, in the county of the husband's residence.” Ky. Rev. Stat. § 452.470 (1975).
Legal actions for alimony and abandonment were available to women in Kentucky. At that time, an underlying assumption of the Kentucky venue statute was that "if the wife filed only for alimony, the husband was at fault for abandoning her." In *Hummeldorf*, the Kentucky Court of Appeals used the new intermediate level of equal protection review to closely examine the traditional protective attitude of the courts toward women. The court of appeals determined that the classification served no important governmental objectives, was not substantially related to the achievement of any important governmental objectives, and was, therefore, unconstitutional.

In reaching this decision, the court considered three governmental interests raised by the appellee. The first objective the court considered was the historical basis of the statutory classification. The court recognized that "[h]owever laudable and necessary protection [of women] was in the past, we do not think it comports with the changing status of women in our society today." If the court upheld the statute, it would provide unnecessary protection to a woman in the situation in which a woman leaves her husband and forces him to litigate in her new forum.

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100. Id. (footnotes omitted).
101. Id. at 726 nn.13 & 14. The notes quote from M. Paulsen, W. Wadlington, & J. Goebel, Domestic Relations—Cases and Materials (1970): "Divorce a mensa et thoro was a partial divorce which did not extinguish any right or responsibilities attached to the marriage bond. . . . Alimony was basically a remedy provided by the English courts in a divorce a mensa et thoro, based on the husband's common law duty to support his wife. Id. at 416-19. Reference is also made to R. Petrilli, Kentucky Family Law (1969): "by statute of 1812 . . . wives could sue and recover alimony without divorce . . . . There are several reasons a wife might choose to file for alimony but not divorce. The main reason is that a wife who divorced had to give up her dower interest in the husband's property. 28 C.J.S. Dower § 25.27."
102. Abandonment [included but] was not limited to desertion. The husband could legally abandon the wife by treating her in such a manner as to force her to leave him—in effect constructive abandonment. . . . For example, in Williamson v. Williamson, the wife left her husband when he mistreated her children from a previous marriage. . . . In her subsequent suit for alimony, the court stated: [A] suit for alimony may be maintained independent of and without regard to a divorce, where the husband treats the wife with cruelty and compels her to leave him.
103. Id. at 727.
104. 616 S.W.2d at 797.
105. Id. at 796.
106. Id.
107. Id. This is the same rationale the Court used in Orr v. Orr, 440 U. S. 268 (1979), pertaining to the Alabama alimony statutes. See note 83 supra. The Court said that the
The second interest considered was the intention of the classification to "minimize conflicts by limiting the court's inquiry on venue . . . to the county of the wife's residence." The appellee argued that to "'equalize' the statute would foster a race to the courthouse." The court rejected the interest of judicial and administrative conveniences, however, since the original statute already created a race to the courthouse. The court stated that to "'equalize' the statute did not create a race, but merely changed the character of the existing race." In addition, the court offered certain guidelines to the circuit courts to avoid confusion over who would win the race. The courts were directed to follow "jurisdictional restraints on the court's ability to handle the related matters of child custody, child support, maintenance and property settlement." The court also stated that the factors outlined in Shumaker v. Paxton were relevant to divorce venue questions: "(1) the county of the parties' marital residence prior to separation; (2) the usual residence of the children, if any; (3) accessibility of witnesses and the economy of offering proof." The Hummeldorf court also noted that the use of forum non conveniens was within the discretion of circuit courts who chose to decline jurisdiction when appropriate.

Finally, the court rejected the objectives of limiting "forum shopping" and jurisdiction. Although these might be important governmental objectives, the statute was not substantially related to the objectives. Rather, "a more narrowly drawn version providing for venue in the county of the parties' last residence prior to separation would serve that purpose without resort to the unre-

"present Alabama statutes give an advantage only to the financially secure wife whose husband is in need." 440 U.S. at 282.
108. 616 S.W.2d at 797.
109. Id.
110. Under the statute, venue was determined based on the wife's actual residence. Therefore, with the requisite intent, the wife could change her residence immediately. 616 S.W.2d at 797. For instance, in Whitaker v. Bradley, 349 S.W.2d 831 (Ky. 1961), the wife lived four days in her new county. In Burke v. Tartar, 350 S.W.2d 146 (Ky. 1961), the husband won the race by filing for divorce in the morning while the wife was en route to a new residence.
111. 616 S.W.2d at 797.
112. Id. at 797-98.
113. 613 S.W.2d 130 (Ky. 1981). This case involved a dispute over the "proper forum for modification of an existing child custody decree." 616 S.W.2d at 798.
114. 616 S.W.2d at 798.
115. Id.
116. Id. at 797.
lated factor of gender.”117 The court, in essence, found an “unduly tenuous ‘fit’” between the valid governmental objective and means used to achieve it.118

As a result of Hummeldorf, Kentucky courts are now required to determine venue in divorce suits on gender-neutral factors. The immediate effect has been to end Kentucky’s reign as the only jurisdiction which rejected the usual criteria for divorce venue—the county of the plaintiff, the county of the defendant, or the county where either party lives.119 However, the more important result of the case is the implication for other gender-based laws in Kentucky. The final section of this comment will analyze the application of Hummeldorf and intermediate equal protection review to the current gender-based discriminatory practice in Kentucky of placing restrictions on a woman’s right to use her own legal surname.

V. HUMMELDORF AND A WOMAN’S SURNAME

In 1974, the Kentucky General Assembly made comprehensive revisions of state laws attempting to eliminate gender-based language and practices.120 However, a symbolically important remnant of the historical attitude toward women continues through controls place on a married woman’s surname. Hummeldorf’s application of the intermediate standard of equal protection review calls into question the legality of these controls.

A. History and Significance of Surnames

At English common law, a married woman was not required to take her husband’s surname upon marriage.121 But the feudal doctrine of coverture (marriage) created the “old common law fiction that the husband and wife are one . . . [and] the one is the hus-

117. Id.
118. Id. See also Craig v. Boren, 429 U.S. 190, 202 (1976).
119. Simms, supra note 97, at 731 nn.40-44.
120. Act of April 2, 1974, Ch. 386, 1974 Ky. Acts 762. See Simms, supra note 97, at 734 n.62, for a proposal to conduct a study, and nn.66-69 for examples of changes made to eliminate sex discrimination.
121. Comment, Women’s Name Rights 59 Marq L. Rev. 876, 882 (1976). See also Comment, Married Women and the Name Game 11 U. Rich. L. Rev. 121 (1976) [hereinafter cited as Name Game]. “When a woman married she generally adopted the name of the husband by usage but she was not required to do so. . . . There were significant instances in which the wife and the husband held different surnames. It was even more common for the husband to adopt the wife’s surname.” Id. at 128 (footnotes omitted).
Since married women did not have the legal right to contract, to sue or be sued, or handle property, the married woman adopted her husband's surname out of practical necessity. The change of name, however, existed in fact, not in law.

Surnames function as a powerful symbol of identity. In America, names often serve to establish or alter identity with certain ethnic groups. For example, immigrants frequently have anglicized their names in order to assimilate themselves into American culture. Surnames are said to perform at least three functions: (1) provide continuity with identity; (2) maintain relationships with biological or psychological parents and a nuclear family; and (3) serve as a vehicle for transferring the goodwill associated with the name in a community. Thus, requiring a wife to adopt her husband's surname is an explicit symbolic statement of the merger of the wife's indemnity with her husband's. Her symbolic relationship with her parents is terminated and she loses whatever goodwill was associated with her prior name. The strong reaction from both proponents and opponents of the woman's right to use her maiden name, in itself, indicates the importance of a person's surname.

B. Surname of Divorced Women with Children

The current statutory control Kentucky laws place on a woman's surname occurs in divorce. Prior to 1972, Kentucky law allowed a woman the absolute right to restore her maiden name after a divorce. Today, under comprehensive revisions of Kentucky divorce law, the judge determines whether a divorced woman with children may return to the use of her maiden or former name.

126. Id. at 304. Though the article states that children's surnames perform these three functions, these functions also are applicable to surnames of adults.
127. B. BROWN, A. FREEDMAN, H. KATZ & A. PRICE, WOMEN'S RIGHTS AND THE LAW: THE IMPACT OF THE ERA ON STATE LAWS 102 (1977). This comment does not seek to negate the choice of a woman to assume her husband's surname. "Rather, the issue is whether society has such a significant interest in a particular name-symbol of marriage that a married woman must bear a name which she feels does not reflect her true identity." Name Game, supra note 121, at 125.
128. Name Game, supra note 121, at 124.
129. "If the wife obtaining a divorce so desires, the Court shall restore to her the name she bore before marriage." KY. REV. STAT. § 403.060 (1972) (repealed 1972).
130. See note 1 supra.
establishing this restriction, the determinative factor is whether there are “children of the parties.” The following analysis is offered to illustrate that the objectives of the provision relate to the interests of the children or the state, and not the woman. It will focus on the intermediate level of equal protection review adopted in *Hummeldorf* any gender-based law in Kentucky must fulfill important governmental objectives and employ means substantially related to the achievement of those objectives.

The objectives related to protecting the children’s interest involve the previously discussed purposes of surnames: (1) continuity of identity; (2) relationships with parents and family; and (3) transferring goodwill of the name. To implement these three objectives, the state requires that the mother (former wife) retain the paternal (former husband’s) surname to prevent the children from having parents with different surnames. In determining whether children should adopt the surname of a mother who remarries, the courts in other states have considered the embarrassment, confusion, and inconvenience a child may experience due to different parental surnames. Most courts find these factors insufficient and “minimize the severity of the problem by pointing out that the situation has been relatively common in a society where divorce and subsequent remarriage are so prevalent.”

The means to accomplish the objectives identified above also are inadequate under Kentucky common law, since a woman who remarries is not required to keep her former husband’s surname. Though the woman who remarries may have children by the former marriage with the former husband’s surname, the woman is not required to retain it but may adopt a new surname. To require divorced mothers to retain paternal surnames, while married mothers are not required to, creates an over-inclusive classification. Finally, the objective of transferring the goodwill of a name is not an issue when the mother changes her name, since the child retains the paternal name and the “goodwill” of the name

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131. The conflict only arises when a divorced woman chooses and requests to have her maiden or former name restored.
132. 616 S.W.2d 794.
133. See note 125 supra.
134. Thornton, supra note 125, at 325 n.100. These cases involved a parental request to change the child’s name rather than a parental request to change his or her own name.
135. Id. at 326 (footnotes omitted).
136. See note 147 infra.
137. See note 30 supra.
The other possible interest of the provision is administrative convenience for the state. Requiring women to adopt paternal surnames purportedly facilitates ascertaining legal relationships. However, the Court has not upheld administrative convenience as a valid objective in gender-based distinctions. In addition, the means of achieving this objective are not substantially related to it. For instance, a less restrictive alternative would have “state officials in charge of vital records cross-index births under the surnames of both parents.” Also, one commentator states that there is no adequate explanation “why the administrative burden of a change [the court] condone (the adoption by a wife of her husband’s surname) is less than that of the change they oppose (the resumption of the pre-marriage name by a married woman).” Finally, since at common law any person could informally change a name by public declaration, a divorced woman may informally change her name even if the court does not do so. To facilitate administrative convenience and prevent dual names, the court should grant the informally used name to divorced women upon request.

The statutory restrictions on a divorced woman’s surname fail to meet the equal protection standard of intermediate review. Therefore, the statute should either be revised to reflect previous law or the courts should be limited to preventing fraudulent use of names. For instance, the Indiana Supreme Court concluded that in an Indiana statutory provision where a judge “may change the names of natural persons on application by petition,” the only duty of the trial court upon the finding of such petition is to determine that there is no fraudulent intent involved.

138. But the goodwill of a name could “pass as easily through a maternal as paternal line, and the automatic choice of one over the other without an analysis on the merits does not seem to meet even a deferential standard of equal protection.” Thornton, supra note 125, at 310 (footnotes omitted).
139. Id. at 306.
141. Thornton, supra note 125, at 308 (footnotes omitted).
142. Name Game, supra note 121, at 154 n.218.
144. See note 129 supra
145. IND. CODE ANN. § 34-4-6-1 (1973) (emphasis added).
146. In Re Hauptly, 312 N.E.2d 857, 860 (Ind. 1974). See also Name Game, supra note 121, which says, “Courts in jurisdictions which have not abrogated the common law right to
C. A Married Woman and Her Driver's License

An oral instruction issued by the Director of the Division of Driver Licensing, Kentucky Department of Transportation, required that "all operator's licenses issued to married women must be in the surname of their husbands unless a court order granting a name change is presented to the circuit clerk at the time of the application for, or renewal of, the license." Thus, a local circuit clerk could refuse a married woman a driver's license unless she complied by using her husband's name.

The constitutionality of this administrative requirement was tested in Whitlow v. Hodges. The plaintiff used her maiden name as her legal name after her marriage, but was denied a driver's license unless she used her husband's surname. A class action suit was filed based on a violation of civil rights under the due process and equal protection clauses of the fourteenth amendment. The United States District Court for the Eastern District of Kentucky dismissed the complaint. But, upon remand from the United States Court of Appeals of the Sixth Circuit, the District Court ascertained that "under the common law of Kentucky, a woman upon marriage abandons her maiden name and assumes her husband's surname." The court said that, under the common law, "the wife's legal existence was, in virtue of marriage, suspended or extinguished . . . or entirely merged or incorporated into that of the husband." Upon subsequent appeal, the Court of Appeals of the Sixth Circuit decided that "upon further reflection . . . we need not determine with finality that the challenged change a legal name by usage without legal proceedings will generally wish to minimize a judge's discretion." Id. at 153 (footnotes omitted).

148. 539 F.2d 582 (6th Cir. 1976), cert denied, 429 U.S. 1029 (1976).
149. By brief order, the late District Judge Mac Swinford dismissed the complaint relying wholly upon Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), a three-judge district court ruling, affirmed without opinion by the Supreme Court at 405 U.S. 970, 92 S. Ct. 1197, 31 L.Ed.2d 246 (1972). The court in Forbush denied the same claim now being urged by plaintiff in the instant case.
150. The case was remanded primarily to permit an inquiry into whether Kentucky law allows a married woman to retain her maiden name as her legal name, indicating that if the district court should find that Kentucky law, like that of Alabama, requires a woman to take her husband's surname upon marriage, then . . . the result would be clearly compelled by the affirmance of Forbush.
151. Id.
regulation is consistent with the common law of Kentucky. . . . Instead [the] primary thrust [is] directed to the question of whether the challenged regulation has a rational connection with a legitimate state interest.”153 Using the rational basis test, the court of appeals held that the rationale of orderly and convenient administration of license issuance and the preservation of the integrity of licenses, which the United States Supreme Court affirmed in Forbush v. Wallace,154 were also reasonable state interests in this case.155 The court further noted that Kentucky afforded a simple and inexpensive means for changing a person’s name.156

Although the Sixth Circuit followed the rationale and result of Forbush, the court of appeals avoided deciding whether Kentucky common law does, in fact, require married women to assume their husbands’ surnames.157 Under Section 233 of the Kentucky Constitution, the English common law is said to rule, unless specifically abrogated by the Kentucky courts or legislature.158 The district court, however, incorrectly equated the feudal customs of marriage with the common laws regarding surnames,159 and held that the English, and therefore Kentucky, common law merged the wife’s identity into her husband’s.160 As observed in Kruzel v. Podell,161 surprisingly, the English common law theory of coverture did not require the wife to assume the husband’s name: “However, when the wife did assume the husband’s name, it was a matter of

153. 539 F.2d at 583.
155. “The rationale of Forbush can be applied equally here and without variation.” 539 F.2d at 583.
156. Any person at least eighteen (18) years of age, may have his name changed by the county court of the county in which he resides. If he resides on a United States army post, military reservation or fort his name may be changed by the county court of any county adjacent thereto.


157. As Justice McCree indicated, “We cannot determine whether this case is governed by Forbush . . . unless we first determine whether the common law of Kentucky, like that of Alabama, requires a married woman to adopt her husband’s surname.” 539 F.2d at 584 (McCree, J., dissenting).

161. 67 Wis.2d 138, 226 N.W.2d 458 (1975).
Thus, the district court's rendition of the Kentucky common law was incorrect and the court of appeals should have reversed on that issue alone.

In addition, case law has since rejected historical practices as rationales for gender based classifications. Even if there had been a tradition of women accepting their husband's surnames, to require the perpetuation of such a practice does not comport with the "changed status of women." In the words of one commentator, the courts in Whitlow ignored significant doctrinal changes that had occurred after Forbush was decided. Had the court in Whitlow applied the appropriate standard of review, it would have found a violation of Whitlow's right of equal protection under law. Although the decision in Whitlow employed the rational basis test, as a result of Hummeldorf, now an important governmental objective must be shown and the means used must have a substantial relation to that important governmental objective.

The governmental interests advanced by the state were administrative order and convenience, and preserving the integrity of the driver's license. Administrative convenience, however, has been held an insufficient governmental objective in gender-based distinction. In addition, the state's interest in preserving the integrity of the driver's license, even if arguably an important governmental interest, is not implemented by a means substantially related to the achievement of that objective. Since, under Kentucky common law, a married woman legally may retain her maiden name, there is no substantial relation between using the driver's license as a means of identifying a woman, when she must use a name other than her legal name. Rather than being rational, the result created an irrational scenario in which the law

162. Id. at 463. See notes 121-124 supra.
164. Hummeldorf v. Hummeldorf, 616 S.W.2d at 796. See notes 105-06 supra and accompanying text.
165. 616 S.W.2d at 796.
166. Driver's License, supra note 4, at 163.
168. 539 F.2d at 583.
169. See Reed v. Reed, 404 U.S. 71 (1971), and notes 55-58 supra and accompanying text. See also Frontiero v. Richardson, 411 U.S. 677 (1973) and notes 61-63 supra and accompanying text.
170. See note 163 supra and accompanying text.
171. Driver's License, supra note 4, at 161.
demanded that a woman “change” her name to what it already is.\textsuperscript{172}

The requirement that a married woman use her husband’s surname on her driver’s license clearly fails to meet the standards of intermediate review. To rectify this inequity, the discriminatory practice was recently repealed by administrative order.\textsuperscript{173} The Kentucky courts, however, should use the intermediate level of equal protection review adopted in \textit{Hummeldorf} to overrule the gender-based references to the supposed common law merger of a woman with her husband. Finally, the Kentucky legislature could amend the laws\textsuperscript{174} pertaining to surnames on vehicle operator licenses. In two previous sessions, bills have been presented to correct the driver’s license problem, but they have failed to receive approval.\textsuperscript{175} Legislatures should reconsider the implications of practices requiring women to use their husband’s names that perpetuate archaic notions that a woman has no separate identity from that of her husband.

**CONCLUSION**

The recent decision in \textit{Hummeldorf} provides the clearest statement of reasons to eliminate the discriminatory restrictions on a woman’s choice of surname. The intermediate level of equal protection requires such restrictions to serve important governmental objectives and utilize means substantially related to their achievement. But neither the surname restriction on a driver’s license or in a divorce may be justified by administrative convenience. Also,

\textsuperscript{172} \textit{Id.} at 162.

\textsuperscript{173} See note 5 supra.


\textsuperscript{175} Senate Bill 199 proposed to amend Ky. Rev. Stat. § 186.412 by adding: “If a married person has elected to retain a maiden or former name, then such person may be issued an operator’s license in such maiden or former name so long as the name is not used for fraudulent purposes.” The amendment was deleted by the committee on Highways and Traffic Safety. \textit{Bill Summaries, Legislative Record}, April 3, 1978, at 29.

House Bill 592 proposed to amend Ky. Rev. Stat. § 186.412 by adding: “If a married or previously married person has elected to use or retain a birth, former, or hyphenated name, then such person may be issued an operator’s license in such birth, former, or hyphenated name, so long as the name is not used for fraudulent purposes.” The amendment after a defeat on March 25, 1980, was reconsidered on March 27, 1980, and passed the House by a vote of 54-37 and was forwarded to the Senate Committee on Highways and Traffic Safety. This session ended on April 3, 1980, without the bill ever leaving the committee. \textit{Bills in Committee, Legislative Record}, April 16, 1980, at 2. Although the bill had been prompted by the request of the Kentucky Commission on Women, the 1980 House bill became dubbed the “Phyllis George” bill. Louisville Courier-Journal, Mar. 30, 1980, at 34, col. 1.
historical or traditional practices are no longer permitted, due to the changed status of women. Furthermore, the purposes—perserving the integrity of driver licenses and providing children with identity or relationships to parents—do not serve any important objectives. A woman, whether married or not, should have the constitutional right to maintain an independent social and legal identity by being allowed to use the name she chooses. As one commentator has expressed it, the symbolic function of a woman choosing her own legal name "is to show that she is an individual, in her own right" and that "[n]o matter how important the relationship [of marriage] may be, she does not feel that it should define her identity."\footnote{Comment, A Woman's Right to Her Name, 21 U.C.L.A. L. Rev. 665, 685 (1973) (footnotes omitted).} Because of current Kentucky limitations placed on a woman's choice of surname fail to pass the intermediate level of equal protection review, these restrictions should be eliminated.

DENISE HOUGH
PLANNING AND ZONING IN KENTUCKY: WHO REALLY ADOPTS THE COMPREHENSIVE PLAN?

I. INTRODUCTION

Adoption of zoning ordinances by cities and counties in Kentucky, once taken for granted as a relatively easy method of local regulation, is suddenly the subject of considerable confusion. It can also no longer be taken for granted as a simple tool for controlling the use of land. The confusion surrounding adoption of zoning ordinances results from a series of cases decided by the Supreme Court of Kentucky during the past few years. The general tenor of the cases is that a zoning ordinance adopted by a city or county will be held invalid where there has not been strict compliance with those procedures required by the statute authorizing adoption of zoning ordinances. This basic premise is not surprising. The difficulty arises, however, from the fact that the court is interpreting these required procedures in a manner that differs from the interpretation that has been generally accepted by the planning profession in Kentucky. The conflicting interpretations seem to be a result of the courts lack of understanding of planning and zoning, the roles and functions of each, and the relationship between the two areas. One interpretation by the court, relating to adoption of a comprehensive plan by the legislative body as a prerequisite to adoption of a zoning ordinance, is particularly alarming. The purpose of this comment is to review the enabling statute which authorizes zoning, to review the recent cases decided in this area, and to discuss the consequences and problems that may result from these decisions.

II. PLANNING AND ZONING — KENTUCKY'S ENABLING STATUTE

In 1966, the Kentucky General Assembly enacted comprehensive changes in its planning and zoning statute. This legislation was codified as Chapter 100 of the Kentucky Revised Statutes. Primary features of this statute include: provisions for the required governmental structure allowing cities/counties to engage in land use regulation; types of regulating tools that may be employed; and the division of authority among the elected and advisory bodies that comprise the required governmental structure. One of the most significant features of Kentucky's law, as compared to the laws of many other states, is the emphasis placed on comprehensive planning as a fundamental part of the land use regulation process. The following discussion describes these aspects of Kentucky's planning
and zoning law in greater detail.

A. Required Governmental Structure

The basic structure required for engaging in land use regulation is a "planning unit," defined as "any city or county, or any combination of cities, counties, or parts of counties engaged in planning operations." Three different types of planning units are permitted: the joint planning unit, the independent planning unit, or the regional planning unit. A joint planning unit includes a county and at least one city located within the county that agree to combine their planning functions. In such cases, part of the county or another city within the county may be excluded, but a self-excluded city may not form an independent planning unit. An independent planning unit consists of an individual city or county engaged in its own planning operations. An independent planning unit may not be created unless the city or county has undergone an interrogation process to form a joint planning unit and such process is unsuccessful in establishing the joint unit. Finally, a regional planning unit may be created when two or more adjacent planning units (or portions thereof) agree to combine all or part of their individual planning functions.

Once the planning unit has been formed, a planning commission, comprised of at least five and not more than fifteen members, must be established. Chapter 100 of Kentucky Revised Statutes also provides for appointment and requirements of planning commission members, term of office, vacancies, removal of members, officers, a quorum, conflict of interest, number of required meetings, adoption of by-laws and maintenance of minutes and records.

The legislative body[s] and/or fiscal court belonging to the planning unit may finance the commission by appropriation from general revenues. It may also assign to the commission functions relating to urban renewal or public housing.

2. Id. § 100.113.
3. Id. § 100.121.
4. Id. § 100.117.
5. Id. § 100.123.
6. Id. §§ 100.133, .141, .143, .157, .161, .163, .167, and .171.
7. Id. § 100.177.
8. Id. § 100.181.
B. Authorized Types of Land Use Regulatory Tools

Chapter 100 of Kentucky Revised Statutes provides for five primary types of land use regulatory tools. These devices include: 1) comprehensive plan; 2) zoning regulations (both interim and permanent); 3) subdivision regulations; 4) public improvements program (also called public facilities improvement program or capital improvements program); and 5) official map regulation. 9

The comprehensive plan is the key regulatory device because it is a required precondition (or at least some elements of the plan) for authority to adopt the remaining regulatory tools. 10 Minimum requirements are set by the enabling statute as to contents of the comprehensive plan, including specific types of research and analysis that must be conducted as part of the preparation of the plan. The necessary elements of a comprehensive plan include: 1) a statement of goals and objectives, principles, policies, and standards; 2) land use plan element; 3) transportation plan element; 4) community facilities plan element; and 5) any additional elements may be included. 11 The required research upon which the plan must be based includes: population analysis and forecast, economic analysis and forecast, and an inventory and analysis of existing land use, transportation and community facilities. 12

The enabling statute also imposes procedural requirements for the adoption of a comprehensive plan. Section 100.193 of Kentucky Revised Statutes requires that the planning commission first prepare and adopt a statement of goals and objectives to act as a guide in the preparation of the remaining elements of the plan. This statement must also be adopted by the legislative body[s] and/or fiscal court[s] in the planning unit. During the preparation of the remaining elements of the plan, the planning commission must consult with various public officials and citizen groups. Prior to adoption of the remaining elements of the plan, Section 100.197 of Kentucky Revised Statutes requires that the planning commission hold a public hearing. This section also permits the planning commission to adopt the various elements of the plan as they are completed, or as a whole.

Adoption of zoning regulations is authorized if the planning commission has adopted at least "the objectives and land use plan

9. Id. §§ 100.187, .203, .281, .297, .311, and .334.
10. Id. §§ 100.201, .207, .273, .293, and .311.
11. Id. § 100.187.
12. Id. § 100.191.
The planning commission is charged with the responsibility of preparing the zoning regulations and holding the required public hearing[s]. The authority to adopt zoning, however, is vested with the legislative body or fiscal court.

When the planning commission is conducting, or in good faith is preparing to conduct, studies that are required for preparation of a comprehensive plan, the commission and legislative body[s] are authorized to adopt interim zoning regulations. However, in Daviess County v. Snyder, the Supreme Court of Kentucky held that the requirements of section 100.201 and 100.207 of Kentucky Revised Statutes (requiring adoption of the objectives and land use plan element to authorize permanent zoning) also apply to interim zoning regulations.

All of the required elements of the comprehensive plan must be adopted before subdivision and official map regulations may be adopted. There is no such specific requirement authorizing adoption of the public improvements program, although the program is required to identify, in priority order of need, those public facility improvements proposed in the “comprehensive community development plans.”

C. Division of Responsibility

Chapter 100 of the Kentucky Revised Statutes is a comprehensive piece of legislation that has many interrelated parts. The statute carefully divides the responsibility for a full range of planning operations, primarily between the planning commission and legislative body or fiscal court.

The enabling statute clearly delegates to the planning commission these responsibilities:

1) To prepare the comprehensive plan;

2) To adopt the comprehensive plan, provided that the statement of goals and objectives is adopted by the legislative body[s] and/or fiscal court[s].

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13. Id. §§ 100.201 and .207.
14. Id. § 100.334(2).
15. 556 S.W.2d 688 (Ky. 1977).
16. Id. at 690.
17. KY. REV. STAT. §§ 100.273 and .293.
18. Id. § 100.311.
19. Id. § 100.183.
20. Id. § 100.197.
3) To prepare the zoning regulations, text and map; 31
4) To hold the required public hearings for adoption of, and amendments to, the comprehensive plan and zoning regulations; 32
5) To make recommendations to the applicable legislative body or fiscal court on adoption of zoning regulations, including subsequent amendments, and, on location and extent of proposed public facilities; 33
6) To adopt subdivision regulations, subject to approval or rejection by the appropriate legislative body[s] and/or fiscal court[s]; 34
and
7) To prepare and adopt, in conjunction with the legislative body or fiscal court, an official map regulation. 36

Authority is vested in the legislative body or fiscal court for the following actions:
1) To approve or reject the statement of goals and objectives prepared by the planning commission; 36
2) To adopt zoning regulations; 37
3) To adopt a public facilities improvement program; 38
4) To approve or reject the subdivision regulations promulgated by the planning commission; 39
5) To adopt an official map regulation, in conjunction with the planning commission. 40

D. Summary

Kentucky’s planning and zoning enabling statute clearly specifies the types of regulatory tools that may be utilized by local governments in the Commonwealth. While the wording of specific sections may be confusing, and the overall organization of individual sections lacks continuity, it is evident that the statute establishes a comprehensive scheme for authorizing local planning operations.

21. Id. § 100.207.
22. Id. §§ 100.197 and .207.
23. Id. §§ 100.207, .211, and .321.
24. Id. § 100.273.
25. Id. § 100.293.
26. Id. § 100.193.
27. Id. §§ 100.201 and .207. A Board of Adjustment must be established in order to have a valid zoning ordinance pursuant to § 100.217. The powers of the Board are expressly granted and defined in the enabling statute.
28. Id. § 100.311.
29. Id. §§ 100.273 and .334.
30. Id. § 100.293.
With a few exceptions, the statute provides uniform requirements for all cities and counties, regardless of class of city or any other distinction. It authorizes a variety of regulatory tools, encompassing nearly all traditional devices recognized in the planning profession and some relatively innovative features, such as planned unit development (PUD) and historic preservation districts. Although not perfect, the statute provides a workable structure for planning operations in Kentucky. Recent court decisions, however, indicate a lack of understanding by the courts of the intent and purpose of this legislation as a unified act. This results in unpredictable and problematic statutory interpretations. The following discussion will briefly summarize some of these recent cases and point out the apparent confusion of the court. Finally, one statutory interpretation of particular significance will be analyzed in greater detail.

III. RECENT CASE LAW AND SIGNIFICANT HOLDINGS

In the past few years, three important cases relating to planning and zoning have been decided by the Supreme Court of Kentucky. In each case, the party bringing suit was allegedly aggrieved by a specific action or zoning regulation, such as denial of a proposed zone change. However, each party challenged not only the validity of the specific action in question, but also challenged the validity of the entire zoning ordinance itself, for failure to comply with required statutory procedures. This approach to winning zoning cases has severe consequences, for, if the aggrieved party wins on the ground that the entire zoning ordinance is invalid, the city or county is left with no zoning controls on any land within its jurisdiction. The obvious result is “open-season” for developers, property owners, and anyone who has been denied a zone change. This “open-season” lasts until a new zoning ordinance can be validly adopted. Depending upon what procedural defect[s] caused the invalidation of the first zoning ordinance, the process to adopt new zoning could take only a few months, or as long as a few years. In

31. Some special provisions are made for counties containing a city of the first class. In actuality, this affects Jefferson County and the city of Louisville, the only first class city in Kentucky.

32. A Planned Unit Development is a large tract of land developed with a mixture of land uses and/or housing types, but designed according to a unified plan for the entire tract of land. It is an innovative land planning tool that increases flexibility of design over conventional zoning laws (which typically regulates lot-by-lot development of land) by varying lot sizes, setbacks, and heights.
order to fully understand the impact of these court decisions, a brief discussion of each of the three cases is included.

A. Daviess County v. Snyder

In Daviess County v. Snyder,\textsuperscript{88} the Kentucky Supreme Court was faced with the validity of an interim zoning ordinance adopted by the Daviess County Fiscal Court. The plaintiffs had been denied a request for rezoning of their property and challenged both the validity of the action to deny the zone change and of the entire zoning ordinance itself.

Daviess County was significant because it was the first time the Supreme Court of Kentucky interpreted the specific statutory procedures required for adoption of zoning, including the procedure to adopt the comprehensive plan. The case established a precedent for requiring strict compliance with the statute. The holding as to adoption of the comprehensive plan was entirely consistent with the language of the statute, although it represented a very narrow interpretation. In this regard, Daviess County held that

1) Chapter 100 vests the function of planning in the planning commission, and the function of zoning in the legislative body or fiscal court;

2) The planning commission has the duty to prepare and adopt the comprehensive plan;

3) The statement of goals and objectives must be adopted by the planning commission and the legislative body/fiscal court as a prerequisite to the preparation and adoption of the remaining elements of the comprehensive plan; and

4) Both interim and permanent zoning are authorized only when the planning commission and legislative body/fiscal court have adopted the statement of goals and objectives, and the planning commission has adopted at least the land use plan element.\textsuperscript{34}

Except for the court's holding that the procedure to adopt interim zoning must comply with the procedure to adopt permanent zoning (a subject fit for another comment), the court's analysis was a reasonable interpretation of the statute.

Although the court's decision is justifiable, it is not necessarily the only, or best, interpretation of the statute. It could easily be argued that it is not critical that the legislative body/fiscal court adopt the goals and objectives prior to the preparation of the rest

\textsuperscript{33} 556 S.W.2d 688 (Ky. 1977).

\textsuperscript{34} Id. at 690.
of the comprehensive plan, if the following circumstances are present: 1) the goals and objectives are adopted by the legislative body/fiscal court prior to the adoption of any of the subsequent regulations, such as zoning or subdivision regulations; and 2) the goals and objectives are the same goals and objectives that were adopted by the planning commission and those upon which the rest of the comprehensive plan was based. Where these two conditions exist, there appears to be no need for strict compliance with the steps enunciated in Daviess County. The logical reason for requiring the legislative body/fiscal court to adopt goals and objectives prior to the preparation of the rest of the plan is to prevent the planning commission from pursuing a direction that is contrary to the overall policies of the legislative body/fiscal court. This is an important consideration because the preparation of the comprehensive plan can be a very time-consuming and costly effort, as illustrated by all the required research and compliance with the elements discussed earlier. 85

Nevertheless, if the legislative body/fiscal court does not adopt the goals and objectives until the entire plan is completed, the validity of the plan should not be affected. The only harm that would result from adopting goals and objectives out of sequence is that, potentially, the legislative body/fiscal court might not agree with the goals and objectives adopted by the planning commission, in which case much time and money might have been wasted. Such a situation establishes an excellent argument for the court’s use of “substantial compliance”—a concept the court is, to date, expressly unwilling to apply to planning and zoning actions. 86 Although this specific fact pattern has not been confronted by the Kentucky Supreme Court, the cases infer that a comprehensive plan, and thus any subsequently adopted regulations, would be held invalid with only the minor defect described above. Such an interpretation is completely unreasonable. The remedy does not fit the “wrong.” If the court had a better understanding of planning and zoning, and the differences between the two, there might be hope that these types of problems could be rectified. 87

37. A comprehensive plan is an official document providing a general guide for the long-term (20-30 years) future development of a community. It is based upon broad principles, outlining the desirable direction[s] for the community to pursue. A zoning ordinance is a
B. Kindred Homes, Inc. v. Dean

The clear division of responsibility enunciated in Daviess County, that planning is vested in the planning commission and zoning is vested in the legislative body/fiscal court, was undermined by the court in Kindred Homes, Inc. v. Dean. In that case, the developer (Kindred Homes, Inc.) had applied for rezoning of a 252 acre tract in 1976 and again in 1977. In both cases, the application was denied by the Jessamine Fiscal Court. During the time between the two applications, the planning commission approved amendments to its comprehensive plan, which had been adopted in 1971. Although the original comprehensive plan had been adopted by the fiscal court, the amendments to the plan were not approved.

Kindred Homes appealed the disapproval of its requested zone change and also challenged the validity of the Jessamine County-City of Wilmore Zoning Ordinance and the validity of the 1977 amendments to the comprehensive plan. The Jessamine Circuit Court reversed the fiscal court's action on the zone change, finding the 1977 amendments to the comprehensive plan invalid, thereby granting the zone change request. However, the circuit court upheld the validity of the city-county zoning ordinance.

The challenged zoning ordinance was an interim regulation, adopted after goals and objectives had been adopted but prior to completion of the comprehensive plan. Permanent zoning regulations had never been adopted after the comprehensive plan was completed. The validity of the amendments to the comprehensive plan were challenged because the amendments had not been adopted by the fiscal court. The court of appeals, whose decision was affirmed by the Kentucky Supreme Court, held that both the interim zoning regulations and the amendments to the comprehensive plan were invalid. The court's analysis, as it pertains to the comprehensive plan, is quite alarming.

The court's decision indicates considerable confusion regarding the differences between a comprehensive plan and a zoning ordinance. They are two distinctly different documents, clearly defined

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38. 606 S.W.2d 15 (Ky. App. 1979), discretionary review granted sub nom. Chandler v. Kindred Homes, Inc., 598 S.W.2d 762 (Ky. 1979), vacated, 606 S.W.2d 165 (Ky. 1980).
39. Id. at 16.
40. Id. at 17-18.
in Chapter 100 of Kentucky Revised Statutes,\textsuperscript{41} which provides for their adoption by two different bodies. A comprehensive plan is not a regulatory device that imposes specific requirements on an individual's property. Its apparent statutory purpose is to insure that some agency, related to local government, is adequately planning for the future. The plan is then meant to guide those legislative actions, such as zoning regulations, to provide for reasonable, well thought-out regulations and to prevent arbitrary and piece-meal decision-making. But language in the opinion, such as "[t]he comprehensive plan relegates the entire county outside the two major towns as an agricultural zone,"\textsuperscript{43} indicates the court does not understand these differences. Its ultimate decision further supports this contention.

In \textit{Kindred Homes}, the court held that amendments to the comprehensive plan must be approved by the legislative body/fiscal court. There is no such express requirement in Chapter 100 of Kentucky Revised Statutes. The court came to this conclusion by referencing three other sections of Chapter 100:

1) Section 100.197 of Kentucky Revised Statutes, which provides that the procedure to amend the plan is the same as for the original adoption;

2) Section 100.334(1) of Kentucky Revised Statutes, which authorizes the planning commission to adopt all necessary rules and regulations, but requires that they be submitted to the legislative body/fiscal court for approval or rejection; and

3) Section 100.111(17) of Kentucky Revised Statutes, which defines a regulation as an enactment by the legislative body/fiscal court, but includes subdivision regulations adopted by the planning commission.\textsuperscript{43} Without any discussion or analysis, the court stated that "[t]he above statutes, when read together, lead us to the conclusion that any amendments to the comprehensive plan require approval by the fiscal court."\textsuperscript{44} To reach this decision the court also must have come to the conclusion that a comprehensive plan is a "regulation," although it did not expressly make that interpretation. Without such an interpretation, however, Section 100.334(1) would not be applicable to the comprehensive plan.

\textsuperscript{41} Ky. REV. STAT. §§ 100.
\textsuperscript{42} 605 S.W.2d at 17.
\textsuperscript{43} Id. at 18.
\textsuperscript{44} Id.
The court ignores the fact that Chapter 100, affirmed by Daviess County, provides that the planning commission adopt the comprehensive plan. It also ignores the fact that the definition of regulation specifically includes subdivision regulations adopted by the planning commission, but makes no reference to the comprehensive plan. Is this not significant? Does the court really believe the legislature intended the comprehensive plan to be a regulation, and left it out of the definition through oversight? It should be recalled that the comprehensive plan provides the required foundation in the enabling statute for all other actions that may be taken. It hardly seems reasonable to assume that such a basic part of the statute would be excluded inadvertently from the definition. In reality, the opposite conclusion is the more reasonable one. The fact that subdivision regulations are included in the definition shows an intent not to include the comprehensive plan within the definition. The holding in Kindred Homes is not consistent with the specific sections of the statute cited, nor with Daviess County. The implications of the decision may cause many problems.\footnote{Some of the problems resulting from Kindred Homes are discussed in the next section.}

C. Creative Displays, Inc. v. City of Florence

The final important zoning and planning case to be discussed is Creative Displays, Inc. v. City of Florence.\footnote{602 S.W.2d 682 (Ky. 1980).} In that case, Creative Displays challenged the validity of the Boone County Comprehensive Plan and the Florence Zoning Ordinance because of requirements in the zoning ordinance governing the placement of billboards.

Prior to 1966, the Boone County Fiscal Court and the city of Florence operated as separate planning entities. As a result of the new enabling statute in 1966, a joint planning unit was formed. A comprehensive plan for the county was adopted immediately after the forming of the joint planning unit. This plan combined the pre-existing plans of the city of Florence and Boone County and contained the minimum elements required by Chapter 100 of Kentucky Revised Statutes. A public hearing had been held when each of the individual plans was first adopted, but another public hearing was not held when the plans were adopted as a county-wide plan.\footnote{Id. at 682-83.}
The Supreme Court of Kentucky held that the Boone County Comprehensive Plan was invalid. Although it admitted that the plan complied with the substantive requirements of Chapter 100 of Kentucky Revised Statutes, the plan was found invalid because all of the procedural steps had not been satisfied. Specifically, the court relied on the following defects: 1) the "pro-forma" adoption of the already existing individual plans did not constitute the "preparation" of a comprehensive plan for the newly formed joint planning unit; 2) the research and analysis, and statement of goals and objectives contained in the individual plans did not address the question of needs, projections, and goals for the jurisdiction of the county-wide planning unit; and 3) a public hearing was not held for the county-wide plan; thus the citizens of Florence were not afforded an opportunity to comment on the plan for the rest of the county and the citizens of the remainder of the county were not afforded an opportunity to comment on the Florence plan.

The significance of the court’s decision in Creative Displays to this comment was its harsh and inflexible rejection of the "substantial compliance" argument. Although the ultimate holding of Creative Displays on the specific facts at issue is not unreasonable, there may be cases in which substantial compliance could be appropriate. Again, it is noted that, if the court had a more sophisticated understanding of planning and zoning, the advantages of a substantial compliance argument in appropriate circumstances would be readily apparent to it. If the procedural defect in question does not result in impairing the purpose for which the procedure is required, then substantial compliance is surely a more reasonable approach than invalidating an entire comprehensive plan and/or zoning ordinance. It is suggested, for purposes of illustration, that in the situation in which the planning commission adopts goals and objectives prior to preparing the rest of the comprehensive plan, but the legislative body or fiscal court does not adopt those same goals and objectives until after completion of the comprehensive plan, finding that there has been substantial compliance is quite appropriate. The procedural defect is merely one of sequence. The goals and objectives have been adopted by both the planning commission and legislative bodies.

48. Id. at 684.
49. Id. at 683.
50. The substantial compliance theory was the basis for the decision by the Court of Appeals in upholding the validity of the Boone County Comprehensive Plan.
body or fiscal court as required by statute. The remaining elements were prepared, based upon the adopted goals and objectives. In such a case, the planning commission would be risking the fact that the time and money spent on preparing the rest of the plan would be wasted if the goals and objectives were subsequently disapproved. But, when the legislative body or fiscal court does in fact adopt the same goals and objectives as the planning commission, and upon which the remaining elements of the plan were based, no statutory purpose for this procedural step has been undermined. Perhaps if a suitable fact pattern is presented to the court, it might reconsider its harsh position on substantial compliance.

IV. PROBLEMS AND CONSEQUENCES

The preceding discussion has summarized many of the statutory requirements for undertaking planning and zoning operations in Kentucky and three key cases interpreting the enabling statute. As each case was discussed, problems, disagreements or concerns with the court’s interpretations were noted. The remaining portion of this comment will focus on the impact of one such interpretation — the apparent holding of Kindred Homes, Inc. v. Dean51 that the legislative body/fiscal court must adopt the comprehensive plan in addition to adoption of the plan by the planning commission.

The first problem is that the court has interjected a step in the process required for adopting a valid zoning ordinance that is not expressed in the statute. Since the process of adoption of zoning requires strict compliance, the consequences may be disastrous. It is quite probable that many planning units throughout the state have adopted a comprehensive plan and zoning ordinance, carefully adhering to all the steps outlined in the statute, but have not had the comprehensive plan adopted by the legislative body or fiscal court. The apparent remedy for such misfeasance is invalidation of the comprehensive plan, thereby invalidating the zoning ordinance and any other subsequently adopted regulations which require adoption of a comprehensive plan.

The effect of the court’s invalidating a city or county’s zoning ordinance is that there is no control on the use of any land in the city. A liquor store may be built on a vacant lot in a single-family subdivision. A high-rise apartment complex may be built at the

51. 605 S.W.2d 15 (Ky. App. 1979).
end of a cul-de-sac street. An "adult" bookstore may open up in the central business district, just around the corner from the high school. Numerous businesses may be built with inadequate off-street parking spaces. The list could go on indefinitely, and these hypothetical examples are not an exaggeration. Locally, a county zoning ordinance has been held invalid for procedural defects and a brick yard has "sprung up" adjacent to a newly developing single-family subdivision. The action precipitating the lawsuit that invalidated the zoning ordinance involved a zone change request for property located miles away from the brick yard. Until the city or county corrects the deficiency in its zoning law, it has no control over the use of land within its jurisdiction.

The court's remedy seems extreme and inequitable for such an insignificant defect. The three court cases previously discussed do not even hint that the court gave this problem any consideration whatsoever. The city or county and its residents have likely relied for years on the existence of their zoning ordinance to protect the health, safety, and welfare of the community as a whole, and of individual property values in particular. Apparently, the court finds no difficulty in throwing out the baby with the bath water. Nevertheless, it is hoped that this particular problem, although severe, will be a short term one. Planning units throughout the state can take corrective measures to bring their plans and regulations into compliance with Kindred Homes. Of course, this assumes that the court will refrain from announcing any additional steps to be included, retroactively, in the process.

The second problem is a long-term consequence of the requirement that the legislative body or fiscal court must also adopt the comprehensive plan. Pursuant to Section 100.197 of Kentucky Revised Statutes and Kindred Homes, two governmental bodies now have authority to adopt the same document. This creates an inherent conflict. It is unclear whether the legislative body has the authority to adopt a plan different from the plan adopted by the planning commission. Furthermore, if the legislative body does adopt a plan with some changes, it is unclear whether there are, in fact, "two" comprehensive plans and if so, which one is controlling.

52. The zoning ordinance adopted by the Campbell County Fiscal Court for the unincorporated areas of Campbell County has been held invalid by the Campbell County Circuit Court in Campbell County Municipal Planning & Zoning Commission v. Johns, (No. 79-CI-1078 and 79-CI-1093 Campbell Cty. Cir. Ct.). These cases are currently on appeal, (No. 81-CA-1836-MR and 82-CA-266MR).
There are no obvious answers to these questions, a condition which in itself points to the fallaciousness of the court’s decision.

Various provisions of Chapter 100 of Kentucky Revised Statutes also challenge the Kindred Homes decision. As discussed previously, the enabling statute authorizes five separate planning tools, each distinctly defined as to contents, responsibility for adoption, and administration. The comprehensive plan is the focal point of the entire legislative scheme because it provides the framework and authority for adoption of the other regulatory devices. But the comprehensive plan is substantially distinct in “kind” from the other tools. It is broad in nature. Its purpose is to identify existing difficulties and needs, project future expansion and make recommendations as to what is necessary to solve current problems, prevent new problems and accommodate new growth. It is not a “regulation.” It does not have the force and effect of law. Penalties cannot be imposed for “violations.” The plan is a complete study of an area to ensure that subsequent legislative acts, such as zoning ordinances, are enacted based upon reasonable grounds.

If the entire legislative scheme of Chapter 100 of Kentucky Revised Statutes is reviewed, it is apparent that there are logical reasons for authorizing adoption of the comprehensive plan by the planning commission rather than the legislative body or fiscal court. First, the enabling statute clearly favors the creation of joint planning units instead of independent planning units. The obvious reason for this is the encouragement of county-wide planning, irrespective of arbitrary city corporate limits. But, if the comprehensive plan is to be adopted by the legislative body or fiscal court instead of the county-wide planning commission, the impact and advantages of county-wide planning are negated. Furthermore, many practical difficulties may arise in a joint planning unit if each legislative body and the fiscal court must agree to all that is contained in the county-wide comprehensive plan. It seems evident that the legislature intended that the comprehensive plan be adopted by the planning commission as a way to further encourage county-wide planning and to minimize conflicts between the various cities and the county that comprise the joint planning unit.

A second reason for providing that the comprehensive plan be adopted by the planning commission is one of political practicality. Zoning ordinances have traditionally been somewhat controversial in nature. Clearly, the authority to adopt the zoning ordinance itself could only be vested in the legislative body, comprised of
elected officials. Also obvious is the fact that elected officials are often subject to political pressure. Kentucky's enabling statute offers a solution to this potential problem. The statute requires the preparation and adoption of a comprehensive plan which forms the underlying basis for the city/county's zoning ordinance. But the plan is required to be adopted by the planning commission, an appointed body. This at least partially insulates the zoning decision-making process from sometimes arbitrary and undesirable political influences. The enabling statute has consciously established a balanced situation.

There are additional reasons supporting the premise that the comprehensive plan is not required to be adopted by the legislative body/fiscal court. First, Section 100.213 of Kentucky Revised Statutes establishes specific conditions which must exist in order for the legislative body to approve a zone change which is not in agreement with the comprehensive plan. This is also part of the legislative "balance." The purpose of the comprehensive plan is to guide legislative decisions on zoning. It is clearly more than a study to be relegated to the bookshelf. But it is not totally controlling. The statutory scheme enables the legislative body or fiscal court to vary the direction set by the comprehensive plan. But this ability to vary is limited — to prevent arbitrary decision-making. Second, Sections 100.211 and 100.321 of Kentucky Revised Statutes provide that the legislative body can override the recommendation of the planning commission (in regard to amendment to the zoning ordinance or official map) by a vote representing the majority of the entire membership of the legislative body. Again, the intent to create a comprehensive scheme, establishing a distinct division of responsibility, is evident.

*Kindred Homes* upsets the balance and confuses the division of responsibility. If the legislative body were to adopt the comprehensive plan with one different recommendation as to the land use for a particular piece of property, such as the planning commission's plan designating the property for industrial use and the city's plan designating it for a shopping center, it appears that such action would not require a vote of a majority of the entire membership of the legislative body. Sections 100.211 and 100.321 of Kentucky Revised Statutes, however, do establish such a requirement, if the action of the legislative body is taken to change the zoning (as opposed to the comprehensive plan's land use designation) of the property to shopping center, rather than to industrial use as rec-
ommended by the planning commission. Both of these sections require a majority vote of the entire legislative body to override the planning commission's recommendation on an amendment to a zoning ordinance. Thus, it seems that the legislature considered this requirement very important. But neither section refers to action by the legislative body in regard to adoption or amendment of the comprehensive plan. Rather than assume it was an oversight, the more reasonable interpretation is that it is not required because the enabling statute does not require adoption of the comprehensive plan by the legislative body.

The possibility of the legislative body adopting a comprehensive plan that differs from the plan adopted by the planning commission creates further complications. If the legislative body, consisting of six members with five members present, takes action to approve the comprehensive plan with a difference from the plan adopted by the planning commission, by a 3-2 vote, such action is presumably valid. Subsequently, if a developer requests a zone change for the property in question, the planning commission may recommend disapproval of the zone change, staying with the recommendation for industrial development, consistent with "its" comprehensive plan. Now, a vote of a majority of the entire membership of the legislative body (four votes) is clearly required to override the planning commission, pursuant to Sections 100.211 and 100.321 of Kentucky Revised Statutes. When the vote is taken by the legislative body on the zone change, again the results may be 3-2. Such a vote would be insufficient to approve the zone change request. But, the proposed zone change would be in agreement with the legislative body's comprehensive plan. What is the result? Presumably, litigation; but, beyond that it is anyone's guess. A conflict of authority and responsibility has now been created, a conflict which the enabling statute had carefully avoided. Undoubtedly, numerous other scenarios could be drawn to unveil other problems and conflicts created by Kindred Homes. Unfortunately, the answers are not easily found.

V. CONCLUSION

Chapter 100 of Kentucky Revised Statutes is a comprehensive legislative scheme governing planning and zoning activities in Kentucky. This enabling statute is relatively progressive compared to those in many other states. It is also very complex and some of the language is, unfortunately, sloppy unclear or contradictory. Yet, to those who use it on a daily basis, it is evident that much thought
and insight went into its drafting. As a whole, the statute offers a workable scheme for conducting sound planning operations. The difficulty lies in the fact that, on occasion, questions of interpretation of the statutory language must be made. This is a problem because the courts apparently do not recognize, nor understand, the concepts forming the rationale behind the statutory requirements. As a result, the courts interpret the statutes on a superficial level, often creating more questions of interpretation than the cases resolve. This comment has chosen one such interpretation as an illustration of a problem that is much broader in scope. The solution apparently lies in the education of Kentucky's judges — a solution much more easily written about than accomplished.

Betsy A. Horwitz
And he spake this parable unto them, saying, "What man of you, having an hundred sheep, if he lose one of them, doth not leave the ninety and nine in the wilderness, and then go after that which is lost, until he find it?" And when he hath found it, he layeth it on his shoulders, rejoicing. And when he cometh home, he calleth together his friends and neighbors, saying unto them, "Rejoice with me; for I have found my sheep which was lost. I say unto you, that likewise joy shall be in heaven over one sinner that repenteth, more than over ninety and nine just persons, which need no repentance."

**INTRODUCTION**

The parable of the prodigal child is a familiar part of the cultural dunnage that numerous people, regardless of their religious habits of mind, have carried with them for centuries. They understand it to signify the unique delight that is experienced when one who might have been lost is saved from calamity and that the omission of countless others to so go astray can produce no comparable joy. The fact of the survival of this moral lesson and of the religious tradition of which it is a part, along with many other worn items of cultural gear, have contributed to the development in contemporary times of what one social historian refers to as "chronocentrism": a kind of "historical parochialism" that produces hostility to the social precepts that guided human relations of our distant ancestors. Many would find repugnant—at least theoretically—the remorseless ease with which people of past historical periods might have slammed the door in the face of the erring child in the parable and turned to embrace his more tractable brother.

A significant aspect of contemporary chronocentrism is the attitude to children, such as is embodied in the Christian ethos for which the parable of the prodigal son is a metaphor. Inherent in the parable is the salvagability of the corrupt child, who had "wasted his substance with riotous living." And underlying that is

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2. Id. 15:3-32.
the central notion of Christianity: that within each person there is a core of childlike innocence, which makes that person fit to worship regardless of the many layers of wickedness that must be cast off to expose it.

The prevalence of the metaphor of innocence to suggest the Christian state of grace is credited with helping to work a profound change in attitudes to children during the Middle Ages. Along with other factors, this attitude has helped to shape the modern perception of children as tender, guideless beings over whom, for their own safety, adults must exercise beneficent despotism. It was this image of children that was before the reformers who, in nineteenth century America, created a separate judicial system, ostensibly to rescue infants from the dangerous influence of adults. The tarnishing of this image in the last two decades has caused a peculiar reversion of society to the depiction that dominated earlier history. Again the child is being seen "as a man on a smaller scale," capable of assuming adult responsibility for his or her actions. Nowhere is this more evident than in the recent revisions by numerous states of their transfer statutes, permitting trial as adults of younger and more numerous categories of children.

7. See the contemporary documents concerning the early juvenile courts collected in II Children and Youth in America, 1866-1932, 502-54 (R. Bremner ed. 1971) [hereinafter cited as Bremner]. Said one early reformer of the children who were arrested and discharged:

[During the one year there were in [Chicago] upwards of 10,000 young persons given a regular criminal experience without having committed any crime. Think of this a moment. And if so many in one city, what a multitude throughout the land! Mind, these were not even offenders. But what was the treatment they received? Why, precisely the same as if they had been criminals. They were arrested, some of them clubbed, some of them handcuffed, marched through the streets in charge of officers, treated gruffly, jostled around. At the police station the name and a complete description of the person of each was written on the prison records, there to remain. Some of them were bailed out, while the remainder where shoved into cells and forced to spend a night and sometimes a week there, forced to stand around with criminals, before they were discharged. Now, what effect will this treatment have on them? Will not every one of them feel the indignity to which he or she was subjected, while life lasts? Will they not abhor the men who perpetrated what is felt to be an outrage? Will they not look on this whole machinery as their enemy, and take a secret delight in seeing it thwarted?

J. Altgeld, Our Penal Machinery and Its Victims 31-32 (1886), quoted in id. at 502.
8. P. Aries, supra note 5, at 10.
the aim of this comment to explore the development of the concept of childhood; its influence in the formation of the juvenile justice system; the recent loss of faith in children's incorruptibility and the misconceptions giving rise to it; the expansion of laws allowing trials of youths as adults; and the retrogressive juvenile justice reform movement that is underway.

I. THE "MYTH OF BENEFICENCE": 10 THE ORIGINS OF CHILDHOOD AND DELINQUENCY

A. The Origin of Childhood

Many sufferers of the modern malady of chronocentrism should be startled back into good intellectual health to discover that acts such as carrying to school and using weapons, consuming drugs and intoxicants, and engaging in sex, which are now thought of as delinquent when performed by persons in their early teens, were acceptable behavior up until about one hundred-fifty years ago. 10 At the time, those who were outraged by such antics were just as dismayed to see them performed by persons in their twenties and thirties. The reason for this is quite simple: no distinction was made between the two age groups nor was there conduct acceptable to the older group but not to the younger. Designations such as "child," "adolescent" and "adult," currently employed to describe these two age groups, are avoided here initially because these terms were not used then as they are now. 12
Reference to the history of the common law, the language of which is still confusingly in currency, 13 makes this apparent. While in Anglo-Saxon times there had been no fixed rule defining the age of majority (the point at which a young person achieved a separate legal status) that of the knightly class became the standard. 14 Until he had reached twenty-one years, the age at which an individual was considered strong enough to bear the heavy medieval armor, a tenant by knight's service was referred to as an "infant."

At common law, a person's life was divided into two periods, infancy and... 

The first age is childhood when the teeth are planted, and this age begins when the child is born and lasts until seven, and in this age that which is born is called an infant, which is as good as saying not talking, because in this age it cannot talk well or form its words perfectly, for its teeth are not yet well arranged or firmly implanted.... After infancy comes the second age... it is called puertita and is given this name because in this age the person is still like the pupil in the eye, as Isidore says, and this age lasts till fourteen.

Afterwards follows the third age, which is called adolescence, which ends according to Constantine in the viaticum in the twenty-first year, but according to Isidore it lasts till twenty-eight... and it can go on till thirty or thirty-five. This age is called adolescence because the person is big enough to beget children, says Isidore. In this age the limbs are soft and able to grow and receive strength and vigour from natural heat. And because the person grows in this age to the size allotted to him by Nature...

Afterwards follows youth, which occupies the central position among the ages, although the person of this age is in his greatest strength, and this age lasts until forty-five according to Isidore, or until fifty according to others. This age is called youth because of the strength in the person to help himself and others, according to Aristotle. Afterwards follows senectitude, according to Isidore, which is half-way between youth and old age, and Isidore calls it gravity, because the person is grave in his habits and bearing; and in this age the person is not old, but he has passed his youth, as Isidore says. After this age follows old age, which according to some lasts until seventy and according to others has no end until death.

Id. at 21-22.

13. See, e.g., 43 C.J.S. Infants § 1 (1978) and cases noted therein.
15. F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 438 (2d ed. 1968). Pollock and Maitland depict the choice as the age of majority of the age at which the knight was assumed to have reached full physical strength as somewhat arbitrary:

There is more than one "full age." The young burgess is of full age when he can count money and measure cloth; the young sokeman when he is fifteen, the tenant by knight's service when he is twenty-one years old. In past times boys and girls had soon attained full age; life was rude and there was not much to learn. That prolongation of the disabilities and privileges of infancy, which must have taken place sooner or later, has been hastened by the introduction of heavy armour. But here again we have a good instance of the manner in which the law for the gentry becomes English common law. The military tenant is kept in ward until he is twenty-one years old; the tenant in socage is out of ward six or seven years earlier. Gradually however the knightly majority is becoming the majority of the common law.

Id. (footnote omitted) (emphasis added).
majority, and "infant," as Pollock and Maitland comment, "the one technical word that we have as a contrast for the person of full age [stood] equally well for the new-born babe and the youth who was in his twenty-first year." The remark indicates that these two nineteenth-century historians, like inhabitants of the chronocentric present, ascribed a fixed meaning to the word "infant," which, as it now does, then must have evoked images of helpless babyhood.

It takes very little digging to discover that only in the past few centuries has the infant become a creature dependent upon, and an object of, almost worshipful love. Prior to that time, as one commentator has it, "infants were seen less as human beings than as strange formless little creatures somehow different from people who had survived for a few years and with whom strong emotional ties were to be avoided." Nor were their somewhat older brothers and sisters viewed much more benevolently. Sexual use of small children was apparently common in classical Greece and Rome and is discussed quite matter-of-factly by authors of the time. The laws of Judaism set the penalty for sodomy with children over nine years of age as death by stoning, "but copulation with younger children was not considered a sexual act, and was punishable only by a whipping, 'as a matter of public discipline.'"

A more recent example of what came to be seen as the exploitation of children was their participation in the labor force. Only in the last fifty years has it become taboo for children to perform the same jobs as adults. In 1900, around 187,000 American children between the ages of ten and thirteen were working full-time, as

16. Id. at 439 (emphasis in original).
17. Aries suggests the inception of this image in the portrayal of the infant Jesus in Renaissance art: "From this religious iconography of childhood, a lay iconography eventually detached itself in the fifteenth and sixteenth centuries." P. Aries, supra note 5, at 37.
18. L. Empey, supra note 6, at 7.
19. See excerpts in de Mause, supra note 5, at 43-46. It ought to be mentioned here that de Mause's chronocentric distaste with such practices is so strong that he views the history of adult treatment of children as a series of modes reflecting a global pathology that has very gradually progressed toward healthiness: "Infanticidal Mode (Antiquity to Fourth Century A.D.);" "Abandonment Mode (Fourth to Thirteenth Century A.D.);" "Ambivalent Mode (Fourteenth to Seventeenth Centuries);" "Intrusive Mode (Eighteenth Century);" "Socialization Mode (Nineteenth to Mid-twentieth Century);" "Helping Mode (Begins Mid-twentieth Century)." Id. at 51-52.
20. Id. at 45, quoting L. Epstein, Sex Laws and Customs in Judaism 136 (1948).
part of a total work force of 28,500,000. A legal full day's work for Al Priddy, aged thirteen and employed in the textile mills in New Bedford, Massachusetts, was ten and a half hours. Nevertheless, Priddy explains that, from three to four days out of his five day work week, he spent thirteen hours in the mill, cleaning the spinning machine, a task that could not be done while the machine was in motion and that was required of him if he wished to keep his job.

In fact, it was the distaste experienced by those who saw, and read accounts such as Priddy's of, young people at work that motivated far-reaching reforms in treatment of and attitudes to children. But reform was a long time coming and, to understand it, it is important to recognize that childhood is a social construction and that the young of most of past history were thought of very differently from today's. Until well into the seventeenth century, infanticide, particularly of the physically unsound, the illegitimate, and girls, was widely practiced. More common than infanticide, in the fourth through thirteenth centuries, was abandonment of unwanted children. Setting aside the outrage that such usages evoke, it is probably true, as has been said, that these, "rather than contraception and abortion, were methods of controlling family size and ensuring achieving the maximum utility from one's offspring." What must be realized is that, until only quite recently, the child was viewed less as an object of love than as one of economic value. The modern sentimentalization of children makes such a statement appear cynical, but even in this century, the contribution of children to the family's financial support has often been necessary to the family's survival as a unit.

Traditional methods of care of infants, in use for many centuries, also exhibited a certain amount of what in this century would be considered parental indifference. Newborns of all social classes were turned over to wet nurses to be kept until they were

23. A. Priddy, Through the Mill 167-68 (1911), quoted in Bremner, supra note 7, at 618.
24. L. Empey, supra note 6, at 26-28; de Mause, supra note 5, at 25-29.
25. See L. Empey, supra note 6, at 29; de Mause, supra note 5, at 51.
26. L. Empey, supra note 6, at 28.
27. Id. at 29.
28. See Kelley & Stevens, Wage Earning Children, in Bremner, supra note 7, at 635.
29. One author has attempted to explain parental indifference in light of the high infant mortality rate. See L. Empey, supra note 6, at 30.
weaned.\textsuperscript{30} Probably mainly for the sake of convenience, infants were wrapped tightly in swaddling bands for the first four months or so of their lives, a custom that continued in America to the end of the eighteenth century.\textsuperscript{31} Returning from wet-nursing, the child could expect to enter a home devoid of privacy, where "[e]verything was done in the same rooms with his family,"\textsuperscript{32} and where little notice was taken of the child by the mother.\textsuperscript{33} At age seven, the child, in the Middle Ages regardless of social station but later only if poor, was sent from the home to become an apprentice.\textsuperscript{34} Apprenticeship, during which children performed adult work, constituted children's education and signaled their entry into grown-up life: "Ready for semi-dependence, they were dressed as miniature adults and permitted to use the manners and language of adult society."\textsuperscript{35}

While this current ran strongly, however, a separate, weaker current had begun to flow within which there glimmered the beginnings of the modern concept of childhood. A perception of childhood innocence, implanted by Christian symbolism, began to take hold, which manifested itself in a new solicitude for, and amusement in, children.\textsuperscript{36} The older practices and attitudes continued, but a band of sixteenth and seventeenth century reformers began to criticize them and to urge the idea that children should be prepared for life apart from the adult world. For many, apprenticeship began to be replaced by formal schooling. Moralists and churchmen harangued parents into giving more thought to child-rearing and discipline.\textsuperscript{37} Schooling delayed children's entry into the adult world and made them dependent on their parents longer. It arrested their intellectual and emotional development, shielding them from maturing quickly.\textsuperscript{38} Education, more than anything else, helped to inspire the modern vision of the helpless, artless child by taking children out of adult workplaces and making them both "economically burdensome" to parents and ignorant of the ways of

\textsuperscript{30} Id.
\textsuperscript{31} de Mause, supra note 5, at 37-38.
\textsuperscript{32} P. Ariès, supra note 5, at 394.
\textsuperscript{33} L. Empey, supra note 6, at 34.
\textsuperscript{34} P. Ariès, supra note 5, at 365-66.
\textsuperscript{35} J. Gillis, Youth and History 8 (1974).
\textsuperscript{36} P. Ariès, supra note 5, at 130-33.
\textsuperscript{37} Id. at 412-13.
\textsuperscript{38} A. Skolnick, The Intimate Environment 322-24 (2d ed. 1978).
the world.\textsuperscript{39} When for all of previous history children had dressed and behaved as adults, suddenly education isolated children from adult contact in “private worlds of children,” endowing them with different dress, language and codes of conduct.\textsuperscript{40}

B. The Origin of Delinquency

Education, so important in creating the modern ideal of childhood, is also inextricably tied to the formulation of a separate, quasi-criminal status for children, that of delinquency. In the 1830’s and 1840’s, progressive social theorists began to cry out against child labor in industry, not so much because of its dehumanizing effects on children, but because it conflicted with compulsory education.\textsuperscript{41} Initial state legislation, enacted between 1830 and 1860, required that children below age fifteen working in factories attend school three months each year, and that the child’s workday be shortened to ten hours.\textsuperscript{42} In 1887, state laws began to be passed that prohibited children below specified ages, usually fourteen, from performing general industrial work.\textsuperscript{43} Thus, while the total numbers of children remained nearly the same, in 1880, there were 825,187 boys ten to fifteen years of age at work, but in 1890, only 400,586 ten to fourteen-year-olds at work.\textsuperscript{44}

What happened to those whom the constriction of child labor laws had saved from the brutalization of factory work? Probably a great many of them wound up penniless and wandering the streets, since, without the efforts of their children, many families doubtless were no longer able to stay together. Presumably a number of

\textsuperscript{39} Panel on Youth of the President’s Science Advisory Committee, Youth, Transition to Adulthood 9 (1974) [hereinafter cited as Youth].
\textsuperscript{40} See A. Skolnick, supra note 38, at 40; Chapters III and IV of P. Aries, supra note 5, at 50-99.
\textsuperscript{41} Youth, supra note 39, at 19.
\textsuperscript{42} U.S. Childrens Bureau, Child Labor Facts and Figures 4-8 (1930), quoted in Bremner, supra note 7, at 666.
\textsuperscript{43} Id. at 667. Another motive for removal of youngsters from the work force was their competition with adults for jobs. See Hunter, Poverty, in Bremner, supra note 7, at 656. The importance of schooling in providing a diversion to keep the young out of work and out of trouble cannot be underestimated: “Perhaps most schoolchildren, particularly older ones, realize that one of the major functions of school is simply to warehouse a portion of the population that is not needed anywhere, but which cannot simply be let loose on the streets.” A. Skolnick, supra note 38, at 328. Skolnick also bemoans the “profound psychological consequences arising from the modern child’s having to spend the first two or even three decades of life in a state of uselessness.” Id.
\textsuperscript{44} Bliss, Census Statistics of Child Labor, 13 J. of Pol. Econ. 246 (1904-05), quoted in Bremner, supra note 7, at 605.
these impoverished children eventually turned up in jail. Though some children may have resorted to petty crimes to support themselves, others were perceived as criminals simply because they were poor. Said one penal reformer in 1875 of rehabilitating children below fourteen: “all may be classed together under this age, for there is no distinction between pauper, vagrant, and criminal children, which would require a different system of treatment.” This philosophy partially may be attributed to circular contemporary reasoning that poverty was the result of immorality and that, if pauperism went unchecked, it would “ripen into criminality.”

The statement also alludes to an important aspect of the reform movement that resulted in the construction of a separate system for prosecution of youthful misdeeds. The system’s “early focus . . . was on children who were not guilty of what was considered real crime.” To prevent the criminal depredations that would surely result if poor children were not brought under social control, nineteenth-century saviors of youth cast the capacious net of parens patriae over the merely needy as well as the misbehaving. As one scholar expresses it, “When the nineteenth-century reformers spoke of parens patriae, they were dealing with neglected and criminal children; they were articulating the duty of the government to intervene in the lives of all children who might become a community crime problem.”

Acceptance of the idea that the state is the father of all indigent and erring children was possible because of the new perception of the child, not as a “miniature adult,” but “as a changing, growing human being, more responsive to guidance than an adult.” This doctrine was something of a departure from the common law. During Edward I’s reign, which bridged the thirteenth and fourteenth centuries, a rule was devised that “persons of tender age could not be guilty of a felony,” the most significant penalty for which was

45. These remarks of Mary Carpenter, quoted in Fox, Juvenile Justice Reform: A Historical Perspective, 22 STAN. L. REV. 1187, 1193 (1970), typify the apprehension of the reformers that delinquent and neglected children were interchangeable. Fox’s account of the fervor for the moral rescue of youth that resulted in the creation of separate courts for children is one of the best of numerous treatments of the subject. See also A. Platt, The Child Savers (1969).

46. Fox, supra note 45, at 1199.

47. Id. at 1192.

48. Id. at 1193 (emphasis in original).

escheat of one's property to his lord.\textsuperscript{50} Though development of this rule occurred at the time that children had first begun to be distinguished from adults,\textsuperscript{51} there is another way to account for it than the new belief in the innocence of young children. At common law, a child below majority could own no property that could escheat.\textsuperscript{52}

Without acquisition of property to compensate for the loss, there would be little benefit in killing, maiming or outlawing one who might otherwise pull his weight and be commercially useful to his family and indirectly to his lord.\textsuperscript{53} Over time, it became the settled common law rule that a child below the age of seven was incapable of committing a felony, that between seven and fourteen he was only presumed to be without capacity, and that over the age of fourteen, he was fully capable of such an act.\textsuperscript{54}

An important factor in juvenile justice reform was its abandonment of these presuppositions concerning children's accountability. Replacing the common law rule was a syllogistic scheme within which the misdeeds of youths were seen not as crimes but as delinquent acts; delinquent acts, not being crimes, were prosecutable without a requirement of criminal capacity; and delinquent children, not being criminals, could be made to answer for numerous acts that were not crimes. Though children were below the common law age limit permitting criminal conviction, they might still be found delinquent for acts that adults could commit with impunity or that the law had heretofore thought children incapable of being held accountable for.\textsuperscript{55} By removing any limits on the age at

\textsuperscript{50} II W. Holdsworth, supra note 14, at 358. According to Holdsworth, felony comprised in the reign of Edward I such offences as homicide, arson, rape, burglary, and larceny. . . . they all involved forfeiture of life or limb; a man accused of these offences might be outlawed; the felon's goods belonged to the Crown, and his lands were forfeited to the Crown for a year and a day, and then escheated to his lord.

\textit{Id.}

\textsuperscript{51} P. Aries, supra note 5, at 34. Aries notes that representations of children found in thirteenth century art "appear to be a little closer to the modern concept of childhood." \textit{Id.}

\textsuperscript{52} See supra notes 14-16 and accompanying text.

\textsuperscript{53} It is important to keep in mind that the term "felony" derived from the word \textit{fel}, meaning gall or poison, and signified a breach in the relations of lord and vassal, as well as of the king's peace. The penalty for such an offense had a dual nature: it was both retributive and remunerative. For poisoning the confidence of his lord, the vassal had to pay with his life and for depriving the lord of a vassal, he had to compensate by forfeiting his property. See II W. Holdsworth, supra note 14, at 357-58.

\textsuperscript{54} III W. Holdsworth, supra note 14, at 372.

\textsuperscript{55} See B. Griffin \& C. Griffin, \textit{Juvenile Delinquency in Perspective} 31-32 (1978). Presently, arrests of children under ten make up four percent of all juvenile arrests. \textit{Id.} at 59.
which children could be made to answer in court, or the acts for which they could be answerable, the state could intervene in the lives of enormous numbers of previously unreachable children. 56

The justification for such massive intrusion, referred to earlier, was the doctrine of parens patriae, which at common law had permitted the Crown to stand in the place of parents to protect the person and property of certain children. 57 The American version of the doctrine, however, set forth in Ex Parte Crouse, 58 permitted the state to become "the common guardian of the community," superseding, when it chose to, the authority of all parents over all children. 59

A peculiar metamorphosis occurred with the passage, in 1899, of the first legislation affecting child criminals, the Illinois Juvenile Court Act, 60 and with the subsequent enactment of its many imitators. Delinquent children were to surrender to the state the powerful cloak of autonomy they had worn as citizens, possessing the rights guaranteed by state and federal constitutions, and in exchange they would be relieved of moral responsibility for, and cured of, their incipient criminality. The transformation was almost magical. The misbehaving or potentially misbehaving youngster was no longer a "criminal," but an offender; 61 he was not to be punished, but to be "rehabilitated"; 62 a successful juvenile proceeding resulted not in a criminal conviction, but in a civil adjudication of delinquency. 63 As the Supreme Court explained in In re Gault, 64 "[t]hese results were to be achieved, without coming to

56. It has been suggested that, as most statutes are now phrased, juvenile courts have the power to direct the lives of nearly all children:
Definitions [of delinquency] based on the commission of delinquent acts describe the juvenile delinquent as any individual of minimum age who commits a delinquent act. This definition would encompass a large proportion of American youth, since self-report studies reveal that from 90 to 95 percent of all youths fall into this category.
Id. at 34.


58. 4 Whart. 9 (Pa. 1838).

59. Id. at 11.

60. Illinois Juvenile Court Act, § 5, 1879 Ill. Laws 133.


63. See, e.g., Banas v. State, 34 Wis.2d 468, 149 N.W.2d 571 (1967).

64. 387 U.S. 16 (1967).
conceptual and constitutional grief, by insisting that the proceed-
ings were not adversary, but that the state was proceeding as
*parens patriae.*"66 The child could be denied the procedural rights
routinely afforded to adults because a child was entitled "‘not to
liberty, but to custody.'"67 Though in *In re Gault, Kent v. United
States*68 and subsequent cases,69 the Supreme Court restored to
children some of the constitutional rights the juvenile court acts
had taken from them, it waited nearly three-quarters of a century
to deride the original deprivation.

II. PERCEPTIONS AND MISCONCEPTIONS: THE CORRUPTION OF THE
PRODIGAL

The Supreme Court decisions acknowledging the constitutional
prerogatives of children are ironically symptomatic of a shift in the
last few decades in the attitudes toward children and delinquency.
One of the bases of the *In re Gault* decision was the Supreme
Court’s recognition that mounting recidivism and “the high crime
rate among juveniles” did not point to the conclusion “that the
absence of constitutional protections reduces crime, or that the ju-
venile system, functioning free of constitutional inhibitions . . . is
effective to reduce crime or rehabilitate offenders.”69 The Court
hastened to add that it did not mean to “denigrate the juvenile
court process or to suggest that there are not *aspects* . . . which
are valuable.”70

Despite its half-hearted protest, the Supreme Court’s latter re-
mark reinforces a widespread perception about which others are
more blunt: that the juvenile courts are not accomplishing the aims
that inspired their establishment.71 One critic’s recommendation
for revamping the juvenile justice system advises “repetition of
correctional social policy founded on [such] undemocratic and un-

65. Id. at 16.
66. Id. at 17.
68. See Fare v. Michael C., 444 U.S. 887 (1979); Swisher v. Brady, 438 U.S. 204 (1978);
Breed v. Jones, 421 U.S. 519 (1975); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re
69. 387 U.S. at 22.
70. Id. (emphasis added).
“spate of legislative proposals, enacted or advocated throughout the country, that attack the
statutory expressions of the rehabilitative ideal,” noting particularly “new legislation [that]
seeks to impose the assumptions of adult criminality on the operations of the juvenile
court.” *Id.* at 8.
proven assumptions" as the ideas "that coercive humanitarianism or compulsory rehabilitation reduces crime and delinquency" and "that bona fide rehabilitation exists in correctional practices." There are even those who claim to have discovered evidence that an adjudication of delinquency, far from rehabilitating youngsters, worsens their behavior.73

The question that inevitably arises in response to the cry that reforms are not working and that it is time to retrogress is, what has happened to produce this loss of faith in the efficacy of juvenile laws to accomplish their purposes? Probably the most significant occurrence is the growing belief that America is in the grips of a crime wave perpetrated by children. A 1977 cover story in Time Magazine speaks of "youngsters [who] appear to be robbing, raping, maiming and murdering as casually as they go to a movie or join a pickup baseball team": "A remorseless, mutant juvenile seems to have been born, and there is no more terrifying figure in America today."74 A more recent article describes Americans as composing "a society terrified of its young."75

This image of children as the victimizers of their elders is not solely the creation of the popular press, which, says one commentator writing about the "myth of crime waves," has to be "discounted hugely."

To a great extent, the inspiration for this lurid scenario may be credited to the statisticians, according to whom, from 1960 to 1975, there was "a 293% jump in the number of arrests of children under 18 for murder, forcible rape, aggravated assault, and robbery—the four categories of violent crime reported in Uniform Crime Statistics published by the Federal Bureau of Investigation."77 Statistics show that, while in 1957 urban juvenile courts disposed of 280,000 delinquency cases, in 1976, they disposed of 715,800.78 Out of a population in 1977 of 188 million, approximately seven and one-half million males and females under eighteen were arrested and charged with committing 1,685,511 of the

violent crimes listed above. 79

Yet, the widening extent of criminal activity by children that these statistics appear to portray is deceptive. For one thing, between 1950 and 1975, the number of males in the population aged fifteen to seventeen doubled. 80 For another, juvenile arrests make up less than one percent of total arrests for violent crimes. 81 For still another, despite the popular perception that the old are most frequently the "prey" of violent delinquents, 82 in fact, it has been reported that the young are by far more likely than the aged to be the victims of other youths. 83 Some other misconceptions also need to be corrected. Black youths apparently do not commit any more delinquent acts than whites living under similar conditions, and there is evidence that there are as many middle as lower income group delinquents. 84

The increase in arrests of youths for violent crimes, moreover, has not kept pace with that of adults for the same crimes, the former increasing twenty-eight percent in the period from 1972 to 1976, while the latter increased 32.5 percent. More importantly, however, arrests of both juveniles and adults for violent crimes are dropping. Between 1975 and 1976, arrests of adults for violent crimes decreased by nine percent and of juveniles by twelve percent. 85 One commentator suggests that in the United States and Western Europe, excepting periodic short-term upsurges, the commission of some violent crimes has been declining for centuries. 86

There are also indications that the available statistics on violent youth crimes should be even lower than they are, due to inherent inaccuracies in the mode of their compilation. Those who complain of the proneness of juveniles to violent crime usually obtain their information from the statistics collected in the FBI's Uniform Crime Reports, which, as mentioned earlier, designate "violent" crimes as either murder, forcible rape, aggravated assault or rob-

79. Id. at 466.
83. Rector, supra note 81, at 19.
86. Gurr, supra note 80, at 295-96. See D. BELL, supra note 76, at 151.
A recent study prepared under a grant from the National Institute of Justice of the Department of Justice, however, questions the validity of gathering numerous offenses within these broad categories: "The principle problem with accepting these figures as indicators of actual offense rates are the wide range of behaviors encompassed under each specific offense type and the strong possibility that youths are being arrested for less serious behavior than adults." 88

One important factor not taken into account by rigid categories, which the authors of the study point out, is that youths are less likely to be armed with deadly weapons or to use them. 89 Further, ninety percent of the arrests of juveniles for offenses in the violent crime categories are for robbery and aggravated assault. The behaviors that may be lumped under those loose designations include schoolyard pranks as well as death threats. 90 Homicide and rape, the two offenses that most readily come to mind as examples of violent crime, and whose designations identify specific behavior, are much less often the cause of juvenile arrest than offenses in the other two categories. When juveniles are arrested for homicide and rape, the arrestees are usually older youths, those aged eighteen and nineteen. 91

Another fact the FBI's data do not reflect is that youths between the ages of eighteen and twenty "experience higher rates of arrest" for the offenses of robbery and aggravated assault. 92 What is suggested is that arrests of youths below the age of eighteen for clearly serious offenses are comparatively small and that the great majority of arrests of youths in this age group are for crimes in "the two

87. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 6 (1978). These purportedly national statistics, compiled annually since 1930, are given to aberrations that make their reliability suspect. One commentator notes that
the 1976 data do not include Chicago arrest data. By contrast, the 1974 Uniform Crime Reports did include . . . Chicago but did not include arrests from a host of police agencies representing a population of more than 20 million who were temporarily omitted from the reporting sample.

Zimring, supra note 85, at 88-89.


90. Id. at 6. See Zimring, supra note 85, at 90.


92. Id. One study suggests that a large number of juvenile offenses are committed by a relatively small group of "chronic offenders." See M. WOLFGANG, R. FIGLIO & T. SELLIN, DELINQUENCY IN A BIRTH COHORT 32 (1977). See also Rector, supra note 81, at 20.
classes of police-defined violence where the label of the arrest tells . . . relatively little about the degree of seriousness of the offense." 93 Moreover, in examining the two categories of offenses for which arrests of the young are more frequent, a comparison of statistics seems to indicate that, in the category of assault, police may be lowering the age at which they are willing to arrest juveniles for what they designate as "violent offenses." 94

Ironically, the increase in arrests of younger persons may be a function of the popular belief in the waxing viciousness of children, which the statistics themselves have helped to produce. The difficulty, according to the National Institute of Justice's study is that, "[e]ven if the rate of youth violence is coming down on a per capita basis, the expanding youth population has led, until quite recently, to an expanding number of offenses." 95 As long as "their own chances of becoming victims of youthful offenders are increasing on a statistical basis," the "non-young [will] be unconcerned with per capita rates of criminality." 96 Unfortunately, it is "the image of the violent young offender that animates policy and political debates," "a complex amalgam of generational, racial, and other societal conflicts." 97

Nevertheless, more accurate and trustworthy compilations of data could help to bring this image into more realistic focus. Greater discrimination in the classification of violent offenses is obviously called for, along with categories that describe offenses more specifically. It has been recommended that data be provided on the type of weapon and the amount of force used; the number of youths involved in the offense and the part each played; and the relationship, if any, of offender to victim. 98 Until an accurate picture of juvenile offenders is developed, penal policies can only be less effective in reducing youth crime and the public's view of its prodigal children will continue to grow more distorted and more

94. Zimring, supra note 85, at 81. Zimring also posits that "the conclusion one reaches about the relationships between age and violent crime depends heavily on one's definition of violence." Id. The problem is the amount of subjectivity given exercise by police in the terminology selected to describe an offense. This is particularly clear with sex offenses, which frequently may be designated as assaults. See Margolin, The Juvenile Sex Offender: Questionable Labelling, 1980 MED. TRIAL TECH. ANN. 1, 4-7.
95. Zimring, supra note 85, at 101.
96. Id. at 101-02.
97. Id. at 102 (emphasis in original).
fearful.

III. THE WAGES OF FEAR: TRIAL OF JUVENILES AS ADULTS

Whether present conceptions of the corruption of juvenile delinquents are misconceptions is a complex question. And whether a belief in the growing appetite of certain youths for violent crime has produced a cynicism about the incorruptibility of all children is also a puzzle that defies simple solution.99 It is at least arguable, however, that the present-day loss of patience with juveniles and juvenile justice is a corollary to a general rethinking of the concept of childhood. Whatever the cause, attitudes to violent children have clearly changed and society is willing to consider them adults and to react to their transgressions accordingly.100 State statutes that permit trial of youths as adults have been widely liberalized to facilitate transfer between juvenile and criminal courts. Time Magazine reports the thinking of “a growing number of lawyers, politicians and citizens . . . that youthful offenders who commit ‘grown-up’ crimes should no longer be treated as children,” and quotes Harvard Law Professor Arthur Miller’s remark that public opinion now favors “making juveniles accountable as adults, for adult crimes, at an earlier age.”101

The means for removing youngsters, whose ages make them subject to adjudication as delinquents, from juvenile court jurisdiction to criminal court for trial as adults is known most often as waiver or transfer of juvenile court jurisdiction, or certification for adult prosecution. Presently, every state has a statute embodying the transfer principle, though at one time several states, notably New York and Nebraska, had no such mechanism.102 Jurisdiction may

99. Popular journalist Adam Smith repeats this statement of an author on the subject of youth crime: “I have met fifteen year olds . . . who will kill absolutely without any remorse. They are especially antagonized by any of the usual symbols of authority, property, office and so on.” Smith, Why We Are Preyed Upon: Our Criminal Class is Becoming Permanent, Esquire, March 1982, at 9.
101. Id.
be waived either judicially, legislatively or prosecutorially. In jurisdictions using the most common method, judicial waiver, a judge determines whether to waive jurisdiction after a hearing that examines the potential effectiveness of juvenile court resolution, usually according to certain statutory criteria. Legislative waiver, on the other hand, is much more rigid, and involves a predetermination by the legislature that youths charged with certain offenses will automatically be excluded from the juvenile process. Statutory schemes in many jurisdictions make provision for both judicial and legislative waiver. In those jurisdictions permitting prosecutorial waiver, the waiver decision may be made by the pros-


103. See, e.g., KAN. STAT. ANN. § 38-808 (1981). Kansas juvenile courts are commanded to consider these factors:

(1) Whether the seriousness of the alleged offense is so great that the protection of the community requires criminal prosecution of the child; (2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner; (3) the maturity of the child as determined by consideration of the child's home, environment, emotional attitude and pattern of living; (4) whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted; (5) the record and previous history of the child; (6) whether the child would be amenable to the care, treatment and training program for juveniles available through the facilities of the court; and (7) whether the interests of the child or of the community would be better served by criminal prosecution of the child.

Id. § 38-808(b). For a listing of articles concerned with waiver of juvenile court jurisdiction, and a listing of jurisdictions employing judicial waiver, see Feld, Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions, 62 MINN. L. REV. 515, 522-24 nn.21 & 22. (1978).

104. See, e.g., COLO. REV. STAT. § 19-1-104(4)(e) (Supp. 1981). See also infra notes 116-20 and accompanying text.

105. See Feld, supra note 103, at 523-24.
executor, either directly or indirectly. Though it is a subject open to debate, it appears that each method possesses its peculiar danger, the legislative of being too arbitrary and the judicial and prosecutorial of being too discretionary.

Recently, numerous jurisdictions have altered their waiver statutes, either to ensure that youths charged with certain violent crimes are isolated from other offenders and held responsible as adults, or to lower the age at which youths may be tried as adults. The treatment given here of this phenomenon is not meant to be exhaustive, but to provide samples of some of the more dramatic modifications of prior law that are symptomatic of a pervasive change of attitude. Two aims—making younger children available to the criminal process and separating from their age peers those whose acts are deemed to confer adult status—evidently underlie the alterations. Nevertheless, manifestations of the concern that violent delinquents get their just deserts vary.

Some states, under the guise of restricting already expansive waiver statutes, instead have made it more likely that some youths who might not have been before now will be tried as adults. The recent adoption in these states of statutes specifically designating certain offenses as ones appropriate to criminal prosecution makes this possible. In Alabama, for instance, which had permitted transfer to criminal court of any child over fourteen for any offense, the law now limits it to those charged with acts that would be felonies if committed by adults. A similar change has been wrought in West Virginia, though there the minimum age required before transfer is allowed is sixteen. Amendment of the Idaho waiver

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106. See, e.g., NEB. REV. STAT. § 43-202.01 (1978). It provides that “the county attorney shall . . . mak[e] the determination whether to file a criminal charge or a juvenile court petition.” Id. For a discussion of the merits of prosecutorial waiver, see Feld, Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the “Rehabilitative Ideal,” 65 MINN. L. REV. 167, 173 n.18 (1981); Myleniec, Juvenile Delinquent or Adult Convict—The Prosecutor’s Choice, 14 AM. CRIM. L. REV. 29, 33 (1976).

107. See Feld, supra note 106, at 174. Feld maintains that “legislative redefinition of juvenile court jurisdiction provides a more objective and administratively superior method of identifying which chronological juveniles are ‘adults’ for purposes of prosecution under the criminal law.” Id.


statute, however, which was already like Alabama's new statute, has lowered the minimum age permitting transfer from sixteen to fifteen for youths charged with felony-like acts. Combined with the new desentimentalized picture of children that is now being drawn, the statutory recognition that particular acts of juveniles of a certain age ought to invoke adult punishment should assure transfer in cases in which age and offense coincide with the statute.

Many states whose juvenile laws were once more restrictive have amended their waiver statutes to permit transfer to occur more often and more easily than before. In Virginia, where juvenile courts once had to weigh the possibility of successful rehabilitation prior to transfer, presently, upon a charge of one of a number of specific violent offenses, may waive jurisdiction without any consideration of such matters. Washington's statute now permits a juvenile court to "decline" jurisdiction in any case, but commands it in every case involving a youth sixteen or older who is charged with a Class A felony or one seventeen or older charged with a serious second degree felony. Arkansas has so liberalized its law as to allow waiver of jurisdiction in any juvenile matter regardless of the charge or the age of the child, though previously it required that the child be over fifteen and charged with a felony.

Even the jurisdiction with a reputation for legal innovation and for leniency and liberality where individual rights are concerned, has hardened its juvenile laws in a mold like that used in other states. California, which had previously made transfer depend solely upon the criterion of amenability to treatment, upon amending its statute to include other matters that must be considered such as the offender's previous history and the gravity of the present charge, now presumes that a youngster who is sixteen or older and has been charged with one of the named violent acts, is not amenable to treatment in the juvenile system. Thus, the youth fitting the statutory description comes into court weighted with

113. WASH. REV. CODE ANN. § 13.40.110 (Supp. 1981). Previously, Washington law had provided that if a child under eighteen taken into custody were determined to have "committ[ed] a crime, the court in its discretion, may order the child to be turned over to the proper officers for trial under the provisions of the criminal code." Id. § 13.04.120 (1962) (repealed 1978).
the burden of showing the feasibility of his or her rehabilitation.

Perhaps the most striking changes have been wrought in those states that, up until recently, had no transfer statutes. In one of these, Nebraska, the prosecuting attorney now decides whether an alleged offender should be subjected to the juvenile or criminal process, though if the charge is a felony, he or she must be tried as an adult. Of all the states that have made recent changes in their juvenile laws, the one receiving the most attention is New York. Prior New York law made no provision for waiver of juvenile court jurisdiction. Before its passage of the Juvenile Justice Reform Act of 1978 (hereinafter the 1978 Act), which instituted legislative waiver, New York had tried all youngsters under sixteen as juveniles and all sixteen or over as adults.

In detailing the benefits of the new law, New York Governor Hugh Carey, while admitting that arrests of children under sixteen for murder had dropped "steadily" during the previous four years, opined that the state had "moved from an irrational system to one which grades responsibility and culpability by reference both to the degree of criminality and the age of the defendant." The effect of the new law is not to transfer jurisdiction to criminal court but to permit certain youths to bypass the juvenile process entirely. Now to be tried as adults are thirteen-year-olds charged with second degree murder; first and second degree arson, robbery and burglary; first degree kidnapping, assault, rape, sodomy and murder; and attempted second degree murder and first degree kidnapping.

Though other motivations have been suggested, probably the chief incentive behind New York's new law was the public outrage at the light sentence given fifteen-year-old Willie Boskett, who

118. "A person less than sixteen years old is not criminally responsible for conduct." N.Y. Penal Law § 30.00(1) (McKinney 1975) (amended 1978).
121. See Thorpe, supra note 119, at 29, who notes that New York's Juvenile Justice Reform Act of 1978 "was passed as part of a larger 'get tough on crime' package by an 'extraordinary session' in an election year."
confessed to killing two people and attempting to kill another in 1978.\textsuperscript{122} Under New York's Juvenile Justice Act of 1976, which had increased the severity of juvenile penalties, the most that Boskett could be sentenced was five years in detention.\textsuperscript{123} An important aim of the 1978 Act was to make up for what was assumed to be a deficiency in the law by creating special sentences for youth crimes that are somewhat less strict than adult sentences,\textsuperscript{124} but are still appropriately exacting.\textsuperscript{125}

Once convicted and sentenced under the 1978 Act, a youth will be detained in juvenile facilities but, at age sixteen, may be sent to adult prison.\textsuperscript{126} Under prior law, a youth adjudicated delinquent under age sixteen would never have had to face eventual incarceration with adults.\textsuperscript{127} That a youngster, convicted at thirteen, might be housed at sixteen in an adult penal institution is not shocking, considering that, in many counties in the United States, there are no juvenile facilities and sometimes youngsters awaiting adjudication must be placed in jails.\textsuperscript{128} New York State does have youth institutions, however. It is not a matter of necessity but of public policy that may land a sixteen-year-old New Yorker, who has spent one quarter of his life to date incarcerated, in a prison cell two years before public policy decrees the typical youngster responsible enough to exercise the right of suffrage.

What is unusual about this feature of New York's new law is its deliberate contravention of one of the inspirations for the creation in the late nineteenth century of a separate process for young criminals: abolishing confinement of children in prisonlike "reform" schools and isolating them from matured criminals.\textsuperscript{129} In

\begin{footnotes}
\item[122.] Levy, \textit{supra} note 119, at 52.
\item[124.] See N.Y. \textsc{Penal Law} § 70.05 (McKinney Supp. 1981).
\item[125.] See, e.g., id. § 70.05(3)(a),(b), which would permit a thirteen-year-old convicted of second degree murder to be imprisoned for life (maximum) or, at the least, for five to nine years (minimum).
\item[126.] N.Y. \textsc{Exec. Law} § 515-b (McKinney Supp. 1981).
\item[127.] \textit{Id.} § 516, however did permit temporary imprisonment of an already incarcerated delinquent who had been found dangerous to persons or property.
\item[128.] L. \textsc{Empey}, \textit{supra} note 6, at 468-69.
\item[129.] See \textsc{Bremner}, \textit{supra} note 7, at 439, 502. Perhaps the system has come full circle. In justifying the return to children of procedural protections, which were taken upon the excuse that, since the state intended not to punish but to aid the child, procedures would be a hindrance, the Supreme Court acknowledged that placement in a correctional institution was the kind of deprivation that could not be foisted on a person without due process:
\begin{quote}
A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of
fact, many states still specifically forbid institutionalizing adults and youths together.\textsuperscript{130} Probably characteristic is the New York law in force in 1944, which mandated that “no child . . . be placed in or committed to any prison, jail, lockup or other place where such child can come into contact at any time or in any manner with any adult who had been convicted of any crime or who is under arrest.”\textsuperscript{131} Though it is still true in New York that a child under sixteen will not be detained with adults, it is a heretical departure from the rehabilitative gospel to send a sixteen-year-old who has been interned since age thirteen, and could not have gained much in adult maturity or ability to cope with bad influences, to facilities where hope and euphemisms have been abandoned.

In only shallowly probing New York's 1978 Act—its broadened sweep, toughened penalties and harsher procedures—it is possible to gauge the temperature nationwide. Another oracular feature of the 1978 Act is that it does not provide for holding in confidence proceedings and records of proceedings involving thirteen, fourteen and fifteen-year-olds. Previously all adjudication in which youths under sixteen had figured was conducted in private.\textsuperscript{132} Protecting grownups from the indiscretions of their childhoods has been a limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a “receiving home” or an “industrial school” for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time.

\textit{In re Gault}, 387 U.S. 1, 27 (1967).


131. \textit{In re Society for Prevention of Crime, Inc.}, 183 Misc. 595, 596, 49 N.Y.S.2d 587, 588 (1944). Washington's law is a good example of a current version of such a provision:

When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to bring such child into any yard or building in which such adult convicts may be present.


132. N.Y. CRIM. PROC. LAW § 720.15 (McKinney 1971) (amended 1978). Prior law required the “accusatory instrument [be] sealed” and the “arraignment and all proceedings . . . be conducted in private” of youths committing crimes between the ages of sixteen and nineteen.” \textit{Id.} § 720.10 & .15(1),(2). Since 1978, section 720.15 has been amended and now provides that sealing the complaint and conducting the proceedings in private “shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law.” N.Y. CRIM. PROC. LAW § 720.15(3) (McKinney Supp. 1981). Section 720.10, which explains to whom section 720.15 applies, has been amended so that section 720.15 now encompasses the “juvenile offender.” \textit{Id.} § 720.10(1). The definition of “juvenile offender” includes thirteen, fourteen and fifteen-year-olds committing crimes that permit them to be tried as adults. \textit{Id.} § 1.20(42). The result is that processing of the designated youngsters will not be kept private.
crucial aspect of the rehabilitative nature of the juvenile process, and one approved by the Supreme Court in In re Gault. There the Court prefaced its discussion of the importance of preserving juvenile offenders' anonymity with the remark that being known as a "'delinquent' . . . has come to involve only slightly less stigma than the term 'criminal.'" Recent ly, however, the first amendment has been used to weaken the traditional rule of non-disclosure of information about juvenile processes, of which the Supreme Court had said in Gault, "there is no reason. . . a State cannot continue to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles." In Smith v. Daily Mail Publishing Co., the Supreme Court held that a state's interest in protecting juveniles' anonymity was not strong enough in relation to the first amendment to permit that state "to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." One writer contends that Smith is badly out of harmony with past constitutional cases that had advanced the rehabilitative ideal by sanctioning keeping delinquent pasts in confidence. Nevertheless, this change of tone seems consonant with a larger context in which the Supreme Court has grown generally more "ambivalent" about whether violent juveniles should be treated the same as adults.

133. 387 U.S. 1 (1967).
134. Id. at 23-24. See also In re Winship, 397 U.S. 358, 367 n.5 (recognizing the importance of non-disclosure of juvenile offenders' identities in reducing the delinquency stigma).
135. 387 U.S. at 25.
137. Id. at 106.
139. See Rosenberg, The Constitutional Rights of Children Charged With Crime: Proposal for a Return to the Not So Distant Past, 27 U.C.L.A. L. REV. 656 (1980). Rosenberg contends that "the Court's decisions determining the constitutional guarantees of alleged juvenile delinquents . . . pit adult compassion and understanding that immature youths are not fully responsible against adult anger at children who commit crime." Id. at 658-59. See also Clarke & Koch, Juvenile Court: Therapy or Crime Control, And Do Lawyers Make a Difference?, 14 L. & Soc'y REV. 263 (1980). Clarke and Koch believe that "disillusionment with the therapeutic juvenile court . . . culminated with In re Gault." Id. at 264.

A further, clear sign of the ambivalence of the Supreme Court and other courts about the penal status of the young has been the barometric rise and decline of the concept of right of treatment, said to be owed to delinquents in exchange for confinement by the Due Process and Equal Protection Clauses and the eighth amendment. Martarella v. Kelly, 349 F. Supp. 575, 586, 600 (S.D.N.Y. 1972), enforced, 359 F. Supp. 478 (S.D.N.Y. 1973). See also Nelson v. Heyne, 355 F. Supp. 461 (N.D. Ind. 1972), aff'd, 491 F.2d 352 (7th Cir. 1974), cert. denied,
The recent changes in New York's laws and in other states' transfer statutes mirror more than ambivalence; they reflect frustration with the leniency of juvenile justice and a widespread belief that children who behave as adults must be dealt with as such. Despite its inflexibility, New York's new juvenile law appears to be consistent with national thinking. In a "nationwide random telephone survey," conducted by CBS News in 1977, forty-one and fifty percent respectively of self-described "liberals" felt that delinquents should be given the same sentences as adults and have their names made public. Some legal scholars insist that the existence of transfer statutes in the first place "strikes at the most basic philosophical elements of the juvenile court system" and is an "admission that the system cannot or does not want to try to rehabilitate [those] . . . for whom it was created." Whether or not this is true, current modifications of the statutes enabling the criminal court to gather ever more children within its jurisdiction cannot help but hasten the collapse of a teetering system in which public confidence has already badly deteriorated. If not impending dissolution of the juvenile courts, the liberalizing of transfer statutes at least signifies a drastic revamping of them.


140. SOURCEBOOK, supra note 78, at 289, 696. Fifty-three and ninety percent respectively of "liberals," however, did feel juveniles should be separately tried and confined. Id. at 289.


142. See Thorpe, supra note 119, at 29. In discussing the "proper forum or setting for considering serious charges against very young individuals," Thorpe suggests as an alternative a "'pure adult' system in which all individuals charged with a serious crime, regardless of age, would be processed entirely in the adult court." Id. (emphasis added).
IV. THE PRODIGAL MADE TO PAY: RETROGRESSIVE REFORM

Imagining the "abolition" of, or vast changes in, the juvenile justice system is more than pedantic fancy.¹⁴³ For, as this comment has attempted to suggest, such an occurrence is inevitable if the synonomic reshaping of the concept of childhood prevails. Many signs point the way to change. Penology generally seems to have readopted its former rigid classical stance. Classical criminology, which once held sway and which saw crimes as willed behavior that could be circumscribed by the appropriate punishment, was displaced by positivism, which viewed crime deterministically, as the result of the chance convergence of social forces. The positivists deduced that crime prevention was a matter of controlling the forces that produced it. They were largely responsible for the creation of juvenile courts.¹⁴⁴ Popular dissatisfaction with the potential for rehabilitation of wrongdoers of all ages, but particularly with violent children as the toughening of transfer laws shows, heralds the revivals of classical criminology. Numerous proposals have been put forward for reforming the juvenile process and restructuring the legal rights of the young. A sampling of these, which show dissatisfaction with the juvenile court’s sentimentalized perception of the child and consequently which point to the system’s demise, are discussed below.

Probably the most widely-endorsed reform recommendation is that status offenses be "decriminalized."¹⁴⁵ Status offenses are the juvenile law counterparts of status crimes—typically vagrancy and drunkenness—wrongs that proceed not from the commission of a proscribed act but from the actor’s condition.¹⁴⁶ The notion of status offenses pierces to the heart of the concept of childhood. Because the conditions juvenile law proscribes are modes of being not prohibited to adults, liability depends upon the status of being a

¹⁴³. At least this is true of Martin Guggenheim, supra note 10, at 23-25, who proposes “an integrated system [that] distinguish[es] between offenders on the basis of age.” Id. at 25. Guggenheim says that “[c]alling for the abolition of a separate juvenile court system is not as radical as it sounds” and “[w]ould not require abandonment of all of the aspects of the present . . . system.” Id.

¹⁴⁴. See Clarke & Koch, supra note 139, at 264; Guggenheim, supra note 10, at 23.


child. Unlike status crimes such as drunkenness, status offenses are forbidden due, not to the nature of the condition, but to the nature of those in the condition.

In most statutory schemes, status offenses include truancy, incorrigibility, and running away, but may encompass such relatively harmless behavior as using vulgar language in public, smoking cigarettes and violating curfew. The proposal that status offenders always be dealt with administratively by social services agencies rather than by the juvenile courts casts doubts on the continued viability of the juvenile court's original rationale that, since no juvenile misdeed is a crime, whether skipping school or stealing a car, then all acts may be lumped together and their actors treated together. Separating status actors from other offenders marks the latter with a quasi-criminal stigma. Further, "diversion" of status offenders, along with children who are mistreated and neglected, to other social agencies is fraught with its own problems. Diverted children may be subject to treatment even longer than those adjudicated delinquent, and be labelled and disposed of without opportunity for review. There are complaints that diversion has "extended the net of social control," in the form of mandatory counseling, therapy and other services, over the lives of parents and children in defiance of their legal rights.

147. B. Griffin & C. Griffin, supra note 55, at 29-30.
149. When the juvenile court was invented, it was assumed: (1) that children are qualitatively different from adults; (2) that legal intervention in their lives is justified because of their dependent and protected status; and (3) that the goal of intervention is rehabilitation, not punishment. ... Today, by contrast, we have not only grown disillusioned with our child-saving institutions but our concept of childhood is changing. More and more our assumptions about children take the following form: (1) that they are not qualitatively different from adults, at least not so much as we thought; (2) that their right to self-determination should prevent legal interference into their lives for behavior which, if exhibited by adults, would not be considered illegal; and (3) that children should be granted all the constitutional protections afforded adults, including the protection of their rights against parents, the school, or the legal system itself.

L. Empy, supra note 6, at 573.
150. See Rutherford, supra note 146, at 89. "It is ironic that the juvenile court, which derived much of its rationale as a means of diverting juveniles from the criminal court, should not itself be the target of diversion strategies." Id.
151. Perhaps due to a growing belief in children's autonomy, social scientists appear to have become more squeamish about encroachments upon the lives of children. See A. Platt, supra note 45, at 178. This may account for the failure of appeal of delinquency prevention programs. Compare S. Glueck & E. Glueck, Toward A Typology Of Juvenile Offenders 84-93 (1970) with Pink & White, Delinquency Prevention: The State of the Art,
Related to plans to decriminalize status offenses is the issue of deinstitutionalization. Reformers urge that children who are merely neglected or who have committed status offenses and are being detained with those adjudicated delinquent be "decarcerated." Moderates point out, however, that all institutions are not "bad" and that the aim of deinstitutionalization should be "ridd[ing] juvenile programs of social isolation, personal degradation, stultifying routines, and severe punishment, not . . . helpful services for children." Nevertheless, decarceration is enthusiastically supported, the rationale apparently being that recalcitrant or deprived children are better off left to their own devices. The implied assertion underlying demands for decarceration gnaws at the foundations of the concept of childhood. It intimates that children have the hardiness to withstand emotional and familial tempests without the shelter of state services.

Another proposition, showing disillusionment with the concept of childhood and the original good intentions of the juvenile system, would deprive courts of the ability to confer indeterminate sentences on delinquents. The indeterminate sentence requires youths to keep contact with the system, upon threat of loss of freedom, until the court's jurisdiction expires, usually at age twenty-one. Though the practice was meant to give juvenile courts the flexibility to individualize remedies for youthful wrongs, it is now argued that indeterminate sentencing encourages abuse of discretion, and that it creates dangerous inequities, since the response of different juvenile courts to the same behavior varies widely. The proposed solution, definite penalties for specific serious acts and less long-term meddling in youngsters' lives, has its detractors as well. Definite sentences, it is said, make the juvenile system too closely resemble the criminal process, discourage the fashioning of creative penalties such as restitution, and produce recidivism be-

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in The Juvenile Justice System 5-26 (1976). Such programs, which are calculated to identify and forestall budding delinquent careers, depend for their success upon intense intrusion into family and individual privacy of the young. Thus, many find such efforts highly objectionable, and, according to report, none of the studies of, and attempts to treat, predelinquency has so far proved effective. See L. Empey, supra note 6, at 510-11. Cf. Hirschi, supra, note 49, at 211 ("free exercises of theoretical imagination") should be permitted to concoct ways to "intervene[ ] before a crime has been committed").

152. Rutherford, supra note 146, at 89-90; L. Empey, supra note 6, at 578-79; M. Fabricant, Deinstitutionalizing Delinquent Youth 1-2 (1980).

153. L. Empey, supra note 6, at 578.

154. G. Wheeler, supra note 72, at 130-32; L. Empey, supra note 6, at 449-50; Rutherford, supra note 146, at 91-94.
cause they encourage non-supervision of young offenders.188

The content of the bickering, for purposes of this comment, is less important than the disappointment with the system it reveals. Suddenly the indeterminate sentence, which was supposed to afford a compassionate system the opportunity to customize treatment so that it exactly fitted children's needs, is seen as an occasion for exercises of erratic and capricious judicial power. The recommendation that definite sentences replace indefinite ones also assumes that children do not need the juvenile court acting as a loving but arbitrary parent and would be better served by, and are capable of coping with, penalties of the same retributive character as are meted adults.

Decriminalization, decarceration and definite sentencing reforms all embody the idea that the juvenile process should respond differently to young performers of serious wrongs than it does to the merely unwholesome and unruly. The implication is that the acts of the former have earned them adult standing. And, if youthful offenders are being accorded adult responsibility in other parts of the process, the thinking goes, then they deserve the procedural safeguards available to adults. Reformers contend that the margin separating criminal and juvenile processes, already reduced by the Supreme Court,155 should be eliminated.156 Juveniles are denied important constitutional rights mechanically furnished to adults such as the right to trial by jury, a public trial, bail, a speedy preliminary hearing to test the legality of detention, and to narrow grounds for detention.157

The right to a jury trial is said to be the most "needed" of these.158 In McKeiver v. Pennsylvania,159 in which the Supreme Court recognized "that the fond and idealistic hopes of the juvenile court proponents . . . have not been realized," it concluded "that trial by jury in the juvenile court's adjudicatory stage is not a con-

156. See Kent v. United States, 383 U.S. 541 (1966) (potential deprivation of special protections of juvenile system demands a hearing); In re Gault, 387 U.S. 1 (1967) (due process requires adequate notice, privilege against self-incrimination, rights to counsel, confrontation and appeal in juvenile proceedings); In re Winship, 397 U.S. 359 (1970) (safeguard of proof beyond a reasonable doubt required in delinquency adjudication); Breed v. Jones, 421 U.S. 519 (1975) (juveniles may not twice be put in jeopardy for the same offense).
157. See, e.g., L. Empey, supra note 6, at 576-77; Guggenheim, supra note 10, at 24; Rutherford, supra note 146, at 91.
159. G. Wheeler, supra note 72, at 136.
160. 403 U.S. 528 (1971).
stitutional requirement." 161 The Court declined to impose it because to do so would "once again place the juvenile squarely in the routine of the criminal process" and would destroy the "juvenile court’s ability to function in a unique manner." 162 This objection, used to justify refusal to extend other protections, apparently means that the informality of the proceeding, and the total control of the judge over it, are still thought necessary to appropriate decisionmaking. 163 It seems contradictory to maintain such a position, however, while admitting that paternalism is not an adequate substitute for due process safeguards. 164 If it is true that the past decisions 165 of the Supreme Court have "reinforce[d] the shift in emphasis from needs of the offender to details of the crime event," 166 then extension of the right to a jury trial to juveniles seems constitutionally necessary. But rather than make a move that might erode beyond repair a badly furrowed and fallow system, the Supreme Court is accused of continuing "functionally [to] place [the burden] on the child to prove his innocence." 167

Analogous to the charge that the procedural constitutional rights enjoyed by adults be extended to children, demands are being made that children be recognized as possessing discrete legal personalities. This may have very important consequences for juvenile justice. If the civil courts free children from the incapacity of age, the criminal courts surely will follow suit and heed age even less. With the stages of youth that underpin it dissolving, the juvenile system must fall. The move to identify "children's rights" began in the nineteenth century, stimulated by a concern for children's physical and moral well being. It helped to impel the creation of separate justice and welfare systems for children. 168 And though the legal capacity of children has quietly expanded since that time, 169 recently interest has revived in the subordinate legal status of children.

161. Id. at 543-44.
162. Id. at 547.
163. See L. EMPEY, supra note 6, at 577.
164. See In re Gault, 387 U.S. 1, 17-20 (1967).
165. See note 156 supra.
166. Rutherford, supra note 146, at 91.
168. For a history of the movement, see Freeman, The Rights of Children in the International Year of the Child, 33 CURRENT LEGAL PROBS. 12-16 (1980).
169. See A. SUSMANN, supra note 158, at 15-52.
Some children's rights advocates\(^\text{170}\) have been concerned chiefly with claiming for children an unqualified right of self-determination, "the right to do, in general, what any adult may legally do."\(^\text{171}\) Others,\(^\text{172}\) like their predecessors,\(^\text{173}\) are more interested in ensuring that children have the safest and least exploitative environment in which to mature. Probably the most influential present-day expression of children's rights are the Standards Relating to the Rights of Minors (hereinafter the Standards) of the Juvenile Justice Standards Project.\(^\text{174}\) Though exhibiting a certain amount of protectiveness, the Standards are acutely cognizant of the "emerging autonomy of the juvenile."\(^\text{175}\) As with the reforms being urged in juvenile justice, the Standards seem preoccupied with treating as adults children who have adopted social mannerisms characteristic of adults. They address seven broad areas of concern: the age of majority;\(^\text{176}\) emancipation;\(^\text{177}\) the right to support;\(^\text{178}\) the right to medical care;\(^\text{179}\) the right to employment;\(^\text{180}\) and contract and first amendment rights.\(^\text{181}\) Only the first five of these will be discussed here.

The independence that the Standards grant children has a dark


\(^{171}\) J. Holt, supra note 170, at 19.

\(^{172}\) See, e.g., H. Foster, A "Bill of Rights" for Children XV (1973). Foster's "Bill of Rights" includes the child's "legal" right to parental love, guidance, and support, to an education "to the best of parental ability," and to seek medical care. Id. Cf. the purpose ascribed to the new chapter of Kentucky Revised Statutes on termination of parental rights. Effective July, 1982, the statute announces that it "must . . . be understood that children have certain fundamental rights," including "the right to adequate food, clothing and shelter; the right to be free from . . . abuse or exploitation; the right to develop . . . to their potential; the right to educational instruction and . . . to a stable family." Ky. Rev. Stat. § 208C.010 (Supp. 1981).

\(^{173}\) See The Children's Charter, in Bremner, supra note 7, at 106-08, which was the product of President Hoover's 1930 White House Conference on Child Health and Protection, and which, among its nineteen guarantees, promised to "every child" spiritual and moral training, a loving and safe home, proper health care, and adequate education and "a community which recognizes and plans for his needs." Id. at 107.

\(^{174}\) American Bar Association, Institute of Juvenile Administration, Standards Relating to Rights of Minors (Juvenile Justice Standards Project 1977) [hereinafter cited as Rights of Minors].


\(^{176}\) Rights of Minor, supra note 174, § 1.1.

\(^{177}\) Id. § 2.1.

\(^{178}\) Id. §§ 3.1-3.4

\(^{179}\) Id. §§ 4.1-4.9.

\(^{180}\) Id. §§ 5.1-5.8.

\(^{181}\) Id. §§ 6.1, 7.1.
as well as a light side. They set the age of majority at eighteen, referencing the lowering of the voting age and the need to "give legal recognition to the social reality that persons age eighteen and over already engage in a vast range of adult responsibility."\(^{182}\)

While uniform adoption of this section would permit children legally to engage in a variety of activities—such as conveying land and purchasing alcoholic beverages—now denied to them even in jurisdictions that have lowered the age of majority,\(^{183}\) the adjacent provision on emancipation may deprive them of certain benefits of childhood at an earlier age.

The *Standards* make it possible for children who have not reached the age of majority to be held responsible for conducting their own legal affairs. The *Standards* deem a child emancipated if he or she maintains a separate residence and finances, disregarding parental consent, traditionally required to signify emancipation.\(^{184}\) A judicial finding of emancipation would confer adult liabilities on a child and deprive him or her of such privileges as the parental obligation of support and social program benefits. A separate section of the *Standards*, relating to support, declares that maintenance may be terminated upon the child's marriage or upon his or her establishing separate dwelling and economic arrangements from the parents'.\(^{185}\)

Though requiring children to assume the burdens of independence when they have sought self-rule, the *Standards* also permit the child of an ongoing family to sue a parent directly for support.\(^{186}\) The support provision entitles the child to enforce the obligation typically imposed in divorce statutes and implied in criminal non-support and neglect laws, but outside these statutory contexts and despite a prior strong public policy against meddling in private family matters.\(^{187}\) Moreover, the *Standards* authorize support "commensurate with [the support obligor's] means and with the style of life which the child has previously been ac-

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182. *Id.* § 1.1, Commentary at 17, 20.
183. The Commentary notes that, though a number of states have lowered the age of majority to eighteen, they have retained "certain peripheral legal disabilities," which the compilers find "demeaning": "Standard 1.1 rejects a position of selective or partial equality in favor of an across-the-board age of majority for all legal purposes." *Id.* at 19.
185. *Id.* § 3.4(B)(1).
186. *Id.* § 3.3(A), Commentary at 39.
Construed together the support standards might permit a child of an otherwise harmonious family, whose lifestyle had been curtailed, perhaps due to a parental attempt at frugality, to seek court restoration of his or her former high standard of living. Such a possibility is likely to disquiet many parents and to make them doubt the compilers' assertion that in composing the Standards they weighed equally the interest of the child, family and state. 188

The portion of the Standards setting out guidelines for a child's obtaining medical care, which unhesitatingly accord the child physical autonomy, are equally certain to cause alarm. Though "in the absence of overriding societal interests," 189 they do encourage parental involvement through prior consent or subsequent notice, the Standards confer sole authority upon children to consent to treatment for chemical dependence, veneral disease, contraception and pregnancy, and mental disorders. 190 Anticipating the objection that allowing minors freely to obtain contraceptives will interfere with the state's and parents' moral instruction, the Commentary accompanying the standard cites the lack of relation between accessibility of contraceptives and frequency of sexual contact. 191 Most controversial of all, after tallying parent and child privacy interests, the Commentary flatly states that the standard "dispenses with any requirement of prior parental consent before a minor may obtain an abortion." 192 Recent Supreme Court pronouncements, however, may have added enough weight to parental privacy to throw doubt on such an assessment of the interests involved. 193

Like the medical care standards, which imply that children who if given the power of choice over the use of their bodies, the employment standards grant youth who want to exercise it discretion in deciding when to go to work. They are said to embody "an un-

188. RIGHTS OF MINORS, supra note 174, § 3.2.
189. Id. at 1.
190. Id. at 6.
191. Id. §§ 4.7-4.9
192. Id. at 74.
193. Id. at 79.
194. See Santosky v. Kramer, 50 U.S.L.W. 4333 (1982). In Santosky, the Supreme Court reiterated its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment" and that "[t]he fundamental liberty interest of natural parents in the care, custody and management of their children does not evaporate simply because they have not been model parents." Id. at 4335.
derlying policy . . . to minimize restrictions on minors' employability by reducing or eliminating many of the present legislative encumbrances contained in child labor laws."195 Lest the compilers be accused of wishing to return to the bad old days of child enslavement, they hasten to add that "[y]outh unemployment and underemployment, and minors' integration into meaningful economic roles is currently a more serious problem than the danger of economic exploitation."196 Thus, the Standards attempt to harmonize compulsory school attendance and labor laws197 and to lift all limitations on youth employability once the compulsory education age minimum is past.198

Because they are usually to varying extents extensions of already existing law,199 the Standards, probably more than anything else, demonstrate what the children's rights movement has been said generally to evince: "that we are in a transitional phase in our beliefs about childhood."200 It is certain that children will not be found to possess the rights of adults unless they are also presumed to be able to accept the responsibilities of adulthood. Thus, their transgressions may come to be regarded as "crimes," not "offenses," the proper response to which is infliction of suffering and not condonation. For, if youngsters are viewed as capable of grown-up decision-making in other areas of life, then it will be assumed

195. RIGHTS OF MINORS, supra note 174, at 6.
196. Id. A number of social scientists share this belief. See, e.g., L. Empey, supra note 6, at 566; Youth, supra note 39, at 43-45; A Skolnick, supra note 35, at 326-31. Skolnick comments that "traditional notions that work is bad for children and separation from the adult world is good are being reexamined," and that "[t]he exploitation of children in the mines and mills of the last century may have blinded us to the fact that responsible and productive action may reward children and aid in their development. Id. at 330.
197. RIGHTS OF MINORS, supra note 174, § 5.1-5.3
198. Id. § 5.5-5.7.
199. The final two standards, relating to contract and first amendment rights, rely more than the others on law already in place. The standards for contracts of minors merely attempt to make uniform current rules of various jurisdictions by devising criteria to govern when contracts of minors between the ages of twelve and eighteen will be honored. Id. § 6.1(A). The standards for exercise of first amendment freedoms claim for minors "the same rights as adults with respect to freedom of expression, freedom of the press, constitutional freedom of association and freedom of religion," which the Commentary asserts is also the position of the Supreme Court. Id. § 7.1, Commentary at 120. A dissenting view appended to the Standards complains that the first amendment standard fails to clarify children's free speech and other rights. Id. at 125. The gripe is a valid one, since the Standards expressly exclude from coverage the exercise of first amendment rights in schools and the Commentary admits that "virtually all of the litigation involving minor's constitutional rights arises in situations of conflict [with] school regulation." Id. at 122.
200. L. Empey, supra note 6, at 568.
that they chose to behave badly and not that they were helpless
victims of a confluence of social pressures from which they may be
rescued and thereafter rehabilitated. At that point, retrogression
will end: misdeeds of youngsters will be punished as crime, just as
they were before the advent of juvenile justice.

Along with the directive that legal personalities of children dist-
tinct from their parents' be recognized, the demand that all inci-
dents of due process be extended to delinquents are crucial factors
in changing the response of the courts to youth. Since there is no
different court system, however, treating minors as adults for civil
trial purposes is not as portentous as trying young wrongdoers as
adults. If juvenile trials come largely to resemble adult trials, then
it will be difficult to justify maintaining a separate, expensive juve-
nile justice system. Given current attitudes, it is not difficult to
imagine a future in which youth offenses are desentimentalized
and recognized as criminal; the aura of criminality is at least osten-
sibly erased from status offenses; the criminal process completely
supplants the juvenile system, except for vestigial appendages at-
tached to social services departments; and young litigants are a
common sight in both civil and criminal courts

CONCLUSION

It is a hornbook cliche that a crime is comprised of two conver-
gent parts, the bad act and the bad thought, without one or the
other of which the actor is not a criminal but has simply thought-
lessly done a bad thing or thought badly and done nothing. But
delinquency, on the other hand, is comprised merely of the bad
act, performed by one who is presumed incapable of possessing the
bad mind required to make the act a crime. For, it is a juvenile law
hornbook cliche that "[a] finding of delinquency . . . does not re-
quire responsibility or criminal intent." Thus, one may be adju-
dicated "delinquent" and subjected to a lengthy detention not un-
like imprisonment, when a criminal court would not have found
him or her to possess the mental state necessary to warrant crimi-
nal liability.

That, probably, is the greatest irony of juvenile justice: the abil-
ity of the state to intervene in the lives of children, often to their
great detriment, upon provocation that would be insufficient to al-
low like interference in the life of an adult. The rationale that per-

201. W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW 192-93 (1972).
202. B. Griffin & C. Griffin, supra note 55, at 36.
mits this well-intentioned interference with children’s destinies is the preception that a person in the first quarter of life is much different than he or she will be in the second quarter; that there is a separate, definable state of being called childhood or youth, during which persons cannot be held responsible for their behavior.

The concept of childhood is the foundation of the juvenile justice system. The more often young people who perform particularly bad acts are found to have the state of mind necessary to evoke criminal responsibility and adult punishment, the more the system is weakened. The more waiver statutes are liberalized to encompass younger and greater numbers of children, resulting in increases in the number of children tried as adults, the more the system is undermined. The more violent children are seen as persons who have never experienced childhood in the conventional sense, the easier it is to perceive docile children as little adults.

Slamming the door on the prodigal, refusing to forgive his wayward youth, may inalterably change society’s treatment of all its children. Whether this is viewed positively is a matter of perspective. Once the door is shut, there will be a sharper division between children labelled “good” and “bad,” and youthful high spirits may come to be indulged less often. For the prodigal, in exchange for fairer treatment in the courts, harsher penalties may be expected. Though prodigals may not be subject to the process as often, due to more stringent proof requirements, the likelihood of their being excused will proportionately decrease. Certainly the state will interpose itself less often in the lives of the young and those of their families, but once it does, it will no let go as easily, and when it does let go there may be deeper scars.

Sherry Brashear Holstein
NOTES


On April 18, 1976, Paul Vance and his wife, Cynthia, invited Carl Leichtamer and his sister, Jeanine, to accompany them on a ride in the Vance’s Jeep Model CJ-7. The Vances were members of the Hall of Fame Four Wheel Club, a recreational facility consisting of hills and trials around an abandoned strip mine near Dundee, Ohio, and Paul Vance drove to the club in order to use the facility for some “off-the-road” driving. While at the club facility, the Jeep approached a double-terraced hill composed of a 33-degree slope, followed by a 70-foot-long terrace and a second 30-degree slope. According to Carl Leichtamer’s testimony, Vance checked to make sure the three passengers had their seat belts fastened, put the Jeep in four-wheel drive, and coasted down the first hill and across the terrace without mishap.1 As the Jeep passed over the brow of the second hill, however, the rear of the vehicle raised up and passed through the air in an arc of approximately 180 degrees, landing upside down with the front pointing back up the hill. Paul and Cynthia Vance were killed; Carl Leichtamer sustained a depressed skull fracture; Jeanine suffered permanent spinal injuries which left her a paraplegic.2

In a subsequent suit against American Motors Corporation, American Motors Sales Corporation and Jeep Corporation, Carl and Jeanine Leichtamer averred that their injuries were caused by the displacement of the “roll bar” on the Vance’s vehicle. There was no allegation that there was a defect in the manufacture of the particular Jeep involved in that it in any way departed from the manufacturer’s design specifications; only that the roll bar tubing was displaced upon impact with the ground because of the collapse of the sheet metal housing to which the bar was attached, and that the weakness of this housing caused enhancement of the

2. Id. at 456-58, 424 N.E.2d at 571.
Leichtamers' injuries. The complaint also averred that the advertisements and promotional material of the defendant corporations encouraged consumers to use Jeep vehicles in a manner which would greatly increase the risk of similar accidents, which are known as "pitch-overs." At the time of the accident, American Motors Sales Corporation was promoting the Jeep in a multi-million dollar television campaign stressing the vehicle's ability to drive up and down steep hills. Carl and Jeanine Leichtamer both testified that they had seen these advertisements and believed the roll bar would protect them if the Jeep landed on its top.

The defendant's principal argument was that the Jeep's optional roll bar was designed to protect passengers only in accidents where the Jeep rolled over onto its top sideways, called a "side-roll," and was not meant to withstand the impact of a pitch-over. Testimony showed that the only testing of the roll-bar was done on a 1969 Jeep CJ-5, a model with a wheel base 10 inches shorter than the CJ-7. Evidence of that testing was offered and refused.

After hearing instructions basing liability on the breach of an implied warranty to provide a product free of defects and reasonably safe for its intended use, the jury returned verdicts for both plaintiffs, assessing damages for Carl at $100,000 compensatory and $100,000 punitive and for Jeanine at $1 million compensatory and $1 million punitive. On appeal, among other objections, American Motors asserted that only negligence principles should provide the basis of liability in a design defect case and that the trial judge erred in submitting instructions founded on strict liability in tort. The Ohio Supreme Court disagreed, holding that section 402A of the Restatement (Second) of Torts, which had been adopted four years earlier by the court as controlling in cases where the plaintiff alleges injury caused by a defect in product's manufacture, should also allow a cause of action in strict liability when the plaintiff alleges injury caused by a defect in the product's design.

By holding that Restatement section 402A is applicable in de-

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3. Id. at 458-59, 424 N.E.2d at 572.
4. Id. at 459-60, 424 N.E.2d at 572-73.
5. Id. at 460, 424 N.E.2d at 573.
6. Id. at 467, 424 N.E.2d at 577 n.2.
7. Id. at 460, 424 N.E.2d at 573.
8. Id. at 462, 424 N.E.2d at 574.
9. Id. at 467, 424 N.E.2d at 577.
sign defect cases, it appears the supreme court is giving Ohio’s lower courts a standard for use in future cases of alleged design defects. In reality, it may only serve to further confuse the lower courts by leaving a number of important questions unanswered. This note will attempt to review some of the problems encountered by other courts which have adopted section 402A for design defect cases, review some of the criticisms of leading commentators who have examined the effects of such use of section 402A, and advance a prediction as to the future course of design defect litigation in Ohio.

THE ROAD TO LEICHTAMER

In order to fully understand the potential effect of Leichtamer on the development of design defect law in Ohio, it is necessary to briefly review the history of products liability law in the state.

As the United States became increasingly industrialized in the 20th century, the courts became increasingly aware of the need to protect consumers from injuries caused by the use of flawed or defective products. The liability of manufacturers for harm caused by the use of their products had expanded in accord with consumer dependency on products which have become technologically sophisticated to a point beyond the comprehension of the average consumer. Toward the middle of the century, a trend toward removing arbitrary and prohibitive limitations on the liability of producers and distributors of potentially dangerous products swept the country. Yet even after many of these artificial limitations had been widely abolished, courts continued to adhere to theories of express and implied warranties of fitness in order to relieve the injured plaintiff of the sometimes-difficult burden of proving negligence on the part of the manufacturer of an injury-causing product.

The concept of strict liability in tort for product-caused injury was introduced by the California Supreme Court’s landmark deci-

10. For a complete discussion of the erosion of privity and other obstacles to recovery under warranty and negligence theories, see Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966); Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960).

11. See, e.g., Rogers v. Toni Home Permanant Co., 167 Ohio St. 244, 147 N.E.2d 612 (1958) (Plaintiff’s hair fell out after her mother gave her a home permanent with defendant’s product. The Ohio Supreme Court held that a consumer could sue the manufacturer of a product for breach of express warranties arising from published advertisements for the product).
sion in *Greenman v. Yuba Power Products, Inc.* In his famous opinion in *Greenman*, Chief Justice Traynor stated that “[a] manufacturer is strictly liable in tort when an article he places on the market, knowing it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.” To establish a manufacturer’s liability, a plaintiff need only prove that he was using the product in its intended manner, was injured as the result of a defect in design or manufacture of which he was unaware, and the defect made the product unsafe for its intended use. “Defect,” however, was left undefined.

Two years after *Greenman*, the final draft of section 402A of the Restatement (Second) of Torts was published. Section 402A stated that sellers of products “in a defective condition unreasonably dangerous” are strictly liable for harm caused to the ultimate user. The official comments to section 402A attempted to aid courts both in defining the term “defect” and in limiting the potential liability of sellers and producers of products. According to the comments, a product falls under section 402A only when it, at the time it leaves the seller’s hands, is in a condition which is not contemplated by the ultimate consumer and which will make the product unreasonably dangerous. There is no liability if the product is delivered in a safe condition and becomes unsafe through subsequent mishandling or substantial modification, and the burden of proving the defect existed at the time it left the seller’s hands is on the injured plaintiff. In order to be considered “unreasonably dangerous,” the product must be “dangerous to an extent beyond that which would be contemplated by the ordinary

13. Id. at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700.
14. Id. at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.
15. § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer
   (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
      (a) the seller is engaged in the business of selling such a product, and
      (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
   (2) The rule stated in Subsection (1) applies although
      (a) the seller has exercised all possible care in the preparation and sale of his product, and
      (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Restatement (Second) of Torts* § 402A (1965).
16. Id. comment g.
consumer who purchases it, with the ordinary knowledge common
to the community as to its characteristics."\textsuperscript{17}

Despite the fact that the majority of state courts rapidly ac-
cepted section 402A,\textsuperscript{18} Ohio continued to cling to the concept of
implied warranties.\textsuperscript{19} It wasn’t until the 1977 case of \textit{Temple v.
Wean United, Inc.}\textsuperscript{20} that the Ohio Supreme Court expressly
adopted section 402A and its official comments. In adopting the
Restatement guidelines, the court noted that "... there are virtu-
ally no distinctions between Ohio’s ‘implied warranty in tort’ the-
ory and the Restatement version of strict liability in tort” and that
section 402A with its comments "greatly facilitates analysis in this
area."\textsuperscript{21}

But \textit{Temple} was not a typical products liability case in which
the court could apply the section 402A “unreasonably dangerous”
test. The plaintiff, a punch press operator, brought action on theo-
ries of negligence, implied warranty and strict liability against the
manufacturer of the press after her hands and arms were crushed
by the press when an object fell onto its operating buttons. Be-
cause of the findings that the employer had altered the machine
involved by moving the operating buttons to waist level, thus in-
creasing the probability of the type of accident which occurred,
and that this alteration was a “substantial change” falling within
the exception imposed by section 402A(1)(B), the court held that
strict liability could not be imposed on the defendant manufac-
turer.\textsuperscript{22} Regarding the allegation that the manufacturer had negli-
gently designed the power press, the court noted that there was no
Ohio case directly on point but that the general rule in such situa-
tions was that "... [i]t is the duty of the manufacturer to use
reasonable care under the circumstances to so design his product
as to make it not accident or foolproof, but safe for the use for
which it is intended."\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} comment i.
\item \textsuperscript{18} By 1977, at least 34 states had adopted § 402A in some form, and at least seven other
states applied a form of strict liability without formally adopting the Restatement for-
\item \textsuperscript{19} Ohio adopted a form of strict liability in \textit{Lonzrick v. Republic Steel Corp.}, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966). Although the court cited both § 402A of the Restatement
and \textit{Greenman} with approval, it nonetheless only permitted the plaintiff to recover on a
theory of implied warranty of fitness.
\item \textsuperscript{20} 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).
\item \textsuperscript{21} \textit{Id.} at 322, 364 N.E.2d at 271 (footnotes omitted).
\item \textsuperscript{22} \textit{Id.} at 323, 364 N.E.2d at 271.
\item \textsuperscript{23} \textit{Id.} at 326, 364 N.E.2d at 273, \textit{citing Gossett v. Chrysler Corp.}, 359 F.2d 84, 87 (6th

Thus, even while adopting section 402A to impose strict liability on sellers of defective products, the court, in dicta, recognized that it would be necessary to impose a negligence standard—a duty on the part of a manufacturer to use reasonable care—to define the boundaries of liability in cases where the plaintiff alleges injury caused by a defect in the design of the product. This problem in applying the same definition of defect to product flaws resulting from manufacturing mishaps and those resulting from conscious design decisions has caused difficulties for many courts attempting to apply the section 402A “unreasonably dangerous” standard to design defect cases. When the defect occurs in the manufacturing process, the product’s defectiveness can be easily evaluated by comparison to other products from the same assembly line, but when the plaintiff alleges the manufacturer’s conscious choice of design caused the product to become “unreasonably dangerous,” no such comparison is possible and courts must develop another standard to determine if liability should be imposed.

Since the employer’s “substantial change” in the design of the punch press removed Temple from the scope of section 402A, Leichtamer was the first occasion for the Ohio Supreme Court to consider whether section 402A should be the sole guideline offered to lower courts faced with design defect cases. In Leichtamer, the court first recognized that Dean Prosser, reporter for the Restatement (Second), questioned the applicability of section 402A to design defect cases because in such cases “liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from the proper standards of care, so that the tort is essentially a matter of negligence...” Nevertheless, the court went on to say that “[w]e see no difficulty in also applying section 402A to design defects.” The rationale given was twofold: First, to draw a distinction between defects resulting from manufacturing processes and those resulting from design decisions with a difference in the burden of proof on the injured plaintiff would “... only provoke needless questions of

Cir. 1976).

25. Id. at 600 n.29.
26. Id. at 600-01.
27. 67 Ohio St. 2d at 464, 424 N.E.2d at 575, quoting Prosser on Torts § 96, at 644-45 (4th ed.).
28. 67 Ohio St. 2d at 464, 424 N.E.2d at 575.
defect classification which would add little to the resolution of underlying claims . . . ; and secondly, to provide a consumer injured by an unreasonably dangerous design . . . the same benefit of freedom from proving fault provided by section 402A as the consumer injured by a defectively manufactured product. . . ." According to the court, a plaintiff's prima facie case in a design defect case would be established by proving by a preponderance of the evidence that his injuries were proximately caused by a defective product unreasonably dangerous to him, and that a product would be found unreasonably dangerous if it is dangerous to an extent beyond the expectations of an ordinary consumer when using the product in an intended or reasonably foreseeable manner.

FORESEEABLE PROBLEMS OF THE LEICHTAMER HOLDING

Ohio trial courts now face the task of applying the section 402A “consumer expectations” test to design defect cases. The problems which the Leichtamer holding may present are perhaps best evaluated by examining some criticisms offered by commentators who have studied the problems this test has presented for other courts.

Some courts adopting this “consumer expectations” test use it as the conclusive determination of the existence of a defect. If the product measures up to consumer expectations, it is not defective. But, depending on the formulation of the jury instructions concerning how consumer expectations should be defined and determined, the results in any given case could vary from court to court.

One major problem with the consumer expectations test is determining whether the test should be objective or subjective. Courts which have not expressly stated that an objective approach should be used run the risk of allowing a jury to inadvertently inject the plaintiff's implied assumption of risk into the analysis of the product's "defectiveness." A plaintiff who is knowledgable about a certain type of product may more readily be seen by a jury as a person who should have had expectations about the particular dangers of using the injury-causing product and will be precluded

29. Id.
30. Id. at 467, 424 N.E.2d at 577.
31. Birnbaum, supra note 24, at 611.
32. Id.
from a recovery which would have been allowed to a plaintiff who was less knowledgeable about the product. 83

Even if the test imposed is an objective one, a second criticism of the consumer expectations approach is that it unnecessarily limits the scope of liability. For example, such an interpretation would preclude recovery in situations where the danger is obvious or generally known, even if the particular plaintiff did not realize the potential danger. 84 In addition, especially when a product is technologically complicated, it is difficult to say if consumers entertain any reasonable expectations concerning the product's safety. As Dean Wade has pointed out, "[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made." 85

These problems have led some courts which have adopted a consumer expectations test to incorporate a type of risk/utility analysis to aid the jury in defining consumer expectations. 86 These risk/utility analyses often are phrased as balancing tests where the jury is asked to weigh the likelihood of harm and the gravity of that harm against the burden of precaution which would be necessary to prevent the harm. 87 Although two noted commentators, Deans Keeton and Wade, have advocated the risk/utility test as a solution to the problems of defining the scope of liability in design defect cases, 88 the approach has been criticized when it is used by

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33. See Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978), cited in Birnbaum, supra note 24, at 611. (Plaintiff was denied recovery in a wrongful death action because decedent, an experienced boater, was aware of the risks of boating and should have realized the danger caused by the lack of a safety device on the boat).

34. See, e.g., Stenberg v. Beatrice Foods Co., 576 P.2d 725, 730-31 (Mont. 1978). This limitation would, however, be in accord with at least one Ohio appellate court decision. See Burkhard v. Short, 28 Ohio App.2d 141, 275 N.E.2d 632 (1971) (fact that a car's dashboard was obviously unpadded precluded plaintiff's recovery for negligent design). But see Jones v. White Motor Corp., 61 Ohio App. 2d 162, 401 N.E.2d 223 (1978) (obviousness of defect is only a factor to be considered in determining if plaintiff was contributorily negligent or if product is unreasonably dangerous).


38. See Keeton, Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products, 20 SYRACUSE L. REV. 559, 568 (1969); Wade, supra note 35, at 834-
courts as the means to define consumer expectations. This criticism turns mainly on the fact that, in cases of patent or obvious dangers, juries instructed to focus on the reasonable expectations of a person using the product might tend to consider the particular plaintiff's implied assumption of risk in using the product as a factor rather than limiting their evaluation to an objective risk/utility analysis to determine if the product should have been designed to be safer.\footnote{39}

In \textit{Leichtamer}, the court adopts a consumer expectations test by holding that the plaintiff must prove injury caused by defective product unreasonably dangerous in that it is dangerous to an extent beyond the expectations of an ordinary consumer. But, because the court found, in that case, that the expectations of an ordinary consumer were reasonably created and defined by the advertising and promotional literature produced by the defendant, the decision does not offer any enlightenment on how lower courts should define consumer expectations in the absence of such advertising. Therefore, it is reasonable to assume that some courts will find it necessary to resort to some sort of risk/utility or balancing tests to aid future juries in determining if a product has fallen below the expectations of the ordinary consumer.\footnote{40}

A second problem with the \textit{Leichtamer} holding is that the plaintiff's prima facie case as established in the case is inconsistent with the court's assertion that it wishes to relieve the plaintiff of the burden of proving fault on the part of the defendant manufacturer.\footnote{41} When analyzed, it becomes clear that asking a plaintiff to prove the injury-causing product was unreasonably dangerous in that it is dangerous beyond ordinary consumer expectations is requiring that plaintiff to prove the defendant was negligent in consciously making a design choice. By the nature of the word "defect" some degree of comparison is necessary to show the product could be made safer, and by the nature of comparison the trier of fact must conclude that the defendant was guilty of some degree of fault in making its conscious design choice. If the Ohio Supreme Court truly is aiming at relieving the plaintiff's burden of proving fault and taking design defect cases out of the realm of negligence,\footnote{35}

\footnote{39. Birnbaum, \textit{supra} note 24, at 615-16.}
\footnote{40. At least one Ohio appellate court has found it necessary to use a balancing test in a design defect case. Jones v. White Motor Corp., 61 Ohio App.2d 162, 401 N.E.2d 223 (1978).}
\footnote{41. 67 Ohio St. 2d at 464, 424 N.E.2d at 575.}
it cannot hold that a plaintiff must prove that the product was "defective" or "unreasonably dangerous."

THE BARKER "TWO-PRONG" TEST

The Supreme Court of California has been producing innovative, ground-breaking decisions in the field of strict products liability since Justice Traynor introduced the concept in Greenman. California never adopted the Restatement section 402A concept of liability, although for several years after section 402A was published many California courts referred to the section as if it was identical to the Greenman rule. In 1972, however, the California Supreme Court unequivocally departed from the Restatement formulation in the decision of Cronin v. J.B.E. Olson Corp. In Cronin, the court held that an injured plaintiff should be relieved of the burden of proving that a product was both defective and unreasonably dangerous. Instead, the plaintiff need only prove the product was defective and that the defective condition was the proximate cause of his injury. The court argued that the section 402A "unreasonably dangerous" limitation of manufacturer liability burdened the injured plaintiff with a proof problem which "rings of negligence . . . . Yet the very purpose of our pioneering efforts in this field was to relieve the plaintiff from problems of proof inherent in pursuing negligence." The court also asserted that the Cronin decision would apply equally to cases where a design defect was alleged as to those in which a manufacturing defect was claimed.

The Cronin decision, however, created substantial confusion in California courts. By eliminating the concept of "unreasonably dangerous" and providing no standard to substitute, the California Supreme Court essentially left the lower courts with no definition of the term "defective."

The California Supreme Court sought to remedy this problem in the case of Barker v. Lull Engineering Co., Inc., by defining defect and establishing a test for the jury to apply in design defect

43. 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).
44. Id. at 133, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
45. Id. at 132-33, 501 P.2d at 1162, 104 Cal. Rptr. at 442.
46. Id. at 134, 501 P.2d at 1162-63, 104 Cal. Rptr. at 442-43.
cases. The plaintiff in Barker was injured when the high-lift loader was operating overturned at a construction site. The plaintiff's allegation that the loader was defectively designed because of its lack of outrigger supports, seat belts and a roll bar49 was countered by defendant's assertion that the accident was caused by plaintiff's inexperience with the loader or the fact that it was being misused in an unforeseeable manner.50 The jury found for the defendant, and the plaintiff appealed on the ground that the jury had erroneously been instructed that strict liability for a design defect must be based on a finding that the product was "unreasonably dangerous for its intended use."51

The Barker court first explained that California should continue to adhere to the principle that, in products liability actions, the trier of fact must focus on the product and not the conduct of the manufacturer and that the plaintiff should not be required to prove that the manufacturer acted negligently or unreasonably.52 The court then proposed a dual-standard or "two-prong" test for juries to use in design defect cases:

[In design defect cases, a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."

The first prong of the test is based on the consumer expectations test of comment i to section 402A of the Restatement. What makes the Barker two-prong test unique is that the section 402A consumer expectations test is not the limit for liability in design defect cases, but rather is the starting point for analysis of the injury-producing product. If the plaintiff proves the product fell below ordinary consumer expectations, the court need not proceed

49. The plaintiff was substituting for the regular operator who failed to report for work that day. Barker had received limited training and had little experience operating the loader. Id. at 419, 573 P.2d at 447, 143 Cal. Rptr. at 229.
50. Defendant's expert testimony attributed the accident to the fact that the loader, designed for use on level ground, was being used on steep terrain. Id. at 421, 573 P.2d at 448, 143 Cal. Rptr. at 230.
51. Id. at 422, 573 P.2d at 449, 143 Cal. Rptr. at 231.
52. Id. at 418, 573 P.2d at 447, 143 Cal. Rptr. at 229.
53. Id. at 426-27, 573 P.2d at 452, 143 Cal. Rptr. at 234.
with its examination of the product's defectiveness. But if the plaintiff fails to satisfy this test, the court moves to an objective risk/utility analysis of the product where the jury may consider such factors as "the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." 8

As has already been stated, a number of courts have utilized versions of risk/utility analysis in design defect cases. What makes the Barker approach unique is that once the plaintiff establishes a prima facie case by showing his or her injury was proximately caused by the design of the product, the burden shifts to the defendant to prove, by a preponderence of the evidence, that relevant factors indicate the product is not defective. 9

WILL OHIO ADOPT THE BARKER "TWO-PRONG" TEST?

The Leichtamer court quoted Barker in the course of its explanation of the meaning of "unreasonably dangerous" in the context of design defect cases, noting that the "first prong" of the Barker test is a rephrasing of section 402A's consumer expectations test. The court then, by footnote, mentioned the "second prong" or alternative test proposed by the Barker court and recited the factors mentioned by the court as relevant in this "risk-benefit" analysis. 5

The question which naturally follows is whether the Ohio Supreme Court is considering adopting Barker as a solution to the problems presented by the use of a strict consumer expectations test in design defect cases.

Even if the Ohio Supreme Court were entertaining the idea of adopting the Barker "two-prong" test, the facts of the Leichtamer case would have rendered an express adoption no more than dicta. Since the court's holding was based on the fact that the Jeep CJ-7 roll bar fell short of consumer expectations as defined by the de-

54. Id. at 430, 573 P.2d at 454, 143 Cal. Rptr. at 236.
55. Id. at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
57. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
58. 67 Ohio St. 2d at 466, 424 N.E.2d at 576.
59. Id. n.1.
fendant’s own advertising, a plaintiff arguing the case under a Barker test would have satisfied the requirements of the consumer expectations test and the court would not have had to consider the applicability of the “second-prong” risk/utility analysis. The Leichtamer court expressly stated that because the appropriateness of the second test was not raised by either party, the court need not express an opinion on the matter.

Furthermore, in addition to this apparently favorable reference to the Barker test, the court gives other indications it might be inclined to further consider the appropriateness of a Barker risk/utility test in a future case. The court’s explanations of the rationale behind adopting strict liability in design defect cases are especially indicative of this inclination.

The court mentions that “a distinction between defects resulting from manufacturing processes and those resulting from design, and a resultant difference in the burden of proof on the injured party, would only provoke needless questions of design classification . . .” and that “[a] consumer injured by an unreasonably dangerous design should have the same benefit of freedom from proving fault . . . as the consumer injured by a defectively manufactured product . . .” The Barker risk/utility alternative test is designed expressly to fulfill that goal of relieving an injured plaintiff of the burden of proving fault by shifting the burden of proof to the defendant to prove the product is not defective once the plaintiff establishes a prima facie case. The Barker court noted:

[t]he allocation of such burden [of proof] is particularly significant in this context inasmuch as this court’s product liability decisions, from Greenman to Cronin, have repeatedly emphasized that one of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action.

In Leichtamer, the court also supported its decision to impose strict liability in design defect cases with a statement of a public policy rationale.

The doctrine of strict liability evolved to place liability on the party primarily responsible for the injury . . . the manufacturer of the defective product . . . Any distinction based upon the source of the defect undermines the policy underlying the doctrine that the public

60. Id.
61. Id. at 464, 424 N.E.2d at 575.
62. 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.
interest... can best be protected by subjecting the manufacturers of defective products to strict liability in tort when the products cause harm.63

The court cites Greenman as supporting this contention as the policy underlying the concept of strict products liability. The Barker court likewise expressly mentions that the rationale behind its decision to shift the burden of proof to the defendant stems from this identical expression of public policy in Greenman. The conclusion that the burden should properly shift to the defendant, according to Barker, results naturally from the policy stated by the Leichtamer court. “... [T]he fundamental public policies embraced in Greenman dictate that a manufacturer who seeks to escape liability for an injury proximately caused by its product’s design on a risk-benefit theory should bear the burden of persuading the trier of fact that its product should not be judged defective...”64

It is also worthy of mention that other courts which have adopted the Barker test65 have done so because the second prong of the test removes the jury's consideration from the conduct of the manufacturer, which implies the negligence test which the Leichtamer court said it wishes to avoid, and focuses it on the product. In Brady v. Melody Homes Manufacturer, an Arizona appellate court noted that whether the jury's attention is focused on the manufacturer's conduct or the product itself “determines the nature of the liability. On one hand is strict liability, and on the other is negligence. California has, it appears in Barker, come down on the side of strict liability.”66

CONCLUSION

The Leichtamer decision to apply the Restatement (Second) of

63. 67 Ohio St. 2d at 464-65, 424 N.E.2d at 575 (citations omitted).
64. 20 Cal. 3d at 431-32, 573 P.2d at 455, 143 Cal. Rptr. at 237.
66. 121 Ariz. 253, 589 P.2d 896, 901 (Ariz. App. 1979). Whether the Barker test, in practice, actually does relieve the plaintiff of the burden of proving negligence has been questioned by commentators. One authority has noted that plaintiffs under the Barker test will still be forced to produce evidence to convince the trier of fact that the defendant could have chosen a different design and to master the technological aspects of the product in order to effectively rebut the defendant's case. In addition, any judgment regarding a product's design is, in effect, a judgment of the manufacturer's conduct in choosing the design. Birnbaum, supra note 24, at 609-10.
Torts, section 402A "consumer expectations" test to design defect cases leaves several questions open for consideration. The most interesting of these questions is the elements needed to establish an injured plaintiff's prima facie case. *Leichtamer* held that a plaintiff must prove the injury was proximately caused by a defective product unreasonably dangerous to him or her in that it was dangerous to an extent beyond ordinary consumer expectations. Since the decision does not explain how "ordinary consumer expectations" regarding a particular product are to be determined, it gives Ohio trial courts no assistance in deciding when a plaintiff has established a prima facie case by showing the product in question has fallen short of those expectations. If the problems encountered by other courts facing the issue of defining consumer expectations are indicative of the future course for Ohio, the supreme court will soon be required to provide some guidelines to ensure uniformity and consistency in the lower court decisions.

In *Leichtamer*, the supreme court expressed a desire to place design defect litigation on the same level as manufacturing defect cases in order to insure that a manufacturer is held strictly liable in either case, and to relieve the injured plaintiff of the burden of proving negligence or fault on the part of the defendant manufacturer. Considering that the *Barker* court proposed its two-prong test precisely to accomplish those same goals, and considering the apparently favorable mention of the *Barker* test in *Leichtamer*, it appears reasonable to predict that Ohio may soon join those states which have expressly adopted the *Barker* test for design defect products liability actions.

JAN KIPP KREUTZER

67. Ohio St. 2d at 467, 424 N.E.2d at 577.
68. See notes 31-35 supra and accompanying text.
69. The problem of defining the limits of liability in actions alleging injury caused by defective design of products may be solved for Ohio if Congress adopts the Products Liability Act of 1982 which has been introduced in the House of Representatives. The Act, which would provide a national uniform standard for products liability law, is presently being considered by the House Energy and Commerce Committee. In the area of design defect cases, the Act provides a negligence standard as the basis for manufacturer's liability and establishes a risk/benefit balancing test of factors to be considered in determining if the defendant acted reasonably in making its design choice. H.R. 5214, 97th Cong., 2d Sess. § 5 (1981).
INTRODUCTION

In 1971, the stockholders of Zapata Corporation (hereinafter Zapata), a Delaware corporation, ratified a stock option plan which granted to certain officers and directors of Zapata the right to purchase common stock of Zapata at prices established at the time of grant. The options were exercisable in installments, the last of which was to occur on July 14, 1974. In 1974, Zapata planned a tender offer for its own shares, with the expected effect that the announcement would increase the market price of the stock by approximately thirty-three percent and double the value of the options. To reduce the optionees' income tax liability upon exercise of the final installment of their options, Zapata's directors, most of whom were optionees, accelerated the date on which the final installment could be exercised. In 1975, William Maldonado, a shareholder of Zapata, instituted a derivative action on behalf of Zapata against the directors of Zapata, alleging breach of fiduciary duty in the acceleration of the option exercise date. Maldonado did not demand that the Board of Directors of Zapata bring the action, since all directors with options were to be named defendants. In 1979, Zapata's directors formed an Independent Investigation Committee, comprised of two directors elected in 1975 after the alleged breach of fiduciary duty. The committee was authorized to investigate the claims of the suit brought by Maldonado in Delaware and two companion suits in federal courts. At the conclusion of its investigation, the committee recommended that Zapata move for dismissal of the suit or for summary judgment. Denying the motion for dismissal, the Court of Chancery stated that the dual nature of the derivative suit denies the corporation the right to compel dismissal because the rights asserted in the suit belong to both the corporation and the shareholder individually.1

The Delaware Supreme Court rejected the chancery court's contention that the shareholder had an individual right to maintain a derivative action once an independent committee investigated the litigation and determined dismissal in the best interests of the Corporation. In its three part holding, however, the court carved away some of the power of corporate self rule endorsed in prior

years under the business judgment rule. The court upheld its prior determinations that a shareholder is entitled to initiate an action on the corporation's behalf, provided prior board demand is excused, and that the Board of Directors, even though tainted by self-interest of a majority of its members, may legally delegate its authority to a committee of independent directors. In order to find a balancing point between bona fide shareholder power to bring an action on behalf of the corporation, and the corporation's need to rid itself of detrimental litigation, however, the court rejected the business judgment rationale. Rather, it imposed a two-step test in ruling on motions to dismiss of this nature. The first step, as in prior cases, requires the court to inquire into the independent committee's good faith; the burden of proof, however, shifts to the corporation. Second, if the motion stands, upon the proof of good faith, then the court may apply its own independent business judgment to determine whether the motion should be granted. This note argues that the result of the second step of the test left many unanswered questions as to the standards which should be employed by future courts in exercising their own business judgment. Further, it is maintained that this decision results in the decay of the business judgment rule and fails to provide directors any clear guidelines to interpret their rights in making decisions concerning stockholder derivative actions.

I. BACKGROUND

The purpose of litigation brought derivatively by a shareholder is to enforce a corporate right, which the directors of the corporation have, upon demand, refused to bring. In certain cases, the shareholder may also pursue the litigation on behalf of the corporation without making prior demand on the directors, if board involvement in the transaction questioned would make the demand futile. In all shareholder derivative litigation, however, the rights at stake are those of the corporation.

The management and supervision of a Delaware corporation is under the direction of its board of directors, as provided under sec-

tion 141(a) of the Delaware General Corporation Law. The power includes the decision whether or not to exercise the right of litigation by the corporation. The general rule in Delaware is that "a stockholder cannot be permitted . . . to invade the discretionary field committed to the judgment of the directors and sue in the corporation's behalf when the managing body refuses." Derivative litigation is no exception. These actions have repeatedly been dismissed by the courts when the corporation's board has deemed the suit not in the best interests of the corporation.

In those transactions where some of the directors of the corporation are involved in or may benefit from the transaction, the boards of directors of Delaware corporations do not lose their power to exercise a judgment or right for the corporation. Rather, section 144(a) of the Delaware General Corporation Law provides that the power to speak for the board resides with the remaining "disinterested directors" (those directors having no interest in the transaction), even if these directors would not constitute a quorum. Delaware law additionally provides that a board of directors may designate committees of the board which may exercise all the powers and authority which the board itself possesses and, by resolution, delegates to the committee. Thus, a corporation may dele-

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6. The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

10. See also Puma v. Mariott, 283 A.2d 693 (Del. Ch. 1971).
11. The board of directors may, by resolution passed by a majority of the whole board, designate one or more committees, each committee to consist of one or more of the directors of the corporation. The board may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The by-laws may provide that in the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or they constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the by-laws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corpo-
gate to a committee the power to decide whether to pursue litigation on behalf of the corporation. When the litigation involves interested directors, the committee must be comprised of "disinterested directors."

To assure that the decision to terminate derivative litigation is not wrongfully made by a board of directors, or its properly delegated committee of disinterested directors, the courts have applied the business judgment rule. The purpose of this rule is to protect directors of corporations from being second-guessed by a court in a suit brought against the directors for an allegedly erroneous corporate decision. Once it appears that the directors' decision was diligently made, with due care and in good faith, a presumption issues in the directors' favor. The rule, by its protection, encourages competent individuals to become directors. The more profound effect of the rule, however, is that it prevents the judiciary from taking on the overwhelming job of corporate decision making: "In the absence of fraud, bad faith, gross overreaching or abuse of discretion, courts will not interfere with the exercise of business judgment by corporate directors." While the business judgment rule precludes the court's independent determination of whether corporate directors acted without error, the courts may nevertheless consider the merits of the board's decision in determining whether the board's action was an abuse of discretion. In Delaware, the business judgment rule may be applied to the decisions of directors if: (1) those making the decision questioned

had no personal interest or self-dealing;\(^{17}\) (2) the judgment was made after thorough investigation of available information;\(^{18}\) and (3) the decision was made in good faith and “attributed to a rational business purpose.”\(^{19}\) The independence, good faith and thoroughness of the determination are susceptible to review by the courts, but its substance is outside the scope of judicial review once all three prongs of the rule are met.\(^{20}\) If, therefore, the plaintiff shareholder does not dispute any of the prerequisites of the business judgment rule, then there is no dispute of material fact making the suit ripe for summary judgment moved for at the recommendation of the board or its authorized committee. If, however, the requirements for invoking the rule are not met, the directors may sustain their action by demonstrating the intrinsic fairness of the decision. Such a demonstration requires full scale judicial review of its merits.\(^{21}\)

In *Zapata v. Maldonado*, Maldonado, a shareholder of Zapata, commenced the action in the court of chancery in June, 1975, on behalf of and for the benefit of Zapata, alleging breach of fiduciary duty. Maldonado then brought a separate action in the United States District Court for the Southern District of New York (hereinafter New York action),\(^{22}\) asserting essentially the same factual claims as alleged in the court of chancery action. In February, 1978, Maldonado’s counsel requested that the court of chancery hold the action in abeyance awaiting the outcome of the New York action. By 1975, four of the defendant-directors had resigned or were terminated, and in the spring of 1975, two new directors were appointed to an Independent Investigation Committee to determine whether to continue the suits. In its determination, this committee was delegated the power and authority of the Board itself. Based upon its investigation, the committee recommended that dismissal of the suit be sought. Two weeks after the direction of the committee, motions to dismiss or, for summary judgment in the alternative, were filed in the court of chancery, the New York action and a third derivative suit filed in the Southern District of

\(^{17}\) See, e.g., *Puma v. Mariott*, 283 A.2d 693 (Del. Ch. 1971); *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107 (Del. 1953).


\(^{19}\) *Muschel v. Western Union Corp.*, 310 A.2d 904 (Del. Ch. 1973).


\(^{21}\) See, e.g., *Johnston v. Greene*, 121 A.2d 919 (Del. 1966).

Texas based on the same facts in the Maldonado action (hereinafter Texas action).23

Thereafter, the appointment of the committee, the investigation and report thereof, were reviewed by the court in the Texas action.24 Transcripts and briefs of the results of this review were filed with all three courts.25 In January, 1980, the New York action was dismissed by order of the court, which ruled that the committee had authority to determine that the action should be dismissed and that the committee acted in good faith and independently.26 Thereafter, Zapata pressed the court of chancery for dismissal under res judicata and collateral estoppel.27

In March, 1980, without deciding the res judicata/collateral estoppel question, the court of chancery denied Zapata’s motion to dismiss, stating that the shareholder had an individual right to maintain derivative actions in certain instances.28 Two months later, the court of chancery dismissed the action based on res judicata, conditioned upon the affirmance of the New York action which had been appealed to the United States Court of Appeals for the Second Circuit.29 This resulted in a “procedural gridlock,” however, for the New York action was stayed by the court of appeals, pending a decision by the Supreme Court of Delaware on the ruling of the court of chancery.30 It, therefore, became necessary for the Supreme Court of Delaware to ascertain whether the granting of Zapata’s motion was warranted.

II. THE COURT’S REASONING

The Delaware Supreme Court’s focus, in its consideration of the court of chancery’s decision denying Zapata’s motion to dismiss, was “the power to speak for the corporation as to whether the lawsuit should be continued or terminated.”31 Three aspects of this focus were discussed: 1) the chancery court’s conclusion that stockholders have individual rights to maintain the suit; 2) the author-

25. Id. at 16.
27. Brief for Appellant at 18.
30. 430 A.2d at 781.
31. 430 A.2d at 782.
ity of an independent committee to cause dismissal of a derivative suit; and 3) the resolution of conflicts between the committee and stockholders.

The court found erroneous the court of chancery's determination, based upon Sohland v. Baker,\(^{32}\) that a stockholder possesses an independent, individual right, once demand is made and refused, to continue a derivative suit alleging breach of fiduciary duty.\(^{33}\) First, the court found that the court of chancery's interpretation of Sohland was far too broad. The issue addressed in Sohland was whether a stockholder has the right to continue a derivative action, if demand has been made on the board of directors to bring the suit and has been refused. The Sohland court determined that a shareholder may sue in his or her own name to enforce the rights of a corporation.\(^{34}\) It did not, however, determine whether the shareholder may continue the action.

Because this new question of the shareholder's right to continuation of a derivative suit had never been addressed, the Zapata court fell back upon the general rules regarding the rights of shareholders as set forth in McKee v. Rogers\(^ {35} \) and United Copper Securities Co. v. Amalgamated Copper Co.\(^ {36} \) The rule set forth in Amalgamated Copper stated that a stockholder may not sue upon the corporation's behalf after refusal by the board, unless the decision of the board was wrongful (due to the fact that the corporation is in control of the alleged wrongdoers, or the directors were guilty of misconduct or the decision itself was unwise).\(^ {37} \) McKee dictated that a shareholder could be permitted to "invade the discretionary field committed to the judgment of the directors" by suing on a corporation's behalf after refusal by the board, unless demand on the board would be apparently futile due to the relation of the responsible directors to the alleged wrongs.\(^ {38} \) Concurring with Maldonado,\(^ {39} \) the decision below, the court found the latter to mean that a shareholder may not, barring wrongful board refusal, initiate suit on behalf of the corporation unless his or her

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33. 430 A.2d at 789 n.18.
34. 141 A. at 281.
35. McKee v. Rogers, 156 A. 191 (Del. Ch. 1931).
36. United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261 (1917).
37. Id. at 264-65.
demand upon the board is properly excused as being futile.\textsuperscript{40}

The court further held that, although Maldonado may have been excused in the present case from making demand upon the board, he was, nevertheless, not extended the right to continue the suit on the corporation's behalf. The court conceded that the derivative suit has a "dual nature"; it involves both a suit to force the corporation to sue and a suit by the corporation, asserted by the stockholders for its benefit.\textsuperscript{41} However, instead of analogizing it to the theories set forth in \textit{McKee} and \textit{Amalgamated Copper}, the court simply stated that, because derivative suits enforce corporate rights and any recovery goes to the corporation, there is no "inherent reason why the 'two phases' of a derivative suit . . . should [place the] control of the corporate right throughout the litigation [in the hands of the shareholder]."\textsuperscript{42}

The possibility that a shareholder might decide the future of a corporation by forcing the continuation of a suit detrimental to it compelled the court to decide whether a permissible procedure exists that allows the corporation to rid itself of the suit, even if demand were excused.\textsuperscript{43} Prior to deciding what this procedure should be, the court reviewed the legality of the delegation to an independent committee by the Zapata Board of Directors of authority to move for dismissal of a derivative suit. The court had to address this question, for if the committee had no power to make a recommendation upon the course of action to be taken by the corporation with respect to the derivative suit, then the question of permissible dismissal procedures became moot. Under section 141(c) of the Delaware Code, a committee of the board retains all powers of the board which are properly delegated to it. Thus, if a board of the directors has the power to move for dismissal, then a properly delegated committee does also. Having previously stated that directors of Delaware corporations, under section 141(a), have the power to initiate or not initiate litigation,\textsuperscript{44} the court considered whether this power terminated merely because demand was excused.

In the situation in which demand on the board is required, and the board refuses, a shareholder may continue the litigation if he

\textsuperscript{40} 430 A.2d at 784.
\textsuperscript{41} 413 A.2d 1251, 1261-62.
\textsuperscript{42} 430 A.2d at 784.
\textsuperscript{43} Id. at 784-85.
\textsuperscript{44} Id. at 787.
or she can show the board's decision wrongful. Allowing the shareholder to pursue the litigation does not take away the board's power; it merely considers the decision wrongful. Stating that the purpose of the excused demand was to save the expense and delay of plaintiff's showing that the demand was wrongful because tainted by the decision of directors involved in the very allegations of the suit, and not to deny the board the power of determination, the court reasoned that the board's power to choose whether to pursue the litigation was thus not lost. 45

In concluding that an independent committee may properly act for the corporation to move to dismiss a derivative action, the court determined that the interest taint of a majority of the board is not a bar, per se, to the exercise of power by the independent committee. The Delaware Code permits a minority of the directors of a corporation to act upon matters in which a majority of the board may have an interest. 46 The consideration of the course of action in litigation in which board members are defendants is no exception. Therefore, the independent committee had full power to move for the dismissal of the litigation which it determined detrimental to the corporation.

In the last portion of its decision, the court set forth the permiss-

45. Id. at 788.
46. (a) No contract or transaction between a corporation and one or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director of officer is present at or participates in the meeting of the board or committee thereof which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if: (1) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or
(2) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or
(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee thereof, or the shareholders.
(4) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.
sible procedures which the corporation, and future courts, should undertake in determining whether a shareholder derivative suit, properly instituted and properly investigated by a board committee, warrants dismissal. It is in this section that the court rejected the business judgment rule, which provided that derivative action must be dismissed if an independent committee of the board, in good faith and upon full investigation, determined the litigation against the best interests of the corporation. 47 The reason for this departure enunciated by the court was its intention to find a balancing point where bona fide stockholder power to bring corporate causes of action could not be unfairly trampled by the board of directors, but the corporation could still rid itself of detrimental litigation. 48 Specifically, the circumstances of this type of derivative suit—where directors pass judgment on fellow directors—compelled the court to exercise caution, which it felt the business judgment rule did not provide.

Because the question of genuine issues of material fact were not reached in the Zapata motion for dismissal or summary judgment, the court classified this motion as a hybrid summary judgment motion for dismissal. Reaching for some justification for injecting its judicial scrutiny, the court likened the motion to two other procedures which involve the review of the court. First, the motion was analogized to the settlement of a shareholder derivative action. Relying upon Neponsit Investment Co. v. Abramson, 49 in which directors of the corporation were involved in both sides of the transaction, and as a result of which the court of chancery was called upon to exercise its own business judgment as to the appropriateness of the settlement, the court stated that the shareholder plaintiff should also be given the benefit of court review. 50 Second, the motion was analogized to a dismissal sought under court of chancery Rule 41(a)(2), (after an answer has been filed), which also requires that the terms of dismissal be deemed proper by the court. Similarly, then, the court of chancery should, in its own discretion, determine whether the recommendation of the independent committee of a board of directors should be followed in this type of shareholder derivative suit. 51

47. Maldonado v. Flynn, 413 A.2d 1256, 1286 (Del. Ch. 1980).
48. 430 A.2d at 787.
49. Neponsit Investment Co. v. Abramson, 405 A.2d 97, 100 (Del. 1979).
50. 430 A.2d at 787.
51. Id. at 788.
To make this determination, the court outlined the following procedure: the corporation may, upon a good faith recommendation of an independent committee, move for a pretrial dismissal, including in the motion a thorough written record of the investigation and findings of the committee. Each side is then permitted to address the motion and, as in a motion for summary judgment, the burden of proving that there is no genuine issue of material fact remains with the corporation. It is at this point that the court created a new two-part test which the court of chancery should apply in ascertaining the motion's validity. Initially, the court of chancery should look into the independence, good faith, and bases supporting the conclusions of the committee. Rather than presuming this good faith, reasonable investigation and independence, as in the past, the burden of showing such shifts from the shareholder plaintiff to the corporation. The court stated as its rationale for shifting the burden of proof the approach taken in reviewing “interested director” transactions. This approach places the burden of proving the intrinsic fairness of a transaction, in which interested directors took a decisional role, upon the corporation. It must be pointed out, however, that this approach has been taken in cases in which the interested director was involved in the decision. That situation is distinguishable from Zapata Corp. v. Maldonado, in which the interested directors were not involved in both sides of the transaction, but rather, a committee of disinterested directors was on one side, interested directors on another.

The court determined that, if the court of chancery finds that good faith, reasonableness or independence is not proved by the corporation, the motion is denied. If they are proved, under Rule 56-summary judgment standards-the court of chancery may then additionally apply its own business judgment to determine whether the motion to dismiss should be granted. Quoting the court below, Justice Quillen stated that this second part of the test holds with the philosophy that courts should decide the merits of a case, not its litigants. The court of chancery must consider the interests of the corporation in dismissal and, when appropriate, give

53. 430 A.2d at 788-89 n.17.
56. 430 A.2d at 789 n.18.
special consideration to matters of law and public policy. Upon the exercise of its own business judgment, and if the court of chancery concurs in the recommendations of the committee of independent directors of the corporation, the motion may then be granted. The court contended that this second step is intended to thwart instances where corporate actions meet the criteria of step one, but the result does not appear to satisfy its spirit, or where corporate actions would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation's interest. Thus, the business judgment rule as it formerly existed was rejected in favor of judicial review in motions to dismiss a shareholder derivative action in which initial demand is excused.

III. Analysis

The decision of the Supreme Court of Delaware carves out an exception to the business judgment rule. The court is permitted to apply its own judicial business judgement to determine whether a derivative suit should be dismissed, after an independent directors' committee has itself made the recommendation to dismiss the suit. This second step of the Zapata decision undermines everything that the business judgment rule was created to avoid: second-guessing by the court.

There are two major problems with the court's decision. First, the two-step test created by the court is extremely open-ended; it leaves more questions unanswered than answered. The decision is silent as to when and why a court may refuse to go forward with the second step of the test. When the court determines that it should proceed with the second step of the test, it has no specified guidelines as to what matters of law and public policy it should consider in its business judgment. When is the corporate interest compelling? When is it outweighed by law and the public interest? While each case individually requires the application of fresh thought to its unique circumstances, certainly some broad guidelines could have been established in Zapata.

Further, there is no indication as to the scope and type of evidence which the court should review in its judicial business judgment. What constitutes thorough written proceedings by the independent committee? May the court turn to experts and examine parties on its own? Should the record be binding with the court

57. 430 A.2d at 789.
merely acting in the role of a court of appeal? At one point the Zapata court suggests that a summary judgment standard be applied. ⁵⁸ This standard, which prohibits the weighing of conflicting evidence, is inappropriate in the application of judicial business judgment, where a balancing procedure is demanded.

This open-ended test may be closed somewhat by future cases which might give clearer guidelines in answer to the questions posed above. Generally, however, motions to dismiss detrimental shareholders derivative suits involving directors will never be simple, inexpensive or straight-forward.⁵⁹

Just as the goal of the motion is overwhelmed by the procedural requirements, the goal of the business judgment rule too is undermined by this court's decision. Section 144(a) of the Delaware Code empowers disinterested directors to make decisions for the corporation, when the transaction involves fellow directors. It does not limit this power when these decisions also involve litigation in which the interested directors are involved. By permitting future courts to substitute themselves for the directors' committee, the court has effectively judicially legislated a change in Section 144(a). The prior standard assumed by the courts in applying Delaware law was that the business judgment rule conferred authority upon a board of directors to terminate derivative litigation.⁶⁰ The Zapata court questioned whether derivative suits against directors went beyond the control of the directors altogether, thus invalidating the prior assumption. Although it does not permit the power of termination to remain with the shareholder, this decision does remove the ultimate power from the directors' committee and places it with the court. The Delaware General Corporation Law does not require a corporation to litigate every cause of action—the determination is a business affair determinable by the board or a delegated committee. The corporation's power to exercise its discretionary right to pursue this type of litigation is effectively usurped by the court.

**CONCLUSION**

This decay in the business judgment rule could, unfortunately, be allowed by the courts to extend into other areas of the corpor-
rate directorship domain. The basis of the corporate power of Delaware companies is in the Delaware General Corporation Law, authorized by that state's legislature. Modifications and limitations of that power should be made by future legislatures and not by the courts.

JANE SHIVELY LEARY

When a criminal defendant introduces proof of insanity, he is entitled to an instruction that the jury may find him not guilty by reason of insanity. Whether or not such instruction should include information on the consequences of the insanity acquittal has been a subject of frequent debate in the courts. Just how much the trial judge may tell the jury about what happens to the defendant acquitted by reason of insanity differs considerably among the various jurisdictions.

A defendant is accorded varying treatment when his insanity plea is successful. He may be automatically committed or he may be subjected to further proceedings to determine his disposition. In Kentucky, a person is not responsible for criminal conduct if, at the time of such conduct, he is substantially lacking in the capacity to appreciate the criminality of his conduct or to conform his conduct to law. When a defendant in Kentucky is acquitted because of insanity at the time the crime was committed, the court or the prosecutor may institute civil proceedings to have the defendant committed for examination and possible detention. If the court has reasonable grounds to believe the defendant is dangerous to himself or others, it may order a temporary, seven day commitment.

When the evidence supports an instruction on insanity pursuant to

1. For a general discussion, see W. LaFave, Handbook on Criminal Law § 40 (1972).
2. For a general discussion, see F. Wharton, 2 Wharton's Criminal Law § 106 (14th ed. 1979).
3. "A person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Ky. Rev. Stat. § 504.020(1) (1975).
4. (1) When a defendant is acquitted of an offense for lack of criminal responsibility by reason of mental disease or defect, as defined in KRS 504.020, the court may on motion of the prosecuting attorney or on its own motion proceed immediately to have the defendant committed for examination and possible detention pursuant to the provisions of KRS chapter 202.
   (2) To facilitate the procedure established in subsection (1), the court, if it has reasonable grounds to believe that the defendant will cause injury to himself or others if not immediately restrained, may order him to be hospitalized for a period not to exceed seven (7) consecutive days. The order of commitment under this subsection shall be pursuant to and under the authority of KRS 202.027 and shall be subject to all of the provisions of that statute.

Id. § 504.030. Section 504.030 will be amended effective July 15, 1982. See H.R. 32, infra, p. 12 & note 68.
section 504.020 of Kentucky Revised Statutes, should the jury be made aware of the consequences of the verdict as provided in section 504.030? The Kentucky Supreme Court confronted this issue in *Payne v. Commonwealth.*

**FACTS**

Defendant Kenneth Payne, a Lexington physician, was indicted by a Fayette Grand Jury on November 12, 1979 which charged him with eight counts of first-degree sodomy, one count of first-degree sexual abuse, and twenty counts of using a minor in a sexual performance. Payne admitted the various acts charged; it was undisputed that he had a mental illness. The principal issue at trial was whether Payne lacked substantial capacity due to pedophilia to conform his conduct to the requirements of law. A jury found Payne guilty on all counts. The trial court sentenced him to the minimum penalty for each of the offenses, with the sentences to run consecutively for a maximum period of forty years.

During the trial, defendant’s counsel requested an instruction to the jury on the consequences of a not guilty by reason of insanity verdict. Counsel for the defendant also made a timely request for permission to include remarks in the closing argument on the effect of an insanity verdict. Both motions were denied.

On appeal to the Kentucky Supreme Court, defendant argued that the trial court had made several errors. Only two of the issues will be discussed in this article:

I. Appellant was deprived of a fair trial by the trial court’s refusal to permit his counsel to inform the jury in closing argument about the consequences of a not guilty by reason of insanity verdict.

II. Appellant was denied due process of law and a fair trial by the court’s refusal to give the jury any cautionary instruction regarding the consequences of a not guilty by reason of insanity verdict.

In its decision, rendered October 13, 1981, the supreme court found no error in the denial of the motions by the trial court.

The court reasoned that the main function of a jury in a criminal trial is to determine a defendant’s guilt or innocence, and “[t]he

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7. 623 S.W.2d at 869.
8. Id.
9. Id.
10. Id.
consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole have no place in the jury's finding of fact and may serve to distort it." The court held "that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial." This reasoning is inconsistent with three prior Kentucky decisions involving insanity instructions.

CASE LAW IN KENTUCKY

The Kentucky Supreme Court first addressed the issue of whether the jury should be informed of the consequences of the insanity verdict in Jewell v. Commonwealth. In Jewell, the court deplored the inadequate provisions made by the state for the safekeeping of the insane who are a dangerous threat to themselves and others. Because of this lack, the court reasoned, it was permissible for the prosecutor, in summation, to remind the jury "that in the event of an acquittal on grounds of insanity there is very little, if any, assurance that they will not soon be at large again." The court expressed concern over the defendant's commitment and release prior to trial, commenting "[t]he lesson likely to be drawn . . . from that is obvious."

Only four months later, in Edwards v. Commonwealth, the court again faced the question of informing the jury of the consequences of an insanity verdict. The issue before the court was different than that in Jewell because Edwards was concerned with jury instructions as to the effects of the insanity verdict. In Edwards, the defendant, on trial for murder, requested the trial court to instruct the jury that, were the defendant found not guilty by reason of insanity, she would be admitted to a mental institution for treatment until further order of the court. The Kentucky Supreme Court upheld the trial court's refusal to permit this instruction on two grounds. First, the requested instruction was not an

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11. Id. at 870.
12. Id.
13. 549 S.W.2d 807 (Ky. 1977).
14. Id. at 812.
15. Id.
16. Id. at 812, n.3.
18. Id. at 383-84.
19. Id. at 383.
accurate statement of the law. Second, the court reasoned that such an instruction had "no legitimate bearing on the issue of fact to be decided by the jury when the defense of insanity has been raised, that issue being whether the defendant was mentally responsible when the criminal act was done," and that it would "divert the jury's attention from the resolution of this issue."

Interestingly, the court commented that the question of an instruction regarding post-verdict confinement was one of first impression. Even though the analogous issue of providing the jury with similar information in the prosecution's remarks had been addressed by the court in Jewell v. Commonwealth, that decision was not cited. The two decisions appear to be inconsistent, but the court did not attempt to reconcile the differences.

In Jewell, the court allowed the prosecutor to inform the jury of the possibility of the defendant's release. The Edwards decision, however, emphasized the importance of having the jury concentrate on whether the defendant was mentally responsible when the criminal act was done. By not resolving the inconsistency, the holding of the court in Edwards left unresolved the question of whether the jury could be informed by means other than jury instruction.

The court attempted to rationalize the differences between Jewell and Edwards in a subsequent case, Gall v. Commonwealth, in which defense counsel attempted to inform a prospective juror, during voir dire, of the availability of civil commitment proceedings when a defendant is found not guilty by reason of insanity. After objection by the prosecution, the trial court would not permit counsel to continue. Upon appeal, the Kentucky Supreme Court adhered to the view espoused in Edwards that consequences of a verdict are not permitted in jury instructions, but held that "Edwards does not prohibit defense counsel from reminding the jury that if the defendant is acquitted on grounds of insanity at the time of the offense, and if he lapses into that condition again,

20. Id. at 384.
21. Id. at 383-84.
22. Id. at 383.
23. 549 S.W.2d at 812.
24. Id.
25. 554 S.W.2d at 383-84.
26. 607 S.W.2d 97 (Ky. 1980).
27. Id. at 111.
28. Id.
there are legal means to bring about his commitment, because that
is the simple truth."29 The court cautioned that defense counsel
cannot say a defendant will be committed, only that "if after the
defendant is acquitted there appears reasonable grounds to believe
he is insane and ought to be committed to an institution, he can be
tried in a civil commitment proceeding."30

Both Jewell and Gall are inconsistent with the rationale of Ed-
wards. There the jury's concern was with the mental responsibil-
ity of the defendant at the time the criminal act was committed, and
an instruction of post-verdict consequences could have diverted
the jury's attention from that issue.31 Jewell and Gall, however,
allow the prosecuting attorney and the defense counsel to com-
ment to the jury on the results of an insanity acquittal, yet neither
opinion considers the effect of such remarks upon the jury's deter-
mination of guilt or innocence.32 Whether the jurors learn of the
effects of the insanity verdict from remarks of counsel or from in-
stuctions delivered by the judge, the same possibility exists that
such knowledge may enter their determinations.

In a subsequent case, Paul v. Commonwealth,33 the court again
addressed the question of informing the jury of the consequences
of the insanity verdict. In Paul, the trial judge himself had interro-
gated the witness on the availability of adequate psychiatric treat-
ment at LaGrange Reformatory, and on the requirements of civil
commitment under state law.34 The Kentucky Supreme Court
found the questioning to be prejudicially erroneous because it had
the effect of admitting the remarks in the form of proof. The court
reaffirmed Jewell and Gall, explaining that "the reason we have
held such remarks permissible is that they are within the realm of
common knowledge and fair comment."35 The court did not cite
Edwards, however, nor make any effort to distinguish informing
the jury through comment and through jury instruction.

After the decision rendered in Paul, then, Kentucky law permit-
ted both the prosecutor and the defense counsel to comment on
the effects of the insanity verdict, but such information could not

29. Id. at 111 (emphasis added).
30. Id. at 111.
31. See 554 S.W.2d at 383-84.
32. 549 S.W.2d at 812; 607 S.W.2d at 111.
33. 625 S.W.2d 569 (Ky. 1981).
34. Id. at 570.
35. Id.
be entered in the form of proof, nor could the jury be informed through instruction from the trial judge. Payne v. Commonwealth, rendered only six weeks after Paul, stands as the last in a line of Kentucky cases and changes the state of the law by overruling Jewell, Gall, and Paul, and adhering to the reasoning of Edwards.36

THE LAW IN OTHER JURISDICTIONS

In Edwards, the Kentucky court noted that it had consulted decisions of other states and found the majority rule opposed an instruction on the consequences of the insanity verdict.37 The court expressly relied on an annotation from the second edition of American Law Reports38 in reaching its conclusion.39 The nine jurisdictions listed in the annotation as not allowing any instruction may have constituted a majority when the annotation was written, but it is questionable whether they do presently.40

The issue of the propriety of an instruction has been considered in many jurisdictions, and its resolution has been divided. The lack of consensus may result from differing opinions among courts and legislatures concerning jury prejudice.41 Jury prejudice arises when the jury's verdict is influenced by variables outside those deemed legitimate by law.42 In general terms, the function of the jury is to determine questions of fact arising in the trial before it, and the court is the judge of questions of law.43 Under this general rule, the jury would appear to have no concern with the post-verdict treatment of the defendant. If the result the jury reaches reflects a consideration of the post-verdict disposition of the defendant, then it is prejudiced and the proper verdict may not have been returned: a verdict of not guilty may change to a guilty verdict after the jury has considered extraneous circumstances.44 State v. Huiett45 provides an example of jury prejudice resulting from an instruction on the status of a defendant acquitted on an insanity verdict. In that

36. 623 S.W.2d at 870.
37. 554 S.W.2d at 383.
39. 554 S.W.2d at 383.
40. Brief for Appellant at 24.
42. Id.
43. 47 AM. JUR. 2D JURY § 3 (1969).
44. See Schwartz, supra note 32, at 172.
South Carolina decision, the jury was unable to reach a verdict after seven hours of deliberation. The trial judge then instructed the jury that if it returned a verdict of not guilty by reason of insanity, the defendant would be transferred to a state mental hospital and if he were then or subsequently found to be no longer mentally ill, he would be released. The jury deliberated only thirteen minutes longer before returning a guilty verdict.46

In the landmark case on the question of instructions on the effects of an insanity verdict, *Lyles v. United States*,47 the Court of Appeals for the District of Columbia adopted the view that the jury has a right to know the meaning of a verdict which finds the defendant not guilty by reason of insanity.48 The court acknowledged the doctrine that the jury should have no concern with the consequences of a verdict, but allowed an exception to that rule in the case of insanity.49 Although the jury might return one of three verdicts when the issue of insanity was raised, the court reasoned, the verdict of not guilty by reason of insanity did not have a commonly understood meaning as did the verdicts of guilty and not guilty.50 The *Lyles* court held that, whenever the defense of insanity is fairly raised, the judge *must* instruct the jury as to the post-verdict disposition of the defendant, unless the defendant requests the judge not to instruct.51

Many jurisdictions requiring the instruction cite the *Lyles* decision and adopt its reasoning.52 In *Commonwealth v. Mulgrew*,53 the Pennsylvania court overruled a prior decision and held that the jury must be instructed concerning the possible treatment and confinement of the defendant following an insanity acquittal.54 Citing *Lyles*, the court commented that requiring such an instruction reduces the possibility of "compromise verdicts" caused by a jury's fear that the defendant will be freed if found not guilty by reason

46. Id. at 863.
48. Id. at 728.
49. Id.
50. Id.
51. Id. at 729.
52. See, e.g., Roberts v. State, 335 So.2d 285 (Fla. 1976); State v. Amorin, 58 Hawaii 623, 574 P.2d 895 (1978); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975). See also W. LaFave, supra at 316 (Lyles position is the better view and is gaining support).
54. Id. at 351.
of insanity.\textsuperscript{55}

Other jurisdictions have required the instruction because of the possibility that the jury might erroneously believe that the defendant would be freed if acquitted due to insanity. Judge Bazelon, dissenting in \textit{Lyles}, concurred with the plurality's view that an instruction should be given,\textsuperscript{56} stating "The false assumption that acquittal by reason of insanity, like outright acquittal, frees the accused to walk out on the streets may lead juries to convict, despite strong evidence of insanity at the time of the crime."\textsuperscript{57} To allow speculation increases the possibility that jurors will fall prey to their emotions and return a guilty verdict to ensure the safety of the defendant and the community at large.\textsuperscript{58}

At least two states require the instruction by statute. In Tennessee, the trial court must instruct the jury that a not guilty by reason of insanity verdict will result in automatic detention of the defendant.\textsuperscript{59} A Kansas statute permits the instruction to be given without a request by the defendant.\textsuperscript{60}

Several jurisdictions have required an instruction on post-verdict commitment proceedings whenever the defendant presents the defense of insanity and requests an instruction on an insanity verdict. Among these states are North Carolina,\textsuperscript{61} Alaska,\textsuperscript{62} Colorado,\textsuperscript{63} Massachusetts,\textsuperscript{64} and Michigan.\textsuperscript{65} In reaching its decision to mandate such an instruction the Michigan court\textsuperscript{66} weighed two factors: (1) The possible injustice in the imprisonment of one who should be hospitalized because the jury does not understand the consequences, and (2) a "possible" invitation to the jury to consider extraneous matters.\textsuperscript{67} The court concluded that the first factor weighed more heavily and, therefore, allowed the instruction at the request of the accused or the jury.\textsuperscript{68} Like Michigan, Louisiana

\begin{footnotesize}
\begin{enumerate}
\item[55.] \textit{Id.} at 276.
\item[56.] 254 F.2d at 734 (Bazelon, J., dissenting).
\item[57.] \textit{Id.}
\item[58.] State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595, 603 (1976).
\item[61.] State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).
\item[63.] People v. Thompson, 197 Colo. 232, 591 P.2d 1031 (1979).
\item[66.] 172 N.W.2d at 366.
\item[67.] \textit{Id.}
\item[68.] \textit{Id.}
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\end{footnotesize}
requires the instruction to be given if requested by either the defendant or the jurors. Both Hawaii and Missouri have enacted statutes giving the defendant the right to request an instruction.

Critics of the rule allowing the defendant to request the instruction argue that it does nothing to enhance the reliability of the verdict. Because the defendant will request the instruction only when it would be advantageous to him, he is given an unfair advantage over the prosecution, which cannot use the instruction whenever desired. The defense counsel would seek an instruction stressing the defendant's segregation from society, calculating that the jury might reject a guilty verdict in favor of a not guilty by reason of insanity verdict on the theory that defendant will be confined. In *State v. Hood*, the Vermont court refers to such maneuvering as giving justice "an a la carte quality in which the defendant may make as wily a choice as possible."

Several states have neither prohibited nor required an instruction on the post-verdict consequences but have allowed the trial judge discretion in deciding whether the instruction is proper. Other states follow a general rule that an instruction is prohibited, but make exceptions in certain circumstances. Indiana, for example, has allowed an instruction to the jury on commitment proceedings only when an erroneous view of the law has been "planted in their minds" as a result of prejudicial remarks.

The view that it is improper to instruct the jury on the consequences of an insanity verdict is followed by at least sixteen jurisdictions, including Kentucky. The rationale underlying most of

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71. See Schwartz, *supra* note 32, at 175.
72. *Id.* at 176.
75. *Id.* at 501.
76. See, e.g., *Bean v. State*, 81 Nev. 25, 398 P.2d 251 (1965) (court held that, although it favored informing the jury, it was not reversible error not to so instruct); *State v. Shoffner*, 31 Wis.2d 412, 413 N.W.2d 458 (1966) (an instruction is "preferred").
77. *Dipert v. State*, 259 Ind. 260, 262, 286 N.E.2d 405, 407 (1972) (holding that an instruction was necessary to overcome prosecutor's prejudicial remarks).
these decisions is the general principle that the jury should not be concerned with the consequences of a verdict. The possibility that the jury does consider the effects of an insanity acquittal is generally not discussed in these cases. The results of one study on the behavior of jurors indicate that they do consider, in their deliberations, the consequences of finding the defendant not guilty by reason of insanity. Without an informative instruction, the jury may base its jettisoning of the not guilty by reason of insanity verdict on ignorance of the consequences of that verdict and the fear that the defendant, if acquitted, will be set free.

Case law on remarks by counsel concerning the result of an insanity verdict is somewhat limited. It has been held to be reversible error for prosecutorial counsel to make prejudicial or inflammatory remarks in closing argument on the results of the verdict. Generally, the conduct of attorneys during the trial is left largely to the control and discretion of the presiding judge. No legal standard exists by which the prejudicial remarks of an attorney may be judged; each instance must be considered on its own merits.

ANALYSIS

As a result of Payne, any comment by the prosecutor, defense counsel, or the court about the consequences of a particular verdict during a criminal trial is prohibited. The court reasoned that the main function of a jury in a criminal trial is constitutionally limited to a determination of guilt or innocence, and "the consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole have no place in the jury's


81. Brief for Appellant at 16.

82. See Bruce v. Estelle, 483 F.2d 1031, 1039-40 (5th Cir. 1973) (remark that an insanity acquittal would let the accused "walk the streets" was found prejudicial); United States v. Birrell, 421 F.2d 665, 666 (9th Cir. 1970) (remark that an insanity acquittal would be "turning the defendant loose" held to be prejudicial).

83. 88 C.J.S. Trial § 36 (1955).

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finding and may serve to distort it." In adhering to the reasoning of Edwards, the court concluded that "external considerations have no legitimate bearing on the jury's factual determination of guilt or innocence." The court did not cite any of the recent decisions of other jurisdictions on the issue, nor did it elaborate on the inconsistency of its prior decisions. The court did, however, overrule the decisions of Gall, Jewell, and Paul to the extent that they were inconsistent with Payne. Although the court did not adequately explain why it had previously wandered from the principles set forth in Edwards, it cleared up a murky area of Kentucky law by prohibiting court and counsel from dispensing any information on the post-verdict consequences of the insanity verdict.

IMPLICATIONS OF NEW LEGISLATION

During the 1982 Session, the Kentucky General Assembly enacted House Bill 32, an act relating to criminal responsibility. The bill, which will become effective July 15, 1982, adopts a new verdict of "guilty but mentally ill at the time of the offense." Persons found guilty but mentally ill are to be sentenced in the same manner as defendants only found guilty. A person deemed mentally ill at the time of sentencing must be provided with treatment while in prison, or on probation, conditional discharge, parole, or conditional release so long as he is mentally ill.

The insanity defense remains available to persons who cannot distinguish right from wrong or who cannot conform their conduct to the requirements of law. However, the consequences of the insanity verdict are changed by the new legislation. Section 504.030 of Kentucky Revised Statutes has been amended to require the

85. 623 S.W.2d at 870.
86. Id.
87. Id.
89. In cases in which the defendant provides evidence at trial of his mental illness or insanity at the time of the offense, the jury or court may find the defendant: (1) Guilty; (2) Not guilty; (3) Not guilty by reason of insanity at the time of the offense; or (4) Guilty but mentally ill at the time of the offense. Id. § 7.
90. The court shall sentence a defendant found guilty but mentally ill at the time of the offense in the same manner as a defendant found guilty. If the defendant is found mentally ill at the time of sentencing, treatment shall be provided the defendant until he is no longer mentally ill or until expiration of his sentence, whichever occurs first. Id. § 10.
91. (2) Treatment shall be a condition of probation, shock probation, conditional discharge, parole or conditional release so long as the defendant is mentally ill. Id. § 10(2).
92. See note 3 supra.
court to conduct an involuntary hospitalization proceeding.  

As a result of the new legislation, the jury in Kentucky may return one of four possible verdicts, rather than the traditional three verdicts of guilty, not guilty, and not guilty by reason of insanity. Because Kentucky does not allow jury instructions or comment to the jury on the consequences of any verdict, the jury cannot be informed of the provisions of the new bill concerning post-verdict disposition of the mentally ill.  

CONCLUSION

The introduction of a fourth possible verdict provides an appropriate reason for the court to reconsider the rationale of Payne that “[t]he consideration of future consequences . . . [h]as no place in the jury’s finding of fact. . . .” 95 Although, ideally, the jury should not be influenced by a consideration of the results of a particular verdict, it is unrealistic to think that a jury will not speculate as to the possible consequences of the insanity verdict and the new guilty but mentally ill verdict. Critics of the bill contend that jurors, now faced with four possible verdicts, might feel a verdict of “guilty but mentally ill” is a quick and easy substitute for the complex consideration of “not guilty by reason of insanity.” 96

As explained in Lyles v. United States, it is not logical that the jury, faced with three verdict choices, should know the consequences of only two of those verdicts (guilty and not guilty) but not know of the consequences of the third (not guilty by reason of insanity). 97 It makes even less sense that jurors in Kentucky, faced with four possible verdicts, should know of the effects of only two of those four possible verdicts. Because of the broad holding of Payne that the jury cannot be informed of the consequences of any particular verdict, 98 the jury cannot be informed of the result of the new guilty but mentally ill verdict. By adopting the rationale of Lyles, the court could limit the situations in which the jury may be told of the future consequences of the verdicts concerning the defendant’s mental state at the time of the crime. An accurate and cautionary instruction to the jury on the meaning of these two ver-

93. When a defendant is found not guilty by reason of insanity, the court shall conduct an involuntary hospitalization proceeding under KRS Chapter 202A or 202B. H.R. 32, § 11.
94. 623 S.W.2d at 870.
95. Id.
97. 254 F.2d at 728.
98. 623 S.W.2d at 870.
dicts would prevent speculation and allow the jury to focus on the finding of fact on the issues before it.

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